13th Annual Conference on European Tort Law

Bell, Andrew; Thiede, Thomas

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

European Review of Private Law 5-2014 [787-806] © Kluwer Law International BV. Printed in Great Britain.

13th Annual Conference on European Tort Law*

ANDREW BELL & THOMAS THIEDE**

After some warm words of welcome from *Georg Kathrein*, Department Head of Civil Law at the Austrian Ministry of Justice, followed by those of *Ernst Karner*, Acting Director of the Institute for European Tort Law of the Austrian Academy of Sciences and the University of Graz (ETL), the conference began, as the conference is wont to begin, with a keynote lecture by a luminary of the tort law world, a session chaired this year by *Ken Oliphant*, former Director of the Institute and Professor of Tort Law in Bristol (United Kingdom). As all private law aficionados know, we can at times be left powerless when *force majeure* strikes – as it did for the opening of this year's Annual Conference. Due to unforeseen circumstances, *Simon Whittaker* was not able to attend the conference and deliver his keynote lecture.[1] A worthy replacement was found, however, in *Helmut Koziol*, who delivered a lecture entitled 'Law of Torts and '*Schadenersatzrecht*' instead.

Koziol's argument consisted of a number of stages, first seeking to establish that really significant differences between the (commonly equated) law of torts and *Schadenersatzrecht* as bodies of law in their respective systems exist and, second, considering some difficult consequences arising from the distinction and a failure to appreciate it. His conclusion was that great care needs to be taken when considering taking instruments from the law of torts for introduction into a body of law that, in the continental tradition, is designed around a uniform concept of damage compensation – the entire context should be considered and the development of separate legal instruments must be contemplated in order to avoid introducing contradictions or fractures into the system.

On the question of the distinctions between the two concepts, *Koziol* (leaving aside the question of the inclusion of contractual liability in *Schadenersatzrecht*) emphasized that the law of torts, in contrast with *Schadenersatzrecht*, is often (though not invariably) discussed entirely in terms of the rules establishing liability, with the remedial consequences separated. Furthermore, and more seriously, in *Schadenersatzrecht* a defined legal consequence – the compensation of damage – is given as the result where the relevant grounds for imputation (e.g., fault) and causation are established,

* 24 April to 26 April 2014, Vienna, Austria.

** Andrew Bell, University of Birmingham; Thomas Thiede, Austrian Academy of Sciences and University of Graz.

1 Simon Whittaker's lecture (Opting into Tort) will still be published in *JETL* (*Journal of European Tort Law*).

whereas in the law of torts the myriad torts with varying prerequisites each raise the question of legal consequences afresh – not all torts even require damage to begin with and, as *Ken Oliphant* has noted, the roughly 70 torts could be seen to give 70 different conceptions of damage.

Koziol then went on to consider whether in fact 'damage' in *Schadenersatzrecht* is really so uniform as at first appears, or indeed the law of torts so heterogeneous, drawing upon the distinctions between pecuniary and non-pecuniary damages and different notions of damage (e.g., natural, legal, economic and positive damage, and loss of profit) in continental jurisprudence, and the question of whether a legal infringement can itself be 'damage' in tort (also noting on the latter point the Italian '*danno biologico*', now in disuse, and the Austrian objective-abstract assessment of damage, which nevertheless requires real damage). He concluded that these issues did not alter the basic proposition. It is clear in any event, said *Koziol*, that the existence of torts 'actionable per se' demonstrates that tort is not always directed at the compensation of damage, and this is emphasized by the absence of a *rei vindicatio* action and the existence of the tort of conversion – an 'astonishing categorization' of the owner's protection under tort.

On the subject of the dangerous consequences, *Koziol* maintained that these differences have impacted the development of European harmonization projects, introducing surprising contradictions into, for example, the Draft Common Frame of Reference; Article 1:102 of Book VI ('Non-contractual liability arising out of *damage caused* to another'[2]) of that instrument provides, despite the title and further content of that Book, for a right of prevention where damage is merely impending. This and a number of other examples show, for *Koziol*, the worrying disruption of a uniform area, centred on the compensation of damage, by virtue of the introduction of ideas from the law of torts without proper regard for the full context of those inspirational ideas in the common law. More worryingly still, argued *Koziol*, this is spreading, and there is a tendency in some quarters to upset the long-established consensus on the damage compensation paradigm in national discourse.

As one would expect, the lecture was met with enthusiastic discussion and a few of the points may be reiterated here. *Ken Oliphant* expanded briefly on the historical development of the two long-standing theories in the common law world on the nature of the law of 'tort' or 'torts' and what might be encompassed by the term. *Reiner Schulze* (Münster) addressed problems in German law; he argued that there, too, the borderline between injunctions and restitution seems to be blurred and so-called '*Gewinnabschöpfung*' (disgorgement of profits) causes problems of categorization. *Koziol* responded that the systematic argument must

2 Emphasis added.

inevitably lead to the conclusion that '*Gewinnabschöpfung*' is a question of the law of restitution. *Ina Ebert* (Kiel) raised doubts over some of *Koziol*'s arguments. First, Germans would understand '*Schadenersatzrecht*' as simply the norms in sections 249 *et seq.Bürgerliches Gesetzbuch* (BGB), which are not related to the law of torts but the assessment of damages generally, as contrasted with the '*unerlaubten Handlungen*' in sections 823 *et seq.* BGB (*Koziol* agreed that this is so in Germany but noted that he had used the term '*Schadenersatzrecht*' in the sense he had for the sake of the broader comparative argument). Second, even within these '*unerlaubten Handlungen*', certain actions, such as the invasion of personality rights, involve no damage. As regards this second argument, *Koziol* remarked that only the compensatory function should count, and German judges and academics would be well advised to avoid further extensions by allowing comparable 'torts actionable per se'. *Ulrich Magnus* (Hamburg) welcomed *Koziol's* analysis and added that due regard must also be had for the social functions of the legal instrument and procedural law. Further food for thought was added by *Jean-Sebastien Borghetti* (Paris), asking whether, given the compensatory social function of tort law, additional regimes such as social security or compensation funds must also necessarily be added to the enquiry. The present authors have the privilege of adding here that *Koziol's* research, as well as that of the Institute of European Tort Law and the European Centre of Tort and Insurance Law, has not neglected this issue but has previously contributed several volumes in the area.[3]

The Friday session of the conference sees a *grande marche* through the conference's national reports, including each of the Member States of the European Union (EU) and a variety of non-Member States, too. Speakers are given the remit to produce and present a summary of one of the significant developments in the law of tort (or perhaps *Schadenersatzrecht*) from their respective jurisdictions in the preceding year. The significant challenge of doing so is testament to the indubitable skill of the presenters, whose full reports on tort developments may, as ever, be admired and appreciated in the annual European Tort Law Yearbook. The following can present but a tantalizing snapshot.

