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Mass Torts: Debates and Pathways

Willem H. van Boom

I. Setting the scene

[page 1] In recent years, the issue of mass tort litigation and the fair and efficient settlement and adjudication of mass torts has drawn increasing attention in academic discourse, legal practice and policy debates. Indeed, academics, practitioners, courts, legislatures and policymakers throughout Europe have been struggling with the 'massification' of private law relationships, both in and outside of tort law.[1] The subject is, however, not easy to demarcate. It moves between the law of civil procedure, substantive tort law, access to justice debates and regulatory frameworks for mass consumer disputes. I understand the definition of the subject matter of this volume to include the broad concept of monetary compensation for wrongs committed vis-à-vis individuals. The adjective 'mass' in 'mass torts' denotes different cases. One variation is a one-time accident which directly and simultaneously causes widespread damage (eg., a train derailment disaster; a chemical plant explosion). Another variation of a mass tort may involve a long-latency disease incurred by many and caused by the defective product of one manufacturer or several manufacturers of an identical or similar product (eg., defective breast implants, asbestos). Each of these variations has its own peculiarities as far as standards of conduct, standard of proof of causation, prescription periods, damages and fair distribution of compensation, and rules of civil procedure is concerned.

This book aims at bringing together viewpoints from both legal practice and academic debate on the above-mentioned issues of mass tort. Thus, it meanders between substantive law and procedural law on the one hand, and the practical operation of law and related mechanisms of behaviour modification and dispute settlement on the other. As a result, this book does not only involve reference to 'the law in the books' but extends well into the domain of 'the law in action'.

From a practical point of view, we set out to collect insights from legal practice on the practical business of mass tort procedures: how are such cases set up [page 2] by claimants, how do respondents react? What strategic considerations are involved, what practical obstacles and pitfalls exist? How do courts deal with the fundamental change that 'massification' seems to have set into motion?

Admittedly, the literature on mass litigation, class actions, group and representative action is abundant.[2] Yet, most of the existing European literature focuses on competition law and consumer

[1] On the concept of 'massification', see *J. Steele/W.H. van Boom*, Mass Justice and its challenges, in: Jenny Steele/Willem H. van Boom (ed.), Mass Justice - Challenges of Representation and Distribution (2011) 1 ff. On the notion of 'mass' see also *Anne Guégan-Lécuyer*, Dommages de masse et responsabilité civile (2006) 53 ff. See also *Harald Koch/Armin Willingmann* (ed.), Großschäden - Complex Damages (1998) ; *Harald Koch*, Haftung für Massenschäden - Recht, Abwicklungspraxis, rechtspolitischer Handlungsbedarf, 53 JZ 1998, 801 ff.

[2] Of the recent literature, I merely mention: *Paul G. Karlsgodt* (ed.), World Class Actions - A Guide to Group and Representative Actions around the Globe (2012) ; *J.G. Backhaus et al.* (ed.), The Law and Economics of Class Actions in Europe - Lessons from America (2012) ; *Christopher Hodges/Astrid Stadler* (ed.), Resolving Mass Disputes - ADR and Settlement of Mass Claims (2013) . For an overview of the various forms of class action in common law jurisdictions, see, eg., *Rachael Mulheron*, The Class Action in Common Law Legal Systems (2004) .

law rather than on tort law. Moreover, recent academic projects on mass tort law are invariably influenced by the well known class action vehicles in the USA, Canada and Australia. Against this backdrop, this book adds to the existing literature by collecting a number of case studies mostly on tort cases and by combining these with thematic chapters in which the challenges concerning mass torts are mapped, explored and analysed from a European perspective.

In this introductory chapter, I set out to introduce the subject matter of this volume, the two sections of this volume and its component chapters. First, I briefly introduce the relevant concepts, terminology and the basic legal framework to facilitate the understanding of the entirety of the book (para 2). Secondly, I sketch debates and pathways in the domain of mass torts. Here, I give a brief overview of the discourse at EU-level on mass litigation. Then inventory is made of the various pathways of litigating, adjudication and resolving mass disputes (para 3.1). Thirdly, I outline some of the issues that merit consideration both in academic and policy debate when considering steps towards modification of the legal framework for resolving mass torts (para 3.2). Fourthly, I give an overview of the contents of this volume and its subdivision into two main sections. Here, I introduce the practitioners' case studies and the thematic academic contributions (para 4). I conclude with some final considerations (para 5).

II. Concepts and basic legal issues

In Europe, private law systems traditionally consider the basis for monetary compensation for wrongs committed vis-a-vis individuals to lie in the law of tort or contract. In turn, tort and contract law are traditionally conceptualized as [page 3] systems offering individual remedies to individual creditors and victims, which are to be exercised by individuals in their individually lodged proceedings. In short, the individual and his individual assets and debts are central to the philosophy of private law.

As a result, the concept of **class action**, the construction of aggregation of claims into one consolidated legal action, well known to the legal systems of the United States of America, Canada and Australia, is different in many ways from this traditional look on the aims and functions of private law.[3] The basic notion of class action is that one representative of a class of individuals (numerosity) with comparable individual causes of action sharing a 'commonality of issues', files a claim and petitions the court to appoint him as 'lead plaintiff' for the entire class. This procedure for class certification may or may not end in actual certification. If it does, the lead plaintiff is the sole legal representative in the proceedings. The class action institute relies heavily on monitoring activities by courts of the lead plaintiff and his entrepreneurial attorney.

By contrast and notwithstanding the potential inefficiencies of this principled approach, the European concept of private law adheres to individual entitlement and responsibility as the foundation of private law relationships. Hence, individual claimants have individual **causes of action** an individual **right of audience**: the right to be heard in a court of law when in pursuit of a cause of

[3] On the functions of private law generally and tort law specifically in a European context, see, eg., *Gerhard Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht - Anmaßung oder legitime Aufgabe?, 206 Archiv für die civilistische Praxis 2006, 352 ff.; *W.H. van Boom*, Efficacious Enforcement in Contract and Tort (inaugural lecture EUR) (2006) . Cf. *G. Wagner*, Collective Redress – Categories of Loss and Legislative Options, 127 Law Quarterly Review 2011, 55 ff.

action for monetary compensation for wrongs committed against them individually. Usually, the cause of action accrues to the harmed individual who has actually suffered the infringement and/or the economic consequences thereof.

