Helmut Koziol

Basic Questions of Tort Law from a Germanic Perspective

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Preface

The title of the German version of this book reads »Grundfragen des Schadenersatzrechts« and is thus much broader than the English title »Basic Questions of Tort Law from a Germanic Perspective«: the notion of »Schadenersatzrecht« not only comprises delicts but also contractual liability; further, not only the conditions and the bases of liability but also remedies. Therefore – apart from sounding strange to English speaking lawyers – neither the »law of damages« nor the »law of liability« would cover the same area as »Schadenersatzrecht«. As no English expression with similar meaning is available or at least common, I thought it best to refer to »tort law« as this is the main topic, although the borderlines to contractual liability are discussed and remedies and even time limitations are dealt with.

Already the discussion about the title shows the difficulties a translation of a book on Continental European law and in particular on Germanic law runs into. Because of the differences in the way of thinking and in the fundamental ideas, the deeper penetrating theory, the much more comprehensive dogmatics and the more detailed systematics makes it nearly impossible to express German legal discussions and argumentations adequately in English as the corresponding expressions are not available.[1] For a Germanic lawyer English is not an ideal language to express his thoughts[2] and, on the other hand, it will not be easy for an English reader to understand the ideas of a German lawyer expressed in English. To make it a little easier for an English reader some of the expressions used by German lawyers are explained and can be found in a »glossary«. Nevertheless, I can imagine that a common lawyer will need quite some patience and perseverance to read this text, but I do hope it will be worth the efforts to some extent.

The volume, »Basic Questions of Tort Law«, is based on the German, Austrian and Swiss legal systems, but moreover it frequently refers in a comparative fashion to other legal systems as well as to the Principles of European Tort Law. The book is the first part of a project supported by the Austrian Science Fund

1 See the section on the problem of terms, concepts and language in *B Markesinis/M Coester/G Alpa/A Ulistein,* Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline (2005) 2 ff.

2 See in regard of this problem *Flessner,* Die Bedeutung von Wilhelm von Humboldts Sprachdenken für die Rechtswissenschaft, in: Grundmann/Kloepfer/Paulus/Schröder/Werle (eds), Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin (2010) 882 ff.

(Fonds zur Förderung der wissenschaftlichen Forschung, FWF), which seeks to produce answers to the basic questions of tort law in Europe from a comparative perspective. »Basic Questions of Tort Law from a Germanic Perspective« is intended to provide a basis for comprehensive responses by representatives of other European legal families and jurisdictions outside Europe on the fundamental ideas elaborated in this book. The statements will in turn be instrumental in the draft of the conclusions, which will attempt to provide substantiated answers to the fundamental questions of tort law, above all its functions and aims but also numerous other important issues. By this, an attempt will be made to offer basic answers founded on comparative research to guide future developments in European tort law.

The book in hand, therefore, tries to give a more extensive introduction to the delictual and contractual law of liability and damages. It addresses basic problems and questions and where appropriate elaborates upon them; it queries the usual arguments, prompts the reconsideration of apparently established ideas and enhances awareness of interrelationships. Accordingly, the rationale of that old but nowadays often disregarded principle that the loss lies where it falls (casum sentit dominus) is called to mind; the issue of »insurance versus liability« is raised and the pros and cons of strict delimitation and rigid norms as opposed to fluid transitions and elastic rules are discussed. Above all, however, the position of the law of tort within the overall system for the protection of legal goods is examined and taken as a basis to elaborate the aims of individual legal remedies in more detail and to reveal the fluid transitions between the legal areas and further develop them. For example, the relationship between claims for damages and preventive and reparative injunctions is looked at; the difficult issue of »punitive damages« at the crossroads between criminal and civil law is examined; the division of roles between tort law and social security law is reviewed. The resulting conclusions serve to facilitate the subsequent elaboration of the tasks of the law of tort, in which context the increasingly emphasised economic function is discussed as well as the compensatory, deterrent and penal functions.

However, the book is not limited to these very general considerations but also seeks to apply the insights gained in order to examine both general and more specific questions. These in turn aim to provide the reader with information which will enable him or her to understand better the – to some extent strange – ideas in foreign legal systems. Nonetheless, no attempt is made to provide a complete overview; instead the focus is on particularly controversial issues and new approaches. Not only is the relationship between breaches of obligations and torts examined, but the basic requirements for a claim under tort law – damage and causation – are also discussed. An extensive section is devoted to the elements of establishing liability; besides wrongfulness and fault, other defects within the sphere of the party liable for damages are looked at: for example, the capacity to bear the economic

burden, insurability, the notion of a risk community and the interplay of the various elements. The question of liability on the side of the victim, ie contributory responsibility, is looked at anew – starting from basic principles. After the limitation of liability, the compensation of damage and the reduction of the duty to compensate, a final section is devoted to the prescription of compensation claims.

As the text repeatedly makes reference to the »Principles of European Tort Law« by the European Group on Tort Law and to the »Draft proposal submitted by the working group set up by the Federal Ministry of Justice for a new Austrian law of damages«, these texts are included in the annex to make the complete wording of the relevant provisions as well as the context available to the reader.

Fiona Salter Townshend has carried out the difficult task of translation from German to English with keenness, great care and experience; my sincere thanks for that. I further want to express my gratitude to Vanessa Wilcox, European Centre of Tort and Insurance Law, Vienna, for her enormous personal commitment and important help in finishing this manuscript. I am indebted to Michael D. Green, Wake Forest University School of Law, for his many helpful suggestions to make the book better understandable for US lawyers.

I am grateful to the Austrian Science Fund for supporting this project, which otherwise would have been impracticable.

The very personal assistance provided by my publisher, Mag Jan Sramek, was as professional and as thorough as an author could possibly wish for, but will very rarely experience.

Helmut Koziol

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List of Abbrevations

ABGB	Allgemeines bürgerliches Gesetzbuch JGS 1811/946 (Austrian Civil Code)
Abs	Absatz (paragraph)
AC	Appeal Cases
AcP	Archiv für die civilistische Praxis
AfP	(German) Zeitschrift für Medien- und Kommunikationsrecht
AJP	Zeitschrift für die Aktuelle Juristische Praxis
AktG	Aktiengesetz BGBl 1965/98 (Austrian Stock Corporation Act)
Anh	Anhang (Annex)
Anm	Anmerkung (Comment)
Ariz L Rev	Arizona Law Review
Art	Article
AtomHG	Atomhaftungsgesetz (German Atomic Liability Act)
BAG	Bundesarbeitsgericht (German Federal Labour Court)
BAGE	Entscheidungen des Bundesarbeitsgericht (Decisions of the German Federal Labour Court)
BergG	Berggesetz BGBl 1975/259 (Austrian Mining Act)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBl	Bundesgesetzblatt für die Republik Österreich (Austrian Federal Law Gazette)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Decisions of the Swiss Federal Supreme Court)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the German Federal Court of Justice in criminal matters)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the Federal Court of Justice in civil matters)
BImSchG	Bundes-Immissionsschutzgesetz (Federal Pollution Control Act)
BlgNR	Beilage(n) zu den stenographischen Protokollen des Nationalrats

BSK	Basler Kommentar zum schweizerischen Privatrecht
BVG	Bundesversorgungsgesetz (German Federal Victims Relief Act)
BW	Burgerlijk Wetboek (Dutch Civil Code)
BWG	Bankwesengesetz BGBl 1993/532 (Austrian Banking Act)
Cal L Rev	California Law Review
Cass	Corte Suprema di Cassazione (Italian Supreme Court of Cassation)
Cass ass plén	Cour de Cassation, Assemblée Plénière (French Court of Cassation, Plenary Court)
Cass civ	Cour de Cassation, chambre civile (French Court of Cassation, Civil Division)
Cass com	Cour de Cassation, Chambre commerciale, financière et économique (French Court of Cassation, Commerical Division)
cf	confer, compare
Cir	Circuit Court of Appeal
CMR	Convention on the Contract for the International Carriage of Goods by Road
COM	Documents of the Commission of the European Union
d	German (in front of another abbreviation)
D	Recueil Dalloz
DCFR	Draft Common Frame of Reference
DHG	Dienstnehmerhaftpflichtgesetz BGBl 1965/80 (Austrian Employee Liability Act)
DJT	Deutscher Juristentag
EC	European Community
ECG	E-Commerce-Gesetz
ECHR	European Convention on Human Rights
ecolex	Fachzeitschrift für Wirtschaftsrecht
ECR	European Court Reports
ECtHR	European Court of Human Rights
ECU	European Currency Unit
Ed(s)	Editor(s)
EEC	European Economic Community
eg	exempli gratia (for example)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the German Civil Code)
EGTL	European Group on Tort Law

EKHG	Eisenbahn- und Kraftfahrzeughaftpflichtgesetz BGBl 1959/48 (Austrian Act on Liability for Railways and Motor Vehicles)
ERPL	European Review of Private Law
et al	et alii (and others)
EuGRZ	Europäische Grundrechte – Zeitschrift
EvBl	Evidenzblatt (joined with the ÖJZ since 1946)
F	Federal Reporter
f, ff	Following page, following pages
FBG	Firmenbuchgesetz BGBl 1991/10 (Austrian Commercial Register Act)
FN	Footnote
ForstG	Forstgesetz BGBl 1975/440 (Austrian Forest Act)
FS	Festschrift (Commemorative publication)
Ga L Rev	Georgia Law Review
GedS	Gedenkschrift (Commemorative publication)
GI	Giurisprudenza
GlUNF	Collection of civil law decisions of the Imperial Royal Austrian Supreme Court, new series; started by *Glase*r and *Unger*, continued by *Pfaff*, *Schey*, *Krupsky*, *Schrutka von Rechtenstamm* and *Stephan* (1898 to 1915)
GmbH	Gesellschaft mit beschränkter Haftung (Private limited company)
GmbHG	Gesetz über Gesellschaften mit beschränkter Haftung RGBl 1906/58 (Austrian Private Limited Company Act)
GMG	Gebrauchsmustergesetz BGBl 1994/211 (Austrian Model Utility Act)
GOG	Gerichtsorganisationsgesetz RGBl 1896/217 (Austrian Act on Court Organisation)
GP	Gesetzgebungsperiode
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil
GUG	Grundbuchumstellungsgesetz BGBl 1947/22 (Austrian Act concerning the Reorganisation of the Land Registry)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German Act against Restraints on Competition)
Harv L Rev	Harvard Law Review
HAVE	Haftung und Versicherung

HGB	Handelsgesetzbuch (German Commercial Code)
HKK	Historisch-kritischer Kommentar
HpflG	Haftpflichtgesetz (German Liability Act)
ie	id est (that is)
immolex	Neues Miet- und Wohnrecht
InsO	Insolvenzordnung (Germany Insolvency Code)
Int Insur Law Rev	International Insurance Law Review
Int'l Rev L & Econ	International Review of Law and Economics
IO	Insolvenzordnung (Austrian Insolveny Code)
IPR	Private International Law
IT	Information technology
JAP	Juristische Ausbildung und Praxisvorbereitung
Jb	Jahrbuch (Yearbook)
JBl	Juristische Blätter
JETL	Journal of European Tort Law
JherJB	Jehrings Jahrbücher für Dogmatik des bürgerlichen Rechts
J Legal Stud	Journal of Legal Studies
JuS	Juristische Schulung
JZ	(German) Juristenzeitung
KartellG	Kartellgesetz BGBl 1972/460 (Austrian Antitrust Act)
KBB	Koziol/Bydlinski/Bollenberger, Kurzkommentar zum ABGB
KG	Kommanditgesellschaft (Limited partnership)
KMG	Kapitalmarktgesetz
KO	Konkursordnung RGBl 1914/337 (Austrian Bankruptcy Code)
KSchG	Konsumentenschutzgesetz BGBl 1979/140 (Austrian Consumer Protection Act)
lit	litera (letter, item)
LuftVG	Luftverkehrsgesetz RGBl 1936 I 653 (Austrian Air Traffic Act)
MarkSchG	Markenschutzgesetz BGBl 1970/260 (Austrian Trademark Act)
MDR	Monatsschrift für Deutsches Recht
MedG	Mediengesetz BGBl 1981/314 (Austrian Media Act)
MedienG	Mediengesetz (German)
MJ	Maastricht Journal of European and Comparative Law
MR	Medien und Recht
MRG	Mietrechtsgesetz

MünchKomm	Münchener Kommentar
MuSchG	Musterschutzgesetz BGBl 1990/497 (Austrian Industrial Design Protection Act)
NF	Neue Folge (New series)
NJW	(German) Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungs-Report
No, Nr	number
NO	Notariatsordnung
NZ	Österreischische Notariats-Zeitung
ö	Austrian (in front of another abbreviation)
ÖBA	Journal of Banking and Financial Research (Österreichisches Bank-Archiv)
ÖBl	Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht
OEG	Opferentschädigungsgesetz (German Act on the Compensation of Victims)
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OHG	offene Handelsgesellschaft (general partnership)
OJLS	Oxford Journal of Legal Studies
ÖJT	Österreichischer Juristentag
ÖJZ	Österreichische Juristenzeitung
OLG	Oberlandesgericht (Higher Regional Court of Appeal)
OR	Obligationenrecht (Swiss law of obligations)
ÖRZ	Österreichische Richterzeitung
ÖZW	Österreichische Zeitschrift für Wirtschaftrecht
para	paragraph
PatG	Patentgesetz BGBl 1970/259 (Austrian Patent Act)
PEL Liab Dam	Draft Common Frame of Reference Book VI: Non-Contractual Liability Arising out of Damage Caused to Another
PETL	Principles of European Tort Law
PHG	Produkthaftungsgesetz BGBl 1988/99 (Austrian Product Liability Act)
ProdHaftG	Produkthaftungsgesetz (German Product Liability Act)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
R C Ass	Responsabilité civile et assurances

RdA	(German) Recht der Arbeit
RdM	Recht der Medizin
RdU	Recht der Umwelt
RdW	Austrian Recht der Wirtschaft
RG	Reichsgericht (Supreme Court of the German Reich)
RGZ	Entscheidungen des (deutschen) Reichsgerichts in Zivilsachen (Decisions of the Supreme Court of the German Reich in civil matters)
RHPflG	Reichshaftpflichtgesetz RGBl 1871/207 (Liability Act of the German Reich)
RTD civ	Revue trimestrielle de droit civil
RZ	Austrian Richterzeitung
San Diego L Rev	San Diego Law Review
sec	Section
SJZ	Schweizerische Juristen – Zeitung
StGB	Strafgesetzbuch BGBl 1974/60 (Austrian Criminal Code)
StPO	Strafprozessordnung BGBl 1975/631 (Austrian Code of Criminal Procedure)
STS	Sentencia del Tribunal Supremo (Decision of the Spanish Supreme Court)
StVG	Straßenverkehrsgesetz (German Road Traffic Act)
SVZ	Schweizerische Versicherungs – Zeitschrift
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (Decisions of the Austrian Supreme Court in civil matters and administration of justice matters)
UCLA L Rev	UCLA Law Review
UGB	Unternehmensgesetzbuch RGBl 1897/219 (Austrian Commercial Code)
UN CISG	United Nations Convention on Contracts for the International Sale of Goods
UNIDROIT	Institut international pour l'unification du droit (International Institute for the Unification of Private Law)
U Pa L Rev	University of Pennsylvania Law Review
UrhG	Urheberrechtsgesetz (Copyright Act)
UWG	Bundesgesetz gegen den unlauteren Wettbewerb BGBl 1984/448 (Austrian Federal Law against Unfair Competition)

Vand L Rev	Vanderbilt Law Review
VersR	Versicherungsrecht – Juristische Rundschau für die Individualversicherung
VersVG	Versicherungsvertragsgesetz BGBl 1959/2 (Austrian Insurance Contract Act)
VOG	Verbrechensopfergesetz BGBl 1975/288 (Austrian Act on Victims of Crime)
Vor	Vorbemerkungen (preliminary remarks)
VR	Versicherungsrundschau. Fachzeitschrift für Sozial- und Vertragsversicherung
VVG	Versicherungsvertragsgesetz (German Insurance Contract Act)
WBl	Wirtschaftsrechtliche Blätter (supplement to the JBl)
WiStG	Wirtschaftsstrafgesetz (German Economic Offences Act)
WLR	Weekly Law Report
WoBl	Wohnrechtliche Blätter
WRG	Wasserrechtsgesetz BGBl 1959/215 (Austrian Water Act)
ZBJV	Zeitschrift des Bernischen Juristenvereins
ZBl	Zentralblatt für die Juristische Praxis
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfRV	Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht
ZGB	Zivilgesetzbuch (Swiss Civil Code)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftrecht
ZR	Blätter für Zürcherische Rechtsprechung
ZSR	Zeitschrift für Schweizerisches Recht
ZStW	(German) Zeitschrift für die gesamte Strafrechtswissenschaft
ZUM	Zeitschrift für Urheber- und Medienrecht
ZVersWiss	(German) Zeitschrift für die gesamte Versicherungswissenschaft
ZVR	Zeitschrift für Verkehrsrecht

Chapter 1

Introduction

I. The victim's own risk and shifting of the damage

An ancient saying runs »casum sentit dominus«; in English it would read »let the loss lie where it falls«[1]. This rule, which is sometimes called the »property rule«, expresses a fundamental and natural idea: *If someone suffers damage, then in principle he must bear this damage himself.* Everybody bears the risk for his own goods, unless another is liable for the harm. Just as each individual is entitled to enjoy advantageous changes to and uses of his interests, on the other hand he must also bear the disadvantageous changes. This principle is emphasised in § 1311 sentence 1 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) and the same line is pursued in § 1292 (3) of the 2007 version of the Draft proposal for a new Austrian law of damages[2] hereinafter the Austrian Draft; moreover, it is also recognised in other cases where there is no express statutory regulation[3]. As *Canaris*[4] emphasises, this principle is not by any means merely expedient, rather it consists in an elementary justice consideration, because it expresses the self-evident nature of the proposition that everyone must bear his own »general risk of life« and that it is not always possible to pass it on to other private law subjects. This basic rule is also tied to the consideration that firstly, the question as to which other private law subject should bear the damage is necessarily left entirely unanswered and secondly, neither can the public always be expected to cover the risk. 1/1

However, it is apparent that in today's society there is an increased perception – fuelled by certain unrealistic political »land of milk and honey« delusions – 1/2

1 See *Zimmermann,* Obligations 154, who refers to *Wacke,* Gefahrerhöhung als Besitzverschulden, Hübner-FS (1984) 670 ff; *Brüggemeier,* Gesellschaftliche Schadensverteilung und Deliktsrecht, AcP 182 (1982) 393, refering to *Holmes,* Common Law (1881) 76.

2 This provision reads: »The consequences of mere chance are borne by the person whose patrimony or person is thereby affected.«

3 See *Weyers,* Unfallschäden. Praxis und Ziele von Haftpflicht- und Vorsorgesystemen (1971) 486 ff; *Deutsch,* Haftungsrecht[2] no 1; *Brüggemeier,* Gesellschaftliche Schadensverteilung und Deliktsrecht, AcP 182 (1982) 392 f with further references.

4 *Larenz/Canaris,* Schuldrecht II/2[13] § 75 I 2 a. For reservations with regard to this principle see *Looschelders,* Bewältigung des Zufalls durch Versicherung? VersR 1996, 529, 538.

that the individual can be cocooned away from all risks; that someone else is always responsible for any damage the individual suffers, and thus each victim's loss must always be covered[5]. However, this overlooks the undeniable fact that compensation to the victim does not eliminate the damage from existence but merely passes it on to someone else, hence the damage is merely shifted and someone else suffers a loss by having to cover it[6]. When this is taken into consideration, it becomes clear how completely illogical it would be if damage always had to be borne by another person and never by the person basically closest to the damage, who owns the damaged interest and who is best placed to protect it against injury – especially when it can be taken as self-evident that the owner of the interest has exclusive enjoyment of the full *advantages* of this interest.

1/3 Hence, there must be *particular reasons* that appear to justify allowing the victim to pass the damage on to another person. In this context, it must firstly be considered that each measure to protect the sphere of a particular individual – in particular their subjective rights[7] – leads to a restriction of the liberty of action of all other persons, who must respect these protected interests as they have duties of care in this regard and they will be subject to additional duties to compensate should damage occur[8]. Therefore, comprehensive consideration of the opposing interests of the individuals involved is necessary, whereby regard must also be had to the interests of the public.

The law of damages thus appropriately provides – to put it very generally and vaguely – for the granting of a claim for compensation against another person and hence for a corresponding shifting of the damage only when such person is »more closely associated« with the damage than the victim. Whether this is the case depends on various criteria: it is necessary that the person obliged to compensate caused the damage, or at least that it was caused within their sphere of influence (ie persons (eg employees, helpers) and property (eg dangerous things, animals) for whom or for which the defendant is responsible because they serve the defendant's interests and are under his influence), and therefore that there is a connection between such person and the loss that was incurred. However, this alone is not sufficient, *special grounds for imputing the damage* (ie establishing liability) are necessary. There are several such grounds for liability, which base

5 On this tendency cf *Holzer/Posch/Schilcher,* Was kommt nach dem Sozialschaden? DRdA 1978, 210; *Grossfeld,* Haftungsverschärfung, Haftungsbeschränkung, Versicherung, Umverteilung, Coing-FS II (1982) 115. On the serious nature of this tendency see *Zöllner,* Zivilrechtswissenschaft und Zivilrecht im ausgehenden 20. Jahrhundert, AcP 188 (1988) 95 f with further references.

6 On this also *Grossfeld,* Coing-FS II 112 f.

7 That is, the powers granted by law to individual persons (legal subjects), eg property right, claim to perform a contract, right to avoid a contract.

8 Cf *Picker,* Vertragliche und deliktische Schadenshaftung, JZ 1987, 1052; *idem,* Die Privatrechtsgesellschaft und ihr Privatrecht. Zur wachsenden Freiheitsbedrohung im Recht und durch Recht, in: Riesenhuber (ed), Privatrechtsgesellschaft (2007) 207 ff; *Wilhelmi,* Risikoschutz 12 ff.

their justification, on the one hand, on the basic notion of iustitia commutativa, retributive justice, and, on the other hand, on the notion of iustitia distributiva, distributive justice. The notion of retributive justice assigns decisive significance above all to culpable misconduct (fault), whereas liability on the basis of responsibility for a source of special danger in particular is based on the notion of distributive justice[9]. These two concepts of justice are not irreconcilable; rather they can complement each other and indeed overlap[10].

1/4 The aggregate of the norms that regulate when an injured person can seek compensation for damage he incurred from another person is referred to as *law of damages* (Schadenersatzrecht) or liability law (Haftungsrecht). It is worth mentioning that Austrian law regulates the compensation of injuries sustained within a contractual relationship or other special legal relationship and extra-contractual (delictual) compensation claims together; only the rules on the latter area can be called tort law. The German Civil Code (Bürgerliches Gesetzbuch, BGB) only treats questions of type, content and extent together (§§ 249 ff); other legal systems practise a more or less strict separation and thus lose sight of the shared aspects and overlaps (see on this see below no 4/1 ff).

1/5 But besides the law of damages, shifts of damage can arise for various other reasons: in particular in the context of securing people's livelihood, *social law* with its community spirit focus leads increasingly[11] to a shifting of personal damage from the injured party to social security, and thus to a distribution of the damage among all other insured persons and due to co-financing of such social security by the public hand, also to the general public. Furthermore, where appropriate the public hand or funds financed by it assumes the damage in *cases of disasters* or the where damage has been sustained by *victims of crime.* By virtue of *insurance contracts,* all the damage can moreover be shifted to the insurance company and thus indirectly to all other insured parties[12].

1/6 This quick glance at the different systems of shifting damage provokes two particular observations: first, it must be noted that the law of damages is aimed at complete compensation of the injured person for the damage sustained, in accordance with the ideas of justice it is based on, but it is at the same time also aimed at preventing any additional advantage going beyond this[13]. Thus, coordination

9 See on this *Canaris,* Die Gefährdungshaftung im Lichte der neueren Rechtsentwicklung, JBl 1995, 15 ff; *Englard,* The Philosophy of Tort Law (1993) 11 ff; *Esser,* Grundlagen und Entwicklung der Gefährdungshaftung (1941) 69 ff; *Henkel,* Einführung in die Rechtsphilosophie[2] (1977) 410 f; *Looschelders,* Die Mitverantwortlichkeit des Geschädigten im Privatrecht (1999) 122 f. *Oertel,* Objektive Haftung in Europa (2010) 24 ff, 46, considers, however, that no superiority of either objective liability or fault-based liability can be inferred from the concept of distributive justice.

10 On this *Canaris,* JBl 1995, 16; *Englard,* The Philosophy of Tort Law 16, 54 f, 85 ff, 228.

11 Cf *Zimmermann,* Obligations 904; *Brüggemeier,* Haftungsrecht 9 and 11.

12 *Oetker* in MünchKomm, BGB II[5] § 249 no 10.

13 On this *Jansen* in HKK zum BGB II §§ 249–253, 255 no 18.

between and interlinking of the different systems is necessary in order to avoid an *undesired enrichment* of the victim[14]. Moreover, it must also be taken into consideration that other legal remedies, which do not provide for reparation of damage, in fact result in similar compensation. For instance, the claim for unjust enrichment available to someone whose rights were infringed may correspond largely with his rights to compensation for damage. In this case, the rules on competing claims will prevent double satisfaction of the injured party.

1/7 Second, it would seem necessary in the face of the general tendency to promote the expansion of the damage absorption systems, to call the following to mind: it is certainly desirable from the point of view of the victim that his losses are covered as extensively as possible. However, it must be taken into consideration that even in the field of patrimony it is not always possible to render the damage »undone« by virtue of complete compensation, and in the wide field of personality rights violations it is not really possible at all to compensate the damage as such. Handicap caused by bodily injury, lengthy deprivation of liberty or pain and suffering cannot be »undone« and frequently neither can their continued future impact be hindered. The victim can merely be awarded money as ultimately inadequate compensation. This was all highlighted by *V. Mataja*[15] more than 100 years ago: »No legislature in the world can eliminate a loss once it has occurred, the law is powerless in the face of such a fait accompli. Thus, in respect of the risk of damage, the law can only pursue two goals: it can seek to (1) exert a deterrent effect as much as possible and (2) shift the damage which nonetheless occurs to those people as seem most suitable to bear the loss according to the requirements of justice and economic interests.«

Hence, in the light of all of these frequent calls for the expansion of tort and other compensation systems, it is important not to lose sight of the *primary* aim[16] of the legal system, ie *prevention of damage.* Naturally, the strengthening of tort protection also serves prevention (more detail in no 3/4), because it creates an incentive to avoid causing damage and thus being burdened with compensation claims. But tort certainly does not have sufficient impact on its own in terms of prevention of damage and its real role only comes into play once the damage has occurred. Thus, energy should be focussed on pursuing the goal of prevention of damage and not primarily expended on discussion of the expansion of compensation remedies for injuries which have already occurred. Besides the available private law relief instruments, such as preventive and reparative injunctions (Unterlassungs- und

14 See on this, eg *Schaer,* Grundzüge des Zusammenwirkens von Schadensausgleichssystemen (1984).

15 *V. Mataja,* Das Recht des Schadensersatzes (1888) 19. On this pioneering work by Mataja see *Englard,* Victor Mataja's Liability for Damages from an Economic Viewpoint: A Centennial to an Ignored Economic Analysis of Tort, 10 Int'l Rev L & Econ (1990) 173 ff.

16 This is also emphasised for example by *Brüggemeier,* Haftungsrecht 9.

Beseitigungsansprüche),[17] an intensification of public law protective laws and measures, for example more effective traffic supervision, or crime prevention, should also be considered and the main goal of effective damage prevention should not be impeded, for example by data protection promoted to serve at its own altar.

1/8 Before the actual law of damages issues can be handled, part II will look at the position of the law of damages within the *overall legal system,* as this is not only of importance in respect of liability law's function within the system but also in respect of the detailed establishment of grounds for liability, the limitation of liability and the proper arrangement of the claims of an injured party. First however, it is important to look at a few fundamental questions – above all those affecting the »raison d'être« of the law of damages, namely whether, eg, tort law would not be better replaced by insurance-based solutions.

II. An insurance-based solution instead of liability law?

1/9 Time and time again, it has been suggested that liability law as a whole or in part, for instance with respect to traffic accidents[18] or medical treatment[19], be replaced by an insurance-based solution (accident insurance). In a sub-field, namely occupational injuries, this notion has already been widely implemented in Germany and Austria[20]. In the case of mistakes made in the course of medical treatment, an insurance system was introduced in Scandinavia, which however does not wholly replace tort law[21]. In New Zealand a non-fault based compensation system even wider in scope was introduced for all personal injuries[22].

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17 See *Dobbs,* Law of Remedies[2] (1993) 164: »A preventive injunction attempts to prevent the loss of an entitlement in the future.« and »The reparative injunction requires the defendant to restore the plaintiff to a preexisting entitlement«. See also Black's Law Dictionary.

