

PERSPECTIVES OF HARMONIZATION OF TORT LAW: THE ROAD-ACCIDENT SECTOR

The choice of Law of Torts perspective as leading sector for purposes of new solutions and for an intensification of harmonization between national legal systems finds important reasons, both of dogmatic and of policy nature.

Under a dogmatic perspective, we must consider that this legal sector shows some special features: a) it has a higher potential in the development of common legal ideas, and in the improvement of cultural communications among different legal models (not only among civil law systems but also with respect to common law ones), so that it has been referred to as a possible “Esperanto for European law”¹; despite this, it is nowadays a sector in which there are still several differences among national legal models, regarding elements such as recoverable damage and its types or amount, ascription *criteria* etc.

Moreover, liability law is heavily expanding: Tort Law in every legal systems is not only an accessory or subordinate remedy, but it is a tool of general and increasing application for the protection of patrimonial or personal rights of citizens and companies. The risk of liability for causing damages must be consequently always considered by commercial operators (and particularly insurance companies), especially when dealing with transnational transactions. The increasing of tort law application causes indeed serious difficulties to injurers and their insurers: insurers are tending to restrict cover or to increase *premia*. Tort law is thus a sector with increasing importance, and its regulation has significant effects on common market of insurance services: the differences among national regulations can have a bad effect on common market, as they determinate a possible indirect obstacle to service exchanges. In fact the variety of solutions offered by national legal systems make difficult for economic operators to foresee the outcome of their decisions.

Under a policy perspective, on the other hand, this sector shows a lack of general and sistematic unification or harmonization at international or at European Union level. European Union only provided harmonizing interventions relating to specific subjects, such as product liability (Directive 85/374/EEC), environmental damage (Directive 2004/35/EC); we also find an indirect harmonization concerning the damages caused by road-traffic accidents.

The current lack of harmonization is caused by some specific reasons:

¹ See CASTRONOVO, “Sentieri di responsabilità civile europea”, in *Europa e diritto privato*, 2008, 787.

- a) Law of Torts does not directly pertain to EU's competence;
- b) A harmonization in this sector faces national oppositions as – unlike contractual liability – it involves public order profiles (in spite of a common evolution of tort and damage law functions; its primary aim is to compensate the injured person for the loss suffered).

Several paths of harmonization on this subject be imagined.

A first possible solution can be the development of a legislative harmonization or unification of systems provided by European Union sources. If such a solution would be chosen, a decision between a complete unification of Tort Law or a harmonization of national regulations in this field must be taken. Since a common unified regulation seems to be really impossible to achieve, we must choose the path of a possible harmonization of systems, choosing as a source European secondary legislation. An uniform regulation can be only realized relating to very specific elements such as applicable law rules or limitation periods for claims.

The solution of a general harmonization based on an uniform framework of general part of Tort Law could be, in theory, the best solution but it comes up against several difficulties.

- First of all, European Union has not a specific competence on this subject, despite the existence of a general source for the harmonization of Member States' law in civil matters (art. 65 Rome Treaty, now art. 81 Lisbon Treaty). Tort Law is not even a specific matter, it merely provides remedies or tools with a scope, which may be extended to all sectors. So it can better be defined as a tool with an overall perspective of application, as it is structurally connected to protection of rights of the individuals, in order to recover damages suffered by the owners or with the purpose of deterrence against injuries. If some interests have a connection with an EU competence regarding a specific field of regulation, the uniform or harmonized intervention concerning damage caused to those interests may therefore be attracted into the specific regulation provided by EU sources for this field. A harmonic regulation of the law of damages will necessary follow the articulated regulation settled by harmonized law sources in order to solve the conflict of interests in each sector.

- As already said, such a competence would besides be difficult to imagine as Tort Law involves public order.

A second solution can be a harmonization concerning specific subjects pertaining the European Union competence. As seen this is a solution already chosen by EC and EU institutions, and it could be increased in the future, introducing a common regulation of specific extra-contractual liabilities (such as in the sector of professional liability).

This solution has some contraries as well: it is an especially difficult task to harmonize specific matters without addressing general issues in every national system of Tort liability. In fact the European limited harmonization has built several “special parts” of an ideal European regulation of Tort Law: in particular a new special part was born as soon as a new liability form was harmonized, in connection to a specific field of intervention.

On the other hand, all these special parts are not based upon different legal features which can be distinguished on different legal concepts; they are only distinguished upon several material case matters, without an unified framework². In general a special part of Tort Law cannot technically be though without a refer to the general part regulation, so that every intervention into the specific regulation of a case of liability plays a consistent effect into the general system of liability in itself. More serious goals may be achieved following the perspective of a soft (or cultural) harmonization of general part of Tort Law, even if connected to an implementation of common regulation of some crucial sectors. The idea is that of a dialogue between jurisprudence and case law, which, assuming the existence of differences in national Tort models, makes an effort in searching a “basic rule” for civil liability; this general basic rule might then become the “pole of attraction for a series of others rules” for each element of liability structure and of damages’ definition, influenced or determined by that basic rule³.

The chosen method can have recourse to the outcome of compared law research: the results of European Group on Tort Law, mainly the very useful Principles of European Tort Law (PETL) and, in general, the Principles of European Law.

