Questioning the Questionnaire: The Unheard Message from Scandinavian Tort Law

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1 Introduction

Scandinavian lawyers generally like their tort law systems. However, we have not had much success with getting our message across in the discussion on the future of a possible common European tort law. One explanation is that we Scandinavians have not been vocal enough. Also we have probably not paid sufficient attention to the European development and in any event we have not put enough effort into promoting, or at least calling attention to, the values that many of us believe are important parts of our legal culture. Hopefully this is about to change: More and more Scandinavians are now participating in different European research projects and there is an increasing number of articles about Scandinavian tort law in law journals accessible also to people that do not speak any of the Scandinavian languages. But the problem lies not only with the Scandinavians. Sometimes the Scandinavians have not been given the chance to partake in the discussion. Another problem is that the method often used in the investigation of common denominators in European tort law, *the questionnaire method*, makes it difficult to capture these deep values behind the different national tort systems.

This essay will provide some critical arguments on a method sometimes used in comparative law research in the area of tort law. The point of departure for my critique will be the recently published Principles of European Tort Law (hereinafter PETL), an effort by a group of academics named The European Group on Tort Law (hereinafter EGTL).[2] My purpose in this context is not so much to criticize the PETL as such.[3] Rather the aim is to point to some problems with the method employed not only by the EGTL but also many other research groups in the so-called Europeanization of private law movement, the questionnaire method. After a short presentation of the PETL the essay consists of two parts. In the first part I comment on some practical problems regarding the use of questionnaires in European private law research, while the second part addresses some more theoretical and, I like to think, profound issues. Before addressing these issues a brief sketch of the Scandinavian approach to tort law might be useful.

2 What is the Scandinavian Model?

The Scandinavian model towards tort law (with emphasis on personal injury law) can be characterized in different ways. The most fundamental and almost banal idea is probably that *personal injury should always be compensated* and that the cost of personal injury compensation is in general best carried by

2 The European Group on Tort Law, Principles of European Tort Law, Vienna/New York 2005. The Principles as such will hereinafter be referred to simply as "Principles".

3 However, in another article I do provide a more specific critique against the PETL, *see* Mårten Schultz, *Disharmonization*, European Business Law Review (EBLR) 2007 (forthcoming). This article draws upon some themes in the forthcoming article in the EBLR.

collective entities.[4] The legal system has thus provided rules that promote that costs resulting from personal injuries are born by collective entities. A more detailed picture of the Nordic Model will reveal a complex interplay between social insurance and other kinds of collective compensation schemes as well as personal insurance, and – to a lesser extent – tort law. [5]

The tradition in the field of tort law is something that I think many Swedish lawyers take pride in. The tort law model together with the insurance law solutions is generally thought progressive, pragmatic and efficient even if it is costly for the insurance collective and the taxpayers. In fact it could even be said that the approach to personal injuries reflects deep values of the Scandinavian civil law systems. Still, the message from the Scandinavians has been difficult to get across in recent comparative law investigations on a common European law of torts. Another reason could be that the Scandinavians have not been adequately represented in the research projects. An example of this is the project presented as the *Principles of European Tort Law*.

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4 *See* for some general accounts of the Swedish or Nordic approach to tort law, Jan Hellner, *Compensation for Personal Injury: The Swedish Alternative*, 34 American Journal of Comparative Law 613 (1986), Jan Hellner, *Compensation for Personal Injuries in Sweden – A Reconsidered View*, 41 Scandinavian Studies in Law 249 (2001), Carl Oldertz, *Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden*, 34 American Journal of Comparative Law 635 (1986). Some reflections on the Swedish alternative from a policy point of view is given by Calabresi in Guido Calabresi, *Policy Goals of the "Swedish Alternative"*, 34 American Journal of Comparative Law 657 (1986).