18 *Von Hippel,* Schadensausgleich bei Verkehrsunfällen, Haftungsersetzung durch Versicherungsschutz (1968).

19 *Barta,* Medizinhaftung (1995); *Dute,* A Comparison of No-Fault Compensation Schemes, in: Dute/Faure/Koziol (eds), No-Fault Compensation in the Health Care Sector (2004) 444 ff; *Radau,* Ersetzung der Arzthaftung durch Versicherungsschutz (1993). Cf on the different approaches also *Cascao,* Prevention and Compensation of Treatment Injury: A Roadmap for Reform (2005).

20 *Brüggemeier,* Haftungsrecht 635; *Gitter,* Schadensausgleich im Arbeitsunfallrecht (1969) 36 ff, 238 ff; *Koziol,* Haftpflichtrecht I[3] no 1/20.

21 *Hellner,* Entwicklungslinien im schwedischen Haftpflichtrecht, Sieg-FS (1976) 155; *Mikkonen,* Compensation in the Finnish Health Care Sector, in: Dute/Faure/Koziol, No-Fault Compensation 186 ff; *J.W. Pichler,* Rechtsentwicklungen zu einer verschuldensunabhängigen Entschädigung im Medizinbereich I (1994) 91 ff; *Wendel,* Compensation in the Swedish Health Care Sector, in: Dute/Faure/Koziol, No-Fault Compensation 367 ff.

22 On this *Rohde,* Haftung und Kompensation bei Straßenverkehrsunfällen (2009); *Skegg,* Compensation in the New Zealand Health Care Sector, in: Dute/Faure/Koziol, No-Fault Compensation 298 ff; *Todd* (ed), The Law of Torts in New Zealand[5] (2009). See also *K. Oliphant,* Landmarks of No-Fault

In the following, an attempt is made to present the most important arguments in favour of and against a general implementation of the insurance-based approach.

A. Fundamental advantages and disadvantages

1/10 The implementation of an insurance-based system would actually invert the starting point as compared to the current situation: whereas today the fundamental rule is that everyone must bear his own damage unless there are special reasons that support shifting such damage to someone else, an insurance-based solution would start on the premise that every victim must be compensated for his loss, regardless of how it occurred. The *advantages* of such insurance-based approaches for the victim are obvious: he is compensated without prior examination of all the tort prerequisites and, therefore, he also will be compensated faster. In addition, administrative costs in running the system will be lower.

1/11 But the *disadvantages* of such a system are also repeatedly highlighted[23]: If the reasons why the damage occurred are not important, then the victim will even get compensated for damage caused by chance or indeed by his own carelessness. However, this would take away the incentive to avoid damage occurring within one's own sphere as far as possible and consequently promote carelessness in one's own affairs[24]. The result would be more frequent cases of damage and thus increased costs for the insurer, which would certainly be felt in the premiums it sets. Hence, the costs of such damage would also have to be borne by all those who applied due care in the management of their own affairs, via said premiums or via contributions payable to the insurer out of general tax funds.

Of even greater concern is the fact that the same would apply for damage to third parties. There would be – apart from possible criminal law consequences – no incentive to avoid damage to such third parties[25]. Tort law's special role in damage prevention would probably be largely obsolete. This is a matter for concern as the legal system should strive towards preventing the *occurrence* of damage[26]: compensation can – as has already been emphasised – only lead to a shifting of the

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▹▹ in the Common Law, in: W.H. van Boom/M. Faure (eds), Shifts in Compensation between Private and Public Systems (2007) no 50 ff.

23 *Koziol,* Ersatz der Haftpflicht bei Verkehrsunfällen durch Unfallversicherung? ZfRV 1970, 16; *B.A. Koch/Koziol,* Comparative Report and Conclusions, in: Dute/Faure/Koziol, No-Fault Compensation 436 ff.

24 This was also pointed out by *F. Bydlinski,* System und Prinzipien 111; *J. Hager* in Staudinger, BGB[1999] Vor §§ 823 ff no 9; *G. Wagner,* Comparative Report and Final Conclusions, in: G. Wagner, Tort Law 312, 338 ff, 348 ff.

25 This was also argued by *G. Wagner,* Tort Law and Liability Insurance, in: Faure, Tort Law 384 ff; cf also *Fiore,* No-Fault Compensation Systems, in: Faure (ed), Tort Law 407, 411 f.

26 Cf *Adams,* Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung (1985) 85, 285 f.

damage which has already occurred and can never undo such damage and never eliminate the difficulties and, particularly in the case of personal injury cases, the suffering caused by the occurrence of the damage (cf above no 1/7).

1/12 Finally, experience with insurance-based approaches shows that full compensation of every injury is not financially feasible[27] and thus it is necessary to depart from the principle of full compensation by introducing deductibles and caps[28]. These rather arbitrary[29] limitations on compensation also affect those who, under current tort law, would have good prospects of obtaining full compensation from the responsible tortfeasor. It is very dissatisfactory that the precise victims who incur the most serious damage are the least likely to be able to obtain full compensation.

1/13 Naturally, attempts can be made to circumvent the most serious disadvantages of the insurance-based approach. Adjustment of compensation after considering misconduct of the victim or generally causation arising in the sphere of the victim comes to mind in particular, as well as allowing the insurer recourse against tortfeasors who act wrongfully or at least who are responsible in the case of injury to third parties[30]. However, the insurance-based approach would then lose substantial advantages: before compensating the victim it would be necessary to examine any contributory responsibility or possible causation by something within his sphere of risk, so that rapid compensation would no longer be possible. This is seen clearly in the medical field, when compensation is tied to the causation of the health problem by medical malpractice and the general life risk is excluded from the insurance cover[31]. Moreover, the introduction of rights of recourse would mean that the insurer has to bear the costs of the process. As the questions of the contributory responsibility of the victim and rights of recourse would properly have to be decided in the main according to present-day tort law rules, the only difference left as compared to present-day tort law solutions would

27 This is also the case in New Zealand, see *Skegg* in: Dute/Faure/Koziol, No-Fault Compensation 298; *Rohde,* Haftung und Kompensation 280 ff. Cf on this also *Stapleton,* Disease and the Compensation Debate (1986) 142 ff. This is not adequately taken into account by *Boccara,* Medical Malpractice, in: Faure, Tort Law 362 ff or by *Fiore* in: Faure, Tort Law 408.

28 See on Swedish law *Dufwa,* The Swedish Model of Personal Injury Compensation Law Reconsidered, Liber amicorum for Helmut Koziol (2000) 114 ff.

29 *F. Bydlinski,* System und Prinzipien 108 f, 111.

30 Cf on this *Krejci,* Grundsatzfragen des Haftpflicht- und Regreßsystems im Recht der sozialen Sicherheit, in: Reformen des Rechts, FS der Rechtswissenschaftlichen Fakultät der Universität Graz (1979) 435.

31 On this *Dufwa,* Liber amicorum for Helmut Koziol 109 ff. See also *Weyers,* Empfiehlt es sich, im Interesse der Patienten und Ärzte ergänzende Regelungen für das ärztliche Vertrags- (Standes-) und Haftungsrecht einzuführen? Gutachten für den 52. Deutschen Juristentag I/A (1978) 98 ff. *Boccara* in: Faure, Tort Law 362, does not take this question into account adequately; neither does *Fiore* in: Faure, Tort Law 407 ff, where he always takes »automatic« compensation via insurance as his basis.

be that the insurer is involved as an intermediary; while this insurer does offer the victim security in respect of the compensation it also gives rise to additional costs[32].

1/14 Overall then, *Rhode*[33] is right when he compares the German and New Zealand approaches and concludes: »The Accident Compensation Scheme is a typical example of how it is not possible to achieve rapid, uncomplicated handling of damage cases and fair and full compensation for damage at the same time.«

1/15 Hence, any social (accident) insurance system should not do away with tort law but merely complement it and – as is mainly the case today – only then provide for compensation awards when such are necessary to *secure one's livelihood.* In this fashion, it should be limited to its function as a »social net«. This was the basis of the Swiss Draft for the overall revision of tort law as well as the EGTL's work on PETL and also the Study Group on a European Civil Code, whose proposal contained a section on »Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab Dam)«, and finally also the working group set up by Federal Minister Böhmdorfer in Austria, who developed a proposal for the reform of Austrian tort law[34].

B. Economic considerations

1/16 In the course of the Swiss debate on reform, the financial advantages and disadvantages of replacing liability law with victims' insurance was examined in detail. The conclusion was that the insurance-based approach would not entail any economic advantages[35]. Hence, this does not constitute a ground for departing from the current system either.

32 Cf on this *Calabresi,* The Costs of Accidents (1970) 28 f; *Wantzen,* Unternehmenshaftung und Enterprise Liability (2003) 124; *Brüggemeier,* Haftungsrecht 639.

33 Haftung und Kompensation 393.

34 See *Koziol,* Grundgedanken, Grundnorm, Schaden und geschützte Interessen, in: Griss/Kathrein/Koziol, Entwurf 24 ff.

35 Bericht der Studienkommission für die Gesamtrevision des Haftpflichtrechts (1991) 6 ff.

III. Strict limits and rigid norms or fluid transitions and elastic rules?

A. Strict delimitation of the different bases for claims

1/17 Even today it is very common practice to draw sharp distinctions and to focus on differences. In this fashion, a distinction is made, for example, between a claim to restore the victim to his position before his rights were infringed by eliminating the source of the annoyance (reparative injunctions) and any tort claims; between the rules on unjust enrichment serving the reversal of wrongfully gained advantages and tort law directed at the compensation of damage suffered; and between contractual and delictual liability or fault-based and strict liability.

The analysis of these contrasts and differences has certainly been very worthwhile and also indeed necessary in order to identify clearly the characteristic features of the juxtaposed areas, the decisive valuations and the appropriate relation of certain legal consequences with corresponding requirements. However, even the next chapter on the position of tort law within the overall legal system clearly shows that these differentiations mostly only include the core areas; the borders between the neighbouring fields cannot in fact be drawn at all clearly and there should also be appropriate interlocking.

Thus, the distinction between rights to be restored to the position one was in prior to an interference (reparative injunctions) and rights to compensation is admittedly very difficult and the former is often extended so far as to blur the distinction between this and compensation by natural restitution (on all of this see below no 2/19 ff). Under the rules on unjust enrichment, this can mean that the loss of enrichment is not taken into consideration or loss which occurred is taken into consideration so that ultimately it comes to a decision on who should bear the loss (cf below no 2/28 ff). In the field of fault-based liability, it is the risk factor that plays a decisive role, also when establishing whether there has been a breach of duty of care, on the other hand strict liability rules also provide for relief when every possible care has been applied (on this see no 6/154 and 189).

1/18 If distinguishing between, for example, *rights to be restored to one's position before an infringement (reparative injunctions) and rights to compensation* is hardly possible, then it is highly questionable from a value judgement perspective when claims with similar elements are classified more or less arbitrarily according to a strict artificial distinction and thus subject to very different requirements. It would undoubtedly be fairer openly to admit the difficulty of making the distinction and consequently to soften the sharp delimitation between the two areas with a fluid transition or an interim area. Thus, it would seem appropriate if the victim's right to be restored to his former position is all the more comprehensive and the tort claim be aligned to this, the more tort law requirements are satisfied.

1/19 When it comes to distinguishing between *rules on unjust enrichment on the one hand and tort law* on the other, the crux is not that no clear borders can be established between the elements of the claims and that there is a fluid transition but that very different elements are involved, namely the surrender of the advantage wrongfully gained by the defendant on the one hand, and on the other the compensation of the damage suffered by the claimant. Far more relevant is the question of whether in the context of rules on unjust enrichment, considerations of who must bear the loss can play a role and whether it is relevant in this regard that the tortfeasor gained an advantage from his tort. Under the rules on unjust enrichment this has long been recognised and in the case of wrongdoing by the enriched person the latter must bear the loss. Hence, a recognised liability criterion, namely fault, is taken into account, so that an alignment with tort law would seem justified (cf below no 2/30 ff).

1/20 Furthermore, it shows that no clear distinction can be drawn between *contractual and delictual liability,* rather there is a smooth transition from one core area to the next (below no 4/1 ff).

1/21 Below it will be discussed in more detail (no 6/188 ff) why it is not possible to proceed on the basis of a *dual-lane structure* of liability law,[36] in the sense that there are two strictly separate areas with two clearly distinct liability grounds, namely *fault-based* and *strict liability.* In their pure form, these two liability areas more accurately represent the two ends of an unbroken chain of mixed forms: danger plays a role in the generation of duties of care and in relation to the assessment of fault; on the other hand, the area of strict liability, which is not based on the behaviour involved but rather on the source of danger, ascribes substantial significance to care in an abstract sense. Treating tort law as a dual-lane phenomenon would be doubly wrong because it is by no means based only on the two liability grounds of fault and dangerousness but rather, as will be seen in Chapter VI, on a much larger number of factors for liability, not all of which are of sufficient weight in themselves to establish liability but only in combination with the others. Hence, it is more fitting to follow *W. Wilburg*[37] in speaking of a multiple-lane structure.

Jansen on the other hand rejects the idea of dual or multiple lanes[38] and aspires to go back to a uniform liability notion, based on responsibility for the result[39]. As, nonetheless, he too must ultimately take the different grounds for liability into consideration, his concept leads only to an apparent uniformity. His object of clarifying the fluid transition between the individual liability fields distinguished today is, however, commendable and largely in line with the approach advocated here.

36 Thus *Esser,* Die Zweispurigkeit unseres Haftpflichtrechts, JZ 1953, 129.
37 Elemente 1 ff.
38 *Jansen,* Die Struktur des Haftungsrechts (2003) in particular 14 ff, 551 ff.
39 In agreement on this point *Jaun,* Haftung für Sorgfaltspflichtverletzung (2007) 320 ff.

It must be clearly highlighted, however, that the dissolution of the distinctions between the fields of law, which in reality are interwoven with each other, cannot justify *neglecting the differences* that are founded in fact or as a feature of the system. These include, for example, the levelling of tort law, which is primarily directed at the compensation, or more properly the shifting, of damage, and criminal law dominated by the idea of prevention, as is widely championed in particular in the case of so-called *»punitive damages«* (on this see below no 2/55 ff). 1/22

It is in fact a cause for grave concern when so-called punitive damages and similar devices, which in spite of the harmless sounding name are not directed at the compensation of damage, are implanted into tort law, meaning that while the conditions for their applicability are determined by tort rules, the actual legal consequences derive mainly from penal law, whereby the payment of the penalty is not made to the state as is usual under penal law but instead directly to the victim. The impermissibility of such an approach would seem manifest: in the established core areas, principles regarding the appropriate conditions for particular legal consequences have gradually developed over time. Thus, the legal consequences from one field, in this case the imposition of penalties, cannot simply be attached to the requirements of a different field of law, in this case tort.[40] This is manifest with respect to punitive damages, despite the fact that the imposition of penalties is only considered permissible under special, far more specific, circumstances. Regard to the principle »nulla poena sine lege« suffices, whereby the penal law standards must fulfil the certainty requirement to a far greater degree than, for example, tort standards; furthermore special procedural and evidentiary rules to protect the accused have been developed and also the liability criteria, for instance fault, are significantly different in many ways. Above all, however, private law is imbued with the necessity of bilateral justification (below no 2/59), so that it cannot be used to grant someone a right to payments for which there is no factual justification and such award would have to be seen as an unearned piece of luck[41]. 1/23

If – though this would first have to be examined carefully – there was really a gap in protection from a preventive perspective that would be filled by awarding »punitive damages«, then the right approach would certainly not be to proceed with a very sketchy and purely conceptual jurisprudential (begriffsjuristischer) method, which untruthfully presents a penalty as damage compensation and accordingly ties it to tort requirements. Rather, it should first be examined which

40 See *Englard,* Punitive Damages – A Modern Conundrum of Ancient Origin, JETL 2012, 4 who writes that »It was only in relatively modern times that the combination of punishment and compensation was conceived to raise methodological and conceptual problems of mixing private suits with criminal law, or more generally private law with public law.«

41 On the historical roots of the principle of full compensation and the prohibition of unjust enrichment see *Jansen* in HKK zum BGB II §§ 249–253, 255 no 17 f, 21, 61.

requirements are necessary for the imposition of penalties according to our legal system and whether these requirements can be met at all by private civil law. On the other hand, it ought also to be examined to what extent private civil law and in particular tort law principles basically admit the imposition of a penalty as a legal consequence. Should it turn out that the attachment of the legal consequence »penalty« to private civil law requirements would conflict with the principles of the two legal fields, then the creation of a new, intermediate protection system must be considered, in which not only the necessary penal law requirements but also the structural principles of private civil law are taken into consideration, so that there is a synthesis both in terms of requirements and legal consequences.

B. Absolutely protected rights and unprotected interests

1/24 When it comes to rights and interests, the legal system often distinguishes between absolutely protected rights (that is rights that enjoy an all-embracing protection against interference by third parties) and unprotected interests. This contrast is another example of the true legal position being presented in a misleading, exaggerated fashion. In truth, the legal system provides very *different protection* under consideration of varying criteria. Thus, the fundamental personality rights enjoy the most comprehensive protection, proprietary rights a still very wide-ranging protection and pure economic interests by contrast are only very modestly protected against third parties and purely immaterial interests are given the least protection (on this see below no 5/8 ff and 6/47 ff).

On the other hand, it is also the case that even the so-called absolutely protected rights do not in fact by any means enjoy unlimited protection; this becomes clear on closer examination of the classic examples of absolute rights, eg rights to property or personality rights. Thus, land owners must tolerate certain emissions from their neighbours. Even a top-ranking right, such as that to bodily integrity, is not protected against every minor impairment to health: eg there are no defence rights against being infected with influenza in the metro or against detrimental exhaust fumes[42]. Even much more serious impairments must be tolerated in respect of the less well-defined personality rights. On the basis of the fundamental freedom of the media, for example, everyone is expected to put up with very serious impairments to their personality rights. On the other hand, the supposedly unprotected interests, such as pure economic interests, enjoy a limited but certainly not negligible protection (more detail on this under no 6/52 ff).

42 Cf further Art 2 (2) and Art 15 ECHR.

C. All-or-nothing principle?

1/25 The situation is similar when it comes to liability and the legal consequences; black and white thinking has a large currency and many people believe that there is a duty either to compensate in full or not at all; the all-or-nothing principle is widely propagated. The emphasis on this principle is all the more astonishing given that the legal systems have long departed from it in all important fields: in Continental Europe contributory fault on the part of the victim has not led to complete elimination of the tortfeasor's duty to compensate for centuries, instead it leads only to a reduction (§ 1304 ABGB; § 254 BGB). The ABGB also takes into account the gravity of the central ground for liability: fault; and provides only for partial compensation in the case of (slight) negligence, namely only the positive damage, not the loss of profit, and only the pecuniary and not the non-pecuniary loss (§§ 1323, 1324 ABGB).

1/26 The avoidance of *abrupt either-or solutions* would also be more appropriate in other situations. Apart from the fact that the swing from full compensation to no compensation on the basis of frequently minor differences is often unfair, it must also be borne in mind that courts might well tend, whether consciously or subconsciously, to manipulate the requirements for liability when they see no other alternative in the face of an either-or solution, in order to avoid a crassly inequitable result. Such manipulation without any disclosure of the factors considered is certainly much more detrimental to legal certainty and the predictability of decisions than the adoption of a middle course, which can and must be openly explained and mapped.

1/27 The above issues are illustrated very well on the basis of the problem of *alternative causation* between an incident which generates liability and chance (in more detail under no 5/86 ff). According to prevailing opinion, the judge must still decide which event was causal, even when the probability of causation by the event that generates liability is approximately the same as that of causation by chance, which must be accounted to the victim. Hence, he must decide whether to affirm or reject liability in the full amount. *Stark*[43] consequently asks the very justified question: »Is it not problematic simply to assume certainty when faced with an identified probability of, for example, between 25 % and 75 %, ie to completely reject liability or completely affirm it? Is not injustice done to one of the parties when one acts as if one knows something that one does not in fact know?« It must also be noted that even the ABGB does not follow the causation principle strictly, but in particular in cases of alternative causation recognises liability for potential causation in the case of *greater concrete dangerousness* of an event, in

43 *Stark,* Die »perte d'une chance« im schweizerischen Recht, in: Guillod (ed), Neuere Entwicklungen im Haftpflichtrecht (1991) 101; *Oftinger/Stark,* Haftpflichtrecht I[5] 124 f.

other words in the case of greater adequacy. Continuing along this line of thought, it would seem more appropriate also to recognise here that the grounds for liability are still there after all, though not so definitively, and that apportionment of liability is appropriate in consideration of the basic notion behind such in the case of contributory responsibility on the part of the victim.

D. Elastic rules

1/28 The dismantling of strict distinctions and contrasts which do not exist in reality and the departure from the all-or-nothing principle is compatible with the basic concept of a flexible system that can also offer the methodological tools to go down this path. The persuasive fundamental notion of the flexible system, which was developed by *W. Wilburg*[44] on a comparative law basis and further developed by *B. Schilcher*[45] and above all *F. Bydlinski*[46], is accordingly considered in this book.

This flexible system aims at including the evaluations of the relevant rule which provides the basis for application of the legal consequences and taking into account both the gradability of the criteria and also of the legal consequences. According to *Wilburg's* ideas, in the process of decision-making all relevant factors must be identified and then taken into account in a flexible system. Whether liability is justified or not does not depend merely on the simple number of criteria met but also on their interaction. Moreover, the significance of the individual elements and their joint significance must be taken into account; thus the »comparative« nature of the elements is stressed. This means that liability may even be affirmed if one of the relevant factors is lacking or only present to a slight degree, if on the other hand the weight of the other factors is greater than usually required. This is highlighted by *Wilburg*[47]*:* »If one element is particularly significant, then it may suffice by itself to justify liability for damage.« He continues on the advantages of this approach: »This system is capable of encompassing all imaginable cases and their special qualities. In contrast to previous principles, it is elastic and does not break like an object made of glass when the value judgement concerning the force of individual elements, such as the dangerousness of an enterprise, changes in the course of time. The addition of new aspects and

44 Elemente; *idem,* Bewegliches System; *idem,* Zusammenspiel der Kräfte im Aufbau des Schuldrechts, AcP 163 (1964) 346 ff. A short, instructive overview is provided by *B.A. Koch,* Wilburg's Flexible System in a Nutshell, in: Koziol/B.C. Steininger, Yearbook 2001, 545 ff.

45 *Schilcher,* Schadensverteilung; *idem,* Neuordnung des österreichischen Schadenersatzrechts, Liber amicorum for Helmut Koziol (2000) 293 ff; *idem,* Der Regelfall als Verbindung von Tatbestandsmodell und Beweglichem System, Koziol-FS (2010) 853 ff.

46 *F. Bydlinski,* Juristische Methodenlehre und Rechtsbegriff² (1991) 529 ff.

47 Bewegliches System 13 f.

forces is also made possible«. As *Schilcher*[48] additionally emphasises, it is necessary to start with the elaboration of a *basic evaluation.* This means it is necessary to establish the significance of those factors which normally suffice to establish liability. It may be assumed that liability must always be affirmed if the joint significance of the factors meets this normal extent. Furthermore, it must be emphasised that not only the factors that are decisive for the triggering of legal consequences are gradable but also the legal consequences themselves.

Admittedly, the idea of the flexible system is in fact not especially novel and thus can hardly be classified as an independent theory, as it simply clarifies what is in fact *self-evident:* all tort rules on conduct and every imposition of legal consequences on the basis of certain conduct requires the legislator to *weigh up* conflicting interests, namely on the one hand far-reaching freedom of movement and development as well as unlimited use of own interests, on the other hand as far-reaching as possible protection of the individual's sphere. In every case where the legislator grants those who apply the law discretion as to decision-making, because it cannot or does not desire to formulate a completely fixed rule, every judge and lawyer who has to use this discretion must *weigh up interests.* This must be done more or less consciously because it is otherwise completely unfeasible. In this weighing up of interests, several factors must usually be considered, and their individual significance and number all play a role. When the legislator indicates this discretion clearly and even names the relevant factors in a show of *»customer service«,* this merely expresses plainly what is an unavoidable fact for everyone applying the law with the aim of achieving appropriate and transparent results. 1/29

Since criticism of the flexible system is often based on the *misapprehension* that its advocates have the goal of establishing as many as possible flexible, uncertain, unclear, random and vaguely defined prohibitions, the fundamental condition formulated by the leading proponent of the flexible system, *F. Bydlinski,* shall be quoted here in conclusion[49]: »Insofar as there are typical, clearly comprehensible facts, also as regards the consequences of a rule, the requirements of legal certainty and pragmatism, ie in this context predictable and simple application of law, and moreover also fairness and equality, support adherence to the system of fixed rules and prohibitions within the legislative system. Also in cases where legal certainty is one of the particular aims of a law, there will be no (or at least very little) room for ›flexible‹ enclaves. A basically flexible law on bills of exchange, real property law, procedural or punitive law is certainly impossible.« 1/30

Because of the complex nature of the problems and the diversity of the facts it is, however, not always possible to formulate fixed private law rules. The flexible

48 *Schilcher,* Schadensverteilung 204.
49 Methodenlehre² 534.

system can strike a balance between rigid prohibitions and vague blanket clauses: the judge's disclosure of the *decisive factors* which must be taken into consideration will secure significant *concretisation,* the *discretion* of the judge is significantly *limited* and his decision rendered predictable; on the other hand however, targeted consideration of the diversity of the concrete circumstances in each case is made possible. The interaction of the different factors, which may be present to different degrees, is decisive in respect of the solution.

1/31 On the other hand, the view, often meant as a criticism, that the flexible system often promotes *flexible solutions* and is aimed at provisions that lead to a departure from the rigid *all-or-nothing principle,* eg in the case of alternative causation of an incident which would give rise to liability and of chance (see no 5/86 ff) is correct. However, this is nothing really new, as the already tried-and-tested and universally regarded as appropriate rule of contributory responsibility (§ 254 BGB; § 1304 ABGB) has already led us away from archaic culpa-compensation and thus from the *all-or-nothing principle.* Apart from the fact that the abrupt swing from full to no compensation on the basis of often minor differences also leads to fairness problems, it must be taken into consideration as afore-mentioned that courts may well tend, whether consciously or subconsciously, to *manipulate* the requirements for liability, when they see no other alternative in the face of an either-or solution, in order to avoid a crassly inequitable result. Such manipulation without disclosure of the factor taken into consideration is certainly *much more detrimental* to *legal certainty* and *predictability* of decisions, than the adoption of a middle course, and the openly granted and defined discretion, which entails disclosure of reasoning.

Chapter 2

The law of damages within the system for the protection of rights and legal interests

I. In general

The law of damages (Schadenersatzrecht) – as clearly indicated by its name – provides for the *compensation of damage* (Ersatz des Schadens), sustained by a person who has a legal right or interest due to the infringement of such. The *compensation* of the loss by the injuring party, which is what is primarily addressed hereby, undoubtedly serves to protect the person who has been allocated a legal right or interest by the legal system. Going beyond this, awarding such claims for compensation also has a general deterrent effect, which is conducive to avoiding future infringements of protected rights or interests. However, it is increasingly considered, especially by economically-oriented theory, that the purpose of the law of damages is indeed primarily *deterrence* and not compensation (on this see below no 3/5). Further, there are tendencies, particularly in German case law, also to draw on the law of damages for the disgorgement of the profit gained by the injuring party through the infringement[1]. Finally, there are increasing efforts to procure a pure *sanctioning* function for liability law too, by means of »punitive damages«[2]. 2/1

The granting of claims for damages is, however – as has already been pointed out (no 1/5) – not the legal system's only response to the infringement or threatened endangerment of protected rights or interests: in fact it has a whole arsenal of very different weapons available to serve the protection of rights and interests in very different ways, by defending such against risks, by compensating losses, by returning unjust enrichment, by disgorgement of profits in favour of the public purse or by the imposition of penalties for infringements attempted or 2/2

1 Caroline-decisions of the BGH in BGHZ 128, 1 = NJW 1995, 861; NJW 1996, 984 f.

2 See on this *von Bar,* Deliktsrecht I no 608 ff; *Koziol/Schulze,* Conclusio, in: Koziol/Schulze, EC Tort Law 596 f; Koziol/Wilcox, Punitive Damages. Cf also below no 2/55 ff.

committed[3]. For the purpose of illustration, the following examples are mentioned in the context of private law: rei vindicatio in respect of items of which the owner has been deprived, preventive or reparative injunctions, rights to self-defence, to the disgorgement of unjust enrichment, the rights of creditors with unsatisfied claims to the avoidance of a debtor's transactions and, finally, claims for damages, which take centre stage here. This private law system of protection is supplemented by the victim's indemnification claims against the state or indemnification from public funds, that is, for instance, granted to the victims of catastrophes or crime, as well as by the state's authority to order profits disgorged on the basis of criminal or public law and, above all, also by the imposition of penalties. The last-named penalties also serve the protection of individual interests indirectly by their general deterrent effect.