Also the common principles, developed by the European Court of Justice are to be considered: the Court has drawn up some important principles, ruling both upon liability of European institutions for damages caused by their agents’ behavior (the competence established by art. 235 Rome Treaty, now art. 268 Lisbon Treaty, is an exclusive competence of ECJ); the structures of Tort liability are, in fact, extracted by the Court from the general common principles of Member States’ law.

These principles concern the structure of liability and imputation *criteria*, and can be resumed in: a) a conduct characterized by fault or negligence; b) the certainty of damage, c) the cause-result relationship between conduct and damage.

The result of this dialogue and of this research should be more ambitious and deeper than those reached by simple comparative law studies, as they shall become essential instruments for the

² See DI MAJO, “Fatto illecito e danno risarcibile nella prospettiva del diritto europeo”, in *Europa e diritto privato*, 2006, 21.

³ DI MAJO, cit., 22.

interpretation and application of harmonized law and of internal law as a cross-border relationship or matter of fact is concerned.

The hermeneutic value of this basic rule could be used:

- By each national judge who decides about damages, applying the special norms provided by European or international treaties or EC regulations (uniform law) or by domestic law, which implements harmonized law sources (for example EC directives); the basic rule(s) shall provide a guideline in order to fulfill the principle of conform interpretation. By the other side, they will make easier for national judges to understand other Tort Law models, when applying foreign law in accordance to *lex loci* (or *lex damni*) principles that may be established in uniform international private law norms.

- By International Courts (especially the ECJ), providing an instrument for an uniformed interpretation of elements of torts.

- In the future the basic rules will probably become the essential *schema* for a general common part of Tort and Damage Law, after a case law evolution in Member States. The new initiatives of International and European Union institutions towards an uniform law are thus often suggested by a common and consolidated praxis of each Member State's judicial authorities or by International Courts' decisions.

In order to accomplish its function, this basic rule must not be too specific – so as to be extremely influenced by a single model solution, adopted in one or more legal systems for each problem – nor too generic – so as to be unable to provide a real guideline for decisions, as it could be filled by every content.

A good start point in the analysis could be the observation concerning the functions settled to Tort liability in each model. The answer to the question of functions served by the Law of Damages is not only of theoretical interest, but has consequences in practice, for the extent of damages depends on the goals pursued by the Law of Damages. The comparative analysis provides an unanimous agreement referring to the primary aim of damages⁴:

- The aim to compensate the injured victims for the loss suffered is the essential and primary function of Tort liability in most European countries (Italy, Germany, Austria, the Netherlands, Greece, England)

- Also a preventive function of Tort Law is recognized in some systems, but it is, at most, a desirable side effect (in German, Greek, Italian, and Dutch law);

⁴ See the result of the research made by European Center of Tort and Insurance Law, in MAGNUS (ed.), *Unification of tort law: Damages*, 2001.

- Some systems (English, French and Austrian law), rather recognize a punitive function of the Law of Damages, but these legislations restrict it to specific situations of outrageous misbehavior, grave fault or the like. These elements of fact are therefore considered in others systems as factors which influence the increasing measure of damages (for example in German and Italian systems).

In general, we can state that a common basic rule can be easily established with regard to the structure of liability. The essential elements are fully recognized in the Principles of European Tort Law (and, as already seen, followed by the ECJ definitions of common principles of European Member States' Tort Law):

1. Damages must be attributed to a conduct constituting fault which has caused it; fault is defined as the voluntary or negligent violation of the required standard of conduct (this definition fulfills also the need of common law systems, where the conduct is defined as wrongdoing);
2. The existence of a cause-result relationship between this conduct and damages;
3. Exceptional provisions of strict liability or of reversal of burden of proof, usually based upon the gravity of danger presented by the tortfeasor's activity.

Most differences in models are referred to the different forms of damages and their measures and calculation: despite the fact that every system distinguishes between pecuniary and non-pecuniary damages, there is no accordance on the limits of recoverable damage in each category nor on the measure of calculation of such elements (for example, some systems adopt an abstract calculation model and others use a concrete calculation model; the sum liquidated are mostly of different final amount). Consequently, it is very difficult to find or establish a basic rule, which can be of common application in every system in this field⁵.

A field, in respect of which a harmonization or the lack of it wields a great influence, can be deemed to be that of road-traffic accidents having cross-border implications.

This subject has been the object of many interventions by EC institutions. This is due to its reflections on the principle of the free movement, which represents one of the fundamental principles laid down in the Rome Treaty and is capital to the functioning of the European system itself.

The **current legal and regulatory framework** is provided mainly by the 09/103/EC Directive (commonly referred to as the 6th Motor Insurance Directive); the Regulation nr. 864, jointly adopted in 2007 by the European Parliament and the Council (known as Rome II Regulation); the Regulation nr. 44, approved in 2001 by the Council.

⁵ See the general reconstruction of such differences in MAGNUS (ed.), *Unification of tort law: Damages*, cit., 191 ss.

