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Article abstract

La distinction entre contrat et délit, en common law anglo-américain, et la distinction entre la responsabilité contractuelle et la responsabilité délictuelle en droit civil français ont été considérées comme fondamentales dans la théorie juridique classique des deux systèmes. Peu importe, en effet, qu'en droit civil les obligations contractuelles et les obligations délictuelles soient considérées comme deux branches d'un même sujet : le droit des obligations. La doctrine française, comme celle du common law, a accordé une attention très particulière à la nature et aux effets des deux sources de responsabilité civile. Cependant, aucun accord n'a été réalisé sur la nature précise de cette prétendue distinction, ni en common law, ni en droit civil, ce qui a contribué sans doute à un certain scepticisme sur sa validité.

Partout au cours du vingtième siècle, les domaines de la responsabilité contractuelle et de la responsabilité délictuelle ont subi de grands changements dans leur étendue propre et dans leurs rapports mutuels. En droit anglo-américain, on remarque actuellement une tendance vers une certaine convergence entre contrat et délit, qui, selon certains auteurs, les rend susceptibles d'être analysés comme obligations pures et simples. Cette tendance opère aussi une certaine convergence entre le common law et le droit civil.

Dans ce commentaire, nous examinerons d'abord ces deux sortes de rapprochement relativement au problème du cumul ou du non-cumul de la responsabilité délictuelle et de la responsabilité contractuelle. Puis, nous suggérons que, malgré certains changements récents vers lesquels le common law tend à se rapprocher du droit civil, des différences importantes demeureront probablement entre contrat et délit, et entre common law et droit civil au titre des obligations. Toutefois, nous remarquons une troisième tendance à convergence qui semble être plus profonde et qui est en train de transformer à la fois le common law, le droit civil, et le droit des obligations. C'est la tendance du droit administratif dans les grands états bureaucratiques du vingtième siècle à s'emparer d'un nombre croissant de matières qui appartenaient autrefois au domaine des obligations, ce qui rend de plus en plus indistincte la démarcation entre contrat et délit, entre droit public et droit privé, et entre common law et droit civil.

OBSERVATIONS ON THE RELATIONSHIP BETWEEN CONTRACT AND TORT IN FRENCH CIVIL LAW AND COMMON LAW*

by Mary Ann GLENDON**

La distinction entre contrat et délit, en common law anglo-américain, et la distinction entre la responsabilité contractuelle et la responsabilité délictuelle en droit civil français ont été considérées comme fondamentales dans la théorie juridique classique des deux systèmes. Peu importe, en effet, qu'en droit civil les obligations contractuelles et les obligations délictuelles soient considérées comme deux branches d'un même sujet: le droit des obligations. La doctrine française, comme celle du common law, a accordé une attention très particulière à la nature et aux effets des deux sources de responsabilité civile. Cependant, aucun accord n'a été réalisé sur la nature précise de cette prétendue distinction, ni en common law, ni en droit civil, ce qui a contribué sans doute à un certain scepticisme sur sa validité.

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* This article is based on a paper delivered by the author at the second plenary session of the 1980 meeting of the Canadian Association of Law Teachers at the University of Quebec in Montreal, June 4, 1980. In its original form, the paper was a synthesis of and commentary on papers given by Professor Barry Reiter of the University of Toronto Law Faculty and Dr. Nicola Palmieri of McGill University, entitled, respectively, "The Interrelationships between Contract and Tort in Canadian Common Law" and "Developments in Civil Liability: from Contract and Delict to Imposed and Assumed Duties".

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SUMMARY

The distinction between contract and tort in Anglo-American common law, and between contractual and delictual responsibility in French civil law, has been treated as fundamental in the classical theory of both systems. Even though the civil law regards obligations arising from contract and those arising from delict as belonging to the single field of obligations, French legal scholars, like their common law counterparts, have devoted a substantial body of writing to the distinctions and the relations between the two headings of liability.[1] However, the fact that no agreement has been reached in either system on the precise nature of the asserted distinction has undoubtedly contributed to the skepticism about it that is now widespread in both systems.[2]

Under persistent challenge, the distinction has become eroded in theory and practice to the point where certain authors have plausibly demonstrated that, in the common law, large areas of what was traditionally called tort or contract, are becoming susceptible to analysis on a unified set of principles as "obligations".[3] Thus, in this sense, the common law can be said to have become "civilized". But, characteristically, "civilization" has not brought solutions to all the problems in this area, since, not only the French, but nearly all the civil law systems, still insist on a distinction for certain purposes between those obligations that are contractual and those that are delictual in origin.[4] Nevertheless, as this article aims to show, it is possible to identify not only an increasing convergence between contract and tort in both civil and common law, but also a certain convergence of civil and common law in these areas.

