

# Non-contractual Obligations in the Nordic Countries: a European's Perspective

Christian von Bar

<b>1</b>	<b>Introduction</b> .....	32
<b>2</b>	<b>Initial Observations</b> .....	33
<b>3</b>	<b>Theses</b> .....	34
<b>4</b>	<b>An Independent Group of Countries within the European Tort Law</b> .....	35
	4.1 A Glance at the rest of Europe .....	36
	4.2 The North .....	38
	4.3 Pure Economic Loss .....	39
<b>5</b>	<b>Law of Management of Another's Affairs and Unjustified Enrichment Law</b> .....	41
<b>6</b>	<b>Insurance-based Solutions</b> .....	44
<b>7</b>	<b>Justice in the Particular Case and Protection of the Weak and Vulnerable</b> .....	46
<b>8</b>	<b>Denmark is Different</b> .....	47
<b>9</b>	<b>Conclusion</b> .....	48

## 1 Introduction

1. It is a considerable challenge to address a conference for which the organisers have chosen the general theme of “What is Scandinavian Law?”. As a foreigner one is almost bound to make a fool of oneself for want of sufficient detailed knowledge and as a European one is faced with the question whether one actually *wants* to address such a theme. After all, suppose every jurisdiction or group of jurisdictions, both great and small, were to organise similar events (“what is French / Polish / Slovakian / Estonian / Common law?”).<sup>1</sup> What message would that send? Perhaps you too would ask yourself why the sharp demarcation at a time in which so many of us have at last entered into a collective dialogue on the development of a European private law.

2. The answer is by no means easy to identify, but I believe it must be this. Our gathering is not one which is directed against the Europeanisation of private law. Quite the opposite, its contribution is to ensure that this process is aligned correctly in method and content. As a matter of legal science it would still be wrong by far to regard the Nordic legal systems today as a mere appendix of continental European law. Here “in the North” something quite special, new and exemplary has developed which calls for scrutiny or, depending on one’s point of origin, must be fed pro-actively into the pan-European discourse if that discourse is to be conducted on a true and therefore profitable basis. The concentration on the “great three” – French, English and German law – is and always was a colossal blunder, born not just out of a lack of linguistic knowledge and inadequate possibilities for research, but also probably out of a mixture of arrogance and a lack of interest. Admittedly, if one did not happen to be speaking in Stockholm about Scandinavian law, one might like to direct such a remark equally *against* one or two Scandinavian authors themselves. Be that as it may, we are concerned here with nothing less than completing the treasury of the European understanding of law and justice - and thus also the “Scandinavian”. In other words, I am not entirely sure that it is important to know what is *Scandinavian* law, but I am certain that it is important to weigh up the arguments which it has generated and consolidated in its rules and methods.<sup>2</sup> I would add that until now I have not looked into Icelandic law at all and have only been peripherally concerned with Norwegian law. In our working teams we have concentrated on the law of the Member States of the EU and hence Denmark, Finland and Sweden.

---

1 There are indeed tendencies in this direction, for instance in France where the *projet Catala* seems to have as one of its objectives the idea of protecting French law against too many “European” influences. See also Lord Goff of Chievely, *The Future of the Common Law*, 46 *International and Comparative Law Quarterly* (1997) 745-760.

2 See in more detail von Bar, *Comparative Law of Obligations: Methodology and Epistemology*, in: Mark van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford 2004), 123-135.

## 2 Initial Observations

3. I presume that a Scandinavian jurist reading the title of this contribution will think exclusively of non-contractual liability for damage. On the continent and particularly in Germany the response would be different. For us it is self-evident that “non-contractual obligations” include the law of management of – better described as benevolent intervention in – another’s affairs (*negotiorum gestio*) and the law of unjustified enrichment. In contemporary Scandinavia these are creatures of legal thought enjoying a very slim degree of popularity. That is, I believe, intimately connected with our search for the “Scandinavian” in Scandinavian law and I will return to that briefly later.

4. In our Study Group on a European Civil Code<sup>3</sup> we have quite deliberately abandoned the traditional designations “law of delict” and “tort law”; neither of them would have been correct in a pan-European context. Instead we refer to “non-contractual liability arising out of damage caused to another”. That comes quite close to the “Damages Laws” of the three Nordic EU Member States, but it strikes me that their nomenclature too is not entirely unproblematic. At the very outset in Ch. 1 § 1 of the Swedish Damages Law, for example, the reader is reminded of the difficult problem zone occupied by the relationship between delict and contract.<sup>4</sup> However, my impression is that as an answer to the question in which matters of damages in contract law the statute is to be applied, it does not really advance beyond a few guiding principles. It is also striking that the Finnish Damages Law (again: in Ch. 1 § 1) on this point is clearly formulated differently and expressly provides that “this Act does not apply to liability for damages under contract or as provided in another Act”. The Danish Damages Law is essentially distinguishable from its Finnish and Swedish counterparts primarily because it is largely confined to questions of redress for liability, whereas the latter two Laws also tackle the most important issues of the foundation of liability. In that regard the Danish usage of the term is obviously clearly closer to the German than it is to the Finnish and Swedish; at any rate, it may be regarded as open to debate whether there is a uniform Scandinavian meaning to the term “Damages Law”. Moreover, none of the statutes really represent a comprehensive “damages law” codification. That is so not merely because special parts such as the law on liability for road accidents,<sup>5</sup> medical law,<sup>6</sup> environmental law<sup>7</sup> and product liability law<sup>8</sup> are to a large extent subject

---

3 For further details see [www.sgecc.net](http://www.sgecc.net).

4 A detailed European comparative law analysis is to be found in v. Bar and Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe* (Munich 2004).

5 Sweden: Trafikskadelagen (1975:1410); Finland: Trafikförsäkringslagen (26.6.1959/279); Denmark: Færdselslov, nr. 712, 2 Aug. 2001.

6 Sweden: Patientskadelag (1996:799); Finland: Patientskadelag (27.5.1986/585); Denmark: Patientforsikringslov, nr. 228, 24 March 1997.

