The tort law industry

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The Tort Law Industry

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by

Jeroen Kortmann

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Vossiuspers UvA

Mevrouw de Rector Magnificus,
Mijnheer de Decaan,
Waarde collegae, studenten en
Allen die door uw aanwezigheid van uw belangstelling blijk geeft,
Especially those of you who have traveled from abroad to be here today,

Introduction: the commercialization of tort law and the call for 'private enforcement'

In university courses on tort law ('*onrechtmatige daadsrecht*'), many of the featured cases involve accidents and incidents that occur in everyday life: a printer who finds out he has been spied on by a competitor, a man who falls through an open cellar-hatch, a baker's assistant who trips over a jumping rope. All deserve their day in court to demand damages for the loss they suffered.[1]

Today, these common little scenes are no longer representative of what happens in our courts. In a global market, wrongful acts can result in losses that are spread out over a large, sometimes indeterminate number of people. With the modern modes of communication it has become relatively easy for claimants to identify wrongful conduct, approach others with parallel interests and 'bundle' claims. As a result, tort law is fast becoming 'big business'. Hardly a week goes by without some lawyer or other launching a mass claim to redress a perceived injustice. Entities pop up left and right to serve as vehicles for the bundling of claims. Examples include *Stichting Leaseverlies*, *Stichting Eegalease*, *Stichting Hoopverlies*, *Stichting Verliespolis, Stichting Woekerpolis Claim, Stichting AH Deloitteclaim* and, after the recent demise of Fortis Bank, *Stichting FortisEffect*.

Investors, too, are starting to recognize the commercial potential of tort law. In our country, the *Begaclaim* provides an early (somewhat unfortunate) illustration of the investment potential of damage claims. Begemann and former executive Van den Nieuwenhuyzen demanded damages to the tune of NFL 1.2 billion from the

Dutch State. Yet, instead of enforcing their damage claims themselves, they bundled their claims in a separate legal entity, which they floated on the Amsterdam stock market. The result was a rather lively trade in over five million 'shares' in the damage claims. After a decade-long legal battle, the claims were eventually withdrawn in 2007. Investors who by then still held shares in Begaclaim, lost their entire investment.

Yet, disappointing though the return on the Begaclaim may have been, it has not stopped the development of damage claims into investment products. Earlier this year, it was reported that in London eight out of ten of the City's top law firms will seriously consider external funding for litigation and arbitration cases.[2] Private equity funds, hedge funds and other professional investors are offered the opportunity to buy a stake in damage litigation. These are nervous times for the market in more conventional financial products. Perhaps understandably, professional investors are prepared to look at litigation as an interesting alternative.

Thus, whereas in the past the tort process was driven by individual victims of wrongful conduct, these days it is more and more common that lawyers or third party investors are in the 'driver's seat'. In the United States of America, where developments are further ahead in this respect, some even speak of a 'Tort Law Industry'.[3]

Coinciding with the increasing commercialization of tort law, is growing support amongst European policy makers and legal academics for the view that tort law can be used as an 'instrument' for the enforcement of other areas of the law. Traditionally, we regard our tort law as, first and foremost, a system of compensation for loss caused by wrongdoing. In accordance with the principle of corrective justice, tort law creates a 'duty to repair the wrongful losses for which one is responsible'.[4] When it comes to the assessment of damages, the focus is on the victim. Looking at the available evidence, the courts identify the adverse effects upon the victim – the claimant – and set the damages at a level that matches at least by approximation the loss suffered.

However, in some areas of tort law there appears to be a modest but discernable shift of focus towards the wrongdoer. Rather than ask what needs to be done to compensate the victim, some prefer to focus on what needs to be done to deter the wrongdoer from reoffending. In this view, tort law serves as an 'instrument' for the enforcement of legal standards. If liability poses a significant threat, poten-

tial wrongdoers will be less tempted to infringe these standards, so the theory goes.

In this inaugural lecture, I will discuss the growing support for the instrumentalist view of tort law. Clearly, if tort law is to become an effective instrument for the enforcement of legal standards, the development of a tort law industry should be welcomed, even encouraged. After all, the more proactively damage claims are pursued, the more significant will be the threat of civil liability and, therewith, its deterrent effect.

Instrumentalism and the 'explosion' of tort law in the United States

In the United States of America, the commercialization of tort law – some speak of a 'litigation explosion'[5] – commenced approximately fifty years ago. While many factors may have contributed towards this development, there is good reason to believe that the rise of the instrumentalist view of tort law is one of them.

At the turn of the 20th century, the prevailing view was still that tort law was firmly based on the principle of corrective justice. Accordingly, the primary purpose of tort law was to provide compensation to victims of wrongful conduct. However, in the first half of the 20th century, influential academics started to promote the view that the judicial process is not so much based on legal principle, but is instead result-oriented.[6] In this view, judges should feel free to use the law as an instrument for the promotion of desirable social ends. By the 1950's, these views had filtered through to the ranks of judges and lawyers and had become 'the accepted gospel'.[7] Public policy arguments became an integral and oft-used instrument in a tort lawyers' toolbox. In his seminal work *The American Tort Process*, John Fleming writes:

> '[For American judges, law] is not an embodiment of "neutral principles" of lasting truth, but an instrument of government to achieve goals for today and tomorrow. Their outlook remains essentially political, their concept of law "instrumentalist".'[8]

Tort law, with its relatively loose structure and open-ended principles, was never likely to escape the grasp of instrumentalism. To the contrary: tort law is a malleable area of the law, which can easily be adapted to promote social ends. In the US context, the availability of (i) punitive damages, (ii) class actions and (iii) 'popular actions' renders tort law particularly suitable for this purpose.

(i) Punitive damages

Punitive damages are damages that are not awarded to compensate the claimant, but to punish and thereby deter the defendant – and others like him – from engaging in wrongful conduct. They are cherished by the States as instruments to further public policies. This use has been sanctioned by the US Supreme Court:

> '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'[9]

Punitive damages also feature in several federal statutes. For example, under the *Sherman Antitrust Act* of 1890, US victims of antitrust infringements can recover 'treble damages', that is, three times the loss suffered.[10] Again, under the *Racketeer Influenced and Corrupt Organizations Act* ('*RICO*'), a victim of racketeering can demand to be paid 'threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee'.[11]

The availability of punitive damages has given litigation in the United States a considerable boost. Whereas penalties imposed under public law are payable to the State treasury, these private law penalties are paid to the claimants themselves. Thus, '[b]y raising the stakes, punitive damages make the pursuit of claims worthwhile or increasingly lucrative for client and attorney'.[12] This, in turn, helps to promote the public policy objective of deterring citizens from engaging in wrongful conduct. The bigger the threat of litigation, the more reluctant wrongdoers will be to re-offend, so the theory goes.

(ii) Class actions

Another well-known feature of US law is the class action system. Under Rule 23 of the Federal Rules of Civil Procedure, one or more members of a class of claimants may launch a class action, if there are questions of law or fact common to the class and the class is so numerous that joinder of all members is impracticable. The class representative, whose claim must be 'typical', must fairly and adequately protect the interests of the rest of the class.