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1. A. TUNC, *Introduction*, in Vol. 11, (Torts), of THE INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pp. 11, 23-24 (A. Tunc ed; Mohr, Tübingen 1973).

2. Skepticism yielded to cynicism in Kessler and Gilmore's observation that:

   "The exact location of the dividing line between contract and tort is of course a mystery which the high priests of the legal profession have always been concerned to preserve and protect from public view."

   F. KESSLER & G. GILMORE, *Contracts: Cases and Materials* 1020 (2d ed., Little Brown, Boston, 1970).

3. G. GILMORE, *The Death of Contract*, 90, 94 (Ohio State, Columbus 1974); B. REITER, "Contracts, Torts, Relations and Reliance," in *Studies in Contract Law* 235, 236, 311 (B. Reiter & J. Swan eds., Butterworths, Toronto 1980).

4. TUNC, *supra*, n. 1, at 19-20. Senegal and Czechoslavakia have legislatively abolished the distinction, *Id.*, at 29, but whether they have succeeded in eradicating it in practice is unknown.

In the first place, the significance of the contract-tort distinction is diminishing in practice in both systems as the judges move increasingly to a pragmatic, functional approach to civil liability. Theoretically, civil law systems should have been aided in this movement by their built-in systematic approach to the law of obligations. Fuller and Perdue, in a now-classic article, attempted to furnish the common law with such an approach.[5] They saw that a reconceptualization of the traditional common law categories would supply an analytical advantage of a type that was already inherent in civil law theory, and they pointed out that "the breaking down of these departmental barriers" between tort and contract was the first step to coherent analysis of "the general problem of the legal sanction to be given expectancies created by words or conduct in terms of the policies involved."[6] However, neither the structure of the civil law of obligations nor the pioneering article of Fuller and Perdue gave much impetus to major new theoretical work in either system until what Gilmore has called the process of "doctrinal disintegration"[7] was well underway. Recent common law literature, inspired directly or indirectly by Fuller and Perdue, along with the developing case law, has increasingly rejected the traditional categories. Impressive demonstrations have now been made in Canada, England and the United States that liabilities in tort and contract may not be so differently grounded as classical (19th century) theory suggested.[8] At the same time, in modern French

5. FULLER & PERDUE, "The Reliance Interest in Contract Damages" (pts. 1 and 2), 46 *Yale L. J.* 52, 373 (1936).

6. FULLER & PERDUE, *op. cit. supra*, n. 5, part 2, 46 *Yale L.J.* 373, 419 (1936): "We have already sufficiently intimated our opinion that the breaking down of these departmental barriers would represent a distinct service to legal thinking. If these ancient boundaries were erased, it would become possible to analyse the general problem of the legal sanction to be given expectancies created by words or conduct in terms of the policies involved, and it would be perceived that these policies cut across distinctions in the 'nature' of the obligation. This would in turn promote a desideratum already recognized, — that the obvious (though generally unexamined) interrelations of contract, deceit, estoppel, and warranty be brought into some coherent pattern." It was not until some 40 years after this was written, and after major change had already taken place in the case law, that the "service to legal thinking" Fuller and Perdue performed began to be widely appreciated by scholars. The importance of their work was early recognized by another far-sighted legal thinker, Malcolm Sharp. See SHARP, "Promissory Liability" (pts. 1 and 2), *7 U. Chi. L. Rev.* 1, 250 (1939), pp. 17, 20.

7. GILMORE, *supra*, n. 3, at 101.

8. In addition to GILMORE and REITER, *supra*, n. 3, see also P.S. ATIYAH, *The Rise and Fall of Freedom of Contract*, pp. 2-4, and ch. 22 (Oxford: Clarendon Press, 1979).

doctrinal writing, there is strong criticism of the French theory of *non-cumul* (the idea that the two headings of liability must be mutually exclusive and that a breach of contract cannot at the same time be a tort).[9] Dr. Palmieri, writing from a civilian point of view, has urged unification of remedies on a functional basis for differently grounded types of liability.[10]

One need not search far for the explanation of the increased judicial readiness in common law systems to re-examine and reformulate traditional headings of liability, and of the renewed interest among scholars generally in the relationship of tort and contract. Starting in the late 19th century, vast changes took place within the fields then marked out as tort and contract, or civil and delictual liability. As these fields continue to change during the 20th century, it was inevitable that the relation between them should be profoundly altered in both civil and common law systems.

This article will explore some aspects of this new relationship, first, in the context of the old problem of concurrent liability. Then, various tendencies toward some degree of convergence between civil and common law "obligations" will be analyzed and placed within the larger context of trends that involve another shifting boundary, that between private and public law. Like the distinction between tort and contract, the private-public law distinction has been traditionally regarded as important, yet has eluded definition and consensus. It will be suggested, finally, that the process of what Georges Ripert and René Savatier long ago called the "publicization of private law"[11] may hold the key to the potentially most important convergence trend between civil and common law in the area of civil responsibility.

