THE RELEVANCE OF CIVIL LAW DOCTRINES IN AUSTRALIAN COURTS: SOME EXAMPLES FROM CONTRACT AND TORT

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> One of the virtues of legal comparison ... is that it allows a scholar to place himself [or herself] outside the labyrinth of minutiae in which legal thinking so easily looses its way and to see the great contours of the law and its dominant characteristics.[1]

I. INTRODUCTION

This article starts from the premise that the comparative study of law is a valuable exercise. A primary incentive for comparing different legal systems was traditionally the highly pragmatic, though not entirely unproblematic,[2] objective of domestic law reform.[3] Comparative study can in addition be approached as an intellectual exercise, because it results in a broadening of knowledge that is valuable for its own sake.[4] But it is not proposed to canvass the arguments in favour of comparativism in great depth here.[5] And, of course, to a certain extent the value of comparative study is already accepted in the

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1 O Kahn-Freund, "Comparative Law as an Academic Subject" (1966) 82 *LQR* 40.

2 The so-called problem of transplantability has been identified and analysed by O Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *MLR* 1.

3 This exercise in law reform logically extends to judge made laws as well as laws based on statute. Interestingly, it is said to be more popular in England than elsewhere. See H Collins, "Methods and Aims of Comparative Contract Law" (1991) 11 *Oxf J Legal Studies* 396.

4 The celebrated French comparative scholar André Tunc describes this benefit of comparativism in terms of an enrichment and an opening-up of the mind ("*La culture et l'ouverture d'esprit*"): A Tunc, "L'Enseignement du droit comparé: présentation" (1988) 40 *Revue internationale de droit comparé* 703.

5 For a fuller treatment, see M Vranken, *Fundamentals of European Civil Law and Impact of the European Community*, The Federation Press/Blackstone Press (1997) pp 2-10.

Australian courts.[6] Even occasional reference to European Union law can be found, as discussed in an earlier article.[7] This essay seeks to build upon that earlier analysis. It does so by providing illustrations of further areas of law where a comparative approach can prove beneficial. Various case studies have been selected in such a manner as to encourage legal scholars and practitioners alike to look beyond European Union law proper, and to additionally consider the civil law tradition upon which the law of the European Union is built; in particular, French and German law.

As a practical matter, the focus of this article will be on what the Europeans commonly refer to as the law of obligations, ie the law of contract and tort. Three case studies will be presented. In the first two case studies, the emphasis is on remedies. The first case study will use the civil law experience to throw new light on the continued reluctance of Australian courts to wholeheartedly embrace pure economic loss as a head of damage in negligence. In the second case study, attention will be drawn to the contrasting approaches of civil law and common law as regards the primary remedy for breach of contract, ie specific performance as opposed to damages. The final case study moves beyond remedies in that it addresses an issue of substantive law. The focus in this study will be on negligent omissions in the common law and the legal duty to rescue in the civil law. All three case studies present many opportunities for the European civil law to serve as a vehicle for widening the Australian debate on common law doctrines that, thus far, appear sacrosanct.

II. CASE STUDY I: COMPENSATION FOR THE NEGLIGENT INFLICTION OF PURE ECONOMIC LOSS

A. The Context

The House of Lords' decision in *Donoghue v Stevenson*[8] is widely regarded as a milestone in the history of tort law. In particular, the case signalled a willingness by the court to abandon the piecemeal approach to the tort of negligence that had prevailed until then. In essence, *Donoghue v Stevenson* stands for the proposition that it is possible, and indeed preferable, to address the issue of liability in negligence in a principled, conceptual fashion. Thus, the decision has allowed for actions in negligence to be dealt with on their merits, without having to ascertain first whether any particular case can be made to fit under the umbrella of a recognised category of negligence actions.

However, the principled approach to the defendant's liability in *Donoghue v Stevenson* has not led to a corresponding, unified approach to compensating the victim's harm. In effect, it would appear that the common law courts feel truly

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6 Examples of a willingness to accept that German legal principles, in particular, may be relevant for law reform in Australia are said to include litigation, restitution, and the doctrine of proportionality: A Marfording, "Federalism and Judicial Review in Germany: Lessons for Australia?" (1998) 21 *UNSWLJ* 155 at 156.

7 M Vranken, "The Relevance of European Community Law in Australian Courts" (1993) 19 *MULR* 431.

8 [1932] AC 562.

comfortable with handling mainstream claims for the compensation of actual physical injury or property damage only. Anything more exotic, such as compensation for nervous shock or for purely financial loss, in particular, has proved much more difficult to obtain. Initially, judicial fear of the unknown resulted in an outright refusal to allow compensation for these heads of damage. Even though this is no longer the case to date, economic loss is still not embraced wholeheartedly by Australian courts.

In 1997, the High Court of Australia had an opportunity to consider the issue of compensation for pure economic loss twice in one day. In one instance[9] damages were awarded, whereas the claim for compensation was rejected in the other decision.[10] Interestingly, the crucial issue before the High Court each time was whether the purely financial nature of the loss could trigger a remedy under the circumstances of each particular case. In the result, a disappointed legatee's claim to be compensated for the economic harm caused, negligently, by a solicitor's failure to act was upheld in *Hill v Van Erp*.[11] Conversely, in *Esanda Finance Corporation v Peat Marwick Hungerfords*, the detrimental reliance by a financier on audited company accounts was held to be an insufficient basis for a remedy in negligence.[12] Both cases confirm a reluctance by the Australian High Court to accept the basic proposition that the nature of the harm ought to be irrelevant in deciding negligence claims. Instead, the High Court clearly prefers to adhere to what can only be described as a piecemeal, one-step-at-a-time approach to compensation for pure economic loss.

The reasons for this judicial reluctance to fully accommodate economic loss under the law of negligence are well known. Quite apart from the seemingly omni-present floodgates argument,[13] there exists a self-professed reluctance both to interfere with the forces of market competition[14] and to further blur the distinction between tort law and contract law.[15] There is also the moral argument that relatively greater social value attaches to the protection of one's physical safety or property. A further, purely pragmatic argument against the recovery of economic loss by use of the law of tort can be found in the

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9 *Hill v Van Erp* (1996-97) 188 CLR 159.