5 In a narrow sense the Nordic Model is sometimes used as a collecting term for four important compensation schemes, covering traffic accidents, patient injuries, pharmaceutical injuries and work-related injuries. *See* Jan Hellner, *Compensation for Personal Injuries in Sweden – A Reconsidered View*, 41 Scandinavian Studies in Law 249 (2001). An interesting and more overarching account of Swedish tort law in an international perspective can be found in Bill W Dufwa, *Development of International Tort Law Till The Beginning of the 1990s from a Scandinavian Point of View*, 41 Scandinavian Studies in Law 87 (2001). One important feature of these schemes is that they all intend to more or less replace the tort system in their respective areas and that insurance is mandatory. It is thus mandatory for someone (whether it is a private company or a public entity) that provides medical services to pay premiums to the patient insurance scheme. The patient insurance is supplied by a private insurance company and is supposed to cover all claims for personal injuries against the service provider. It is therefore very unusual to see for instance malpractice claims tried in the higher courts in Sweden since the compensation issue is normally dealt with under the special system set up under the Act on Patient Injuries that mainly deal with claims for compensation from the patient insurance. Similar points can be made with regard to the kind of injuries that fall under the other three mentioned compensations schemes. The type of tort claims that have plagued for instance American courts (associated with asbestos, DES, silicone implants, Agent Orange, etc.) are today by and large unheard of in the Nordic countries. In a more extensive sense one can see the Nordic model as encompassing not only these comprehensive compensation schemes but a general outlook on the relationship between personal injury compensation and insurance. Many damages, including personal injuries, thus fall under other kinds of insurance, such as the private "home insurance" that covers most Swedish citizens. The view that the costs of damages to the highest extent possible should be covered by insurance has also had important influence on tort legislation as well as on court practice. It has entailed not only that the victim will generally have a good chance of receiving compensation, especially in the case of personal injury, but also that the person that have caused the damage in many situations will be shielded from the risk of being subject of severe liability.

3 A Short Presentation of the PETL

The Principles of European Tort Law is the first published final result of the research groups that has made it their purpose to investigate the future of European tort law. It will in this year be followed by the proposal by The Study Group on a European Civil Code. The purpose behind both the PETL and the Study Group's suggestions is that if and when European tort law will take further steps towards unification, there will be a need for comparative investigations of the similarities and differences between the European jurisdictions. But the EGTL and The Study Group has come to the conclusion that there is not only a need for the results of such comparative research but also for policy suggestions on what kind of unified tort law future Europe *should* strive towards. These policy suggestions have taken the shape of proposals for common European tort law principles, in reality with the form of a sort of a proposal for legislation. The PETL thus looks more like a statute with comments than the results of comparative research project. As far as one can tell today the proposal by the Study Group will have a similar form.

Behind the PETL lies years of comparative research into different tort law systems of Europe. The EGTL has covered a number of topics within these projects: wrongfulness, causation, damages, fault, strict liability, liability for others, multiple tortfeasors and contributory negligence. The different investigations have been continuously published in a publication series, interestingly named "Unification of Tort Law".[6] In the comments to the PETL the EGTL often refer to these investigations in support for the different principles. This is in line with the EGTL's emphasis on finding a "common core" behind the specific principles in national jurisdictions. For instance it may be discovered that all European jurisdictions uphold a requirement of causation and that this requirement is understood in a manner that can plausibly be considered uniform. I think we can therefore assume that the EGTL's position is that when a common core of European tort law is discovered this is in itself a strong case for formulating a principle or principles in line with this common core.

The working method employed by the EGTL in these projects involved using questionnaires and national reporters from the different European jurisdictions. This approach is not uncommon in the European private law society and other ambitious comparative research projects have chosen a similar method.[7] In more detail, and detail may be useful here to get a picture of the

6 *See* Principles, 280 for a list of the publications. *See* also "www.ectil.org", under "Publications".

7 *See* for the following Principles, 14-16 (no. 14-29) and Helmut Koziol, *Die "Principles on European Tort Law" der "European Group on Tort Law*, 2004 Zeitschrift für Europäisches Privatrecht (ZeuP) 234. This method was also used by the Trento group in the investigation of the notion of pure economic loss as reported in Mauro Bussani & Vernon Valentine Palmer, *Pure Economic Loss in Europe* (Cambridge 2003). The Study Group on a European Civil Code has chosen another method. Instead of ready made questionnaires that are distributed to a selected group of experts, the Study Group prepares drafts of principles within working teams consisting of junior researchers under the supervision of a senior scholar – for instance tort law that is dealt with within the Working Team on Extra-

process, the work proceeded as follows. The EGTL selected one of its members to set up a questionnaire on a specific concept or notion, say causation. The questionnaire consisted of two parts: One general part dealing with more basic questions and one part consisting of different concrete cases. This questionnaire was, after revisions, distributed to national members that wrote a national report on the basis of the questionnaire. The national reports thereafter provided the basis for comparative conclusions on European tort law.