On a conceptual level, there is no reason why a class action system would necessarily elicit a deviation from the compensatory principle. In practice, however, the American class action has led to a significant departure from that principle. Class actions are now frequently allowed in circumstances where there is no reasonable expectation of the action resulting in compensation for individual victims. The Illinois case of *Price v. Philip Morris* illustrates the point. There, purchasers of Marlboro Lights and Cambridge Lights cigarettes sued Philip Morris, claiming that advertisements had created the false impression that these cigarettes were safer or less harmful than regular cigarettes. The class consisted of all consumers who purchased Cambridge Lights and Marlboro Lights in the State of Illinois for personal consumption between 1971 and 2001 – an estimated class of 1.14 million members. Surely, the task of proving individual damages would have been insurmountable for the members of this class. After all, who has kept receipts of cigarette purchases going back decades? For the same reason, any method of distributing the class action damages would have been highly arbitrary. Yet, this did not prevent the circuit court of Madison County, Illinois, from certifying the class and eventually awarding 'compensatory' class damages of $ 7.1 billion (plus another $ 3 billion in punitive damages).[13]

Price is not exceptional. Contemporary American class action judgments regularly dispense with the 'injury requirement'.[14] One consequence is that damage awards may remain undistributed to the individual class members. Of course, class-action lawyers have come up with a solution for this problem. They appeal to the trust law doctrine of '*cy pres*', which allows a reinterpretation of the terms of a charitable trust when the literal application would amount to impossibility or illegality. Under this doctrine, the trust funds can be applied towards a purpose that is '*cy pres comme possible*' (in mediaeval French: 'as near as possible') to the stated purpose of the trust. In the class action context, the doctrine is used to

justify the allocation of unclaimed funds to charitable causes. The result is a complete departure from the compensatory principle. As the famous judge Richard Posner once observed:

> '[…] the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to judgment) to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy […] is purely punitive.'[15]

Clearly, where class actions are allowed to proceed without a credible prospect of providing redress to individual class members, it can no longer be maintained that their purpose is compensatory. Instead, they have become an instrument to enforce the underlying principles of substantive law.[16]

(iii) 'Popular actions'

Perhaps the ultimate instance of instrumentalism in the area of tort law, is provided by the 'popular actions' (or '*qui tam* actions') that are included in several pieces of US legislation.

Take for example the False Claims Act, introduced under President Abraham Lincoln in 1863. During the Civil War, unscrupulous defence contractors sold the Union Army decrepit horses, faulty rifles and bad ammunition. Disgusted by these men who 'feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the south', President Lincoln urged Congress to pass in March 1863 the False Claims Act. This Act authorized and encouraged citizens – 'whistleblowers' – to bring damage suits for frauds committed against the government. The rewards were considerable. Under the original False Claims Act, whistleblowers could receive up to fifty percent of the government's recovery.[17]

In the first half of the 20th century, the Act became all but obsolete. However, during the massive defence build-up of the 1980s, reports of $900 toilet seats and $500 hammers prompted the American Congress to breathe new life into the False Claims Act.[18] Under a 1986 amendment, the Act offers successful whistleblowers a minimum of fifteen and a maximum of thirty percent of the damages

awarded by the court or of the consideration paid under a settlement.[19] This can provide a considerable incentive, especially considering that the False Claims Act also includes a provision that allows the government – or the whistleblower on its behalf – to claim treble damages.[20] Thus, the False Claims Act privatizes an area of law enforcement. Rather than leaving it to the Federal Government to protect its own interests, individual citizens are recruited to punish the wrongdoer and recover public funds. The fact that these claimants did not suffer any loss themselves – and therefore do not require compensation – is immaterial. They are private law 'bounty hunters', with tort law as their weapon of choice.

The rise of the instrumentalist view of tort law in Europe

In Europe, on both a substantive and a procedural level tort law is still very much national law. Each of the Member States has its own, individual set of rules. As such, there is no 'European tort law'. There are, however, principles of European Union law that have a 'direct effect', creating obligations for both the Member States and their individual citizens.[21] To ensure that these obligations are given 'full force and effect', national courts must provide effective remedies when such obligations have been infringed. Within the national systems of the Member States, tort law is sufficiently adaptable to provide a basis for such remedies. Almost inevitably, the courts choose to deploy the principles of tort law to support awards of damages. Thus, tort law becomes an 'instrument' for the enforcement of EU law.

An early example is the 1984 case of Sabine von Colson and Elizabeth Kamann against the German Land Nordrhein-Westfalen. Von Colson and Kamann were social workers who had applied for jobs at an all-male prison. Their applications were rejected on the grounds that their sex caused problems and potential risks in the prison's all-male environment. The labour court of Hamm held that this amounted to illegal discrimination in contravention of the Equal Treatment Directive[22] and asked the European Court of Justice what sanction it should apply. The ECJ responded:

> 'Although [...] full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanc-

> tion be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.
> In consequence it appears that national provisions limiting the right to compensation … to a purely nominal amount, such as, for example, the expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the Directive.'[23]

When transposed to a tort law context, this emphasis on the effective enforcement of the Equal Treatment Directive causes a shift from the more traditional objective of compensating the victim to the public policy aim of punishing the employer. Damage claims become 'instruments' for the enforcement of the Directive. Liability must pose a threat sufficient to ensure that the employer – and other employers like him – will no longer be tempted to infringe the principles of EU law.

The recent efforts of the European Commission in the context of antitrust damage claims show a similar penchant for instrumentalism. The Commission has calculated that hardcore cartels cost consumers and other victims in the EU somewhere between € 25 billion and € 69 billion per year.[24] Noting that damages actions for cartel conduct represent an area of 'total underdevelopment',[25] the Commission embarked on a campaign to 'improve damages actions'.[26] For the Commission, 'improvement' implies first and foremost that damage actions should become a more effective tool for the enforcement of competition law:

> 'The antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement. Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.'[27]

When tort law becomes an 'instrument' for the effective enforcement of competition law, the focus naturally shifts from compensation to deterrence. In the eyes of the Commission, tort law should pose a threat so formidable, that in the future

companies will think twice before they engage in cartel conduct. It comes as no surprise, therefore, that the Commission has seriously considered measures that depart from the compensatory principle.[28]

In its Green Paper on Damage Actions for Breach of EC Antitrust Rules, the Commission proposed, *inter alia*, to disallow the passing-on defence and to introduce claims for 'double damages' against horizontal cartels.[29] If accepted, a direct customer of cartel products could claim twice the full cartel overcharge, regardless of whether he limited his loss by passing the overcharge on to his own customers.

Under considerable pressure of the Member States, the Commission eventually took a more measured approach in its White Paper of April 2008.[30] However, the Commission remains determined to employ tort law as an enforcement tool. It proposes, *inter alia*, to introduce a presumption that any given price-fixing cartel has at least an 'average' impact[31] and that any illegal overcharge is passed on in its entirety to indirect purchasers.[32] When drafting its proposals for collective redress, the Commission appears to have been inspired by the American *cy pres* doctrine:

> 'Where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action (e.g. the harm suffered by the producers in a given industry). However, it may be necessary to reflect on the possibility that, exceptionally, the damages awarded to the representative entity are distributed to related entities or used for related purposes.'[33]

Apparently, the Commission wants to leave the door ajar to collective redress in cases in which there is no credible prospect of providing compensation to the individual victims.