Play commenced in the Austrian Supreme Court (*Oberster Gerichtshof* - OGH) with its former President, *Irmgard Griss*, in the chair and *Barbara C. Steininger* presenting for Austria at the lectern. The OGH, it was explained, had handed down judgment in an interesting, though tragic, case on limitation periods. The claimant had been a pupil at a seminary boarding school operated by the defendant abbey, and had been the victim of sexual abuse perpetrated by the

3 See, *inter alia*, U. MAGNUS (ed.), *The Impact of Social Security Law on Tort Law* (Springer, 2003) and W.H. VAN BOOM & M. FAURE (eds), *Shifts in Compensation between Private and Public Systems* (Springer, 2007).

head of boarders at that school in 1982. Only in 2012 did the claimant discover that the defendant had known when appointing the abuser to that position that he had already abused children. The absolute 30-year prescription period had not expired, but the short period of three years was in dispute. On the basis that a claimant needs to know all of the circumstances that justify a claim of wrongful conduct against a given defendant (including the wrongdoer's identity), the court held that the period had not expired, having begun to run only when the claimant became aware of the abbey's culpable violation of duty in 2012. This, *Steininger* eloquently explained, accords with the idea underlying the short limitation period that full protection be denied to those who neglect their interests by failing to avail themselves of remedies – failing to exercise a right is not neglect while exercise remains impossible.

Isabelle Durant from Belgium took the stage next and presented a pyramid scheme fraud case from the Belgian *Cour de cassation* concerning the liability of principals in agency. The decision affirmed (after two conflicting judgments in the early 1990s and contrary to the decision of the trial judge in the present case) that a victim in bad faith (here, the victim, a bank client, knew or had to know that the bank transactions at issue were irregular, because, inter alia, of the 10% p.a. interest rate) of a fraudulent agent in abuse of her office (here, the bank's director) is not excluded from claiming under Article 1384(3) Code Civil against the agent's principal (here, the bank). The case, said *Durant*, is rather to be viewed in terms of contributory negligence, given the significant impact a good faith requirement, not provided for in the law, would have on the Belgian jurisprudence.

Christian Takoff took to the stage for Bulgaria, discussing a problem relating to insurers' recourse claims against insured tortfeasors where a limitation clause between the victim and the tortfeasor indirectly limits the insurer's claim. *Takoff* considered whether a logical application of the *res inter alios acta* doctrine could resolve the limitation difficulty, concluding not; on the one hand, one could conclude that the insurer should remain unaffected by the limitation between the victim and tortfeasor, or else on the other that it is the insurance contract that should be seen as *res inter alios acta* and the tortfeasor left unaffected by it. This 'collision of equal values' renders no solution. *Takoff* addressed a number of further issues, delineating factors that weigh in favour of the insurer or tortfeasor, and left his audience to come to their own conclusion. These included, first, potential abusive uses of limitation clauses by tortfeasors, whether the insurer's right of recourse is 'sacred', the insurer's due diligence in negotiations, and the *cujus commode ejus incommode* rule whereby the insurer deals with the risk of the profession and thus should be ready to take it. Although no solution is clear, a limitation of recourse claims in the cases addressed may very well keep prices stable and it may well be worthwhile to keep the problem, and indeed Bulgarian insurance markets, on the radar.

As Croatia had joined the EU during the report year, the organizers made arrangements for a presentation from that jurisdiction, a task undertaken by *Marko Baretić* with aplomb. *Baretić*, having had a great wealth of developments to choose from in 2013, introduced the new Croatian Protection of the Environment Act, which provides for a two-tier liability system in the environmental field, under which the operators of dangerous activities now face strict liability, while the operators of non-dangerous activities are liable on a fault basis (albeit with a presumption of fault and (unusually) a presumption of unlawfulness). Thereafter, *Baretić* went on to discuss a ruling from the Constitutional Court on the subject of damages for immaterial losses for a tort victim's immediate family and the interpretation of 'especially severe disability'.

Jiři Hrádek ventured into the nexus between family law, property law, and tort law and presented a case on the liability of spouses for damage caused by a deceased tortfeasor in the Czech Republic. The claimant, a guarantee fund of the Czech Bureau of Insurers, claimed by way of a recourse action around EUR 30,000 from the widow of a traffic accident tortfeasor – the deceased had lacked the appropriate, compulsory liability insurance at the time of the accident in which he himself died. At trial, it was held that the husband had acquired the vehicle alone with money given to him by his parents, and not being part of the common spousal property, obligations arising from it also formed no part of the common property. The defendant widow could thus not be held liable in respect of damage caused by the car. In the Supreme Court, however, it was stressed that delictual obligations arise independently of the property (being dependent on the will) and the delictual obligation at issue arose during the husband's lifetime. At that point, it became part of the common property of the spouses for which the defendant widow could now be held liable.

For Denmark, *Søren Bergenser* submitted a case on workplace injuries, with a break in the decades-long tendency of Danish courts to favour compensation. A female teacher had incurred a back injury after having to avoid colliding with a student who was running towards her chasing a ball. The teacher claimed damages from the National Board (*Arbejdsskadestyrelsen*), but the claim was rejected, as the physical impact between student and teacher was deemed insufficiently serious to cause the actual injury. The Danish Supreme Court referred to the Medico Legal Council (MLC) to assess the causal nexus between impact and back injury; the latter found that the impact could indeed have caused the injury, but, as the teacher was already suffering several degenerative changes in her back, the main cause seemed to be the teacher's own prior disposition for developing such injury. The Supreme Court found that the connection between impact and injury was insufficient for the teacher's claim and that the impact did not in itself amount to an injury for the purposes of the industrial injury scheme. Unsurprisingly, the decision did not meet with *Bergenser*'s approval, as the new-found minimum extent or seriousness requirement will be impossible to assess and clearly violates the rule in place where a workplace accident

exacerbates a pre-existing injury. It remains to be seen whether the case represents an incorrectly decided anomaly or the start of a new judicial trend.