The principle of **res judicata** denotes the situation in which there has been a final judgment which is no longer subject to appeal. It is also used to refer to the doctrine which bars or precludes re-litigation of such cases between the same parties **(preclusive effect)**. In this latter usage, the term res judicata is synonymous with "preclusion".[4] So, claim preclusion and/or issue preclusion (also known as 'collateral estoppel' or 'issue estoppel') is the principle which posits that where a determination of an issue as a necessary element of a judgment should [page 4] generally not be re-examined in a subsequent dispute in which the same issue is presented.[5]
In principle, res judicata does not extend to third parties who were not formally implied in the litigation of the case. Thus, where a court establishes certain facts in a tort case between a tortfeasor and one victim, these facts can easily be re-litigated in proceedings with other victims of the same or similar wrongdoing. Moreover, the starting point for many legal systems is that points of law decided in one case do not have any official status in other proceedings. In practice, however, the concept of **precedence** – either in an official, rigid *stare decisis* sense or in a more flexible version of informal **authority** – may somehow remedy this inefficiency.

Others than the individual may have an economic stake in the claim for compensation. For instance, an agent for the harmed individual may lodge proceedings by issuing a writ on the basis of a proxy, a power of attorney or even assignment. **Assignment** of the claim, that is the actual transfer of ownership in the claim – be it for the purpose of legitimate transfer or for the purpose of collecting the proceeds of the claim – may or may not be possible. Here, the various legal systems have different approaches to assignment of claims. Some legal systems are quite comfortable with others (assignee) than the original claimant (assignor) pursuing claims in court as long as the original claimant has expressed his consent with such assignment. Others simply deny the possibility of 'commodification' of some or all types of claims. As a result, the latter jurisdictions may also experience difficulties with **third-party funding** arrangements where the pursuit of the claim is somehow delegated to the third party with or without assignment.[6]

[page 5] Ultimately, the goal of a civil procedure for monetary compensation is to obtain a court order to pay compensation. Such a verdict for compensation may be dissected into various elements: it usually contains statements of facts, applicable legal principles and qualification of facts as fitting the operative parts of a particular legal construct or doctrine. The court **orders** the payment of an amount in **damages**, to be calculated according to principles of the **law of damages**. Usually, the private law of damages centres on the principle of full compensation (*restitution in integrum*).

[4] Definition derived from *Ministry of Justice*, The Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions' (2009) 20.
[5] ALI/Unidroit Principles of Transnational Civil Procedure, (2004) 48 (comment on principle 28). On the res judicata effect in the international mass tort context, see, eg., *Andrea Pinna*, Recognition and Res Judicata of US class action judgments in European legal systems, 1 Erasmus Law Review 2008, 31 ff.
[6] On the legal restrictions imposed on third party funding, the literature abounds. I merely refer to the definitions and further references at *Willem H. Van Boom*, Financing civil litigation by the European insurance industry, in: Mark Tuil/Louis Visscher (ed.), New Trends In Financing Civil Litigation In Europe - A Legal, Empirical, and Economic Analysis (2010) 92 ff.; *Willem H. Van Boom*, Third-Party Financing in International Investment Arbitration, SSRN eLibrary 2011, 1 ff. Cf. *Stephan Madaus*, Keine Effektivität einer Europäischen class action ohne "amerikanische Verhältnisse" bei deren Finanzierung, ZEuP 2012, 99 ff. On practical experience with funding mechanisms in the Dutch context, see, *I.N. Tzankova*, Funding of Mass Disputes: Lessons from the Netherlands, 8 Journal of Law, Economics & Policy 2012, 549 ff.

However, proceedings may also be confined to a petition for **declaratory judgment**. For instance, where a multiplicity of victims chooses to wait with issuance of a writ until one of them obtains a favourable ruling on a point of law in a **test case** proceeding. In the test case, the court is petitioned to render a declaration specifying the legal relationship between claimant and respondent rather than order the payment of compensation. The basic idea is that the outcome of the test case – eg., on whether a particular product design was flawed, whether an auditor neglected a duty of care vis-à-vis investors when signing of an annual report, et cetera – effectively decides the fate of all the other dormant, stayed or pending court cases on that particular point of law. Some legal systems do not have specific procedural rules for test case procedures; there, the authority of the verdict is informal, not official. Others have a specific procedure for test case proceedings (*Musterprozess, lead actions*) which extend res judicata effect to third parties implicated in the wider conflict.

Alternatively, **injunction** may be part of the tool-box of the claimants as well. If in a particular case monetary compensation is not deemed part of the law of damages but rather the law of restitution or unjust enrichment, the cause of action may be one for restitution of an amount paid without legal justification. The appropriate procedural tool may be mandatory injunction ordering the restitution. Such actions may be either loss-oriented or gain-oriented and may, depending on the legal system, form part and parcel of substantive causes of action or constitute a discretionary power of the court.[7]

The person held liable for monetary compensation for the wrong committed vis-à-vis the victim is individually responsible. When summoned to enter civil proceedings, however, the respondent may have a right to compel a third party to join the proceedings **(interpleader; indemnity claim proceedings**). This may be especially relevant where the respondent is not exclusively liable but one of multiple jointly and severally liable wrongdoers.

[page 6] **Joint and several liability** is the legal doctrine where each of two or more persons can be held individually liable in full for the payment of the monetary compensation due to the victim.[8] Such joint and several debtorship may arise in case of joint torts (eg., where two companies deliberately collude to contravene competition law restrictions) , concurrent torts (eg., where the acts of two or more tortfeasors concurrently and incidentally contribute towards the genesis of one undivided damage), vicarious liability (where one is held liable ancillary to the primary tortfeasor) and several other situations.[9]

On the side of the claimant, most European legal systems allow a basic form of **aggregation** of individual claims on the basis of **voluntary joinder** or **consolidation** of claims. This essentially means that claimants join forces and jointly issue a writ against the tortfeasor to have their case heard in one and the same procedure. Where allowed, a joinder may actually take the form of an **opt-in** collective action procedure, where several claimants authorize one of them – or an agent – to lodge proceedings in their name and on their joint behalves. As a rule, joinder does not alter the status of

[7] Further on this topic *Willem H. van Boom*, Comparative notes on injunction and wrongful risk-taking, 17 Maastricht Journal of European and Comparative Law 2010, 10 ff.
[8] B. Koch in this volume (=== fn. 18) prefers the use of the expression 'solidary liability'. Both expressions pertain to the situation where each of a number of tortfeasors is individually liable for the whole of the damage suffered by the victim.
[9] On joint and several liability and its scope, eg., *Israel Gilead et al.* (ed.), Proportional Liability: Analytical and Comparative Perspectives (2013) *Ken Oliphant* (ed.), Aggregation and Divisibility of Damage (2009) ; *W.V.H. Rogers* (ed.), Unification of Tort Law: Multiple Tortfeasors (2004) .

the individual claims that underlie the proceedings (so, one plus one does not equal three). Sometimes, courts have the discretionary power to join related and concurrently pending court cases as well in order to efficiently deal with these in one procedure. However, not much use is to be expected from these powers in those legal systems where existing civil procedure rules are predominantly moulded to the "one-versus-one model" of civil procedure. Bringing multiple claims or tortfeasors together may in fact render the judicial management task even more complex than it already is with single claimant/respondent proceedings.