10 *Esanda Finance Corporation v Peat Marwick Hungerfords* (1996-97) 188 CLR 241.

11 Note 9 *supra*.

12 Note 10 *supra*.

13 This was of paramount significance for Dawson J in the *Esanda* case: note 10 *supra* at 254. The now classic expression of concern that liability in negligence for pure economic loss might expose defendants to liability "in an indeterminate amount for an indeterminate time to an indeterminate class" originated in the dictum by Cardozo CJ in the American case of *Ultramares Corporation v Touche* 255 NY 170; 174 NE 441 at 444 (1931).

14 Deane J has observed that in many commercial or financial transactions there exists "a correlation between the attainment of personal gain for one's self and the sustainment of economic loss by another": *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 503.

15 Note, however, that the former Chief Justice of Australia, Sir Anthony Mason, has identified the desire to preserve tort and contract as separate fields of liability as a major factor in explaining the cautious approach of the English courts, in particular, to permitting recovery for economic loss. His argument reflects a narrower conception of the judicial role in England as compared to Australia, Canada and New Zealand. See Sir A Mason, "The recovery and calculation of economic loss" in NJ Mullany (ed), *Torts in the nineties*, Law Book Co (1997) pp 7-8.

availability of insurance as an alternative to a claim for compensation in negligence.

B. Contrasting Experiences

The common law preference for an incremental approach to economic loss is comparable to the situation under German law. As it has been observed by Markesinis, German law shares the traditional common law "hostility" towards pure economic loss.[16] This makes German law a prime candidate for comparative study, if only to demonstrate the relative ingenuity of the German courts in granting relief to the plaintiff.[17] But the sharpest contrast exists with the long-standing tradition in legal systems based upon the Napoleonic *Code civil*. Specifically, this tradition is one of not distinguishing at all between the various kinds of damage that may be inflicted by a tortfeasor.

The nineteenth century drafters of the French Civil Code sought to embody certain fundamental moral principles. Thus, pursuant to Article 1382 ff *Code civil*, anyone whose "fault" causes harm to someone else is legally obliged to compensate the victim. In principle, this legal obligation not to wrongfully inflict harm is owed to the world at large[18] and the nature of the loss as being purely economic or financial is irrelevant in this regard. The latter point is illustrated by the *Colmar* decision.

(i) The Colmar Decision: A Principled yet Flexible Approach to Pure Economic Loss

The leading case on pure economic loss in France is *Football Club de Metz v Winoth*, better known as the *Colmar* decision of 1955.[19] That case involved the death of a famous (professional) soccer player in a car accident. The soccer club sued the negligent driver for loss of profits. Initially, the claim was rejected for failure to show causation. However, the appellate court of *Colmar* disagreed. It ruled that the tort provisions of the *Code civil* require compensation to be paid regardless of the nature of the loss:

> *Attendu que toute personne, même morale, victime d'un dommage,* quelle qu'en soit la nature, *a droit à en obtenir réparation de celui qui l'a causé par sa faute ...* (emphasis added).[20]

16 BS Markesinis and S Deakin, "The Random element in their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*" (1992) 55 *MLR* 619 at 633.

17 See, in particular, BS Markesinis, "Five Days in the House of Lords: Some Comparative Reflections on *White v Jones*" (1995) 3 *TLJ* 169. See, more generally, BS Markesinis, *The German Law of Torts: A comparative Introduction*, Clarendon Press (3rd ed, 1994; with corrections and additions in 1997) p 194.

18 Elsewhere in the civil law, eg in Germany, Switzerland and even the Netherlands, tort liability is phrased in more relative terms that are reminiscent of the (equally relative) common law duty of care. See in this regard J Herbots, "Le 'duty of care' et le dommage purement financier en droit comparé", (1985) 62 *Revue de droit international et de droit comparé* 52.

19 Colmar, 20 April 1955, *D*, 1956, 723, note R Savatier.

20 "Considering that anyone, whether they be a physical or a moral person, who suffers injury, *irrespective of its nature*, is legally entitled to receive compensation from the person whose fault caused the harm ..." (emphasis added): *ibid* at 724.

The principled, unitary approach to the issue of harm does not prevent flexible judicial decision making. Where, for policy reasons, access to a remedy needs to be denied, French courts do not hesitate to hold that the damage for which compensation is sought is either not the "direct" result of the defendant's conduct, or that the damage allegedly suffered is too "uncertain". In the *Colmar* case, the appellate court said that the disarray of the soccer club, as the *direct* result of the death of one of its players, constituted a *definite* harm for which the club was entitled to demand reparation.[21] The well-known scholar Savatier, in a note accompanying the decision, rejects any suggestion that the loss to the victim's employer could be anything but direct. Instead, any possible problems are said to be confined to the more mechanical or technical quantification of the loss for purposes of the compensation order.[22]

This double qualification, in that the loss must be both "certain" and "direct", provides as many safeguards against the granting of a remedy that, mainly from a policy perspective, would be unwarranted. Interestingly, it is a qualification that does not feature in the actual tort provisions of the Code. Rather, it has been borrowed from the Code provisions on the law of contract. Specifically, the judiciary applies Articles 1149 and 1151 *Code civil* to the law of tort *par analogiam.*

(ii) The Epoux Cohen Decision: Certainty of Damage

The need for the damage to be certain is derived from Article 1149 *Code civil.* The provision obliges defaulting debtors to compensate the plaintiff for any loss suffered, as well as any profits forgone.[23] In order to be "certain" the damage, whether present or future, can not be purely hypothetical. The clearest example of damage that is "certain" is where the loss of the tort victim pre-dates the trial even though it may be on-going. However, damage consisting of a mere loss of a chance, eg the chance of making a profit or to avoid making a loss in the market place, may also qualify as damage that is "certain" provided always that the element of chance is sufficiently serious so as not to be wholly frivolous. Thus, in the case of *Epoux Cohen v Mancusi et autres,*[24] a claim by parents to be compensated for the loss of a chance that their deceased son might have financially assisted them in their old age was rejected as being so speculative under the circumstances as to be purely hypothetical.