2/3 These different legal remedies lead to different legal consequences; however, they are also subject to very different requirements. Firstly, the visible structure of the legal remedies make it apparent that their very nature gives rise to different basic requirements, namely that interference is threatened, a thing has been removed from someone's possession, an advantage has been gained or a loss has been sustained. However, there are also differences in relation to the further grounds for the origination of the respective legal remedy; these derive from the type of the claim and its function. One requirement is nonetheless decisive in respect of all legal remedies under discussion here which concern the reaction to the behaviour of an infringer: the threats to or infringements of protected interests at issue must be subject to censure.

2/4 Below (no 6/1 ff) there is more detailed discussion of the question of when an infringement or a threat is deemed subject to censure by the legal system. In this context, it must be noted first, that there are different gradations of what is wrong and thus subject to censure[4]: in a very abstract sense, every *interference with the protected interests* of another person and thus in the area allocated to another by the legal system, is wrong in that it leads to a result which is subject to censure by the legal system and is to be avoided as far as possible by those subject to the system's norms. If an interference with third-party interests conflicts with the allocation of interests set out by the legal system, this constitutes the factual basis of an infringement (Tatbestand), which is, likely to trigger protection mechanisms. The weight of this wrong is certainly less than when an *action is assessed*

3 On some questions in more detail *Koziol,* Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, Canaris-FS I (2007) 631. See further the detailed comparative analysis in *von Bar,* Deliktsrecht I no 411 ff.

4 On this in more detail *Larenz/Canaris,* Schuldrecht II/2[13] § 75 II 2; similar *Koziol,* Rechtswidrigkeit, bewegliches System und Rechtsangleichung, JBl 1998, 621 ff; *G. Wagner,* Grundstrukturen des Europäischen Deliktsrechts, in: Zimmermann, Grundstrukturen: Deliktsrecht 217 ff; also *G. Wagner* in MünchKomm, BGB V[5] § 823 no 10.

as unlawful and the interferer has violated objective rules of conduct that apply to everyone in the particular circumstances at issue, on a more concrete level. The weightiest ground for liability is *fault,* as in this case the blame is more concrete in that the individual circumstances, eg in particular the capacity for tortious liability, are taken into consideration. The degree of blame depends, however, on whether – beyond the issue of accountability – subjective abilities and knowledge are taken into consideration, as only then can we really speak of personal blame in relation to the wrongdoer. As in most legal systems, an objective assessment is the preferred approach in Germany, whereas in Austria a subjective standard is applied[5].

The assessment of wrongfulness that is based solely on the result, ie on the interference with protected interests, will be referred to in the following as *the fulfilment of the factual elements of the offence* (Tatbestandsmäßigkeit[6]); the more concrete but nonetheless purely objective assessment of the action or omission is referred to as *the violation of a duty* (Pflichtwidrigkeit); the third, more or less subjective evaluation of the behaviour in question is referred to as *fault* (Verschulden). The gravity of the grounds for liability also increases in this order. Accordingly, the legal system attaches the least severe legal consequences to simple fulfilment of the factual elements of the offence (Tatbestandsmäßigkeit) and the most severe to fault. Thus, the fulfilment of the factual elements of the offence alone is usually likely to trigger only preventive injunctions, owners' claims to have property surrendered to them (Eigentumsherausgabeansprüche), claims in unjust enrichment (Eingriffskondiktionen, Verwendungsansprüche) and the right to act in self-defence (Notwehrrecht); violation of duty and fault[7] on the part of the interferer, on the other hand, justify comprehensive claims for damages on the part of the victim.

2/5 In the following, these legal protection systems, as well as the passing on of damage as provided for contractually by insurance agreements, shall be compared. At first glance, it is not obvious whether overall there is a multitude of legal possibilities that more or less coincidentally developed alongside each other, involving various requirements and legal consequences, or in the alternative a largely closed system – albeit with certain gaps and vagaries – with an appropriate division of tasks. The goal of this discussion is to delineate the different protection systems, as well as to demarcate the law of damages in relation to all other legal remedies. It will be shown that the individual protection systems are

5 Cf on this *Koziol,* Objektivierung des Fahrlässigkeitsmaßstabes im Schadenersatzrecht? AcP 196 (1996) 593; *idem,* Liability based on Fault: Subjective or Objective Yardstick? MJ 1998, 111.

6 Cf *Koziol,* Haftpflichtrecht I[3] no 4/11; further *Esser/Schmidt,* Schuldrecht I/2[8] § 25 IV.

7 The other grounds for liability, which can trigger liability for damages, such as the especial dangerousness of things for example, will not be looked at in any more detail here.

not always clearly distinguishable from each other, in fact there are fluid transitions and hybrid forms also exist. However, the discussion will also look at what tasks are appropriately performed by the law of damages and which are very sufficiently and indeed better performed within the framework of other protection systems. In this fashion, questions arise as to whether the disgorgement of profits should actually – as advocated by the German BGH[8] – ensue with the help of the law of damages and whether the imposition of sanctions by »punitive damages« (see on this no 1/23 and below no 2/55 ff) can be an appropriate function of the law of damages.

II. Claims for recovery

2/6 Claims for recovery of something, in particular rei vindicatio (§ 366 ABGB, § 985 BGB), merely require that the claimant be entitled to a thing and that the defendant not be entitled to hold the thing. They are directed only at the surrender and recovery of the thing and not at covering any other further disadvantages sustained.

Claims for damages can also be directed at the recovery of a thing, given the possibility of *compensation in kind* (§ 1323 ABGB, § 249 (1) BGB). However, such claims do require the fulfilment of other grounds for liability, above all fault on the part of the defendant, whereas on the other hand, in line with these stricter conditions, they can also trigger farther-reaching legal consequences, specifically the compensation of consequential damage that has been caused either by the removal of the thing or the unauthorised possession thereof.

III. Preventive injunctions

2/7 As already implied, prevailing opinion is that fault is not a prerequisite for the entitlement to a preventive injunction; unlawful endangerment is sufficient. To be more specific, it is not even required that the party responsible for the endangerment violate any duties, it is sufficient that there is endangerment of an area protected by the legal system, in other words the *fulfilment of the factual elements*

8 In the Caroline decisions of the BGH in BGHZ 128, 1 = NJW 1995, 861; NJW 1996, 984 f.

(Tatbestandsmäßigkeit) of the threat[9] suffices. This seems entirely appropriate[10]: if one has regard to preventive injunctions within the overall system of legal remedies available for the protection of interests, it is firstly significant that this defensive claim to the hindrance of future impairments thus relates to the future and not to the compensation of damage which has already occurred; it serves the purpose of prevention in the general interest[11]. Furthermore, it relates to a legal consequence that encumbers the respondent in a comparably non-onerous fashion[12]: it is merely required that such party not engage in the particular behaviour which poses the endangerment; unlike in claims for compensation, this party will not be required to make expenditures from his own pocket going beyond this in order to compensate another's harm. All of this indicates that a mere accusation against the respondent at the most abstract level, to which only a slight weight can be ascribed, in other words the factual elements of the offence (Tatbestandsmäßigkeit), is sufficient.

As preventive injunctions do not require the presence of fault, in my opinion 2/8
incapacity to commit torts on the part of the party that endangers absolutely protected rights or interests is insignificant in substantive law terms when it comes to the granting of preventive injunctions[13], even if the implementation of such is

9 See on this OGH 6 Ob 244/68 in JBl 1970, 35; 8 Ob 549/91 in ÖBA 1992, 386 = SZ 67/10; 1 Ob 61/08i in JBl 2009, 261; *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche als Instrument des Umweltschutzes (1978) 68; *Karollus,* Zum Beseitigungsanspruch gegen pfandverschlechternde Einwirkungen, insbesondere durch Vermietung der Pfandliegenschaft, ÖBA 1991, 166; *Koziol,* Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, Canaris-FS (2007) 635 f; *Reischauer* in Rummel, ABGB II/1³ § 1294 no 29; *Rummel* in Rummel, ABGB I³ § 859 no 5; *E. Wagner,* Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 220 ff; clearly departing from this *Wenzel,* Zivilrechtliche Unterlassungs- und Beseitigungsansprüche zur Abwehr von Umwelteinwirkungen im Rechtsvergleich zwischen Österreich und Deutschland (2005) 118, who bases his view on a violation of duty of care for Austria. On German law cf *Henckel,* Vorbeugender Rechtsschutz im Zivilrecht, AcP 174 (1974) 113; *Fritzsche* in Bamberger/Roth, BGB II² § 1004 no 6; *G. Wagner,* Die Voraussetzungen negatorischen Rechtsschutzes, Medicus-FS (2009) 605 f. When *Wilhelmi,* Risikoschutz 118 ff, requires conduct contravening a duty for German law as a condition for a preventive injunction, he is only referring to the threatened, still future behaviour (129 f), and not the behaviour triggering the disturbance (128 f).

10 Astonishingly, this is not taken into account by the DCFR, see PEL Liab Dam Art 1:102 and 6:301; no rationale is given for this in PEL/*von Bar,* Liab Dam, Chapter 1 Art 1:102, Comments either. See on this *Koziol,* Außervertragliche Schuldverhältnisse im CFR, in: Schmidt-Kessel (ed), Der gemeinsame Referenzrahmen (2009) 98 f.

11 This is emphasised by *Wilhelmi,* Risikoschutz 56 ff, 71 ff, 352.

12 For the consideration of the costs and the burden for the party potentially responsible in the weighing up of interests see also *Wilhelmi,* Risikoschutz 165.

13 *Fritzsche,* Unterlassungsanspruch und Unterlassungsklage (2000) 148; *Baldus* in MünchKomm, BGB VI⁵ § 1004 no 89; *Spielbüchler* in Rummel, ABGB I³ § 354 no 5, in agreement *Koziol,* Canaris-FS 639. Another view in OGH 7 Ob 150/97b, head note published in ecolex 1998, 124 *(Rubin);* OLG Düsseldorf in MDR 1996, 477; *Böhm,* Unterlassungsanspruch und Unterlassungsklage (1979) 48 f; *Hirsch,* Ist der Unterlassungsanspruch wirklich verschuldensunabhängig? Anmerkungen zu OGH 7 Ob 150/97b in JBl 1998, 541 ff.

not possible because the imposition of coercive penalties requires capacity to be at fault: it is necessary to distinguish between the existence of an entitlement and its current enforceability, in particular because it is certainly possible that the duty to cease will be complied with voluntarily in spite of the lack of capacity to be at fault.

2/9 Nonetheless, it is necessary to depart substantially from the rule that mere fulfilment of the factual elements of the offence (Tatbestandsmäßigkeit) is necessary for an entitlement to a preventive injunction to arise: it is recognised that not only persons who hold absolutely protected positions may be entitled to preventive injunctions, but that such relief is also available to those whose positions only enjoy legal protection against certain risks, for example against behaviour that violates protective laws *(Schutzgesetze)* or violates public morality *(gute Sitten)*[14]. In the case of a violation of protective laws, it would certainly also be possible to distinguish between the fulfilment of the factual elements of the offence (Tatbestandsmäßigkeit), which is always present in the case of non-compliance with the positive or negative requirement and any objective negligence involved in such non-compliance, ie the violation of a duty owed[15]. Such a distinction is completely impossible, however, when the protective purpose only targets behaviour violating a duty *(pflichtwidriges Verhalten),* ie for instance, when behaviour is contra bonos mores (that is, against good morals: offensive to the conscience and to a sense of justice), contravenes duties of care or the position at risk only enjoys limited protection against certain kinds of negligent interference. Thus, in this context we see limited protection in contrast to absolute rights that trigger defence rights as soon as the factual elements of the offence are fulfilled, since otherwise the significantly more concrete violation of duties requirement is decisive[16]. This limitation is justified above all by the fact that the interests requiring protection are not obvious and their sphere of protection is not as clearly delineated as in the case of the classic absolute rights[17]. Thus, it may be noted that in the case of these positions, entitled to lesser legal protection, the requirements for an entitlement to preventive injunctive relief are correspondingly more stringent[18].

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14 Prevailing view in Germany, cf *Fritzsche,* Unterlassungsanspruch 139 ff; *Baldus* in MünchKomm, BGB VI[5] § 1004 no 9; *G. Wagner* in MünchKomm, BGB V[5] § 823 no 15; for Austria likewise *Rummel* in Rummel, ABGB I[3] § 859 no 5; *E. Wagner,* Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 47 ff, 325 ff.

15 See above all *Karollus,* Schutzgesetzverletzung 142 ff.

16 See also *Reischauer* in Rummel, ABGB II/1[3] § 1294 no 27; *Fritzsche,* Unterlassungsanspruch 139 ff; *G. Wagner* in MünchKomm, BGB V[5] § 823 no 15.

17 On the significance of overtness and the clear delineation of the protected position see *Fabricius,* Zur Dogmatik des »sonstigen Rechts« gemäß § 823 Abs. I BGB, AcP 160 (1961), 271; *Larenz/Canaris,* Schuldrecht II/2[13] § 76 I 1; *Koziol,* Conclusions, in: Koziol, Unification: Wrongfulness 132.

18 Cf *Hinteregger,* Rechte des Pfandgläubigers bei Entwertung der Pfandliegenschaft durch Vermietung, ÖBA 2001, 451 FN 24.

2/10 Furthermore, the violation of a duty will also have to be required in the case of *indirect threats* to absolutely protected rights or interests due to the less obvious dangerousness[19]. This is relevant above all with regard to the Austrian debate on preventive injunctive relief for *mortgagees* vis-à-vis any third party that endangers the usefulness of the property due to the establishment of tenancy rights: admittedly the general rule that fulfilment of the factual elements of the offence is sufficient is complied with to varying degrees[20], but sometimes objective negligence, ie violation of a duty, is required[21] and some decisions of the Austrian Supreme Court[22] and some teaching[23] additionally require even fault. The requirements for a preventive injunction are thus aligned to those of a claim for compensation. *Hinteregger*[24] even wants to deny the mortgagee any in rem rights of defence due to the lack of overtness of his position[25]; instead he should merely have rights to compensation and these should – insofar atypically – be non-fault-based. As compensation claims require harm already to have been suffered, this would in fact lead to the denial of a preventive injunction[26]. However, it is not clear why the legal system should refuse to provide any kind of preventive protection and would only allow a response once harm has been sustained[27]. This conclusion, which takes as its base the tenant's lack of knowledge of the mortgage, which typically cannot be held against him, thus goes too far; a more appropriate response to this circumstance would be to require an *objective breach of a duty* in the conduct of the tenant as a condition for a preventive injunction[28].

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19 On the breach of a duty to protect others against risks one has established by one's activity or property (Verkehrspflicht) as a filter for liability in the case of actions indirectly leading to a result, see *A. Walter,* Störerhaftung bei Handeln Dritter (2011) 179 ff.

20 OGH 3 Ob 505/90 in ÖBA 1991, 213 with discursive essay by *Karollus,* ÖBA 1991, 164, who takes the possibility that the tenant acquired the tenancy rights in good faith and thus aims to take the tenant's need for protection into account in line with the system. Cf also *Reidinger,* Inbestandgabe zur Erschwerung von Liegenschaftsexekutionen – aktuelle Rechtsprechung, WoBl 1994, 110; *E. Wagner,* Unterlassungsansprüche 261 f; OGH 8 Ob 254/99g in ÖBA 2001, 483.

21 OGH 3 Ob 134/88 in JBl 1989, 590; *Petrasch* in Rummel, ABGB I² § 458 no 6.

22 OGH 7 Ob 818/82 in EvBl 1984/119; 3 Ob 610/86 in SZ 59/206 = ÖBA 1987, 415 *(Rummel);* 6 Ob 107/98y in ÖBA 2001, 479; 6 Ob 136/98p in ÖBA 2001, 480.

23 *Hofmann* in Rummel, ABGB I³ § 458 no 6.

24 *Hinteregger,* ÖBA 2001, 450 f.

25 In the end she only mentions the reparative injunction, but always connects preventive and reparative injunctions previous to this.

26 Ultimately this view approaches that of *Karollus,* ÖBA 1991, 177 f, which only sees a reparative injunction as appropriate, as it will only be seen in the execution proceeding whether the pledge is impaired at all.

27 There may be cases in which it is already at least highly probable at the time the lease is concluded by the pledgor that the pledgee will have to realise the collateral due to the insolvency of the debtor. Moreover, a preventive injunction could also avert the risk of an impairment by prohibiting conclusion of any contract that is likely to impair the execution rights of the creditor.

28 There is no reason to require further fault in this respect as an objective scope of protection is concerned and moreover no claim for damages is at issue.

Corresponding examples are also supplied by preventive injunctions taken by *patent holders:* again the existence and limitations of patent rights are not obvious per se to third parties. This applies in particular in relation to such actions by third parties as do not consist in a use of the patent but in another course of conduct that could merely lead indirectly to damage to the patent-holder through the use of the patent by someone else; for example, when dealers sell goods that were produced in violation of a patent. It is also recognised that the *provider* is also only exposed to preventive injunctions based on personality rights or trademark rights being endangered or in the case of competition law violations if his conduct violates a duty: if a provider supplies his services to users and such users violate rights in this context, the disturber-liability of the provider due to his indirect interferences is tied to the requirement that his conduct constitutes a breach of a duty[29].

2/11 It must also be pointed out that the preventive legal protection granted to individuals facing concrete threats is supplemented by association claims *(Verbandsklagen)*[30]*:* if public interest is involved and effective, preventive legal protection via individuals is hardly possible and if the idea of general prevention plays a decisive role, associations are granted a claim for preventive injunctions even independent of any specific endangerment[31]. Such naturally serve the protection of individual interests indirectly.

IV. Rights to self-defence

2/12 Self-defence constitutes defence against an *unlawful attack* which is threatening or already in course[32]. Thus, like preventive injunctions it concerns the implementation of preventive protection of legal rights and interests[33] or in the case of attacks already in course the ending of an interference that has already begun in a manner similar to reparative injunctions, in this case however by means of self-help.

29 Cf BGH in ZUM 2004, 831; ZUM 2007, 846, 852; OGH 4 Ob 166/00s in MR 2000, 328 *(Pilz). Koziol,* Providerhaftung nach ECG und MedienG, in: Berka/Grabenwarter/Holoubek (eds), Persönlichkeitsschutz in elektronischen Massenmedien (2012) 41 ff.

30 Cf the German law on injunctions for infringements of consumer and other rights (Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen), as well as §§ 28 and 28a of the Consumer Protection Act (KSchG) in Austria.

31 On this *Feitzinger,* Die »Verbandsklage«, ÖJZ 1977, 477; *Schoibl,* Die Verbandsklage als Instrument zur Wahrung »öffentlicher« oder »überindividueller« Interessen im österreichischen Zivilverfahrensrecht, ZfRV 1990, 3.

32 Cf § 3 öStGB.

33 On this *Fuchs,* Grundfragen der Notwehr (1986) 49 ff.

Like the preventive and reparative injunctions, self-defence rights do not require faulty conduct on the part of the attacker against whom defence is undertaken, but neither do they require breach of duty by such; instead the unlawfulness is to be understood solely in the fact of the result[34], ie only the factual elements of the offence must be fulfilled[35].

2/13 Although it concerns the response to an endangerment subject to censure, the right to self-defence must be limited insofar as defensive actions are not permissible when *on the balance* the injury to the interests of the attacker are out of all proportion to the danger posed by the attack. This is, in any case, the prevailing Austrian opinion[36], which is supported by § 3 (1) sentence 2 of the Criminal Code (StGB): »The action is nonetheless unjustified if it is obvious that the victim of the attack was only threatened with a slight detriment and the defence is disproportionate, in particular given the gravity of the impairment to the attacker that it necessitates.«

German doctrine on the other hand, seems at first glance to at least partly advocate the opposite view, as it emphasises: »There shall be no weighing up of the legal right or interest which was attacked against that affected by the defence, in particular no examination of proportionality according to the rankings of the conflicting interests.«[37] However, advocates of this view also emphasise, in contrast thereto, that in respect of a defence which is clearly inappropriate, eg in the case of intolerable disproportionality between the impairment of the legal interest which was attacked and the effects of the self-defence action, self-defence is to be denied[38]. Others, however, make it clear in principle that especially high-ranking legal rights and interests, in particular the life of a person, may not be sacrificed for the protection of mere material goods[39].

2/14 The fact that in contrast to preventive injunctions, self-defence requires a *specific weighing up of interests,* is explicable with reference to the fact that the attacker is not required simply to cease behaviour that is creating a risk; the situation also concerns interference with the – often most high-ranking – interests of the attacker, namely her or his bodily integrity. The consequences of self-defence thus substantially exceed those of preventive injunctions.

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34 *Larenz/Wolf,* Allgemeiner Teil[9] § 19 no 9.

35 *Koziol,* Haftpflichtrecht I[3] no 4/67 f.

36 *Wilburg,* Elemente 255; *Koziol,* Haftpflichtrecht I[3] no 4/71; *Posch* in Schwimann, ABGB I[3] § 19 no 9; *Apathy/Riedler,* Bürgerliches Recht III[4] no 13/20; *B.A. Koch* in KBB, ABGB[3] § 19 no 5. Departing from this somewhat, however, *Reischauer* in Rummel, ABGB I[3] § 19 no 9 and 13.

37 Thus, *Demhardt* in Bamberger/Roth, BGB I[2] § 227 no 17. Ebenso *Grothe* in MünchKomm, BGB I/1[5] § 227 no 1 and 17.

38 *Demhardt* in Bamberger/Roth, BGB I[2] § 227 no 22; cf also *Grothe* in MünchKomm, BGB I/1[5] § 227 no 17.

39 *Larenz/Wolf,* Allgemeiner Teil[9] § 19 no 19.

V. Reparative injunctions

2/15 While reparative injunctions, like preventive injunctions, are future-oriented and also similarly serve the purpose of *prevention*[40], they only come into question if there is not only a threat but already *interference* with a third party's protected legal position[41] in the sense that the rights or interests of such third party are infringed upon without authority[42].

2/16 The substantive requirements for reparative injunctions are controversial even at the most basic level[43], above all in relation to the question of when the interference can be imputed to someone[44]. The idea that the simple causation principle might apply[45], seems to be a largely outdated view nowadays[46]. Some emphasise that the impairment must be traceable to human behaviour and must be unlawful[47]. According to common opinion, however, the requirements are largely the same as those for preventive injunctions[48]: it is non-fault-based[49] and does not require any violation of a duty[50], rather it is the result which is decisive, namely the unauthorised infringement upon a third-party right or interest or – put differently – the interference with a protected position, ie the fulfilment of the factual elements of the offence[51].

2/17 These *parallels to preventive injunctions* could be explained in the sense that both injunctions serve the aim of protecting certain positions either absolutely or

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40 This is emphasised by *Wilhelmi,* Risikoschutz 56 ff.

41 This must not necessarily be an absolutely protected position, the protection can also derive from specific behavioural rules, see *Henckel,* Vorbeugender Rechtsschutz im Zivilrecht, AcP 174 (1974) 104, 110, 120.

42 On this *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche als Instrument des Umweltschutzes (1978) 132 ff.

43 Cf the overview in *Baldus* in MünchKomm, BGB VI[5] § 1004 no 16 and 61 ff.

44 See on this also *Koziol,* Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, Canaris-FS (2007) 645 ff.

45 In favour, for instance, *Herrmann,* Der Störer nach § 1004 BGB (1987) 419 ff.

46 Cf *Larenz/Canaris,* Schuldrecht II/2[13] § 86 V 1; *Ahrens,* Störerhaftung als Beteiligungsform im Deliktsrecht, Canaris-FS (2007) 3, 16 ff; *Wilhelmi,* Risikoschutz 53.

47 *Baldus* in MünchKomm, BGB VI[5] § 1004 no 92.

48 The preventive injunction requires a threatened disturbance, the reparative injunction an ongoing disturbance, cf § 1004 BGB and on this *Fritzsche* in Bamberger/Roth, BGB II[2] § 1004 no 6.

49 *Larenz/Canaris,* Schuldrecht II/2[13] § 86 I 1 a; *Baldus* in MünchKomm, BGB VI[5] § 1004 no 89; *Mayrhofer,* Schuldrecht I[3] 19; *Karollus,* ÖBA 1991, 166; *Fritzsche* in Bamberger/Roth, BGB II[2] § 1004 no 6.

50 See, however, *G. Wagner,* Die Voraussetzungen negatorischen Rechtsschutzes, Medicus-FS 601 ff.

51 *Larenz/Canaris,* Schuldrecht II/2[13] § 86 IV 1; *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 68 f, 131 ff; *Karollus,* ÖBA 1991, 166; *Apathy/Riedler* in Schwimann, ABGB IV[3] § 859 no 25, in each case with further references. This is not sufficiently taken into account by *Katzenstein,* Der Beseitigungsanspruch nach § 1004 Abs. 1 Satz 1 BGB, AcP 211 (2011) 67 ff, in his criticism of the prevailing view when he assumes that this always requires the infringement of duties to protect interests of others against risks one has established by one's activity or property and contends that a subjectively imputable conduct is held to be necessary.

at least against certain interferences[52]. The comparison can even be extended: the reparative injunction requires a still ongoing interference so that the application for the removal of the source of interference is simultaneously aimed at preventing the future interference that would otherwise threaten[53]. Frequently, however, the removal of the source of interference will require active action on the part of the interferer, although – as in general – the distinction between action and omission is not an easy one. The fact that in the case of ongoing interference, the exact relation to preventive injunctions is correspondingly difficult because in this case the prevention of future interferences requires an active action, namely the removal of the source of interference[54], would not seem problematic from a substantive law point of view given the popularly advocated identity of the requirements and is not of any further significance for the relationship to claims for damages at issue here.

2/18 The issue of distinction does, however, draw attention to a circumstance that might speak against the equivalence of the requirements for reparative injunctions and those for preventive injunctions and in favour of a convergence with those for compensation claims: the reparative injunction can obligate the interferer *to actively do something,* namely remove the source of interference and thus provides for a more serious legal consequence than a preventive injunction. Our legal systems issue orders to actively do something less frequently than to cease doing something, the reason being that it seems more reasonable to order someone to *cease doing something particular* in order to avoid creating damage than to order him to perform some particular action in order to avoid damage. In observing a prohibition, the addressees of such still have several conduct options open; this is not the case if they are obligated to perform particular actions[55]. Since reparative injunctions are directed at having a *certain action* ordered, namely the removal of the source of the interference, it would seem justified that this claim is subject to stricter requirements than a preventive injunction, which is merely directed at the prohibition of certain behaviour, but leaves all other behavioural options open to the respondent.

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52 On this *Fritzsche,* Unterlassungsanspruch und Unterlassungsklage (2000) 41 f; *Karollus,* ÖBA 1991, 166 ff with further references.

53 Cf on this also *E. Wagner,* Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 469 ff; *Lepeska,* Der verschuldensunabhängige Beseitigungsanspruch nach dem ABGB als Instrument des Umweltschutzes, RdU 2000, 97 ff; *idem,* Der negatorische Beseitigungsanspruch im System des privatrechtlichen Eigentumsschutzes (2000) 36 ff, who thus also wants to take as a basis a uniform injunction without making a difference between preventive and reparative »negatorial cease and desist action«.

54 Cf on this *Fritzsche,* Unterlassungsanspruch 202 ff; *E. Wagner,* Unterlassungsansprüche 233 ff. Fundamentally for the distinction between reparative and preventive injunctions see *Henckel,* AcP (1974) 99 ff.

55 Cf *Deutsch,* Haftungsrecht² no 108.

2/19 Furthermore, in the case of a reparative injunction – and this is significant in the context of the issues in focus here – the legal consequence also presents a problem, namely the distinction between the removal of the source of interference and *restitution in kind under the law of damages. Wilburg*[56] outlines the distinction as follows: »While the claim for damages is intended to compensate a disadvantage in the assets of the injured party, a reparative injunction is directed against the damaging state within the injured party's sphere. In one instance the subject of the claim is the damage, in the other the source of damage.«

However, this formula cannot, for example, definitively answer the question of whether the land-owner, into whose land oil has seeped from neighbouring land, can still bring a claim for a reparative injunction or only for damages. Is the removal of the source of damage at issue here or would it already constitute the rectification of the damage? According to *Jabornegg/Strasser*[57] there is only a right to a reparative injunction so long and to the extent to which the sphere of the disturber can be individualised practically and legally in relation to one's own thing[58]. If this is not possible but a state hampering and disadvantaging to the owner exists, then this can no longer be seen as an interference with property but at most as the consequence of interference, ie as damage that can only be compensated according to the principles of the law of damages. According to *Jabornegg/Strasser,* therefore, in the example with the oil, only a claim for damages could come into question; others,[59] however, would still grant a reparative injunction, but then would hardly be able to draw a clear line between this and claims for damages. Proceeding from the main principle that the reparative injunction is directed at preventing future impairments, whereas the claim for damages is directed at compensating damage that has already been sustained[60], it would be possible, however, to take as an additional premise the question of whether the infliction of further damage must be feared and such should be prevented[61], or whether the only basis is the damage already sustained and its complete compensation.