Other forms of collective action go under various names: **collective action**, group action, representative action et cetera. There is no fixed terminology in use, so it is relevant to distinguish on the basis of the characteristics of the procedure instead of the heading under which such actions are brought. Usually, legal systems provide for some sort of **legal standing** for **representative organisations** (ie., associations and/or foundations, that is: incorporated not for profit legal persons with capacity to perform legal acts, obtain assets and incur debts) to have some cases for injunction heard. In the enforcement of European [page 7] consumer law, such collective actions are widely acknowledged.[10] In some countries, designated associations have special statutory powers to claim restitutionary damages (for the benefit of the public purse) on behalf of a represented class of detrimented consumers. In others, such associations and/or foundations have a special role in obtaining amicable settlements for the benefit of individual victims, subject to court approval. [11] It is unusual in Europe, however, for associations and/or foundations – let alone individuals – to be authorised to initiate damages proceedings on behalf of individual victims without their explicit consent. That would in fact amount to a class action model, where one claimant is the exclusive representative of an entire class. The closest any European legal system has come to the USA-style class action, is the collective action procedure with an **opt-out** damages award (eg., the WCAM procedure in The Netherlands). It seems that this model is currently slowly but surely gaining momentum in Europe.

Once a collective procedure for the payment of the monetary compensation due to the collective of victims is successful, there is a **follow-up phase** where the proceeds need to be administrated, distributed and/or invested for the benefit of the collective of the victims. Since most European legal systems do not have a full-fledged collective action procedure as such, it comes as no surprise that such a follow-up phase does not exist either. Unless a specific statutory arrangement for the creation, administration, governance and distribution of a fund exists, perhaps general principles can be applied. In common law traditions, the **trust** may be useful. In other jurisdictions, the incorporation of a dedicated 'special purpose vehicle' may be useful. Accepting the notion of a [page 8] collective damages action in mass tort cases inevitably raises issues of damages calculation

[10] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests; Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation). Further on collective enforcement from a consumer law perspective, eg., *Willem van Boom/Marco Loos* (ed.), Collective Enforcement of Consumer Law - Securing Compliance in Europe through Private Group Action and Public Authority Intervention (2007) ; *Christopher Hodges*, The Reform of Class and Representative Actions in European Legal Systems - A New Framework for Collective Redress in Europe (2008) ; *F. Cafaggi/H.-W. Micklitz* (ed.), New Frontiers of Consumer Protection - The Interplay between Private and Public Enforcement (2009) ; *Christopher Hodges*, The Reform of Class and Representative Actions in European Legal Systems - A New Framework for Collective Redress in Europe (2008) .

[11] This is essentially the Dutch system of the WCAM, on which Stadler in this volume. Cf. *Franziska Weber/Willem H. van Boom*, Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005), Contratto e impresa / Europa 2011, 69 ff.; *Tomas Arons/Willem H. van Boom*, Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands, European Business Law Review 2010, 857 ff.

(quantum) and distribution. Moreover, in the process the function of the **law of damages** may also have to be scrutinized. Rather than paying lip service to the doctrine of full compensation, forms of damage-scheduling, restitutionary damages (skimming off of illegal gains[12]) and cy-press solutions[13] would need to be explored.

A related issue in the follow-up phase is insolvency. **Insolvency** is a complication under any circumstances – so it will not come as a surprise that insolvency of the liable party adds to the already complex distributional issues involved with mass torts. To some extent, the multiplicity of liable parties may render the problem less complicated for the victim. In that case, joint and several liability may offer solace to victims. Obviously, this contrasts with the plight of the solvent parties thus held liable. In other respects, the follow-up phase of administration and distribution much resembles insolvency proceedings, where a trustee in bankruptcy is assigned the task of taking stock of the bankrupt estate and fairly distributing proceeds.

III. Debates and pathways

A. The debate in Europe

During the past decade or so, the European Commission has been struggling with the subject of mass litigation without reaching definite conclusions or policies. Diverging pathways seemed to emerge from the two Directorates responsible for competition policy and consumer policy.[14] Then, in 2011, 'a coherent approach[page 9] to collective redress' seemed to herald convergence of the competition and consumer policy areas.[15] In 2013, the Commission unfolded two pillars of its new comprehensive policy. Firstly, it unveiled a proposal for a Directive on competition law damages actions.[16] Secondly, it published a communication titled 'Towards a European Horizontal Framework for Collective Redress',[17] which was accompanied by a Recommendation 'on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under Union Law'.[18] The Recommendation suggests that Member States should ensure that representative organisations have legal standing to bring representative actions, that opt-in damages actions are to be sustained and that courts are to take on an active managerial role in dealing with such cases. However, none of the above documents lays down a binding