The first of the instruments cited pursues the aim of coordinating all the provisions previously entered into force as regards Motor Insurance Law, rather than innovating on the ambit. The highlights of the Directive are subsequently those already introduced by the former Directives issued at European level since 1970s⁶: the introduction of a compulsory third-party liability motor insurance; the obligation of covering both damage to property and personal injury through this mechanism; the setting of minimum amounts of cover⁷; the creation of a Guarantee Fund applying to the hypothesis of accidents caused by unidentified or uninsured vehicles; the extension of the coverage to all passengers other than the driver in respect of personal injuries; the covering of the whole EC territory via a single *premium*; the appointment of insurer's claims representatives and information centers in each Member State; the provision of a direct claim against the insurer of the liable party.

The second body of rules that applies to controversies arising from cross-border road-traffic accidents is set in Rome II (which, in spite of a dissenting opinion⁸, replaces among Member States the provisions laid down in the 1971 Hague Convention) and reaffirms that the applicable law for disputes relating to non-contractual obligations is, unless otherwise provided for in the Regulation, the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur: that is to say, *lex loci commissi delicti*.

The preference for such an option against the *lex loci damni* – namely, the law of country where the person sustaining the damage has the habitual residence – is partially counterbalanced by the provision that, whenever this person and the one claimed to be liable both have their habitual residence in the same country at the time where the damage occurs, the law of this country shall apply.

In addition to this, recital nr. 33 of Rome II states that, in accordance with the current domestic rules on compensation awarded to victims of -traffic accidents, the judge quantifying damages for personal injuries (in cases in which the accident has taken place in a State different from the one in which the victim has the habitual residence) should keep into consideration any relevant circumstance connected to the injured party, mentioning explicitly the actual losses and the costs of medical and nursing assistance.

⁶ The 1st Motor Insurance Directive (72/166/EC), the 2nd Motor Insurance Directive (84/5/EC), the 3rd Motor Insurance Directive (90/232/EC), the 4th Motor Insurance Directive (00/26/EC) and the 5th Motor Insurance Directive (05/14/EC).

⁷ Currently corresponding to € 1.000.000/victim or € 5.000.000/claim (irrespective of the number of victims) as regards to personal injury and to € 1.000.000/claim (irrespective of the number of victims).

⁸ See FRANZINA, in De Cristofaro-Zaccaria (ed.), *Commentario breve al diritto dei consumatori*, Padova 2010, 1321.

Eventually, the jurisdictional profiles of cross-border road-traffic accidents are addressed by the Regulation nr. 44 of 2001, whose art. 9, lett. b) states that the insurer may be sued before the Courts of the Member State in which the plaintiff is domiciled, providing that the insurer also has the domicile in a Member State and that the controversy is raised by the policyholder, the insured party or the beneficiary.

The above-mentioned rule needs to be read in combination with art. 11, where it is written that – among others – also art. 9 is applicable to the direct action brought by the injured party, on condition that the national system of the latter admits such an action.

Despite the common interpretation given to these provisions by most Authors⁹, the ECJ stated – in the renowned “*FBTO Schadeverzekeringen NV c. Jack Odenbreit*” decision¹⁰ – that the provisions mean that the injured party is entitled to sue the insurer before the judge of the country in which he/she has the domicile, since the effect of art. 11 is to widen the list of those who can bring a claim in the Member State where they are domiciled (rather than merely specifying that such judges also have competence for the direct action brought by the injured person towards the insurer).

The striking consequence, arising from the legal framework cited above, is that the national of a Member State has the right to take action before the Courts of his/her country, but in solving the dispute these will be bound to apply the law of the State where the accident occurred.

Narrowing down to **domestic legislation**, an exam of the various rules adopted in each Member State pinpoints the multiplicity of solutions adopted as far as Law of Torts is concerned, which leads to significant differences in compensation within the EU territory from a country to another. Differences regard many aspects, the most relevant being the *criteria* used to ascribe liability, the assessment of damages and the limitation periods to which legal claims are subject.

Starting the analysis from the first profile, by means of simplification it is possible to divide European Countries into three groups.

Countries that rely on civil law system (*id est*, France, Germany, Italy, the Netherlands and Spain) tend to adopt strict-liability rules. Such provisions may prove less or more stringent, according to the extent of the escape clause granted to the person who is assumed to be liable for the accident: while, according to some States, liability can be attributed irrespective of any fault in the driver’s behavior – this is, with some approximation, the case of France, where *Loi Badinter* prevents defenses based on *force majeure* and sets numerous limitations to the possibility to invoke

⁹ See an overview of different opinions in BONA, “R.c.a. e sinistri trans-frontalieri: giurisdizione (tutti a casa propria) e diritto applicabile (risarcimenti con regole aliene)”, in *Danno e Responsabilità*, 6/2008, 619 ff.

¹⁰ 13 december 2007, C-463/06.

contributory negligence on part of the victim, the only relief from liability being the *faute inexcusable*¹¹–, in other cases liability requires the occurrence of fault, although the claimant is aided by a reversal in the burden of proof, thus having to prove only the existence of the damage and the causal link between the defendant’s conduct and such damage, while the defendant will have to demonstrate that the activity put into being fell within the scope of an escape clause. This might consist in any event that cannot be foreseen and avoided by a person (giving raise to what is known, in French words, as *force majeure*) or in the faulty victim’s behavior, either intentional – as it is required by Belgian legislation – or simply negligent (the so-called “contributory negligence” defense that can on its turn be subject to significant restrictions)¹².