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56 Elemente, 263. Cf also *Baur,* Der Beseitigungsanspruch nach § 1004 BGB, AcP 160 (1961) 489; *Baldus* in MünchKomm, BGB VI[5] § 1004 no 103; *Wilhelmi,* Risikoschutz 56 ff, 73 f.

57 *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 150 ff. Also *Gursky* in Staudinger, BGB[2006] § 1004 no 101; *Picker,* Der negatorische Beseitigungsanspruch (1972) 32, 88; *idem,* Der privatrechtliche Rechtsschutz gegen baurechtswidrige Bauten als Beispiel für die Realisierung von »Schutzgesetzen«, AcP 176 (1976) 50.

58 *E. Wagner,* Unterlassungsansprüche 306 ff, on the other hand, considers the fact that this can be individualised should only be used as an indication.

59 *Baur,* AcP 160 (1961) 479; *Mühl* in Soergel, BGB X[12] § 1004 no 4.

60 *Wilhelmi,* Risikoschutz 56 ff, 71 ff.

61 See *Wilhelmi,* Risikoschutz 73 f.

2/20 *Picker*[62] attempts to avoid the difficulties involved in making a clear and persuasive distinction between the impairments decisive in respect of a reparative injunction and the disadvantages to be assessed under the law of damages[63] by taking a fundamentally different approach. According to him,[64] the aim of the actio negatoria (reparative injunction) is the *preservation of freedom* of property or some other protected legal right or interest. He says the prerequisite is thus solely the infringement of the legal integrity, the factual usurpation of the right of a third party. The negative protection thus exists if and because the exercise of the owner's powers are legally hindered, and because in effect the protected right is availed of by a third party. Hence, impairment and damage are two infringements of an intrinsically different nature; terminological overlaps and transitions are not possible between them, according to him: the impairment limits the legal capacity of the party disturbed, the damage on the other hand merely gives rise to a limitation of the actual capability of the victim. The reparative injunction thus always requires an interference with third-party rights.

Picker reaches the conclusion that an impairment only exists as long as the interferer impacts the third-party right. Therefore, it ends when the disturber stops the nuisance, when the disturbing thing is combined with the property affected to become a main component of such or when the disturber gives up his right to the disturbing thing[65]. Proceeding from the function of a reparative injunction as providing elementary and thus essential protection, *Picker*[66] concludes that the negating liability is »without precondition«: it requires neither fault nor any other subjective liability grounds nor even any causal behaviour on the part of the disturber; therefore, property that has ended up on land owned by a third party must also be removed even if it has ended up there through third parties or natural catastrophes or the party disturbed has taken action against a completely »innocent« legal successor. According to *Picker,* the fact that the costs of the reparation would be imposed upon the »disturber« by law should not distract from the fact that this is a rule made solely for reasons of expedience.

62 See *Picker,* Beseitigungsanspruch*; idem,* Zur Beseitigungshaftung nach § 1004 BGB – eine Apologie – zugleich ein Beitrag zur bürgerlich-rechtlichen Haftungsdogmatik, Gernhuber-FS (1993) 315.

63 *Picker,* Beseitigungsanspruch 20 ff, 85 ff.

64 *Picker,* Beseitigungsanspruch 49 ff; *idem,* Gernhuber-FS 331 ff. Following this line *Kahl,* Negatorischer Kern und restitutorisches Beiwerk in der Praxis des Beseitigungsnaspruchs, Picker-FS (2010) 391 ff; *Katzenstein,* AcP 211 (2011) 81 ff.

65 On the other hand, waiving the position that usurps the right can in its own right provide the basis for liability in respect of damage, according to him.

66 *Picker,* Beseitigungsanspruch 104 ff; *idem,* Gernhuber-FS 340 f.

2/21 *Picker's* approach nonetheless reveals decisive weaknesses[67] that will not be discussed in any more detail here[68]. Only one point will be addressed, which seems significant precisely in respect of the relationship to damages: *Picker* emphasises that the disturbed party's reparative injunction does not require any further preconditions because it is not about shifting a disadvantage, thus this approach can only be persuasive insofar as no costs accrue to the disturber, but on the other hand certainly no longer if the disturber must bear the often very substantial *reparation costs*[69]. With his fundamental concept, *Picker* could consequently only argue that the disturbed party has the authority to interfere in the rights of the disturber and thus to end the usurpation of the right, hence that the disturber is merely under a *duty to tolerate* in this respect[70]. This idea is clearly also behind *Picker's* opinion that the disturber could end the impairment by giving up his property.

As soon, however, as the issue is reparation by means of action that must be undertaken and the expense of reparation, the question of who is to bear the disadvantage is unavoidable, and thus his claim that terminological overlaps and transitions between damage and impairment are not possible when his approach is applied proves no longer tenable: the solution advocated by *Picker* also concerns after all the problem of *who is to bear the damage.* Therefore, it must be emphasised that the question of who is to bear the costs cannot be justified merely by expediency considerations but only by criteria for liability that are similar to those of the law of damages. Ultimately, the consideration of rei vindicatio, as rightly considered important by *Picker,* is an argument against the idea that a duty to repair that is connected with costs always arises like such without prerequisites: In the case of *rei vindicatio,* the party in possession is only required – precisely because of the lack of prerequisites attached – to make the thing available to be picked up[71] and by no means to expend costs, in order to make it possible once again for the owner to exercise full rights.

2/22 The discussion shows that in particular the *»conditionless« reparative injunction* advocated by *Picker* is only appropriate and can only fit within the overall system of legal consequences insofar as *no costs of reparation* are imposed upon the disturber. This means ultimately that the »conditionless« claim extends only

67 Cf the book review by *Baur,* AcP 175 (1975) 177 ff, and the criticism by *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 97 ff, as well as *Baldus* in MünchKomm, BGB VI[5] § 1004 no 33 ff and *Wilhelmi,* Risikoschutz 48 ff.

68 See also my comments in Canaris-FS (2007) 645 ff.

69 For example, one thinks of the case where someone steals a lorry but the joyride ends in a building pit belonging to the disturbed party.

70 On mere obligation to tolerate when there are no grounds for liability or if such are minor, see also already *Wilburg,* Elemente 261; *Baur,* AcP 160 (1961) 475, 477, 479.

71 Cf BGH in BGHZ 104, 304; *Fritzsche* in Bamberger/Roth, BGB II[2] § 985 no 26.

so far as that the disturber is obligated to *tolerate* the removal of the source of the disturbance by the disturbed party[72], so that the disturber can only be called upon to decline from resisting[73] and, thus, this is nothing more than a subset of the preventive injunction. This accords with those views[74] that already considered that a disturber should merely be obligated to tolerate the removal of the source of disturbance in the case of merely minor grounds for liability. However, even this right of the disturbed party is not completely »conditionless« either: it is necessary after all – as in the case of other preventive injunctions – that there be an impairment, ie a third-party's protected good must have been availed of[75], thus there must have been an infringement of the allocation of goods under the law[76]. Insofar it is possible to speak of the factual elements of an offence and harmony with the rules on preventive injunctions can be restored[77]. Furthermore, the causation must at least be through the sphere of the disturber, which also includes things and installations.

Insofar, however, as the disturber is to be obliged to *actively remove* the interference using efforts, time and money or other assets, there is also the question of how the – sometimes very heavy – costs are to be borne. As shown especially in the law of damages, *special reasons* are required before someone who has incurred a disadvantage can shift this onto another. If an owner is impaired in the exercise of his right, then the disadvantage has arisen within his sphere and there must be sufficient grounds for liability before he can require that another bears the costs. Hence, the question here is also who is closer to the damage[78]. Since it undisputedly concerns the question of who is to bear the disadvantage and thus a problem that

72 The disturber can also comply with this in that he relinquishes the disturbing thing and thus his property no longer stands in the way of the disturbed party removing the disturbance. If merely the toleration of the removal is at issue, then – but only then – may it be agreed, argues Picker, that the disturber can end his negatorial liability by giving up his property (cf *Picker,* Zur Beseitigungshaftung nach § 1004 BGB – eine Apologie – zugleich ein Beitrag zur bürgerlichrechtlichen Haftungsdogmatik, Gernhuber-FS [1993] 337 with further references); *Katzenstein,* AcP 211 (2011) 79 f and 93 ff. This limitation of the relinquishment solution would also seem to fit in with the line taken by *Larenz/Canaris,* Schuldrecht II/2[13] § 86 III 3 d and that of *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 145.

73 On this *E. Wagner,* Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 13 f with further references; *Katzenstein,* AcP 211 (2011) 92.

74 Thus, already *Wilburg,* Elemente 261; *Baur,* AcP 160 (1961) 475, 477, 479.

75 As *Picker,* Gernhuber-FS 334, highlights, this concerns a principle that also provides a basis for the law on unjust enrichment. On the significance of availing of a third-party good as an element of liability under the law of damages cf already *Wilburg,* Elemente 29 ff.

76 If no absolute protection is foreseen, it depends on whether the conduct violates a duty; cf *Baur,* AcP 160 (1961) 483 f. *G. Wagner,* Medicus-FS (2009) 606 f, however, now advocates that a breach of duty of care always be required without differentiation for the reparative injunction.

77 There is a difference to fault-based liability under the law of damages because it is not based on violation of a duty in relation to conduct. *Baur,* AcP 160 (1961) 471, 482 on the other hand, proceeds on the basis that the concept of unlawfulness in § 1004 BGB and in § 823 BGB must be the same.

78 Cf *Larenz/Canaris,* Schuldrecht II/2[13] § 86 II 2 b.

is addressed above all by the law of damages, those opinions[79], according to which reparative injunctions are subject to completely different rules, are not particularly persuasive. It is much more in line with the other values in our legal system when *Canaris*[80] highlights the connections with the law of damages in this respect.

2/23 However, it must be taken into account that reparative injunctions are primarily directed at prevention and not at compensation and that the special interest of the legal system in the avoidance of damage speaks for a lowering of the prerequisites[81]. Furthermore, it must be taken into consideration that the legal consequences are generally far less comprehensive than in the case of claims for damages: the disturber only has to bear the costs for the removal of the source of disturbance but is quite clearly *not* liable for the often very extensive *consequential damage* nor does he have to restore the previous state of affairs. Since the burden imposed even by an action directed at active removal, while greater than that imposed by a preventive injunction, is nonetheless typically less onerous than that imposed by a claim for damages, it would seem fitting that in this case too the prerequisites be set as something between those for actions for preventive injunctions and damages[82]. *Baur*[83] therefore considers it rightly impermissible to impose general strict liability upon the owner, ie to expose him to a reparative injunction even when the disturbance cannot be traced back to his actions; nonetheless even when the actions of the disturber fulfil the mere factual elements of disturbance this is not sufficient on its own to give rise to liability for actions, ie does not automatically constitute an interference with a protected position. On the other hand, and in contrast to the law of damages, fault is not required[84]. Instead – as will fall in line with the prevailing view[85] – objective negligence is required and also suffices[86], so that in particular the disturber's capacity to commit a delict is not a requirement[87].

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79 Cf *Picker,* Gernhuber-FS 332 ff; cf also *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 134 f, 144 f; *Katzenstein,* AcP 211 (2011) 74 ff.

80 *Larenz/Canaris,* Schuldrecht II/2[13] § 86 I.

81 This is emphasised by *Wilhelmi,* Risikoschutz 60 f, 352.

82 Such aspects are not considered at all by *Katzenstein,* AcP 211 (2011) 73 f.

83 *Baur,* AcP 160 (1961) 478.

84 See for instance *Larenz/Canaris,* Schuldrecht II/2[13] § 86 I 1 a and V 3 b; *Baldus* in MünchKomm, BGB VI[5] § 1004 no 89.

85 *Larenz/Canaris,* Schuldrecht II/2[13] § 86 I 1 b and IV with further references.

86 As in the case with preventive injunctions, it is debated in Austria whether a reparative injunction directed against the tenant on the basis of impairment of the lien requires fault; in favour *Hofmann* in Rummel, ABGB I[3] § 458 no 6; OGH 8 Ob 254/99g in JBl 2000, 508; contra *Rummel* in Rummel, ABGB I[3] § 859 no 5; an up-to-date overview of the prevailing state of opinion is offered by *Hinteregger* in Schwimann, ABGB II[3] § 458 no 6. If it is advocated here that due to lack of overtness of the lien from the perspective of the tenant, his objective negligence – but not fault – must be required, then this is accordingly in line with the general prerequisites in relation to reparative injunctions.

87 Thus also *Baldus* in MünchKomm, BGB VI[5] § 1004 no 89.

In summary, it is my view that two types of reparative injunctions must be recognised, namely one directed at an obligation to tolerate removal and the other directed at the obligation to actively remove the disturbance[88], and these require different grounds for liability. It is true that the undeniable difficulties in drawing a distinction between impairment and damage are not eliminated by this approach. However, they do seem essentially manageable; in particular the above-mentioned arguments of *Jabornegg/Strasser,* based on whether it is possible to individualise, are persuasive in my opinion[89]. Moreover, the boundaries may be somewhat relaxed and thus defused: if there are more weighty grounds for liability, for example a more serious violation of a duty[90], then the impairment can extend further and thus the claim may with good reason be approximated to the claim for damages; in the case of minor grounds for liability, on the other hand, the boundaries should be drawn more restrictively. 2/24

VI. Unjust enrichment by interference

A. The relationship between claims for unjust enrichment and claims for damages

Actions for unjust enrichment by interference (Eingriffskondiktionen; §§ 812, 816 BGB), which are referred to as Verwendungsansprüche, literally translatable as »claims for use«, in Austria (§ 1041 ABGB) are an expression of the principle that no one may *enrich* himself unjustly *at the expense of third-party goods*[91]. This is based on the notion that someone who drew advantages from goods allocated to another, without any grounds for justification, must surrender such enrichment to the »person who lost out«[92]: the law allocating the goods continues to have effect in the case of such infringement in the form of a claim to the advantage gained in contravention of the lawful allocation (continuing effect of a right). 2/25

Thus, claims for unjust enrichment by interference and claims for damages are related insofar as they both require in equal measure[93] an interference with 2/26

88 *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 67 f, on the other hand, clearly assume that according to the law today only reparative injunctions directed at actual action exist.

89 *Jabornegg/Strasser,* Nachbarrechtliche Ansprüche 131 ff, 150 ff.

90 On how this can be graded see *Wilburg,* Elemente 48; *Reischauer* in Rummel, ABGB II/1³ § 1304 no 5; *Karollus,* Schutzgesetzverletzung 212 ff.

91 *F. Bydlinski,* System und Prinzipien 235.

92 *Wilburg,* Ungerechtfertigte Bereicherung 27 ff; *Larenz/Canaris,* Schuldrecht II/2¹³ § 69 I 1c; *F. Bydlinski,* System und Prinzipien 242 f.

93 This harmony would also seem to apply in relation to goods that cannot be paid for; see *Koziol,* Bereicherungsansprüche bei Eingriffen in nicht entgeltsfähige Güter? Wiegand-FS (2005) 449.

the protected interests of another person.[94] Apart from this, they must nonetheless be distinguished from each other[95]: the law of damages is directed at compensating the *damage* sustained by the impaired party; the law on unjust enrichment at the disgorgement of the unjust *enrichment*[96] gained by the interferer[97]. Accordingly, it is also recognised today that claims for unjust enrichment do not require any damage on the part of the person at whose expense the enrichment was gained[98]. The protection under the law of unjust enrichment can thus be applied in cases when the law of damages cannot be drawn on due to the lack of any disadvantage suffered.

2/27 There is also consensus that the prerequisites for the two types of claim are different[99]: claims for unjust enrichment do not depend on fault or breach of a duty by the party unjustly enriched; claims for damages on the other hand do require fault on the side of the party liable for damages, or equivalent grounds for liability to this party, for example a special risk posed by something within his sphere of responsibility. This is in principle justifiable on the basis of the argument that compensating the disadvantage suffered by a third party with one's own resources is a considerably more onerous legal consequence than disgorging an advantage gained in an impermissible fashion. Accordingly, claims for damages are subject to much stricter prerequisites than claims for unjust enrichment[100].

B. Blurred boundaries between claims for unjust enrichment and claims for damages

2/28 The boundary between claims for unjust enrichment and for damages is, however, by no means so clearly drawn as it might seem based on the overview above, either with respect to the *prerequisites for the claim* or the *legal consequences.*

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94 Cf *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1d; *Koziol,* Rechtswidrigkeit, bewegliches System und Rechtsangleichung, JBl 1998, 624; *Jansen,* The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law, JETL 2010, 17 f.

95 *F. Bydlinski,* System und Prinzipien 185 ff, 233 ff; *Böger,* System der vorteilsorientierten Haftung im Vertrag (2009) 50 ff.

96 *Wilburg,* Ungerechtfertigte Bereicherung 5 f, 97 ff; *Larenz/Canaris,* Schuldrecht II/2[13] § 67 I 1; *F. Bydlinski,* System und Prinzipien 233; *Koziol* in KBB, ABGB[3] § 1041 no 4.

97 If the loss of the disgorgement is not taken into consideration as relief, there is nevertheless a deviation from this basic principle. This will be looked at in brief below.

98 *Wilburg,* Ungerechtfertigte Bereicherung 97 ff; *Larenz/Canaris,* Schuldrecht II/2[13] § 67 I 1 b; *F. Bydlinski* in Klang, ABGB IV/2[2], 529 f; *Reuter/Martinek,* Ungerechtfertigte Bereicherung (1983) § 14 I 1; *Apathy,* Der Verwendungsanspruch (1988) 46; *Rummel* in Rummel, ABGB I[3] § 1041 no 5.

99 Cf *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1 b and c; *F. Bydlinski* in Klang, ABGB IV/2[2], 530; *Apathy* in Schwimann, ABGB IV[3] § 1041 no 2; cf also *Reuter/Martinek,* Ungerechtfertigte Bereicherung § 7 I 1.

100 *Koziol* in KBB, ABGB[3] § 1041 no 4; *idem,* Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement? F. Bydlinski-FS (2002) 175 ff.

2/29 If one follows the persuasive *doctrine of allocation* (Zuweisungstheorie) in respect of *claims for unjust enrichment by interference* (claims for use) and not the unlawfulness theory[101], then there is certainly a striking difference as compared to fault-based liability under the law of tort since it is merely the allocation of the good by the legal system which is decisive and thus the *factual elements of the offence,* but not a breach of duty on the part of the enrichee. This is true, however, only in the field of so-called absolute goods. Limited allocation of goods can also justify claims for *unjust enrichment* if there is interference in the area of interests protected. If, however, the interests are only protected against certain unlawful types of conduct that are described in particular by duties of conduct or bonos mores, then it is the *breach of duty* constituted by the behaviour which is relevant[102].

2/30 *Canaris*[103] further emphasises that there is a transition from liability for unjust enrichment to liability for damages, for example, in the liability of an owner who *knows* of the duty to return something due to deficiencies in a commercial transaction and thus *knows* of the seller's claim in respect of unjust enrichment and carelessly destroys the item.

Nor is it possible to miss the fact that the stricter application of liability rules under the law of unjust enrichment[104] in the case of *dishonesty* on the part of the enrichee takes into account grounds for liability that are at home in the law of tort. If in the case of dishonesty, the basis for the claim is no longer the specific, still existing enrichment, in other words the loss of the enrichment is not taken into account, this application can no longer be justified solely on the basis of the disgorgement of the advantage obtained, rather an additional allocation of risk is involved[105]. Thus, in the case of such stricter liability, behaviour is relevant as a criterion for liability; *Canaris*[106] distinguishes between liability based on assets and independent of liability and behaviour-related, imputation-based liability under the law of unjust enrichment. As the latter leads to the interferer not only having to surrender any still existing advantage but also being liable if the advantage has since been lost, ie possibly being liable to cover the risk at his own expense, it is fitting in this context to require imputability[107]. If in addition to the breach of duty

101 On this *Wilburg,* Ungerechtfertigte Bereicherung 27 ff; *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1 b; *F. Bydlinski,* System und Prinzipien 240 ff; *Reuter/Martinek,* Ungerechtfertigte Bereicherung § 7 I.

102 *Wilburg,* Ungerechtfertigte Bereicherung 44 ff; *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1c; *F. Bydlinski,* System und Prinzipien 243; *Koziol,* Der Verwendungsanspruch bei Ausnützung fremder Kenntnisse und schöpferischer Leistungen, JBl 1978, 239. Contra, for example, *Reuter/Martinek,* Ungerechtfertigte Bereicherung § 7 III d.

103 *Larenz/Canaris,* Schuldrecht II/2[13] § 67 I 1 c.

104 On this see for German and Austrian law *F. Bydlinski,* System und Prinzipien 279 ff.

105 See on this *F. Bydlinski,* System und Prinzipien 282 ff.

106 *Larenz/Canaris,* Schuldrecht II/2[13] § 71 III and § 73.

107 Thus, *Larenz/Canaris,* Schuldrecht II/2[13] § 71 III 1 a and § 73 II 2 a.

constituted by his conduct, the interferer is also at fault[108], then all prerequisites for a claim for damages have also been satisfied.

2/31 Without having regard to the dishonesty and independent of the attainment of any advantage, such party as *deliberately* decided to use the asset in question should also be liable to the extent of the objective value of the third-party good of which he availed[109]. The deliberate disposition to utilise a third-party good as such does not justify a duty to compensate it is true, but it does justify the allocation of risks in case the undertaking turns out to be a failure.

2/32 The fluid transition between the laws on unjust enrichment and damages is also revealed in the circumstance that, vice versa, the unjustified attainment of an *advantage* can also be of significance in relation to *liability under the law of tort.* This will be looked at again below (no 2/54 and no 6/171 ff).

C. The overlap between the laws on unjust enrichment and damages[110]

1. The problem area at issue

2/33 This concerns such cases as when the enrichee obtained his advantage by destroying a third-party interest: eg, entrepreneur B injures his competitor V so seriously that the latter becomes unable to work and cannot continue to operate his business. Perpetrator B can increase his sales and demand higher prices due to his new monopoly position. Similarly, there are cases in which the machines of a competitor are damaged or destroyed. However, examples can also be found in completely different fields: the media entrepreneur B publishes a fictional interview with famous personality V, offered to him by a journalist, without checking this adequately in advance; this publication increases sales of B's newspaper for some time quite dramatically.

108 If (as predominantly in German law) an objective standard of fault is advocated, then in case of objective carelessness and the perpetrator's mental capacity fault would always be given. In Austrian law, which also considers the subjective knowledge and abilities of the perpetrator according to the prevailing view, on the other hand, the requirement of fault would extend beyond the criteria for liability for unjust enrichment. On the different concepts of fault see *Koziol,* MJ 1998, 111.

109 *Wilburg,* Zusammenspiel der Kräfte im Aufbau des Schuldrechts, AcP 163 (1964) 356 ff; *F. Bydlinski,* System und Prinzipien 285 ff; *Koziol* in KBB, ABGB[3] § 1041 no 16.

110 On this in more detail *Koziol,* Gewinnherausgabe bei sorgfaltswidriger Verletzung geschützter Güter, Medicus-FS (2009) 237 ff.

2. Inapplicability of the law of unjust enrichment

2/34 The view prevailing today in the law on unjust enrichment takes – as already mentioned – the *»allocation doctrine«* (Zuweisungstheorie)[111] as its basis and assumes that the claim for unjust enrichment by interference is to be considered a claim based on the continuing effect of a right: the good allocated by the legal system to the person at whose expense another was enriched is effectively continued in the claim against the interferer. According to the allocation doctrine, however, the granting of a claim for unjust enrichment depends not only on which positions are accorded the required allocative power but also how far such extends. According to *Canaris,*[112] this question can be answered by combining the allocation doctrine with the justified core of unlawfulness theory, whereby additionally it is necessary to take as a premise the principle that the allocative power is established by the protection afforded against delicts. This is basically true[113]; nonetheless, it must be noted that frequently the law of delict on its own cannot provide the answer as regards the establishment of the allocative power of legally recognised positions, rather such must be deduced from the legal system as a whole[114]. Moreover, it must be considered whether differences in the protective scope do not also arise from the nature and purposes of the individual legal remedies. Precisely this would appear to be the case in the relationship between the laws on damages and unjust enrichment.

2/35 Specifically, there is widespread consensus that only *use* contravening the essence of an allocation gives rise to a claim for enrichment by interference and thus protection under the law on unjust enrichment[115]. Use is understood as any utilisation for designated purposes, eg consumption, usage, processing or transfer of the good[116]. *Rummel*[117] emphasises this very clearly: »The simple destruction of a thing contrary to its designated purpose may not generally be deemed a use, even if it serves one's interests (for example, in the course of a burglary). This is the only

111 Fundamentally see *Wilburg,* Ungerechtfertigte Bereicherung 27 ff; continuing along this line *von Caemmerer,* Bereicherung und unerlaubte Handlung, Rabel-FS (1959) 352 ff; see further in more recent times, for example *F. Bydlinski,* System und Prinzipien 242 f; *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1c; *Reuter/Martinek,* Ungerechtfertigte Bereicherung (1983) § 7 I 1.

112 *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1c.

113 In favour, for example, also *Jansen,* Die Struktur des Haftungsrechts (2003) 479, 496, 521 f.

114 Cf also *Jansen,* Struktur des Haftungsrechts 495 ff.

115 On use as a prerequisite for the claim see *Apathy,* Der Verwendungsanspruch (1988) 46 ff; *Rummel* in Rummel, ABGB I[3] § 1041 no 3.

116 Only the various possibilities for use are mentioned in each case, but never destruction, cf *Wendehorst* in Bamberger/Roth, BGB II[2] § 812 no 127; *von Caemmerer,* Rabel-FS 353; see further from more recent times, for example *F. Bydlinski,* System und Prinzipien 242 f; *Ellger,* Bereicherung durch Eingriff (2002) 228 f; *Reuter/Martinek,* Ungerechtfertigte Bereicherung § 7 IV 1; further from a comparative law perspective *Schlechtriem,* Restitution und Bereicherungsausgleich in Europa II (2001) 111 ff.

117 *Rummel* in Rummel, ABGB I[3] § 1041 no 3; following this line *Koziol* in KBB, ABGB[3] § 1041 no 9.

way to draw the distinction from the law of tort.« This shows that while the law of damages naturally provides protection even when something is destroyed, this is clearly not the case with respect to the law on unjust enrichment[118].

In the above-described cases, a *use must be denied* and thus V has no claims on the basis of unjust enrichment. This is also perfectly reasonable as – from the perspective of the allocation doctrine – the uses of a good are certainly allocated to the owner of such (cf § 354 ABGB) and the possibilities of use also determine the value of the thing (cf § 305 ABGB); accordingly, the concept of continuing legal effect grants the owner »a claim for use« if an unauthorised party draws an advantage from a use allocated to the owner[119]. The use that an unauthorised party draws indirectly from the destruction of the thing allocated to the victim, on the other hand, is not allocated to the owner, so that the concept of continuing legal effect does not apply[120]: if an entrepreneur destroys machines belonging to his competitor in order to neutralise the latter, the competitive advantage thus gained does not constitute a use that was allocated to the owner of the destroyed machines. It is not the advantage from using the machine that was gained but an advantage that a third party draws precisely from the destruction of the thing and the associated neutralisation of a competitor by his own actions, a use which the owner would never have been able to obtain from his good and which was not allocated to him. Accordingly, *Bollenberger*[121] emphasises that an advantage that someone gains due to the ancillary effect of simple destruction of a third-party's item does not constitute an enrichment derived from what was allocated to such third party. Nonetheless, it can still be said that by virtue of his interference the injurer neutralises *potential use* to which the victim was entitled in order to derive an advantage for himself.

3. The shortcomings of the law of tort

2/36 Although the example cases cited at the beginning therefore do not give rise to any claim for restitution under the law of unjust enrichment, according to prevailing opinion, I consider that it may nonetheless be fitting[122] under certain circum-

118 Cf also *Ellger,* Bereicherung durch Eingriff 125 f; *Reuter/Martinek,* Ungerechtfertigte Bereicherung § 7 II 2.

119 Fundamental on all of this *Wilburg,* Ungerechtfertigte Bereicherung 27 ff; see further *F. Bydlinski,* System und Prinzipien 242 f; *Ellger,* Bereicherung durch Eingriff 148 ff; *Larenz/Canaris,* Schuldrecht II/2[13] § 69 I 1c; *Reuter/Martinek,* Ungerechtfertigte Bereicherung § 7 I 1; cf also OGH 3 Ob 544/95 in JBl 1996, 48.

120 Parallel problems also arise in some cases where profits are obtained by breach of fiduciary duties, cf on this for example *Rusch,* Gewinnhaftung bei Verletzung von Treuepflichten (2003) 251 f; *Böger,* Vorteilsorientierte Haftung 103 ff.

