

InDret

Introduction to this special issue

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Working Paper No: 126
Barcelona, April 2003
www.indret.com

In this special issue *InDret* offers its readers the papers that were presented at the “Seminar on Current Developments in European Tort Law”, held at the *Max-Planck Institute for Foreign and International Private Law* in Hamburg on June 7, 2002. The Seminar was organised by Prof. Dr. Reinhard Zimmermann, Director of the Hamburg MPI and the Executive Director of *InDret*, Prof. Dr. Pablo Salvador Coderch, Professor of Civil Law at the University Pompeu Fabra in Barcelona, and benefited from the participation and the presence of outstanding European legal scholars. I would not like to forgo this opportunity to thank Prof. Zimmermann and the MPI Institute in Hamburg on behalf of *InDret* for their hospitality during this meeting and, on behalf of several generations of Spanish legal scholars, for generously making its premises available to us, for offering us its facilities open-handedly and for wholeheartedly sharing with us their legal concerns and interests over decades.

In a recent survey, one of the leading European legal scholars, Prof. Dr. Ewoud Hondius, has pointed out how important the efforts are which have been made by different groups of legal scholars over the last few years towards a harmonisation or approximation of Private Law in Europe and that, although Tort Law is not as high on the European agenda as Contract law, those efforts in this area have also been remarkable (HONDIUS, 2002). Several Groups and Projects, such as the *Study Group* (VON BAR, 2000a; ROCA TRÍAS, 2003), the *European Group on Tort Law* (KOCH, in this *InDret* issue; MARTÍN CASALS, 2003) and the *Trento Project* (BUSSANI/MATTEI 2000; CÁMARA LAPUENTE 2003) have been actively engaged in the development of European Tort Law and many publications and several first drafts of still sketchy *Principles* are already available. Some of their representatives also took an active part in this MPI / *InDret* Seminar thus contributing to a lively debate.

The Executive Director of *InDret*, Professor Pablo Salvador, presented a paper entitled *Vicarious Liability and Liability for the Actions of Others* in which he analyses the legal and economic grounds underpinning liability in these cases. The paper had been written together with Carlos Ignacio Gómez Ligüerre, Assistant Professor of the International University of Catalonia in Barcelona and Juan Antonio Ruíz García, Assistant Professor at the University Pompeu Fabra in Barcelona, with the co-operation of Antonio Rubí Puig and José Piñeiro Salguero, both Research Assistants at the latter University.

In the first part of their paper the authors set out how the rules that hold a person liable for the acts of others, historically linked to relationships between master and servant and, in the Civil law, also to relationships of dependence between family members, currently deal with problems arising from the operation and management of much more complex organisations characterised by the progressive division of labour. The greatest solvency and capacity to face the transaction costs of the person who is made accountable for the act of another justifies that he is held liable and, accordingly, has to compensate the plaintiff, either alongside the person who caused the harm or instead of him. One of the main difficulties of Spanish Tort Law being the existence of several jurisdictions with different substantive rules, in the first part of their paper they focus their attention on the legal regulation of the liability of the Public Administration and in the second part they analyse vicarious liability in the Civil and Criminal Codes, as well as in the Organic Act of Criminal Liability of Minors.

MAGNUS

Prof. Ulrich Magnus, Professor of Private Law at the University of Hamburg, deals in his paper with the recent German Damages and Tort Law reform carried out by the *Zweite Gesetz zur Änderung schadenersatzrechtlicher Vorschriften* (Second Act on the Amendment of Provisions on the Law of Tort and Damages) of June 19th., 2002 which came into force on August 1st., 2002, a topic which had already been introduced in *InDret* by Dr. Albert LAMARCA I MARQUÉS (Working Paper 96).

In the area of damages, the most fundamental novelty is the abandonment of the restrictive German position with regard to the compensation for non-pecuniary loss or immaterial harm. Pursuant the old § 253 BGB, such losses were only recoverable where statute so provided and, in practice, recoverability was confined to tort liability for fault causing bodily injuries (cf. old § 847 BGB). By repealing § 847 BGB and providing in the amended § 253 BGB that non-pecuniary loss has to be compensated in any case of injury of body, health, freedom and sexual self-determination, regardless of the fact whether tort liability is based on fault or is strict, or whether it has contractual nature, this reform has brought the German law of damages closer to the general European trend (See ROGERS 2001, 250 et seq.).

