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The Work of the European Group on Tort Law – The Case of “Strict Liability”

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1. The European Group on Tort Law

In 1993 Jaap Spier, at that time Professor at the University of Tilburg in the Netherlands, called together a working group to discuss the fundamental questions concerning tort law on a comparative basis. The limits of liability were first examined. The results of these deliberations were published in two volumes¹. Subsequently, quite a demanding project was begun – the drafting of „Principles of European Tort Law“ – which should serve as the basis for a future European tort law.

One member of these first years, Christian von Bar, soon went on to pursue his own project. The remaining Group, now also well-known under the name „European Group on Tort Law“, has grown considerably and today comprises over twenty members from most EU Member States², from Poland and the Czech Republic³, but also from Switzerland, where a comprehensive tort law reform co-authored by our member Pierre Widmer is currently under discussion.

It probably comes as no surprise that there are also members from the United States – Dan Dobbs from the beginning, later on the general reporter of the new (third) *Restatement on Torts*, Gary Schwartz, who deplorably passed away last year. His co-author Michael Green stepped in in the meantime. Inviting U.S. experts does not mean, however, that their jurisdictions are considered

¹ J. Spier (ed.), *The Limits of Liability: Keeping the Floodgates Shut* (1996); J. Spier (ed.), *The Limits of Expanding Liability: Eight Fundamental Cases in a Comparative Perspective* (1998). Both volumes (as all subsequent ones cited later on) have been published by Kluwer Law International (The Hague).

² Austria (B.A. Koch, H. Koziol), Belgium (H. Cousy), England (W.V.H. Rogers), France (G. Viney, S. Galand-Carval), Germany (U. Magnus, M. Will), Greece (K. Kerameus), Italy (F.D. Busnelli, G. Comandé), the Netherlands (M. Faure, Edgar du Perron, J. Spier), Portugal (J.F. Sinde Monteiro), Spain (M. Martín Casals), Sweden (B. Dufwa).

³ Poland is represented by M. Nesterowicz, the Czech Republic by L. Tichy.

primary role models for European legal systems. It is nevertheless inevitable to at least consider the developments in the United States. Furthermore, their experience gained in the creation of *Restatements* is of invaluable help to our own work.

It may surprise at first sight that a “European Group” also include members from Israel⁴ and South Africa⁵. There is good reason for this, however: South Africa has a mixed legal system which is built upon continental European and English law and therefore is a good example of the blending of common and civil law⁶. Israel is of the same interest since she has experience with codifying English case law. Furthermore, her law of torts is also currently under substantial revision.

In order to create a secure institutional basis for the drafting of the *Principles*, the “European Centre of Tort and Insurance Law” (ECTIL) was founded in Vienna at the beginning of 1999. ECTIL also undertakes further research projects in the field of tort and insurance law.⁷

2. The Principles of European Tort Law

There is certainly no single standard recipe for concocting and structuring principles of tort law. All European legal systems have at least in part followed quite different flavours and therefore offer quite a mixture of possible ingredients.

There are basically two poles on the scale of possible rule-making combinations. On the one hand, one might regulate every single specific problem as such expressly (even though this might be done on the basis of one common theoretic foundation). On the other hand, one could think of a (certainly much shorter) list of general clauses, which as a result would leave the judge with quite some leeway in practice. Neither extreme can be followed exclusively.

Accordingly, all current legal systems can be placed somewhere along the line between those two poles, though some of them might be significantly closer to the end which promotes specific and detailed rules. German law would certainly fall into this latter group: It does not yet have a general rule on strict liability, for example, and would not allow analogy to the existing singular statutory schemes. German law in practice nevertheless forces its way through the tight corset of statutory limitations – just think of the emerging protection of personality rights or the history of product liability before the implementation of the respective EU Directive.

⁴ I. Gilead.

⁵ J. Neethling.

⁶ See R. Zimmermann, *Das südafrikanische Privatrecht im Schnittpunkt zwischen Common law und Civil law*, *Zeitschrift für Rechtsvergleichung (ZfRV)* 1995, 111.

⁷ Further information on the work of ECTIL can be found on its website <http://www.ectil.org>.

The new civil code of the Netherlands certainly has more general clauses⁸, as does the current draft tort law reform⁹ in Switzerland¹⁰. Both texts use arguments such as good faith and fair dealing, equity, common understanding, or the circumstances of the individual case significantly more often than many other jurisdictions. When applying such rather broad terms in practice, one tends to refer to prior experience, which initially has to be gained, however. At least for this initial phase it were desirable that the underlying valuations would be expressed in the norm texts themselves.

