

The Efficacy of Enforcement in Tort and Contract

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Three features of enforcement in tort and contract

■ The *ex post* feature

- Remedies usually targetted at making right the wrong after the event
- Compensation of damage after negligent act
- Rescission of contract after mistake, fraud etcetera

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■ The *restoration* feature

- The specific claimant must as much as possible be put in a situation that resembles the hypothetical situation without the wrong
- Specific calculation of damage, taking all circumstances into account
 - Reinstating original positions after invoking nullity
 - No concrete statutory rules, merely broad principles

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■ *The specificity feature*

- Every individual has to secure his own position (autonomy to claim his own damage, invoke nullity in his contract et cetera)
- With regard to injunctive relief, declaratory relief et cetera, the claimant has to show standing in court (is his legal interest at risk?)
- In principle, abstract claims or claims with a general interest are not allowed

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Three examples of underenforcement

- Court decisions on employers' duty of care
- Invariably decided *after* the event
 - Precise phrasing of duty often related to specific circumstances of the case
 - Primarily aimed at restoration

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■ Court decisions on contractual information duties

- Restoration: too much or too little?
- Neglecting duty of care to obtain informed consent without causing physical damage
- Bankers' liability for misrepresentation

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■ Minor nuisances and dispersal of economic harm

- Passing on of harm in case of competition law infringement (who is suffering?)
- Individually uneconomical to file claim (too small)

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Possible causes

■ The ex post feature and ownership of problems

■ Causation, damage, and the restoration feature

■ Dispersal, passing on and the specificity feature

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Routes to efficacy

■ Public agencies filling the gap

- In all three examples

■ Can private law adapt?

- Supporting self help
 - Activating interest group action?
 - Activating private initiative (class action)
- Generalizing results of private litigation
 - Expanding ambit of declaratory judgement

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How can we activate interest group action?

- Tackling *ex post* feature and *specificity* feature
 - Stimulating injunctive relief *ex ante*
 - Giving specific function to *ex ante* declaratory ruling
 - Focusing less on specific case and more on generating general rules
- Addressing the *restoration* feature
 - Collective right to profit disgorgement
 - Getting to keep the proceeds
 - Public fund for litigation cost of 'qualified entities'

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Should we activate ?

- With regard to, e.g.,
 - Preventing death and personal injury?
 - EU Consumer Directives (e.g., information duties)
 - Minor nuisances and dispersal of economic harm

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