7 Sweden: Miljöbalken, Chap. 32; Finland: lag om ersättning för miljöskador (19.8.1994/737); Denmark: lov om erstatning for miljøskader, nr. 225, 6 April 1994.

8 Sweden: Produktansvarslagen (1992:18); Finland: Produktansvarslag (17.8.1990/694); Denmark: lov om produktansvar, nr. 371, 7 June 1989.

to their own rules. They are not codes for the further reason that many central rules are “incomplete” in the sense that they only express what is more or less self-evident, leaving the thorny issues to the courts. The rules on the recoverability of so-called pure economic loss (which to my thinking is in any case an unfortunate category from a systematic point of view) are an example of that.<sup>9</sup>

5. The law of non-contractual liability for injury to another is universally a field of law of such gigantic proportion that even the question where to start and where to finish, if one is to address only a few regional particularities, throws up quite a problem. In thinking about Scandinavia one naturally turns one’s mind to the numerous insurance solutions which have reduced the practical significance of the law of “delict” in this part of the world to an appreciable degree (that is to say, judged by the number of disputes on matters of liability law conducted before the ordinary courts).<sup>10</sup> One might perhaps also point to the regime – rather surprising in nature, but equally a stimulus for reflection – of the sort found in § 19 of the Danish EAL, whereby a private individual (and his liability insurer) is *not* liable for property damage which he caused merely negligently (i.e. neither intentionally nor grossly negligently) if the injured person has himself taken financial precautions by means of property insurance or an insurance against loss of use. Whether economic considerations (in the form of reduction of transaction costs between the insurer providing comprehensive insurance and the insurer providing liability cover) really justify such a rule, whose economic result is to make a contract for the benefit of a tortfeasor out of an insurance paid for by the victim, in effect “socialising” the victim’s money to some extent, is open to dispute. However, perhaps this rule has a different underpinning – namely, as a response to the phenomenon that people who as consumers or as victims of damage have repeatedly been told that the State will protect them from the financial imponderables which the law may throw up are no longer prepared to contemplate that they must nonetheless still pay if they *themselves* have done something wrong.

6. Be that as it may, digging out one distinctive Danish response to a particular issue does not of course suffice to unearth the “Scandinavian” in the Scandinavian law of non-contractual obligations. I believe in any case that that is only possible on the basis of theses which allow for a good measure of fuzziness at the margins, here and there drift into exaggeration and ultimately remain coloured somewhat by subjective considerations.

### 3 Theses

7. I will venture five such theses. (i) Judged by the method with which they arrange the material they set out, the Finnish and Swedish Damages Laws in particular have cut a path which allows them to be singled out as an independent

---

<sup>9</sup> See below at nos. 17-18.

<sup>10</sup> A very informative overview is provided by von Eyben, *Alternative Compensation Systems*, *Scandinavian Studies in Law*, 41 (2001), 193-232.

group of countries within European tort law. (ii) In the other fields of the law of non-contractual obligations the disengagement from the continental European legal systems has been more advanced. The current position of legal development, however, remains in such a state of flux that to an external observer it seems to be comparatively less sharply defined. (iii) The Scandinavian law of non-contractual liability has adopted a pro-active and independent approach to the interaction with insurance. In doing so it has not just fulfilled its social responsibility. It is in this field that it has maintained its intellectual honesty. (iv) The Scandinavian law of non-contractual liability places great store in upholding basic rights, achieving justice in the particular case and protecting the weak and vulnerable in society. The price paid in pursuing these aims, however, is to forego a certain measure of legal certainty. (v) The Scandinavian legal systems constitute a common but by no means homogenous group. The differences between Sweden and Finland are smaller than those between these two jurisdictions on the one hand and Denmark on the other. § 19 EAL mentioned earlier is certainly not the only illustration of this differential.

#### **4 An Independent Group of Countries within the European Tort Law**

8. Instead of looking first to the broad picture, a not unappealing approach to justifying my first thesis would be to start with details which demonstrate in a surprisingly striking way where historically the influence of Roman law based continental rules on liability ended in its “northerly advance”. The rules governing liability for animals would furnish a perfect example<sup>11</sup>, but probably

---

11 In SWEDEN, several statutes regulate the liability for the keeping of animals. The law (1943:459) on supervision of dogs and cats, prescribes a strict liability for the owner of a dog, and joint liability if another keeps or uses the dog (§ 6) (Supreme Court 10 December 1947, *NJA* 1947, 594: damage to bicyclist who crashed into a dog; Supreme Court 28 February 1990, *NJA* 1990, 80: liability for a dog mating with another dog; *see* also Supreme Court 28 February 1996, *NJA* 1996, 104: owner’s liability for injury to a keeper was decided to be assessed under the contractual obligations, whereby negligence applied). The statute does not state liability for cat owners, but does however prescribe a duty to supervise cats (and dogs) for the purpose of preventing damages and other inconveniences (§ 1), whereby liability for omissions under the general negligence rule will apply for cats. The law (1933:269) on peaceful enjoyment of property establishes strict liability for the owner, and jointly with the keeper or user, of cattle (§ 47), regarding damages to other persons’ crops. *Byggningsbalken* (the ancient Land Code) ch. 22 § 7 regards strict liability for damage to cattle by another’s cattle, and § 8 includes liability for wild animals which may render strict liability. DENMARK does also not have a general principle on the liability for animals (von Eyben and Isager, *Lærebog i erstatningsret* 5<sup>th</sup> ed. (Copenhagen 2003), 179). The Dog Act (*Hundloven*) provides for strict liability of the dog’s possessor regarding all types of damages (§ 8). The law on peaceful enjoyment of land and roads (*mark- og vejfredsloven*) provides strict liability for the possessor, notwithstanding ownership, of a domestic animal, for damage caused to other domestic animals or crops or other agrarian property (§ 3). Damage to other types of property or personal injuries fall outside that scope, and are thus subjected to the general negligence rule (von Eyben and Isager *loc.cit.* 180). The ancient Danish Code (*Danske Lov*) establishes strict liability for the possessor of cattle (6-10-2) (for details *see* VLD 19 April 1994, *UfR* 1994, 573; VLD 15 December 1997, *UfR* 1998, 502 and Supreme

also liability of parents for damage caused by their children and indeed any of the cases in which the large codifications deploy – at any rate according to their wording – a concept of liability based on a rebuttable presumption of fault (as e.g. in the area of liability for defective buildings which in the Nordic countries again falls under the general *culpa*-rule). However, that approach would lead to rather circumscribed findings and for that reason a bird’s-eye view of the field is inescapable.