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where the author suggests the time may be ripe for a unified theory of contract, tort *and* restitution in which benefit - and reliance-based liabilities will be the major unifying factors, and in which promise-based liability will have a diminishing role.

9. See TUNC, *supra*, n. 1, at 24-25.

10. See, N. PALMIERI, "The Interrelationships between Contract and Developments in Civil Liability: From Contract and Delict to Imposed and Assumed Duties," (Paper given at the Canadian Association of Law Teachers' meeting, 4 June 1980, Montreal, and on file with the author). See also, N. PALMIERI, *Characterization of Concurrent and Alternative Claims in the Borderland of Contract and Torts: A Comparative Analysis of German, French and the Common Law*, Thesis, McGill Univ., Montreal, 1979.

11. Georges RIPERT, *Le déclin du droit, Études sur la législation contemporaine* (Paris, 1949); René SAVATIER, *Du droit civil au droit public à travers les personnes, les biens et la responsabilité*, 2d. ed. (Paris, 1950).

I- Concurrent Liability

The problem of concurrent liability lies in what Prosser has called the borderland of tort and contract.[12] The problems arising from the situation where a promisor has breached a contract and has at the same time committed a tort in relation to the contractual undertaking are both intensely practical and technically complex. The difficulties for analysis are magnified when one tries to approach them on a comparative basis. At first sight, it would appear that French civil law and Anglo-American common law have diametrically opposite approaches. The prevailing view in France still is that there can be no *cumul*: if the parties are in a contractual relation, there can be *no* cause of action in tort; if there was no contractual relationship, or if the harm was independent of the contract, there can be only tort liability.[13] The principle of *non-cumul* is, however, subject to qualifications and to certain outright exceptions. The common law systems, in apparent contrast, recognize that contractual and tort liability can co-exist but usually at some point require a choice between the two. Thus, as Tony Weir has put it, in French law you get one ticket with a stated route to your destination; in the common law you get two tickets but you must turn one in at the door.[14] In the three opinions of Justices Mayrand, Paré and Montgomery in the *Wabasso* case,[15] *Québec* is symbolically poised between these two apparently opposed views.

There are four points to be made about this apparent contrast: (1) The practical differences between the systems are probably much less than it would seem from stating the rules in this way. (2) Neither the traditional French nor the common law approach is satisfactory as judged by modern functional notions. (3) The functional approach in recent French doctrinal writing and recent United States, Canadian, and English cases is evidence of a convergence trend which potentially could produce more satisfactory results. (4) In spite of many existing similarities and even a partial convergence (*de lege ferenda*) differences between legal systems in this area are likely to persist.

12. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORT (1953).

13. J. CARBONNIER, *Droit civil*, vol. 4, 422-26, 8th ed. (Paris, 1975). This is by no means the view taken in civil law systems generally, including those which are directly inspired by French law. T. WEIR, *Complex Liabilities*, in Vol. 11 (Torts) of The International Encyclopedia of Comparative Law, pp. 27-34 (A. Tunc, ed. 1976).

14. *Ibid.*, at 25.

15. *National Drying Machinery Co.* v. *Wabasso Ltd*, (1979) C.A. 279.

(1) Two examples will have to suffice to make the first point, which is that the presence of different — or even opposite — rules on concurrent liability within different legal systems does not necessarily mean that the systems achieve significantly different results in similar fact situations.[16] In the United States, two of the commonest reasons for concern about whether an action lies in tort or contract have to do with recovery of pain and suffering damages (which are in theory only allowed in tort), and the running of statutes of limitations, which often provide for different periods and times of accrual depending on whether an action is a contract or tort action. In France, however, pain and suffering damages are recoverable indifferently in either contract or tort, and a single thirty-year period of prescription applies in principle to both delictual and contractual claims. These facts at one and the same time made *non-cumul* possible in France, and constituted major reasons for concurrent liability elsewhere.

(2) Yet, despite frequent similarity of result, both *cumul* and *non-cumul* as they are generally understood have come under attack. Both force lawyers and courts to constantly manipulate facts and legal categories depending on the benefits they perceive as accruing in the areas of damages, statutes of limitations, standards of care, exemption clauses, and so on. In both the French and the common law systems, in the occasional case, doctrine alone has prevented a person from receiving compensation for harm he has suffered.