Ultimately, the Commission's goal is to develop a culture of damage litigation. Of course, Commissioner Kroes has vehemently denied this, stating that 'private enforcement is nothing to do with encouraging a litigation culture'. However, in almost the same breath she added that 'double damages for hard core cartels are worth considering, but only if it is proven that single damages are not enough to get the victims to court'.[34] Clearly, for the Commission 'getting victims to court', that is, developing a litigation culture, is an important objective *per se*. If full com-

pensation is not enough, then 'further incentives' remain on the Commission's agenda:

> '[O]ne also has to take into account the fact that the risk/reward balance in antitrust damages litigation is skewed against bringing actions. The Commission considers it necessary to address this negative balance by ensuring that there are sufficient incentives for victims of competition law infringements to bring meritorious claims. One way of doing so would be to assure the claimant a priori that if he wins the case, he will be awarded damages that are higher than the loss actually suffered. However, [...] such a general approach would not appear necessary today. If it were to emerge, though, that the current situation in Europe of very limited repair of the harm caused by infringements of the competition rules does not structurally change over the coming years, it should be considered what further incentives are required to ensure that victims of competition law infringements actually bring their antitrust damages action.'[35]

For the European Commission it is only natural to be inclined towards an instrumentalist view of tort law. With enforcement of competition law as one of its primary tasks, the Commission need not apologize for seeking to mobilize other areas of the law.

If tort law is to become an effective enforcement tool, then liability must pose a sufficient threat to deter future wrongdoing.

Also, 'private enforcement' cannot exist without 'private enforcers'. The development of a market for private enforcers – a tort law industry – is a precondition for the ultimate success of private enforcement. If private citizens are to be stirred into action for the greater good of law enforcement, then one must ensure that 'the potential benefits of bringing proceedings will outweigh the possible costs'.[36]

The Netherlands: a modest shift towards the instrumentalist view

In the Netherlands, the instrumentalist view of tort law is still a minority view. While few will deny that damage actions may have the beneficial side-effect of deterring undesirable conduct[37] – thereby aiding the 'enforcement' of the standards of conduct – deterrence is not generally accepted as an *objective* of tort law.[38] Instead, the primary focus is on the compensatory function of tort law. In the words of Bloembergen: '… these days, most will agree that the purpose of the obligation to pay damages is not to punish the wrongdoer, but to help the victim'.[39] The underlying assumption is that punishment – and more generally law enforcement – is the exclusive domain of public law.

Recently, however, a modest shift is discernable towards a more instrumentalist view of tort law. In his inaugural lecture in 2001, my colleague Martijn Hesselink argued that, in view of European developments, national private law is bound to become 'instrumental in achieving political, social, economic and other aims'. In his view, '[i]t is time that we fully face this reality in Europe'. Ultimately, he regards it as 'untenable' to think of private law 'as having its own internal logic and as being based essentially on "fairness" or morality'.[40] In 2006, Olav Haazen recommended the introduction of US-style whistleblower statutes, arguing that 'a little bit of privatized law enforcement could have a refreshing and wholesome effect'.[41] The same year, Willem van Boom argued in his inaugural lecture at the University of Rotterdam that private law should focus its attention on 'more efficacious incentives for compliance with the underlying substantive rules'.[42] He went on to advocate the introduction of both punitive damages – which he termed 'post-facto incentive damages'[43] – and group actions by authorised private interest groups.[44] To test the potential of these proposed measures, he suggested that we should conduct 'specific experiments within the European legal context'.[45] In October 2008, the *Weekblad voor Privaat- en Notarieel Recht* devoted a special issue to the subject of 'enforcement in private law'. In this issue, Hartlief argued in favour of the introduction of punitive damages in relation to certain specific types of activities, such as the disgraceful conduct sometimes displayed by the tabloid press.[46] In this context, Hartlief openly supports the development of a 'litigation culture'.[47]

The Dutch judiciary has not (yet) demonstrated a similar leaning towards the instrumentalist view of tort law. Some have argued that the size of damage awards in cases of violation of privacy and damaged reputation suggests that the underlying motive is to deter future wrongdoing,[48] but the courts continue to couch their decisions in terms of compensation. A possible exception is the recent decision of the Amsterdam Court of Appeal in the case of the housing corporation *Ymere* against one of its tenants, where the Court allowed an action for the disgorgement of profit earned through illegal subletting. The Court of Appeal noted that the housing corporation was in urgent need of an 'effective instrument in the battle against subletting'.[49]

The key question is, of course, whether we should indeed – wholly or partially – abandon the compensatory principle of tort law in favour of a more instrumentalist approach. If enforcement should become an objective of our law of tort, there is no denying that it is worth considering the introduction of some of the concepts that are prevalent in the United States. Should we, as Van Boom has suggested, conduct some experiments to test whether punitive damages and group actions, or indeed popular actions will work within the European legal context?

Before we dive headfirst into an attempt to answer these questions, perhaps it is advisable to briefly step back and consider whether we are right to assume that private enforcement has not yet been tested in a European context. If we do, we will soon find that concepts like 'punitive damages' and 'popular actions' are by no means foreign to the Western European legal tradition. To the contrary: these concepts originate in Europe.

Private enforcement and the Western European legal tradition

American whistleblowers' legislation derives from the English doctrine of the 'common informer' which, through the writings of William Blackstone, can be traced back to the Roman *actiones populares*.[50] At the time of the early Empire, it is believed that there may have been as many as four million people in and around Rome. To accommodate this 'multitude', the Romans raised their buildings 'to a great height'.[51] With the masses moving through narrow streets, the dangers posed by things falling or pouring down from buildings were considerable:

> '[…] See what a height it is to that towering roof from which a potsherd comes crack upon my head every time that some broken or leaky vessel is pitched out of the window! See with what a smash it strikes and dints the pavement! There's death in every open window as you pass along at night; you may well be deemed a fool, improvident of sudden accident, if you go out to dinner without having made your will. You can but hope, and put up a piteous prayer in your heart, that they may be content to pour down on you the contents of their slop-basins!'[52]

To promote safety on the public roads, the Roman praetor introduced strict liability of the occupier. The relevant actions not only provided for punitive damages (here: 'double damages'), but in certain regards the action was also 'popular'. For example, if a freeman was killed by something falling from a building onto a public road, any member of the public could sue the occupier for a penalty of fifty gold pieces.[53] An action for ten gold pieces lay against the occupier who had things placed on or hanging from his building that could endanger passers-by.[54] Clearly, the Roman praetor saw fit to partially privatise the enforcement of safety standards.