#### 4.1 *A Glance at the rest of Europe*

9. When casting an eye across the rest of Europe one is immediately struck that the differences between the existing national laws of non-contractual liability arising out of damage caused to another in the European Union lie much less in the substantive outcomes of fact situations than in their external representation (their structures). Certainly there are also, here and there, differences in conception in judging concrete situations of conflict in society. Nonetheless, the greatest obstructive boulder on the path to a better mutual understanding is, or rather has been until now, the divergence in theoretical constructs devised for the functioning of the law of non-contractual liability.

10. At one end of the spectrum there is the Common Law of England, Ireland and Cyprus with its system of individual torts, which resembles the way continental European systems set out their penal laws. There are roughly 70 to 75 torts.<sup>12</sup> However, those which really matter in day to day practice are rather limited in number: trespass, negligence, breach of statutory duty, nuisance, and defamation. Among these, negligence is the most important. In addition one finds many statutory regulations, normally with a very small field of application. It is probably fair to say that no European jurisdiction has as many tort law statutes as England.

11. All other European systems have their starting point in one (sometimes subdivided) basic tort law provision. On closer inspection, however, one will find that these basic tort law provisions differ in many respects. It has become customary to place in one box those Romance systems which do no more than rely on the general principle that anybody who through his *faute* causes damage to another must make good the damage (French, Belgian and Luxembourgian CC arts. 1382 and 1383). Spanish CC art. 1902 is in very similar terms. Whether or not one can say that Greece and Italy also rely on a “general clause” is probably open to debate. Greek CC art. 914 provides for what in German legal

---

Court 19 June 1974, *UfR* 1974, 692. Personal injury may also be compensated under this head (VLD 19 April 1994 loc. cit.). The Danish Code also provides strict liability for damages to another’s cattle (6-10-5), and for wild animals (6-10-4). For FINLAND Hunting Act (jaktlagen) § 87 states that compensation for damages caused by wild animals, domestic animals, and cattle may be sought from the state. The ancient Byggningsbalken provides for strict liability of the owner of dangerous, but not domestic, animals (ch. 22 § 8) (Hakulinen, *Obligationsrätt*, 311). Damage caused by other types of animals will have to be decided under the general negligence rule (cf. Supreme Court, HD 1951 II 154). Damages caused by animals to another’s crop are also subjected to the negligence rule (Hakulinen loc. cit. 312). Thus, claims will in most cases have to be based on the general negligence rule of the Damages Liability Act.

12 Rudden, *Torticles*, *Tulane Civil Law Forum* 6/7 (1991-92), 105-129.

terminology is called a “blanket provision”. Taken literally Greek CC art. 914 contains no more than the tort of breach of statutory duty. A cause of action in tort requires that the defendant’s behaviour was “*para ton nomon*”, against the - or a - law. However, ever since the Greek courts decided that statutory provisions like the one on “Good Faith and Fair Dealing” amount to “statutes” within the meaning of CC art. 914 the conclusion seems inevitable that Greece, too, has been moving towards a “general clause”. The situation is rather similar in Italy. Italian CC art. 2043 differs from its French model only in so far as it expressly requires an “unjust damage”, a *danno ingiusto*. Originally this term was interpreted in a way very much along the lines of German CC § 823(1), but since then the Italian courts have changed the situation in many important respects - so much so that the present Italian tort law seems to be much closer to the French than to the German. At least on the face of it countries like Portugal, Austria<sup>13</sup> and Germany must be put in another box. The approach of their basic provisions is much narrower, the narrowest being Portuguese CC art. 483(1). Austria, too, relies on a list of protected interests. Although Austrian CC § 1295(1) recognises no such list of “absolute rights” (the wording of this provision amounts to a classical general clause) the Austrian courts interpret it very much along the lines of the wording of the German Civil Code. The latter splits its basic tort law provision into three separate headings. There are three fundamental causes of action: the infringement of an absolute right, breach of statutory duty and breach of *bonos mores* accompanied by the intention to cause damage (CC §§ 823(1), (2) and 826). The Dutch solution contains a compromise between the German and the French model. Dutch tort law operates (as the German does) with the infringement of a right and the breach of statutory duty as distinct causes of action. The “rights” are, however, not enumerated and need not be “absolute” in character.

12. Among the tort laws of the acceding countries the differences in legal systems just referred to are likewise evident. Cyprus, as far as tort law is concerned, is a Common Law jurisdiction; the Civil Wrongs Law is not regarded as an exhaustive codification. Cyprus courts therefore apply the English Common Law.<sup>14</sup> The Maltese CC of 1874 is the only European civil code that opens its law of tort with the principle *casum sentit dominus*. The Czech and Slovak CC in § 420 simply read: “Everyone shall be liable for damage caused by violating a legal duty”.<sup>15</sup> The Hungarian CC of 1959, in § 339(1) also contains a

---

13 Reform of the ABGB’s law of damages is being contemplated in Austria. A draft to that effect was submitted to the Federal Ministry of Justice in 2005. For details see Griss, *Der Entwurf eines neuen österreichischen Schadenersatzrechts*, Juristische Blätter 2005, 273-288 and Griss/Kathrein/Koziol (eds.), *Entwurf eines neuen österreichischen Schadenersatzrechts* (Vienna 2006). See also Schmidt-Kessel, *Reform des Schadenersatzrechts. Band I: Europäische Vorgaben und Vorbilder* (Vienna 2006).

