
# Tort and Insurance Law Yearbook


Helmut Koziol
Barbara C. Steininger (eds.)

# European Tort Law 2001

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Tort and Insurance Law
Yearbook

# European Tort Law 2001

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# Foreword

It is well known that in the last decades there has been an increasing interest for the approximation and harmonisation of private law in Europe. Although the answers given recently to the *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM (2001) 398 final, Official Journal (2001/C255/01) show that there is still little support for the enactment of a European Civil Code in the short or in the medium term, most of the governments and groups of legal professionals who have been consulted have shown, by contrast, that there is already strong widespread support for the elaboration of *Principles* of law, a task which is carried out by several international groups of legal academics and professionals.

The task of these groups is difficult and praiseworthy. By using comparative law techniques they have undertaken to point out those *Principles* which are common and, in the case of great differences, to stress, among the various options, which solutions are more in accord with current legal needs. Such *Principles* can be very useful for the legislators of the Member States, since they show the way to approximation and harmonisation of legislations. They can also be very helpful for the courts of the different Member States, as guidance in their search for general legal standards, as well as for citizens when organising their legal relationships. It is long recognized that such *Principles* should not only be developed in the area of contract law, but also for other subject matters, such as tort law and, beyond the realm of the law of obligations, even property law.

Therefore the subject matter that this book deals with is one of the main focuses of attention in this process of Europeanisation. Those who know the rules of tort law in various European jurisdictions will have noticed that, although there are developments and trends that are common, the foundations of tort law in these legal systems, at least to some extent, differ considerably. These differences cannot be analysed simply by drawing a line between common law and continental law. Even within continental countries, such as France, Italy or Spain, the tort law in many respects significantly differs from the approach taken for instance in Austria, Germany or the Netherlands.

The *European Centre of Tort and Insurance Law (ECTIL),* which organises and coordinates the research that is presented in this book, was founded in Vienna at the beginning of 1999, among other reasons, to create a secure insti-

tutional basis for the drafting of the *Principles* carried out by the *European Group on Tort Law*. This Group, established in 1993 by Jaap Spier, at that time Professor at the University of Tilburg in the Netherlands and currently Advocate General of the Dutch Supreme Court, has already published six books related to the most relevant aspects of tort liability such as wrongfulness, causation, damage and strict liability. The Group comprises more than twenty experts from EU Member States as well as from other European and non-European countries, who discuss these and other fundamental questions concerning tort law on a comparative basis.

The *European Centre of Tort and Insurance Law* is also involved in other comparative legal research studies, the results of which are published in the series "Tort and Insurance Law" by Springer (Vienna/New York). In 2002, ECTIL initiated an Annual Conference to provide both practitioners and academics with the opportunity to learn of the most significant recent developments in tort law. Experts from all over Europe provide a comprehensive overview of the previous year's court practice and legislation in their respective jurisdiction.

This Yearbook includes the papers presented at the 1st Annual Conference on European Tort Law which was held in Vienna on 5 April 2002.

Angel Acebes Paniagua
Ministro de Justicia de España
May 2002

# Preface

A harmonisation of European law presupposes sound mutual knowledge of the jurisdictions involved in the harmonisation process. However, partly due to language problems it is not always easy to obtain information about all these jurisdictions, especially as far as new developments are concerned. Against this background, the European Centre of Tort and Insurance Law decided to publish a Yearbook on European Tort Law containing reports on the most interesting new developments in the field of tort law in different European countries.

The present Yearbook on European Tort law includes reports on EU Member States, Switzerland, the Czech Republic, Poland as well as an overview of the developments in the field of EC law. Additionally, it was decided to include one non-European country in every Yearbook – for this volume South Africa, with its highly interesting mixture of civil law and common law, was chosen. Furthermore, the Yearbook includes a short comparative overview and two essays on key issues of tort law. In next year's Yearbook we intend to broaden the scope of information provided by also covering the tort law systems of Hungary and Slovenia. As non-European country we plan to present a report on the developments in Israel. The essays, as well as the most important results of the country reports and some comparative remarks, were presented and discussed at the 1st Annual Conference on European Tort Law in Vienna on 5 April 2002. The 2nd Annual Conference on European Tort Law will again take place in Vienna and the date has been fixed for 25 April 2003.

In publishing the Yearbook we pursue the idea of providing a comprehensive overview of the latest developments in the law of torts of many European countries and thereby, enabling scholars as well as practitioners from different national backgrounds to keep abreast of questions concerning tort law. Furthermore, we do hope that the Yearbook will enhance and promote a greater understanding of the respective national legal and judicial systems which is essential for a successful harmonisation of European Tort Law.

At this point, we would like to express our gratitude for the support of this project by the Austrian Ministry of Education, Science and Culture; the Austrian Ministry of Justice; the Kulturabteilung der Stadt Wien; Munich Re; the Vienna Convention Bureau and Wiener Städtische Allgemeine Versicherungs AG. Without their support this project could never have been realised. Moreover, we would like to thank the staff of the European Centre of Tort and

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Helmut Koziol and Barbara Steininger
Vienna, August 2002

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# Damages for Non-Pecuniary Loss in a Comparative Perspective

2001. XX, 318 pages.
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How should loss, which cannot be expressed in money, be compensated? How should pain be financially assessed? Questions which are increasingly gaining significance. This volume focuses on bodily injury, non-pecuniary loss and compensation in an overview of the various provisions in Europe written by leading international experts as authors.
At the centre of the presentation is non-pecuniary loss. These losses, not measurable in money, are examined in country reports written by leading international experts.
These reports are supplemented by a comprehensive comparative report and a discussion concerning the harmonisation or standardisation of compensation for non-pecuniary loss. The volume provides important ideas for future developments. The questions of to what extent the various European legal systems have general principles in the area of non-pecuniary loss or whether there are rather special provisions for certain circumstances are dealt with. In this context the volume examines how far the presence of such special provisions allows conclusions concerning the position or the significance of non-pecuniary loss in the various legal systems.