Annette Morris took a negligence case as the subject for her presentation on England and Wales. In *Woodland* v. *Essex County Council* [2013] UKSC 66, the 10-year-old claimant attended a school under the control of Essex County Council (ECC). As part of the National Curriculum, the school provided swimming lessons, held off-site during school hours, which were outsourced to an independent contractor. The claimant suffered severe brain damage during one such lesson and pursued claims against several parties, including ECC, which accepted that it owed Woodland a duty to take reasonable care in respect of its own acts (i.e., in selecting the independent contractor) but argued against the imposition of vicarious liability for the acts of the independent contractor (which was uninsured) and denied that it owed Woodland a 'non-delegable' duty to ensure the careful provision of the outsourced lessons. The non-delegable duty question was pursued as a preliminary issue, and both the High Court and the Court of Appeal rejected the claim on that count as bound to fail. The Supreme Court unanimously allowed an appeal. In their reasoning, their Lordships noted that non-delegable duties are inconsistent with fault-based negligence but held that they are fair, just, and reasonable in cases with the following features: (1) the claimant is especially vulnerable or dependent on the protection of the defendant (particularly patients and children); (2) there is a prior relationship between the claimant and defendant that places the claimant in the care of the defendant and through which the defendant assumes a positive duty to protect the claimant from harm; (3) the claimant has no control over how the defendant performs that duty; (4) the defendant delegated a function that is part of its positive duty towards the claimant to a third party; (5) the third party was negligent in the exercise of that delegated function (not in a collateral respect). Morris stressed the focus on control of the *claimant* as the essential element, and the Supreme Court's view that the resultant liability was not open-ended and so would not have the 'chilling effect' feared in the lower courts.

A new car insurance law had been enacted in Estonia, to come into force in the autumn of 2014, and appeared in *Irene Kull*'s presentation. In this new legislation, a conceptual change in motor insurance took place; the victim is now allowed, in certain circumstances, to file a claim against his or her own insurer. That insurer, after compensating the victim, may then proceed against the insurer of the person who caused the damage. It seems noteworthy that compensation for non-pecuniary damage remains rather modest; the maximum compensation sum for severe injury in motor accident contexts is capped at EUR 3,200. This is, however, still a significant improvement on the previous EUR 640. A traffic accident also formed the subject of one of several cases explored by *Kull* (No. 3-2-1-7-13, 19 March 2013) and one that represented a development in a number of respects, not least of which being that the requirements for operating a vehicle were fulfilled with a stationary car.

In Finland, a problem of state liability in the context of European law was the subject of *Päivi Tülikka*'s presentation. A limited liability company, which was not liable for value-added tax (VAT), had brought a used car from Belgium to Finland in 2003. In addition to the car tax, the company had been ordered to pay VAT that was based on the car tax. Unsurprisingly, the company appealed, failed, and paid the tax, only subsequently to sue the Finnish state on the basis of discriminatory treatment and a breach of EU law, as the Finnish state was aware that this tax was problematic in relation to Union law – a judgment on this question had already be given by the European Court of Justice (ECJ) (C-101/00, *Siilin* and C-10/08). According to that decision, VAT based on car tax was discriminatory and in conflict with EU law, violating the prohibition on discriminatory taxation (Art. 110 Treaty on the Functioning of the European Union (TFEU)). The Finnish Supreme Court concurred and, referring to Cases C-46/93 and C-48/93, *Brasserie du Pecheur*, held the Finnish State liable. *Tülikka* also discussed the Supreme Court's use of the jurisprudence of the European Court of Human Rights in a number of defamation cases over the last year.

For France, *Michel Séjean* chose the overarching theme of prevention for his presentation on the Law of 16 April 2013 on Independent Expert Reporting in matters of Health and Environment and on the Protection of Whistle-Blowers (an interesting area, in particular with respect to the importance of the compensation of damage in *Koziol*'s keynote address, discussed above). According to *Séjean*, the law will further the reliance on whistle-blowers and experts and reduce the reaction time of authorities by establishing (symbolically, perhaps – for *Séjean* the protection of free expression already covers this) clear protection for whistle-blowers in the (connected) fields of health and the environment. A new authority will also be established to provide guidelines for experts delivering opinions in these areas – and force other public authorities thereby to take warnings seriously while protecting whistle-blowers as well.

As in recent years, *Florian Wagner-von Papp* addressed the issue of infringements of personality rights in Germany in the so-called 'auto-complete' case. In April 2009, Google introduced the 'auto-complete function' into its search engine, which makes suggestions based on past user searches. This has led to litigation where the auto-complete suggestions following the entry of a name falsely indicate an association with illegal, immoral, or otherwise socially disfavoured behaviour, as with Bettina Wulff, Germany's former first lady (auto-complete introducing the term 'prostitute'). The Wulff case attracted worldwide attention.[4] Those proceedings were stayed awaiting judgment in another case concerning 'auto-complete' in the Federal Court of Justice. Here, a

4 See N. KULISH, 'As Google Fills in Blank, a German Cries Foul', *The New York Times*, 19 Sep. 2012, p A4.

nutritional supplement and cosmetics distributing corporation (the first claimant) using a 'network-marketing system' (multilevel marketing) and its founder and Chief Executive Officer (CEO) (the second claimant) sued Google on the basis of defamation; when the full name of the second claimant was entered into Google, the auto-complete suggestions were 'fraud' and 'Scientology'. In contrast to the lower courts, the Federal Court of Justice considered the effect of the auto-complete content to be more substantial as users expect, or at least consider possible, an inherent connection between the search term and the suggestions, potentially rendering Google liable for infringing personality rights. However, the Court considered the key point to be the omission to remove defamatory suggestions rather than the act of suggesting connected search terms. Google does not have to prevent the occurrence of defamatory auto-complete suggestions *ex ante* but has to investigate possible infringements once notified and 'take down' infringing suggestions. The question then is the extent of Google's duty to investigate an infringement of personality rights once notice is given. The Court remanded the case to the Higher Regional Court for an assessment of whether Google complied with its duty to investigate an infringement of the claimant's personality rights.