121 Das stellvertretende Commodum (1999) 218.

122 See also already *Koziol,* Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement? F. Bydlinski-FS (2002) 175 ff.

stances if those who caused the destruction of a good had to surrender the *benefit* they gained thereby, which was allocated to the good. At first glance it might seem that there is no necessity for this since the victim generally has a claim for damages when the perpetrator has acted culpably. However, this is not ultimately the case: while claims for damages and for use both require to the same extent that there has been interference with the protected interests of another, the law of tort aims at the compensation of the *harm* suffered by the party whose interests were impaired, whereas the law on unjust enrichment serves the disgorgement of the *advantage* gained by the interferer.[123]

2/37 In principle, there is certainly no doubt as to the victim's claim to compensation for the damage culpably inflicted upon him in the cases under discussion here. The need for a solution under the law on unjust enrichment arises, however, because the law of tort does not seem sufficient in this respect[124] since by its very nature it is only directed at the *compensation of the harm.* This may – as the Caroline cases above all have shown[125] – lead to the interferer being left with a considerable profit even after full compensation of damage, so that the law of tort cannot procure any deterrent effect. The approach taken by the BGH, of increasing the compensation for non-pecuniary damage on this basis is clearly impermissible because it disregards a fundamental principle of liability law, namely that claims for damages are only directed at the compensation of the damage[126]. Moreover, this approach does not come into question for many other abundantly obvious reasons: the destruction of a thing does not concern the infringement of personality rights that could trigger a claim for non-pecuniary damage. Even in the case of bodily injury, increasing the damages for pain and suffering on the basis of the advantage gained by the perpetrator comes even less into question than in the Caroline cases.

The *claim for disgorgement of profit*[127] would also have the advantage for the victim that the claim is based on an actual enrichment gained by the interferer and

123 Cf *Wilburg,* Ungerechtfertigte Bereicherung 97 ff; *Böger,* Vorteilsorientierte Haftung 50 ff.

124 *Helms,* Gewinnherausgabe als haftungsrechtliches Problem (2007) 1, limits the question of surrender of profits completely to those cases in which a plus on the side of the infringing party is not matched by a corresponding minus on the side of the victim.

125 BGH in BGHZ 128, 1 = NJW 1995, 861; NJW 1996, 984; NJW 1996, 985.

126 Cf *Canaris,* Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, Deutsch-FS (1999) 102 ff; *Löwe,* Der Gedanke der Prävention im deutschen Schadensersatzrecht (2000) 188 ff; *Böger,* Vorteilsorientierte Haftung 882 ff. Departing from this, however, *Helms,* Gewinnherausgabe 300 ff; *von Bar,* Deliktsrecht I no 609.

127 On the reference to the right to management without authorisation, see in particular *Canaris,* Deutsch-FS 87 ff; further *Hoppe,* Gewinnorientierte Persönlichkeitsverletzung in der europäischen Regenbogenpresse, ZEuP 2000, 29; *Löwe,* Prävention 185 ff; *G. Wagner,* Geldersatz für Persönlichkeitsverletzungen, ZEuP 2000, 200; *Wernecke,* Schadensersatz und Gewinnherausgabe als Strafelemente des bürgerlichen Rechts? (2005). On Swiss law see *Inderkum,* Schadenersatz, Genugtuung und Gewinnherausgabe aus Persönlichkeitsverletzung (2008) 171 ff.

not dependent on any difficult-to-prove loss or lost profits;[128] furthermore, the victim would not have to disclose the circumstances of his own enterprise in order to prove the damage sustained [129].

4. Approaches to solutions in intellectual property law

2/38 The *law on intellectual property* could provide a starting point for a solution. According to § 150 (1) of the Austrian Patent Act (Patentgesetz), the party whose patent rights have been infringed due to *unauthorised use* of a patent has a claim against the infringer for appropriate remuneration. This is a »claim for use« in the sense of § 1041 ABGB and is accordingly non-fault-based. The enrichment of the unauthorised interferer is measured according to the fee he circumvented by not procuring permission. The Austrian Supreme Court[130] rightly emphasises that the appropriate remuneration must generally be determined according to the value of the use of the patent and thus equals it to an appropriate license fee, which the user would have had to pay in the case of authorised use.

There is no corresponding provision in the German Patent Act (Patentgesetz) and hence a claim for unjust enrichment by interference (Eingriffskondiktion) under general civil law principles was denied for years on the basis of the allegedly exhaustive provisions of the Patent Act, despite heavy criticism by academics. Nonetheless, the BGH now recognises claims for unjust enrichment by interference in the case of interference in the absence of fault, considering that such claims are to be assessed on the basis of an appropriate license fee.[131]

2/39 Besides the claim for unjust enrichment under § 150 (1) of the Austrian Patent Act, which displays no unusual features, § 150 (2) provides for an unusual claim: in the case of *culpable infringement of a patent,* the victim may demand either damages including lost profit or the *disgorgement of the profit,* that the victim gained by infringing the patent. This claim for disgorgement of profit appears to be a claim for unjust enrichment in terms of its legal consequences, although it is uncharacteristically contingent upon the fault of the enrichee; on the other hand, the wording in this provision shows that it applies not merely in the case of use of a third-party patent but in general when profit is gained by culpable »patent *infringement«.*

The German Patent Act does not contain any corresponding provision, but intellectual property case law[132] has long recognised the option of assessing the –

128 Cf *Stoll* Haftungsfolgen im bürgerlichen Recht (1993) 43; *Helms,* Gewinnherausgabe 4 f.

129 See *Kraßer,* Schadensersatz für Verletzungen von gewerblichen Schutzrechten und Urheberrechten nach deutschem Recht, GRUR Int 1980, 264.

130 OGH in 4 Ob 246/97y in ÖBl 1998, 307; 4 Ob 36/05 f in ecolex 2005, 928 *(G. Schönherr).*

131 BGH in BGHZ 68, 90 = JZ 1977, 515 *(Bälz).*

132 BGH in GRUR 1962, 401; BGHZ 145, 366. Cf on this – also from a comparative law perspective – *König,* Gewinnhaftung, von Caemmerer-FS (1978) 188 ff.

non-fault-based – claim for damages[133] according to the profit actually gained by the infringer.

2/40 On the other hand, until September 2008 § 97 (1) of the Germany Copyright Act (UrhG), explicitly provided for a claim for disgorgement of profit: in lieu of damages the victim could seek the disgorgement of the profit that the negligent infringer gained by infringing the right. The new wording of the provision is less distinct in saying that in establishing the damages the profit can be »taken into consideration«; moreover, assessment of damages may be based on the »appropriate remuneration«. The corresponding provision in § 87 (4) of the Austrian Copyright Act (UrhG) still says that the victim can seek disgorgement of the profit which the damaging party gained by means of the culpable interference.

Hence, this does not depend as is usual in the law on unjust enrichment on the stricter prerequisite of *use* of the third-party intellectual property right but instead on its *infringement* – a much broader term. The legislator balanced the relaxation of this requirement with the other requirement – contrary to the general rules of unjust enrichment law – that there is *culpable behaviour,* just as in the law on tort.

2/41 When it comes to the arguments in favour of these rules, it may be assumed (see above no 2/36 f) that the disgorgement of an additional, unlawfully obtained *advantage* is subject to considerably less strict requirements than the obligation to expend one's own goods, that one could otherwise dispose of freely, in order to cover *damage* suffered by a third party. This evaluation would normally speak in favour of an obligation to surrender the advantage gained by destroying a good even in the absence of fault in respect of the destruction. On the other hand, the duty to surrender cannot be triggered by the same broad requirements as is otherwise the case in respect of a »claim for use«; the good but not the benefit acquired through its destruction was allocated to the eventual claimant. In the absence of this allocation, not every benefit obtained, whether by means of the enrichee's own actions, the actions of the party at whose expense the enrichment was gained or by chance can suffice as a basis for the claim – as is otherwise the case under § 812 BGB and § 1041 ABGB. For only when the good is the object of a subjective exclusion right of the party at whose expense the enrichment was obtained and this right was intended to secure the use potential associated with the good is it always objectively justified to award such party compensation under the law on unjust enrichment.

2/42 The allocation doctrine thus serves the *bilateral justification* of the claim for unjust enrichment by interference and thus resembles a structural principle of private law to which *F. Bydlinski*[134] in particular has pointed persuasively. Applied

133 In BGHZ 68, 90 the BGH refers to this non-fault-based claim as a »residual claim for damages«.

134 System und Prinzipien 92 ff; *idem,* Die Maxime beidseitiger Rechtfertigung im Privatrecht, Koziol-FS (2010) 1355 ff. Following this line in particular in respect of the law on unjust enrichment

to our problem area this means: if there are not only arguments for a disgorgement of the advantage unlawfully gained by the enrichee, but also arguments in favour of compensation on the basis of the allocation of the good used in an unauthorised manner to the claimant, then such claimant should be awarded the claim for unjust enrichment by interference. Only when there are solely arguments to the effect that the advantage should not be left with the enrichee but no grounds in favour of a claim on the other side, would the claim no longer fall under the law on unjust enrichment and in such case disgorgement to the benefit of the state should be ordered (see below no 2/82 f).

In the area under discussion here, however, it could after all be argued that while there was certainly no allocation of the use in the strict sense, there was nevertheless an *attenuated allocation:* the infringer frustrates the possibility of use allocated by the legal system to the victim[135] and avails of this potential for use himself. In my opinion it must also suffice for the bilateral justification of a claim for disgorgement of the profit obtained if the party whose good was the subject of interference is *comparatively more entitled* than the interferer[136]. It would after all seem more fitting if the party who owned the good and who suffered a disadvantage due to the interference receives the benefit obtained by the destruction of his thing than if it is received by the party that destroyed a third-party good[137].

That claims be granted merely on the basis of comparatively more entitlement is indeed by no means uncommon under the ABGB and the BGB: in the case of action of ejection the outcome does not depend on whether the claimant is conclusively entitled to the thing of which he was deprived. This aspect plays an even greater role in the case of the actio Publiciana, which explicitly simply invokes the comparatively stronger right (cf § 372 ABGB, § 1007 BGB)[138].

2/43 However, this *attenuation* of the justification on the side of the victim has to be balanced by *toughening* the prerequisites for the claim on the side of the interferer in order to proceed overall from appropriate grounds for the existence of the claim as in the case of the claims more closely regulated by law; unless it is balanced such claim would not fit harmoniously into the overall legal concept. This is why the claim for disgorgement of profits that goes beyond the actual area of

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▹▹ *Bollenberger,* Gewinnabschöpfung bei Vertragsbruch, ZEuP 2000, 905. In the same sense – however, without invoking *F. Bydlinski's* arguments – *Ellger,* Bereicherung durch Eingriff 409. Rejecting this, on the other hand, *G. Wagner,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS (2010) 932 f. See additionally under no 2/92.

135 A similar concept is developed by *Helms,* Gewinnherausgabe 157.

136 *von Caemmerer,* Bereicherung und unerlaubte Handlung, Rabel-FS 360, sees the justification in that the damage suffered by the victim should roughly correspond to the profit gained by the interferer. However, this is merely speculation, which will by no means always reflect reality.

137 In this sense already *Koziol,* Bereicherungsansprüche bei Eingriffen in nicht entgeltsfähige Güter? Wiegand-FS (2007) 454 ff.

138 Similar results are achieved in Swiss law under Art 934 ff ZGB.

allocation should be bound to the requirement of *negligent* interference in third-party goods. The intellectual property law rules do speak to some extent of *culpable* behaviour but in my opinion it would be an excessive requirement if one were to take subjective culpability as a basis: this would not adequately take into account that it is not damages that are at issue but the surrender of an *enrichment,* ie a lesser legal consequence. Milder legal consequences call for correspondingly milder prerequisites, which thus must be less stringent than those for claims for damages.

This slight correction, to the effect that fault means objective negligence in this context, means the intellectual property law rules fit seamlessly into a consistent overall system: by means of this toughening of the prerequisites in comparison to those under the law on unjust enrichment, the assessment once again falls overall in favour of the party at whose expense the enrichment was obtained. Moreover, it can be argued that additionally deterrent grounds[139] also speak in favour of granting a claim to disgorge profit.

2/44 Therefore, it is to be presumed that in the case of *negligent destruction* of a good, the party to whom this good was allocated also has a claim for disgorgement of the profit gained by the interferer thereby even if the specific advantages gained cannot be deemed to have been allocated to the owner. The comprehensive protection and thus the general allocation of the good at least allows the owner of the good to be reckoned as more entitled than the unauthorised interferer to gain the advantage actually drawn from the infringement of the third-party good.

5. The doctrinal classification of the claim to disgorgement of profit

2/45 The doctrinal classification of intellectual property law claim to disgorgement of profit is considered unclear[140]. This is unsurprising in that some *requirements* are based on the law of tort whereas the *legal consequences* are oriented on the law of unjust enrichment[141]. Frequently, the claim is referred to as a claim for damages due to the requirements derived from the law of tort[142]. But the Austrian Copyright

139 The concept of deterrence is emphasised above all by those who advocate the economic theory, see *Köndgen,* Gewinnabschöpfung als Sanktion unerlaubten Tuns. Eine juristisch-ökonomische Skizze, RabelsZ 64 (2000) 679 ff.

140 *Seiler* in MünchKomm, BGB IV[5] § 687 no 27; *Helms,* Gewinnherausgabe 263 ff; *Alexander,* Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht (2010) 255 ff.

141 Thus, for example *Däubler,* Anspruch auf Lizenzgebühr und Herausgabe des Verletzergewinns – atypische Formen des Schadensersatzes, JuS 1969, 53.

142 There is always reference to a threefold method of *damage* assessment; cf also *Canaris,* Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, Deutsch-FS (1999) 92; *Helms,* Gewinnherausgabe als haftungsrechtliches Problem (2007) 275 ff. In *my* contribution, Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement? F. Bydlinski-FS (2002) 188 f, I too referred to the claim as a claim for damages because of the requirements

Act already distinguishes in the heading to § 87 UrhG between the claim to damages and that for disgorgement of profit.

The recognition of a separate category *»claim for disgorgement of profit«* in copyright law is certainly substantially more satisfactory than forcing it into one of the usual groups of claims, as it is very clearly a claim that lies in the *interim area between the law of tort and of unjust enrichment*[143]*:* the weakness of the allocation criterion, which is decisive in respect of liability under the law of unjust enrichment, is balanced by requiring that the stricter prerequisite of negligence on the part of the interferer must be fulfilled.

6. Conclusion

2/46 The basic principles, which can be obtained by comparison of the requirement for claims and the legal consequences under the law of tort and the law on unjust enrichment, point to the following solution: if the party that infringes a protected good has obtained an advantage through interference that does not consist in use in the usual sense, and this advantage is not covered by the allocation of the infringed good, the injured owner of the good can demand disgorgement of such advantage if the enriched infringer is guilty of objective negligence as regards the infringement.

However, this rule is not explicitly contained either in the general private law norms of the law of tort nor those of the law on unjust enrichment. It would certainly be a bold step to recognise a new type of claim merely on the basis of the discernible general principles, such claim being a mixture of the requirements of damages claims (negligence) and the legal consequence under the law of unjust enrichment (surrender of the enrichment) and thus located somewhere in the no man's land between these two legal fields. Nonetheless, it is decisive that the legislator and established case law have already recognised this hybrid claim in intellectual property law and have already conceived of a whole system of claims from

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▹▹ derived from the law of damages, following the German terminology for patent infringements, see BGH in BGHZ 68, 90. Critical, however, of such classification see, for example *Jakobs,* Eingriffserwerb und Vermögensverschiebung in der Lehre von der ungerechtfertigten Bereicherung (1964) 81 ff; *von der Osten,* Zum Anspruch auf Herausgabe des Verletzergewinnes im Patentrecht, GRUR 1998, 284 with reference to *Isay,* Kommentar zum Patentgesetz[4] (1926) § 35 Comment 16.

143 This is also taken into account too little by *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag (2006) 96 f, who advocates classification under the law of damages, but in proposing such a provision once again speaks of how »in lieu of damages, the disgorgement of the profit« can be sought and thus ultimately recognises the different nature of the claim. *L. Alexy,* Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts durch die Medien (2009) 205 ff, also sees the claim for disgorgement of profit as a claim for damages and hence neglects significant differences.

preventive injunctions to damages claims and all the gradations between in this area. The positive law starting point and established case law mean the intellectual property law norm can acquire general validity by analogy under consideration of the basic principles governing our legal systems in general.

VII. Creditors' avoidance

2/47 According to predominant opinion and rightly in my view, creditors' avoidance of debtor's transactions is primarily directed at the *ineffectiveness* of the debtor's transaction challenged in respect of the transferred property's liability for the debtor's obligations[144]; the secondary entitlement is a claim under the law on unjust enrichment[145]. The law on avoidance of transactions, therefore, is not aimed at the compensation of damage caused and by no means generally requires that grounds for liability under the law of damages are fulfilled.

This latter point is revealed most clearly in the context of actions to avoid a gift, but even avoidance of a fraudulent transfer of property (actio Pauliana) does not require that the respondent be accused of any delict[146]. Thus, nowadays the »delict theory« is rightly not considered to offer an adequate approach to explaining the law on avoidance[147].

2/48 Due to the fact that the prerequisites for creditors' avoidance are considerably less strict than those for a damages claim, it is highly dubious when avoidance merely for indirect disadvantages implicated by a transaction is so widely extended, at least under Austrian but also now under German law[148], that the

144 On this *Henckel,* Anfechtung im Insolvenzrecht (2008) § 143 no 23 ff; *Koziol,* Grundlagen und Streitfragen der Gläubigeranfechtung (1991) 45 ff with additional references; *Bork,* Grundgedanken, Geschichte, Bedeutung, in: Bork (ed), Handbuch des Insolvenzanfechtungsrechts (2006) no 1/4.

145 *Gerhardt,* Die systematische Einordnung der Gläubigeranfechtung (1969) 236 ff; *Koziol,* Gläubigeranfechtung 61 ff.

146 *Jaeger,* Die Gläubigeranfechtung außerhalb des Konkursverfahrens[2] (1938) 45, cites the example of when the debtor throws a bill of exchange into the fire in full view of the obligator, declaring his intention to disadvantage the creditor. Although the obligator cannot be accused of anything in this regard, he is exposed to the possibility of action for avoidance by the creditor.

147 See in detail *Jaeger,* Gläubigeranfechtung[2] 45 ff; *Baur/Stürner,* Zwangsvollstreckungs-, Konkurs- und Vergleichsrecht II[12]: Insolvenzrecht (1990) no 16, 18. *Fridgen,* Die Rechtsfolgen der Insolvenzanfechtung. Vorsatzanfechtung unter dem Gesichtspunkt des Schadensersatzes (2009) in particular 140 ff, seeks, however, to understand the legal consequence of avoidance for intent as a claim for damages; in this respect he does not have sufficient regard to the differences between the requirements for the claim and also the legal consequences.

148 *Hirte* in: Uhlenbruck (ed), Insolvenzordnung[12] (2003) § 129 no 127 f, § 133 no 14; *Schoppmeyer,* Directly disadvantageous transactions, in: Bork, Insolvenzanfechtungsrecht no 9; *Kreft* in Eickmann et al (eds), Heidelberger Kommentar zur Insolvenzordnung[4] (2006) § 129 no 45, § 132 no 9.

respondent actually covers the proportional damage suffered by the creditors due to the fact that insolvency was not filed in good time (Quotenschaden)[149], although the liability criteria under the law of damages must not be fulfilled[150]: the avoidance for indirect disadvantage through the transaction conceived as a penalty for failing to file for insolvency on time is permissible subject to far less stringent prerequisites than asserting liability for damages on grounds of delay in filing insolvency and furthermore, the burden of proof is balanced in favour of the party seeking avoidance[151]. Insofar as the matter concerns compensation of damage caused, therefore, either no creditors' avoidance should be allowed and the matter should be dealt with under the law on damages or, alternatively, the prerequisites for avoidance must be correspondingly stricter; however, the provisions on avoidance do not provide any means to this end.

VIII. Claims for damages

2/49 In the following, only the most important principles, prerequisites for liability and consequences of liability will be addressed, such as are or could be significant in the relationship between the law of tort and adjoining legal protection mechanisms.

The law of tort regulates when a victim can pass the *damage* he has suffered onto someone else. Since, as already mentioned in the introduction, in principle everyone must bear the risks of the goods he is entitled to himself, there must be special reasons to justify *shifting the damage* to someone else. Damage can basically only be imputed to someone other than the victim if such other party himself *caused* the harm or such was caused by his sphere of responsibility. Furthermore, however, further *criteria for liability* must also be fulfilled: in the field of extracontractual liability, our legal systems recognise above all the following criteria: misconduct on the side of the party causing the harm (delictual liability), misconduct by such party's auxiliaries (liability for auxiliaries), the particular dangerousness of something within his sphere of control (strict liability) and permitted

149 See, for instance, in more recent times OGH 6 Ob 72/06s in ÖBA 2007, 654 *(Fruhstorfer).*

150 Accordingly critical *Koziol,* Gläubigeranfechtung 94; *Bollenberger,* Anfechtung von Finanzierungsgeschäften gemäß § 31 Abs 1 Z2 Fall 2 KO, ÖBA 1999, 422 f; *Rebernig,* Konkursanfechtung des Kontokorrentkredites (1998) no 162; *Fruhstorfer,* Anmerkungen zu OGH 6 Ob 72/06s in ÖBA 2007, 662 ff.

151 As regards such claims see OGH 1 Ob 571/86 in SZ 59/132 = ÖBA 1986, 570; 6 Ob 508/86 in ÖBA 1988, 828 *(Apathy); Koziol,* Die Haftung wegen Konkursverzögerung durch Kreditgewährung, RdW 1983, 34 and 66; *Karollus,* Banken-, Gesellschafter- und Konzernleitungshaftung nach den »Eumig« -Erkenntnissen, ÖBA 1990, 337 and 438.

interference with third-party goods (Eingriffshaftung). Hence, we speak of a *multi-lane liability system*[152].

Nonetheless, even liability within the context of special relationships is by no means single-lane. Besides liability on the basis of fault, there is also – as stipulated by law or by contract[153] – non-fault-based guarantee liability, which is indeed the norm under common law[154]. Finally, the likewise non-fault-based risk liability of the mandator or employer, as foreseen, for example, by § 1014 ABGB, is also significant.

2/50 In Continental Europe, it is generally recognised that the primary aim of the law of tort is to *compensate* the victim for damage sustained (in more detail on this see below no 3/1 ff); this also applies as regards compensation for non-pecuniary harm.

2/51 It is widely recognised today that besides this compensatory function – also in the field of strict liability – the law of tort serves a *deterrent function* (*for* more detail on all of this see below no 3/4 ff). In Austria, the widespread understanding of the notion of the *continuation of a right* (Rechtsfortsetzungsgedanke) is based on this deterrent function (on this see below no 3/8 ff). According to this idea, the injured right or interest is continued in the victim's claim for compensation: in lieu of the destroyed good, a claim worth the »ordinary value«, ie for the general market value, emerges against the injuring party. Thus, the notion of continuation of a right, by virtue of the fact that the injuring party must always compensate the market value even if the subjective damage is less, gives rise to a liability to compensate the objective value when something is destroyed and thus serves the aim of deterrence. Awarding compensation is nonetheless still based primarily on the notion of compensation for damage sustained.

Reference is had to the fact that the aim of deterrence – independently of the notion of compensation – is also pursued above all by criminal law; hence, the private law measures should not be viewed in isolation. This must be borne in mind, for example, when supporters of the economic analysis of law[155] forcefully complain that killing a person does not involve any consequences under tort law[156]

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152 See on this *Canaris,* Grundstrukturen des deutschen Deliktsrechts, VersR 2005, 577 ff with additional references.

153 On this *Schermaier* in HKK zum BGB II § 275 no 56 ff.

154 *Treitel* in Burrows (ed), English Private Law[2] (2007) 771 f; cf also *R. Halson* in Frumston (ed), The Law of Contract[3] (2007) 1573 ff; *Beale* in Beale (ed), Chitty on Contracts I[30] (2008) 1598 ff.

155 See, eg, *Schäfer/Ott,* Lehrbuch der ökonomischen Analyse des Zivilrechts[4] (2005) 349 ff.

156 This applies in any case to German, Austrian and Swiss law, see *Koziol,* Die Tötung im Schadenersatzrecht, in Koziol/Spier (eds), Liber Amicorum Pierre Widmer (2003) 203 ff. The situation is different, however, under Japanese law, which recognises a compensation claim on the part of the deceased that is passed on to his heirs; see on this *Marutschke,* Einführung in das japanische Recht[2] (2010) 171 f; *Nitta,* Die Berechnung des Schadens beim Unfalltod eines minderjährigen Kindes, in: Müller-Freienfels et al (eds), Recht in Japan 11 (1998) 77 ff.

unless there are surviving dependants to whom the deceased had a duty to make maintenance payments: in reality – when the overall legal system is taken into account – there is no gap in protection here as criminal law comprehensively protects human life[157].

2/52 One controversial question is whether besides the notions of compensation and deterrence, the *penal notion* also plays a significant role in the law of tort (more detail on this below no 3/12 ff). If at all, this can only be relevant in the context of fault-based liability since only censured conduct can reasonably trigger penalties; however, even in this field its application is controversial. Under Austrian law, the gradation of the scope of compensation provided for in § 1324 ABGB according to the degree of fault could speak in favour of the penal concept. Nonetheless, the gravity of the fault and the compensation are only balanced against each other within the bounds of the compensation principle. This consideration of the gravity of the fault never leads to any penalty exceeding the compensation of the damage sustained but on the contrary, does mean the damage is only partially compensated if the fault is slight.

2/53 As far as the convergence of the different systems of legal protection is concerned, particularly in the *interim areas,* reference is had to the above-described overlaps between reparative injunctions and restitution in kind under the law of tort and also between the law on unjust enrichment and the law of tort. The blurring of the borders with the law of tort discussed in the context of the law on unjust enrichment could, however, also ensue – within narrow confines – when unjust procurement of an *advantage* is taken into consideration when imputing damage[158], because liability to compensate is all the more reasonable when it is covered by an enrichment:

Wendehorst[159] suggests that in cases where it is likely there was damage but this cannot be proven or estimated – for example in the field of competition law or intellectual property – the victim should be awarded the advantage gained by the perpetrator that acted unlawfully and culpably[160]. This may mean that the victim is awarded too much but it is more acceptable that, if need be, the victim ultimately gains an advantage and not the perpetrator who acted unlawfully and culpably. This evaluation in connection with the increased need for deterrence given the special vulnerability of the legal interests at issue, would seem to justify at

157 *Koziol* in: Koziol/Spier, Liber Amicorum Pierre Widmer 206; thus also *B.A. Koch,* Der Preis des Tötens, Barta-FS (2009) 189; *Kötz/G. Wagner,* Deliktsrecht[11] (2010) no 738.

158 On this in more detail *Koziol,* Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement? Zur Auflockerung der Grenze zwischen Schadenersatz- und Bereicherungsrecht, F. Bydlinski-FS (2002) 175 ff.

159 *Wendehorst,* Anspruch und Ausgleich (1999) 171 ff.

160 This is relevant in the rarer cases in which the prerequisites for a claim in respect of unjust enrichment are not fulfilled, see on this *Koziol,* F. Bydlinski-FS 188 f.

least a *reversal of the burden of proof* rather than the awarding of the advantage, so that the interferer must prove that the damage suffered is less than the advantage gained.

2/54 Furthermore, when it comes to the *assessment of the damage* the scope of discretion often available should be utilised to the benefit of the victim insofar as such is covered by the advantage gained. This applies in particular in the case of non-pecuniary damage, which always allows considerable scope for discretion in assessment[161]. However, it must be strongly emphasised that this must not lead to compensation awards that are no longer in any way covered by any measurable harm – as was wrongly assumed by the BGH in the Caroline cases[162]. The disgorgement of profit gained by deliberate interference with third-party rights may only be obtained under the law on unjust enrichment or at most by invoking the concept of negotiorum gestio (Recht der Geschäftsführung ohne Auftrag)[163].

The procurement of an advantage is also a reason in my eyes to expand the – in principle elastic[164] – border between *adequacy* and the *protective purpose,* as the procurement of an advantage makes it more reasonable that the damage must be borne: it is appropriate that the damaging party that has acted unlawfully and culpably must also compensate the more remote damage he caused if and insofar as he has gained corresponding advantages from the action giving rise to liability. Nevertheless, this compensation still falls within the framework set out by the notion of compensation.

If the injuring party's procurement of an advantage is a decisive factor for liability for the damage, this must also be taken into consideration in cases of the victim's contributory conduct in establishing the proportions in which injuring party and victim must bear the damage. Therefore, within the boundaries of the profit gained, the injuring party may additionally be required to compensate a further part of the damage beyond what he would have to compensate according to the assessment of fault.