A peculiar situation is then represented by Sweden, which – after adopting a strict-liability rule for road-traffic accidents in the 1950s – in 1975 replaced this rule with a no-fault insurance system. Firstly, the compensation is provided by the social insurance system (pension funds for the unemployed, sickness payments for those employed); later on, the payments received in this form are deducted from the amount of damages awarded in Court, with the consequence that tort damages substantially cover non-economic losses.

The liability *regime* may vary as to limitation periods as well. Many factors are able to wield an influence on the length of the actual period¹³:

- the length itself of the time.

For example, with specific regard to action against a third party’s liable insurer, Spain allows only an one-year term, while Italy and Malta opt for two years, Germany, Portugal, Romania, Sweden and the United Kingdom for three (for personal injury) and France for ten years.

- the triggering event determining when the limitation period starts to run.

Some Member States’ legislation, including Austria, Estonia and Belgium, apply the “date of knowledge” principle, which means that the limitation period starts from the time when the injured party knows the consequences arising from the accident, whereas others – exemplified by Italy or Hungary – refer to the “date of the accident”. There are also countries that have a mixed approach,

¹¹ Which, furthermore, has stricter limits where victims are pedestrians, minors (people that have not turned 16 years old yet), elderly (people over 70 years old) or disabled persons, defined as those whose normal working capacity is reduced at least at 20% of the normal capacity.

¹² For example, German law since 2002 does not allow any reduction in the offender’s liability where the contributory negligence belong to children up to 10 years old, who lack tortuous capacity.

¹³ As pointed out in the “*Compensation of victims of cross-border road traffic accidents in the European Union: comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims*” study, implemented in 2007 by DEMOLIN, BRULARD, BARHTELEMY to the European Commission- General Division for internal market and services.

consisting in applying both a longer limitation period, which begins from the date of the event, and a shorter one, that runs from the date of knowledge.

- the existence and the nature of circumstances, independent of the victim's actions or instead linked to them, that may suspend or interrupt the limitation periods.

Causes for interruption or suspension of limitation periods differ from Member State to Member State: sometimes the mere notification of the claim will work as an interruption, whereas in other cases the plaintiff will have to get a Court's ruling (the latter solution is generally connected to the provision of longer limitation periods, as happens in Slovakia).

Furthermore, once that a suspension has been granted, the limitation period running after the termination of the suspension may continue its course or otherwise it may restart from the beginning or also have a completely different length, set by the law.

- the discretion granted to the Courts to extend limitation periods.

In France, for example, judges may extend the length of the limitation period in fairness to victims or depending on the circumstances of the case.

- the existence of general and specific limitation periods.

Italy or France discriminate limitation periods applying to tort controversies from limitation periods applying to contract disputes, while Austria and Ireland hold the same limitation period for both the kinds of claim.

- the impact of other limitation periods on the limitation period in tort.

This may be the case when the harmful activity constitutes also a criminal offence. In Italy, where injuries caused by a wrongful act are punished by art. 590 of the Criminal Code ("*lesioni colpose*"), when a judgment of the Criminal Court recognizes the offence, a longer limitation period applies, starting from the date of the decision. France has a similar provision, which states that the limitation period concerning a litigation linked to a criminal action is the same that normally applies to the latter.

- the special *regime* applicable to disabled persons and minors.

These types of victims are sometimes protected in a more effective way by providing that the actions, which they may take, are subject to limitation periods that run only from the date in which they gain full capacity.

Last but not least, the most significant differences come from the assessment of damages.

Although it is widely accepted that injured parties need to be fully compensated for the consequences arising from the accident (so-called rule of "*restitutio in integrum*", which covers actual losses as well as future ones, both in the form of expenses and of loss of income), this

principle knows some exceptions; the most remarkable being Spain, where in 1995 a law providing a binding tariff system for the quantification of bodily injury entered into force, moreover preventing judges from granting different amounts of damages in accordance with the peculiarities of the concrete case.

This aside, some countries do not include non-material damages in the definition of damage under civil law. As of today, this is for instance the case of Malta¹⁴; such a disparity proves difficult to accept, if we consider that not only the primary victim of an accident may suffer a lot from its consequences (for example, when he or she is left invalid), but also that secondary victims – which means the victim's partner or relatives – are very likely to face serious pain and suffering due to the injuries sustained by the loved one.

Apart from the differences concerning the headings of damages, the actual quantification itself may vary in a truly significant way. *Prima facie*, people having their habitual residence in States with higher standards of living run the risk of serious undercompensation, since they will be granted an amount of damages that is compared to poorer States' standards.

This – letting aside the fact that an injury receives different treatment according to where it occurs, which may be understood by jurists but much less by interested parties – does not take into sufficient account that in most cases the injured parties will bear the consequences arising from the accident in their home countries, e.g. for what concerns medical expenses and after-care costs.

The impact of the different assessment, enlightened in various studies conducted on behalf of EC institutions¹⁵, may lead to compensations varying from extremely few amounts (an estimated 320-euros compensation in Estonia or 500-euros in Lithuania), to much higher fees – mounting to hundreds of thousands of euros – in States like United Kingdom, France and Germany.