4 A Methodological Problem: Representation

There are several problems with the questionnaire method used in these comparative projects. One obvious, practical problem concerns representation. If the method of questionnaires is to be used for conclusions on a common core of European law, one would need to cover all European jurisdictions, or, at least, provide arguments as to why some jurisdictions are more important than other. This will often entail a practical problem of finding reporters from all jurisdictions that can answer the questionnaire. (To answer questionnaires can often be tedious and uninspiring work.) To focus on "representative jurisdictions" – for instance to let a report on Swedish law provide a picture of "Nordic law" – is a dangerous strategy, since it means that someone needs to make an assessment of what jurisdiction can be representative of another jurisdiction, and this assessment will in general be made by someone from a third jurisdiction. How can, for instance, a French or a German professor acquire sufficient information for the methodological conjecture that a report on Finnish tort law can also provide a good picture of Swedish tort law.

In the case of the PETL, the problem of insufficient representation is brought to the front. Some European jurisdictions were not covered by the national reports. In the General Introduction of the PETL this problem is acknowledged. The drafters of the PETL there state that even though the "very greater part" of the EU countries was represented in the group not every jurisdiction was covered.[8] The problem, however, is downplayed, as it is further said this "shortcoming was remedied by extensive knowledge of several members of the legal systems of the non-represented countries".[9] I do not think this shortcoming has been remedied at all.

Contractual Obligations in Osnabrück (hereafter the Working Team) led by professor Christian von Bar. These drafts are then discussed and further prepared by expert panels consisting of experts on the subject in question in sessions, and the results of the expert panels are then discussed at larger meetings of the so-called Co-ordinating Committee.

8 Principles, 16, no. 26.

9 Reinhard Zimmerman suggests that the composition of the EGTL in a way which only include members from some EU states can be seen as a reflection of the idea that the members of the EGTL were not there as representatives from their states. Reinhard Zimmerman, *Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact*, in European Tort Law 2003 2, at 6-7 (Helmut Koziol & Barbara C. Steininger eds., 2004). This sounds good in theory, but unfortunately the composition of the Group entailed not only that certain countries were left outside of the group but also that these jurisdictions were generally left accounted for. At the end of the

Not even all jurisdictions of the EU before the latest expansion are covered in the preparatory investigations published in the Principles Series. From a Scandinavian perspective the selection of countries is difficult to understand if one wants to provide a picture of European tort law. For instance, I think that no report from Finland or Denmark was included in *any* of the published investigations in the Unification Series. Sweden was covered only on a few of the topics investigated. No Nordic country was represented in the Drafting Committee that formulated the final proposal published in the Principles and by only one representative in the EGTL as such.[10]

This lack of input from the Nordic countries, which together made up a fifth of the number of EU jurisdictions before the expansion – is important. In fact, the Nordic countries can provide some interesting contributions to the picture of a European common core. For instance the Nordic countries, including also the Nordic countries outside of the EU (Norway and Iceland) share a common attitude towards tort law within the system of a social welfare state that one can see very few traces of in the Principles.[11] No regard is taken in the Principles or the commentaries of the pragmatic and non-formalistic approaches to basic conditions of liability, which has left basic criteria such as causation uncodified, that many see as one of the great benefits of the Nordic approach.

That there are few traces of the experiences of Nordic jurisdictions in the Principles is made very clear when one examines the hundreds of references to national solutions of different tort law problems in the footnotes of the PETL. As far as I am aware, Scandinavian countries are only mentioned *once* regarding the content of national law in the footnotes of the PETL altogether.[12] At the end of the PETL the principles are translated into 13 languages, including Chinese and Korean, but there are no translations into any Scandinavian language.[13] The apparent lack of interest for Northern Europe becomes painfully clear against the fact that EGTL often refers to solutions in many non-European countries. The EGTL apparently found much more inspiration for their European principles

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day I think many comparative projects will end up with discussions where participants argue (perhaps fight is a better word) for the solutions taken in their own national systems. Cf. Basil Markesinis, *Why a code is not the best way to advance the cause of European legal unity*, 5 European Review of Private Law 519, at 520-521 (1997).