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161 See on this *F. Bydlinski,* Die »Umrechnung« immaterieller Schäden in Geld, in: Koziol/Spier, Liber Amicorum Pierre Widmer 27 ff.

162 BGH in BGHZ 128, 1 = NJW 1995, 861; NJW 1996, 984 f. On this above all the persuasive criticism by *Canaris,* Gewinnanschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, Deutsch-FS (1999) 99 ff.

163 See in particular *Canaris,* Deutsch-FS 87 ff; cf further *von Bar,* Deliktsrecht I no 515 f; *Hoppe,* Gewinnorientierte Persönlichkeitsverletzung in der europäischen Regenbogenpresse, ZEuP 2000, 29; *Löwe,* Der Gedanke der Prävention im deutschen Schadensersatzrecht (2000) 185 ff; *G. Wagner,* Geldersatz für Persönlichkeitsverletzungen, ZEuP 2000, 200; *Wernecke,* Schadensersatz und Gewinnherausgabe als Strafelemente des bürgerlichen Rechts? (2005).

164 See *Wilburg,* Elemente 242 ff; *F. Bydlinski,* Zum gegenwärtigen Stand der Kausalitätstheorie im Schadensrecht, JBl 1958, 5 ff; *Koziol,* Haftpflichtrecht I³ no 8/16 and 21.

IX. »Punitive damages«?

A. Alleged need for such and concerns

2/55 The question here is whether the law of tort can or should converge with the criminal law to the extent that the victim is awarded an amount exceeding the damage sustained on the grounds of penalty or deterrence. Such awards exceeding the compensation of the damage suffered are generally referred to as »punitive damages«, a term obscuring the fact that in reality they are *not* directed at *compensating damage* but solely at imposing *monetary penalties.*

2/56 With respect to the need to grant such claims, which are not recognised in Continental European legal systems[165] but are established in Anglo-American jurisdictions[166], reference is repeatedly had to the argument that even in combination with other claims, such as for unjust enrichment by interference, the law of tort is not capable of providing the necessary protection for the rights recognised by the legal system.

This is emphasised above all with respect to intellectual property,[167] where this has already led to the awarding of payments twice as high as the licence fee[168]. These could be understood as punitive damages: due to their intangibility – thus the argument – intellectual property interests are »omnipresent« and facilitate simultaneous use by several people at several different places. However, this greater vulnerability is associated with particular difficulties when it comes to damage assessment as unauthorised use does not prevent use by authorised persons and thus any restrictions of the freedom to dispose of the good are difficult to prove. Any disgorgement of the profit gained by the interference under the law on unjust enrichment would only have minor deterrent effect, the argument continues, since such is only directed at the disgorgement of the advantage gained and thus involves no disadvantages for the interferer but only means he cannot realise the advantage for which he hoped. Besides this, the interferer's risk of getting caught is not very high, concludes the argument.

These references to the vulnerability of intellectual property rights and the insufficient deterrent effect of the existing remedies open to victims are certainly persuasive. However, it must be pointed out that the same situation may arise in

165 More detail on this in the relevant country reports and the Conclusio in: Koziol/Wilcox, Punitive Damages; see also *B.A. Koch,* Strafe muss sein – auch im Haftungsrecht, G.H. Roth-FS (2011) 379 ff.

166 See the reports in: Koziol/Wilcox, Punitive Damages, on English law (*Wilcox,* 7 ff), on US-American law (*Sebok,* 155 ff) and on South African law (*Neethling,* 123); *Prosser/Keeton,* Handbook of the Law of Torts[5] (1984) 9 ff; *Dobbs,* The Law of Torts (2000) 1062 ff; *Stoll,* Punitive Damages im Englischen Recht, Henrich-FS (2000) 593.

167 On this in more detail *Dreier,* Kompensation 60 ff, with additional references.

168 See *Dreier,* Kompensation 293 ff, with additional references.

relation to certain tangible things. One example would be mass transport systems, which can also be used simultaneously by many people and in which context it is likewise hard to prove the damage sustained by the owner in the case of unauthorised use. In this case too, the payment of the appropriate fee enforceable under the law on unjust enrichment[169] has no deterrent effect: someone travelling without a ticket would only have to pay what he should have paid in the first place anyway – should he be caught; moreover, he runs a good chance of not being caught.

Therefore, it is hard to find sound reasons for confining any doubling of the fee payable when users conduct themselves lawfully to intellectual property law; rather this principle would have to be extended to all cases which concern the unauthorised use of third-party goods in the context of high vulnerability and when subsequent payment of just the normal fee does not obtain the necessary deterrent effect.

2/57 Furthermore, the basic objections to punitive damages, which will be explained in more detail in the following, speak against the doubling of the fee otherwise payable – at least prima vista. Nevertheless, I consider it possible to reconcile the above-described doubling of the fee in cases of unauthorised use with the notion of compensation and thus to circumvent the reservations associated with punitive damages: on the one hand, the doubling of the usual fee for use is a very limited increase of the compensation so that no uncertainty as regards the penalty or proliferation thereof must be feared[170]. On the other hand, the doubling of the fee could indeed be understood not as a penalty independent of damage suffered, but as damages in a lump sum for the harm sustained in the absence of adequate means of assessing such: the investigation and pursuance of unauthorised users and the enforcement of the claim typically necessitate considerable expense, which would not arise if a contract for use was duly concluded, and are extremely difficult to prove. Likewise, proving the damage arising from market disturbance when intellectual property rights are infringed is subject to almost insurmountable difficulties in terms of evidence. If in the absence of other more specific indicators, the extent of the harm is stipulated to be equivalent to the fee for use and this amount is accordingly added to the fee that was never paid, awarding double the fee for use can be reconciled with the notion of compensation under the law of tort.

2/58 Apart from these cases, however, the fact that the concept of penalty or deterrence fundamentally cannot found such private law claims (see below no 2/60)[171] speaks against the introduction of real punitive damages. On the whole, the

169 On the civil law claims see, for example, *Stefula,* Zivilrechtliche Fragen des Schwarzfahrens, ÖJZ 2002, 825 ff, with additional references.

170 This is also highlighted by *Dreier,* Kompensation 547.

171 Further, *Koziol,* Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusion, in: Koziol/Wilcox, Punitive Damages no 43 ff.

notion of punishment is foreign to the private law. This even applies to the law of tort[172], although – at least when it comes to fault liability – it is the field of private law which was formerly connected with criminal law[173] and in which the penal concept could most reasonably still play a role today as it did in the past[174]: it is true that the legal consequences are tied to conduct breaching duties and involving fault so that there are obvious parallels to criminal law; nonetheless in Continental European jurisdictions *»punitive damages«* are persuasively rejected for very fundamental reasons[175]. The German BGH[176] even ruled that punitive damages awarded as a lump sum in addition to pecuniary and non-pecuniary damages was contrary to German public policy and consequently that a US-American judgement is often not enforceable in this respect in Germany[177]; in the case of substantial departures from the compensation principle this also applies under the new Art 40 (3) EGBGB[178]. The Italian Supreme Court[179] now takes a corresponding

172 *Oetker* in MünchKomm, BGB II[5] § 249 no 8 with additional references in respect of German law.

173 See *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 2 f.

174 Historical outlooks are offered by *Jansen* in HKK zum BGB II §§ 249–253, 255 no 10 and 15. See *Englard,* Punitive Damages – A Modern Conundrum of Ancient Origin, JETL 2012, 15 f who considers the notion of a stark division between private and public law a »romantic one«. He writes that » … a typical tendency of many scholars is to cloth ideologies with theoretical legal notions and concepts. Thus an essential distinction between public and private law is fundamentally based upon ideological premises.«

175 On this *F. Bydlinski,* Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft, AcP 204 (2004) 343 ff; *idem,* Die Maxime beidseitiger Rechtfertigung im Privatrecht, Koziol-FS (2010) 1362 ff; *Coderch,* Punitive Damages and Continental Law, ZEuP 2001, 604; *Koziol* in: Koziol/Wilcox, Punitive Damages no 21 ff; *Mörsdorf-Schulte,* Funktion und Dogmatik US-amerikanischer punitive damages (1999). See also § 1292 (1) of the Austrian Code and on this *Koziol,* Grundgedanken, Grundnorm, Schaden und geschützte Interessen, in: Griss/Kathrein/Koziol, Entwurf 32. However, the following advocate punitive damages: *Ebert,* Pönale Elemente im deutschen Privatrecht (2004); *Kocholl,* Punitive Damages in Österreich (2001); critical on the last-named work *B.C. Steininger,* Austria, in: Koziol/B.C. Steininger, Yearbook 2001, 82 f; *Müller,* Punitive Damages und deutsches Schadensersatzrecht (2000) 360 ff; *Schlobach,* Das Präventionsprinzip im Recht des Schadensersatzes (2004); *Sonntag,* Entwicklungstendenzen der Privatstrafe (2005); in the field of intellectual property protection likewise *Fort,* Strafelemente im deutschen, amerikanischen und österreichischen Schadensersatzrecht unter besonderer Berücksichtigung des gewerblichen Rechtsschutzes und Urheberrechts (2001).

176 BGHZ 118, 312. In this sense also *Mörsdorf-Schulte,* Funktion und Dogmatik 298. Taking another view, however, *Müller,* Punitive Damages 360 ff. See also *Magnus,* Comparative Report on the Law of Damages, in: Magnus, Unification: Damages 187.

177 Another view on the other hand is taken by the Spanish Tribunal Supremo in the decision *Miller Import Corp. v. Alabastres Alfredo,* S.L., STS, 13. 11. 2001 (Exequátur no 2039/1999).

178 Cf *Junker* in MünchKomm, BGB X[5] Art 40 EGBGB no 113; *Schäfer,* Strafe und Prävention im Bürgerlichen Recht, AcP 202 (2002) 429 f.

179 Cass 17. 1. 2007, no 1183, in GI, 2007, 12, 2724; Cass 11.11.2008 no 26972. See *Scarso,* Punitive Damages in Italy, in: Koziol/Wilcox, Punitive Damages 374 ff and likewise *Navarretta/Bargelli,* Italy, in: Koziol/B.C. Steininger, Yearbook 2007, no 6 ff; *Navarretta/Bargelli,* Italy, in: Koziol/B.C. Steininger, Yearbook 2008, 338. See however the position in France where it was said in the context of the enforcement of a US decision awarding punitive damages that such damages are not in themselves contrary to public policy insofar as the awarded amount is not disproportionate to the harm

position. Even in its »heartland«, the USA, *»punitive damages«* are by no means uncontentious[180].

A more profound rationale for the civil law rejection of penalties that express public censure but are designed to accrue to someone who suffered neither loss to the corresponding extent nor deserves protection under the law of unjust enrichment, is delivered by *F. Bydlinski*[181]. He convincingly showed that such an approach conflicts with the structural principle of *bilateral* justification for legal consequences so fundamental to all of private law. He emphasises that civil law norms always deal with the relationship *between* two or more subjects of the law and that therefore every provision has a direct impact on the relationship between persons described more closely in terms of the factual elements of the offence; that every allocation of rights, advantages or opportunities to certain subjects at the same time involves the direct establishment of duties, burdens or risks for certain other subjects. According to him, therefore »not only must there be a reasoning as to why one subject of the law is assigned a per se favourable and another subject a disadvantageous legal consequence but also why this ensues precisely in the relationship between these two subjects; in other words why a certain subject should be allocated rights or duties, opportunities or risks in relation to precisely a certain other subject.« Hence, the principle of bilateral justification within this relationship should apply, he argues: absolute, one-sided arguments relating only to one subject, however strong they may be in a certain way, can never suffice alone to justify a private law rule. Applied to our current discussion, this means that however strong the arguments in favour of penalising the perpetrator might be, they can never justify in any way awarding another private law subject an advantage when there is neither damage on the one side nor unjust enrichment on the other side to be compensated[182]. Moreover, the same arguments also speak against awarding such claims for deterrent purposes[183]. 2/59

▹▹ sustained and the contractual breach. On the facts of the case, however, the court considered the amount disproportionate. The Cour de cassation case (Cass Civ 1, 1 December 2010, case no 1090) is discussed by *Wester-Ouisse/Thiede,* Punitive Damages in France: A New Deal?, JETL 2012, 115 ff.

180 *Prosser/Keeton,* Handbook of the Law of Torts[5] (1984) 9 ff; *Dobbs,* Law of Remedies[2] (1993) 355 ff. See also the report by *Sebok,* Punitive Damages in the United States, in: Koziol/Wilcox, Punitive Damages no 86 ff.

181 *F. Bydlinski,* System und Prinzipien 92 ff; *idem,* AcP 204 (2004) 341 ff; *idem,* Koziol-FS 1355 ff. The principle of bilateral justification elaborated by *F. Bydlinski* is also recognised, for example, by *Bollenberger,* Gewinnabschöpfung bei Vertragsbruch, ZEuP 2000, 905; *Canaris,* Grundstrukturen des deutschen Deliktsrechts, VersR 2005, 579; *Koziol* in: Griss/Kathrein/Koziol, Entwurf 32; *H.P. Walter,* Recht und Rechtfertigung – Zur Problematik einseitigen Privatrechts, Gauch-FS (2004) 302 ff. Rejecting this line, on the other hand, *G. Wagner,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS 932 f.

182 Cf on this also *Gounalakis,* Persönlichkeitsschutz und Geldersatz, AfP 1998, 17.

183 In favour above all *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag

If there are only arguments for penalising one party but not for a claim on behalf of the other party, criminal law may come into play but not private law[184]. Even if the criminal law protection – in particular in the field of intellectual property rights – proves insufficient[185], this does not allow for the law of tort to be rearranged in a manner that would contravene the principles of private law and the law of tort. Instead either an independent area of law should be created or there should be a reform of criminal law, as is indeed underway. For instance, corporate criminal law should be well suited to closing some of the gaps in protection under criticism[186].

2/60 Apart from the fact that punitive damages conflict with the basic principles of private law, the concept also displays numerous other shortcomings. Firstly, it should be pointed out that the aim of deterrence proclaimed so loudly is only very inadequately served precisely in those situations when the punitive amount – like the damages – can only be subject to legal action when the injury has already occurred and damage has been sustained and not as soon as the conduct subject to censure is engaged in. It is highly inconsistent to direct a procedure at the punishment of proscribed conduct but make punishability contingent upon the occurrence of damage and yet still not link the extent of the penalty to that of said damage. In order to realise the aim of deterrence, it would moreover be necessary to disregard the occurrence of damage and tie the penalty to the committing of the prohibited action and even to the preparatory actions and the attempt in this respect. Only in this way is it possible effectively to prevent the damage. This means that the monetary penalties would also have to be permisible in connection with preventive and reparative injunctions if their advocates are to be consistent, though however, it would be necessary to take into consideration that fault must be required in respect of monetary penalties in contrast to private law preventive legal protection.

2/61 This leads us to another problem which applies in general to the German law regarding monetary penalties: the objective standard of fault in the law of tort means subjective blameworthiness is disregarded yet precisely this is rightly still seen as a prerequisite for imposing penalties[187]. Civil law monetary penalties, therefore, should not be based on the objective concept of fault under the law of

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▹▹ (2006) 451 ff; *idem,* Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? AcP 206 (2006) 451 ff; *idem,* Koziol-FS 931 ff; cautiously also *Dreier,* Kompensation 500 ff. See on this in detail below no 2/63 ff.

184 Likewise *H.P. Walter,* Gauch-FS 305. It should be pointed out that in Austria administrative penalties are foreseen in many cases and thus public prosecutors and criminal courts are not occupied with such matters; see for instance § 32 KSchG and § 98 BWG.

185 On these see *Dreier,* Kompensation 523 ff.

186 This is also accepted by *Dreier,* Kompensation 527 ff.

187 *Welzel,* Das deutsche Strafrecht[11] (1969) 3 ff; *Freund* in MünchKomm, StGB I Vor § 13 no 12; *Roxin,* Strafrecht, Allgemeiner Teil I[4] (2006) § 8 B no 19.

tort but on the subjective concept of fault specific to criminal law. In Austria, on the other hand, this problem does not arise as a subjective standard of fault is applied anyway – except in the case of professional experts (§ 1299 ABGB).

Further, less satisfactory consequences[188] arise in cases that involve or may involve several victims. Should the first claimant, who for instance sues in respect of an injury caused by the defective construction of an automobile, be awarded the entire punitive amount appropriate to the offence, this reveals the arbitrariness of the result very tellingly given that the other victims receive nothing. If each of these claimants were to be awarded just part of this punitive amount in order to avoid such a situation, the problem is that it is not usually possible to determine in advance the number of further claimants and thus the proportions of the amount to be awarded to each.

B. Alternatives

2/62 Even if the law of tort, which grants the victim rights to compensation from the injuring party is not the appropriate field for *»punitive damages«,* then we could consider other legal protection systems, which on the one hand exercise sufficient deterrent effect by bridging gaps left by the criminal law but, on the other hand, do not violate private law principles. It would certainly have to be a condition that individual claimants were not undeservedly rewarded with the punitive amount. Possible candidates would be rules which – like actions for preventive injunctions and damages[189] – grant associations the right to sue for monetary penalties[190] and these awards are paid to the public purse or at least to charitable institutions[191]. This would not infringe the prohibition on enrichment always emphasised in the law of tort[192] or the requirement of bilateral justification in private law; on the other hand the deterrent effect regarded as necessary would be attained without over-burdening the criminal courts.

188 *Dreier,* Kompensation 549 ff, also points out possible distortions of competition.

189 Association claims (Verbandsklagen) for damages are provided for in several European countries. Cf on French law *Kühnberg,* Die konsumentenschützende Verbandsklage. Eine Gegenüberstellung der österreichischen und französischen Rechtslage, ZfRV 2005, 106; on Greek law *Mikroulea,* Verbandsklage auf Schadenersatz im griechischen Verbraucherschutzgesetz, Georgiades-FS (2006) 281 ff. Cf furthermore the ideas presented by *van Boom,* Efficacious Enforcement in Contract and Tort (2006) 29, 33.

190 As an incentive to file such claims, a lump-sum payment for the efforts associated with the preparation of the enforcement of the right could be taken into consideration.

191 Cf *Ben-Shahar,* Causation and Forseeability, in: Faure, Tort Law 99 f, who clearly wants to provide for this very generally in cases in which the payment exceeds the actual damage.

192 On its development see *Jansen* in HKK zum BGB II §§ 249–253, 255 no 17 f, 21, 61. On the case law of the BGH cf *Dressler,* Schadensausgleich und Bereicherungsverbot, G. Müller-FS (2009) 11 ff.

It would nonetheless require careful scrutiny as to whether the civil procedure with its different distributions of the burden of proof, different standards of proof, the admissibility of prima facie evidence, the objective standard of fault at least in Germany and its rules on reimbursement of litigation costs etc., is suitable for the enforcement of such legal consequences or whether such is best left to the criminal law after all[193]. Above all it must be taken into account that the principle nulla poena sine lege (Art 103 [2] of German Basic Law [Grundgesetz]; § 1 öStGB), the requirement peculiar to criminal law of certainty of the criminal offence and the extent of the penalty[194] and the ban on analogy linked with this has no counterpart in civil law[195] and thus – as shown in particular by American examples – throws open the door to arbitrariness in determining the penalty. If all of these concerns are taken into account, the option of designing a private prosecution under criminal law[196] and the creation of separate criminal offences would seem far more preferable.

C. Preventive damages instead of punitive damages?

2/63 *G. Wagner*[197] makes an interesting attempt to justify punitive damages in substance by shifting the line of argumentation to *»preventive damages«,* which do not serve the aim of punishment but of deterrence. This, to some extent, is similar to the law and economics view of punitive damages. By reference to »preventive damages«, *Wagner* wants to avoid most of the arguments directed against punitive damages. According to his opinion, such damages must be awarded on the one hand if the defendant committed the infringement with the *intent to gain a profit* that exceeds the damages he may have to pay, and on the other hand if claims for damages would otherwise be *insufficiently enforced.*

2/64 However, this does not seem very convincing[198]: prevention is *not* the sole aim of tort law and, therefore, is unable to justify *on its own* a claim for damages. According to *Continental legal systems,* prevention, ie deterrence, is not even the main aim of tort law; rather, the primary aim is the idea of *compensation* as the claim for

193 *G. Wagner,* Tort Law and Liability Insurance, in: Faure, Tort Law 385, points out these differences; they can certainly not be circumvented by transplanting penalties to private law.

194 See the proposals for limitation put by *van Boom,* Efficacious Enforcement 35 f.

195 Cf on this also *Oppermann,* Gedanken zur Strafe im Privatrecht, Rüping-FS (2009) 160 ff.

196 The prosecution authorities would be disburdened as advocated by *Dreier,* Kompensation 525, in this manner.

197 *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag (2006) 451 ff; *idem,* AcP 206 (2006) 451 ff; *idem,* Koziol-FS 931 ff. Cf *W.H. van Boom,* Eficacious Enforcement 35 ff; *Visscher,* Economic Analysis of Punitive Damages, in: Koziol/Wilcox, Punitive Damages 222 ff.

198 Cf in more detail *Koziol* in: Koziol/Wilcox, Punitive Damages no 43 ff; cf also below no 3/4 ff.

damages always requires that the claimant suffered a loss and as damages have to be calculated in correspondence to the *loss* suffered by the victim. Further, tort law is not in a position to achieve the aim of prevention, because if prevention were the decisive aim of tort law, punitive damages would have to be awarded regardless of whether the claimant suffered any damage, only taking regard of the defendant's *misbehaviour.* Therefore, even a mere attempt at wrongdoing would have to be sufficient to trigger an award of preventive damages. It also seems inconsistent to require the occurrence of damage in order to establish a claim for preventive damages although such damages have nothing to do with damage.

2/65 All this is *not* presented as an argument that tort law has no preventive consequence; I only want to stress that this effect is secondary to the main aim of compensation. This means that under tort law, the victim's claim cannot go beyond the loss. Further, I am *not* of the opinion that remedies with pure *preventive* aims are prohibited under private law. Of course not, as the rules on the application of an injunction show. I only reject the dishonest way in which the departure from existing principles of tort law is disguised in Continental European legal systems. It has to be emphasised that preventive damages are *different remedies* from those provided for by tort law or the law of injunctions and that creating such remedies which are unknown to civil law as it exists on the Continent require special justification.

2/66 My endeavour to draw a clear *borderline* between tort law, aiming at compensation of a loss, and remedies with a primarily preventive aim is based on the realisation that different remedies depend on different prerequisites[199]. It is anything but convincing that the same reasons as in the case of a claim for compensation of the loss speak out in favour of the victim's claim for payments far beyond his loss and thus for a windfall. One should not abuse tort law for other – albeit sensible – aims but instead look to or design a different branch of law which takes regard of the different aims pursued.

2/67 Last but not least, as far as »preventive damages« have the function of siphoning off a gain netted by a wrongful activity, the rules on *unjust enrichment* seem to be more appropriate than tort law where the damage and not the gain is decisive. It is an unreasonable violation of tort law to use it as a basis for gain-oriented claims. There is a rather strange tendency in these times to neglect differences; to put the same label on different things and in doing so to feel happy that the world is simple and is in such harmony.

199 See *H. Koziol,* Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, Canaris-FS (2007) 631 ff, 654 ff.

X. Insurance Contract Law

A. In general

2/68 Not only statutory obligations can provide for damage to be shifted from a victim to another person, this may also ensue on the basis of legal agreements concluded in advance. Within this context, the most significant role is not played by individual arrangements, for example between relatives or by taking over the guarantee for someone else's undertaking (§ §880 ABGB), centre stage clearly goes to insurance contracts.

Insurance contracts facilitate the inclusion of the risk threatening the insuree in a legal community of others threatened in the same manner, by which means the insuree is granted a claim against the insurer should the risk manifest[200]. The purpose of insurance can be summarised comprehensively for all types of insurance by the prevailing »Planungssicherungstheorie« (planning certainty theory)[201]: the idea is to balance chance interferences in economic plans through loss of income, or the accrual of expenses, with specific insurance payments.

2/69 Insurance relationships based on contracts can be relevant to the law of tort in various ways: if the insurance contract is directed at covering the risk of damage to the insuree's goods, the insurance and damages claims may compete against each other. The primary issue is whether the insuree is entitled to both claims parallelly and may thus receive more than the damage he suffered, as is the case when it comes to fixed-benefit insurance or if overall he should not receive more than the total amount of damage, as is the case of indemnity insurance (§ 55 öVersVG; § 55 dVVG)[202]. In the latter case, the question is how this can be achieved technically, although nowadays the most common approach is to transfer the victim's claim for damages to the insurer to the extent of the insurance benefit (§ 67 öVersVG; § 67 dVVG). Generally, in any case, the benefit paid by the insurer to the insuree does not mean that the injuring party's duty to compensate is reduced by this benefit being set off against the damage; this is not usually the purpose that the victim pursues in concluding an insurance contract.

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200 See *Deutsch,* Das neue Versicherungsvertragsrecht[6] (2008) 4; cf further *F. Bydlinski,* System und Prinzipien 631; *Dörner* in Honsell (ed), Berliner Kommentar zum Versicherungsvertragsgesetz (1999) Einleitung no 36 ff; *Schug,* Der Versicherungsgedanke und seine historischen Grundlagen (2011) 31 ff.

201 *Schmidt-Rimpler,* Zum Begriff der Versicherung, VersR 1963, 493 ff, who discusses the patrimony developement theory (Vermögensgestaltungstheorie); *Braeß,* Elemente einer dynamischen Versicherungskonzeption aus wirtschaftswissenschaftlicher Sicht, ZVersWiss 1970, 9. In agreement, for example *F. Bydlinski,* System und Prinzipien 635 f; *Deutsch,* Versicherungsvertragsrecht[6] 12; *Jabornegg,* Wesen und Begriff der Versicherung im Privatversicherungsrecht, Frotz-FS (1993) 560 ff; *Schauer,* Das österreichische Versicherungsvertragsrecht[3] (1995) 30 ff.

202 See *Schauer,* Versicherungsvertragsrecht[3] 37 ff.

B. Third-party liability insurance and damages

Of more relevance to the questions at issue here, however, are those insurance relationships that serve to cover the risk that the insuree himself will be liable to a third party, ie *third-party liability insurance.* These contracts may either be concluded voluntarily or may be required by law, as is common for example when it comes to liability in relation to motor vehicles. 2/70

From the perspective of the law of tort, mandatory or voluntary third-party liability insurance produces an ambivalent picture[203]. One less pleasing consequence of third-party liability insurance is without doubt the fact that it at least considerably impedes the *deterrent function* of the law of tort, possibly even eliminates it[204]. It can be assumed that the incentive to avoid causing damage as far as possible decreases along with the degree to which the injuring party will be burdened with the duty to compensate. If someone has third-party liability insurance, liability to pay damages will hardly affect him financially.

These arguments should not be interpreted as a call to prohibit third-party liability insurance as much as possible. It must be taken into consideration that even in the absence of third-party liability insurance, there may be no deterrent effect. For example, if the impending duty to compensate constitutes no burden to the injuring party due to his wealth; or alternatively if he will not be in any position anyway to fulfil his duty to compensate because he has no assets. Moreover, the positive aspect of third-party liability insurance in relation also to the victim must not be overlooked[205]: third-party liability insurance serves the interests of victims as it secures the compensation payments; hence it serves the compensatory function of the law of tort[206]. Third-party liability insurance is therefore very desirable and in many cases even prescribed as compulsory for this reason[207], particularly as afore-mentioned in the context of motor vehicle liability. 2/71

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203 Impressively on this *Cousy,* Tort Liability and Liability Insurance: A Difficult Relationship, in: Koziol/B.C. Steininger, Yearbook 2001, 18 ff. See further *Hinteregger,* Die Pflichthaftpflichtversicherung im Schadensrecht – eine funktionelle Analyse, Reischauer-FS (2010) 513 f; *G. Wagner,* Comparative Report and Final Conclusions, in: G. Wagner, Tort Law 338 ff.

204 Cf *von Bar,* Das »Trennungsprinzip« und die Geschichte des Wandels der Haftpflichtversicherung, AcP 181 (1981) 311 ff; *Brüggemeier,* Haftungsrecht 4 f, 638.

205 Cf on this *Lewis,* The Relationship Between Tort Law and Insurance in England and Wales, in: G. Wagner, Tort Law 48 f, 51 f; *Baker,* The View of an American Insurance Law Scholar: Six Ways that Liability Insurance Shapes Tort Law, in: G. Wagner, Tort Law 297 f; *Hinteregger,* Reischauer-FS 511 ff; *Lewis,* The Relationship Between Tort Law and Insurance in England and Wales, in: G. Wagner, Tort Law 48 f, 51 f; *Schilcher,* Schadenstragung und Schadensverteilung als Haftungsgründe, Posch-FS (2011) 676; *Wantzen,* Unternehmenshaftung und Enterprise Liability (2003) 83.

206 Cf *F. Bydlinski,* System und Prinzipien 113; *Looschelders,* Bewältigung des Zufalls durch Versicherung? VersR 1996, 529, 535 ff.