14 Neocleous and Campbell (-Christoforou/Glykis/Markouli), *Introduction to Cyprus Law*, (Salzburg a.o. 2000), 545-546.

15 Official translation in the version online at “[mujweb.cz/www/vaske/obcan1.htm](http://mujweb.cz/www/vaske/obcan1.htm)”.

typical general clause.<sup>16</sup> It only features the peculiarity of a general reversal of the burden of proof for “fault”. The most recent civil code in this region - the Slovenian Law of Obligations Act 2002<sup>17</sup> - adopts this rule in art. 131(1) almost word for word. Polish CC art. 415 is formulated in extremely concise terms: “Whoever by his fault caused a damage to another person shall be obliged to redress it”.

13. Estonia and Lithuania have recently enacted new codes on the law of obligations. The Estonian Law of Obligations Act of 5 June 2002 essentially follows the German model.<sup>18</sup> Under the Lithuanian Law of Obligations Act (CC) of 18 July 2000<sup>19</sup> the starting point is art. 6.246(1), a provision which works with the notion of unlawfulness, but foregoes an express list of interests protected by tort law. The Latvian Civil Code of 1938<sup>20</sup>, brought back into force on a phased basis from 1992, for its part adopts in CC art. 1635 the Romance concept of the general clause.<sup>21</sup>

#### 4.2 *The North*

14. Stating matters in a rather simplistic way on the basis of this overview (which for reasons of time and scope cannot take strict liability into account), it may be said that in the rest of Europe we are confronted with three groups of countries: legal systems fashioned in a “Romance” mould with a general clause; legal systems with a “Germanic” mould and a doctrine of wrongfulness; and the Common Law systems with a multitude of individual torts. Where do the Scandinavian legal systems belong within this schema? In my view the answer must be that they do not belong to any of these three groups. Instead they constitute a fourth group of their own. Of course on a more exact analysis the historic roots of particular rules are readily identifiable. Ch. 5 § 1 of the Finnish Damages Law, for example, which is in some respects strongly suggestive of German law<sup>22</sup>, evidently takes up the *actio de dolo* of Roman law and in doing so imports nothing more than a version in modernised wording of § 826 BGB and its sister norms in the other civil codes of the continent which are cast in a “Germanic” mould. However, that does not affect the general assessment. Every European legal system has drawn inspiration from one or other of its European

16 For details *see* Szécsényi, *Grundzüge des ungarischen Deliktsrechts*, ZfRV 1999, 175-184. For the development of the law of tort in Eastern Europe in general *see* Küpper, *Deliktsrecht in Osteuropa - Herausforderungen und Antworten*, OER 2003, 495-541 (both in German).

17 *See* Trstenjak, *Das neue slowenische Obligationenrecht*, WGO 2002, 90-110.

18 § 1043: “A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law.”

19 English translation online at “[www3.lrs.lt/cgi-bin/getfmt?c1=w&c2=245495](http://www3.lrs.lt/cgi-bin/getfmt?c1=w&c2=245495)”.

20 English translation online at “[www.ttc.lv/lv/publikacijas/civillikums.pdf](http://www.ttc.lv/lv/publikacijas/civillikums.pdf)”.

21 “Every delict, i.e., every wrongful act *per se*, shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act”.

22 von Bar, *The Common European Law of Torts*, vol. I: The core areas of tort law, its approximation in Europe, and its accomodation in the legal system (Oxford 1998), no. 245.

counterparts in particular fields from time to time. That is just a badge of flexibility, which incidentally is also one of the marks of quality of Swedish case law in its preparedness increasingly to have regard to the fruits of comparative legal study and to draw on this source in judicial reasoning.<sup>23</sup>

15. Denmark, Finland and Sweden are distinguishable from the traditional approach of the Common Law for the fundamental reason that their law of damages is developed from *one* basic norm – the so-called *culpa* rule. On the other hand, however, that rule is at the same time “common law” in Denmark – that is to say, it has a customary law quality; only in Sweden and Finland is it placed on a statutory footing. Moreover, it is also true to say that the English law of torts in its liability for negligence has moved continuously towards a *culpa* rule (it is hardly thinkable that a defence to liability in the tort of negligence could be established with the argument the damage was caused intentionally and not negligently!), while the Scandinavian legal systems have increasingly adopted special regimes in which their Damages Laws hardly play any role.

16. On the other hand, the Finnish and Swedish Damages Laws do not contain any bare general clauses since their application turns on structured ingredients in which in particular personal injury, damage to property and pure economic loss are distinguished. It may be said that that in part resembles not just English law, but also of course the law in Germany, Austria, Portugal and (in recent times, once again) Estonia. On a more exact examination, however, it is clear that the very theoretical (and therefore in my view also misguided) academic castle-building associated with the concept of unlawfulness, which at its core holds the latter systems of tort law together, is missing in the Scandinavian laws.

### 4.3 *Pure Economic Loss*

17. Probably the most important substantial point in these various ways of drafting is the compensation for pure economic loss. The German Civil Code deliberately excluded pure economic interests from the protection afforded by CC § 823(1); they are recoverable only under CC §§ 823(2), 824 and 826. Whereas – even after *Hedley Byrne v. Heller*<sup>24</sup> – Germany and England remained relatively close to each other, a rather dramatic gap developed between the Romance and the Germanic legal systems. A typical French, Belgian, Luxembourgian, Spanish or Hungarian lawyer will most probably not even understand the concept: a *dommage purement économique* is a category completely alien to him. Seen from this angle, the Scandinavian tort laws obviously belong to the legal tradition to be found on the British Isles and in the countries influenced by German law: the category of pure economic loss is

---

23 Swedish Supreme Court 29 December 2000, *NJA* 2000, 747 (contract law, opinion of Justitierådet *Håstad*; reference made to, *inter alia*, PECL art. 2:205(1)); Swedish Supreme Court 17 September 2005, *NJA* 2005, 608 (inducing breach of contract, reference made to European literature); Swedish Supreme Court 24 October 2006, nr. T 3004-04 (contract law, concurring opinion of Justitierådet *Håstad*; reference made to, *inter alia*, PECL art. 2:208 and PECL art. 1:201).