10 The Swedish participant was Bill W. Dufwa, who also wrote reports on some of the questionnaires. It is interesting to note that of the 20 members of the European Group on Tort Law listed in the Principles (p. XII) there are two members from the USA, one from Israel and one from South Africa. Still there was apparently no room for any participants from Finland or Denmark, nor from Iceland or Norway, which even though they are not members of the EU. at least belong to Europe.

11 A noteworthy example of this is the section on mitigation of damages, or reduction of damages, of the Principles (Art 10:401) which from a Swedish perspective seems much too inflexible and restrictive compared to the open formulations in the Swedish Tort Liability Act (especially Ch. 6, sect. 1).

12 The Scandinavian statutes are only mentioned in the comment to the rule on reduction of damages, *see* Principles, 179, fn. 1.

13 Principles, 183-273.

outside of Europe than in Northern Europe, to judge from the many references to tort law solutions in US, South Africa and Israel.[14]

To a considerable extent the same can be said for the EGTL's treatment of former Eastern Europe and other newcomers to the EU family. It is understandable that the EGTL focused on the EU but the exclusion of the Baltic countries, Cyprus, Poland, Malta, Slovenia, Slovakia, and Hungary (the Czech Republic was represented in the EGTL) is difficult to explain only with the argument that these nations only recently entered into the EU in light of the many references to countries outside of Europe. It must be understood as a reflection of the interests of the participants of the EGTL, which apparently lied with the legal systems of the continental European countries that belonged to the old EU and the United Kingdom.[15] This has not stopped the drafters from making general statements that such and such a rule exist in all of Europe.[16]

The experiences of the EGTL point to a general difficulty with the use of questionnaires in comparative law research. The basic point is obvious, but sometimes it is useful to state the obvious, namely that the questionnaire method gives little support for valid general comparative conclusions, that goes beyond the jurisdictions covered. More specifically: One should be skeptical against claims that different ideas or principles belong to a European common core if not all European jurisdictions have been investigated.

A complete coverage, on the other hand, is often difficult to achieve for practical reasons. In some situations it could, perhaps, be sufficient to focus on representative jurisdictions. Perhaps it is sufficient to focus on only Finland, Sweden, Denmark and Norway in a comparative investigation that looks into the common core of European tort law. But such a methodological standing point should at least be supported by good arguments that seek to show why the jurisdictions emphasized in fact are sufficient to provide a picture of a common core of European law.

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14 Here I must contrast with my impression of the work of Study Group, where the Working Team has always included a Scandinavian representative and where there have been conscious efforts to take into regard all jurisdictions of the EU.

15 Comparisons can be made with the stated aim on the web page of the Study Group on a European Civil Code: "We take the view that *every* legal system in the EU potentially has much to offer and the appropriateness of rules is determined on their merits rather than their national origin.", *see* "www.sgecc.net", under "Introduction". My italics.

16 *See* for instance the (in substance probably correct) assertion that there is a "unanimous view held by the European tort systems" that compensation for reasonable expenses in the case of personal injury also includes expenses for costs of adaptation of the home of the injured, Principles, p. 166, n. 10, or the (more dubious if not qualified) claim that the "European legal orders accept that reasonable preventive costs can be claimed as damages", Principles, 38, no. 9.

5 A General Methodological Problem with Questionnaires: Superficiality

Another problem with the questionnaire method is of a more general nature: The questionnaire method leaves little room for input at a deeper level.[17] The work on the PETL illustrates this. If we for instance look at the questions posed in the questionnaire on causation (where, by the way, the absence of Nordic participants is particularly apparent) we can see that the general questions regarding causation-in-fact are centered around the importance of conditio sine qua non formula. The more specific, case-oriented questions for instance take up the ubiquitous Summers v. Tice/Cook v. Lewis-like hypotheticals (where two hunters simultaneously shoot the victim and it is impossible to say which of the hunters actually hit the victim) and similar problems closely connected with a conditio sine qua non-outlook.