207 See on this with further details *Faure,* The View from Law and Economics, in: G. Wagner, Tort Law 240 ff; *idem,* Economic Criteria for Compulsory Insurance, The Geneva Papers 31 (2006) 149 ff; *Hinteregger,* Reischauer-FS 507 ff.

It must also be borne in mind that third-party liability insurance is absolutely essential for *entrepreneurs* in order to make the liability risks associated with operating the enterprise calculable.

2/72 Thus, it may be said that third-party liability insurance promotes the compensatory function of the law of tort but is detrimental to the deterrent purpose. This negative aspect could, however, certainly be mitigated and therefore third-party liability insurance should so far as possible be designed so as not to undermine the deterrent function of the law on tort. This could be achieved, inter alia, by means of deductibles and premiums determined by the bonus-malus system[208].

2/73 It remains to be said that the *reasonableness of drawing on third-party liability insurance* in order for the legislator to norm liability can be decisive; the *actual existence* of third-party liability insurance in the specific case does not however have this power without further ado (see below no 6/174 ff).

XI. Social security law

2/74 Social security legal relationships – unlike private insurance contracts concluded by legal transactions – belong to the realm of public law and are dominated by the principles of solidarity and social redistribution; this is expressed above all by the fact that the contributions paid in by insurees are not adjusted to risk but to income[209].

Social security law is traditionally only of relevance when it comes to personal injury[210]. It serves to secure the insurees against damage regardless of whether such is brought about by their own fault, the fault of a third party or accident. Insofar as only specific risks are insured, eg those associated with the exercise of a profession, a causal link between the insured activity and the damage sustained is required in order to trigger the insurance benefit[211].

As the primary purpose of social security is *to secure livelihoods,* the costs of treatment and loss of earnings are commonly indemnified but in general no damages for pain and suffering are paid, or at least no comprehensive payments are

208 *Rodopoulos,* Kritische Studie der Reflexwirkungen der Haftpflichtversicherung auf die Haftung (1981) 45; *Faure* in: G. Wagner, Tort Law 265 ff; *Hinteregger,* Reischauer-FS 517 f; *G. Wagner* in: G. Wagner, Tort Law 339 f; *G. Wagner,* Tort Law and Liability Insurance, in: Faure, Tort Law 391.

209 See *Dörner* in Honsell, Berliner Kommentar, Einleitung no 17; *Brüggemeier,* Haftungsrecht 634.

210 With a comparative perspective on this *Magnus,* Impact of Social Security Law on Tort Law Concerning Compensation of Personal Injuries – Comparative Report, in: Magnus (ed), The Impact of Social Security on Tort Law (2003) 266 f and the country reports that are cited.

211 *Barta,* Kausalität im Sozialrecht (1983); *Magnus* in: Magnus, Social Security Law 284 ff.

made in this respect. Furthermore, the compensation may be lower than would be granted according to the principles of the law of tort[212].

2/75 In general, social security law does not supersede the law on damages, instead the two systems exist *side-by-side;* this interaction is of great importance when it comes to understanding the law of damages[213]. As, however, it is not intended that the victim should receive double compensation in cases where a third party is liable, the social security provider is granted rights of recourse against the liable injuring party[214]. This may be accomplished by act of transfer or legal cession of the victim's damages claim.

In some legal systems, however, the law on damages is *superseded* at least in some areas by social security law, above all in the field of damage caused to employees by employers[215]. The fact that the employer is not merely released from compensation duties to the victim but also largely from the social security provider's recourse claims is justified according to broad consensus by the fact that the employer pays the insurance premiums either in full or in part, ie he relieves himself of liability by providing insurance coverage. Furthermore, it is pointed out that the relationship between employer and employee and indeed between employees should not be strained by litigation for damages[216]. The real reason would seem, however, to be that accident insurance also takes on the nature in a functional sense of third-party liability insurance for the employer but also for the employee[217].

2/76 A legal policy aspect of social security cover remains to be highlighted: insofar as personal injury is compensated by social security, the victim's need of protection is greatly reduced[218]. Whether and to which extent there is a claim for damages is then only relevant with respect to the social security provider's claims for recourse against the injuring party[219]. This should be taken into consideration when the victim's especial need for protection is raised as an issue in the context of personal injury. If this argument is employed to advocate making the law on damages stricter in this respect, in truth it is primarily the interests of the social

212 With a comparative perspective *Magnus* in: Magnus, Social Security Law 287 f.

213 See *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 28; *Neumayr,* Rechtsfragen an der Schnittstelle von Sozialversicherungs- und Schadenersatzrecht, RZ 2010, 161 ff.

214 Cf on this *Krejci,* FS der Rechtswissenschaftlichen Fakultät der Universität Graz 435; *Magnus* in: Magnus, Social Security Law 288 ff with references to the country reports.

215 From a comparative perspective on this *Magnus* in: Magnus, Social Security Law 280 ff.

216 Critical of these arguments *Deinert,* Privatrechtsgestaltung durch Sozialrecht (2007) 265 ff.

217 Thus, *Deinert,* Privatrechtsgestaltung 267 ff.

218 However, cf as regards the situation in the USA *Wantzen,* Unternehmenshaftung 101 f.

219 *Weyers,* Unfallschäden Praxis und Ziele von Haftpflicht- und Vorsorgesystemen (1971) 401; *Kötz,* Sozialer Wandel im Unfallrecht (1975) 8 ff, 25; *G. Wagner,* Grundstrukturen des Europäischen Deliktsrechts, in: Zimmermann, Grundstrukturen: Deliktsrecht 309; *Wantzen,* Unternehmenshaftung 103; *Brüggemeier,* Haftungsrecht 639.

security providers that are served – insofar as the social insurance provides coverage – as their recourse actions are thus expanded; nonetheless, it also serves the purpose of deterrence. Reference to the victim's especial need for protection in the case of personal injuries therefore only carries full weight in jurisdictions without social security systems; the more comprehensive a social net is provided, the less persuasive is this argument. In many European countries, however, due to the comprehensive social security cover for victims, their damages claims against the injuring party ultimately only concern non-pecuniary harm[220], and not the compensation of pecuniary harm threatening their livelihood.

XII. Compensating victims of crime and catastrophes

A. Victims of crime

2/77 The provisions of the Act on Victims of Crime (Verbrechensopfergesetz 1972 – VOG), in the current version dating from 2005, also aim to secure the livelihood of victims of crime by recourse to the general public[221]. According to § 1 VOG, Austrian citizens are entitled to support if it is probable that they have suffered physical injury or harm to their health as a result of a deliberate action punishable by more than six months imprisonment or as an uninvolved party in connection with such an action and are consequently faced with treatment costs or are limited in their earning capacity[222]. There is no claim under the VOG if the victim can invoke state liability claims. The compensation of the loss of earnings is furthermore limited as to amount and the victim is not entitled to such if he has income in any case worth a corresponding amount (§ 3 VOG)[223].

If people who have received payments under this federal law can claim compensation of the damage that they sustained as a result of the action in the sense of § 1 (1) VOG on the basis of other legal provisions, this claim is transferred to the state insofar as it pays benefits under this federal law (§ 12 VOG).

2/78 Consequently, the state would seem merely to redeem the victims' damages claims, thus relieving them of the risks of taking action and enforcing the usually uncollectible claims; this is of course of considerable benefit to the victims.

220 This is also emphasised by *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 29.

221 On this *Eder-Rieder,* Opferrecht (2005) 89 ff.

222 The support is limited to cases in which the loss of earning capacity will prospectively last at least six months or when serious bodily harm was inflicted by the punishable action.

223 All income actually realised or realisable in the form of money or in kind including all returns on assets insofar as such were achievable without decreasing the substance of such, as well as any alimony payments provided they are based on an obligation, counts as income.

However, the support goes much further: according to para 2 of § 1 VOG, support must be provided not only when the criminal law prosecution of the perpetrator is impermissible due to his death, statutory limitation or other reason, or the perpetrator is unidentified or cannot be prosecuted due to his absence; it is also to be provided even when the punishable action was committed by someone who is not accountable for his actions, for example because of insanity, or when the perpetrator's action was justified by necessity. In these last-named cases either there are no claims to compensation or – in the case of necessity – only very limited claims to compensation. Thus, the act provides for compensation of the damage even when the victim would have no claims to damages and goes far beyond merely securing existing claims.

The reason why this damage is borne by the general public would seem to be founded in the notion of community, which appears very tenable with respect to the manifestation of a community risk. Furthermore, the idea that the community has »failed« in its task of preventing crime could well be relevant. It remains unclear in this case, however, why such support is only granted in the case of bodily injury or harm to health caused by an unlawful, deliberate action punishable by more than six months imprisonment. On the one hand, the damage affects the victim just as much when the penalty for the damaging act is less severe and, on the other hand, the community has also »failed« in the case of such offences.

2/79 The German Act on the Compensation of Victims (dOEG) is based on the same idea; this act provides support[224] subject to an application by the victim in the form of reparation for harm to health and its financial consequences that a person has suffered as a result of a deliberate, unlawful physical attack or lawfully defending himself against such, under the German Federal Victims Relief Act (Bundesversorgungsgesetz – dBVG). Cases of particular hardship can be mitigated by compensation in agreement with the Federal Ministry for Work and Social Affairs (§ 89 dBVG). If the infliction of damage also constitutes an accident within the terms of the statutory accident insurance scheme, only the claim under dBVG (§ 54 dBVG) applies. If a beneficiary of such support under the dBVG has a legal claim against third parties for the compensation of the relevant damage, this claim is transferred to the Federal Republic of Germany to the extent that it has paid out benefits (§ § 81 dBVG). Therefore, this also shows that in such cases the risk of the injuring party's insolvency is transferred from the victim to the state.

224 On the scope of the support cf § 9 dBVG.

B. Victims of catastrophes

2/80 The Austrian Act on a Fund for Catastrophes (Katastrophenfondsgesetz) 1996 provides for financial support to victims of catastrophes[225]. Compensation for damage caused by catastrophes does not generally compete with payments of damages but represents relief granted to the victim with respect to the normal risk within his own sphere, which he would have to bear himself according to the rules of the law of tort.

However, there is no answer to the question of why the victim should not receive any support in the event that there are not numerous other victims and thus no catastrophe took place, even though the individual's worthiness of protection cannot be dependent on whether there were no other victims or a large number of other victims. Thus, this rule seems problematic from the point of view of the notion of equality and moreover, to be questionable because the victims' capacity to protect themselves by means of insurance is not taken into account in any way. Neither is it taken into account whether the victim knew of the risk and entered into it in order to obtain advantages, for example if they acquired a piece of property in full knowledge that this is an area liable to floods because it was substantially less expensive than property outside of the flood risk zones. It does not seem very reasonable that in such cases the general public should have to bear this consciously accepted risk, at least in part.

2/81 Thus far, no general legal framework comparable to the Austrian Act on a Fund for Catastrophes has been established in Germany; instead *ad hoc* legislation has responded to certain catastrophes by setting up relief funds, for example the Flood Victim Relief Solidarity Act (Flutopferhilfesolidaritätsgesetz) in response to the record flood of the Elbe in 2002[226]. This approach is no less problematic with respect to the notion of equality: the lack of objectivity in the differentiation between victims does not arise in this respect from the provisions of a general piece of legislation but out of the fact that state relief can usually only be relied on in the case of catastrophes that exceed a certain magnitude[227]. Again, criticism arises because the individuals' worthiness of protection cannot depend on the total number of victims or the financial scale of the disaster[228].

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225 See on this *Hinghofer-Szalkay/B.A. Koch,* Country Report Austria, in: Faure/Hartlief (eds), Financial Compensation for Victims of Catastrophes (2006) 12 ff. This volume contains reports on the different systems to protect victims of catastrophes in some different European countries and in the USA.

226 *Magnus,* Country Report Germany, in: Faure/Hartlief, Catastrophes 8.

227 *Magnus* in: Faure/Hartlief, Catastrophes 30.

228 Cf on the problem of equitable distribution of limited financial relief funds *C.G. Paulus,* Das Insolvenzmodell, in: H. Koch/Willingmann (eds), Modernes Schadensmanagement bei Großschäden (2002) 117 ff.

XIII. Disgorgement claims

2/82 The structural principle of bilateral justification of legal consequences (see above no 2/59) plays a role not only in the law of tort and thus in relation to how punitive damages are rejected but also as regards delimiting the law on unjust enrichment. If there are solid reasons for why the advantage gained should not be left with the enrichee but no reasons to grant the advantage to another, then only disgorgement *in favour of the state* or at least to charitable institutions can come into consideration.

Such disgorgement claims can, for instance, be justified when there are duties to desist from doing something, such duties protecting goods that are not allocated to any one legal subject, for example the environment. Clear value judgements speak in favour of adding emphasis to the duties to desist by not allowing the interferer ultimately to retain any advantage gained by impermissible actions in this respect and instead requiring him to disgorge it, though in this context too the introduction of association claims (Verbandsklagen) should be considered[229].

2/83 The same applies when the legal system seeks to prevent the advantage going permanently to the disadvantaged person in all other circumstances[230]. In such cases, the victim's claim for unjust enrichment must be denied and instead the public authorities must be granted a claim for disgorgement. This avoids the inappropriate result that the interferer, who is in any case not entitled to such, may keep the advantage. It is also possible, however, that letting the advantage gained by the interferer go to the disadvantaged person does not give rise to any concerns, or even that this would be desirable, but the particular type of claims are in fact never asserted, or at least very rarely, because the amounts due to the individual disadvantaged parties – for instance, in the case of violations of competition law – are so low as not to make it worthwhile enforcing claims[231]. In such cases, the aim of deterrence means it is preferable to have the public purse or a suitable institution enforce the entire amount.

Positive law examples for such disgorgement can be found, for example, in § 1013 ABGB[232] and in Austrian competition law: if an entrepreneur has enriched himself by means of a forbidden cartel, the Cartel Court shall order him to pay an amount equivalent to the enrichment to the state (§ 21(1) KartellG). In Germany, in particular § 10 of the German Act on Unfair Competition (UWG) and § 34 of the Act against restraints on Competition (GWB) provide for disgorgement of

229 On this *Micklitz/Stadler,* Unrechtsgewinnabschöpfung (2003) 82 ff.

230 *Koziol,* Bereicherungsansprüche bei Eingriffen in nicht entgeltsfähige Güter? Wiegand-FS (2005) 467 f.

231 *Alexander,* Schadensersatz und Abschöpfung 460 ff, 483 ff.

232 Presents that an agent has received from a third party »shall be confiscated for the poor relief fund«.

profit[233]. Further, § 73 of the German Criminal Code (StGB) and § 8 WiStG provide for the forfeiture of assets that the perpetrator gained by the criminal acts respectively at issue[234]; likewise § 20 of the Austrian Criminal Code (StGB). In the context of such state claims for disgorgement, the claims for unjust enrichments granted under civil law to those who suffered a disadvantage must of course be taken into account[235] (see § § 20 öStGB), so that these are not impaired but also not doubled.

XIV. Criminal law

2/84 For the purposes of the following lines there is no need to analyse the various, different definitions of criminal law[236]. It is sufficient to note that criminal law and administrative law, unlike the law of tort, are *not* directed at *compensating* the victim of crime for the harm suffered; thus, criminal law does not require that damage has been sustained[237]. By imposing *sanctions* (penalties[238], deterrent measures[239]) in the case of grave infringement of goods especially worthy of protection, the aim of criminal law is above all *to protect legal goods*[240] and implement the *notion of deterrence*[241]. It is not the compensation of negative results of socially harmful actions, such as the damage sustained, that is in focus but the aim of

233 Critical on this *Micklitz,* Unterlassungsklagen – Gewinnabschöpfung – Gruppenklagen im Lauterkeitsrecht in: Krejci/Kessler/Augenhofer (eds), Lauterkeitsrecht im Umbruch (2005) 135 ff; he also gives an overview of the disgorgement of unjust profits in other EC states. On German law *Alexander,* Schadensersatz und Abschöpfung, in particular 437 ff; *Leicht,* Gewinnabschöpfung bei Verstoß gegen die lauterkeitsrechtliche Generalklausel (2009) 213 ff; *Oppermann,* Gedanken zur Strafe im Privatrecht, Rüping-FS 168 ff; *Sieme,* Der Gewinnabschöpfungsanspruch nach § 10 UWG und die Vorteilsabschöpfung gem. §§ 34, 34a GWB (2009).

234 On this *Leicht,* Gewinnabschöpfung 195 ff; *Reichhart,* Die Vermögensabschöpfung im Strafverfahren (2007) 4 ff; *Savini,* Handbuch zur Vermögensabschöpfung im Ermittlungsverfahren (2005).

235 This is also pointed out by *Oppermann,* Rüping-FS 170.

236 See on this *Fuchs,* Österreichisches Strafrecht: Allgemeiner Teil I[7] (2008) Z 3 no 12; *Gropp,* Strafrecht Allgemeiner Teil (1997) 12 ff; *Kindhäuser,* Strafrecht Allgemeiner Teil (2004) 29; *Roxin,* Strafrecht Allgemeiner Teil I[4] (2006) § 1 I no 1 ff; *Triffterer,* Österreichisches Strafrecht: Allgemeiner Teil[2] (1994) 4 ff.

237 This is only different in the case of torts based on the result; for a comparison of the criminal law liability criteria in the case of such torts and the requirements under the law of tort, see *Frei,* Der rechtlich relevante Kausalzusammenhang im Strafrecht im Vergleich mit dem Zivilrecht (2010).

238 *Kienapfel/Höpfel,* Grundriss des Strafrechts: Allgemeiner Teil[13] (2009) 1/7 ff; *Triffterer,* Strafrecht AT[2] 470 ff.

239 *Kienapfel/Höpfel,* Strafrecht AT[13] 1/6 and 1/25; *Triffterer,* Strafrecht AT[2] 486 ff.

240 *Fuchs,* Strafrecht AT[7] Z 4 no 1; *Kindhäuser,* Strafrecht AT 37 f; *Roxin,* Strafrecht AT[4] § 2 A no 1; *Wessels/Beulke,* Strafrecht Allgemeiner Teil[39] (2009) no 6.

241 *Fuchs,* Strafrecht AT[7] Z 2 no 7; *Kienapfel/Höpfel,* Strafrecht AT[13] 2/10; *Roxin,* Strafrecht AT[4] § 3 A no 37 ff; *Triffterer,* Strafrecht AT[2] 5, 14.

preventing individual, socially undesirable behaviour which results in such[242]; therefore criminal law can also provide for the necessary protection where tort law cannot be applied due to lack of recoverable damage, for example, when a person is killed without leaving any surviving dependants (cf no 2/51) or very generally also when unsuccessful attempts are made this is punishable.

Punishing those who behave in a manner damaging to society is intended to prevent a repetition of such acts by the same perpetrators *(special deterrence)*[243]. A further main aim of criminal law and an effect of such specially deterrent measures is to increase compliance by the public with the threat of punishment and its execution *(general deterrence)*[244] and besides this to preserve and strengthen law as the essential, fundamental order of society[245]. Although punishment is an evil and expresses reproach[246], prevailing opinion today is that it has *no function of revenge*[247], even though the notion of revenge is not negated by all modern criminal law theories[248].

2/85 The result of the different functions of the law of tort and criminal law is that liability and punishment must essentially be considered as separate from each other. Nonetheless, a certain inter-dependence does consist in the fact, on the one hand, that criminal law rules are deemed protective laws and thus may be of importance for the assessment of liability under the law of tort (§ 823 ([2] BGB; § 1311 ABGB); on the other hand, the punishability of an action may be cancelled if the damage caused has been repaired by the damaging party before the authorities took action or at least when an obligation in this respect is founded (cf for example §§ 167 StGB, 204 StPO). Hence, in certain closely defined cases, it is assumed that the voluntary willingness to compensate damage negates the necessity for a penalty.

Due to the overlapping of the functions of the law of tort with those of criminal law, however, it must be noted once again that criminal law not only serves the protection of goods allocated to the individual but also the protection of society as a whole against interferences and risks.

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242 *Von Bar,* Deliktsrecht I no 600.

243 *Fuchs,* Strafrecht AT[7] Z 2 no 7; *Gropp,* Strafrecht AT 35 f; *Kienapfel/Höpfel,* Strafrecht AT[13] 2/11 ff; *Roxin,* Strafrecht AT[4] § 3 A no 11 ff; *Triffterer,* Strafrecht AT[2] 12 ff; *Wessels/Beulke,* Strafrecht AT[39] no 12a.

244 *Fuchs,* Strafrecht AT[7] Z 2 no 6; *Gropp,* Strafrecht AT 34 f; *Kienapfel/Höpfel,* Strafrecht AT[13] 2/14 ff; *Kindhäuser,* Strafrecht AT 39 f; *Roxin,* Strafrecht AT[4] § 3 A no 21 ff; *Triffterer,* Strafrecht AT[2] 12; *Wessels/Beulke,* Strafrecht AT[39] no 12a.

245 *Kienapfel/Höpfel,* Strafrecht AT[13] 2/18 ff; *Roxin,* Strafrecht AT[4] § 3 A no 1; *Triffterer,* Strafrecht AT[2] 14; *Wessels/Beulke,* Strafrecht AT[39] no 6 and 12a; differentiating *Gropp,* Strafrecht AT 25.

246 *Fuchs,* Strafrecht AT[7] Z 2 no 9; *Kienapfel/Höpfel,* Strafrecht AT[13] 1/7 ff.

247 *Fuchs,* Strafrecht AT[7] Z 2 no 9; *Kienapfel/Höpfel,* Strafrecht AT[13] 2/17; *Roxin,* Strafrecht AT[4] § 3 A no 8; *Triffterer,* Strafrecht AT[2] 13 f; a summary of older views is offered by *Roxin,* Strafrecht AT[4] § 3 A no 2 ff.

248 *Gropp,* Strafrecht AT 37; *Kindhäuser,* Strafrecht AT 40; *Wessels/Beulke,* Strafrecht AT[39] no 12a.

XV. Concluding remarks

A. Use of legal protection mechanisms in a manner contrary to their function

2/86 Linking clearly distinguishable legal consequences to significantly different prerequisites applies at least with respect to the core areas of the legal fields addressed. Nonetheless, the awareness of the necessity for certain prerequisites to be appropriately linked to certain legal consequences appears to be diminishing[249]. This is revealed, for instance, in the fact that the disgorgement of unjust profits with the help of damages claims is considered theoretically possible[250] or that »punitive damages« are advocated (see above no 2/55 and below 3/12 ff). Moreover, the prerequisites for separate legal remedies are sometimes converged but the differences in legal consequences remain unaffected; or vice versa the legal consequences are harmonised although the prerequisites are different. At this point some examples will be given in order to illustrate this.

2/87 In respect of the *preventive injunction,* for example, it is generally emphasised that it merely requires the endangerment of an area protected by the legal system, ie simply the fulfilment of the factual elements of the offence (more on this above no 2/7). Neither is any imminent specific damage or enrichment necessary, the simple interference with a legal interest allocated to another and thus a disadvantage or enrichment threatened in a very abstract, objective manner suffices.

In particular in connection with the preventive injunction against a threatened impairment of a mortgage by renting the land under mortgage, however – as explained above (no 2/10) – Austrian law requires objective negligence from some and frequently even fault. The prerequisites for a preventive injunction are thus approximated to those for a damages claim. *Hinteregger*[251] even considers that the

249 At this point it could be pointed out that in Austria bankruptcy avoidance due to the disadvantageousness of the transaction (§ 31 sec 1 KO) leads to consequences under the law of damages without correspondingly strict prerequisites; cf on this *P. Doralt,* Anmerkungen zu OGH 1 Ob 686/88 in ÖBA 1989, 1016 f; *Koziol,* Grundlagen und Streitfragen der Gläubigeranfechtung (1991) 94; *Bollenberger,* Der erforderliche Zusammenhang zwischen Haftungsgrund und Haftungsumfang beim revolvierenden Kredit als nachteiliges Rechtsgeschäft (§ 31 Abs 1 Z 2 zweiter Fall KO), zugleich eine Besprechung der Entscheidung OGH 17.11.2004, 9 Ob 24/04a, ÖBA 2005, 683 ff.

250 Cf *Micklitz/Stadler,* Unrechtsgewinnabschöpfung 79. In another place they mention, however, that the profit gained by the interferer can merely offer a starting point for the assessment of the disadvantage that accrued to the victim (58). Moreover, they concede (125) that a claim directed at disgorgement of profit that requires unlawfulness and fault is a sui generis claim.

251 *Hinteregger,* Rechte des Pfandgläubigers bei Entwertung der Pfandliegenschaft durch Vermietung, ÖBA 2001, 450 f.

mortgagor should be accorded no in rem rights of defence but only claims for damages.

Moreover, Austrian and German court decisions have rejected actions for preventive injunctions against persons who do not have the capacity to commit torts (see above no 2/8 FN 13), thus advocating closer convergence with the law of tort by taking subjective fault as a basis.

2/88 The substantive prerequisites for *reparative injunctions* on the other hand, are controversial from the start. Widespread opinion considers them, however, to be largely the same as those for preventive injunctions: reparative injunctions do not require any breach of duty but instead are based on the result, specifically the interference with a protected legal position, meaning that mere fulfilment of the factual elements of the offence is required, so the general view goes (see above no 2/16). Furthermore, the legal consequence, namely the distinction between such reparation and restitution in kind under the law of tort, also presents difficulties.

As discussed above, this should be distinguished as follows: insofar as the reparative injunction only requires the disturber to tolerate the removal of the source of interference by the disturbed party, so that the disturber is in fact merely required to desist from resistance and thus the action is for nothing other than a preventive injunction, then as in such case only the fulfilment of the factual elements of the offence must be required. However, if the disturber is required actively to remove the interference, so that he must incur efforts or costs in so doing, it must be seen that this is a question of who should bear the disadvantages. When establishing the appropriate prerequisites for requiring a party to bear the disadvantages and thus granting a reparative injunction, it must be considered on the one hand that the legal consequences are more serious than in the case of a preventive injunction, since the respondent is required actively to undertake something involving costs to him. On the other hand, the legal consequences are in principle less far-reaching than in the case of actions for damages as the disturber must only bear the costs of removing the source of interference and must not compensate any further damage. Thus, it would seem appropriate to set the prerequisites so that they lie between those for preventive injunctions and those for damages claims. Hence, the fact that the disturber's actions fulfilled the factual elements of the offence should not suffice on its own, but on the other hand fault should not be required. Instead, objective negligence on the part of the disturber would seem both necessary and sufficient. Besides this, in parallel to the law of tort, vicarious liability and strict liability should also be recognised when it comes to reparative injunctions. Just as less strict prerequisites in relation to behaviour are sufficient in the case of reparative injunctions due to the less severe legal consequences, however, a lesser degree of dangerousness must also be sufficient, so that not only the abstract risk of frequent or more severe damage

even to a very slight degree is enough but also the specific dangerousness due to a defect[252].

As far as the *difficulties in distinguishing* between removal of the interference and damages are concerned, the approach taken by *Jabornegg/Strasser,* based on whether individualisaton is possible, is persuasive. Moreover, the borderline can be relaxed and thus be less stringent: if there are serious grounds for liability, for example grave breach of duty, the reparative injunction may be extended further and thus converge with the claim for damages; if the grounds for liability are weak, the borderline should be drawn more restrictively.

2/89 Finally, the Caroline cases provide a hotly disputed example of the blurred lines between claims for damages and for *unjust enrichment;* in these cases the German BGH[253] assessed the claim for damages, without regard to the disadvantage suffered respective the unjust enrichment gained, for deterrent purposes. Thus, a claim was granted, which – apart from the causation of damage – set out the prerequisites of the law of tort, but in substance was a claim for unjust enrichment.

B. The need for a consistent overall system

2/90 The *aim* of the short overview of the legal consequences above is to try and fit the law on damages better into an *overall system,* based on understandable value judgements, of available legal protection options, thus allocating the appropriate place to the law on damages within the overall legal system. This classification could provide guidance on how the existing rules on damages should best be interpreted in Germany and Austria, how the law on damages should be developed in the future and to what extent some of the functions attributed to it today could appropriately be taken over by other areas of laws – already existing or to still to be developed.

2/91 The purpose of the overview of the different existing or debated protection mechanisms is thus an attempt to arrive at a better understanding of the *functions attributed to* individual rules. The bird's eye picture shows up more clearly which functions should be attributed to each area of rules according to its nature, whether there are currently deficiencies in how some needs for protection are covered and thus whether certain areas should be allocated additional tasks or new protection systems should be developed.