[12] See further on skimming-off procedures according to German law, eg., *Gerhard Wagner*, Neue Perspektiven im Schadensersatzrecht - Kommerzialisierung, Strafschadenersatz, Kollektivschaden (Gutachten zum 66. Deutschen Juristentag Stuttgart 2006) (2006) 111 ff; *Julius Neuberger*, Der wettbewerbsrechtliche Gewinnabschöpfungsanspruch im europäischen Rechtsvergleich (2006) ; *Michael Leicht*, Gewinnabschöpfung bei Verstoß gegen die lauterkeitsrechtliche Generalklausel (2009) 213 ff.; *Stefan Sieme*, Der Gewinnabschöpfungsanspruch nach § 10 UWG und die Vorteilsabschöpfung gem. §§ 34, 34a GWB (2009) . Cf. *Gerhard Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht - Anmaßung oder legitime Aufgabe?, 206 Archiv für die civilistische Praxis 2006, 352 ff.
[13] On *cy près* distribution in a European context, see, eg., *Geraint Howells*, Cy-près for consumers: ensuring class action reforms deal with 'scattered damages', in: Jenny Steele/Willem H. van Boom (ed.), Mass Justice - Challenges of Representation and Distribution (2011) 58 ff. generally on cy-pres in litigation *Rachael Mulheron*, The Modern Cy-près Doctrine: Applications & Implications (2006) 213 ff.
[14] Cf. Green Paper 'Damages actions for breach of the EC antitrust rules' (COM(2005) 672 final); White Paper ' Damages actions for breach of the EC antitrust rules' (COM(2008) 165 final); Green Paper 'Consumer Collective Redress' (COM(2008) 794 final).
[15] Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress (SEC (2011) 173).
[16] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013) 404 final).
[17] COM(2013) 401/2.
[18] C(2013) 3539/3.

instrument for the member states to enact particular collective redress remedies.[19] Instead, member states are invited to introduce adequate procedures for collective action procedures concerning injunction and redress for damages in the coming two years. After this period, the Commission will revisit the subject and assess whether further action at EU-level is opportune. It seems that, for the time being, the Commission accepts that the developments in this area at member state level are still in their infancy and that the time for harmonization has not yet come (if it ever will).

Indeed, as far as developments at member state level are concerned, new initiatives and innovative developments are rife. In countries such as Denmark, the Netherlands and Portugal, some form of opt-out damages procedures was introduced some time ago.[20] The serendipitous success of the Dutch WCAM in attracting cross-border settlements in mass financial and investment disputes is noteworthy. [21] If anything, the WCAM has fuelled debate within Europe on whether [page 10] mass damages procedures should be cobbled together on *opt-in* or *opt-out* bases.[22] Recently, further momentum for the introduction of so-called opt-out collective actions seems to be building. For instance, in the United Kingdom concrete suggestions for the introduction of such procedures have been made in the area of competition law and consumer law.[23] In Poland, the 2009 Act on Pursuing Claims in Group Proceedings was introduced.[24] In France, a legislative draft on a limited opt-out collective action in consumer law is currently pending before Parliament.[25] Meanwhile, in Belgium a Parliamentary Bill on collective redress was recently introduced.[26] One can easily conclude that it appears that there is a competition going on between Member States in designing the most attractive alternative for the USA class action while retaining the national legal cultural texture.

B. Pathways

When considering the various pathways to damages adjudication, settlement and compensation, one cannot but investigate tort law in conjunction with other systems of deterrence, compensation and

[19] Cf. *Astrid Stadler*, Die Vorschläge der Europäischen Kommission zum kollektiven Rechtsschutz in Europa - der Abschied von einem kohärenten europäischen Lösungsansatz?, Zeitschrift für das Privatrecht der Europäischen Union (GPR) 2013, 279 ff.

[20] See the brief overview of countries at *Willem H. Van Boom*, De Minimis Curat Praetor – Redress for Dispersed Trifle Losses, 4 Journal of Comparative Law 2009, 171 ff.

[21] On the WCAM, see *Franziska Weber/Willem H. van Boom*, Dutch Treat: the Dutch Collective Settlement of Mass Damage Act (WCAM 2005), Contratto e impresa / Europa 2011, 69 ff.; *Tomas Arons/Willem H. van Boom*, Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands, European Business Law Review 2010, 857 ff.; *W.H. van Boom*, Collective Settlement of Mass Claims in The Netherlands, in: Matthias Casper et al. (ed.), Auf dem Weg zu einer europäischen Sammelklage? (2009) 171 ff.; *Andreas Mom*, Kollektiver Rechtsschutz in den Niederlanden (2011) 311 ff. Cf. *Willem H. van Boom/Marco Loos* (ed.), Collective Enforcement of Consumer Law – Securing Compliance in Europe through Private Group Action and Public Authority Intervention (2007) ; *Hélène Van Lith*, The Dutch Collective Settlements Act and Private International Law (2011) 13 ff. Cf. *W.A. Kaal/R.W. Painter*, Forum Competition and Choice of Law Competition in Securities Law after Morrison v. National Australia Bank, 97 Minn. L. Rev. 2012, 132 ff.

[22] Cf. on the dichotomy opt-in/opt-out, *Rachael Mulheron*, The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis, 15 Colum. J. Eur. L. 2008, 409 ff.

[23] Department for Business Innovation & Skills (BIS), Private actions in competition law: a consultation on options for reform (London 2013); BIS, Civil enforcement remedies: consultation on extending the range of remedies available to public enforcers of consumer law (London, 2012).

[24] *Jarosław M. Szewczyk*, Selected issues concerning pursuing claims in the Polish group proceeding, 1 Journal of Education, Psychology and Social Sciences 2013, 60 ff .

[25] Projet de loi relatif à la consommation, introduced in Parliament on May 2, 2013. On French developments generally, see, eg., *S. Brunengo-Basso*, l'Emergence de l' action de groupe, processus de fertilisation croisee (these 2009 Universite Paul Cezanne - Aix-Marseille III) (2011) , 235 ff.; *Anne Guégan-Lécuyer*, Dommages de masse et responsabilité civile (2006) 403 ff.

[26] Parliamentary Bill on 'Causes of Action for Collective Redress', January 17, 2014, Doc 53, 3300/001. Cf. on Belgian law *Stefaan Voet*, Een Belgische vertegenwoordigende collectieve rechtsvordering (2012) ; *B. Allemeersch et al.*, Vers un 'Class Action' en Droit Belge? (2008) .

vindication.[27] The same is even more [page 11] true for mass damages, where the limits of fair, balanced and expedient court adjudication come in sight even quicker than in 'single victim/single tortfeasor' cases. As **figure 1** illustrates, there are competing pathways that may fulfil comparable roles as tort law. These alternatives may not render exactly the same results in the strict legal sense but they may well suffice from a societal point of view. Indeed, they may turn out to be superior in other respects such as speed and accessibility of procedure. For instance, it has been suggested that in regulated markets (eg., financial services, telecommunications) there should be a discretionary power for the relevant market authority to coerce a regulatee who contravenes statutory standards to provide redress according to some predefined compensation standard. This could indeed be a viable alternative to the arduous route of private litigation.[28] Also, the promise of ADR bodies has been highlighted in this respect.[29]