Eugenia Dacoronia, Greece, presented a case on an old favourite of the Annual Conference – wrongful birth. The claimants were married and expecting their first child. The wife, in her 21st week of pregnancy, was given an ultrasound that detected a distended bowel in the foetus (echogenic bowel). This can be an indication of Down's syndrome or cystic fibrosis in a foetus. The claimants, advised by the medical professionals that foetuses suffering from cystic fibrosis 'are not left to be born' and that they and the foetus should receive a molecular test for the disease (with the option to terminate), agreed to such a test. The test was performed by the defendants who, due to their negligence, did not discover that the parents were carriers of cystic fibrosis or that the foetus was suffering from it. The parents were consequently not informed of the disease's presence and there was no termination. Once the child was born with the disease, the parents filed an action claiming for their moral harm in the violation of their personality right, alleging that they would have terminated the pregnancy if they had been informed by the doctors. The Greek Supreme Court, taking into account the circumstances, the kind and the extent of the infringement of their rights and its consequences, the culpability of the defendants, and the social and financial status of the litigants, awarded EUR 250,000 to each spouse. The Court held that the protection of the personality under Article 57 of the Greek Civil Code (GCC) encompasses all goods related to the human being, such as health (public and personal), honour, private life and the sphere of secrecy, all external distinguishing elements of the person (name, image), and physical and emotional integrity. The emotional element of health can also be violated by an unlawful act directed against another person closely related to the sufferer of grief and pain. Moreover, held the Court, obstructing a pregnant woman in the exercise of her

legal right to choose whether to terminate a pregnancy when this is permitted by law constitutes a violation of her personality rights in the sense of Article 57 GCC. A claim can also be raised by the husband, because the decision to terminate is a joint decision within a marriage, and moreover, the close relationship with the pregnant woman means that the adverse consequences on her personality are also felt by her husband.

In Hungary, a new Civil Code came into force and several of its provisions were discussed. According to *Attila Menyhárd*, the Code may not in itself be revolutionary (being predominantly aimed at incorporating modern case law developments), but some aspects, and particularly in tort law, warrant very close inspection. This may be true for the new rule for awarding compensation for wrongful interferences with inherent rights of persons, and the fact that, with the new Code, non-pecuniary damages are no longer awarded in the Hungarian legal system. According to *Menyhárd*, the legislator proceeded on the presumption that all compensable harm can be described as either material loss, interference with inherent rights of persons ('pain and suffering', '*Schmerzensgeld*' – after a question from *Monika Hinteregger*, *Menyhárd* clarified that inherent rights here means personality rights), or breach of a travel contract. Immaterial disadvantages that cannot be described as interferences with inherent rights of persons are no longer to be compensated. Obviously, these changes result in problems where harm or manifest disadvantage is not required (not even emotional distress) by law and no *de minimis* limit exists. Moreover, according to the new Code, a causal link will not be established in connection with losses that were not and ought not to have been foreseen by the tortfeasor. This results in difficulties in the context of negligence, where it is unclear whether the loss or the risk is required to be foreseen.

Reporting on Ireland, *Eoin Quill* introduced a case on an overeager (to say the least) debt collector in *Sullivan* v. *Boylan (No 2)* [2013] IEHC 104. In this case, the claimant Sullivan had a dispute with, and overpayment for building work carried out by, Boylan. The latter hired a debt collector who made unpleasant phone calls, sent text messages and e-mails, parked his van outside her house, and eventually threatened to put up a sign displaying the details of the debt and make house calls around the neighbourhood. Sullivan suffered mental distress (though no medical harm was proven) and claimed on the basis of this against the original builder, Boylan. In court, there was no doubt that the debt collector's behaviour constituted unlawful harassment under the criminal law, but the private law actions of private nuisance, breach of statutory duty, and the *Wilkinson* v. *Downton* tort were deemed unsuitable. The court thus resorted to an action for breach of constitutional rights and awarded EUR 15,000 in general damages and EUR 7,500 in exemplary damages. According to *Quill*, this extension of breach of constitutional rights was not necessary, as a private nuisance claim should, in fact, have been available, given the claimant's ownership of the dwelling where

the harassment was carried out (as well as, potentially, the *Wilkinson* v. *Downton* claim, there being no authority against such an extension).[5]

In Italy, questions concerning restoration in kind and causation were raised in the context of a case presented by *Elena Bargelli*. The claimant (Cir) and the defendant (Fininvest) were in dispute over control of a third company (Mondadori) in the 1980s, with the claimant's arguments resting on the corruption of a judge in the Rome Court of Appeal (there was already a criminal judgment against the judge). Seeking damages for the lost chance to take over Mondadori, the claimant alleged that, had the judge not been corrupted, a decision on the validity of an arbitration agreement would have been made in its favour and it would not have entered into the bad compromise it did subsequently with the defendant. The Tribunal and the Court of Appeal of Milan awarded the economic damages sought, and these judgments were upheld on appeal to the *Cassazione*. For *Bargelli*, the case involved numerous key questions: whether a claim for damages is permissible where the claimant would be allowed to claim restoration in kind (the decision of the Tribunal of Rome could be overturned); whether the compromise agreed between the parties prevents any judicial claim (*res litigiosa transacta*); and whether there was a sufficient causal link between the decision and the economic damage. The *Cassazione* held that the revocation, aimed at restoration of the *status quo ante*, had no relevance in the present case as restitution *in integrum* was impossible, invoking, further, the right to an effective remedy as justifying compensation for damage in these circumstances. The compromise agreement did not prevent the claimant from making an extra-contractual claim for damages, and the Court also confirmed that there was sufficient causation on the basis of the 'more probable than not' doctrine.