Furthermore, some of what we today view as the exclusive domain of criminal law in Rome was enforced by and between citizens. Theft, robbery and the infliction of certain types of personal injury were reckoned among the Roman delicts – torts. Victims of such delicts could exact considerable penalties – punitive damages – upon the perpetrators. Thus, the victim of a 'manifest theft' was entitled to demand fourfold the value of the stolen property, plus the return of the property itself. Similarly, the ancient laws of the Germanic tribes described a scheme of monetary penalties for nearly all conceivable types of injury. As the famous English legal historian Sir Henry Maine observed, 'in the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime but on the Law of Tort'.[55]

In our country, the reception of Roman law ensured that instrumentalist concepts like punitive damages and popular actions continued to be part of our private law until the days of our Republic. However, our jurisprudence has since outgrown its stage of 'infancy'.[56] With the rise of the Natural law school in the 17th century, we moved away from the concept of private citizens exacting punish-

ment.[57] In his seminal work *De Iure Belli ac Pacis* (1625), Hugo Grotius drew upon Christian doctrine to argue that it was not for citizens to punish each other:

> 'It is not safe for Christians, as private citizens, to exact punishment, even when universal common law allows it. [...] In harmony with the foregoing is the widely current opinion, that not any and every person should be allowed to bring accusations for crimes, but that there should be certain persons upon whom this task is laid by the public authorities. [...]'[58]

Six years later, in his *Jurisprudence of Holland*, Grotius confirmed that in Holland punishment and prosecution had by-and-large become public affairs:

> 'Again, the right to punish belongs to the rulers of the State, but the right to claim redress belongs to those who have suffered wrong. It is quite true that in former times amongst many nations and our forefathers amongst others, the victims or their kin were given the right to demand the punishment of crime by legal process [...] Now although, in later times, all this has been notably altered and the prosecution of crime has almost entirely come into the hands of the Count and his officers, namely bailiffs and sheriffs, as we will explain more fully when we treat of public law, to which this subject properly belongs [...]'[59]

By the end of the 17th century the *actio popularis* for things threatening to fall down from buildings had also become obsolete.[60]

By contrast, in England the popular action survived well into the 20th century. In a voluminous work on the history of English criminal law, Radzinowicz lists the numerous English statutes that offered citizens rewards for the prosecution of their fellow-countrymen. One statute that appears to have been particularly popular with these 'common informers' is the Lord's Day Observance Act. Anyone who organized an amusement or entertainment on a Sunday, was criminally liable and was at serious risk of being sued by a common informer. In August 1933, one common informer may have overstepped a boundary. Several celebrities of the theatrical and cinema world in the neighbourhood of Manchester organised a garden party for charity on a Sunday afternoon. A common informer who lived over 180 miles away gave notice to the police of the infringement of the Lord's Day

Observance Act, threatening to bring an action for penalties. This incident appears finally to have triggered the abolition of all English common informer statutes.[61]

The question rephrased: should we consider a return to instrumentalism?

In view of the above, the more precise question is not whether we should consider introducing, but rather whether we should consider *reintroducing* some of the instruments of law enforcement into our tort law.

Those who argue in favour of an affirmative answer, tend to point to the limitations and shortcomings of public enforcement.[62] Public enforcement agencies have limited resources and need to make choices between conflicting interests. To fill the void, Van Boom has argued that we should consider privatizing enforcement, 'at least in areas … in which public enforcement is in a state of underdevelopment or in an obvious need of ancillary enforcement efforts'.[63] Similarly, Hartlief's plea for the introduction of punitive damages to straighten out the tabloid press appears to be motivated by dissatisfaction with public enforcement in that area: 'it is clear that we cannot expect much from other [enforcement] mechanisms, like criminal law'.[64]

Personally, I do not find this type of reasoning very convincing. If there are areas in which public enforcement is clearly in 'a state of underdevelopment', then we may have to consider improving public enforcement in that area. If society agrees with Hartlief that the tabloid press needs straightening out – I am not sure it does – then why should we not address this issue through public enforcement measures? At any rate, if tort lawyers want to rush forward and claim ownership of the problem, they must provide a clear justification for doing so. [65] I, for one, do not see such justification. To the contrary: I see at least four arguments that militate strongly against a return to the use of tort law as an instrument of enforcement.

Four arguments against a return to instrumentalism

(i) It is not necessary to use tort law as an instrument of enforcement

Firstly, there is no clear necessity to supplement our system of public enforcement with instruments of private enforcement. If we go back to the days of our mediaeval ancestors when there was no efficient police force, it was not altogether unnatural, for lack of a better alternative, to rely on a system of private enforcement.[66] Likewise, it is understandable that President Lincoln, in a country ripped apart by a Civil War, felt it necessary to mobilize citizens in the fight against unscrupulous defence contractors. One can even understand why the European Court of Justice and the European Commission – confined as they are by the limits of their mandates – would jump at every available opportunity to enforce Union law. Yet, at the level of most European Member States there is no such necessity.[67] At least in our country, we have a good system of public enforcement in place, which, if and when needed, can be upgraded or adjusted to meet the needs of modern society.

(ii) Experience suggests that it is difficult to keep 'private enforcers' under control

Secondly, experience from our European past and the American present suggests that it is difficult to keep 'private enforcers' in check. From Groenewegen van der Made we learn that in the 17th century one of the main concerns was that private citizens might prosecute 'out of hatred and a desire for vengeance', rather than on the basis of an objective assessment of the case.[68] His contemporary Antonius Matthaeus cites the Venetian cardinal Contarini, who wrote:

> 'No private citizen can take the role of accuser on himself without provoking very great ill-will and incredible hatred on the part of him whom he has summoned to trial. As a result squabbles easily arise among the citizens. That problem has been exceptionally well avoided by our people [the Venetians, JK] by entrusting this entire duty of prosecution to an official who prosecutes, not led on by his private grudge but in terms of the law.'[69]

As most of the instruments of private enforcement rely on financial incentives to mobilize citizens, our ancestors may also have been concerned that private prosecutors were motivated by personal greed. In England, it was exactly this combination of law enforcement and financial incentives that lead to abuse of the system of 'common informers'. It had been hoped that common informers would be 'of great assistance in the administration of criminal justice, solely because of the spur provided by the offer of reward'. However, Radzinowicz writes:

> 'These hopes were not fulfilled. Instead there arose a small but ruthless and unprincipled group of people who, from time to time, interested themselves in particular sets of statutes the enforcement of which would provide them with easy and appreciable profit.'[70]

It is hardly a stretch to compare the bad reputation of the 19th century English common informer with the reputation of the modern-day American plaintiffs' bar. Of course, this reputation has been tarnished mainly by the conduct of a relatively small group of unscrupulous plaintiffs' attorneys. Yet, there is no denying that the American class action system, in which financial success is largely dependent on the speed with which one files an action and the size of the class one seeks to represent, is particularly prone to abuse. When I worked in New York, a defence attorney with many years of experience told me that whenever a big corporate transaction goes public, he has just enough time to make a cup of coffee before two class actions are filed. One action is filed by a lawyer representing the shareholders of the seller, arguing that the company has been sold too cheaply. Another suit is launched on behalf of the shareholders of the purchaser, proclaiming that the purchase price is clearly excessive.

Unfortunately, this story is only too real. Wherever considerable financial incentives are on offer, a market will be created. If the incentives are tied in with disputes, then there will be a market in disputes. Disputes will arise where before there were none. Meanwhile, the disputes' tradesmen – lawyers – will make a handsome profit.[71] To society, this all comes at a considerable cost.[72] While it is very difficult to estimate the amount of unnecessary litigation, a 2007 survey published in the *Columbia Law Review* suggests that as many as 72% of all whistleblower actions under the False Claims Act are frivolous.[73] This brings me to a third objection against the privatization of law enforcement.