24 *Hedley Byrne & Co. Ltd v. Heller and Partners* [1964] AC 465, HL(E).

recognised and considered thoroughly<sup>25</sup> and in doing so Swedish law wrestles with essentially the same questions which occupy lawyers in all countries where a distinction is drawn between consequential economic loss and “pure” economic loss. Sometimes it would appear that Swedish law adopts (or has adopted) a surprisingly restrictive approach. For example, it ought to be self-evident that procuring a breach of contract is a ground of liability, but in Sweden this has only just recently been confirmed by the Supreme Court.<sup>26</sup> Moreover, it must be noted that Finland and Sweden are presumably the only countries of the world which have gone so far as to define the notion of “pure economic loss” by statute. On this point Sweden<sup>27</sup> has clearly gone further than Finland.<sup>28</sup> Whether that was a wise move – not least because it runs against the grain of a reserved attitude towards concept-driven deductions of all sorts – may well be doubted. Personally I do not even believe that an adequate substantive corpus of fairness is inherent in the category of pure economic loss. In any case, it must be appreciated that the meaning of this concept can vary from country to country. An English, Irish, Scottish and Cyprus lawyer would define “pure economic loss” as any loss not occurring consequent to damage to the physical integrity of a person or a tangible thing. A German, an Austrian, a Portuguese and (probably) a Dutch and an Estonian lawyer, in turn, would describe “pure economic loss” as any loss not consequential to the infringement of an “absolute” (personal or property) *right*, thus excluding many losses from the notion of pure economic loss which in the first group of countries would be seen as typical examples for this category. For Sweden Ch. 1 § 2 of its Damages Law provides at a prominent place in the statute that it regards as “pure economic loss” an “economic loss which is not in connection with personal injury or damage to property sustained by a person”. Such a wide range of terminological variations is simply not good for Europe.

18. Moreover, it is not merely the terminology which manifests a marked uncertainty as regards the category of pure economic loss; it is also the substance itself. The conditions in which such loss is recoverable vary. The Swedish Environmental Liability Law (*miljöbalken*),<sup>29</sup> for example, provides in Ch. 32 § 1(2) that “pure economic loss which is not caused by a criminal offence is only recoverable if it is of a certain significance”. This formulation echoes the wording of Ch. 5 § 1 of the Finnish Damages Liability Act, but there is nothing comparable in the Swedish Damages Law. That statute (in Ch. 2 § 2) adds

---

25 See in particular Professor Kleineman’s leading monograph *Ren förmögenhetsskada* (Stockholm 1987).

26 See above at fn. 23 (Swedish Supreme Court *NJA* 2005, 608).

27 Ch. 1 § 2 of the Swedish Damages Act (quoted in the text following).

28 Ch. 5 § 1 of the Finnish Damages Liability Act provides that: “Damages shall constitute compensation for personal injury and damage to property. Where the injury or damage has been caused by an act punishable by law or in the exercise of public authority, or in other cases, where there are especially weighty reasons for the same, damages shall also constitute compensation for economic loss that is not connected to personal injury or damage to property.”

29 See above at fn. 7.

nothing beyond providing for the recoverability of pure economic loss on the basis it was caused by a criminal offence. It entrusts the solution of the difficult cases – e.g., the large field of liability for negligent provision of incorrect information – to case law, which as a whole has hitherto only hesitantly ventured beyond the terrain mapped out by the statute. Moreover, it appears to me that in its wording Ch. 2 § 2 of the Swedish Damages Law still too goes too far because it is not restricted by the limitation that pure economic loss must lie within the relevant penal statute's sphere of protection. Where a dangerous criminal breach of road traffic law causes a traffic jam, one may well question, for example, whether a business man who is "held up" in the congestion and misses an appointment should really have a claim to compensation for loss of profit.

## 5 Law of Management of Another's Affairs and Unjustified Enrichment Law

19. The time and scope allotted to me unfortunately do not allow for a treatment with the required meticulousness of the Scandinavian parallel concepts to the matters which in my country are customarily dealt with under the headings *negotiorum gestio* and unjustified enrichment. The reservation – both intellectually and as a matter of policy-making in law – as regards both these fields is a further point on which Scandinavian legal thinking in the field of the law of non-contractual obligations can be pinned down. Admittedly one of the internationally most acclaimed monographs on the law of management of another's affairs stems from Sweden of all places<sup>30</sup>, but even Professor *Håstad's* book did not alter the fact that Scandinavian jurists instinctively seem to shrink back when one seeks to convince them of the existence of duties in the law of obligations which do not have their basis in contract law or the law of tort and are not otherwise founded on a pre-existing relationship between the parties. In that regard Scandinavian law is much closer to English law, which, however, has now furnished itself with a law of unjustified enrichment. Here, in this second field, it seems that Scandinavian jurists are gradually losing their last partner.

20. The concept of *negotiorum gestio* itself is well-known, but decisions that explicitly refer to this area of law are very rare. This holds true for Sweden and Finland in particular; Denmark, once again, follows a slightly different approach.<sup>31</sup> To assess whether a valid claim has arisen as a result of the altruistic furtherance of another's interest the Scandinavian jurisdictions as a rule rely on specific regimes which either explicitly govern the problem or serve as a basis for analogy. In comparison to continental legal systems little importance is

---

30 Håstad, *Tjänster utan uppdrag* (Stockholm 1973).

31 The concept of *negotiorum gestio* is accepted as a general ground of justification in Danish tort law (see inter alia von Eyben/Nørgaard/Vagner, *Lærebog i erstatningsret* 3<sup>rd</sup> ed. (Copenhagen 1995), 49; Jørgensen, *Kontraktsret* (Copenhagen 1973), Bind 2, 152; Vinding Kruse, *Erstatningsretten* 5<sup>th</sup> ed. (Copenhagen 1989), 48). Cf. also Danish Supreme Court 8 February 1961, *UfR* 1961, 344 (an employee was killed during his attempt to calm horses running wild; the claim of the employee's relatives against the accident insurer was upheld on considerations similar to those of the law of benevolent intervention).