In the area of tort law, this reform clearly shows its piecemeal character since it focuses on several different, and to some extent, unrelated areas. In the area of strict liability it raises the caps or maximum amounts provided by a large number of strict liability statutes, thus falling short of bringing German strict liability in line with the general European trend which uses caps sparsely (KOCH/KOZIOL 2002, 428 et seq.). By contrast, with regard to the improvement of the protection of victims in the area of traffic accidents it follows the trend initiated in France and in Belgium long ago, but confines it to the protection of children between 7 and 10 years of age. Furthermore, it extends the liability of motor vehicle keepers, excludes the compensation of the so-called “fictitious damage” in cases of property damage, establishing that the value added tax of the cost of repair will not be recoverable if the victim has not actually incurred any of these costs, and changes the old-fashioned § 825 BGB into a general rule protecting both females and males against the violation of their right of sexual determination. The reform also deals with two other particular topics: the amendment Pharmaceutical Act (*Arzneimittelgesetz* [AMG]) which, by establishing a presumption of causation and a new right of information to the benefit of the victim involves and extension of liability for medicines, and compensation for pure economic loss for wrong opinions given by court experts.

As Prof. Magnus points out, this reform has not been a fundamental one but has a limited nature only. Although he deems that the reform purports an improvement of the traditional German Law of Damages and Torts and that brings German Tort Law closer to its European neighbours' laws, many points have remained unsettled and have been left for a later reform.

NILS JANSEN

In his paper *Structures of a European Tort Law—Historical Development and Modern Dogmatic*, Prof. Dr. Nils Jansen, since October 1, 2002 Professor for Civil Law, Roman Law, Private History and Legal Jurisprudence at University of Augsburg (Germany), presents in a shorter form some of the fundamental theses that he had developed in much more detail in his *Habilitationschrift* (JANSEN, 2003). The eminent young Professor (Hanover 1967) from Reinhardt Zimmermann's School, stands for the abandonment of the two-track system (i.e. negligence *versus* strict liability) in the further development of European Tort Law by arguing that the differences between the two grounds of liability are wrong, since in both cases it is a matter of liability for imputable harm to legally protected interests of the others for which the tortfeasor must respond personally.

The author explains why this differentiation between of what he calls *Deliktsrecht* (in the restricted sense of fault liability) and *fehlverhaltensunabhängigen Haftungen* (liabilities unrelated to conduct, an expression also used by VON BAR [VON BAR II, 2000, p. 336 et seq.] to refer to what to lawyers is regularly considered as different forms of strict liability) does not offer workable criteria for a practical organisation of Tort Law. He also underlines that, in contrast to the traditional explanation of German legal scholarship, the grounds for this dichotomy cannot be found in the Aristotelian distinction between *iustitia commutativa* and *iustitia distributiva*, since Tort Law always requires a combination of both. In a breathtaking journey from Ancient Roman Law to 20th Century developments, through the Commentators, the Usus Modernus, the Spanish Late Scholastic and the Natural Lawyers, Professor Jansen concludes that the difficulties posed by the current two-track Tort Law system lie in the fact that two legal concepts, *iniuria* (unlawfulness) and *culpa* (fault)— which had been originally coined for Roman Tort Law— have become dysfunctional in the many and diverse changes that they have undergone through the centuries.

In order to overcome the problems posed by the traditional two-track Tort Law system and in order to carry out a just distribution of risks, which the fault liability and strict liability divide does not solve, the author suggests the introduction of a sort Wilburg's *bewegliches system* (WILBURG, 2000) starting from the basic idea that tort liability is not based on a duty not to infringe certain protected interests of the other but on a burden that the tortfeasor must bear when an other's interest is infringed. *Prima facie*, the imputable infringement of the protected interest of another person would offer a ground for compensating the damage ensued. However the decision on whether the tortfeasor must bear the damage caused would depend on the weighing up of often opposing principles. The construction of a "flexible system" with principles such as fault, risk, cheaper cost insurer, the special protection of children, adequate prevention and others pointed out by the author would be decisive.

BERNHARD A. KOCH

Prof. Dr. Bernhard A. Koch (Feldkirch 1966), Associate Professor of the University is one of the most prominent young members of the "[European Group on Tort Law](#)" and one of the most

devoted to the harmonisation tasks conducted by the [European Centre of Tort and Insurance Law](#) and the new [Research Unit for European Tort Law of the Austrian Academy of Sciences](#) established in 2002. In his papers he presents an outline of the work conducted by the “European Group on Tort Law” in the light of his experience as co-coordinator (together with Prof. Dr. Helmut Koziol) of volume 6 of the series “Principles of Tort Law”, devoted to strict liability (KOCH/KOZIOL 2002), and of his indispensable participation in the Drafting Committee of the Group.