If a single national jurisdiction introduces a new codification, it can thereby build upon well-established tradition (even if it is overturned) which at least traces out those basic valuations. Yet, such common practice utilizable for solving a practical case will be missing altogether in the case of a future comprehensive European codification¹¹. If not even its decisive basic valuations were discernible, these new common rules would inevitably drift apart in real-life practice of a multitude of supreme courts who at present already operate on the basis of different valuations¹². The ultimate goal of harmonization would necessarily be missed or could only be approached by pursuing the long and frequently unpredictable detour of calling the European Court of Justice.

A compilation of legal rules aiming at the harmonization of European tort law therefore must not content itself with including broad general clauses for all key issues which necessarily require further clarification. On the other hand, the new set of rules should not be too rigid either. The *Principles* should therefore not go into too much detail, but instead at least primarily draw the borderlines of a comprehensive and compact system of tortious liability. As a minimum achievement, they should present a framework for the further development of national laws, but also of singular European legislation, which could avoid a further drifting-apart of selective rule-making. We obviously also test our *Principles* on their potential for laying the foundations of a future European codification.

It further has to be noted that we certainly do not intend to produce a draft which is so original and innovative that it departs from all existing European tort laws both in content and structure. After all, we strive for the broadest possible acceptability of our proposals. It is thereby inevitable to abide by the common foundations of all legal systems which Zimmermann has pointed out so impressively¹³. After all, the current European and non-European legal systems reflect the wisdom and experience of centuries. To ignore this rich treasure would be flatly irresponsible and would speak of gross overestimation of one's own abilities. We therefore need to build upon

⁸ For examples, see H. Koziol, *Das niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadenersatzrecht*, *Zeitschrift für Europäisches Privatrecht* (ZEuP) 1996, 587.

⁹ Cf. Art. 45d (environmental damage), 45e (immaterial harm), Art. 52 *et seq.* (damages).

¹⁰ Cf. H. Koziol, *ZEuP* 1996, 587.

¹¹ R. Zimmermann, *Konturen eines Europäischen Vertragsrechts*, *Juristenzeitung* (JZ) 1995, 477 (491, on the Lando Principles).

¹² H. Koziol, *ZEuP* 1996, 594.

¹³ R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990); *id.*, *JZ* 1995, 491.

existing rules and carefully enhance and develop them¹⁴. Only to the extent that current national rules are not satisfactory and meet with general consent, a new solution has to be found.

3. *The Working of the European Group on Tort Law*

In preparation for the actual drafting of the “Principles”, the whole area of tort law is divided into several key topics which are examined in separate projects. The studies on damages¹⁵, causation¹⁶, wrongfulness¹⁷ and strict liability¹⁸ have already been published. The next volumes in our series “Principles of European Tort Law” (Kluwer Law International) will concern fault, vicarious liability and contributory negligence. Upcoming further projects include issues of multiple tortfeasors as well as loss of third parties.

For each of these topics a questionnaire is distributed whose contents are already discussed in advance with all members. These questionnaires include theoretical questions as well as case hypotheticals. In response to these questionnaires, members or guests of the Group produce country reports on whose basis a comparative report is drafted by the project leader(s). These reports are subsequently discussed in a plenary meeting which is held at least once a year. This year, for example, we had a meeting in Pisa in May, the next one will be in November when we will meet in Hamburg. In between such meetings, there is quite some active electronic communication as well.

On the basis of the submissions and the discussion, the first raw draft of Principles is prepared (unless it has already been presented to the Group together with the comparative report). For the actual composition of the Principles selected members of the Group form a “Drafting Committee” which meets in between the aforementioned plenary meetings. The main task of this Drafting Committee is the merger of all existing drafts and the preparation of a comprehensive set of Principles on the basis of all prior proceedings.

The meeting in Pisa this year for the first time had no special key area of tort law on the agenda, but instead served as a forum for discussing the first comprehensive draft of the Principles. Fortunately, there was consent on quite a large portion of the draft. Some issues were sent back to the Drafting Committee for further amendments in light of new discussions.

¹⁴ Cf. R. Zimmermann, JZ 1995, 491.

¹⁵ U. Magnus (ed.), *Unification of Tort Law: Damages* (2001).

¹⁶ J. Spier (ed.), *Unification of Tort Law: Causation* (2000).

¹⁷ H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998).

¹⁸ B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002).