There is a danger with an approach such as this. The way the questions are posed and the system in which the questions are framed substantially predetermine the answers. This can only to a certain degree be remedied by allowing the respondents to participate in the formulation phase of the questionnaire as the EGTL has done. Without knowing too much about how the EGTL's work progressed in each case, I think that a general objection against a questionnaire method of this kind is that already the first formulation of a questionnaire, even if it is open to revisions, entails a preconception. It will set mental borders within which the reporters will formulate their answers.

To use a tired metaphor: The questionnaire will provide a box in which the answers must be placed and even if the size and to some extent the form of the box may be questioned, it will be difficult to think outside the box. And even if someone *does* think outside the box, a questionnaire method makes it difficult to see what to make of the "answers". This has implications on different levels. It has importance for the account that will be given of solutions to individual concrete cases. But it also has a more significant implication, in that this method will be a bar to comparisons of the differences (and similarities) between the national systems that lie on a deeper level.

An example might illuminate the point I am trying to make here. If the first draft of a questionnaire on the criterion of causation starts of with a question like "Does your national system recognize the conditio sine qua non formula as the basic test of causation" and then continues with variations on the conditio sine qua non-theme, the answers will take the form of being either positive or negative accounts of the importance of the conditio sine qua non formula within each jurisdiction. It will be difficult to give an account of causation that does not

17 Some of these issues are dealt with in Mårten Schultz, *Analyze This! Some Swedish Reflections on the Europeanization of Tort Law*, 15 European Business Law Review 223 (2004). After this article was published my attention was drawn to an interesting paper by Luke Nottage, where similar concerns are being raised in a much more elaborated way, *see* Luke Nottage, *Convergence, Divergence and the Middle Way in Unifying or Harmonising Private Law*, EUI Working Paper, No. 2000/01. Some of these issues are discussed also in Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 4 Global Jurist Frontiers, Issue 2, Article 1 (2004).

take the framework of the conditio sine qua non-formula for granted. It will be *impossible* to give a free and uninfluenced account of the causation criterion that actually reflects the way it is understood within a jurisdiction that uses other terminology and concepts. Once the conceptual glasses of the conditio sine qua non-doctrine have been put on they create distortions whenever one wants to observe phenomena that do not fit the doctrine's worldview.

The objection just made takes aim at the (very familiar) problem of how preconceptions and previous knowledge/belief/prejudice will influence an understanding of principles and concepts from another legal system. This is not a very original critique of comparative investigations and I generally think that this line of critique tends to take exaggerated forms. I do *not* think that jurists within Europe live in different and incommensurable mental universes that make comparisons impossible or futile. In fact my opinion is that there are more similarities than differences between the European tort systems and that is the reason why I think that a common European tort law in the (probably quite remote) future is both feasible and positive. I do however think that a working method like that used by the EGTL brings these problems to the fore. A questionnaire method will be too influenced by the structure provided by the drafter to really be able to reflect the diverse phenomena of different legal orders.[18]

Another objection related to the previous line of argument is that a questionnaire method will put too much stress on concrete solutions to concrete cases, which in its turn will tend to provoke answers that refer to rules and principles.[19] But as important as the investigation of different solutions in a concrete case is, it is not as important as an investigation into the underlying, basic features of tort law. What kind of features might that be? One can frame the questions I have in mind here in different terms.

A trend of comparative law has been to focus on the rather diffuse idea of *legal culture*.[20] But recognition of the importance of the deeper structures of the

18 Vernon Valentine Palmer gives a beautiful account of an alternative approach to comparative law that attempts to let the legal material of the compared systems speak for itself and to minimize the influence of the investigator's preconceptions, Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 4 Global Jurist Frontiers, Issue 2, Article 1, 13-14 (2004).

