

are those in which liability for negligent operation is involved. Under the present law of *The Netherlands*, there is only liability for fault, although Frans J. J. Van Heemstra finds that there is much discussion on the subject and that extension has been proposed for increased liability in new sections of the Civil Code which have not yet been enacted. Under *Belgian* law, according to Robert M. Gottschalk persons who have no contractual relationship can sue only on a tort theory, in which case they must prove fault. Under the laws of *Spain*, according to Milton Schwartz, products liability recovery is available only to the direct purchasers; others must sue in tort and prove fault or negligence. Peter D. Lederer reports that there is no case in *Switzerland* dealing with the problem and that it has only recently drawn the attention of the commentators.

On the other hand, an approach to our principles of law is found in the case of *France* and *England*. The study made by Dr. Doris Jonas Freed shows that French law has evolved from a strict insistence on fault to an acceptance of almost absolute liability, and I. Arnold Ross finds that products liability law in England, similar to ours, is now firmly established.

Since the study of comparative law should serve more than intellectual curiosity or the storage of useful legal facts, this study will serve a useful purpose if it will lead to realization and appraisal, and perhaps ultimately to progressive reform in some countries and judicious restraint in others.

Austria

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If this subject were to be treated to the restricted extent suggested by the title, this article would be very short, since no such specific law or legal provision exists in Austria. That, however, does not mean that a buyer, including a buyer of motor vehicles, is not protected by Austrian law. On the contrary, he is amply protected not by specific laws but by the general principles of the law of damages as set forth in the General Civil Code (*Algemeines Buergerliches Gesetzbuch*, hereinafter cited as ABGB) and in the Commercial Code (*Handelsgesetzbuch*, hereinafter cited as HG).

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In this connection it seems advisable to stress that there is no judicially created law in Austria. Article 24 of the Federal Constitution provides that: "Federal legislation is enacted by the National Council [the Assembly] together with the Federal Council [Senate]" (author's translation). Article 49 of the Constitution provides that Federal laws must be published by the Federal Chancellor in the Federal Gazette (*Bundesgesetzblatt*, or *BGBL.*) to become enforceable. Hence it is clear that "law" (*Gesetz*) can only be a provision duly enacted by the legislature and published in the Federal Gazette.¹ There is no area left for any other kind of "law" and, therefore, the concept of judicial law based upon *stare decisis* does not exist in Austria. This principle—the exclusion of precedents as a source of law—is expressly stated in Section 12 of the Civil Code, which reads in translation that: "The decisions issued in individual cases and handed down in particular litigations never have the force of law; they cannot be extended to other cases or other persons."

That does not mean that the decisions of the Supreme Court in Vienna (the highest Austrian court) are never taken into consideration; those of general interest are published and frequently followed by the lower courts because of their persuasiveness (many of them read, in fact, like scientific treatises), but they never constitute the "law."

Of course the law cannot provide for all contingencies, and therefore interpretation is a necessity. But the judge is not free in his interpretation; there are legal rules for this process, as set forth in Sections 6 and 7 of the Civil Code.

Claims for Indemnification

The greatest portion of the pertinent legal provisions can be found in the Civil Code. Several are set forth in the Commercial Code and some special cases are provided for in some special laws.² The Civil Code, of course, applies to all persons; the Commercial Code applies only to merchants.

The principal relevant provisions of the Civil Code are the following:

¹ The Austrian Federal Constitution provides for Federal and Provincial laws (*Landesgesetze*), the latter being enacted by the Provincial Diets (*Landtaege*) and published in the Provincial Gazettes. The Constitution also limits the respective powers of the Federal and Provincial legislatures.

² *E.g.*, the liability of railroads, automobile drivers and owners, and owners of air-transport enterprises for damages arising from accidents.