(iii) Private enforcement is costly

Some have suggested that the State's budget is insufficient to make the necessary improvements to our system of public enforcement.[74] Yet, we rarely stop to ask what the cost of our tort system is. In the United States, where economic analysis of the law has a much more prominent place on the curriculum, experts have long argued over this question. While opinions on the exact cost vary widely,[75] most agree that the tort system is uncommonly costly, not in the last place because of its 'staggering overhead cost'.[76] On average, the combined cost of legal representation for both claimant and defendant and the cost of administrating the court system exceed any damages that are recouped.[77] While there are significant differences between the American and our own tort systems – most notably the use of contingency fees – the high cost is to some extent inherent in the nature of tort liability.[78] Therefore, while the privatization of law enforcement may ease some of the burden on public enforcement institutions, the cost to society could be (much) higher than the benefit obtained.[79] Ultimately, only one thing is certain: those who stand to gain most by the tort law industry, are the members of the legal profession.

(iv) Private enforcement undermines the State's monopoly on prosecution and punishment

A fourth objection against the privatization of law enforcement is that it undermines the fundamental principle that only the State is entitled to prosecute and penalize its citizens.[80] The State's monopoly on prosecution and punishment is part of the fabric of our constitutional state.[81] To ensure that public authorities charged with law enforcement are independent and unbiased, their conduct is subject to judicial review. If we were to allow individual citizens to take up the task of prosecution, this would raise serious concerns regarding the protection of the defendant's legal rights.[82] Moreover, many will regard the mere notion that private individuals could punish their fellow-citizens – and stand to gain considerable financial rewards for their efforts – as objectionable.[83] Indeed, when the English legislature finally abolished the doctrine of the common informer in 1951, Viscount Simon stated that it would be 'universally agreed that that system is wrong, and that if we have – as we have today – adequate means of administering the criminal law without encouraging people to refer to it for the purpose of their

private advantage and remuneration, it is shocking that such provisions should survive'.[84]

Back to basics: the compensatory principle

For the above reasons, I would regard a return to an instrumentalist view of tort law as a real 'step backward'. Rather than seek to develop methods of private enforcement, I would suggest that we wholeheartedly embrace the compensatory principle of tort law. Not only does it accord with approximately three centuries of accumulated wisdom, but a recent consultation suggests that the compensatory principle still receives wide support from the European Member States. After the publication of the Commission's Green Paper on Damage Actions for Breach of EC Antitrust Rules, several Member States expressed concerns regarding the Green Paper's focus on the purported enforcement function of tort law. In its response, the Dutch government stated:

> '[…] above all, the Netherlands is of the fundamental opinion that compensation of loss suffered is the main purpose of damage claims. Compensation is the general principle in relation to damage claims in the Dutch law of tort.'[85]

Similar views were expressed on behalf of the Danish, the Finnish, the French and the Norwegian authorities.[86] In response to this criticism, the European Commission has decided to change its focus from 'private enforcement' to 'full compensation'.[87]

I suggest we do the same in our country. Our efforts should go towards providing victims of wrongful conduct with real, effective tools to obtain compensation.

In this context, the introduction of more effective measures of collective redress deserves serious consideration, *not* as an enforcement tool, but as a mechanism to ensure compensation. In our present system, loss that has been spread out over a large group of victims often remains uncompensated for the mere reason that the loss suffered by each individual victim is too small to warrant the pursuit of a legal action. In my view, the European Commission's proposal to allow qualified entities – for example national consumer associations – to bring 'representative actions' for damages on behalf of identified victims, is well-balanced. How-

ever, I see no reason to allow collective damage actions in cases in which there is no credible method of distributing the damages to the individual victims. The American *cy pres* doctrine should therefore be dismissed.

Furthermore, we should ask ourselves whether the transformation of damage litigation into an investment product should under all circumstances be tolerated. If professional investors are allowed to buy up – or buy a stake in – damage claims, there is a considerable risk of tort victims being short-changed. Again, this issue is not new. As early as AD 506, the Roman emperor Anastasius introduced legislation to discourage financial speculation in litigation.[88] Under the *lex Anastasiana*, any party who purchased a claim could not recover more from the debtor than the price he had paid for the claim. In the Netherlands this rule was abolished with the introduction of our own Dutch Civil Code in 1838.[89] Yet, the rule still features in the French *Code Civil*.[90]

In England, investing in another person's lawsuit used to be prohibited under the torts of maintenance and champerty.[91] While third party funding is now no longer unlawful, in 2007 the Civil Justice Council recommended that the sector be 'effectively regulated and rigorously controlled by the courts'.[92]

I do not propose to reintroduce the *lex Anastasiana*. However, I do think that the compensatory purpose of our tort law is ill served if we do not put some limitation on third party investors – or indeed 'uncontrolled litigation vehicles set up by lawyers'[93] – taking control of litigation in our courts.

Ik heb gezegd.

Notes

1. Cf. Hoge Raad, 31 January 1919, NJ 1919, p. 161 (*Lindenbaum/Cohen*), Hoge Raad, 5 November 1965, *NJ* 1966, 136 (*Kelderluik*) and Hoge Raad 22, November 1974, *NJ* 1975, 149 (*Broodbezorger*).
2. http://www.legalweek.com/Articles/1107976/External+funding+booms+as+litigators+plot+upturn.html. A Belgian entity by the name of *Cartel Damage Claims* buys up antitrust damage claims. For the cost of the assessment and preparation of court cases, they rely on '[p]rofessional litigation funders as well as private and institutional investors' (http://www.carteldamageclaims.com/english/case_funding_engl.htm).
3. E.g. B. McManus, 'Feckless Friends', *New York Post*, 18 March 2008.
4. J.L. Coleman, 'The Practice of Corrective Justice' in D.G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995), p. 72.
5. W.K. Olson, *The Litigation Explosion* (Dutton New York, 1991). See also J.G. Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988), p. 12.
6. See for more detail R.S. Summers, *Instrumentalism and American Legal Theory* (Cornell University Press, 1982), esp. chapter 2.
7. J.G. Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988), p. 8.
8. Idem, p. 33.
9. *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 568 (1996).
10. 15 USC § 15(a).
11. 18 USC § 1964(c). 'Racketeering' is a broad term for criminal acts that are typically performed by criminal organizations. Examples include murder, murder-for-hire, kidnapping, bribery, counterfeiting, theft, embezzlement, fraud, obstruction of justice and money laundering.
12. J.G. Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988), p. 214.
13. *Price v Philip Morris*, Circuit Court Madison County Ill, Case No. 00-L-112 (March 21, 2003), http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/tobacco/pricepm32103jud.pdf; overturned for different reasons in *Price v. Philip Morris*, No. 96326, 2005 WL 3434368 (Ill.).
14. M.S. Greve, *Harm-Less Lawsuits?* (AEI Press, Washington 2005), pp. 18-24.
15. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).
16. See *Barbara Schwab et al. v. Philip Morris USA Inc. et al.*, 2005 US Dist. Lexis 27469 (E.D. N.Y., 2005) ('It is the large scale of the defendants' alleged fraud that makes fluid recovery necessary to fully effectuate the substantive law in this case'). This decision includes a detailed overview of the use of the *cy pres* doctrine in a class action context.
17. Act of 2 March 1863, ch. 67, § 6, 12 Stat. 698.
18. L.D. Lahman, 'Bad Mules; A Primer on the Federal False Claims Act', 76 (12) Oklahoma Bar Journal 901-907, 902 (2005).