attached to an unambiguous systematic classification of the legal rule which is derived. Accordingly, the boundary with contract law in particular remains fluid. However, the basis for an analogy may also be found in other areas of the law such as the law of persons, family law, the law of succession or property law.<sup>32</sup> At least as far as Finland and Sweden are concerned a discrete profile of the law of benevolent intervention in another's affairs is hardly discernible. Its contours can be traced only with difficulty across a broad spectrum of specific provisions. They range from Ch. 18 § 10 of the Commercial Code 1734 (it being overwhelmingly assumed that the provision remains in force<sup>33</sup>) to § 8 of the Swedish *konsumenttjänstlagen* 1985:716 (Consumer Services Act). The latter provides that a person rendering services in defined circumstances is authorised to provide services which have not been ordered and may claim remuneration for them according to § 38. A prerequisite for the application of this provision is that the instructions of the consumer could not be obtained in time, that the price for this additional service is insignificant in proportion to the services ordered, or that the person rendering the service had a particular reason to assume that the consumer wanted the additional service. A provision similar in all material regards may also be found in Ch. 8 § 6 of the Finnish Consumer Protection Law (*konsumentskyddslag*) of 20 January 1978/38. Further rules whose substance has a recognisable connection with the law of *negotiorum gestio* can be found in the law on commission agency<sup>34</sup>, the law on lost and found property<sup>35</sup> and in many other places (which it is not possible to review here<sup>36</sup>).

21. All these specific provisions, however, do not alter the basic proposition. There is no *independent* regime of *negotiorum gestio*. That such slender importance is placed on this is in my view, even in times of modern communication technology, both noteworthy and regrettable. A concern that freedom is restricted when an obligation is incurred other than by an exercise of freewill is of course readily understandable. It may well be the *movens* as a matter of legal policy-making which underpins this abstinence in systematisation of this area of the law. However, it is also true that the law on management of another's affairs (or rather: benevolent intervention) has the function of creating a legal framework for solidarity in civil society – for a society in which one crosses the road and does not simply pass by on the other side. Really one would have expected therefore that a modernised law of *negotiorum gestio* would be

---

32 Håstad, loc. cit. chapter VI.

33 For details see Håstad loc.cit. 285-286.

34 Swedish and Danish Commission Act § 8; Lag (1914:45) om kommission; kommissionslov (lovbekendtgørelse of 15 September 1986 no. 636).

35 Reimbursement of expenses and finder's reward, e.g. Swedish Act Concerning Lost Property § 3 Lag (1938:121) om hittegods; Danish Lost Property Act § 3, Lovbekendtgørelse om hittegods of 1 September 1986 no. 591; Finnish Lost Property Act § 10, Hittegodslog of 26 August 1988 no. 778.

36 For more detail see *Principles of European Law. Study Group on a European Civil Code. Benevolent Intervention in Another's Affairs* (PEL Ben.Int.). Prepared by Christian von Bar (Sellier, Bruylant, Staempfli, Oxford University Press 2006), Introduction nos. 53-57.

welcomed with open arms in Scandinavia. For the time being at least, however, there does not appear to be any prospect of that.

22. In most of the Scandinavian legal systems one also encounters a point of departure in the law of unjustified enrichment which is quite different from that in my own country (and which, as already indicated, is also now different from that in the United Kingdom). An “unjustified enrichment law” was unknown to the old codifications (i.e. the *Danske lov* of 1683 and the *Sveriges rikes lag* of 1734); nor is it to be found in the numerous specific statutes enacted in more recent times.<sup>37</sup> The notion of a general enrichment claim has remained an alien concept to most Scandinavian jurists; some even consider that from a Scandinavian perspective it revolves around nothing more than a reference to fairness and equity which is not capable of being subsumed under any head of liability.<sup>38</sup> The *condictio indebiti*, which in Scandinavia is recognised as a matter of common law, is as a rule not thought of in connection with “unjustified enrichment law” (or even the doctrine of quasi-contracts).<sup>39</sup> It is regarded instead as an independent remedy which essentially relates to mistaken payments (paying twice over, paying the wrong person<sup>40</sup>, overpayment<sup>41</sup>). In scholarly writing it is maintained that a *condictio indebiti* claim is distinguishable from an enrichment claim in that the former is directed towards re-payment of the excess and not the disgorgement of an existent enrichment.<sup>42</sup> It is, however, remarkable that even fierce critics of the concept of unjustified enrichment law have dedicated a separate section in their works on tort law to “enrichment claims”<sup>43</sup> and in Danish case law the term “enrichment claims” occasionally finds expression.<sup>44</sup> By contrast, in Swedish case law such an enrichment-driven approach seems to occur only in rare cases.<sup>45</sup> Despite some lines of argument in

---

37 For the background see Vinding Kruse, *Restitutioner* (Copenhagen 1950), 56 ff.

38 Hellner, *Om obehörig vinst* (Uppsala 1950), 40 ff.

39 See further Hult, *Juridisk debatt* 1952, 42; Hellner, *Betalning av misstag*, JT 1999-2000, 409, 413; Ravnkilde, *Betalningskorrektioner* (Copenhagen 2001), *passim*; Roos, JFT 1992, 75, 77. There are, however, exceptions, e.g. in Swedish Supreme Court 30 March 1994, *NJA* 1994, 177, 183, concerning an “unintentional transfer of patrimony without a legal justification”.

40 Swedish Supreme Court 30 March 1994, *NJA* 1994, 177; Swedish Supreme Court 17 September 1999, *NJA* 1999, 575.

41 Swedish Supreme Court 31 May 1989, *NJA* 1989, 224.

42 Gomard, *Obligationsret III* (Copenhagen 1993), 172; Roos *loc. cit.* 80.

43 See e.g. Vinding Kruse, *Erstatningsretten* 5<sup>th</sup> ed. (Copenhagen 1989), chap. 19.

44 E.g. in ØLD 3 September 2003, UfR 2003, 2607 (enrichment claim instead of an invalid retention of title); Supreme Court 18 December 2003, UfR 2004, 826 (disgorgement of an enrichment arising from a milk quota left with the premises by the tenant and increasing its value) and VLD 29 June 2004, UfR 2004, 2512 (reimbursement of electricity charges levied without a legal basis).