On the facts of this case, the parents' situation of need only arose following their decision to return to France, some two years after their son was killed in a road accident, and having previously resided in Tunisia under what the trial judge had found to be financially adequate conditions. Furthermore, on the evidence there was no record of regular aid by the son prior to his accidental

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21 *Ibid* at 724: "*la désorganisation de l'équipe, conséquence* directe *de la mort de Kemp* (the soccer player), *est une source de préjudice* certain, *dont le FCM* (the soccer club) *est en droit de demander réparation*" (emphasis added).

22 *Ibid* at 725.

23 *Code civil,* Article 1149: "*de la perte qu'il a faite et du gain dont il a été privé*".

24 Cass civ, 2nd ch, 3 November 1971, *D*, 1972, J, 667, note Deschamps.

death, nor did his estate contain any money or goods of value. Under those circumstances it was not at all clear that the son would, or indeed could have, come to the aid of his parents. Deschamps, in a note accompanying the decision by the Cour de Cassation, sums up by quoting from Victor Hugo: "*L'avenir, fantôme aux mains vides qui promet tout et n'a rien*".[25]

It should not be inferred from the above case that the Cour de Cassation adopts a timid approach to the compensation of economic loss. In a more recent case,[26] a trial court decision not to entitle a personal injury victim to compensation for the loss of the chance of getting a job promotion was overturned, even though the actual occurrence of that promotion was relatively uncertain. One commentator suggests that the current approach by the highest court in France, in allowing compensation for loss of a chance, may be too generous.[27] At a minimum, it would seem that the Cour de Cassation operates more as a further appellate court rather than merely as a guardian of the law as it is applied by the lower courts.[28]

(iii) The ASSEDIC Decision: Directness of Damage

In addition to having to be certain, the damage needs to be direct. The legal basis for this requirement is Article 1151 *Code civil*. That provision formally limits entitlements to compensation for proven loss and/or profit forgone to harm that is the immediate and direct result ("*suite immédiate et directe*") of the non-performance of contractual obligations. Major problems can arise in its application to tort situations, where the initial tortious act produces a snowball effect, commonly known as *préjudices par ricochet* or *préjudices en cascade*. Ultimately, the question is whether sufficient causation can be proven. In theory, all consequences of the initial wrongful act trigger compensation. In practice, the French courts allow themselves plenty of leeway so as to avoid having to order compensation for damage that is too remote.

In the case of *ASSEDIC Doubs-Juura v Dimanche et autre*,[29] a butcher apprentice was the victim of a road accident. Because of the nature of his injuries he would never be able to return to his old job. In fact, the extent of his injury made any employment impossible for almost a year following the accident. Thereafter, the victim experienced difficulty in finding alternative employment and received unemployment benefits for some two years before getting a job as a night guard. Subsequently, the government organisation in charge of unemployment benefits brought a court action to recover from the party responsible for the road accident the sums it had paid to the butcher

25 *Ibid*: "The future, phantom with empty hands who promises all and has nothing".

26 Cass civ, 2nd ch, 14 October 1992, *Bull civ*, II, no 241, 120; P Jourdain, "Jurisprudence française en matière de droit civil", *RTD civ*, 1993, 148.

27 CL Deschamps, "La réparation du préjudice économique pur en droit français" in EK Banakas (ed), *Civil Liability for Pure Economic Loss*, Kluwer (1996) 89 at 93, (text reproduced in (1998) 50 *Revue internationale de droit comparé* 367).

28 Y Chartier, note under Cass civ, 9 November 1983, and Cass crim, 3 November 1983, *JCP* 1985, II, no 20360. Unlike its German counterpart, the Cour de Cassation does not normally substitute its decision for that of the lower court.

29 Cass civ, 2nd ch, 28 April 1982, *D*, 575 (including the opinion of advocate general Charbonnier).

apprentice. The action failed for want of a direct link between the initial road accident and the payment of unemployment benefits. The appellate court ruled that the state of the national economy was the real reason for the victim's initial difficulties in finding suitable employment. The Cour de Cassation refused to upset this finding by the lower court.

Advocate general Charbonnier, in a concurring opinion that accompanies the above decision, argues that only *force majeure*, ie a force that is both unforeseeable and irresistible, can sever the causal link between the initial fault of the tortfeasor and the ultimate loss suffered by the victim.[30] An interesting application of this principle is the decision in *SARL Les transports héandais v SA Les grands travaux du Forez*.[31] The case involved a bulldozer on private property that had been left out in the open overnight, along with various other pieces of industrial equipment. The company concerned was in the habit of leaving the keys of the bulldozer on the dashboard in order to avoid delays in the commencement of work in the morning. One night an unidentified individual entered the courtyard, found the keys to start the engine of the bulldozer, and set about to cause maximum property damage for no apparent reason. The Court of Appeal ruled that, notwithstanding the company's negligence in leaving the keys in the vehicle, the particular act of deliberate vandalism amounted to a new risk that did not necessarily follow from the initial fault by the company and that was not foreseeable. The Cour de Cassation agreed:

> *les dommages ... sont dus à des actes de vandalisme, ... ainsi un risque nouveau et non nécessaire a été introduit par le comportement très particulier et exceptionnel du voleur, qui n'était pas normalement prévisible.*[32]

By contrast, the French courts do not hesitate to adopt a much more victim-friendly approach, or so it would seem, when the opportunity for the loss to be caused is provided through the negligence of a bank. In one instance, the victims of bouncing cheques sought reparation from the bank that allegedly failed to check the background of a notorious swindler prior to issuing the latter with a cheque book.[33] Even though it merely created the risk of harm rather than producing the harm itself,[34] the bank was held liable.