Agris Bitāns, in his report for Lativa, addressed the legal basis for compensation of non-pecuniary loss caused by environmental pollution (in this case caused by a road traffic accident). In 2008, there was an accident near the claimants' home involving the defendant's tractor; after the driver of the tractor lost control, the vehicle crashed into a metal barrier, spilling diesel and 9 tonnes of ammonium nitrate fertilizer onto land belonging to the claimants, as well as causing some structural damage to the house. The driver, an employee of the defendant, was punished under the Administrative Violations Code. An analysis by environmental experts found pollution of the claimant's soil and underground water, air pollution, and landscape degradation resulting from the accident. The water pollution in particular rendered the living conditions for the claimants unsanitary. The defendant's insurer paid an indemnification of EUR 1,500 as compensation for property damage in the form of damaged trees and the polluted

5 The present authors might be so bold as to contribute a comparative reference to the English case of *Khorasandjian* v. *Bush* [1993] QB 727 (and now the Protection from Harassment Act 1997).

soil, but the claimants sought compensation for their significant non-pecuniary loss in the form of mental and physical suffering resulting from the pollution. The legal basis for this claim was not clear, but the Latvian Supreme Court found for the claimants on the basis of Article 1635 of the Civil Law, and thus held the motor insurance company liable for the non-pecuniary harm as well.

A rather obnoxious criminal scheme perpetrated by a prisoner in Lithuania was the topic of *Loreta Šaltinytė*'s presentation. A prison inmate had illegally obtained a mobile phone and called the claimant, masquerading as a police officer and alleging that the claimant's mother was being held by the police. The conversation continued for two hours until the claimant was persuaded to make a payment of nearly LTL 13,000 (around EUR 3,700) to a third party (never identified) in order to secure the mother's release. The fraud was, of course, soon discovered, and despite a successful claim against the prisoner the claimant understandably wished to proceed against the state for failing to prevent the prisoner's access to the mobile and insufficiently supervising him. The Lithuanian Supreme Court accepted the principle that the state may be liable for such an omission but, in the absence of sufficient evidence, remitted the case for reconsideration. The second question before the court, whether the state was liable with the prisoner *in solidum*, was answered in the negative: Articles 6.279(1) and 6.6(3) of the Civil Code only provide for solidary liability in cases where the whole or a distinct part of the damage is attributable to more than one person, and if the nature of causation between the conduct of the parties and the damage is identical. Hence, where the direct cause of damage is the conduct of one tortfeasor and the second tortfeasor contributes only indirectly, the liability of the tortfeasors is several, not solidary.

Giannino Caruana-Demajo demonstrated the problems in tort caused by a third-party cover-up of the sexual abuse of a minor in Malta. The claimant, a 9-year-old girl, met her abuser (the first defendant) while making weekly visits to her grandfather. On multiple subsequent occasions, the abuser brought the claimant to his own flat and in several cases made her miss school in order to do so. The second defendant, a doctor, issued medical certificates at the request of the first defendant, which were used to excuse the claimant's absences from school to the satisfaction of the school authorities. The claimant suffered psychological harm and claimed damages. The lower courts had held the doctor liable in negligence, as he had issued the certificates on several occasions without even seeing the child, knowing that the abuser was not her legal guardian and thus in clear breach of the standards of his profession. The Maltese Court of Appeal quashed the judgment and found no liability. The judges argued that the cause of the harm was the abuse and not the certificate and, although the doctor had breached the standards of his profession, that alone is not sufficient for liability. Foreseeability is necessary and the second defendant could not have foreseen the use that the abuser made of the certificate. *Caruana-Demajo* disagreed with the judgment on the basis of four points. First, the doctor acted

knowingly (albeit not maliciously). Second, although he could not foresee the particular outcome, it was clear to him that the rules that he broke are in place for a reason. Third, and consequently, he was in reality reckless rather than negligent. Fourth and finally, it is arguable that the degree of foreseeability required should be adapted to the level of fault demonstrated.

Jessy Emaus outlined a case from the Netherlands that touched upon two wider issues in Dutch tort law – the role of tort in remedying infringements of fundamental human rights and the circumstances in which compensation can be claimed for non-pecuniary loss. The case, decided by the *Hoge Raad*, concerned enormous time delays in an Egyptian citizen's application and reapplication for a residence permit (and the objections he lodged against the rejections of those applications, themselves likewise rejected) and the use of tort law to redress the excessive length of those proceedings, which breached the applicant's fundamental rights.

Wrongful birth was at the centre of *Magne Strandberg*'s Norwegian case. The claimant, not having been given the required amniotic fluid test for the disease during pregnancy, gave birth to a child with Down's syndrome. Had she been offered the test as she should have, the disease would have been discovered and the claimant would, she claimed, have terminated the pregnancy. She sought compensation from the Norwegian System of Patient Injury Compensation for psychological harm following the birth under the Norwegian Patient Injury Compensation Act (2001/53). That claim was dismissed by the Supreme Court on the basis of the arguments that all humans carry the same human dignity and that such damages are difficult to prove with regard to causation and assessment. According to *Strandberg*, the reasoning of the minority in the case, that the psychological problems were undoubtedly damage in Norwegian tort law and caused by a mistake at the hospital, should not be forgotten. He also noted the multitude of issues not raised in the judgment at all, including the lack of economic loss, the legal provisions pertaining to abortion, and ethical considerations in point.

Eva Bagińska considered a case of misdiagnosis from Poland. The claimant had a stroke, originally diagnosed as a 'common' stroke, but which later developed into a serious brain failure. The family members attempted to convince the doctor to make a referral for a computerized tomography (CT) scan at another hospital (the first hospital did not have the relevant equipment), but these requests were rejected. After a dramatic deterioration in the patient's condition, the CT scan did go ahead two days later and the patient underwent life-saving surgery thereafter. Nevertheless, the patient was left seriously disabled and claimed compensation. In the opinions of two expert witnesses, the same brain damage would have occurred if the scan had been performed immediately upon the initial diagnosis, but that the omission to perform the scan certainly constituted a breach of the required procedures. In consequence, the Supreme Court dismissed the claim for personal injury but allowed the claim for the

violation of the patient's right to health-care services that meet the requirements of medical science. As *Bagińska* expanded, two distinct bases for the award of non-pecuniary damages were available: medical malpractice resulting in personal injury, leading to pain and suffering (Art. 445 *Kodeks cywilny* (KC)), and the infringement of a patient's rights (Art. 4 of Patient Rights Act, ex 19a Medical Establishments Act). Although the doctor committed no error of diagnosis in the circumstances, the unjustified delay in performing diagnostic tests constituted a negligent violation of the patient's right to proper medical services.