A study conducted in the United Kingdom in 2003 calculated that the sudden death of a 20-year old legal secretary would have been compensated within a range going from only funeral expenses (Finland) to approximately € 175,000 (Italy)¹⁶.

¹⁴ The leading-case in this subject is the widely known *Boys vs. Chaplin* decision, dating to 1971 (AC 356), in which the plaintiff – who went to the English court, of whom he was a citizen – argued (unfortunately for him, without success) that Maltese legislation excluding liability for non-pecuniary damages was not a substantive law, but only a procedural one (that is, selecting which measures a Maltese judge could take), as such not applicable beyond Maltese borders.

¹⁵ See an exhaustive example in “*Full compensation of victims of cross-border road traffic accidents in the European union: the economic impact of selected options*”, a study presented in 2007 by RENDA and SCHREFLER to the European Parliament-Directorate General Internal Policies of the Union-Policy Department C (Citizens rights and constitutional affairs).

¹⁶ *Personal Injury Awards in European Union and European Free Trade Association countries* (Kluwer law, 2003).

Another study, made by Swiss Re in 2004 on the basis of an accident occurred to a 30-year old man, with unemployed wife, two children aged 2 and 5, an average income in dependent employment, which remains 100% disabled due to severe spinal or head injury (requiring no ventilation but highest assistance level), showed that the United Kingdom granted a compensation – more than 4,000,000 euros – that enormously exceeded the one awarded by the Czech Republic, corresponding to around 200,000 euros.

Such a difference, which also relies on different cultures and sensibilities (is death worse or better than serious disability? should pain and suffering be compensated irrespective of the rising of a mental illness? how close must be the tie between the victim and the persons who claim damages due to the injuries suffered by the former? should a person gain a higher compensation according to a better social position before the accident?), is obviously not acceptable in a system that relies so much on the free movement of people among Member States, as the European Union is: thus it becomes imperative to find solutions, which – although not easily implementable in the short-term period – will have positive effects in the future.

Before analyzing **ways of legislative harmonization regarding liability regulation**, which can be applied in each State, in case of road-accidents – particularly referring to imputation *criteria* and escape clauses for the injurer – we must better rethink that the entire field of motor-vehicles civil liability has been interested by an intense and broad normative production at European Community level, in the last thirty years, especially concerning the aspects connected to compulsory insurance against civil liability.

The EC harmonization in this field has grown up a deep integrated system at European level, thanks to five directives, recently consolidated in one unified legal text (Directive 09/103/CE, of 19.9.2009), in order to provide a simplification for that multi-stratus discipline.

Thus the EC law has always omitted to adopt an intervention directly affecting the liability *regime*, despite several legal interventions, one following another during the years. The EC legislator has only harmonized obligations and proceedings of calculation, regarding drivers and insurance companies, so that (as already said) the effect on Tort Law system is merely indirect in this specific sector. Nevertheless, European law has developed a common system able to uniformly operate, despite the differences in liability rules and regarding the burden of proof distribution connected to each national regulation. The choices made by EC legislator offer an adequate protection to all possible victims of a road accident inside European community territory, through a compulsory insurance mechanism and the related provision of uniform standards with regard to minimal maximums of recover. The same goals achieved by EC legislation finds even the accordance of

domestic legislator in every different system, where the definition of liability structure, even if not totally giving up the subjective element of tort – establishing forms of absolute strict liability – is heavily characterized by stringent choices burdening the procedural and substantial position of injuring driver, who needs to demonstrate that his/her activity fell within an escape clause, in order to go over a presumption of fault on him stated.

From what has been said, we can easily find out that the disparities of regulation in each country (regarding road circulation liability) are mostly absorbed through the functioning of the insurance recover mechanism, which offers to damaged parties a deep pocket burdened of unlucky results of occurred accident, and on whom the risks – connected to a licit and necessary activity but possibly causing damages (and so defined a dangerous activity) – are allocated. Compulsory insurance, combined with description of tort liability cases based on ascription *criteria* which differ from fault-connected liability and are functional to outstrip all problems of proof for road-accidents victims, if compared to ordinary proof *criteria*, suggest a new approach to this matter outdoing the traditional perspective of the Law of Torts. The now described system shows the purpose of realizing a form of collectivization of risks settled in the society by road circulation: each citizen pays a contribute to the costs of those risks in a measure equal to the *premia* paid to his/her own insurer.

In the light of what has been just said, we must make a question, first of all regarding the relevance and role accomplished, in this normative asset, by each state's applicable liability *regime*; secondly we must ask ourselves if a normative harmonization, which can reduce differences among each country with refer to legal treatment of such cases, is to hope for.

With regard to the first question, we can put in evidence that the existing common system grants only a social collectivization of risk, merely able to fulfill an exclusive function of recover, but it is unable to stimulate virtuous and efficient behaviors towards citizens and consumers. They find an offer of insurance covering granting a compensation for possible damages caused by others' negligent conducts, and at the same time they are freed from the final financial and economic burden for damages they have caused to other people.