(3) Consensus is therefore gradually emerging that issues such as measure of damages and prescription should be decided on a more rational basis, rather than according to how they are labelled. In this spirit Dr. Palmieri has put forward a proposal for resolution of the problem of concurrent liability.[17] He begins with the proposition that one set of facts may give rise to multiple breaches which generate a single claim leading to a single recovery, diversely grounded. (Since no one would claim that a person should recover twice for conduct which could be viewed either as tortious or as a breach of contract, it is probably immaterial whether we view such cases as giving rise to a single claim doubly grounded or to two claims for a single satisfaction.) What is important is, first, how the

16. For a detailed treatment of this point, see WEIR, *supra*, n. 13, at pp. 6-24, on which this paragraph is based.

17. PALMIERI, *Developments in Civil Liability: From Contract and Delict to Imposed and Assumed Duties*, p. 16 (1980), *supra*, n. 10.

incidental rules on limitations, burden of proof, exemption clauses, etc., are applied; and second, whether, in appropriate cases, what we now call tort liability and contractual liability could be cumulated so that full and adequate compensation can be made. As to these two problems, Dr. Palmieri has suggested that the bases of the claim should be coordinated to get the result most appropriate under all the circumstances and that the victim should receive full compensation for all his harm. This would involve not only a rejection of the French theory of *non-cumul* but also of the common law option between the two headings as an approach to applying incidental rules or to assessing damages.

A view remarkably close to Dr. Palmieri's, though nowhere systematically presented, is beginning to find its way into recent United States cases. It is true that the great tort scholar Prosser cautioned in 1953 that United States law on this subject is "a snarl of utter confusion from which no generalization can be derived except that there is almost complete disagreement."[18] However, since Prosser surveyed the field, it has become increasingly clear that the differences between the jurisdictions are often more apparent than real. The high degree of similarity of results, together with the appearance of unifying trends in the more recent cases, permit at least a few general observations pertinent to the matters here under consideration.

In the United States, the starting point is with modern civil procedure rules. A plaintiff is not only free to pursue alternative or even inconsistent theories and thus to sue in *both* tort and contract, but he need not even specify one or the other. It is sufficient if he merely states the facts upon which his claim for relief is based and leaves it up to the court, if it wishes, to characterize the cause of action. In fact, if the plaintiff does characterize his claim, his choice will not bind the court. If the plaintiff chooses the "wrong" characterization, the court will not deny relief under the "right" heading because of the plaintiff's mistake. To this extent, most American courts seem to have comfortably settled into a practical approach in which their decisions on whether the gist of a suit is in tort or contract are very much affected by their attitude toward the rule which the plaintiff is trying to invoke or avoid.

So the interesting question now becomes whether in some cases a plaintiff will be allowed to have the distinctive advantages of *both*

18. PROSSER, *supra*, n. 12 at 434.

contract and tort — say where contract law would offer expectation damages, ordinarily denied in tort, and where tort law would offer compensation for pain and suffering, ordinarily denied in contract cases. Piecing together existing cases, one can venture a cautiously affirmative answer to this question. First of all, on the present state of the law in most jurisdictions, it seems that a prudent practitioner is well advised to adopt something like Dr. Palmieri's theory in pleading, that is, to ask for addition of damages to the extent that this does not involve double recovery for a single harm. The behavior of the U.S. courts in such cases is consistent with Professor Reiter's analysis of the recent Canadian and English decisions.

There is no shortage of cases, old and new, where U.S. courts have expanded either tort or contract theory to give full relief under one heading, thus blurring the distinction between the headings. What is significantly different about a few recent cases is that some courts are openly expressing distaste for purely doctrinal barriers to causes of action, and are consciously striving for consistency of results in recurring fact situations. Two recent Massachusetts cases from the area of legal malpractice illustrate this last point. In 1974, in *Hendrickson* v. *Sears,* the Massachusetts Supreme Judicial Court had to decide whether a cause of action by a client against an attorney for negligent certification of title to real estate was barred by the statute of limitations.[19] This issue in turn hinged on the question of whether the claim accrued as of the time of certification, or as of the time the mistake was, or should reasonably have been, discovered. The complaint did not label the action as in contract or tort, but Massachusetts statutes provide that a contract action must be commenced within six years, and a tort action within two years after accrual. Since the attorney's malpractice took place more than 10 years before the suit was brought, the crucial issue was the time of accrual which is a matter for judicial determination. Traditionally, the Massachusetts courts have said that an action for attorney's malpractice is essentially *contractual,* and that the cause of action accrues from the time of the malpractice. But in 1974 the court began its opinion by asserting, "That limitation statutes should apply equally to similar facts regardless of the form of the proceeding is intrinsically a sound proposition."[20] The court then proceeded to bring legal malpractice into line with a group of *tort* cases where the cause of action is held to accrue upon discovery, or the happening of an event likely to put the plaintiff on notice. The court stated that the

19. *Hendrickson* v. *Sears,* 365 Mass. 82, 310 N.E. (2d) 131 (1974).