Another case of wrongful life arose in *André Dias Pereira*'s report on Portugal, where a baby was born severely malformed. The mother succeeded in claiming EUR 200,000 from the defendant physician and clinic, but the disabled son's claim was rejected by the Court of Appeal and the Portuguese Supreme Court. There is no action for 'wrongful life' under Portuguese law, because there is no constitutionally guaranteed right to be born healthy. Moreover, the malformations were not caused by the defendants, and such claims could lead to absurdity, with a child attempting to sue the parents for failing to terminate the pregnancy. *Pereira* argued furiously against this decision on the basis, *inter alia*, of the clear violation of the doctor's duties to inform. The full report will be a fascinating read in the forthcoming Yearbook of European Tort Law 2013.

Christian Alunaru presented for Romania and covered a case that centred on events during the tremendous upheaval that accompanied Romania's shift to western democracy. The claimant sought to claim against the Ministry of National Defence and the Ministry of Internal Affairs in respect of the shooting of the claimant's son in December 1989, arguing that they should be held liable as principals for their agents' acts. In the area where the shooting took place, there had been a mix of forces from the Ministry of National Defence, the Ministry of Internal Affairs (Militia), patriotic guards of various state companies, and armed civilians present, defending that zone. The military units had permitted a group of civilian demonstrators, including the claimant's son, to enter a courtyard and thus, according to the claimant, were under a protective duty towards that group. As *Alunaru* explained, several conditions would apply to such liability. First, a relevant 'principal-agent relationship' must exist, whereby, by agreement, the agent recognize the authority of the principal to direct and control his activity – there is no such agreement with conscripted soldiers for the Ministry of National Defence. Military service being compulsory for Romanian men under Article 52, paragraph 2 of the Romanian Constitution then in force, the young soldiers merely fulfilled a constitutional duty of honour in the judgment of the court. Subordination was imposed by law to this end. Second, the damaging act must have been committed by the agent in the fulfilment of the function assigned by the principal. On this point, the Romanian High Court had found that this requires 'a direct causal relationship or such connection that the function assigned to the agent would have decisively determined the commitment of the act'. The Court held that this involves an implied condition that a principal can

be held liable only if the agent can be identified. Different kinds of military personnel and soldiers were present when the claimant's son was killed, and, depending on the basis of the employment of any individual, the resultant position as regards the principal's liability will be different. The Ministry could not be held liable for conscripted soldiers and so the impossibility of establishing which agent committed the act caused the claimant's action to fail – the inability to identify the perpetrators was not imputable to the Ministry of Defence. *Alunaru* concluded that the High Court's solution is profoundly unjust, albeit based on case law, legislative provisions, and various opinions in the relevant literature.

Martin Hogg presented a Scottish case from tort law's more prurient underbelly. The pursuer and one of the defenders' employees had had a brief sexual affair. At the relevant time, this employee was a social worker assigned to the pursuer, and it was he who ended the relationship. The pursuer alleged that she had suffered serious injury to her mental health and a number of pecuniary losses as a result of that romantic entanglement, seeking GBP 100,000 in damages from the defenders on the basis of vicarious liability and the defenders' direct duty to protect her from their employee. The court rejected the claims, holding that the various duties argued on behalf of the pursuer would represent too impractical and onerous a burden on the employers; that in any event there was no reason to expect that the defenders should have appreciated that there was an improper sexual relationship and nothing could have been done to prevent the parties' voluntary romantic conduct; that it was not fair, just, and reasonable to impose a duty on the employee not to begin such a relationship; that the employee did not intend to inflict harm; and that the conduct was outside the scope of employment. *Hogg* commented that these were novel arguments in Scottish courts and that it is probably desirable for courts to avoid imposing duties in relation to consenting adults and their romantic involvements (although the approach taken to vicarious liability and the course of employment was a strict and traditional one, whereas an analogy to the 'close connection' test used in child abuse cases is perhaps arguable).

Anton Dulak reported a noteworthy departure from the goal of compensation and the highest ever damages award for personal injury in Slovakia. The first claimant had undergone nasal surgery and suffered permanent and irreversible brain damage. It was alleged that, during the operation and period of post-operative care, the defendant hospital had committed a gross breach of their duties, which caused the damage. Compensation was sought by the first claimant for pain and suffering (EUR 90,000), reduced capacity for social life (EUR 155,000), and immaterial injury (EUR 330,000). His parents and siblings (claimants two to five) sought compensation for immaterial injury of EUR 90,000 each. To the first claimant, the first instance court made the maximum possible award for pain (EUR 17,942) and awarded EUR 181,666 and EUR 200,000 for the reduced capacity for social life and immaterial injury, respectively. The parents recovered EUR 90,000 each, and the siblings EUR 10,000 each. That

judgment was upheld on appeal, with the court stating that, where the provisions on damages do not provide for sufficient satisfaction, claimants are not excluded from seeking further satisfaction under the general provisions on personality rights. Moreover, the grave fault of the defendant hospital would justify the amount awarded here, as the decisive goal of the Slovakian provisions is not only compensation but also prevention and sanction.

The question of assessment of damages in cases where one public authority expropriates property from another public authority was the topic of *Barbara Novak*'s report for Slovenia. The Slovenian state had expropriated by decision 12,084 m^2 of real estate from the claimant municipality in order to build a road. This road was then handed over to the municipality for management and maintenance. The municipality argued, however, that this transferral was not pecuniary compensation for the prior expropriation, as it did not obtain ownership of the road or the land it was built upon. The authority brought an action for pecuniary compensation. The Slovenian Supreme Court disagreed and found that the transfer of management represented a sufficient benefit for the municipality, as it could be evaluated in pecuniary terms. *Novak* questioned the decision, noting that the Court did not attempt to evaluate the level of benefit from management and whether this could really be equivalent to the right of ownership lost.