(iv) Other Limiting Principles: The Need for the Damage to be Personal and Legitimate

Yet another judicially developed means to avoid the risk of opening the floodgates through an overly liberal approach to compensation is the requirement

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30 *Ibid.* The opinion of the advocate general is not a formal part of the court decision.

31 Cass civ, 2nd ch, 17 March 1977, *D*, 1977, 631, note A Robert.

32 *Ibid* at 632: "the harm ... is to be attributed to acts of vandalism, ... thus a new risk that does not necessarily follow has been introduced by the very peculiar and exceptional conduct of the thief, which was not reasonably foreseeable".

33 Cass comm, 17 January 1968, *JCP*, 1969, II, no 15839, note J Stoufflet.

34 F Grua, "La responsabilité civile de celui qui fournit le moyen de causer un dommage", *RTD civ*, 1994, 1.

that the damage be personal to the plaintiff.[35] In effect, this is as much a device for restricting the categories of plaintiffs as it is a vehicle for determining the proper scope of the damages available. In principle, no exhaustive list of legitimate plaintiffs exists that would limit the category of 'acceptable' plaintiffs to parties that can point at a certain relationship, because of family ties or otherwise, between the immediate tort victim and themselves. In practice, the French courts are of the opinion that, where the relationship between plaintiff and victim is purely of a business nature, the death of a valuable client does not itself provide a basis for a compensation claim. The death of a good client, therefore, does not ipso facto entitle business people to compensation. But, as it has been argued by Deschamps, it may be a different story when the negligent killing of a debtor deprives the lender of the chance of getting repaid.[36] Thus, in a scenario where party A lends money to party B, and B gets killed in a road accident caused by party C before the loan has been repaid, the renouncement of the inheritance by the family of B may force A to bring a claim against C. The legitimacy of this course of action was accepted in a 1975 case before the Cour de Cassation, even though the trial judge subsequently dismissed the claim on the separate ground that the harm was too indirect.[37]

Further judicial leeway in handling compensation claims is ensured by the seemingly obvious requirement for the injury itself to be legitimate. This requirement really allows the courts to scrutinise the position of the victim in an attempt to separate claims that seek to uphold a legitimate interest of the victim from claims that do not do so.[38] The requirement recently provided the Cour de Cassation with a justification to reject a claim by mothers of unwanted babies born following failed abortion attempts due to medical error. In the case of *X v Y*,[39] the Cour de Cassation held that the existence of a child does not itself amount to a legally compensable harm for the mother.

C. Concluding Remarks

The legal position in Belgium and in the Netherlands is essentially the same as that in France.[40] Of course, French tort law cannot claim to be representative for the whole of the civil law legal family. In recent years, English commentators have tended to focus on that other exponent of the civil law: Germany. Paragraph 823,I of the German *BGB* restricts compensation to instances of damage to "the life, the body, the health, the freedom, the property or another right" ("*das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht*") of the victim. Parallels have been drawn between the ensuing need for the German judiciary to adopt a piecemeal approach to compensating non-enumerated loss and the on-going struggle of the common law courts to come to terms with pure economic loss. Undoubtedly, the incremental

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35 Deschamps, note 27 *supra* at 95: "*le caractère personnel du dommage*".
36 *Ibid* at 96.
37 Cass civ, 2nd ch, 25 June 1975, *RTD civ*, 1976, 134, note Durry.
38 Deschamps, note 27 *supra* at 96: "*le caractère légitime de l'intérêt lésé*".
39 Cass civ, 1st ch, 25 June 1991, *D*, 1991, 566, note Ph le Tourneau.
40 Herbots, note 18 *supra* at 52; Fokkema and Markesinis, cited in Markesinis, note 17 *supra*, p 44.

approach of the German courts as regards, specifically, the compensation of economic loss provides an interesting reference point for the assessment of the manner in which Australian courts currently handle any such claims. The French unified approach goes one step further, though, in that it provides a real-life laboratory when assessing what might happen if Australian courts were to return to the spirit of *Donoghue v Stevenson*, by abandoning their incremental approach to economic loss in exchange for a more principled acceptance of economic loss as a head of damage. The above discussion of French case law suggests that a principled approach and flexibility need not be mutually exclusive aspirations. It follows, then, that the floodgates argument of the common law may be somewhat of an overstatement.

III. CASE STUDY II: SPECIFIC PERFORMANCE AND THE PRIMARY REMEDY FOR BREACH OF CONTRACT

A. Introduction

In his classic text on "Specific Performance in France and Germany", Dawson points out that, prior to the close of the twelfth century, the most striking feature of English legal procedure was the total reliance on specific relief to the exclusion of a remedy in damages.[41] Clearly, this is no longer the case today. In fact, the current availability of specific performance effectively depends upon a court finding as to the inadequacy of damages as a primary remedy for breach of contract, ie a finding that an award of damages does not allow for the non-breaching party to be put in the same position it would have been in had the contract been performed.

The traditional reasons for restricting the availability of specific performance as a remedy for breach of contract are well known.[42] Briefly, specific performance is generally regarded as an undesirable interference with the personal freedom of the contracting parties.[43] Furthermore, it is said that the need for on-going court supervision makes specific performance unattractive from an administrative point of view. Notwithstanding that some observers have noted a tendency for the courts to expand somewhat the situations in which specific performance is available in recent years,[44] the Australian courts continue to insist that it is not an appropriate remedy in most cases. In this regard, it is important to bear in mind that, as an equitable means of relief, specific performance is an entirely discretionary remedy and, therefore, it brings into play 'soft factors' including, in particular, considerations of fairness to both parties. This leads the courts to take account of the defendant's situation as well

41 JP Dawson, "Specific Performance in France and Germany" (1959) 57 *Michigan Law Review* 494.

42 See, generally, GH Treitel, *Remedies for Breach of Contract: A Comparative Account*, Clarendon Press (1988) p 47.

43 Logically, it follows from this that specific performance is available where it is an express term of the contract.

44 JW Carter and DJ Harland, *Contract Law in Australia*, Butterworths (3rd ed, 1996) p 885.

as the plaintiff's conduct.[45] Thus, specific performance is refused where it risks inflicting "undue hardship" on the defendant[46] or where the corresponding obligation of the plaintiff can not be enforced simultaneously.[47]