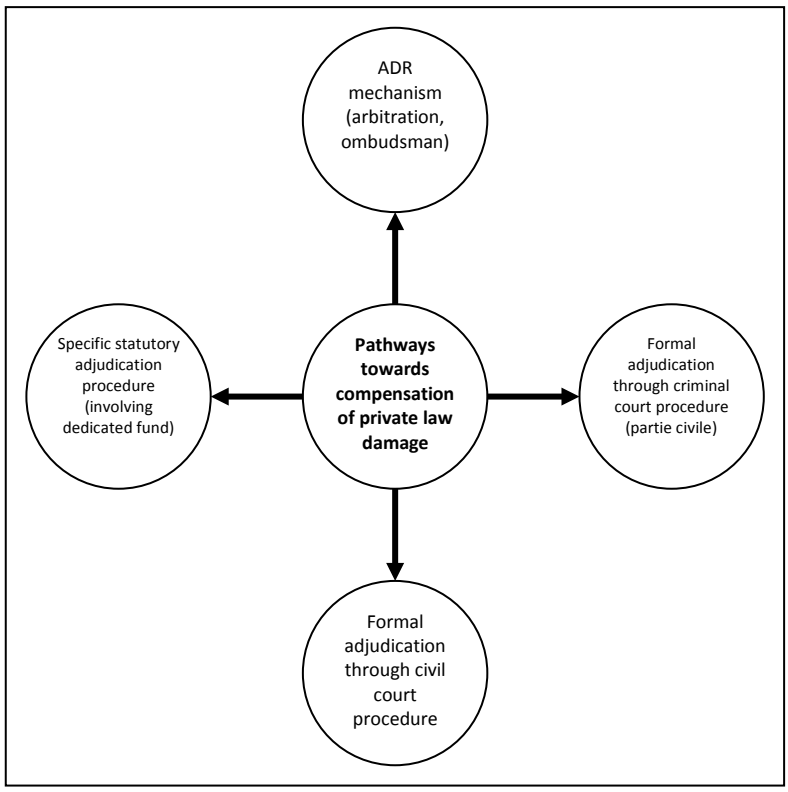

Figure 1 - pathways towards compensation

[page 12] Furthermore, in some countries it is not uncommon for mass tort cases to become part of criminal proceedings, where the law allows victims of a crime to submit their claim (follow-on 'partie

[27] This point was raised and addressed in some of my earlier writing. See, eg., *W.H. Van Boom/M.G. Faure*, Introducing "Shifts in Compensation Between Private and Public Systems", in: W.H. van Boom/M.G. Faure (ed.), Shifts in Compensation between Private and Public Systems (2007) 1 ff.; *Willem H. van Boom*, Compensating and preventing damage: is there any future left for tort law?, in: Hugo Tiberg/Malcolm Clarke (ed.), Festskrift till Bill W. Dufwa – Essays on Tort, Insurance Law and Society in Honour of Bill W. Dufwa - Volume I (2006) 287 ff. Cf. also the literature referred to in *W.H. van Boom*, Efficacious Enforcement in Contract and Tort (inaugural lecture EUR) (2006) .

[28] See, eg., *Christopher Hodges*, The Reform of Class and Representative Actions in European Legal Systems - A New Framework for Collective Redress in Europe (2008) 207 ff.

[29] Cf. *Simon Roberts/Michael Palmer*, Dispute Processes - ADR and the Primary Forms of Decision-Making (2005) .

civile'). There are some advantages for victims involved: it is the State prosecution service that provides the expert witnesses, investigates the facts and causation issues and covers the legal expenses for the prosecution. Furthermore, it can make use of investigative powers which ordinary victims lack. Criminal conviction may also open up access to a national Criminal Injuries Compensation Authority. The obvious drawback of the 'partie civile' pathway is that the victims are not in full control of the proceedings. The route towards redress hinges on the actual prosecution and successful conviction of the tortfeasor. Moreover, others who are jointly and severally responsible but are not prosecuted are not affected. This merely shows that each pathway has its inherent limitations and that one should heed the suggestion that 'one size fits all torts' exists.

IV. The contributions to this book

A. Cases and reflections

The book consists of two main sections: 1) case reports from legal practice and 2) academic reflections on wider issues of mass torts. Thus, the first section brings together concrete examples of how mass tort litigation, settlement and administration work out in practice. The chapters in this section were written by expert practitioners in their field and thus give an insight into the practical operation of the law in the cases at hand. In the case reports, a sketch of the case and its facts is presented, the legal and factual issues involved as well as an impression of the stakeholders involved (eg., primary and secondary victims, liable parties, lawyers, interested associations and pressure groups, insurance companies, regulatory authorities, media and political involvement). As concerns the legal issues, questions arise such as which jurisdictions were involved (and why)? What substantive rules were relevant (tort, contract, administrative law, etc.)? Were there attempts at settling out of court? And if so, which stakeholders were involved? How did these attempts work out? If court intervention was involved, how did they manage the case? As to the dynamics of the case, issues are covered such as what were the decisive elements of the case that tipped the balance one way or the other (e.g., pressure exerted by a regulatory authority? Media attention may cause a business to settle rather than go to court over a case, etcetera). Finally, it may be considered whether in hindsight the case could have been dealt with differently (more efficiently, effectively)? And if so, what [page 13] would be the conditions under which this alternative scenario could have worked?

Here, some words on the scope of the book are in order. Mass torts come in different shapes and sizes and the word 'tort' seems malleable when combined with 'mass'. Furthermore, mass claims need not be based on tort law exclusively; they may also arise under contract law, as in cases involving the transport sector (cancellation of trains or flights, late departure) and in cases involving the sale of securities by banks, investment funds or brokers. In fact, the concept of tort heavily depends on the delineation between contract and tort in the various jurisdictions. Thus, a case of misleading information to potential investors may be considered a true tort case in one jurisdiction and a case of (quasi-)contract in the other, just as much as a case of personal injury may be framed as either the result of negligence to perform a common law duty of safety in tort law or the contractual non-performance of contractual obligations to provide safety.