The author shows that there is not a clear-cut borderline between fault liability and strict liability but a *continuum* and, since currently diversity among all European jurisdictions in this area is great, argues that the challenge of finding “Principles” that are acceptable to all jurisdictions is unlikely to be met. Starting from the general clause established by the Swiss Draft, which was used as a model in a first draft of the Group, he sets out how the Group is working on a draft that can help in reaching a wider consensus.

SWANN

Dr. Stephen Swan is member of the [Study Group on a European Civil Code](#) and is extensively involved in its [Working Team on Extra-contractual Obligations](#) which is currently drafting a set of “Principles of European Tort Law”. However, his paper on the “Conceptual Foundations of the Law of Delict as Proposed by the Study Group on a European Civil Code” is not the work of an unconditional supporter but, as he points out, the work of a “critical insider”. It is well known that the Study Group’s Principles have been drafted, so to say, from the point of view of the victim and that some of their key elements are: 1) The notion of “relevant damage”: the basic rule refers to “[A] person who suffers legally relevant damage” and Chapter Two provides a general notion of the meaning of “relevant damage” together with detailed provisions regarding “particular types of legally relevant damage”; 2) The notion of accountability (i.e. attribution, subjective imputation) and its grounds: intention, negligence and “accountability without intention or negligence”; 3) A very general rule on causation (see VON BAR 2001).

With regard to the notion of “relevant damage” the author considers that the criticism arguing that it really sets out a list of specific torts is not justified, since the circumstances provided in these specific cases are never in themselves sufficient to give rise to liability. With regard to the notion of accountability, however, the author points out that, in the Study Group’s draft, it is invoked with a shifting sense, emerging sometimes as grounds for accountability and others as a combination of one of these grounds with the element of causation. With regard to the general rule on causation, criticism is also justified, and the author considers that the rule offers no definition of causation at all and confines itself to list factors which, from a policy point of view are relevant in determining whether a given defendant should ultimately be regarded as responsible for the damage which has been sustained.

PINTOS

Dr. Jesús Pintos Ager, Associate Professor of Procedural Law at the University Carlos III in Madrid, deals in his paper *Damage schedules and tort litigation in Spain*, with the Spanish mandatory legal tariffication scheme or scheduling of awards for personal injury resulting from traffic accidents. This has been one of the most innovative and crucial reforms in the area of tort liability in Spain and has given rise to a heated debate in the courtroom and among legal practitioners even before its introduction in 1995.

In his paper Dr. Pintos analyses this reform focusing particularly on how schedules for damages awards resulting from bodily injuries affect tort litigation. In an attempt to identify the incentives, costs and final effects to be expected from this legal institution objectively, he approaches the topic by means of litigation models that are well developed in Law & Economics. Firstly the author refers briefly to the changes introduced in 1995 into the Spanish legislation for non familiarized readers and then, by using a standard analytical framework of dispute resolution, in order to approach the question objectively, he systematises and presents the multiple effects that have been detected separately.

The analysis carried out in his paper points out that one of the most beneficial effect of the schedules on litigation, i.e., an immediate reduction in litigation rates, has not taken place as clearly, and to the extent that the legislator and the supporters of the schedule would have expected, and suggests that the ambiguity shown by the model encourages a reconsideration of its social desirability and more attention to be put on its secondary effects.

GÓMEZ / RUIZ

Fernando Gómez and Juan Antonio Ruiz, respectively Professor and Assistant Professor of Law at the University Pompeu Fabra in Barcelona, present a paper that deals with one of the hottest topics in the current European Tort Law debate (see BUSSANI/PALMER, 2003 and VAN BOOM / KOZIOL/ WITTING, 2003). The title of the paper —*The Plural –and Misleading- Notion of Economic loss in Tort: A Law and Economics Perspective*— already shows an indictment against a unitary and comprehensive notion of pure economic loss and a blind and uncritical introduction of this notion into the Continental European legal discourse. Furthermore, it shows that it is distancing itself from classical doctrinal scholarship (POSNER, 2002) and that in their interdisciplinarity, although the authors do not disregard traditional doctrinal tools and the use of comparative law –mainly in abridged references in the footnotes— they focus their analysis from the point of view of law and economics.