19. 31 USC § 3730 (d). Thirteen states have introduced their own whistleblower statutes. See U.S. ex rel. Bogart v. King Pharmaceuticals, 493 F.3d 323, 332 (3rd Cir. 2007), with further references. With a maximum reward of 50%, the California and Nevada statutes appear to be the most generous. See Cal. Gov.Code § 12652(g)(3) and NRS § 357.210(2).
20. 31 USC § 3729 (a).
21. ECJ 9 March 1978, Case 106/77 (Simmenthal), para. 15. Cf. for more detail C.H. Sieburgh, 'Het Europese gemeenschapsrecht en het Nederlandse buiten-contractuele aansprakelijkheidsrecht', in A.S. Hartkamp, C.H. Sieburgh and L.A.D. Keus (eds), *De invloed van het Europese Recht op het Nederlandse Privaatrecht*, Vol. 1 (Kluwer, Deventer 2007), pp. 465-540.
22. Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions.
23. ECJ 10 April 1984, Case 14/83 (Von Colson and Kamann v Land Nordrhein-Westfalen), para. 14.
24. Commission Staff Working Document, Impact Assessment, COM (2008), pp. 14-15.
25. European Commission's Green Paper on Damage Actions for Breach of EC Antitrust Rules (19 December 2005), COM (2005) 672 ('Green Paper'), p. 4, referring to Ashurst, *Studies on the conditions of claims for damages in the case of infringement of EC competition rules* (2004), p. 2.
26. Green Paper, p. 4.
27. Green Paper, p. 3.
28. The European Commission has drawn inspiration from the United States. Cf. also the opinion of Advocate General Van Gerven in the case of Banks & Co v British Coal, Case C-128/92, para. 44 ('Individual actions for damages have for some time proved useful for the enforcement of federal anti-trust rules in the United States as well.').
29. Green Paper, pp. 7-8 (options 16 and 22-24).
30. White Paper on Damages Actions for Breach of EC Antitrust Rules ('White Paper'), 4 April 2008, http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.
31. Commission Staff Working Paper accompanying the White Paper, com (2008) 165, p. 60.
32. White Paper, p. 8.
33. Commission Staff Working Paper accompanying the White Paper, p. 20. See also p. 18, where the Commission expressly refers to the *cy pres* doctrine.
34. Neelie Kroes, 'Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe', speech at the European Commission/IBA Joint Conference on EC Competition Policy, Brussels, 8 March 2007.
35. Commission Staff Working Paper accompanying the White Paper, p. 59, § 195.

36. N. Kroes, 'The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights', Opening speech at the European Parliament workshop on damages actions for breach of the EC antitrust rules, Brussels, 6 June 2006, http://ec.europa.eu/comm/competition/antitrust/actionsdamages/speech_06062006.pdf.
37. Cf. however P. Cane, *Atiyah's Accidents, Compensation & the Law* (5th edn 1993), pp. 361-369 and M.R. Mok, 'Regels betreffende de Mededinging – Kartelrecht en Bepalingen over Staatsteun' in A.S. Hartkamp, C.H. Sieburgh and L.A.D. Keus (eds), *De Invloed van het Europees Recht op het Nederlandse Privaatrecht* (Kluwer, Deventer 2007), pp. 561-600 at 581.
38. See A.T. Bolt and J.A.W. Lensing, *Privaatrechtelijke boete* (Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, 1993), p. 61 and C.E. du Perron, 'Genoegdoening in het civiele aansprakelijkheidsrecht' in *Het Opstandige Slachtoffer* (Preadviezen voor de Nederlandse Juristen-Vereniging, 2003), pp. 107-161 at 108-109.
39. A.R. Bloembergen, *Schadevergoeding bij Onrechtmatige Daad* (Kluwer, 1965), p. 362 (nr. 251) ('*... we zijn het er tegenwoordig wel over eens, dat het opleggen van een verplichting tot schadevergoeding niet dient om de dader te straffen, maar om de benadeelde te helpen.*'). See for a more detailed analysis T. Hartlief, *Ieder Draagt zijn Eigen Schade* (Kluwer, 1997).
40. M.W. Hesselink, *The New European Legal Culture* (Kluwer, 2001), p. 38.
41. O.A. Haazen, 'Amerikaanse Toestanden; Qui Tam', *Nederlands Juristenblad* 2006/21, p. 1158 ('*Zou dus een beetje geprivatiseerde rechtshandhaving geen verfrissende en heilzame werking kunnen hebben*'). Cf. also Studierapport Algemene Rekenkamer, TK 2007–2008, 31 388, nr. 2, p. 13, where it appears to be suggested that a reward mechanism for whistleblowers is an option that deserves serious consideration and R. van den Bergh, 'Schadevorderingen wegens schending van het mededingingsrecht in het spanningsveld tussen compensatie en optimale afschrikking', *Markt & Mededinging* 2006/5, pp. 143-151 at 149, who argues that consumer organizations should be allowed to bring claims on behalf of the State and keep a percentage of the damages recovered.
42. W.H. van Boom, *Efficacious Enforcement in Contract and Tort* (Boom, The Hague, 2006), p. 33.
43. Idem, pp. 35-36.
44. Idem, pp. 40-41. See also Chr.F. Kroes, 'The beauty and the beast? Over "class actions", de claimcultuur en het toenemend beroep op de rechter', *Nederlands Tijdschrift voor Burgerlijk Recht* 2008/7, pp. 266-274.
45. Idem, pp. 36 and 41.
46. T. Hartlief, 'Handhaving in het aansprakelijkheidsrecht. Op weg naar een betere samenleving?', *Weekblad voor Privaat- en Notarieel Recht* 6772 (2008), pp. 769-777 at p. 776 ('*Privaatrechtelijke boetes zouden dan ook niet over de gehele linie, maar juist gericht moeten worden ingezet*').