Liability in respect of Thalidomide in Spain was addressed by *Albert Ruda*. The drug, distributed under the label 'Contergan', was withdrawn from the Spanish market in 1962 leaving approximately 3,000 victims with severe birth defects. Claims by the victims could conceivably have been barred as a matter of limitation, given that 50 years had elapsed. However, according to recent decisions of Spanish courts, the drug results in general and progressive impairment of the victims and thus in continuing damage (*daños continuados*), rendering the prescription period irrelevant. Damages have been awarded in the sum of EUR 20,000 per percentage point of disability, a figure several times higher than that under the system for motor vehicle accident tariffs, although an appeal has been lodged. Difficulties remain, *Ruda* argued, in the approach taken to distinguishing types of damage.

Håkan Andersson, in his inimitable style, presented a Supreme Court case from Sweden involving a 13-year-old girl who, by setting fire to a department store, had caused EUR 4 million in property damage. The girl had at various times been under the care of the social authorities, who knew about her pyromaniacal tendencies, and it was these authorities who were sued and held liable when the child, released to stay with her mother for want of a place in an appropriate institution, set the fire. The essence of the case for *Andersson* lies in the principles relating to proof – the authorities' record-keeping over their involvement with the girl was critical in facilitating analysis of the facts – and in the social and ethical questions raised – where human dignity and integrity is

involved, it would be wrong to consider only an economic risk analysis, which we might require public authorities to conduct.

Peter Loser took the stage for the final national jurisdiction, namely Switzerland, and considered condemnation of the Swiss limitation period in cases of injuries with long latency periods by the European Court of Human Rights. In the decision (before that court) in *Howald Moor and Others* v. *Switzerland* of 11 March 2014, a ten-year limitation period running from the date of the breach of obligation by the defendant was held to deprive the claimants of their Article 6 rights under the Convention where this limitation barred their claims in respect of mesothelioma diagnosed in 2004, some 26 years after the end of the period of asbestos exposure. *Loser* explained that a new 30-year limitation period consistent with the Principles of European Contract Law and Draft Common Frame of Reference had been proposed but with problematic transitional provisions. The longer period is not supposed to apply where the old period had already expired by the time the new period takes effect; as Loser made clear, this will render no aid to mesothelioma suffers, whose claims, given the 1989 ban on asbestos, will generally still be time-barred. *Pierre Widmer* (Lausanne) responded, among others, to the report, remarking that a new absolute limit of 30 years still does not resolve the issue. In response, *Loser* stressed the importance of certainty.

With regard to developments in tort law in the EU, *Thomas Thiede* chose the case of *Melzer* v. *MF Global UK* for his presentation on the international consequences of the financial crisis. *Thiede* began by explaining that many investors have lost considerable sums in the wake of the crisis and are now attempting to hold anyone related to underperforming financial products liable and preferably in domestic courts. In his chosen case, the company Weise Wertpapier Handelsunternehmen (registered in Düsseldorf), solicited the claimant, Melzer (domiciled in Berlin), as a client. Weise opened an account for Melzer with MF Global UK (a brokerage house in London), which traded in stock market futures in return for corresponding fees. Subsequently, Melzer paid a total of EUR 172,000 into that account. The investment did not go as planned and MF Global UK repaid only EUR 920. Weise became bankrupt in Düsseldorf, and so Melzer brought proceedings against MF Global. Critically, he did so in tort before the Landgericht Düsseldorf in Germany. The question was whether the court in Düsseldorf – Weise's principal place of business – was internationally competent to hear the claim against the London-based MF Global. In 1976, the ECJ held that Article 5(3) of the Brussels I Regulation, according to which a person may be sued 'in the courts of the place where the harmful event occurred', must be understood to include both the place where the damage occurred and the place where the event giving rise to the damage took place. Hence, the defendant MF Global could be sued, at the choice of the claimant, in the courts at either of those places. With the former unavailable, as the claimant had put his funds into an account with the brokerage house in London, where they were lost, international jurisdiction was then only available for the wrongful acts committed

by MF Global in Düsseldorf. The German courts assumed that MF Global and Weise acted as accomplices when committing the harmful act, basing jurisdiction on the German provisions of section 830 BGB and section 32 Code of Civil Procedure, according to which international jurisdiction may be based on infringements committed by any of the participants, since they may all be held mutually liable for such acts under section 830 BGB. The Court of Justice of the European Union (CJEU) disagreed and underlined that the rules regarding the special jurisdiction under Article 5 Brussels I Regulation must be 'interpreted restrictively'; the link between the dispute and the place of the alleged participation of MF Global UK was too slim, and with the (other) participant not being implicated in the proceedings, the national court was in a rather poor position to take evidence and rule – thus, the Düsseldorf court was not competent.

Of course, one of the highlights of the Friday session are the concluding comparative remarks, this year delivered for the first time by *Ernst Karner*, Acting Director of the Institute for European Tort Law. The remarks aim to highlight common themes and make valuable links with developments in previous years. For 2013, *Karner* identified a number of general topics for closer scrutiny, the first being the protection of the environment and cultural heritage. According to *Karner*, tort law faces difficulties when it tries to tackle environmental harm; if common property – like the air, the sea, and the public soil – is polluted, nobody is entitled to sue because these goods are not allocated to any legal subject. As long as restitution in kind is at stake, such difficulties can be solved if the state – as the holder of general interests – is granted corresponding claims. In this regard, *Karner* suggested that Croatia could serve as a helpful model. Awarding damages, however, raises further problems because the impairment of the environment as such does not necessarily constitute a loss measurable in monetary terms.

A second field highlighted by *Karner* was public liability, which has been a perennial issue since the very first Annual Conference on European Tort Law. He noted a general trend towards increasingly rejecting the received principle that 'the King can do no wrong'; now state liability can even result from pure omissions (*Karner* highlighted the Swedish and Lithuanian cases discussed above in particular), but, it was stressed, the area gives rise to difficult questions of policy and a difficult relationship with political decision-making.