Consequently, the current state of the Principles cannot yet be published even though preparations have already gone quite far. For the time being, we are planning to present the Principles to the public at our meeting in Lausanne next year in May.

While discussions are still on-going until then, first parts of the commentary on the Principles shall already be drafted until then. Ultimately, the future publication shall not only include the mere text of the Principles, but also explanations, case hypotheticals as well as cross-references to existing tort laws.

4. The Project on "Strict Liability"

4.1. Project history

The working of the European Group on Tort Law shall now be illustrated at the example of our project on strict liability. Before doing so, we have to make clear at the outset that the name of this project (if taken by its technical English meaning) does not cover the full scope of the project. Instead, it was used in a much broader meaning to include all varieties of liability deviating from traditional fault liability. We nevertheless decided to use this term for the publication since there was no better term imaginable for the time being. In the following, the term "strict liability" is therefore used in this broader sense, while other terminological issues are excluded altogether (such as whether vicarious liability should count as "strict" liability). In the current draft of the Principles, the term "strict liability" has been avoided to the extent possible in order to avoid such likely misunderstandings as indicated.

The questionnaire on strict liability¹⁹ is divided into "General Questions" and "Cases". The first part of the questions is aimed at the dogmatic foundations of strict liability in the context of the entire tort law system. The next set of questions deals with the status quo of all varieties of strict liability in the respective jurisdiction. This includes questions on the liable person or on "defenses". Another set of questions concerns deviations from general tort law as well as the interplay between other systems of compensation. The theoretical part is concluded with political questions on the necessity as well as possibilities of future reforms.

The case hypotheticals in the second part of this questionnaire relate to the theoretical questions of the first part. Some of these case examples are based on real-life examples, such as question 8 (which is inspired by the English cases "Cambridge Water & Eastern Counties Leather").

¹⁹ M. Will, Questionnaire on Strict Liability, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 3.

In response to this questionnaire, fifteen country reports have been submitted²⁰. On their basis, a comparative report was drafted which further considered an internal paper on international conventions drafted by Bénédicte Winiger (Geneva) as well as an economic analysis prepared by our Dutch colleague Michael Faure.

It thereby becomes clear that we also include the results of the economic analysis of law, whose ways of thinking is promoted by two members of the Group in particular. Economic analysis is, however, only considered as a secondary line of reasoning since we agree that basic valuations should not be decided exclusively on the basis of the efficiency criterion (though precise it may be).

Furthermore, the aspect of insurability naturally also plays a significant role in all our proceedings.

The issues of strict liability were discussed at two meetings of the Group in the year 2000, one in Würzburg and Graz each. Subsequently, the comparative report was redrafted; some country reports required minimal updating before forwarding the document to Kluwer.

4.2. Basic Valuations

In the case of strict liability, we generally all agreed that a common method used in many jurisdictions should be abandoned: Instead of singular rules addressing singular sources of harm, a general solution should be found²¹.

When talking about “dangerousness” in the following, it is meant to designate a flexible standard defined by the interplay of two elements: possible extent of damage as well as likelihood of harm. We also need to point out that there is no single justification for no-fault liabilities: Apart from abstract and sometimes concrete dangerousness, there are further reasons such as the possibility to avoid the harm (on either side), practical difficulties of establishing both sides’ case, the linking of beneficial and harmful consequences of an activity and many more²². This broad spectrum of possible arguments has to be borne in mind when considering the following outline.

We are convinced that the element of dangerousness in the above-mentioned sense not only plays an important role in the core areas of traditional strict, but equally for fault liability. This is not the only reason why there is no clear-cut borderline between those two basic types of liability, but “in terms of substance there is really a continuum”²³: The more dangerous a situation is, the

²⁰ Austria, Belgium, Czech Republic, England, France, Germany, Greece, Israel, Italy, Netherlands, Poland, South Africa, Sweden, Switzerland, U.S.A.

²¹ See Art 50 of the Swiss draft.

²² See B.A. Koch/H. Koziol, Comparative Conclusions, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 395 (407 *et seq.*).

²³ W.V.H. Rogers, England, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 101.

more duties of care arise to prevent harm, which are considered for evaluating the behaviour of all persons involved. Furthermore, many jurisdictions acknowledge that especially dangerous circumstances can lead to a reversal of the burden of proving fault.