In this perspective, the applicable liability rules, detected through the *lex loci* rule, represent the unique deterrence issue provided by this system. Thanks to their efficacy we must determine the subject responsible for all or part of the damage caused by the accident; this step is therefore relevant even in the third group systems (that based on a insurance model type). The injurers' insurer finally burdened of the cost of accident is indeed not able to control and administer the risks connected to driving conduct of its insured party: because of this, the preventive function served by liability rules could be improved introducing tools of calculation for individual *premia* paid by each

driver with consideration to individual driving history, as a rate measuring the risk factor introduced in the society by the driving conduct of each driver. In fact, only the precise and accurate determination of *premia* saves the deterrent capacity implied in the cost-allocation, which would be otherwise completely vanished in connection with the operating of the insurance system.

Under this perspective, a first purpose of harmonization could directly make an intervention on the already mostly integrated regulation regarding insurance system, imposing on every insurance company, operating in the common European market, common mechanisms of calculation for *premia* in order to improve the rating connected to accidents' risk shown by each insured driver, traced in his or her "insurance history". This is thus a harmonizing intervention that can be realized through the source provided by an EC Directive, but more or less redundant in connection with the relevance currently assured to past accident caused by the drivers in just every domestic law and in each country insurance praxis. As of today, recital n. 28 pays attention to this issue by stating that "the policyholder should have the right to request at any time [to his insurer] a statement concerning the claims, or the absence of claims, involving the vehicle or vehicles covered by the insurance contract at least during the preceding five years of the contractual relationship".

With regard to the second problem, we must observe that the difference of regulations in different states play – as just said – little influence, as most systems are by now translated from Law of Torts' field to Law of Insurance's field. The remaining differences can mostly be referred to the broadness of escape clauses, both in cases of presumption of fault, and in cases of contributory negligence of the damaged and also in cases of exclusion of causal nexus through *force majeure* or conduct of third parties.

These profiles keep a relevance as they grant the correct functioning of insurance mechanism and an efficient allocation of costs caused by road accidents, firstly among several insurance companies and secondly determining a re-modulation of *premia* concerning insurance customers.

A deeper harmonization of liability rules operating in different legal systems is hopefully expressed by 09/103/EC Directive, whose recital n. 20 remarks that "motor vehicle accident victims should be guaranteed comparable treatment irrespective of where in the Community accidents occur".

This harmonization appears even able to make the functioning of liquidation proceedings for damages easier and faster, as cross-border accidents are concerned: they assure that these proceedings would not find obstacles connected to different burden of proof rules and partially different ascription *criteria*.

Otherwise, the existence of liability rules in several countries which are already sufficiently comparable, in addition with the illustrated problems in choosing a "hard-harmonization", suggest

to choose soft (or cultural) harmonization solutions: the protagonists in the implementation of such solutions are naturally lawyers, legal operators and judges who must make an effort in order to apply internal law in the light of indications and issues provided by comparative research (in this field especially coming from Principles of European Tort Law), without being unfaithful to words and *ratio* of national law. An important role can be played:

A) with regard to imputation *criteria*, by § 4:201 of Principles (Reversal of the burden of proving fault in general), as it is reminded that “the burden of proving fault may be reversed in light of the gravity of the danger presented by the activity. The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur”; moreover by § 5:101 (Abnormally dangerous activities), as it says that “a person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it”; and also by § 5:102 (Other strict liabilities), as it states that “national laws can provide for further categories of strict liability for dangerous activities even if the activity is not abnormally dangerous”;

B) with regard to the hypothesis of damagers’ exclusion from liability options, by § 7:102 (Defences against strict liability), as it remarks that “strict liability can be excluded or reduced if the injury was caused by an unforeseeable and irresistible a) force of nature (*force majeure*), or b) conduct of a third party”, and by § 8:101 (Contributory conduct or activity of the victim), which states that “liability can be excluded or reduced to such extent as is considered just having regard to the victim’s contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor”.

On the other hand, we can probably adopt a totally different option of harmonization, as differences in **limitation period rules** are concerned: too many different limitation periods and different regulations of suspension and/or interruption, or *dies a quo* date exist in several States.

Referring to this field, a limited hard harmonizing intervention or just an unification of applicable law is hoped for. Such an intervention should introduce an uniform limitation periods’ rules concerning recover claims for damages caused by road accidents, even without interfering with the general structure of torts available in each national legal system.

On the other hand, the existence of a specific limitation period for claims in some specific matters is not new and shall not introduce any incoherency in each national legal system, as we know how internal legislators can freely set different limitation periods for each legal action. In road-accident field the provision of a common regulation concerning limitation periods could provide a high clearness and certainty of law, as far as cross-border litigation cases are concerned; this result could

probably be achieved through the most incisive EU law source: the European Community regulation.

At the end, we must consider the discrepancies existing in several countries, referring to categories of **recoverable damages and different calculation criteria** used by national judges: it is, as already said, the most difficult field for harmonization, not only because the differences between national legal models are more significant, but also because the possible option of harmonization cannot be easily chosen, so that the interpreter must evaluate *pros* and *cons* for each solution.