45 E.g. in Supreme Court 23 May 1925, *NJA* 1925, 184 (concerning a right to cut timber which was not exercised).

case law<sup>46</sup> and legal policy-making<sup>47</sup> tending in the opposite direction, not even the basic principle can be regarded as anchored at present: it is thought that ordinarily enrichments at the expense of another may be retained.<sup>48</sup> At any rate “the concept of unjust enrichment ... in Swedish law [is] considered far too unclear for it to be referred to for any claim.”<sup>49</sup> Since Finnish law has been less prone to the influence of the so-called “Scandinavian realism” and has given more weight to Germanic and Romance doctrine, influential advocates of a general principle of unjustified enrichment may also be found in Finland.<sup>50</sup> The current radius of that principle, however, does not appear to be conclusively settled.<sup>51</sup> In its reasoning case law makes use of constructs and terminology lifted from enrichment law - at any rate in those cases where the matter turns on justifying a claim to compensation on the basis of “law and equity”.<sup>52</sup> Whether recent Norwegian studies devoted to the subject of “enrichment law” which are based on comparative law<sup>53</sup> will lead to a corresponding change of views in the other Nordic countries cannot at present be foreseen. I myself assess the prospects for such a change rather sceptically; much will depend on whether our Principles of European Law – Unjustified Enrichment<sup>54</sup> can succeed in putting the topic back on the Scandinavian agenda. I have not been able to identify any substantive reasons supporting the scepticism about a general law of unjustified enrichment. Rather it appears to me to be rooted in a simple desire to prevent what is in part an absurdly complex theoretical superstructure from spilling over into Sweden.

## 6 Insurance-based Solutions

23. To return to the law on compensation for damage. All Scandinavian countries rely on far-reaching insurance schemes. They can be found in

---

46 Modes of thought borrowed from unjustified enrichment are manifest in Supreme Court 8 February 1993, *NJA* 1993, 13 and in Supreme Court 6 October 1999, *NJA* 1999, 617.

47 See e.g. Prop. 2004/05:85 p. 756 (concerning a new law on stocks and shares: “... general principles of unjustified enrichment”) and the justification of the Code on Environmental Law (*miljöbalk* [1998:808]), ch. 10 § 5. The provision imposes on landowners an obligation to pay compensation if the value of their land is increased by so-called follow-up treatment following environmental damage. The preparatory paper justifies this rule on the basis that landowners might otherwise “obtain an unjustified enrichment” (Prop 1997/98:45 p. 757).

48 Håstad, *Tjänster utan uppdrag*, 36.

49 Tiberg, *Fordringsrätt* 5, 21.

50 Hakulinen, *Perusteettoman edun palautus: Siviilioikeudellinen tutkimus* (Helsinki 1931); ditto, *Obligationsrätt 1: Allmänna läror* (Helsinki 1962). For details of the historical background see Björne, *Nordische Rechtssysteme* (Ebelsbach am Main 1987), 90.

51 Roos, *JFT* 1992, 75-97.

52 Roos loc. cit., citing further material.

53 In particular Hagstrøm and Aarbakke, *Obligasjonsrett* 2<sup>nd</sup> ed. (Oslo 2003), chap. 26.3 and 27.1-5, and Monsen, *Om restitutionskrav på ulovfestet grunnlag*, 157-197.

54 To be published in 2008.

particular in labour law, the law governing road traffic accidents, the law protecting patients including the law on damage caused by pharmaceuticals, the law protecting victims of crime, and environmental protection law.<sup>55</sup> Such insurance schemes have been debated in practically all European legal systems. They have met with some acceptance and been copied, but they have also been fiercely rejected and have sometimes given rise to the most surprising of constructions. It is not for me here to enter into the pros and cons of such solutions based on insurance and funds. They are not only highly political questions. They are constructs with significant economic implications and I do not regard myself as sufficiently competent in that field to evaluate them. It is more important to grasp the point that insurance-based solutions have become a Scandinavian trademark which certainly can no longer be swept aside elsewhere by pointing to the comparatively small populations of these countries. Much more is at issue – namely, a form of providing for social responsibility which in itself is perfectly coherent.

24. For tort lawyers two further aspects of these insurance-based solutions are of particular note, though these are aspects which are only seldom appreciated abroad. One of them I have already mentioned in connection with my theses. It is striking what a purifying effect instituting insurance-based solutions has on the rest of the law on liability for damage. In so many of Europe's nations liability insurance has degenerated into an ill-disguised accident insurance for the benefit of third parties. The basic principle of a law on liability for damage, if it is to avoid the descent into cynicism, must of course be that insurance *follows* liability, but does not govern it. Whether a person is liable is to be decided independently of the question whether he is insured. After all, nobody on our continent would be prepared to formulate a basic norm of tort law liability in terms of an injured person having a right to reparation from a person who has injured him intentionally, negligently or within the scope of insurance! In the practical course of the law, however, this happens repeatedly. The French law of liability for damage acclaims this in veritable excess with no other theoretical baggage than the principle of protection of the victim. Recently the Court of Cassation decided that parents are also liable 'for damage caused by their children' when their children have done nothing wrong at all and were simply pushed by other children into the victim who sustained significant injury as a result.<sup>56</sup> How is one to explain to parents in the light of that decision that it is a ground of liability to bring children into the world? That the Court of Cassation itself in its annual report 2002 immediately appealed to the legislature to introduce compulsory insurance or a solution based on a fund so as to eradicate the problem it had just created may not bear the appearance of cynicism, but it does smack rather of helplessness. This episode alerts us to the fact that insurance-based solutions must be created by means of a planned legislative process and not by well-intentioned dabbling.