The question arises as to what, if anything, a common law jurisdiction such as Australia stands to lose if it were to consider moving towards a greater acceptance of specific performance as a remedy for breach of contract. Lücke argues that the ultimate strength of the common law approach to contract remedies lies in its pragmatism.[48] Specifically, the common law is said to display an underlying rationale to the effect that: "mutual trust and confidence in each other's willingness and capacity to perform are indispensable ingredients of any healthy contractual relationship".[49] Supposedly, the contrast with the civil law, where specific performance is proclaimed to be the rule rather than the exception,[50] is therefore a sharp one. And yet, members of the European civil law family do not appear particularly handicapped because of this interpretation of the *pacta sunt servanda* rule. For reasons of clarity, the discussion below distinguishes between developments in France and Germany.

B. France: A Case of Too Much Pragmatism?

Lack of pragmatism certainly is not characteristic of French law. Admittedly, the Napoleonic code reflects its nineteenth century origins through an emphasis on individual freedom from constraints by the state. It will be recalled that this is also one of the main reasons for the common law's reluctance to postulate specific performance as the primary remedy for breach of contract.[51] An interesting provision in this regard is Article 1142 *Code civil*. That provision holds that the remedy for non-compliance with legal obligations is damages.[52] However, principle and pragmatism go hand in hand in the French Code, and this is carried over into the attitude of the judiciary charged with its application and interpretation.[53] Certainly, it would be misleading to view Article 1142 *Code civil* in isolation. A combination of judicial creativity and contextual interpretation has reduced the apparent prominence of Article 1142. In the result, that Code provision today reflects the exception (damages) rather than the rule (specific performance).

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45 For illustrations as to the general proposition that specific performance will not be granted where the courts consider it to be an unjust remedy in the circumstances, see NC Sedden and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract*, Butterworths (7th ed, 1997) pp 810-11.

46 *Ibid*, p 811.

47 *Ibid*, p 815.

48 HK Lücke, "Book Review" (1990-1991) 3 *JCL* 241.

49 *Ibid* at 248.

50 K Zweigert and H Kötz, *An Introduction to Comparative Law*, Clarendon Press (3rd ed, 1998) pp 483-4.

51 See Part III A immediately above.

52 "*Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur*".

53 See the discussion of codes and their interpretation in Vranken, note 5 *supra* pp 35 and 56.

(i) The Distinction between Contracts "to Give" and Contracts "to Do or Not to Do"

Article 1142 *Code civil* only applies to certain types of contracts. In line with Roman law tradition,[54] the drafters of the Code distinguished between obligations "to give" ("*donner*"), ie to transfer specific ownership rights, and obligations "to do or not to do" ("*de faire ou de ne pas faire*") something.[55] Article 1142 does not apply to the former category of contracts which covers such major transactions as sales, gifts and exchanges.[56] But even as regards the latter category of contract the Court of Cassation's interpretation of the *Code civil* leaves room for doubt as to which is the most appropriate remedy for breach of contract. In the case *Epoux Ailloud*,[57] the Court formulated the principle that Article 1142 applies only to obligations (to do or not to do) that are "personal" in character.[58] Because of the infamous brevity of Court of Cassation decisions, the case does not go into detail about the meaning of this qualification. It would seem, though, that the reference is to a rather narrow category of obligations that require performance *in personam*. The classic example is that of a famous artist entering into a commitment to paint a client's portrait.[59] A more contemporary illustration may be the personal duty of employees to carry out work they have been engaged to perform pursuant to an individual contract of employment. In *Epoux Ailloud*, the Court specified that Article 1142 does not apply when the failure to comply with an obligation to do consists of the mere (albeit unjustified) withholding of goods that belong to someone else and where substitute performance is an available option. A pragmatic Code provision par excéllence in this regard is Article 1144 *Code civil*. It provides the legal basis for a court order to obtain substitute performance by someone other than the defaulting party itself.[60]

(ii) Further Qualifications to Article 1142 Code civil

Article 1142 must be viewed in the context of the surrounding provisions of the *Code civil*. Apart from Article 1144 referred to immediately above, Article 1143 *Code civil* also allows for substitute performance where one of the contracting parties seeks to undo that which the other party has done in contravention of the contract. The application of Article 1143 concerns primarily the demolition, by order of the court, of unlawful construction work. The provision has been invoked successfully in instances of breach of a legal obligation arising out of a contract for the subdivision of land,[61] rules on co-

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54 See Dawson, note 41 *supra* at 496 ff.

55 Aticle 1101 *Code civil*.

56 As regards contracts "to give", legal title passes upon a mere meeting of minds of the contracting parties. See the discussion in Dawson note 41 *supra* at 509-11.

57 Cass civ, 1st ch, 20 January 1953, *D*, 1953, 222.

58 *Ibid*: "*Une obligation personnelle de faire ou de ne pas faire*".

59 B Nicholas, *The French Law of Contract*, Clarendon Press (2nd ed, 1992) p 219.

60 Cass civ, 3rd ch, 29 November 1972, *Bull civ*, III, no 642: "*Le créancier peut aussi, en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur*".

61 Cass civ, 3rd ch, 19 May 1981, *Bull civ*, III, no 101.

ownership,[62] and even zoning laws.[63] Attention must also be drawn to Article 1184 *Code civil*. That provision is best known for its first paragraph, as it constitutes the legal basis for the rescission of contracts containing reciprocal obligations. However, the second paragraph of Article 1184 grants the innocent party the option of either demanding performance or petitioning the court to dissolve the contract in exchange for damages.[64] Thus, it is the absence of a principled opposition to specific performance in the *Code civil* that ultimately allows French law to display great flexibility in devising the appropriate remedy for breach of contract.