- § 1293: Every injury is called damage which has been inflicted on somebody with respect to his property, his rights or his person. To be distinguished therefrom is the loss of such profits which a person may well expect in accordance with the usual course of events.
- § 1294: Damages arise either from an illegal act or from an illegal omission by another person or from an accident. An illegal injury is caused either willfully or unwillfully. Willful injury is based either on malicious intent, if the damage has been inflicted knowingly and purposely, or on negligence if it is based upon inexcusable ignorance or the lack of proper attention or of proper care. Both are called 'fault.'
- § 1295: Everyone is entitled to demand from the person who is the cause of the injury indemnification for the damage which the said causer has inflicted upon him by his fault, whether the damage has been caused by a breach of a contractual duty or without any relation to a contract. . . .
- § 1296: In doubtful cases, the presumption prevails that the damage arose without any fault of another person.
- § 1297: But it is also presumed that every person of sound mind is capable of such a degree of care and attention which can be applied on the basis of normal intellect. Whoever, acting in a way causing an infringement of another's rights, fails to apply this degree of care or attention, is guilty of a wrong.

See also in this connection the Commercial Code Section 347 (1):

Whoever [acts] in a transaction [as] a commercial dealer . . . is obligated to act carefully towards another [and] must apply the care of a regular merchant.

The above provisions show that in general no distinction is made whether the damage arose from a contractual relationship or otherwise (*ex delictu*). Of course there are certain distinctions between contract and delict (civil fraud, including negligence).³ In this connection the relevant provisions on contracts are as follows:

§ 922, Civil Code: If a person transfers a thing to another person for a consideration,⁴ he guarantees that it has the expressly stipulated or the normally supposed quality and that it can be used or

³ Special warranties and their consequences are omitted from this discussion; they are additional provisions in a contractual relationship, existing only between the parties thereto, and therefore they must be judged in accordance with their wording.

⁴ In Austrian law, consideration is not a condition for the validity of a contract unless it is an essential part thereof.

employed in accordance with the nature of the transaction or pursuant to the special stipulation.

§ 360, Commercial Code: If an article is to be delivered which is defined only with respect to its type, then commercial merchandise of medium sort and quality must be delivered.

In other words, if no warranty exists and if no special declaration with respect to the merchandise was given, the merchandise must be of merchantable, or average, quality and usable for its purpose ("commercial" merchandise is required from a merchant). The seller is liable to the buyer for any deviation therefrom and for any damages connected with it. As can be seen this code provision is about the same as what we in the United States would call an "implied warranty." If, therefore, a vendor sells a defective motor vehicle, he is certainly liable to the buyer for damages *ex contractu* on the basis of the sections quoted above.⁵ Thus, the retail dealer may have redress against the wholesaler (if any) or the manufacturer, if he purchased the vehicle directly from the latter, and a wholesaler redress against the manufacturer. The remaining question is whether the buyer who has suffered the damage can assert a direct claim against a wholesaler or manufacturer. The answer is generally in the affirmative, provided of course that fault on the part of the manufacturer or wholesaler can be proved.

Causes of Action

Substantively, we must deal with two different causes of action. The first is the contractual liability between buyer and retailer, retailer and wholesaler (if any), retailer and manufacturer (in the case of direct purchase from the manufacturer), and wholesaler and manufacturer. The code here uses the expression "*Gewährleistung*," i.e., guaranty or warranty (§§ 1295 & 1297, ABGB; § 347 (1), HG) to describe the seller's duty. In the absence of express warranty (in which case the stipulation prevails), the seller assumes the responsibility that the goods sold by him are at least of medium, average quality and are usable for the purpose implied in the transaction in question (See § 922, ABGB, and § 360, HG). In the case of a purchase of a new motor vehicle the provisions of the Commercial

⁵ This report deals only with liability as such and with the question as to which persons are liable. We have therefore not discussed in which way and to what extent indemnification is to be calculated.