20. *Ibid.,* 365 Mass. at 85, 310 N.W. (2d) at 131.

practical and policy reasons for such a shift were "overwhelming." It spoke especially of the reliance that clients place upon the attorney's title search and the reasonable expectations entertained in such situations, particularly where, as in Massachusetts, an attorney's title certification is widely regarded as an alternative to title insurance. The court permitted the plaintiff to sue without bothering to say whether the action was in tort or contract.

Then in 1979, in *McStowe* v. *Bornstein,* the court considered a suit brought by a client injured by an attorney's failure to timely file a claim.[21] The case (surprisingly) was brought as a *tort* action against the estate of the attorney, now deceased. Under Massachusetts law, contract actions survive the death of the defendant, but tort actions, with certain exceptions, do not. The Court might merely have corrected the plaintiff's "mistake" and characterized the action as contractual. But it did not. The Court began this time by saying that "A client's claim against an attorney has aspects of *both* a tort action and a contract action."[22] Then, citing its 1974 decision, it said, "We have looked with disfavor on rigid distinctions between contract and tort and are more concerned today with substance than with form."[23] It concluded that the existence of a contractual relationship between the parties permitted the action to survive the defendant's death, reversing earlier cases to the contrary. Both of these cases are consistent with Canadian trends analyzed by Professor Reiter.

Cases like *Hendrickson* v. *Sears* and *McStowe* v. *Bornstein* suggest that the United States may already be well on the way to a situation where the courts will not require one ticket to be turned in at the door, and where different kinds of damages will be cumulative, subject to safeguards against double recovery and double accounting. Indeed, in two other recent cases, this is precisely what the courts have done. In 1979, a federal district court in Minnesota allowed what it called "aggregation" of damages in a suit based on breach of contract, common law fraud, and violation of federal and state securities law.[24] In this case the court treated a single act as both a tort and a breach of contract, and, with very little discussion, awarded damages under both headings except where it

21. *McStowe* v. *Bornstein,* 388 N.E. (2d) 674 (Mass. 1979).

22. *Ibid.,* 388 N.E. (2d) at 676.

23. *Ibid.,* 388 N.E. (2d) at 677.

24. *Boerth* v. *Lad Properties,* 82 F.R.D. 635 (D. Minn., 1979). See also *Fletcher* v. *Western National Life Ins.,* 10 Cal. App. (3d) 376, 89 Cal. Rptr. 78 (1970).

thought such damages would be "duplicative." The court stated, succinctly:

> Recovery in tort does not preclude further recovery for breach of contract, provided the plaintiff does not recover damages in excess of the actual injury sustained.[25]

In the second case, the court was more reflective about what it was doing. The plaintiff had sued a Hawaii resort hotel for breach of contract and for punitive damages for refusing to honor his vacation reservations. The Supreme Court of Hawaii, saying that "certain situations are so disposed as to present a *fusion* of the doctrines of tort and contract," gave him contract damages for his out-of-pocket losses plus damages in tort for emotional distress.[26] The court stated that it preferred to accumulate the damages this way rather to strain "the traditional concept of compensatory damages in contract to include damages for emotional distress and disappointment."[27] The concurring judge agreed with the result but not with the manner of reaching it, saying that, in his opinion, "It seems far... preferable to strain the traditional concept of compensatory damages than to rupture the foundations of tort and contract liability."[28] There thus appears to be ample support in United States law for Professor Reiter's theory that common law tort and contract are "collapsing into a 'law of obligations',"[29] and for Dr. Palmieri's view that damages should be cumulative in order to assure full, but not double, compensation. In the newer cases especially, the courts everywhere are considering individual circumstances more than ever, and consciously striving to protect reasonable reliance and expectations.

(4) The fourth point to be made on the subject of concurrent claims is that, despite many similarities of result and of trends at the most general level, certain differences between legal systems in this area are likely to persist. In the first place, the significance of the distinction between tort and contract in French and common law is, as suggested above, different. This difference follows in no small measure from the structure of the legal system itself, including particularly its procedural rules. I will not go into detail on this here. However, one must not underestimate the importance of this fact,

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25. *Boerth* v. *Lad Properties*, 82 F.R.D. at 646.

26. *Dold* v. *Outrigger Hotel*, 54 Hawaii 18, 22; 501 P. (2d) 363, 371-72 (1972).

27. *Ibid.*, 54 Hawaii at 22, 501 P. (2d) at 372.

28. *Ibid.*, 54 Hawaii at 27, 501 P. (2d) at 374.