Therefore, some of the issues raised in this volume may well fall within the scope of both tort and contract law. Nevertheless, the book as a whole focuses on what can be understood to be mass torts. Set in other terms, the book may even have been divided not only in two main sections but also into a number of distinct categories. As can be gleaned from what follows, at least three main areas of interest are involved: personal injury claims (airplane crashes, ship wrecking, defective products), investment claims and consumer cases (e.g., boarding denial and late departure cases, mis-selling of endowment policies). Note, however, that these three areas of interest do not necessarily have a traditional 'tort' focus and their relative relevance for policymakers (at least at a European level) is not identical. Therefore, we decided not to over-emphasize these categories but instead we categorised the contributions to the book along the two sectional lines as referred to earlier.

B. Case studies

Although other orders would have been perfectly tenable, we have decided to arrange the case studies in the following order.[30] First, under the heading of 'several events with common causes', there are two case studies on defective products and business processes which endangered life and health: asbestos and silicone breast implants. Secondly, under the heading 'one event with [page 14] multiple victims' we deal with two salient disasters that caused widespread death and injury: the grounding, tilting and capsizing of the Costa Concordia (2012, Italy) and the derailment and collision of a high-speed train in Eschede (1998, Germany). Thirdly, the theme of 'multinationals and multi-district actions' deals with the accountability in tort of multinational corporations for mass damage caused elsewhere, illustrated by the litigation of African silicosis claims against mining companies and environmental claims against Shell before UK courts. The fourth and final category of case studies involves financial markets and mass damage. One case study involves the allegedly misleading annual report of the German Telekom, a second one the Italian bank (over)charge class action and a final third one the claw-back actions by the trustee in the Madoff bankrupt estate.

1. Several events with a common cause

In the chapter titled 'The Italian 'Eternit Trial': Litigating Massive Asbestos Damage in a Criminal Court', Coggiola and Graziadei report on the criminal prosecution in Torino, Italy, of former managers and related group companies of the international asbestos manufacturing company Eternit who were held accountable for the historical actions and omissions of Italian Eternit factories. The criminal indictment was based on the lack of safety measures at the factories, which had exposed numerous employees, relatives and inhabitants living in the vicinity to the risks of asbestos related disease. The criminal trial involved numerous individuals, organisations and public authorities who joined as 'parti civili'. Coggiola and Graziadei show how the Italian legal system grapples with both the prosecution of a complex string of corporate actions and omissions – which is rather more complicated than the prosecution a one-off act with a single victim – and the involvement of multiple victims claiming compensation for hugely disparate damage in the context of one and the same criminal proceeding. The authors identify a number of pertinent questions that the Italian Eternit trial raises, such as

[30] Cf. on the typology of mass tort cases *Sonja Lange*, Das begrenzte Gruppenverfahren (2011) 3 ff.

whether the criminal trial is the most efficient way of dealing with such complicated mass damages cases. One obvious advantage the criminal trial has over tort trials is that the huge investment in the investigation of facts and causation is borne by the State judicial authorities rather than by private claimants. The downside obviously is that victims have less say in how the criminal prosecution is conducted.

Ferrari discusses the rise of mass litigation concerning silicone breast implants. After an in-depth comparative analysis of the US-origins of litigation in this area, Ferrari turns her attention to the recent PIP scandal and the [page 15] implications is has had for European medical devices safety policies. She furthermore shows that the EU products liability framework[31] may at first sight offer adequate protection against defective implants but since defectiveness and causation need to be shown by the claimant, cases involving ruptured implants are by no means clear-cut. Moreover, since manufacturers of implants and recipients may well reside in different countries (including the USA), there are inevitably issues of jurisdiction and applicable law involved. Moreover, Ferrari demonstrates that the fact that the manufacturer may enter into bankruptcy further adds to the complication of obtaining compensation. She concludes that some form of aggregation of claims – be it through class action or otherwise – is key to resolving the obstacles for individual victims and can offer judicial economy as concerns both fact-finding, leverage for settlement negotiations and 'closure' for defendants.

2. One event with multiple victims

The capsizing of the "Costa Concordia" cruise ship off the coast of Il Giglio, Italy, on January 13, 2012, is discussed by Perrella. Perrella's contribution offers insight in the different aspects involved in this mass damage event. Apart from the deplorable loss of lives and great number of injured, there are substantial insurance claims, wreck removal cost and environmental claims involved. One of the issues here is to ascertain which legal regime applies to the claims, whether maritime limitation (treaty) regimes apply[32] and what courts have competence to hear the various claims. Indeed, a class action was filed in the USA. Perrella also shows that the way in which offers for settlements are phrased and framed in the immediate aftermath of a mass damage event can be decisive for its pick-up rate and therefore its success.

Krasney reports on his experience as the Ombudsman for the victims of the 1998 rail disaster in Eschede, Germany. In Eschede, a high speed train derailed and collided with a concrete bridge after material fatigue caused a wheel to disintegrate. The disaster left 101 persons dead and some 88 injured. The German railway company DB accepted responsibility and appointed Krasney as [page 16] Ombudsman for the victims involved. The assistance supplied by DB was aimed to be comprehensive and to include both financial compensation and other support such as psychological help. As Krasney shows, the appointment of an Ombudsman by the responsible corporation itself to distribute compensation does require careful balancing in order to avoid any perceived conflict of interest or appearance of partiality and to bolster trustworthiness of the official involved. As Krasney

[31] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and adminis-trative provisions of the Member States concerning liability for defective products [1985] OJ L 210, 2933.
[32] Here, one of the conflicting issues may well be that the *lex sitae* of the ship's flag is decisive for the applicable regime to limitation while the contract of carriage may well be subject to a different law.

demonstrates, it seems that the Ombudsman successfully acted as an intermediary between the disaster victims and the liable company.

3. Multinationals and multi-district actions

In his contribution titled 'International environmental mass litigation in the UK', Marangos firstly deals with claims against Shell Petroleum for environmental damage sustained by communities in the Niger Delta following accidental oil spillage. The claims are pursued before the London High Court, which raises all sorts of conflict of laws issues, such as whether damages should be assessed in accordance with the Nigerian or English law of damages. Marangos then turns to comparable foreign cases litigated in the UK such as the BP oil spill in Colombia, the *Cape* asbestos proceedings . He asks what will be the future consequences of such cases reaching UK courts, especially in light of differences in the levels of compensation awarded in domestic courts.