Code will normally be applicable in most instances because, as a rule, one purchases a new car from a professional dealer.⁶

The second cause of action assumes no contract. If for lack of a contractual relationship the provisions concerning contractual sales relationships are not applicable, the buyer can nevertheless resort to the general principles of the Civil Code concerning liability for fault, as shown above in Sections 1294 through 1297 of the Civil Code. Thus liability *ex delictu* is based upon the principle that a person is liable to *anybody* who is damaged by his fault. "Anybody" includes, especially, the buyer of a motor vehicle. Thus in a case where a buyer is asserting a damage claim against a manufacturer from whom he has not directly purchased, he must prove that the manufacturer is at fault. An intentional fault will probably be rare, but certainly any failure in the motor, the chassis, or the body could involve negligence and, pursuant to Section 1294 of the Civil Code, negligence is also a fault creating civil liability. Proof will not be too difficult; the mere fact that something is wrong in the construction of the car is necessarily to be traced back to the manufacturer unless the latter can prove that a defect was caused later by an intermediary (a wholesaler or retailer). In addition thereto, it is the duty of the manufacturer to inspect the finished product thoroughly before it is put on the market, and the omission of such a duty is certainly an act of negligence attributable to him. It might be more difficult for the buyer to claim damages against the wholesaler, since the latter has nothing to do with the construction of the car. Apart from the hardly credible fact that he tampered with the car in question (which would be considered as intentionally damaging the same), he might be considered negligent for omitting the inspection of the car before delivering it to the retailer. Such a cause for liability might be doubtful and difficult to prove. If, however, the buyer buys directly from the manufacturer, then the latter is in direct contractual relation with the buyer and liable on the basis of the contract. In that case the buyer could rely upon the contractual liability based upon implied guaranty or upon liability *ex delictu* or both.⁷

⁶ While there are also dealers (merchants) who sell second-hand merchandise, many second-hand transactions are entered into between private persons, especially in the car business. While in the latter case the Commercial Code is not applicable, the provisions of Section 922, Civil Code, and some of the succeeding sections are sufficient to protect the buyer.

⁷ Apart from the texts of the pertinent codes, especially those quoted in this report, the writer has relied principally upon the *Commentary on the ABGB* by

Conclusion

Before reviewing briefly the Austrian law in comparison to the U.S. law, two points of difference must still be mentioned:

(1) The three types of damages prevailing in the United States—"nominal damages," "compensatory damages," and "punitive damages"—are alien to Austrian law. The latter recognizes only "compensatory damages," which means that concrete damage must have been inflicted if a valid claim for indemnification is to be asserted. Included therein is indemnification for physical injury or even mental suffering and the like. Such damage must be pleaded and proved, and without actual damage there is no indemnification.

(2) In the case of a contractual relation (sale), the buyer has various remedies, such as rescission of the contract, with or without damages, or refusal to accept delivery if the goods are not considered to be in conformity with the contract. If the defect was not essential but nevertheless diminished the article's value, a claim for appropriate reduction of the price may be asserted (*quanti minoris*).

According to Section 1324, ABGB, the claimant is entitled to what the law calls "damages properly speaking" if the damage is caused merely by slight negligence. Pursuant to Sections 1323, 1324, and 1331, however, he may claim "full satisfaction" if the damage was caused intentionally or by gross negligence. This "full satisfaction" consists of the damages plus indemnification for lost (including future) profits insofar as they can be anticipated in the regular course of events. If, however, the damages was caused by a criminal act or through mischievousness and malice, then a claim for "special damages in respect to sentimental value" can be raised.

In comparison to the American principles as set forth in the Restatement (Second) of Torts, Section 402 A,⁸ we find that the

Professor Heinrich Kland (Vol. 3 on §§ 859-932 and Vol. 4 on §§ 1293-1341), one of the best known works, and upon the leading textbook, Volume 2 of the *System of the Austrian General Private Law* by Professor Armin Ehrenzweig, the volume dealing with the law of obligations, contracts as well as *ex delictu*. It must be noted in this connection that in Austria the opinion of scholars, set forth in commentaries, textbooks, treatises, monographs, is of far greater authority than court decisions, which vary much more frequently than those in the United States. Insofar as court practice has been established, applicable decisions are cited by scholars and in annotations to the code sections in annotated editions of such codes.

⁸ Section 402 A of the *Restatement (Second) of Torts* reads as follows:

SPECIAL LIABILITY OF SELLER OF PRODUCT TO USER OR CONSUMER.

(1) One who sells any product in a defective condition unreasonably danger-