In the Common Law tradition and, also to a certain extent, in the German Law tradition (the so-called *reine Vermögensschäden*), pure economic loss is set in contrast to physical damage, i.e. a damage which involves either a personal injury or death or damage to property. Pure economic loss, as the authors of the paper set out, “is not the direct financial impact of personal or property injury, nor the consequential financial impact upon the victim of such personal or proprietary

injuries”. This damage occurs independently of death or personal injury or damage to the property of the *plaintiff*. This reference to the plaintiff must be stressed since in certain cases the pure economic loss of the plaintiff will be related to a physical damage to a third person or his or her property with whom the plaintiff has some sort of relationship (the so-called *relational pure economic loss*), this being immaterial with regard to the pure economic character of the losses of the plaintiff. Furthermore, as results from the above mentioned definition, pure economic loss must also be set apart from the so-called *consequential economic loss*, i.e. an economic loss which is ancillary to personal injury (for instance, loss of earnings) or damage to property (for instance, loss of value of the repaired object). These sorts of economic losses do not pose the same problems presented by pure economic ones.

It is well known that whereas some legal systems seem to depart from a so-called “bright line” or “exclusionary” rule, which would turn non-compensation of pure economic loss into the general rule, others even ignore this legal notion and handle the problems posed by the compensation of these types of losses with legal devices such as the scope of causation or the notion of damage. However, even in the countries where pure economic loss is common ground the specious unity of the pure economic loss phenomenon encompasses a large variety of disparate situations. These situations cannot be tackled with the same yardsticks and devices and the so-called exclusionary rule—if it ever was as rule—is neither a general rule nor a “bright line” one any longer.

Due to this heterogeneity the authors argue that this category is misleading, both as a normative category and as useful term to group related cases and issues together and favour a pluralistic approach. In this approach they avail themselves of several economic principles—such as subrogation, social losses versus private losses in forgone sales, surrogate tort liability for failed contract liability and the so-called “liability of the gatekeepers”—in order to organise and shed some light on the issues involved.

What the authors call the “surrogatory principle”, which speaks in favour of compensation of pure economic losses in certain cases, is commonly known among non-law and economics lawyers as “transferred loss”, and is a subcategory of the so-called “relational loss”. It refers to situations in which damage that would normally have been suffered by the injured party is sometimes in fact suffered by a third party because of the special relationship existing between the injured and the third party. It includes pure economic losses such as the salaries and wages that employer must keep on paying to his or her employee despite his or her temporary disability; or lease or charter contracts in which the lessee or the charterer must continue on paying the contract price for the object while it is under repair and without being able to use it, etc.

Other principles under analysis are confining compensation to those private losses that are not offset by someone else’s gains (the traditional core of BISHOP’s argument [BISHOP 1982]) and what the authors call “surrogate of contractual liability” and “gatekeeper’s liability”, referring to cases of liability in tort for negligent services or information. In the first case, they contend that the private cost – social cost divide does not offer a workable yardstick for the practice of the courts. In the second, they argue that solution of the problems requires taking into consideration the

distinctiveness of every case, thus making such a broad notion as “pure economic loss” unworkable.

Josep FERRER RIBA

In *Domestic Relations* Dr. Josep Ferrer Riba, Associate Professor at the University Pompeu Fabra, combines his experience in the area of Tort Law with his mastery in Comparative Family Law in order to analyse both the role that Tort Law actually plays, and that which it should play, in compensating harm caused by family members or people living together. Starting from the traditional domestic privileges and immunities in Civil law and in Common Law, and focusing his attention mainly on the German legal system and on the different solutions offered by the United States' jurisdictions, he analyses how in continental Europe the different jurisdictions have coped without establishing immunities, either by changing the objective standard of care legally by a *quam in suis* standard (as for instance, in Germany, §§ 1359 and 1664 I BGB and § 4 LPartG) or by operating judicially with the open-textured nature of tort liability rules (as, for instance in France, Italy or Spain). By contrast, the immunity between spouses and between parents and children, which had been paramount in the Common Law, has more recently been put into question and progressively substituted by privileges of substantive law elaborated on a case-by-case basis. This progressive dismissal of tort immunities has substantially reduced the differences between Common Law and Civil Law.

The author discusses three possible rationales as grounds for exemption from liability or for its mitigation: a) the family status of the tortfeasor and the victim, a criterion that has been fundamental for decades in determining the scope of the immunities in the Common Law; b) the cohabitation between the tortfeasor and the victim, which by reducing the relevance of the family status gives greater weight to cohabitation as grounds for a justification of certain conducts that would involve a exemption or reduction of liability and c) the connection of the harmful conduct with the performance of a family legal role or the fulfilment of family legal duties.

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