29. REITER, *supra*, n. 3 at 236.

especially for a system such as *Québec's* that is inspired by French law and influenced by common law. The fact is that, so long as any distinction between tort and contract remains, the resolution of the problems of concurrence of claims will depend on the *effects* of concurrence or non-concurrence within a particular legal system. Thus, as a practical matter, what seems to be desirable is to frame the incidental rules with reference to specific issues rather than with reference to the categories of contract and tort. For this purpose, Dr. Palmieri would differentiate according to whether the duty involved is imposed by law or assumed by the parties, while Professor Reiter would differentiate by inquiring into how the parties are related.[30] Weir would distinguish according to the type of harm suffered.[31] Tunc would unify the incidental rules governing delictual and contractual liability.[32] However, even if one of these alternative and possibly more rational approaches is adopted, it is still likely that different legal systems will, sometimes, reach different policy decisions on the incidental rules, particularly with respect to the role of contract in subtracting from imposed duties. But at least the policy decisions will be more conscious and explicit, not masked by more or less arbitrary labels. In the process, of course, the distinction between contract and tort will be attenuated.

In both civil and common law, contractual and tort liability are intertwined to a great extent, and, in varying degrees, the significance of the distinction between them has been reduced. But, at the present time, the distinction between tort and contract, elusive though it may be, still has some vitality in the minds of practitioners and judges, although it has lost vitality in the *behavior* of judges over time. This change in judicial behavior makes it possible for legal theory to begin reconceptualizing the issues along new lines. Whether the distinction between tort and contract will disappear entirely, however, is doubtful. Even Professor Reiter, after arguing that the only question in concurrent liability cases should be what is appropriate to do in the particular

30. PALMIERI, *supra*, n. 10 at p. 17; REITER, *supra*, n. 3 at 264. It seems questionable whether Dr. Palmieri's proposed distinction would facilitate a more rational approach to the type of situation involved in a given case. Like the distinction between tort and contract, the borderline between imposed and assumed responsibility is blurred. Imposed duties may be mandatory or exemptable, and assumed duties in the developed nations are always and everywhere regulated to some degree. See text *infra*, at n. 42 et seq.

31. WEIR, *supra*, n. 13 at 21.

32. TUNC, *supra*, n. 1 at 28.

case before the court in light of the relation between the parties there involved, concedes that, "there will fairly be some elements of contract and some of tort that must be considered in elaborating a proper legal response."[33] With this, one is reminded that systems such as the French with a unified law of civil responsibility, have found nevertheless that different types of obligations seem to lend themselves to different treatment; that, within the unified field, there are differences between "transactions and collisions" that resist complete amalgamation.[34] The common law, on the other hand, which developed various separate actions out of the writ system, is increasingly discovering that there are some common principles of obligation shared by contract and torts, and, one is inclined to add, restitution. Still, as Professor Reiter acknowledges, there may be a paradigm case of contract or tort at either end of the spectrum with a broad overlap of "obligations" in between.[35] A different observer, however, looking at the same spectrum, might see a large group of torts and contracts at either end, with a middle band mostly confined to certain typically recurring fact patterns, such as misrepresentation, that have more in common with each other than they do with the paradigmatic tort or contract situations.

As has already been mentioned, the peculiarity of the asserted distinction between contract and tort is that while nearly all legal systems have it, there is no agreement on what the distinction is.[36] Furthermore, the distinction is universally difficult to make within each system, and the practical effects in one country may be entirely different from those in another.[37] This naturally gives rise to doubts about the validity of the distinction. Tunc, one of the leading critics of the distinction, attributes it to tradition, not to reason, and approves what he perceives as a trend toward its decline.[38] Even Tunc, however, doubts that the two heads of liability — whatever they are — can or should be completely fused.[39] What seems clear is that both the common and the civil law are becoming relatively

33. REITER, *supra*, n. 3, p. 265.

34. The expression is WEIR'S, *supra*, n. 13 at 38.

35. REITER, *The Interrelationships between Contract and Tort in Canadian Common Law* (Paper given at CALT Meeting, 4 June 1980, Montreal, and on file with the author, p. 11 (1980)).

36. TUNC, *supra*, n. 1 at 11, 19.

37. *Ibid.*, at 24.

38. *Ibid.*, at 20.

39. *Ibid.*, at 27.

more liberated from doctrine than they have been in the past. Therefore, rather than linger over the residual differences, real or apparent, between tort and contract liability, let us rather turn to the assertedly expanding overlap between them.