(iii) Penalties for Non-Compliance with Court Orders (Astreintes)

Court orders for the specific performance of contractual obligations in the absence of an enforcement mechanism are futile. In France, the courts developed a practice of imposing the payment of money sums so as to force (*astreindre*) reluctant parties to comply with a court order for specific performance. Interestingly, the courts adopted this approach quite soon after the 1804 *Code civil* had been promulgated, even though the Code itself did not address the issue. In the absence of an express legal basis for the *astreinte*, penalties for non-compliance were treated as a form of damages under Article 1142.[65] Legislation adopted in 1972 has since regularised this situation.[66] The Act also abandons the earlier pretence that the *astreinte* is nothing but a variant to a court order for damages.

C. Germany: Principle to the Exclusion of Pragmatism?

(i) Specific Performance and the BGB

The starting point in German law is precisely the opposite of that in French law. The nineteenth century drafters of the *BGB* expressly elevated specific performance to the primary remedy for breach of contract. Paragraph 241 *BGB* states, in somewhat abstract terms (perhaps because it is meant to cover obligations in tort as well as in contract), that legal obligations entitle the creditor to claim performance by the debtor.[67] It is a provision of general application. This means that, unlike in French law, the nature of the legal obligation (in particular, whether it involves a duty to give, to do or not to do something) is irrelevant. For a court order of specific performance to be meaningful, performance by the debtor must still be possible. To the drafters' mind at least, this is meant to provide a most narrow defence to specific performance only.[68] Of course, there may be occasions where the defence

62 Cass civ, 3rd ch, 18 January 1972, *Bull civ*, III, no 39.

63 Cass civ, 3rd ch, 7 June 1979, *Bull civ*, no 124; Cass civ, 3rd ch, 18 February 1981, *Bull civ*, III, no 38.

64 *"La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention ..., ou d'en demander la résolution avec dommages et intérêts"*.

65 See the discussion in Dawson, note 41 *supra* at 513-17; Nicholas, note 59 *supra*, p 222.

66 Act no 72-626 of 5 July 1972.

67 *"Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern"*.

68 JP Dawson, "Judicial Revision of Frustrated Contracts: Germany" (1983) 63 *Boston University Law Review* 1039 at 1041-5.

extends to instances of (mere) impracticability, ie impossibility under the circumstances of the case. Zweigert and Kötz give the example of a wedding cake delivery after the event.[69]

Paragraph 241 *BGB* immediately precedes its much more famous companion provision of Paragraph 242 *BGB*. The latter provision stipulates that obligations are to be performed in good faith.[70] Significantly, both provisions share a history of great pragmatism in their application to the effect that, especially in business transactions where the litigants themselves may actually prefer to forego the primary remedy of specific performance, damages have become more important than a plain reading of the German Code might suggest. Even so, it must be stressed that the drafters of the *BGB*, perhaps in anticipation of any such evolution, chose to set formal limits on the availability of the damages remedy. These include requirements for the official notification of the defaulting party with a (formal) demand for specific performance and, in some instances, an actual court order fixing a time limit for any such specific performance.

(ii) Specific Performance and the ZPO

Where one of the parties prefers specific performance, German courts generally have not invoked discretionary powers to order damages instead.[71] Noteworthy, from a common law perspective, is the availability under the Code of Civil Procedure (*ZPO*), of a range of different means by which the courts can enforce an order for specific performance. Fines or imprisonment, while available,[72] are by no means the sole or even the primary enforcement method. Rather, the method of enforcement tends to be more specifically tailored to the judgment to be enforced.[73] Thus, if specific performance requires the transfer of goods, enforcement is by taking the goods from the debtor and giving them to the creditor.[74] In the case of real estate the debtor can be compelled to vacate the property so as to give possession to the creditor.[75] The enforcement of obligations to do is by way of court authorisation, upon application, to have the task undertaken by someone else at the debtor's expense.[76] Zweigert and Kötz give various examples of obligations where the person of the debtor is not considered so vital as not to allow for substitute performance.[77] They include obligations to undertake construction work,[78] to print a manuscript,[79] or even to prepare an extract from the company books or accounts.[80]

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69 Zweigert and Kötz, note 50 *supra*, p 473.

70 *"Der Schuldner is verpflichtet die Leistung so zu bewirken wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern"*.

71 Dawson, note 41 *supra* at 529-30.

72 *ZPO*, Paragraphs 888 (personal obligations) and 890 (negative obligations, ie not to do something or to let someone else do something).

73 Treitel, note 42 *supra*, pp 53-4.

74 *ZPO*, Paragraphs 883, 884, 897.

75 *ZPO*, Paragraph 885.

76 *ZPO*, Paragraph 887.

77 Zweigert and Kötz, note 50 *supra*, pp 473-4.

78 Landsgericht Hagen, *Juristische Rundschau*, 1948, 314.

79 Oberlandesgericht Munich, *Monatsschrift für deutsches Recht*, 1955, 682.

80 Oberlandesgericht Hamburg, *Monatsschrift für deutsches Recht*, 1955, 43.

D. Concluding Remarks

Arguably, specific performance is the morally superior remedy in that it forces parties not to renounce that which they have committed themselves to. Specific performance may also constitute the most economically efficient remedy. There exists a preparedness among at least some law-and-economics scholars to question the notion of efficient breach. The latter notion means that, where breach of contract can make one party better off without making anyone else worse off, the payment of compensation in lieu is deemed to produce a result that is Pareto superior. This conventional wisdom is currently being questioned, which in turn has led to a new focus on the efficiency of specific performance as a remedy for breach of contract.[81]

The above discussion did not concern itself with these considerations of morality and economic efficiency. However, it may have made clear that the remedy of specific performance is not at all frowned upon in the European courts. Rather, it is viewed as a valuable addition to the arsenal of available remedies for breach of contract. As a practical matter, in neither France nor Germany has the specific performance option led to a stifling of the law of contract or the requirements of business relationships. Thus, it seems that the distrust of the common law is largely unwarranted.