47. T. Hartlief, 'Leven in een claimcultuur: wie is er bang voor Amerikaanse toestanden?', *Nederlands Juristenblad* 2005/16, pp. 830-834 at 834 ('*Lang leve daarom: de claimcultuur*!').
48. A.J. Verheij, *Vergoeding van immateriële schade wegens aantasting in de persoon* (Ars Aequi, Nijmegen 2002), p. 327.
49. Hof Amsterdam, 9 September 2008, *NJF* 2008/437.
50. See Sir William Blackstone, 3 *Commentaries* 160 ('and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a qui tam action').
51. Vitruvius, *On Architecture*, edited and translated by F. Granger (Harvard University Press, 1955), p. 127 (book II, chapter VIII), where it is reported that Augustus set the maximum height at 70 feet.
52. Juvenal, *Satire* 3, lines 268-277, edited and translated by G.G. Ramsay (Loeb Classical Library, 1918).
53. See *D.* 9.3.1.*pr* and 9.3.5.5.
54. See *D.* 9.3.5.6 and 9.3.5.13.
55. H.S. Maine, *Ancient Law* (1st edn 1906), p. 381. See for more detail Th. Mommsen, *Römisches Strafrecht* (Dunker & Humblot, 1899), pp. 507-508.
56. In mediaeval Europe the prosecution of criminal offences was largely dependent on private initiative. In the course of the High Middle Ages, public prosecution came to replace private prosecution, ultimately resulting in State monopolies on prosecution of criminal offences. See for more detail L. von Bar and T.S. Bell, *A History of Continental Criminal Law* (T.S. Bell, trans., Little, Brown & Company, Boston, 1916), pp. 88, ftnt 1, 114-115, 128 and 139, R. Martinage, *Histoire du droit penal en Europe* (Presses Universitaires de France, Paris, 1998), pp. 14-19 and S. Lepsius, 'Public Responsibility for Failure to Prosecute Crime? An Inquiry into an Umbrian Case by Bartolo da Sassoferrato' in J.A. Marino and T. Kuehn (eds), *A Renaissance of Conflicts* (Centre for Reformation and Renaissance Studies, Toronto, 2004) at pp. 131-135 with further references.
57. R. Zimmermann, *The Law of Obligations* (Clarendon Press Oxford, 1996), pp. 1032, 1088-1089.
58. Hugo Grotius, *De Iure Belli ac Pacis*, Vol. II (F.W. Kelsey, ed. & trans., Clarendon Press, 1925), pp. 486-487 (book II, chapters XIV and XV).
59. Hugo Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (1631), (R.W. Lee, trans., Clarendon Press, 1926), pp. 461-467 (book III, chapter 32). See also S. Groenewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus*, Vol. IV (3rd ed. 1669), ad *C.* 9.47.1 and S. van Leeuwen, *Het Rooms-Hollands-Regt* (10th ed., Boom, 1732), p. 451 (Book IV, Part XXXII, s. 8) and p. 660 (Book V, Part XXVII, ss. 2-3). Cf. U. Huber, *the Jurisprudence of My Time (Heedensdaegse Rechtsgeleertheyt)*, Vol. II (P. Gane, ed. & trans. 1939), pp. 414-415 (Book VI, Ch. 10, ss. 4-6).

60. S. Groenewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus*, Vol. II (3rd ed. 1669), ad *D.* 47.23. However, the action still appears to feature in J. Voet, *Commentary on the Pandects*, Vol. II (P. Gane, ed. & trans., Butterworth & Co., 1955), pp. 601 and 602 (Book IX, Title 3, sections 4-6). See also R. Zimmermann, *The Law of Obligations* (Clarendon Press Oxford, 1996), p. 1127. From Huber we learn that in Friesland the action could no longer be maintained for a penalty, but only for the removal of the thing threatening to fall down. U. Huber, *the Jurisprudence of My Time (Heedensdaegse Rechtsgeleertheyt*), Vol. II (P. Gane, ed. & trans. 1939), p. 386 (Book VI, Ch. 3, s. 8). In Germany the *actio popularis* was abolished, but its function was eventually taken over by a provision in the Criminal Code prohibiting the dangerous suspension of things that could cause harm to the general public. See H. Freiesleben et al. (eds), *J. von Olshausen's Kommentar zum Strafgesetzbuch fur das Deutsche Reich*, Vol. II (11th edn, Franz Dahlen, Berlin 1927), p. 2056 (§ 366, 8 StGB).
61. Hansard HC Deb. 6 November 1934, Vol. 293, cc 843-846.
62. See A.T. Bolt and J.A.W. Lensing, *Privaatrechtelijke boete* (Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, 1993), p. 84.
63. W.H. van Boom, *Efficacious Enforcement in Contract and Tort* (Boom, The Hague, 2006), p. 25.
64. T. Hartlief, 'Handhaving in het aansprakelijkheidsrecht. Op weg naar een betere samenleving?', *Weekblad voor Privaat- en Notarieel Recht* 6772 (2008), pp. 769-777 at p. 776 ('*Waar het gaat om publicaties over "publieke personen" is duidelijk dat van andere mechanismen zoals het strafrecht weinig heil te verwachten is*'). See also H-J. Boukema, 'Roddel, Schuld & Boete', *Nederlands Juristenblad* 2008/24, pp. 1464-1470.
65. Cf. C.J.J.M. Stolker, 'Straffen met privaatrecht – of juist verzoenen?' in A.M. Hol and C.J.J.M. Stolker (eds), *Over de grenzen van strafrecht en burgerlijk recht* (Kluwer 1995), p. 36.
66. After: Viscount Simon, Hansard HL Deb. 5 June 1951, Vol. 171, col. 1052 ('If we go back to the old days when there was no efficient police force, when, indeed, in some parts of the country there was no police force at all, and consider the importance of enforcing the law against criminal offences, it would seem that it was not altogether unnatural for our ancestors, because they could not do any better, to set up the system of common informers').
67. Cf. M.R. Mok, 'Regels betreffende de Mededinging – Kartelrecht en Bepalingen over Staatsteun' in A.S. Hartkamp, C.H. Sieburgh and L.A.D. Keus (eds), *De Invloed van het Europees Recht op het Nederlandse Privaatrecht* (Kluwer, Deventer 2007), pp. 561-600 at 582 ('*In het algemeen is voldoende dat het recht van de lidstaten voldoende mogelijkheden biedt tot handhaving – waar nodig – van het communautaire recht* […]').
68. See S. Groenewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus*, Vol. IV (3rd ed. 1669), ad *C.* 9.1.2 ('*ex odio et vindictae cupiditate*'). Cf. also A. Rodger, 'The Relationship between Private and Criminal Law – a View

from Britain' in A.M. Hol and C.J.J.M. Stolker (eds) *Over de grenzen van strafrecht en burgerlijk recht* (Kluwer 1995), p. 116 ('What seems to me to be unhealthy, however, is that … civil proceedings are used, not for the true purpose for which they were designed, but rather as a substitute for the criminal proceedings which the prosecuting authorities deliberately declined to bring').

69. A. Matthaeus, *De Criminibus*, Vol. IV (1644; M.L. Hewett, ed. & trans. 1996), p. 667 (ad *D.* 48.20.2), citing the third book of Gasparo Contarini's *De Republica Venetorum*.
70. L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, Vol 2 (London, 1956), pp. 146-147.
71. Amongst the most successful of plaintiffs' lawyers were Bill Lerach and Mell Weiss. Today, both have received criminal convictions for paying kick-backs to their clients to ensure that they had the best chances of being the first to file suit. See for details *Fortune Magazine,* 13 November 2006 (Vol. 154, nr. 9), cover story.
72. See also W.P.J. Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, World Competition, Vol. 32, No. 1, March 2009 (forthcoming), with further references in ftnt. 41.
73. Ch. Orsini Broderick, 'Qui Tam Provisions and the Public Interest: an Empirical Analysis', 107 *Columbia Law Review* 949-1001, 975 (2007).
74. A.T. Bolt and J.A.W. Lensing, *Privaatrechtelijke boete* (Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, 1993), p. 83.
75. Compare for example L.J. McQuillan, H. Abramyan, A.P. Archie e.a., *Jackpot Justice: The True Cost of America's Tort System* (Pacific Research Institute, 2007) and T. Baker, H. M. Kritzer and N. Vidmar, *Jackpot Justice and the American Tort System: Thinking Beyond Junk Science* (SSRN, 2008). Available at SSRN: http://ssrn.com/abstract=1152306.
76. J.G. Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988), p. 18.
77. Idem, pp. 19-20, ftnt 73, citing research done in the 1970's and early 1980's. A 2006 update on 'Tort Cost Trends' by the consultancy firm Towers Perrin suggests that in the US tort costs per capita have almost doubled between 1980 and 2005: http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf, p. 5.
78. J.G. Fleming, *The American Tort Process* (Clarendon Press, Oxford, 1988), p. 19.
79. See also Council of Economic Advisers, *Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System* (April, 2002), where it is conservatively estimated that the cost of excessive tort litigation is approximately $ 87 billion per year, which is equivalent to a 2% tax on consumption: http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.
80. See for example the Parliamentary history with the Dutch Code of Criminal Procedure, Bijl. Hand. II 1917/1918, 77 stuk 1, p. 44/45 in folio Stb. 1921, 14 ('[The State's monopoly on prosecution] excludes private citizens, even victims and interested parties, from direct participation in acts of prosecution'). Cf. A. Rodger, 'The Rela-