Tansley discusses the pending 'South-African silicosis litigation in London'. Here, the UK courts were called upon to consider damage relating to wrongs allegedly committed in South Africa. As far as jurisdiction was concerned, the issue is whether the defendant company had its place of domicile in London – which necessitates an interpretation of the Brussels 1 Regulation (Council Regulation (EC) No 44/2001) on what constitutes 'central administration' and 'principal place of business'. Moreover, the main substantive questions turn to the duty of care of a mining company vis-à-vis workers contracting silicosis, whether there was a breach of that duty and if so, what the appropriate level of compensation is.

4. Financial markets and mass damage

Rolla reports on the use of the Italian class action procedure for recouping consumer overcharges by banks. The Italian class action statute entered into force in 2010. It allows an opt-in consolidation of homogenous claims on initiative of the original claimant. The bank charges case offers an interesting example of [page 17] how the new statutory regime can be used by consumer organisations in building a mass damages case. Meanwhile, it also shows the inherent restrictions of the opt-in consolidation process. Before engaging in such a process, the original claimant(s) needs to assess the chances of others opting in and how the costs incurred can ideally be distributed (and financed).

Tilp and Roth report on the 'The German Capital Market Model Proceedings Act as Illustrated by the Example of the Frankfurt Deutsche Telekom Claims'. The Telekom case involves private investors in Deutsche Telekom claiming compensation for allegedly false, incomplete and misleading prospectus. The facts date from the late 1990s, the first individual cases were brought to court in 2001, the Kapitalanleger-Musterverfahrensgesetz (Act on Exemplary Proceedings in Capital Market Disputes, KapMuG) was enacted in 2005 and only in 2012 were the first so-called 'model decisions' (verdicts in the KapMuG test case) handed down. And the end is not yet in sight, as Tilp and Roth demonstrate. Perhaps, what this test case procedure shows is that meticulous mass adjudication is not necessarily expeditious. Indeed, it seems that the experience with the German KapMuG shows that efficiency,

expedience and pace are not easily reconciled without abandoning the foundations of procedural autonomy and the opt-in principle in mass litigation.[33]

The contribution by Boldon discusses various tort aspects in the aftermath of the collapse of Bernie Madoff's global Ponzi scheme. The trustee in bankruptcy of Bernoff's business and estate initiated legal actions to obtain restitution of payments made to hedge funds and investors who had profited from payments before the fraudulent nature of the scheme was uncovered and who could not argue they had received these payments in good faith; some banks were also held responsible for not preventing some of these transactions. The scale of the trustee's recovery operation is immense: more than 1,000 legal actions worldwide were started for a total amount of over USD 17 billion. Settlements were reached with various defendants, enabling the trustee to claw back more than USD 9 billion and to distribute the proceeds to the fraud victims. Boldon shows that because of the international nature and the vast scale of the investments involved, both the recoup efforts and the distribution of proceeds involve numerous issues of jurisdiction, applicable law and cross-border recognition and execution. Meanwhile, the trustee's fees and legal costs are coming close to USD 1 billion.

[page 18]

C. Academic reflections

The second section of the book concerns the academic reflections on some of the themes that surfaced in the first section. The section covers a broad range of underlying legal and policy concerns. The chapters were written by outstanding scholars, experts in their fields, with a broad and comparative vision on the issues involved. Here, the volume focuses at a more general level on many of the problematic issues that were raised at case level in the case studies. How do fundamental principles of substantive tort and insurance law (such as joint and several liability, standards of proof of causation), as well as principles of civil procedure (such as rules of evidence, burden of proof and the right to be heard) stand up in face of the challenges posed by 'massification'? Can civil procedure effectively deal with aggregation of claims, collective damage actions, model cases and test case proceedings? What alternatives to litigation have developed in terms of dealing with mass dispute adjudication in tort law and related areas? Have alternative pathways to compensation been successful in addressing all stakeholders' interests in a fair and balanced way? What is the role of conflict of laws in the market for dispute adjudication services within Europe? And finally, what is the relevance of insolvency proceedings in examining responsibility and fairly distributing compensation?

The contribution by Harald Koch, entitled 'Mass Damage in Europe: Aggregation of Claims, Effective Enforcement and Adequate Representation', provides an extensive overview of the wider issues involved in designing adequate responses to mass tort phenomena in private law systems. If courts are to distribute 'effective enforcement' in mass damages cases, the question is what the goals of the underlying substantive rules are and whether the emphasis should be laid on deterrence values, fair and swift compensation or something else. Koch thus points out that both the foundations of substantive law and the suitability of the concomitant procedures need to be addressed. He then touches upon alternative pathways towards mass dispute resolution such as ADR, arbitration and

[33] Recent amendment of the KapMuG has not changed the basic design of the Act. Cf. *Astrid Stadler*, Developments in Collective Redress: What's new in the 'new German KapMuG'?, European Business Law Review 2013, 723 ff.

settlement, the limited value of test case procedures, methods of aggregation, issues of accountability in representative actions and the framework for funding mass litigation. In conclusion, he draws attention to the logistics of mass torts and the need for risk management by the companies involved.

Bernhard Koch's contribution titled 'Multiple Tortfeasors in Mass Tort Cases' deals with the issue of attributing liability in mass tort cases where more than one tortfeasor is involved and it is uncertain who caused the damage. Obviously, the first hurdle is the standard of proof. Koch shows that legal systems have adopted different approaches to this problem and that besides the [page 19] dichotomous approach of either fully attributing responsibility or fully denying it, there are such alternatives as proportionate liability, the loss of a chance doctrine and various variations of joint and several liability. Koch then moves on to model the different case scenarios in which multiple tortfeasors are involved and may or may not have contributed to the damage, and in which the injured party is or is not attributed contributory fault. Koch argues that both economic efficiency and equity should be considered in finding the most equitable framework for attributing responsibility. Moreover, he lists several factors such as the type of harm involved, the nature of the relationship between the parties and the basis of liability as relevant for the limits to imputation of legal causation. In essence, Koch poses the question whether the traditional bipartite model of litigating torts is fitted to suit mass damages cases.