IV. CASE STUDY III: DUTY OF CARE AND NEGLIGENT OMISSIONS

A. Overview

A vital component of any successful claim in negligence is the presence of a duty of care. Despite an expansive interpretation of this concept of duty by the courts in the post *Donoghue v Stevenson*[82] era, the common law has never really accepted the existence of a duty to pro-actively go to the assistance of needy members of the general public. To be clear, the judiciary at times has displayed great creativity in 'discovering' certain categories of special relationships between plaintiff and defendant which subsequently are deemed to be governed by a duty of care that effectively takes the shape of a legal obligation to act. A case in point is the legal obligation of school teachers to take positive steps for the safety of their pupils by the mere fact of the teacher-pupil relationship. In *Richards v State of Victoria*,[83] the Full Court of the Supreme Court of Victoria said that: "foreseeability of harm arising from particular conduct is of course relevant to the question whether there has been a breach of the duty, but it is not,

81 TS Ulen, "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies" (1984-1985) 83 *Michigan Law Review* 341. See also the discussion in M Richardson and J Sgro, "Game Theory and Remedies for Breach of Contract" in M Richardson and G Hadfield (eds), *The Second Wave of Law and Economics*, The Federation Press (forthcoming, 1999) p 50.

82 [1932] AC 562; [1932] All ER 1.

83 [1969] VR 136.

in our opinion, relevant to *the existence of the duty itself which arises from the relationship of schoolmaster and pupil*".[84] In *Geyer v Downs*,[85] the High Court of Australia went one step further when it held that the existence of this teacher-pupil relationship (and therefore also the legal obligation to take positive, albeit reasonable steps to avoid harm) is not necessarily confined to official school hours.

The existence of a similar duty for parents to take "affirmative action"[86] for the protection of their children based on a special parent-child relationship is more doubtful.[87] Of course, this does not prevent the finding of a duty of care owed by parents to third parties.[88]

However, even when making allowance for the existence of special relationships, the general rule continues to be that the common law does not require the priest or the Levite to behave like the good Samaritan. Australia is not out of step with the rest of the common law world in this regard.[89] Feinberg, in particular, has made explicit the moral implications of a legal tradition that fails to address even harmful omissions of an immoral kind.[90] In European Code-based legal systems the situation is somewhat more complex. The comments that follow will focus on French law in the first instance, as it is here that the contrast with the common law is most pronounced.

B. France

(i) Duty to Rescue and Articles 1382 and 1383 Code civil

In France, civil liability in tort is regulated by Articles 1382 ff *Code civil*. Article 1382 provides the legal basis for civil liability in instances of intentional infliction of harm, whereas Article 1383 governs instances of 'mere' negligence. Both Articles 1382 and 1383 are fault based. Significantly, the notion of fault is deemed sufficiently broad to cover not only positive acts but also abstentions by the tortfeasor. Thus, in principle, it ought to make no difference that the blameworthy conduct consists of a failure to act rather than positive action.

In practice, under the civil law's deductive approach to legal reasoning, general tort principles - including fault - only acquire meaning through their application to individual cases. Of necessity room is made for pragmatism in the process. Thus, even though the drafters of the Code did not expressly distinguish omissions from other instances of wrongful conduct, it soon became clear that, in order to hold defendants legally accountable, at least some reprehensible behaviour on their part needs to exist (or be found).[91]

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84 *Ibid* at 140-1 (emphasis added).

85 (1977) 138 CLR 91.

86 The expression is borrowed from M Davies, *Torts*, Butterworths (1995) p 174.

87 *Robertson v Swincer* (1989) 52 SASR 356 at 360, 362.

88 *Smith v Leurs* (1945) 70 CLR 256.

89 See the discussion in M Vranken, "Duty to Rescue in Civil Law and Common Law: Les Extrêmes se Touchent?" (1998) 47 *ICLQ* 934.

90 J Feinberg, *The moral Limits of the Criminal Law: Volume one: Harm to Others*, Oxford University Press (1984) p 126.

91 This qualification to the general duty to rescue was articulated by the Cour de Cassation in the 1924 case of *Companie des Messageries maritimes*, Cass civ, 24 December 1924, *D*, 1925, 120.

(ii) Duty to Act by Statutory Mandate outside of the Code civil

The most obvious instance of blameworthy conduct involves a failure to comply with a legal command. A legal duty to act exists whenever the legislature expressly stipulates to that effect. In most European countries, including Germany, the criminal legislature has imposed a duty to rescue, even though the precise conditions under which any such duty is enforced tend to vary. Interestingly, in France criminal liability and civil liability tend to go hand in hand. Thus, a civil duty to act may be created by situations governed in the first instance by the criminal code.[92] Specifically, where a criminal offence causes harm, the victim may join the proceedings brought by the public prosecutor by means of a civil action (*action civile*). In essence, the purpose of these civil proceedings before the criminal court is to facilitate the victim's legitimate claim to compensation for any loss suffered.[93]

On 19 June 1996, the criminal chamber of the French Court of Cassation had an opportunity to confirm that a civil action in damages can be based solely upon the criminal offence of failure to assist a person in need.[94] Two minors were involved in a car crash. The vehicle had earlier been stolen and it was being driven by someone without a licence. At one point the driver lost control over the car and it hit the pillar of a bridge. The passenger pulled his badly injured friend out of the vehicle. He then fled the scene of the accident without calling for medical assistance. The driver subsequently died from his injuries. The parents of the deceased brought a civil action against the passenger. Expert evidence showed that, but for the lack of timely medical assistance, the victim might have survived the accident. The Court of Appeal of Pau ruled that the passenger was guilty of failure to assist a person in danger and it held him (and his mother) civilly liable for all of the (non-pecuniary) loss (*préjudice moral*) incurred by the parents and brother of the deceased. The Cour de Cassation upheld that decision, and it rejected a submission by the defendant that the victim's own fault ought to at least reduce the (civil) liability of the passenger.