19 I am aware of the fact that I refer to "rules and principles" in a way that seems oblivious to Dworkin's important distinction. The reason for this confusion is that I have been influenced by the particular manner in which the expression "Principles" is used in the Europeanization discussion. Strictly speaking, the PETL should probably be seen as a set of rules and not a set of principles. They are (in general) of an all-or-nothing kind that we associate with "rules" and if they are taken seriously they necessitate a certain outcome in a particular case in a way that characterizes "rules". I am grateful to Mauro Zamboni for this point. The expression "principles" in connection with the PETL, as well as in the Principles of European Contract Law ("the Lando Principles"), is called a "misnomer" by Reinhard Zimmerman, *see* Reinhard Zimmerman, *Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact*, in European Tort Law 2003 2, at 9-10 (Helmut Koziol & Barbara C. Steininger eds., 2004).

20 The focus on "culture" seems to me at least exaggerated. From a cultural point of view it seems to me that the private law orders of Europe (and indeed the rest of the Western world) are more similar than they are different. At least this goes for tort law. All European

national tort systems does not have to entail that the comparatist needs to engage in cultural studies. One can also claim that a comparative investigation should try to account for the *deeper values* that are the foundations of the law of torts.[21] On this level I think an investigation would find a similar general morality behind the European tort law systems but I do not think that the discovery of a common ground on this level will be able to provide much help in the concrete work of formulating common European principles. All these approaches can provide interesting results, but I would like to suggest another focus when the subject of investigation is formulated.

I think that when it comes to *tort law* an important subject for comparison is *patterns of legal reasoning* and how these patterns are applied to different phenomena dealt with in tort law. I would view such patterns of reasoning, with which mean *structured models of argumentation* as the most basic cornerstones of tort law. The expression may seem vague but what I have in mind are models of legal arguments; models that are often partially products of conscious theoretical efforts by legal scholars and judges. A deeper understanding of these patterns of legal reasoning captures not only the way lawyers might go about answering a legal question and what kinds of result such a legal inquiry could result in, but also an understanding of how lawyers understand what they are doing.[22] Say for instance that we want to comparatively address an issue of how the scope of liability is decided in a case of (what in Sweden and some other jurisdictions would go under the term) pure economic loss. A questionnaire

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jurisdictions start from a set of basic ideas, that individuals are autonomous beings that have rights that are protected (for instance in tort law), that the other side of the coin is that individuals may be held responsible for harm they cause, that such responsibility may require the obligation to compensate the victim with money, that social concerns may alleviate the burden of the harm causing party etc. In other words I think all European tort law systems can be seen as an outflow of a liberal tradition of individual rights and responsibility, in a Kantian-Aristotelian tradition, if one likes. Is this not (part of) a common European legal ”culture” of the law of torts?

21 The subject of such an inquiry will be difficult to catch since different jurisdictions will deal with similar practical problems within different parts of the law. An account of the law of accidents will in an American context to a high degree be a matter of tort law, while in Swedish law the most important answers to how society deals with accidents will be found in social insurance law. Should also the latter issues be covered in an investigation of comparative tort law, issues that in some countries will lie within the sphere of tort law but not in other countries? If the answer is yes, this will undoubtedly have importance for how we will look at the basic values of tort law. My hunch is that the best way to explain tort law and its functions also in a social welfare infused jurisdiction such as Sweden is with corrective justice types of arguments. But such an explanation will seem far-fetched if the object of study includes what in Swedish law would be seen as social insurance law or some other part of public law.

22 Martin Stone makes a related point in a comparison of different explanatory frameworks for understanding tort law: “[T]ort law is not just a set of results concerning who wins and who loses in particular cases, but also a discursive or concept-involving practice purporting to justify those results. […] This means that an understanding of tort law must be an understanding of certain legal understandings: of the concepts through which the law is self-consciously organized and which figure in its everyday application.” Martin Stone, *The Significance of Doing and Suffering*, in: Philosophy and the Law of Torts 131, at 132 (Gerald J. Postema ed. 2001).

method of the kind used by the EGTL will, I think, often lead a reporter covering her own system to seek a rather simple answer if the question has previously not been tested within the national system. There will sometimes be a simple answer, but such an answer will not be complete.[23] The resort to simple answers is not a product of the reporter's laziness or dishonesty; it is the only kind of answers one can give to specific tort law questions in a survey. It is impossible to give a complete picture of the whole of tort law as an answer to every simple question in a questionnaire. Let me illustrate with a rather extensive (fictitious) example.[24]