Differences among EU Member States are clearly shown as the victim decides to claim against injurer before the judge of the State where he or she is domiciled, as granted by EC Regulation 44/2001. In those cases of cross-border litigations, victims who live in Member States with developed recoverable damages systems (which grant victims full compensation as, for example, Italy), can find out that, even if they take a proceeding before their domestic judge, at the end of the proceeding, the recoverable damages could be determined and estimated in a less favorable measure, as the rules of calculation are provided by *lex loci* (for instance thinking about the possible application of Spanish Rate-Tables, introduced by *Disposición adicional octava de la ley 30/1995 de Ordenación y Supervisión de los Seguros Privados*, or of Romanian or Greek law that sets fewer calculations of recoverable pecuniary damages if an accident occurs to , for example, an English or Italian driver).

Cross-border accidents' victims are exposed to the risk to receive less compensation sums by their domestic judges, when compared to citizens who have suffered damages from accidents occurred in their homeland, if they live in countries with high standards of living.

There is an antinomy between jurisdictional provisions of the EC Regulation n. 44/2001, granting the right to claim before the judge of the country of domicile, and the applicable law under Rome II, which will usually differ from that of the country where the victim claims against the injurer. This phenomenon will introduce not tolerable discriminations in recover of damages comparing internal and cross-border accidents.

Different actions may be taken towards an effective harmonization of Member States' legislations.

a) First of all, the zero option (or "do nothing" option) needs to be considered.

This means that EC institutions should not modify the existing legal and regulatory framework, but merely interpret the provisions stated in the Regulation nr. 44/2001 and in Rome II, so as to give the judges the power to award damages consistent with any circumstance related to the victim of the accident – including the actual loss of income and the costs of medical and nursing assistance – whenever the country of habitual residence of this person differs from the country in which the

accident took place (as it is clearly set down in the recital nr. 33 of Rome II).

As it can be easily inferred, such an approach implies a really low degree of harmonization, since the judge – although granted an equitable power, by means of which the assessment of damages may meet the standards of compensation applied in the country of the victim’s habitual residence – would be unlikely to provide a comparable treatment in cases in which Member States show the most striking differences.

b) Far more stringent is the introduction at EU level of a “basic rule” setting a harmonization of damages, through common headings and rate-tables allowing an uniform quantification of bodily injuries and death. This approach would positively simplify the assessment of damages in any case of cross-border road-traffic accident and provide a compensation both full and fair irrespective of the country where the event occurs.

For the time being, however, an uniform approach seems highly unlikely from two different standpoints.

In first place, differences in the standards of living – which may prove dramatically significant – would end up making identical compensations unfair: national of Member States with higher standards would face an undercompensation, for medical expenses and loss of income will probably be higher than those in countries with a lower standard of living; and the other way round, as citizens of poorer countries would be overcompensated having to bear lower costs with the same amount of money.

Secondly, harmonizing specific matters without drawing on general issues would be a hardly achievable result. It would be pointless, for instance, to introduce uniform tables of compensation concerning the damage to the health, but at the meantime limiting their application only to injuries arising from a cross-border road-traffic accident and not to injuries otherwise caused. In other words, would it be possible to accept different compensations for a broken leg depending on the cause of the accident?

We believe that an effective harmonization of tort liability through limited interventions would probably lead to unacceptable disparities of treatment in similar situations in a domestic perspective, making subsequently better to pursue this aim after – and not before – the creation of widely agreed rules and principles.

c) Finally, a *depeçage* could be made between the law used to address liability issues and the law applied to the quantification of damages: namely, the law of the country where the accident occurred would serve to clarify under which conditions a person is to be deemed liable for an accident, whereas the law of the country where the victim has his/her habitual residence would

provide the *criteria* to assess damages.

This option, strongly supported by the *Academic Committee* of the *Pan-European Organization of Personal Injury Lawyers* and originally put forward by the European Parliament when approving Rome II, would prove recommendable for various reasons: for instance, the need to take into consideration not only the sums necessary to face the consequences of the accident in the victim's home country, but also the payments that may have been received through the Health and Social Security System (this, as previously stated, is for example the case of Scandinavian countries).

Enabling the victims to recover compensation in accordance with the laws in force in the countries in which they are domiciled reduces the risk of injustice and allows the compensation to be tailored to the victims.

Insurers, moreover, would be granted the opportunity to assess more precisely the amount of insurance *premium* owed by each policyholder on the basis of a fixed index, depending on the country of habitual residence of the former, which would identify the law applying to quantification of damages.

Exemplifying, we can imagine the case of an insurance policy against tort liability whose object is the circulation of a vehicle registered in Spain, the contract being stipulated by a Spanish insurer and a person having habitual residence in Italy.

According to the existing legislation, the insured party would benefit from the differences in compensation between the two countries, since he or she pays a lower *premium* that uses as a benchmark the level of damages awarded in a State not recognizing full compensation; although it will be more likely for the accident to occur within the Italian territory, which means that the insurer will be bound to refund a higher sum in accordance with *lex loci*.

On the contrary, the approach suggested implies that the policyholder be bound to declare the place of habitual residence, thus enabling the insurer to estimate the *premium* in accordance with the standards of living applying in that country, irrespective of the place where the accident might occur.