If the degree of dangerousness is even higher, fault as a requirement for liability is gradually being replaced by other elements, which demarcates the area of strict liability in its narrower (*e.g.* German) sense. But even there, the respective degree of dangerousness must be considered, which becomes relevant for defences: If the degree of dangerousness is not particularly high (as is the case in the grey areas close to fault liability, such as liability for domestic animals), the defendant can typically avoid liability by proving that he acted in accordance with all objective standards of due care; the reasons for establishing (or denying) liability in this case are the objectively wrongful behaviour on the one hand and the dangerousness of the situation on the other, which replaces the subjective component of fault. If dangerousness is even higher, the defendant must prove that he has acted with utmost care and therefore obeyed an even higher objective standard. The evaluation of the tortfeasor's behaviour is gradually losing weight in the overall assessment the higher the risk involved. In extremely dangerous cases, only *force majeure* might remain as a defence, or none at all.

A defence such as *force majeure* not necessarily has to exclude liability altogether, but might also lead to a mere reduction thereof (and thereby to a balanced distribution of loss). While the dangerousness of a factory, for example, may speak in favour of shifting all negative consequences arising therefrom to its keeper, certain unavoidable external influences may nevertheless fall within the sphere of the victim (as any general risks of life). If both factors together have jointly caused harm, one should therefore also consider to distribute this loss according to the balance of the risks within the respective party's sphere. Only if a source of danger brings about extremely high risks, defences may not be available at all, which is currently the case in some countries in the area of liability for nuclear energy.

4.3. The first draft

These considerations have led to a first draft by Helmut Koziol and myself, starting from the fact that the current diversity among all European jurisdictions in the area of strict liability is so strong that no single one of them could be used as a model for harmonization that might prove universally acceptable in the remaining countries.

The current spectrum extends from an extremely far-reaching no-fault liability in France via somewhat narrower concepts including a general clause (such as the current Swiss draft) to jurisdictions such as Germany which maintain a longer or shorter list of singular rules, and finally to the English legal system which hardly ever departs from the requirement of fault (not even in the case of traffic accidents).

For England in particular, whose system leaves very little leeway for strict liability, any somewhat more comprehensive solution in the direction of a general clause seemed to be unacceptable as long as it included such common risks as traffic accidents. In France, a proposal based on the

notion of dangerousness (such as the Swiss draft) would lead to a restriction of its current court practice which goes beyond such reasoning. Neither of these two extreme positions could, however, serve as a suitable basis for a common European law of strict liability: In France, hardly any convincing general argument can be found for the vast diversity of instances where fault is no longer required to establish liability. In England, on the other hand, the (otherwise commonly accepted) principle is acknowledged that someone who uses a dangerous object for his own advantage should also bear the disadvantages resulting from such object or use. In other legal systems, this principle is not always reflected in the current state of the law (which could then be used as a model): Just think of the German hodgepodge of singular statutes which leave out comparable risks (such as motor boats or dams) and thereby lead to unacceptable discrepancies. The aforementioned Swiss draft has drawn the consequences of a comparable state of the law and includes the proposal of a general clause which we used as a model in our first draft. We thereby tried to apply the flexible system approach by Walter Wilburg and to adapt the consequences of liability to the weight of its underlying reasons.

While this first draft was accepted initially by a majority of our Group, it had to be revised substantially later on. This may have been the result of a somewhat different composition of the Group at both meetings. The first draft may, however, have been too radical anyhow for some jurisdictions since it departed from long-established lines of reasoning, even though these have meanwhile proven to be incoherent, and coherence was what we strived for. In light of the substantial differences indicated before it had to be feared, however, that such a change would not have been sufficiently acceptable by all jurisdictions, which is the foremost goal.

4.4. The current state of our work

If the discussions in our Group will not lead to a last minute change of minds, the current draft of our Principles now includes a somewhat narrower general clause which covers the area of strict liability that is already accepted by the English legal system. Furthermore, it allows for special no-fault legislation in other areas and specifically acknowledges the possibility of analogous application thereof. While this may not be an ideal solution, it at least goes one step further than many current legal systems.

The other areas of strict liability in the aforementioned broader sense are regulated in further Principles, which also address instances of tightened fault liability as well as enterprise liability.

5. Outlook

As indicated, work on the Principles is not yet completed. At our meeting in Pisa, all members have been invited to submit further suggestions and amendments in preparation of our next meeting in Hamburg. It is unlikely, however, that the basic structure will be subject to any more changes.

At our public presentation of the Principles in Lausanne next year, we will invite practitioners to contribute to the discussion, not only judges and attorney, but also experts from the insurance industry. In the following months thereafter, the Principles shall be further fine-tuned in light of this input.