tionship between Private and Criminal Law – a View from Britain' in A.M. Hol and C. J.J.M. Stolker (eds), *Over de grenzen van strafrecht en burgerlijk recht* (Kluwer 1995), p. 120 ('But in both England and Scotland nowadays the hallmark of prosecution is really that it is brought or maintained by an independent prosecutor acting in the public interest') and B. Windscheid, *Lehrbuch des Pandektenrechts*, Vol. II (Th. Kipp ed., 9th edn, Frankfurt am Main, 1906), p. 354, ftnt. 6 ('*Die* actiones populares *sind heutzutage überhaupt unpraktisch. Es darf als durchgreifender Grundsatz des heutigen Rechts bezeichnet werden, daß der Staat in der Geltendmachung eines öffentlichen Interesses, und so namentlich auch in der Einforderung der Strafe, nicht durch jeden, der da will, vertreten werden kann*').

81. C.P.M. Cleiren, 'Het monopolie op strafrechtelijke waarheidsvinding', *Strafblad* 2008, pp. 272-285 at 275.
82. See P.C. Adriaanse, T. Barkhuysen, F.M.J. den Houdijker and E.-J. Zippro, 'Het EVRM-kader voor invoering van *punitive damages* in mededingingszaken', *Nederlands Tijdschrift voor Burgerlijk Recht* 2008/7, pp. 274- 286, where it is argued that a claim for punitive damages would amount to a 'criminal charge' under Art. 6 ECHR. In this context, difficulties may arise when public and private enforcers compete to exact punishment for the same wrong. See *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) and others* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637, where a demand for exemplary damages was refused, because the defendants had already been fined by the European Commission ('double jeopardy'). Cf. however A.T. Bolt and J.A.W. Lensing, *Privaatrechtelijke boete* (Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking, 1993), p. 83 ('*Dat een bevestigend antwoord ten dele ten koste zou gaan van de waarborgen voor de verdachte … moet dan maar op de koop toe worden genomen*').
83. Cf. T.M. Schalken, 'Rechtshandhaving en het nieuwe premiejagen', *Delikt en Delinkwent* 1992/6, pp. 543-546 at 543 ('*De rechtshandhaving staat in dienst van doelstellingen die hun betekenis ontlenen aan datgene wat met recht wordt beoogd en niet aan de financiële opbrengsten van wat aan handhavingsactiviteiten wordt ondernomen.*').
84. Hansard HL Deb. 5 June 1951, Vol. 171, col. 1052.
85. Ministeries van Economische Zaken en Justitie, *Nederlandse reactie op het Groenboek inzake schadevorderingen wegens schending van de communautaire antitrustregels*, p. 2 ('*Ten aanzien van het Groenboek is Nederland principieel van mening dat compensatie van geleden schade het belangrijkste doel is van schadevorderingen. Compensatie is het algemene beginsel bij schadevorderingen in het Nederlandse schadevergoedingsrecht.*') http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html.
86. The Danish Ministry for Economic and Business Affairs, *Review of damages actions for breach of the EC antitrust rules*, p. 1 ('However, the Danish Government finds it important that such initiatives are well-balanced to avoid, in connection with these initiatives, to create new rules of procedure and compensation rules within the scope of competition law differing substantially from what applies to general law of torts and law of procedure.'); Finnish Ministry of Trade and Industry, *Review of Damages Actions for Breach*

of EC Antitrust Rules, p. 5 ('In the view of the Ministry, the principal function of damages is to compensate for injuries, whereas penalties arising from the infringement of antitrust laws have the distinct function of acting as a punishment and deterrence.'); Secrétariat Général des Affaires Européennes, République Française, *Réponse des autorités françaises au questionnaire de la Commission Européenne*, p. 2 ('*Les autorités françaises sont particulièrement attachées au respect des principes suivants: – le maintien de la notion de dommages et intérêts compensatoires, fortement ancrée dans notre système juridique [...]*'); and Norwegian Royal Ministry of Government Administration and Reform, *Comments to the Green Paper on Damages actions for breach of the EC antitrust rules*, p. 2. ('We believe [...] that there is a need for a fundamental discussion of principle on the merits of establishing a system in which the award of damages is a means of enforcing the competition legislation rather than primarily an institute awarding compensation [...]. Our main point of view is that the rules on the award of damages should remain an institute ensuring compensation of loss only.').

87. The phrase 'full compensation' features 25 times in the Staff Working Paper accompanying the White Paper, COM (2008) 165. See also the Commission's Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ('Rome II'), COM (2003) 427, p. 12 ('[...] the modern concept of the law of civil liability [...] is no longer [...] oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, [...]'.).
88. *Codex* 4.35.22. Cf. M.H. Riseman, 'The Sale of a Litigious Right', 13 Tul. L. Rev. 448, 448 (1939) ('A desire to put an end to litigation and to prevent speculation in lawsuits has resulted in the disapproval by the civil law of the sale of litigious rights.').
89. C. Asser, *Het Nederlands Burgerlijk Wetboek Vergeleken met het Wetboek Napoleon* (2nd ed., Van Cleef 1838), p. 520.
90. Art. 1699 CC: '*Celui contre lequel on a cédé un droit litigieux peut s'en faire tenir quitte par le cessionnaire, en lui remboursant le prix réel de la cession avec les frais et loyaux coûts, et avec les intérêts à compter du jour où le cessionnaire a payé le prix de la cession à lui faite*.'
91. See for an overview of the history of maintenance and champerty the Canadian case of *McIntyre Estate v. Ontario* (2002), 218 D.L.R. (4th) 193. Cf. also J.B. Ames, 'The Inalienability of Choses in Action' in his *Lectures on Legal History* (Harvard University Press, 1913), pp. 213-214.
92. Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs* (2007), p. 12: http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf.
93. Phrase borrowed from N. Kroes, 'Consumers at the heart of EU Competition Policy', address at a dinner organized by the European consumers' association BEUC, Strasbourg, 22nd April 2008, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/212&format=HTML&aged=0&language=EN&guiLanguage=en.