The questionnaire includes the following hypothetical under the heading of "Scope of liability". "A merchant A tries to achieve an advantage in the competition of a small but lucrative retail market that previously was dominated by merchant B. A thus convinces B's suppliers to break their contracts with B, effectively hindering B's possibility to sell the goods she previously sold. B goes out of business. B wants to sue A in torts for the interference with her contractual relations. One could argue that B's first option should be or would be to sue her suppliers but let us assume that for some reason she does not want or cannot do that. B wants A to pay. Assume also that A's behavior is not criminal. How would the scenario be dealt with within your jurisdiction?" An honest Swedish reporter dealing with this question[25] would probably have to say "I have no idea!" or, a more typical answer, "It depends…".

An expanded answer would first point to a section in the Tort Liability Act of 1972 (hereafter the Act), chapter 2, sect. 2, that says that pure economic loss that someone suffers a result of a criminal activity is compensatable.[26] In the

23 The well written accounts on Swedish law in Bussani's and Palmer's previously mentioned comparative account on pure economic loss (op. cit.) exemplifies this. The picture of the Swedish approach to pure economic loss is that most questions have an easy answer in the principle on third party loss or some other principle. While these answers are in one way absolutely correct they are in another way incorrect, or at least incomplete, since they do not (and cannot within such a context) show how these principles are terms of art that are extracted and limited depending on different key factors. Even in a core case of "third party loss" a Swedish court could sometimes establish liability, notwithstanding the basic principle of no liability.

24 I will use a Swedish reporter as an example since Swedish law is the only law I can claim to really know something more detailed about, but I think that in scenarios such as the given equally complicated methodological questions can arise in jurisdictions. It should also be said that the example uses a hypothetical concerning "inducement to breach of contract", which recently was dealt with by the Swedish Supreme Court, *see* NJA 2005 p. 608. This particular issue is thus not as unclear as it was before. But since the question in this hypothetical makes the issue I have in mind particularly clear I will use it anyway ignoring the Supreme Court judgement (which, by the way, does not solve all the complicated questions of liability in these situations).

25 Again, disregarding NJA 2005 p. 608.

26 In Swedish law this is a pure economic loss according to the definition provided by the Tort Liability Act (ch. 1, sect. 2) that stipulates that an economic loss that is not a consequence of a previous personal injury or property damage is a pure economic loss. This definition entails that a loss that a third party is caused as a result of another person's personal injury, for instance the loss an employer may suffer as a result of her employee's personal injury, is not a pure economic loss.

hypothetical A's behavior was not criminal so the rule in the Act, it seems, does not say something about whether this loss is compensable or not. In the preparatory works of the Act, a source of interpretation often used in Swedish law, the legislator stated that this rule was not to be interpreted *e contrario*. It was thus not the legislator's intention that this rule should exclude pure economic loss resulting from non-criminal behavior. However, in the practice of the courts the rule has nevertheless been interpreted in just this way, so that pure economic loss generally will only be compensated where the defendant's action was criminal (for instance fraudulent). One approach to answer this question would be to point to court decisions where the general principle of no crime=no compensation for pure economic loss is laid down. Still that would only be a part of an answer since there are exceptions to this principle, for instance in the situation of negligent misrepresentation.

A complete picture of how the section on pure economic loss is used and understood in Swedish law would thus need to include also these exceptions. Thereafter the reporter would need to account for general doctrines that are used to deal with questions of scope of liability. For instance the doctrine of adequate causation plays a significant role in Swedish tort law. What the criterion of adequacy more specifically requires is very difficult to pinpoint however. A leading Swedish scholar has famously said that the concept of adequacy is the vaguest concept employed in civil law literature, "which is not to say little".[27] The difficulty with the adequacy doctrine in Swedish law is that it involves many different notions that are used in a manner that might seem haphazard. In some situations the court will refer to notions such as probability as a standard for dealing with the adequacy question. In other situations the court will refer to "foreseeability". And in other situations the courts will simply state that a result was adequate even in spite of it apparently being both improbable and unforeseeable.

This is but a few of the different lines of argument put forward under the heading of adequacy. It would however be a mistake to see the adequacy doctrine as completely arbitrary or as only a justificatory device used to support a decision reached in a more intuitive way. One can see the adequacy doctrine as it has evolved in Swedish law as a complex web of different lines of reasoning that are triggered by factors that would be very difficult to fully capture. To account for the position of the adequacy doctrine one would need to address all these lines of reasoning.