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# Table of Contents

# Essays

# I. Strict Liability: What About Fault?

***Bénédict Winiger***[1]

## A. Introduction

**1** For nearly 200 years, fault was a necessary requisite for liability. Since the Code Civil Français from 1804, all the important national codifications have mentioned it as a basic condition for the reparation of damage[2]. Today, fault is sick, overcharged by tasks for which it had not been conceived: Judges have extended its application on new forms of risk typical for industrial societies. The particularity of these new dangers is to come up without the fault of anybody. The result of this evolution is a fault concept 'without fault'[3].

**2** One of the main aims of contemporary legislators is to find a remedy to this contradiction in terms. The Swiss draft (SD)[4], for example, introduces a specific norm for strict liability (art. 50 SD)[5] with the declared aim of the drafters

[1] I thank Helmut Koziol and Pierre Widmer for their reading of my paper as well as my assistants Samantha Meregalli and Guillaume Etier for their help. My thanks go also to Donna Stockenhuber for proof-reading my English text.

[2] Art. 1382 CCF, §§ 1294 and 1295 ABGB, § 823 BGB, art. 41 COS, art. 2043 CCI, art. 6:162 BW *etc.*

[3] See Pierre Widmer/Pierre Wessner, *Révision et unification du droit de la responsabilité civile. Rapport explicatif* (2000), p.120.

[4] *Avant-projet de loi fédérale sur la révision et l'unification du droit de la responsabilité civile* (2000), (cited Report).

[5] Avant-projet suisse *Art. 50 Responsabilité pour risque*
*1 La personne qui exploite une activité spécifiquement dangereuse est tenue de réparer le dommage dû à la réalisation du risque caractérisé que celle-ci comporte, même s'il s'agit d'une activité tolérée par l'ordre juridique.*
*2 Est réputée spécifiquement dangereuse l'activité qui, par sa nature ou par celle des substances, instruments ou énergies utilisés, est susceptible, en dépit de toute la diligence qu'on peut exiger d'une personne spécialisée en la matière, de causer de fréquents ou de graves dommages; tel est notamment le cas lorsqu'une loi institue une responsabilité spéciale à raison d'un risque comparable.*
*3 Sont réservées les dispositions spéciales régissant la responsabilité à raison d'un risque caractérisé déterminé.*
*Art. 50 Gefährdungshaftung*

to give back to fault its initial scope[6]. Other drafts, like the Project of the European Group on Tort Law based in Vienna, could propose comparable solutions.

The present paper will try to draw some possible consequences of strict liability norms on fault. In my sense, the first and apparently paradoxical consequence could be not a diminution, but a notable revaluation of the fault concept. One means of achieving this could be the differentiation of the fault in *culpa levissima, levis* and *lata*. 3

## B. Concepts of Fault Liability

First let us examine some different forms of fault we meet in our law systems. In the absence of real definitions by the law, certain doctrines propose their own definitions, while others prefer to give general descriptions. 4

A first, and let us call 'basic notion of fault' is that defined by Austrian doctrine: "A person is behaving faultily when that person should have acted differently and, furthermore, would have been able to act differently"[7]. A Swiss definition underlines "the blame not to have avoided harm to another person, notwithstanding the fact that one would have been in a position and under a duty to foresee and to avert the damage"[8]. Two elements dominate these definitions: the tortfeasor *should* and *could* have acted differently. This type of definition is the oldest one we know, formulated first by Mucius (2nd century B.C.), saying: *but a fault is what had not been foreseen although it could have been foreseen by the diligent or what had been denunciated when the danger could not have been avoided*[9]. Already here, we have the two elements of prevision and duty. 5

*1 Wird Schaden dadurch verursacht, dass sich das charakteristische Risiko einer besonders gefährlichen Tätigkeit verwirklicht, so haftet dafür die Person, die diese betreibt, selbst wenn es sich um eine von der Rechtsordnung geduldete Tätigkeit handelt.*
*2 Eine Tätigkeit gilt als besonders gefährlich, wenn sie ihrem Wesen nach oder nach der Art der dabei verwendeten Stoffe, Geräte oder Kräfte geeignet ist, auch bei Anwendung aller von einer fachkundigen Person zu erwartenden Sorgfalt häufige oder schwerwiegende Schäden herbeizuführen; dies ist inbesondere dann anzunehmen, wenn für ein vergleichbares Risiko bereits ein Gesetz eine spezielle Handlung begründet.*
*3 Spezielle Haftungsbestimmungen für ein bestimmtes charakteristisches Risiko sind vorbehalten.*

[6] See Report, p. 120.

[7] H. Koziol, Austrian Report on Fault, in: P. Widmer (ed.), Unification of Tort Law: Fault (cited Fault, forthcoming 2003), no. 3; ibid., Wrongfulness under Austrian Law, in: H. Koziol, (ed.), *Wrongfulness* (1998), p. 17; ibid., Liability Based on Fault: Subjective or Objective Yardstick? [1998] *Maastricht Journal*, 111.

[8] P. Widmer, Swiss Report on Fault, Fault, no. 3.

[9] Paulus D. 9,2,31: "... *culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denuntiatum esset, cum periculum evitari non possit*".