Due to the above-mentioned reasons, in our opinion the mixed option – *lex loci* as regards the *criteria* of ascription of liability and *lex damni* as to the amount of the damages – proves the most cost-effective in terms of reduction of costs and fair distribution of the accident's costs, in addition with being the fairest in respect of the treatment of victims according to their pre-existent social condition.

Furthermore, this solution – combined with the right to take direct action in one's home country – would eventually have a positive impact on the injured party, who would save money in bringing

the claim due to the simplification of the litigation which would come in the long-term.

Contraries connected to the mixed option may derive from the difficult task imposed on judges and lawyers when dealing with possibly more than one foreign system, comprised not only of existing legislation, but also of the interpretation given by Courts, which alone can provide the rules set down with a concrete meaning; needless to say, this will increase the duration and the costs of litigations, since it will be necessary to have recourse to experts in foreign laws.

Anyway, such inconveniencies may be already found in the possibility – granted by the Regulation nr. 44/2001, at least as interpreted by the ECJ in the decision previously cited – of going to the national judge, who will have to get to terms with the law applied in the country where the accident took place as regards both the liability *regime* and the quantification of damages.

The solution suggested would be incomplete without spending some considerations on **liquidation's procedures** throughout the European Union.

The matter is of capital importance given that the effectiveness and the functioning of the insurance system depends substantially on the length of the procedures, on the costs of litigation and on the exchange of informations among the people concerned.

There is little doubt that the highest cost is represented by the risk of the injured party deciding to bring a legal claim, risk which is more likely to occur if out-of-court settlements lack celerity and adequacy.

Nevertheless, it is equally important that the EC and the Member States do not succeed in avoiding lengthy and expensive judicial disputes by means of an overcompensation, that is an excessive increase of the sum offered to the injured party so as to persuade the latter not to take legal action: in fact, such a solution would have negative effects on the level of insurance *premia*, thus restricting the possibility for the less well-off people to access the insurance market.

Moreover, this increase could not be prevented by merely imposing a higher *premium* to the tortfeasor. The insurer, indeed, is not truly capable of checking the policyholder so as to correctly assess the pricing of the policy: the system, which aims to a social distribution of the cost of the accidents, fills the gap between the risk connected to the insured driver and the *premium* pricing by means of the collectivization of the risk itself, leading to the consequence that the wrongful conduct on part of an individual is redistributed among other policyholders through a general increase of insurance fees.

The considerations made allow to grasp the importance not only for the policyholders and the insurers concerned by a single accident, but for the insurance system in general, to identify appropriate liquidation's procedures for the damages linked to road-traffic accidents, so as to reduce

at its fullest the recourse to Courts and provide cost-effective ways of solving disputes.

Under this point of view, giving value to claims representatives' feature, introduced by EC Law, we would like to suggest the creation of an European Compensation Fund, which can become the direct counterpart for victims of cross-border accidents. The Fund would offer the victim an indemnity, freeing him/her from the burden represented by claiming against the insurance company of the injurer settled in a country, which differs from that where he or she is domiciled. The fund acquires the right to get back what has been paid to the civil liable insurer company, claiming against the injurer as a sort of enforcement agency in the common market.

Thanks to that Fund, insurance companies will consequently hold down expenses, as they shall not face the risk to be claimed before a foreign State Judge in a cross-border judicial proceeding.

Another cost saving effect could be achieved if the Fund would be provided the role of defendant in claims before domestic judges against foreign insurance companies, and granting the injured the execution of judicial decisions directly against Fund: insurers will avoid a great amount of legal costs and expenses. What was a cross-border litigation would thus become an ordinary claim which would take place before judges of country where injured party is domiciled.

The system portrayed could draw a simplification of procedures as well as a reduction of litigations' costs from the setting of a generally binding tariff system for the assessment of bodily injury, which – not having to affect heads of damages and liquidation *criteria* in the Member States – should enable the injured party to get a compensation straight from the Fund, according to a categorization of the most recurring types of accidents and a distribution of liability within a 0, 50 and 100% range, thus neutralizing the risk of any inefficiency that may arise from a third-party insurance system, where the policyholder is naturally inclined to act in favor of an increase in the damages sustained and the insurer tends to deem the client's requests as excessive at first glance.

Nevertheless, the injured party keeps the possibility of bringing a claim whenever he or she thinks – on the basis of the applicable law – that a higher sum would be awarded in Courts or that the proportion of the liability has been incorrectly assessed.

The uniform management of cross-border litigations – leaving intact the possibility for the liable party's insurer to participate directly in the action –, of relations with policyholders and of relief procedures provides a further reduction in costs arising from the accident.

The nature itself of the Fund, its aim and the adoption of common tables for the assessment of damages should avoid the risk that a liquidation procedure – managed by someone on behalf of someone else, namely the undertaking that will bear the final cost – generates an unreasonable increase of the compensation with the result of an increase of insurance *premia*.

This aim – at least with regard to property damages, consisting in the damages to the vehicle – could be pursued by means of a harmonization imposing restitution in kind as the main way of compensation, allowing the insurer to grant a satisfying result without being subject to excessive demands.

We believe that what has been pointed out demonstrates how an appreciable result may be achieved only through a combination of different kinds of harmonization (not only legal but also cultural), and shows that Law of Torts may prove to be a leading sector in transnational judicial cooperation.