25. The second question is whether the Scandinavian compensation schemes mentioned earlier are channelled *de jure* or *de facto*, and to what extent. The

---

<sup>55</sup> See no. 4 above.

<sup>56</sup> Cass.ass.plén. 13 December 2002, Bull.ass.plén. 2002, no. 4 p. 7 (two decisions).

Danish system is unique in the sense that it channels claims for compensation *de jure* to certain insurance schemes, such as damage covered by property insurance (EAL § 19), industrial injuries insurance and patient injuries insurance. The difference found in the other two countries is this: while persons are not in general obliged to seek compensation through tort law in order to benefit from the insurance scheme, they may opt out of the alternative insurance scheme and seek damages under tort law.<sup>57</sup> The victim *may* claim from the insurer of the person causing the damage without proof of liability, but *need not do so*. The claim in tort remains. Such regimes can therefore be characterized as channelling compensation claims to the insurance schemes *de facto*.<sup>58</sup> Finland and Sweden (but not Denmark) have limited their compensation schemes to personal injuries. Moreover, they are often closely bound up with the general law of liability – for instance, in the realm of quantifying the damage for which reparation may be recovered or because they involve certain relaxations in the matter of proof of causation. The most important message remains, however, that in no way must the operation of insurance-based solutions necessarily entail the abolition of the law on liability for damage. They do not take rights away; they grant additional rights. They constitute an offer, not arm-twisting. That has simply not been understood outside Sweden and Finland.

## 7 Justice in the Particular Case and Protection of the Weak and Vulnerable

26. My impression is that the Scandinavian law of liability is also distinguished by a yet further characteristic – namely, by its great emphasis on safeguarding basic rights, doing justice in the particular case and protection of the weak and vulnerable in society. Of course in today's Europe examples can be found everywhere in abundance for these three facets, but in the North they count for a great deal. It is my understanding that Sweden is the only European country at present with an Act on Names and Pictures in Advertising<sup>59</sup> and it has been one of the countries with gratifyingly clear judgments on the protection of the character of foreigners from abusive battering by right-wing extremists.<sup>60</sup> Furthermore, in 1972 the Swedish Damages Law may have been one of the first in the world expressly to designate “unlawful discrimination” a tort (ch. 1 § 3). It was also here that the legislature – and not, as in France, initially the courts – resolved to establish an efficient protection of employees against personal liability to third parties arising out of the causation of damage in the course of their working activities (ch. 4 § 1). And long before other legal systems came to

---

57 See e.g. § 18 of the Swedish Traffic Damages Act (1975:1410). In the law on accidents at work the victim may invoke the general law of tort in relation to damage which is not covered by the insurance (Hellner and Johansson, *Skadeståndsrätt* 6<sup>th</sup> ed. 292, cf. von Eyben loc. cit. [fn. 10 above], 206).

58 von Eyben loc. cit., 226.

59 Lag (1978:800) om namn och bild i reklam.

60 Supreme Court 28 June 1989, *NJA* 1989, 374.

similar notions it was the rule in Sweden that in relation to personal injuries a reduction of the claim to damages by reason of contributory fault should in principle only come into consideration in cases of intention or gross negligence (ch. 6 § 1(1)).

27. However, it is the many “equity clauses” in the law of non-contractual liability which make a particular impression. Under the Swedish Damages Law “equity” governs, for example, the liability of persons under 18 years of age (ch. 2 § 4) and the liability of mentally disabled adults (ch. 2 § 5). The liability of employers for property damage is reduced if this is reasonable, having regard to existing insurance or possibilities to insure. Reparation for loss of income or maintenance is to be paid in the form of a lifelong annuity “if there are no special reasons against doing so” (ch. 5 § 4). Reductions based on contributory fault are determined “by equitable discretion, taking account of the degree of fault on both sides and the other circumstances” (ch. 6 § 1(3)). And finally “[w]here liability to pay damages would be unduly burdensome for the person liable with regard to his financial situation, the amount of the compensation may be reduced according to what is reasonable, having regard also to the victim’s need of compensation and other relevant circumstances” (ch. 6 § 2). One’s head begins to buzz somewhat when all of this has been absorbed and digested. Really it is quite possible that nowhere else in the world are judges so often required to state whether their decisions are equitable, just, fair and reasonable as they are in Sweden.

## 8 Denmark is Different

28. Finally, I return once more to the initial question: what is Scandinavian law? This question implies that there is *a* Scandinavian law and indeed that thesis can be made out for a broad expanse of legal issues. However, there is one population – and in this instance, not in the north-west of France, but between the North Sea and the Baltic Sea – which addresses some questions differently from its cousins. Denmark is distinguishable from Finland and Sweden in many particulars. Reference has already been made to § 19 of the EAL and also to the point that the insurance schemes in Denmark encroach more profoundly as a matter of law on the non-contractual law of liability for damage than they do in Finland and Sweden. Denmark really only addresses the details of the remedial aspects of the law of liability for damage in its Damages Law and not the circumstances in which liability arises. It is less radical in its rejection of the concepts of *negotiorum gestio* and unjustified enrichment.

29. And there are still a few further significant differences. The most important of these is perhaps that the Danish Damages Law has cut an independent path in so far as it has introduced a standardised quantum of compensation for a series of heads of damage. They relate, for example, to pain and suffering (§ 3) and permanent injuries (§ 4), establish a method of quantification and ceilings for loss of income (§§ 5-8), a minimum amount and again methods of quantification for the loss of the family breadwinner (§ 13) and even fixed rates of compensation for each day the injured person must stay in

bed (§ 3). None of that is to be found in Sweden or Finland, even accepting that the Swedish Board for Traffic Injuries publishes standardised tables for compensation from insurance for various degrees of invalidity.

## **9 Conclusion**

30. All in all it can hardly be doubted that the Scandinavian law of non-contractual liability for damage shows some distinctive defining particularities which are only to be found in this legal family. However, it would be a mistake to suppose that the Scandinavian law of obligations is a monolithic block since on a closer scrutiny the fact cannot remain hidden that within Scandinavia itself the breadth of variation in the response to particular problems can be quite great.