II- The Relationship between the Fields of Tort and Contract

Within the intersection of torts and contracts the common law seems to be developing an increasingly unified set of principles — indeed a "law of obligations." Chief among the unifying factors are the expanded range of facts that may be considered by a court as legally relevant, and trends in contract law toward increasing protection of reasonable reliance and expectations.[40] At this level of generality, it may be suggested that a certain convergence is occuring occured not only between contract and tort but also between civil and common law. There is an overwhelming tendency in modern private law to avoid results based on doctrinal distinctions alone and to work toward a functional approach to concrete problems. This trend has brought along with it a movement from abstract and general rules to individualized standards, from what Max Weber called formal rationality to substantive rationality, or irrationality, as the case may be.[41] It is within this broad legal movement that I would situate the trend well-demonstrated by Professor Reiter, which seems to be fully confirmed by the United States cases, that there has been a significant expansion of reliance-based liabilities in contract and tort law.

However, I would suggest at this point that another long-run convergence trend comes into the picture, namely, a trend toward the expansion of public and administrative law at the expense of private law.[42] Thus, at the very time the area of convergence between tort and contract may be expanding, the fields themselves may be shrinking. And while the principles which are now beginning to unify the law of obligations may be more finely tuned to individual circumstances and to full compensation, the subject matter upon which they shower their benefits may be becoming smaller. Indeed a cynic might say these wholesome principles can

40. As documented throughout in GILMORE, *supra*, n. 3; REITER, *supra*, n. 3; and ATIYAH, *supra*, n. 8.

41. M. WEBER, LAW IN ECONOMY AND SOCIETY ch. XI, (M. Rheinstein ed, Harvard Univ. Press, Cambridge, 1954).

42. The suggestions in this concluding section are based on Ch. 5 of M. GLENDON, *The New Family and the New Property* (Butterworths, Toronto) forthcoming.

now have full play because they don't operate on anything really important. If this is so, then the common law of contract and torts may indeed be collapsing into a law of obligations, but the result may be like a giant star that collapses into a black hole — it is very intense, but very small in relation to its former size.

Let us briefly consider the sense in which the areas of tort and contract are shrinking. André Tunc's masterful comparative survey of tort law in the International Encyclopedia of Comparative Law provides a convenient starting point by calling our attention to the profound changes in the scope and nature of tort liability that have taken place everywhere in the industrial age.[43] Tunc begins with a paradox: on the one hand, there has been a great increase in civil liability suits because in our technological societies the constant increase in accidental harms has been accompanied by a growing unwillingness to tolerate and accept misfortune; yet at the same time, the need for *tort* liability as such has diminished because public and private insurance schemes have developed to the point where, in the industrialized countries, tort liability is no longer the main source of compensation for personal injuries.[44] With respect to the large overlap between tort law and public social security law, Tunc asserts that, in any area of great public importance, tort law has tended to follow a movement like that of industrial accidents law in France: from tort in the 19th century, to workmen's compensation schemes within tort law, then to employers' insurance schemes, then to laws requiring workers to pursue only the insurer, until finally the entire system was absorbed by the national scheme of publicly administered social insurance, and even recourse against the tortfeasor has begun gradually to disappear. As the place and role of tort law in the field of personal injury shrinks, Tunc believes that tort law tends to retreat to the fields of damage to property, business interests and moral values — areas where convergence to contract can more easily take place. Tunc therefore concludes: "[T]ort law may have reached its zenith: at the very moment when it occupies a position without precedent, it

43. TUNC, *supra*, n. 1.

44. TUNC, *supra*, n. 1 at 3-6. See also D. NOEL and J. PHILLIPS, *Cases and Materials on Torts and Related Law*, p. 358 (Bobbs-Merrill, Indianapolis 1980):

> "It is conceivable that before present-day law students are thoroughly established as practitioners much of the personal injury practice will disappear. This would leave tort law largely as a remedy for economic injury, or for incremental damage such as that from poor environmental or housing conditions."

is impregnated and surrounded by institutions which deeply modify its traditional working and put into question its functions and its domain."[45] In the same vein, an American torts coursebook in 1980 devoted an entire chapter to the "enlargement of the field of administrative law at the expense of tort law."[46]

When we turn to consider contract, we find major theorists in the throes of much the same kind of *angst* that property scholars must have experienced in the 19th century, when so many property rights began to be reconceptualized as contract rights. Grant Gilmore's announcement of the "Death of Contract,"[47] was followed by P.S. Atiyah's meticulous post-mortem examination in "The Rise and Fall of Freedom of Contract."[48] One does not necessarily have to enter into the eschatological mood of these works, in order to see that contract, like property before it, has ceased to be paradigmatic for modern legal thought. The current contract literature contains two important themes, which when put together, give us something like Tunc's paradox for contracts. In the first place, Gilmore has called our attention to the reduced importance of what Professor Reiter describes as the "gatekeeper doctrines"[49] of contract law. With the decline of the parol evidence rule and consideration and the rise of reliance, more promises become enforceable; but with the proliferation of excuse and unconscionability doctrines, *relief* from promissory liability is also increasingly available.[50] The result, as I have said elsewhere, is that contract, like marriage, is becoming easier to enter and easier to leave.[51] This may be because contract, like marriage, is becoming less important as an economic institution. A second major theme of recent contract literature supports this hypothesis. Here, the work of Lawrence Friedman is particularly important.