(iii) The Case of Branly: Duty to Act in the Absence of an Express Legislative Mandate

A legislative instruction to act is no by no means a prerequisite. In the classic case of *Branly*,[95] the author of an article on the history of the telegraph machine published in a popular magazine deliberately, albeit in good faith, left out the name of a scientist who was generally regarded as having played a major role in this particular invention. In deciding the case, the Cour de Cassation put the proposition that professional practice or tradition can provide an alternative basis for the legal duty to act. It follows from the decision in *Branly* that the duty to

92 A Tunc, "Abstention délictueuse", para 34 in *D nouveau rép* 1947, 8, as cited in "The Failure to Rescue: a Comparative Study" (1952) *Colum LR* 631 at 640.

93 See the discussion of criminal proceedings in C Dadomo and S Farran, *The French Legal System*, Sweet and Maxwell (2nd ed, 1996) p 192.

94 Cass crim, 19 June 1996, decision no 2822, *Bull crim* no 260; *D*, 1997, somm 142, note J Pradel.

95 Cass civ, 27 February 1951, *D*, 1951, 329, note H Desbois.

act is not an entirely abstract one as professionals, acting in their professional capacity, are singled out for special attention.

C. Concluding Remarks

The tort provisions of the German *BGB* do not display the sweeping generality of Articles 1382 and 1383 *Code civil* in France.[96] Even so, German law also sees no reason in principle to treat negligent omissions differently from other instances of negligent conduct. As in France, the crucial question each time is whether there exists an underlying obligation to act.[97] No legal liability in tort is incurred unless a duty to act can be found.

Contemporary legal scholarship, especially in France, continues to have reservations about the wisdom of the distinction between wrongful action and inaction. The doctrine rejects the distinction whenever it may lead to differential treatment of tort victims. And, of course, the requirement for there to be a duty to act in order for inaction to be wrongful does precisely that. In an attempt to mitigate the discriminatory impact of the duty-to-act requirement, its application is now said to be limited to instances of 'mere' omission (*abstention pure et simple*) as opposed to omissions in the broader context of other wrongful (positive) conduct (*abstention dans l'action*).[98]

The above distinction is one with which Australian tort lawyers are also familiar. It would seem that both the legal families of civil law and common law (correctly) fail to see the difference between personal injury caused by, say, a driver's failure to stop a traffic lights and injury triggered by that same person's wrongful conduct in driving in excess of the speed limit. If then civil law and common law ultimately part ways after all, it is because of the unambiguous preference by the French judiciary and scholarship, in particular, for a restrictive interpretation of the category of mere omissions.

V. OVERALL CONCLUSIONS

In Europe, great historical significance attaches to the term *ius commune*. That term refers to the availability of a common basis – Roman law and canon law – for the study of law throughout medieval Europe. While the nationalistic reflex of the nineteenth century codification movement signalled the formal end of this 'common law of the civil law', it has since been replaced with a political desire to supplement national law with a new, supra-national legal order. Significantly, the emerging legal order of the European Union effectively amounts to a process of penetration and assimilation of the national legal orders of its member states. Indirectly at least, this phenomenon of 'communitarisation' of national law, along with the mixed membership of the European Union,

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96 Vranken, note 5 *supra*, p 132.

97 K Larenz, *Lehrbuch des Schuldrechts*, I, Beck (14th ed, 1987) p 457 as cited in W van Gerven, J Lever, P Larouche, C von Bar and G Viney, *Common Law of Europe Casebooks. Torts: Scope of Protection*, Hart Publishing (1998) pp 61-2.

98 F Terré, P Simler and Y Lequette, *Droit civil: Les obligations*, Dalloz (6th ed, 1996) pp 566-8.

diminishes the traditional divide between the legal families of civil law and common law.[99] As a member of the common law legal family this is a development that cannot leave Australia untouched indefinitely.

But the impact of the European Community on the law of its constituent states has also led to a renewed interest in identifying the common legal roots among the members of this new European legal order. The approach here is one that operates from the bottom up, unlike communitarisation, which works more from the top downwards. As stated by van Gerven, its focus is on strengthening the common legal heritage of Europe, not on strangling its diversity.[100] From an Australian perspective, the benefits of this second development are clear. By uncovering the fundamental principles that underlie the European legal culture, a more explicit and sharper reference point for comparative study is made available. Thus, a deeper understanding of the civil law by European and non-European students of law alike is greatly facilitated.

In *Smith v Littlewoods*, Lord Goff of Chieveley said:

> But since we all live in the same social and economic environment, and since the judicial function can, I believe, be epitomised as an educated reflex to facts, we find that, in civil law countries as in common law countries, not only are we beset by the same practical problems, but broadly speaking we reach the same practical solutions. Our legal concepts may be different, and may cause us sometimes to diverge; but we have much to learn from each other in our common efforts to achieve practical justice founded upon legal principle.[101]

This article has demonstrated that civil law and common law may not always reach the same solutions, let alone employ the same legal concepts. Nevertheless, there can be no doubt that knowledge of foreign law facilitates a better appreciation of the different tools that may be available for achieving Lord Goff's "practical justice founded upon legal principle".

It may be that, following a comparison of the foreign law to one's own legal system, the foreign solution ultimately is rejected as inappropriate for domestic consumption. But, at the very least, any such rejection is then a considered one. The enrichment factor that attaches to comparative study in these circumstances lies in a better understanding of one's own legal system.[102] It is hoped that this article contributed to a deeper understanding of Australian law, if only by exposing the weakness of the floodgates' argument against claims for the compensation of pure economic loss, by revealing the scope for greater flexibility in juggling damages and specific performance as remedies for breach of contract, and by providing a test ground for the successful marriage of moral and legal obligations as regards the assistance of persons in need.

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99 See the discussion in Vranken, note 5 *supra*, pp 217-21.

100 W van Gerven, "Foreword", note 97 *supra*, p v.

101 [1987] 2 WLR 480 (HL) at 511.

102 See the quote from Kahn-Freund at the start of the article.