In addition to the adequacy doctrine the reporter would need to say something on other lines of reasoning that are used in Swedish law to draw the limits of liability, such as the doctrine of protected interest etc. One would also need to say something on the general attitude towards compensation for economic loss that is reflected in principles such as the exclusionary rule on third party loss.

All these models of legal reasoning interplay in a very complicated way. It is only through an extensive understanding of all these models one can understand

27 Hjalmar Karlgren, *Skadeståndsrätt* 46 (5 ed. 1972).

how the scope of liability issue in pure economic loss situations is addressed in Swedish law.

To answer a question like that posed in our hypothetical one would thus need to fully address these complex models or patterns of reasoning as well as how they interplay. It is these models, I think, that can be seen as the basic constituents of tort law.[28] And it is only through detailed accounts of these models that one can provide a picture that reflects how the actors within the national system perceive the law and how a court would go about answering questions of liability in difficult situations.

To only give a short answer to a question such that in the hypothetical does not cut it, because the real solution of an actual case can always go in either way depending on the circumstances of the case. Even oversimplified hypotheticals (say questions like "A hits B intentionally and B receives a concussion") can result in either liability or non-liability depending on the detailed circumstances of the situation. The only way to provide questions such as these with an answer that is interesting would be through extensive accounts of the different models of legal reasoning.

How would you go about investigation this complex interaction between different legal models of argumentation or reasoning? That is not really for me to say and I do not pretend to have something important to say on positive comparative law method. Some basic requirements seem obvious, however.

For instance I do think that the kind of comparative law research that would be needed to account for these experiences would need participants from all jurisdictions it is supposed to cover. These factors are very difficult to account for by someone that has not, so to say, been born into the legal culture she is covering. To account for the nuances and complexities of the national system one will need, at least generally, to be an "insider" of the system.

In addition to participants from all systems that are covered this vision of comparative law research requires a lot of time and a lot of hard labor. This may seem like a banality, but what I mean is that a comparative research project devoted to the whole of Europe will probably only be able to get past the surface level of "rule talk" if scholars from all European systems work together as a team, on a daily basis, for years. As far as I am able to see this is the only way the deeper currents of the different systems can be adequately accounted for.

Now, I realize that this may seem impracticable. It will certainly require a lot of recourses and a management that consists of some sort of Herculean comparative scholar that can guide the project. But it is not impossible. The working groups within the project of The Study Group on a European Civil Code have actually worked along these lines, under the management of such a Herculean comparative scholar. Other projects work in similar ways.

The problem with the EGTL's questionnaire method – a problem not unique to this project – is that it makes it insurmountable to give an accurate picture of these deeper aspects of the national tort law systems. It seems to me manifestly impossible to answer concrete questions with the extensive accounts that would

28 To just take up one more illustration I would thus not consider the Swedish rule on fault or negligence, the culpa principle, as a basic constituent of tort law but rather the patterns of legal reasoning used to evaluate whether a conduct was negligent.

be needed to capture the nuances of the legal reasoning employed within the national systems.[29]

To put the conclusion short: *A questionnaire method focusing on concrete cases and principles will result in oversimplified answers*. The gist of the national systems will be lost in the process.

29 The previous example on whether liability for inducement to breach of contract can occur in Swedish law shows this. A full account of the issues that this question involves in Swedish law (before the Supreme Court's recent judgment) would have shown that the law is unclear, that the question entails a complex evaluation of different principles and legal doctrines that need to be weighed against each other, and the end result of such a distinguishing process would be that liability is unlikely but not out of the question. A realistic answer to such a question from a national reporter – and this is more or less what I would have written myself – would be that Swedish tort law generally holds that liability for pure economic loss require the conduct to be criminal if there is no support in specific legislation (as there for instance is in company law) and that liability for inducement to breach of contract is unlikely Swedish law. But such an answer would have been wrong. (And – I guess one must add – it is not wrong because the law can be said to have changed through the Supreme Court judgment. On the contrary, the arguments for liability were known already before.)