In her contribution entitled 'Mass Damages in Europe – Allocation of Jurisdiction – Cross-Border Multidistrict Litigation', Astrid Stadler analyses the existing framework for litigating and settling mass tort claims with an international dimension and then discusses the need to reflect on private international law to ensure adequate responses to such issues as parallel court cases and contradictory court rulings across Europe and beyond, national differences in the civil litigation playing-field and the ensuing chances of a genuine *forum shopping* of claimants for the most favourable jurisdiction to push their claims. One of the conclusions that can be drawn from Stadler's analysis is that the EU rules on competence, applicable law, recognition and execution do not fit the legislative innovations at Member State level concerning mass tort damages procedures. Stadler concludes that the recent initiatives at EU level fail to address the private international law dimensions of mass tort litigation in Europe and that therefore the challenges posed by forum shopping within Europe will be further exacerbated. One of the possible ways to overcome these challenges is by adopting a rule of concentration of proceedings in one Member State, or so Stadler suggests.

Hodges' contribution on 'Delivering Redress through Alternative Dispute Resolution and Regulation' seeks to analyse the gradual movement from classical litigation models – or even their replacement – to alternative and online dispute resolution mechanisms (ODR and ADR). After an overview of the various methods of compensating victims outside tort law, the alternatives for resolving contract disputes (such as commercial arbitration), he turns to consumer ADR as the prototype of contemporary alternatives to litigation, the 'partie civile' method of piggy-backing on criminal proceedings and the growing involvement of regulatory authorities in particular markets (such as Ombudsmen, Financial Services Authorities etcetera) to ensure swift and adequate redress to (mostly) wronged consumers. Hodges foresees that the use of instruments such [page 20] as ADR and ODR will further spread and will indeed change the role of litigation and legal services generally.

Brinkmann's contribution entitled 'Mass Tort Related Insolvency Proceedings: Choice of Jurisdiction, Treatment and Discharge of Tort Claims' deals with the insolvency aspects of mass litigation. Three main issues are analysed, namely which court is competent to deal with mass tort claims where the tortfeasor has been declared bankrupt (the gravitational force of insolvency), whether tort victims enjoy priority or other preferred treatment in the *pari passu* distribution of assets and how discharge of the bankrupt's debts affects tort victims present and future. The insolvency aspect of mass torts is rather important conceptually as well.[34] Insolvency procedures are mainly a method of distribution scarce resources according to transparent rules. As such, the concept of insolvency, the method of asset restructuring and the role of the trustee in distributing the funds can inform policymakers and legislatures when considering new ways of dealing with the 'scarcity problem' that may be associated with mass damages.[35] Moreover, as Brinkmann aptly demonstrates, we may experience a development towards *forum shopping* of corporate tortfeasors in view of the threat of insolvency to find the most attractive 'centre of main interest' within Europe.

V. Final considerations

As can be concluded from the previous paragraphs, this volume covers the breadth and depth of mass tort litigation, negotiation, settlement, adjudication and compensation. In doing so, it offers further guidance in a highly complicated area of the law which involves concepts and principles derived from both substantive and procedural law. This volume does not offer rough and ready answers to the challenges posed by mass torts. Underlying the cases and reflections, however, is at least one issue that may merit further discussion: are we ready yet for a common pan-European approach to mass tort litigation? Is the legislature willing to step away from the traditional doctrine which holds that individuals have individual claims which are to be heard individually? Here, a balance between the fundamental right of individual audience and efficiency in [page 21] judicial dispute resolution is to be sought.[36] This search for balance is decided by several factors. One of the factors that influences legal change is *legal culture*. Where the culture within a particular legal system tends to be such that emphasis is put on principles of due process, fair hearing and precise adjudication, it will have difficulty in delivering on speed, flexibility and equal treatment of single cases. There, constitutional restrictions arguments may well be used to justify the legal status quo.[37] In other legal cultures, members of the bar are considered entrepreneurs first and 'servants of the law' second, courts are deemed to provide a legal service rather than constitute a state institution, and market solutions are preferred over state-administered and corporatist solutions. Perhaps, in such cultures certain legal solutions for the challenges posed by mass tort litigation would be considered more appropriate than others.

If European legal systems are to tackle the issue of mass tort litigation and the fair, efficient and expedient settlement and adjudication of mass torts, they need to rebalance both substantive and

[34] On the conceptual similarities and differences between insolvency and mass tort actions, see cf. *Richard A. Nagareda*, Mass Torts in A World of Settlement (2007) 161 ff.
[35] Another procedure that may offer fresh insights into how to distribute among mass tort victims, is the maritime procedure for general average procedure (dispatch).
[36] *Willem H. Van Boom*, De Minimis Curat Praetor – Redress for Dispersed Trifle Losses, 4 Journal of Comparative Law 2009, 177.
[37] Further on constitutional limitations according to German law, eg., *Lilly Fiedler*, Class Actions zur Durchsetzung des europäischen Kartellrechts (2010) 237 ff.

procedural law and principles. So, if procedural rules need to be adjusted in light of mass tort cases, perhaps so does substantive law. For instance, in dealing with mass trifle loss cases (ie, those cases where a large number of persons are affected but each suffers a minor financial loss) , both the procedural right of individuals to a fair hearing and the substantive law of damages (skimming-off, restitutionary damages, cy-près solutions) may need rethinking.[38] If we acknowledge that mass torts are 'different' and that they deserve different rules, why would that only apply to rules of civil procedure? In turn, this raises the question whether victims of mass torts deserve 'special treatment'. Bernhard A Koch raises the interesting point that it seems that in mass tort cases victims have higher chances of receiving (higher) compensation than single victims in singular tort scenarios have.[39] Does the fact that there is a multitude of victims indeed lead to higher success rates, eg., through the increased legal pressures on the tortfeasor(s) and the leverage that crowds have, the involvement of media and politics and other such factors? If so, this might also explain the pressures on the legal system to amend procedural rules and even substantive rules (eg, on burden of proof concerning causation) to deal with mass tort cases more effectively, swiftly and efficiently.

The way forward for the European Union is unclear. Given the differences in national legal culture, and the simmering hotchpotch of legislative innovations at Member State level, perhaps the recent decision to keep to recommendations is the wisest possible for now. Yet, the contributions by Stadler and Brinkmann as well as the some of the case studies show that in the near future the least that European Union could do is to design unambiguous rules on court competence, applicable law, stay and priority of proceedings, recognition and execution and insolvency aspects in mass tort litigation.

[38] For an interesting sociological approach of the various interests that collective (damages) actions could ideally take into account, see *Ludwig von Moltke*, Kollektiver Rechtsschutz der Verbraucherinteressen (2003) 101 ff.
[39] Koch nr 62 fn 52.