Friedman has pointed out how, in the United States, contract (to use his image) was forced to disgorge some of the fields it swallowed up in its 19th century heyday.[52] This did not come about through

45. TUNC, *supra*, n. 1 at 6.

46. NOEL and PHILLIPS, *supra*, n. 44, Chapter 9, p. 358.

47. *Supra*, n. 3.

48. *Supra*, n. 8.

49. REITER, *supra*, n. 3 at 238.

50. G. GILMORE, *supra*, n. 3 at 69, 81-83.

51. GLENDON, *The New Family and the New Property*, 53 Tulane L. Rev. 697, 706 (1979).

52. L. FRIEDMAN, *Contract Law in America*, pp. 17-26 (Wisconsin Press, Madison 1965).

change in contract law itself but through removal of much of its subject matter by laws that have taken priority in regulating clauses, agreements as a whole or types of contract — labor law, insurance law, antitrust, securities regulation, to name a few. This erosion has progressed to the point where the content of the most basic contracts (such as employment and rent contracts) is fixed by the law more than it is by the will of the parties. To a great extent, the agreements that are on the largest scale and most important for the economy as a whole fall into the special fields. This is especially noticeable in French and West German law where special statutes have removed whole areas from the coverage of the civil codes.

In his 1967 study of the history of contract law in the United States, Friedman's conclusion was that the general law of contract as it is taught in schools and appears in books had become (to use his word) "residuary" law.[53] Then in a 1973 comparative study, observing the extent to which public authorities everywhere permanently intervene in the formation, termination and determination of the content of the most important contracts, Friedman went further and predicted "The future of contract law may lie more and more in the administrative sector."[54] P.S. Atiyah's historical study of contract law builds on and supports Friedman's idea that the rise and fall of contract has paralleled the rise and fall of belief in the free market and of liberal philosophy.[55]

If it is true that private law has been deeply invaded and often supplanted by administrative law, this may have certain implications for the further progress of those principles of protection of reliance and reasonable expectations that have been applauded by Professors Gilmore, Reiter, and many others. Administrative law seems, in the United States at least, less inclined to protect reliance and reasonable expectations than is contract law. While contract and tort have become finely-tuned and individualized, administrative law tends to be abstract, general, formal and volatile. This last quality is of particular importance, it seems to me. The liabilities that are imposed by administrative law are based neither on promises, reliances or expectations. Rather they tend to reflect the balance of power of conflicting interests in society at any given time and to shift when these do. This is of course true of all law to some

53. *Ibid.*, at 17.

54. FRIEDMAN, *The Impact of Large Scale Business Enterprise Upon Contract* in Vol. VII, Ch. 3 of THE INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, p. 17 (A. von Mehren ed. 1973).

55. ATIYAH, *supra*, n. 8, Ch. 22.

extent. But, as Professor Bernard Audit has pointed out, the fact that regulatory and administrative law is particularly sensitive to social and economic stress and instability probably explains why French Civil Code revision has not succeeded in reintegrating the law of obligations and the law of property from the special statutes into the Civil Code.[56] The law of the special statutes resists codification and even authoritative restatement because it is constantly changing.

It seems appropriate to conclude these observations by taking up the image of "the two solitudes" (Canadian civil and common law) that was chosen as the general theme of the 1980 meeting of the Canadian Association of Law Teachers at which the relationship between contract and tort was a major topic. As Quebec and Louisiana have taught us, there is a great potential for fruitful communication and mutual enrichment between civil and common law. The "two solitudes" are different in this respect from a larger solitude that threatens to engulf both of them — the barren landscape of the bureaucratic state, where *citoyen* becomes *administré*,[57] and where the important relations are not between man and man, but with large organizations — public and private. The relations of employment or governmental dependency are now the chief determinants of an individual's social standing and economic security.[58] Yet, this state of affairs grows of our interdependent society as surely and inevitably as does the legal recognition increasingly given by private law to reliance, and expectations growing out of relations. We must now hope that the values which have made such progress in the private law can somehow be made to penetrate public and administrative law.

56. AUDIT, *Recent Revisions of the French Civil Code*, 38 La. L. Rev. 747-749, 751, 804 (1978).

57. Theodore LOWI, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority*, p. 144 (Norton, New York 1969).

58. See M. GLENDON, *supra*, n. 42, Chapter 4.