The third overarching topic singled was prescription, as evidenced by several cases mentioned above. *Karner* expanded that, although it is generally undisputed that tort claims must lapse after a period, the exact requirements are far from clear and continue to form the subject of legal disputes. In summary, *Karner* held, tort law must strive for the right balance between the protection of the victim and the need to keep the floodgates closed. Drawing on *Håkan Andersson*'s earlier comments, *Karner* stressed that it should never be forgotten

that law is a humanistic science that should be handled by humans in the best interest of humans.

As ever, the entirety of the Saturday session was given over to examination of a single topic by a select group of commentators. This year's theme was 'Cyber Torts'. *Bernhard A. Koch* gave a first insight into the topic, presenting the basic questions at hand. He found that problems associated with the use of, and access to, the Internet, as well as with the availability of information online, are manifold. This is evidenced by an abundance of cases on, for instance: malicious software, phishing, 419 scams, bullying, stalking, defamation, humiliation, 'happy slapping',[6] and denial-of-service attacks. An important question is what potential responses there are for those suffering as a result of such undesirable conduct – aside criminal sanctions, *Koch* submitted that action might be taken against the offender and/or an ISP, etc., within the boundaries of legitimate self-help and that there might be monetary and non-monetary responses for harm done or the restitution of benefits, including, for example, a right of reply. Such claims might be addressed against the primary wrongdoer, or third parties (such as service providers). Continuing, *Koch* considered whether any of these issues were truly new or else in essence just a new arena for established torts. Just because the Internet is involved does not necessarily mean that the conduct itself is, at its core, different from behaviour in classic offline interactions. Posting something online, it was argued, is not so dramatically different from disseminating information *via* newspapers if we focus on evaluating the harmful behaviour itself. Of course, some new issues might emerge, it was said, such as where harm results from interference with Internet access by flooding and blocking the victim's server with traffic. Moreover, problems regarding international jurisdiction and conflict of laws can often arise.

On the substance of a cyber-tort claim, *Koch* addressed the questions of what losses might arise and which of those are recoverable. In cases of interference with security software, control systems, or health-care networks, even bodily harm has to be contemplated – regarding the health-care network example, *Koch* found that a cyber-attack that puts patient lives at stake could be launched by almost anyone – as well as damage to property – it is conceivable that a purely digital command transmitted *via* the Internet could destroy or at least impair tangible property. *Koch* then finally broached issues relating to damage assessment; how, for instance, can the amount of productive time lost to spam be measured? The Internet, merely by virtue of its tremendous scale, presents many difficulties in this area.

The scene having been set, *Ronen Perry* stood to discuss comparative and economic analyses of liability for online anonymous speech. *Perry* mapped out

---

6 A trend involving filming acts of violence against strangers; footage is often uploaded to the Internet.

four distinct models. First he outlined exclusive direct liability, such as that found in the United States, whereby wrongdoers bear the costs of the negative effects of their activities[7] and are incentivized to take the desirable level of care (a model that can suffer because of under-deterrence caused by various factors, including high identification costs and anonymous participants with easy access who are essentially judgment-proof defendants). Second, exclusive indirect liability, seen for example in Israel, whereby a third-party (usually the host provider) would be liable (a model confronted with high monitoring costs, notwithstanding the fact that such monitoring may interfere with recent judgments of the CJEU regarding the Data Retention Directive,[8] which then may result in over-deterrence). Third, a model of concurrent liability was mapped out by *Perry* (associated with the current EU position) and finally a form of residual indirect liability (as found in England of late) such that the speaker alone will be liable unless unidentifiable, at which point indirect liability is imposed on the providers. As became clear in the following discussion, the concurrent model would combine the disadvantages of both direct and indirect liability (over-deterrence and additional monitoring costs). *Perry* consequently favoured the residual model on the basis of its better economic credentials.

Following this, *Steve Hedley* ventured into the topic of 'cyber-trespass' and introduced his audience to the US case law employing the concept, including, for example, cases of degradation or destruction of computing resources, or theft of services. *Hedley* then related its fall from favour due to the rise of alternative solutions, including contractual liability and situation-specific regulations. The ultimate question raised was whether a meaningful role remained for this concept, grounded in the metaphor of the Internet as a 'place'.

Mårten Schultz gave the final topical report on 'Tort Law, Guerilla Warfare and the Promotion of Cyber Privacy'. In his lecture, *Schultz* argued forcefully for civil responsibility to 'save the internet and make the world a better place'. The structure ran as follows. First, *Schultz* outlined distinct problems regarding a lack of protection in cases of cyberbullying, abuse, and privacy violations in the digital arena. Second, he put forward a case that tort law was the best instrument for the victim to achieve justice, which would, thirdly, boost tort law leading, finally, to a web 3.0 – or as *Schultz* named it: 'tortopia'. As regards the first portion, *Schultz*'s argument was that cyberbullying and illegal online abuse are an enormous privacy problem, as strong social forces accentuate privacy violations and impair mechanisms of responsibility. As regards the second, criminal law – to which most victims turn for justice – was said to be insufficient, as substantive and procedural

7 So-called 'negative externalities'; Perry stressed the failure to consider the positive effects ('positive externalities') of providing speech platforms in the accounting under this model, including the benefits to advertisers and information providers.

8 Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others.*

rules, costs, Internet competence failings, and the priorities and attitude of the judiciary lead to deficiencies in the aid, if any, provided to the victim. This led to the conclusion that it is for tort law to provide a cure. *Schultz* maintained that tort law would provide the only effective mechanism, as victims could take action themselves by suing abusers. This would eventually lead, it was argued, to a more responsible web, a web 3.0.

As always, a brief summary of proceedings at the Annual Conference is no substitute for the rich and rewarding final efforts of those national reporters published in the accompanying European Tort Law Yearbook. Case abstracts will subsequently be available in the European Tort Law database at www.eurotort.org. Furthermore, the papers from the special session, along with a revised version of the opening lecture, will be published during the course of 2014 in the *Journal of European Tort Law* (*JETL*). Next year's Annual Conference will take place from Thursday, 9 April to Saturday, 11 April 2015.