252 On this *Koziol,* Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, Canaris-FS (2007) 649 f.

253 BGHZ 128, 1 = NJW 1995, 861; NJW 1996, 984 f.

C. Observation of the structural principles of private law and public law

Even this short overview has shown that the legal system aims to protect legal goods in part under private law but also partly under public law. As private and public law – despite increasing intertwinement – do not have the same functions and are governed by different basic principles, the classification of the individual protection mechanisms within one of the two major areas of law must be taken into account when determining their *functions.* When determining the functions of the existing private law instruments for protecting legal goods, ie in particular also of the law of tort, and likewise in the context of its future development, the *fundamental principles of private law* must therefore always be taken into account and the instrument must not be allocated any public law tasks foreign to its nature. Hence, in the context of the law of tort under discussion here the structural principle of *bilateral justification* specific to private law must be observed in particular; this opposes above all the granting of someone's claims solely on the basis of the perpetrator's conduct and in the absence of any reasons for granting the claims on the applicant's part[254]. *F. Bydlinski* emphasises that civil law norms always affect the relationship *between* two or more legal subjects and thus every rule has a direct impact on the relationship between persons described more closely in terms of the factual elements of the offence; that every allocation of rights, advantages or opportunities to certain individuals means duties, burdens or risks are imposed directly on other individuals. According to him, therefore, it is necessary »not only to justify why one subject of the rule be allocated per se a favourable legal consequence and the other, however, a disadvantageous legal consequence, but also why this ensues precisely in the context of the relationship between these two; thus, why one subject should obtain rights or duties, opportunities or risks exactly in relation to a certain other subject.« Hence, the principle of relative bilateral justification applies, pursuant to *Bydlinski.* Absolute, *one-sided,* arguments referring merely to one subject may be very strong but can on their own never justify a private law rule. 2/92

This applies especially to »punitive damages«, which do not serve the compensation of damage or disgorgement of unjust enrichments (see on this above 2/93

254 *F. Bydlinski,* System und Prinzipien 92 ff; *idem,* Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft, AcP 204 (2004) 341 ff; *idem,* Die Maxime beidseitiger Rechtfertigung im Privatrecht, Koziol-FS 1355 ff. The principle of bilateral justification worked out by *F. Bydlinski* is accepted among others by *Canaris,* Grundstrukturen des deutschen Deliktsrechts, VersR 2005, 579; *Koziol,* Grundgedanken, Grundnorm, Schaden und geschützte Interessen, in: Griss/Kathrein/Koziol, Entwurf 32; *H.P. Walter,* Recht und Rechtfertigung – Zur Problematik einseitigen Privatrechts, Gauch-FS (2004) 302 ff. Rejecting this, however, *G. Wagner,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS 932 f.

no 2/55 ff), but which despite the harmless sounding name do not require the existence of any corresponding damage and thus have a purely penal nature. However, by principle it is public law which is responsible for penalties, in particular criminal law including administrative penal law.

The fact that the law of tort does *not,* or at least not primarily, have a public law *penal function* makes it easier, on the other hand, to depart from the subjective standard of blame traditionally required for penalties, ie fault, and to regard other grounds for liability as equally valid, for example being in control of a source of danger or at least under certain circumstances to take a less stringent basis for liability by applying an objective standard of fault, for example due to the notion of guarantee when the duty to fulfil contracts is breached or in the case of professional experts (see below no 6/87 ff).

2/94 Furthermore, it becomes apparent that *public law* – in pursuance of the *notion of solidarity* effective within the community – is aimed at securing the livelihood and existence of individuals, in particular in the context relevant here by means of social security law and the provisions on the indemnification of victims of catastrophes and crimes. Hence, there is no necessity to over-burden the law of tort with this task, which is foreign to its nature, and thus to alienate it from its general principles. The existence of social security law, on the other hand and quite apart from the issue of redress rights, could be relevant to the law on damages to the extent that it may reduce the need for protection under the law on damages.

D. Taking into account the relationship between prerequisites and legal consequences

2/95 However, even within the private law system of legal consequences, the functions of the individual protection mechanisms become more obvious when seen in overview. Thus, it becomes clear that the preventive injunction with its comparatively low prerequisites may not be stretched so far as to serve the compensation of damage and otherwise would undermine the substantially stricter law of damages. At the least, such convergence of the legal consequences would require convergence likewise with the prerequisites applicable under the law of damages. Vice versa, it is no harm on the other hand, if the stricter law of tort, for instance by granting restitution in kind, grants nothing different to a reparative injunction, as is the case for example when it comes to the revocation of defamatory statements under § 1330 (2) ABGB: this may not seem very logical but does not undermine in any way those rules which grant reparative injunctions even under less strict prerequisites. Hence, there is no objective reason why the preventive injunction which requires less strict prerequisites should be refused due to the claim for damages.

In any case, more regard should be had to how prerequisites are matched to legal consequences, above all to the fact that more onerous legal consequences call for stricter prerequisites.

E. Taking into account the appropriacy of tasks to the nature of the instrument, the interplay of different protection mechanisms and the further development of borderline areas

2/96 This short presentation has clearly revealed how the intrinsic borders of the different protection mechanisms – considered to have been resolved for decades – distinguishing between those rules that are directed at the compensation of damage and thus on *shifting the damage,* and the rules serving the *disgorgement* of unjust advantages have become blurred. The discussion on how the law of tort is misused in this respect indicates that the law on unjust enrichment should apply when it comes to the disgorgement of profit and – in the event that this falls short in its present form – further development of this field should be considered. At the least it ought to be examined whether an interim area should be developed in order to bridge the gaps in protection. On the other hand, however, it has been shown, if only within a narrow extent, that the consequences of damage may be more easily imputed when an advantage has been gained by the act forming the basis for liability[255].

2/97 Insurance contract law, on the other hand, can be relevant to the law of tort in a two-fold – somewhat contradictory – sense: better availability of insurance for the risk that one's goods are damaged may be an argument that the victim is less worthy of protection. On the other hand, the easier availability of third-party liability insurance is an argument in favour of more stringent liability of the harm caused by the damaging party.

2/98 It will also be shown that the present-day understanding of the individual protection mechanisms, and thus also the law of tort, sometimes requires certain readjustments. This is because there are relatively clear differences in the prerequisites and legal consequences of the core areas of the various instruments of legal protection but ultimately the borders between the instruments cannot be mapped out so clearly and instead transition areas must be recognised. This recognition can be of particular importance when it comes to explaining seeming inconsistencies and showing that gaps in protection assumed to exist between the individual instruments of legal protection do not really exist or that it is clearly possible to circumvent them because the elaboration of the fluid transition areas according to the value judgements can lead to a comprehensive protection system.

255 On this *Koziol,* Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement? F. Bydlinski-FS (2002) 175 ff.

2/99 Gaining an overview of the system as a whole should also make it possible to avoid the increasing *misuse* of a legal concept in order to attain a desired goal, in that objectively justified and system-appropriate prerequisites are elaborated and the corresponding appropriate legal consequences provided for. Thus, the aim is to avoid the rather conceptual-jurisprudential (begriffsjuristische) arrangement of claims in seemingly defined categories; transition areas and new instruments should provide support.

In this respect it must be borne in mind not only generally – as already mentioned – that the *prerequisites must fit the legal consequences,* and in this context that the graver the legal consequences the stricter the prerequisites must be; more importantly prerequisites and legal consequences must also be in harmony with the fundamental structures and aims of the individual mechanisms for legal protection. Thus, claims for damages should not be deployed in order to disgorge unjust enrichments or to impose pure penalties. Any gaps in protection should instead be closed in a manner consistent with the overall system by recognising the transitions between today's protection systems, in which prerequisites and legal consequences may converge. In this manner, claims for unjust enrichment may apply regardless of the lapse of the unjust enrichment by the application of liability grounds deriving from the law of tort and, on the other hand, damages claims may be cautiously expanded by taking into account the advantage gained by the damaging party in the context of the compensatory purpose. This shows that the existing legal remedies can be developed in harmony with the overall system, but certainly not by taking on elements foreign to the system, so that the gaps in legal protection may be closed within the framework of an overall system for the protection of legal goods with consistent values and hence, a legal system serving the notion of fairness as such may be accomplished.

Chapter 3

The tasks of tort law

I. Compensatory function

For centuries[1] it has been practically undisputed in Continental European legal systems[2] that the primary task of »Schadenersatzrecht« (the law of damages), as its name suggests, is to provide the victim with *compensation for damage that has already been sustained.* Accordingly, both § 1295 ABGB and § 823 BGB refer to the »compensation of damage« and likewise Art 10:101 of the PETL[3], which were developed by the EGTL, emphasises the compensatory function of tort law. The justification of this view is also demonstrated in that each legal system's need for rules on compensation of damage is covered solely by the rules of the law of damages, at least in the Continental European systems. The tendency, so common today, to reject the notion of compensation and place the focus on the deterrent function, for instance, thus contradicts not only positive law but also overlooks the fact that this would rip open a regulatory gap, as then *no* legal institution would fulfil the function of compensating damage. 3/1

The compensatory function is peculiar to the law of damages as a whole, regardless of the liability criteria such is based on, ie both in respect of the field of *fault-based liability and that of strict liability.* When *Bälz*[4] assumes that strict liability is not aimed at the compensation of harm suffered but at the disgorgement of the advantages obtained, this contradicts all positive law provisions and is not justifiable in theory since the legal consequences are clearly aimed at the

1 On this *Jansen* in HKK zum BGB II §§ 249–253, 255 no 17 ff.

2 *F. Bydlinski,* System und Prinzipien 187 ff; *Magnus,* Comparative Report on the Law of Damages, in: Magnus, Unification: Damages 185; *Meder,* Kann Schadensersatz Strafe sein? Zum Wandel des Verhältnisses von Schadensersatz und Strafe unter Berücksichtigung von Gefährdungshaftung, Versicherung und Familienrecht, Rüping-FS (2009) 125 ff; *Schiemann* in Staudinger, BGB[2005] Vor §§ 249 ff no 3; *Wilhelmi,* Risikoschutz 62 f. European law also holds the compensatory purpose to be primary; see *Kelliher,* Aims and Scope, in: Koziol/Schulze, EC Tort Law 10 ff; *Oliphant,* The Nature and Assessment of Damages, in: Koziol/Schulze, EC Tort Law 241; *Oskierski,* Schadensersatz im Europäischen Recht (2010) 85 f.

3 On these see *Magnus,* Nature and Purpose of Damages, in: EGTL, Principles 149 ff.

4 Ersatz oder Ausgleich? JZ 1992, 57.

compensation of the damage suffered and, moreover, the degree of dangerousness is a criterion for the liability of the damage caused, substantially equivalent to that of fault.

3/2 The scepticism expressed, for instance, by *Kötz*[5] as regards the compensatory notion seems to be primarily based on the fact that he expects this concept to clarify issues which it is not intended to clarify and indeed understandably cannot clarify. Specifically, his criticism is based on the argument that compensation of damage is by no means always required and that this principle does not offer much insight into the question of what goals the legislator pursued in selecting the special grounds that lead to compensation of damage. The elaboration of the compensatory notion is not, however, aimed at delivering insights into the grounds for liability but merely to clarify what function the right to compensation should have, *if* the criteria for liability are met[6]. The compensatory notion clearly expresses the purpose of tort law[7], provides a guideline for the *scope* of the claim for damages and thus excludes the integration, for example, of punitive damages (no 1/23 and 2/55 ff) or the disgorgement of an enrichment within the framework of the law of damages – a finding that if observed could have provided the means to avoid many a wrong turn and that underlines the importance of emphasising this notion.

3/3 The compensatory function is also decisive in respect of the field of *non-pecuniary damage*[8] according to persuasive opinion[9] and in precisely this sense Art 10:301 PETL speaks very clearly of »*compensation* of non-pecuniary damage«. In

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5 Ziele des Haftungsrechts, Steindorff-FS (1990) 644 f. Cf also *Möller,* Das Präventionsprinzip des Schadensrechts (2006) 247 ff; *Schiemann,* Argumente und Prinzipien bei der Fortbildung des Schadensrechts (1981) 185 ff; *Visscher,* Economic Analysis of Punitive Damages, in: Koziol/Wilcox, Punitive Damages 6 and 57; *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 38 f; *G. Wagner,* Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? AcP 206 (2006) 453 ff.

6 Thus, also *F. Bydlinski,* System und Prinzipien 187 f; *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 12 f; cf also *Wilhelmi,* Risikoschutz 63, 65 f.

7 *F. Bydlinski,* System und Prinzipien 187 f.

8 This is also recognised by the BGH, when in BGHZ 118, 312, 339 it holds that the function of satisfaction does not provide the basis for any direct punitive character of damages for pain and suffering, but instead is inseparably linked to the compensatory function also inherent in the claim for damages for pain and suffering.

9 *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 253 f; *Karner,* Ersatz ideeller Schäden 88 f, 132 ff; *Köndgen,* Haftpflichtfunktionen und Immaterialschaden (1976) 84 ff; *E. Lorenz,* Immaterieller Schaden und »billige Entschädigung in Geld«, (1981) 95 ff. However, see *Deutsch,* Haftungsrecht[2] no 904 ff; *Oetker* in MünchKomm, BGB II[5] § 253 no 13; *Strasser,* Der immaterieller Schaden im österreichischen Recht (1964) 16 ff. From a comparative perspective on this complex of problems *Brüggemeier,* Prinzipien des Haftungsrechts (1999) 189 ff; *B.A. Koch/Koziol,* Comparative Analysis, in: B.A. Koch/Koziol, Personal Injury 420, 424 f; *W.V.H. Rogers,* Comparative Report of a Project Carried Out by the European Centre of Tort and Insurance Law, in: W.V.H. Rogers, Non-Pecuniary Loss 251 ff.

Germany, however, prevailing opinion considered that the compensation of non-pecuniary damage had a sole or at least additional *function of satisfaction.* Hence, a landmark decision of the BGH[10] noted that the claim to damages for pain and suffering under § 847 BGB was no ordinary claim for damages but instead a claim of a separate type with a dual function. According to the court, it is intended to offer the victim appropriate compensation for that part of the damage that is not of a proprietary nature, and at the same time take account of the notion that the tortfeasor owes the victim satisfaction for what he did to him.

Among academic writers, however, this function of satisfaction is contentious and is met with increasing rejection[11]: even though such satisfaction is primarily intended to restore the victim's feelings of self-esteem, the emphasis of this function nonetheless prompts concern because the damages for pain and suffering may thus move towards the concept of private penalty. Besides this, the question arises, whether the notion of satisfaction can indeed have any independent significance or whether it is not in fact superfluous, so the arguments submitted go[12]. These concerns are justified as the aspects addressed in the context of the satisfaction function can be integrated without further ado into the compensatory function: for instance, if more damages for pain and suffering are to be awarded to the victim in the case of gross negligence on the basis of the satisfaction function, this could also be justified to a certain extent according to the compensatory function, since in cases where the damaging action was particularly seriously wrong, the emotional damage inflicted thereby is exacerbated[13]. *G. Wagner*[14] also rightly points out that a satisfaction function understood as expiation by means of damages for pain and suffering is per se irreconcilable with strict liability. Moreover, it would also be untenable within the realm of fault liability because it is not possible to justify why retribution would only be necessary when non-pecuniary damage is inflicted but not in the far more common cases of pecuniary damage.

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10 BGH in BGHZ 18, 149.

11 Cf *Rixecker* in MünchKomm, BGB I/1[5] Anh zu § 12 no 223 ff.

12 See *Canaris,* Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, Deutsch-FS (1999) 102 ff; *Funkel,* Schutz der Persönlichkeit durch Ersatz immaterieller Schäden in Geld (2001) 154 ff; *Köndgen,* Haftpflichtfunktionen 117 ff; *E. Lorenz,* Immaterieller Schaden 102 ff; *idem,* Schmerzensgeld für die durch eine unerlaubte Handlung wahrnehmungs- und empfindungsunfähig gewordenen Verletzten? Wiese-FS (1998) 261 ff; *Nehlsen-v. Stryk,* Schmerzensgeld ohne Genugtuung, JZ 1987, 119 ff, 126 f. In contrast *C. Schäfer,* Strafe und Prävention im Bürgerlichen Recht, AcP 202 (2002) 419 ff, emphasises once again the satisfaction function and says this should give rise to »satisfaction damages« besides the compensation award.

13 See *Karner/Koziol,* Ersatz ideellen Schadens 26 with additional references.

14 In MünchKomm, BGB V[5] Vor § 823 no 44.

II. Function of deterrence and continuation of a right (Rechtsfortsetzungsfunktion)

A. The deterrent function in general

3/4 Nowadays, it is largely recognised that the law of damages also has a deterrent function[15]: the threat of a duty to compensate in the event of damage being caused undoubtedly provides a general *incentive to avoid inflicting damage.* With respect to the specific tortfeasor who has already caused harm and thus been held liable for compensation, it provides motivation to avoid causing damage as far as possible in future. The significance of the deterrent function is emphasised by many voices today above all with respect to intellectual property law[16], as in that context a high degree of vulnerability is combined with unusual difficulties when it comes to establishing damage or enrichment.

3/5 Especial weight has been accorded to the deterrent function of the law of damages in more recent times by advocates of the *economic analysis* of law[17], who strive towards a comprehensive explanation by application of economic approaches[18]. *Landes, Posner* and *Calabresi*[19] come in this respect to the conclusion that rules on liability may be interpreted as a legal attempt to create incentives for socially efficient behaviour. Nonetheless, the view taken by certain adherents of the economic approach that the notion of deterrence is therefore the only, or at least the decisive, aspect for the law of damages is misguided[20]. As already mentioned, according to its positive law construction in Continental European legal systems, the law of damages is in fact primarily directed at the objective of

15 *F. Bydlinski,* System und Prinzipien 190 ff; *J. Hager* in Staudinger, BGB[1999] Vor §§ 823 ff no 10; *Koziol,* Haftpflichtrecht I[3] no 1/15; *Magnus,* Comparative Report on the Law of Damages, in: Magnus, Unification: Damages 185 f; *Möller,* Präventionsprinzip des Schadensrechts; *Spickhoff* in Soergel, BGB XII[13] Vor § 823 no 31; *L. Tichý,* Prävention im Haftungsrecht: Ansatz zu einer Revision, Koziol-FS (2010) 908 f; *G. Wagner,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS (2010) 931 f. A stocktaking of German and European law developments is offered by *K. Sailer,* Prävention im Haftungsrecht (2005) 21 ff; *Meder,* Kann Schadensersatz Strafe sein?, Rüping-FS 125 ff; *Oskierski,* Schadensersatz im Europäischen Recht 86 ff.

16 See in detail *Dreier,* Kompensation 57 ff, 128 ff, 413 ff.

17 This theory will be looked at in more detail below no 3/18 ff.

18 *Kötz/Schäfer,* Schadensverhütung durch ökonomische Anreize, AcP 189 (1989) 502 ff with additional references; *Gimpel-Hinteregger,* Grundfragen der Umwelthaftung (1994) 43 ff; *Faure,* Comparative Analysis, in: Faure/Koziol, Medical Malpractice 294 ff, 320.

19 On this *Schäfer/Müller-Langer,* Strict liability versus negligence, in: Faure, Tort Law 4 f.

20 See, for example, *Adams,* Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung (1985); *Schäfer/Ott,* Lehrbuch der ökonomischen Analyse des Zivilrechts[4] (2005), both with additional references; see further in particular *G. Wagner,* AcP 206 (2006) 451 ff; *idem,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS (2010) 931 ff, in each case with additional references. Cf also below no 3/23.

compensation[21], this function is clarified unambiguously in the legal consequences it defines. Deterrence is merely a secondary function and is not enough on its own under the law of damages to justify the imposition of payment obligations that do not serve the purpose of compensation. This is true not only due to the necessity for bilateral justification of the claims, as is a feature of private law (see above no 2/92), but also because the law of damages is in fact not at all suitable to serve as an instrument for the consistent implementation of the notion of deterrence. For it to be suitable, it would be necessary that the penalty be linked to the *censured behaviour,* ie also to the preparatory actions or the attempt as such and for it *not* to be contingent on damage being sustained. As the duty to compensate only arises when damage has been sustained, however, penalties imposed solely on the basis of proscribed behaviour are alien to the nature of this field of law[22]. Finally, those critics of the principle of compensation who – wrongly – contend that it is merely an empty principle and that it is impossible to deduce from it when compensation should in fact be paid, should recognise that the deterrence notion they prefer would accordingly suffer from matching emptiness[23].

3/6 It should be emphasised that the deterrence function is not only exercised by the laws on fault liability but also by those of *strict liability*[24] as the threat of a duty to compensate increases efforts to prevent damage being caused by a source of danger as far as possible; this applies at least – as specified by the economic analysis of law – insofar as the costs of preventing damage do not exceed the otherwise threatening duty of compensation.

3/7 As already discussed above (no 2/70), the deterrent function of the law of damages is eliminated or at least greatly reduced by the widespread availability of *third-party liability insurance.* This kind of insurance is nevertheless highly desirable in the interest of the victims whose compensation it secures, and from the perspective of the damaging party it is particularly necessary for entrepreneurs in order to make liability risks calculable. However, efforts should be increased to design third-party insurance policies as far as possible so they do not undermine the deterrent function of the law of damages, for instance by including appropriate deductions and basing premium rates on a bonus-malus system.

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21 See *Taupitz,* Ökonomische Analyse und Haftungsrecht – Eine Zwischenbilanz, AcP 196 (1996) 126; *Koziol,* Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusion, in: Koziol/Wilcox, Punitive Damages no 65; *Wilhelmi,* Risikoschutz 64 f. Qualifying this *Möller,* Präventionsprinzip des Schadensrechts 270 ff.

22 *Spickhoff* in Soergel, BGB XII[13] Vor § 823 no 31 and above no 2/60.

23 This is rightly pointed out by *Wilhelmi,* Risikoschutz 65 f.

24 *Adams,* Ökonomische Analyse 47 ff; *Faure,* Economic Analysis, in: B.A. Koch/Koziol, Unification: Strict Liability 364 ff; *Oertel,* Objektive Haftung in Europa (2010) 34 ff; *Schäfer/Ott,* Ökonomische Analyse[4] 203 ff; *Stoll,* Das Handeln auf eigene Gefahr (1961) 347 ff; *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 17, 49, 52.

B. The notion of continuation of a right (Rechtsfortsetzungsgedanke)

3/8 The notion of providing for the continuation or continuing effect of a right or interest takes as a basis the deterrent function[25]; there is widespread consensus that it provides affirmation for an *objective-abstract assessment of damage.*[26] Specifically, the notion of continuation of a right sees the injured right or legal good as surviving in a claim for compensation: in lieu of the destroyed good, a claim against the damaging party arises. As the legal system protects the rights and legal goods based on their general appreciation in the legal community, the notion of continuation of a right leads to a claim for compensation for the »ordinary value«, ie the market value, regardless of the concrete interest of the owner who suffered the loss.

Thus, the notion of continuation of a right secures the emergence of a duty to compensate provided the other relevant criteria for liability are satisfied, thus serving the function of *deterrence*[27]*:* the damaging party must compensate as *minimum damage* the objective-abstract value loss, at least if the destroyed or damaged good enjoyed general appreciation, and even if the subjective damage is less or the damage has been shifted. This safeguarding of the duty to compensate reinforces the incentive to avoid inflicting damage.

3/9 This mode of calculation does not – as is sometimes alleged[28] – contradict the principle of *prohibition of enrichment:* the victim in fact does sustain a pecuniary loss – open to objective assessment – and thus also the power to dispose of this value as he did previously. Apart from that, this method of assessment is justified by the notion of continuation of a right.

However, objective-abstract assessment of damage is vehemently opposed by some[29] when it comes to Austrian law; nonetheless, it has been recognised by positive law in the form of § 1332 ABGB and is also to be found in § 1315 (5) of the Austrian Draft as well as in Art 10:201 PETL.

3/10 It is certainly also worth noting that while in general only the subjective-concrete assessment of damage is supported in *Germany*[30] and thus objective-abstract

25 On this *Neuner,* Interesse und Vermögensschaden, AcP 133 (1931) 277; *Wilburg,* Zur Lehre von der Vorteilsausgleichung, JherJB 82 (1932) 51; *F. Bydlinski,* Schadensverursachung 29 f; *idem,* System und Prinzipien 191 f; *Schiemann,* Argumente und Prinzipien bei der Fortbildung des Schadensrechts 205 ff; *Koziol,* Haftpflichtrecht I³ no 1/18; *J. Hager* in Staudinger, BGB¹⁹⁹⁹ Vor §§ 823 ff no 9. More recently see, the notion of continuation of a right has been emphasised in particular by *Gebauer,* Hypothetische Kausalität und Haftungsgrund (2007) 12, 101 ff, 221 ff, 256 ff.

26 See Principles, Commentary no 5, 6, 7 to Art 10: 201.

27 *F. Bydlinski,* System und Prinzipien 191 f.

28 *Lange/Schiemann,* Schadensersatz³ 251.

29 Cf *Reischauer* in Rummel, ABGB II/1³ § 1332 no 17.

30 See, for example, *Oetker* in MünchKomm, BGB II⁵ § 249 no 16 ff with additional references.

assessment of damage is firmly rejected there[31], the damage is in fact objectively assessed in problematic cases, even though this is not recognised or at least not openly acknowledged.

A good example is provided by the compensation of the »loss in commercial value« (merkantiler Minderwert): this minimum value is based on the fact that in the market a car damaged in an accident is valued as worth less, even when it has been completely repaired, than a car that has not been involved in any accident. Hence, it is not the value of use that is reduced but only the market value. If the interest in the car is calculated on a subjective basis, a disadvantage could only be established when the car is sold but not in the course of its use until only scrap value remains or at least up until the point when the loss in commercial value has decreased again to nothing. The BGH[32] holds, however, that it is not decisive whether the loss in value has manifested in a sale of the car and takes the objective reduction of the market value as the sole basis. In truth, this is nothing other than an objective-abstract assessment of damage since only the market value is taken into account and not the subjective-concrete interest of the victim[33]. If, moreover, the theoretical justification for this is that[34] »after the repairs the victim has an asset which, if the market takes into account the loss in commercial value, has already lost in value because this is determined solely by market criteria«, there is very clearly recognition of objective-abstract assessment of damage based on market value. The usual theoretical mislabelling should thus finally be abandoned.

3/11 The principle of continuation of a right does not apply when the damage to the victim consists in incurring a liability or having to expend costs; in both cases a compensation claim would not represent the continued effect of a damaged good[35]. On the other hand, the objective-abstract assessment is not limited only to the property damage mentioned in § 1332 ABGB, in fact it is always applied pursuant to the basic principle when the protected right or legal good that is damaged has a market value. Therefore, for instance, a victim who has suffered a reduction

31 Cf for example, *Lange/Schiemann,* Schadensersatz[3] 248: »Within the claim for compensation it is not any ›objective‹ value of the legal good at issue which is decisive but how the circumstance giving rise to liability has affected the assets of the person entitled to compensation.« Further 250 f: »The general conclusion that the victim can under all circumstances seek some specific ordinary market value as minimum damage even when the specific damage event at the relevant time does not account for a corresponding difference in assets, would on the other hand contravene the ban on enrichment under the law of damages.«

32 See the German case law since BGHZ 35, 396 = JZ 1967, 360 *(Steindorff).* Further details in *Oetker* in MünchKomm, BGB II[5] § 249 no 52 ff. See also *Martens/Zimmermann,* Collective Damage in: Winiger/Koziol/Koch/Zimmermann, Digest II 2/24 no 1 ff.

33 Thus, rightly, *Steindorff,* JZ 1967, 360.

34 *Lange/Schiemann,* Schadensersatz[3] 266.

35 *Koziol,* Haftpflichtrecht I[3] no 2/66.

of his capacity to earn may be awarded an abstract annuity as compensation[36]. On the other hand, when a person is killed even the continuation of a right theory cannot lead to an objectively-abstract assessed compensation award[37], although the absolutely protected right to life has been violated[38]. The approach fails here because life does not have any objectifiable pecuniary value in the sense that it is acquired or sold for money[39]. Furthermore, concerns arise when it is proposed that when a person is killed a claim to compensation for the value[40] of a person, which in any case is not measurable in money, or even just the value of their destroyed earning capacity, be recognised and deemed to be passed on to their heirs. Ability to earn is an asset but this is never included in the estate and can, accordingly, never be passed on to the heirs; instead the ability to earn expires with the person and thus cannot be inherited. If in cases of a killing triggering liability, a compensation claim in this respect was recognised and included in the estate as an ordinary pecuniary claim, in end effect a highly personal and thus non-inheritable good would be transformed to a non-personal and thus inheritable monetary claim solely so that the heirs obtain an asset. However, ultimately these heirs would be obtaining an asset that they would never have received had the pecuniary good not been destroyed. Hence, recognising such a compensation claim when someone is killed would not have significant regard to the fact that ability to earn is inseparable from the person and thus ends with said person[41]. The same grounds speak even more strongly against awarding a compensation claim for destroyed life, as in contrast to the ability to earn such is not a pecuniary good and can only be due to a certain person because it is highly personal and thus by its very nature is not transferable.

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36 OGH 2 Ob 143/03y in SZ 2003/106; *F. Bydlinski,* Schadensverursachung 50 ff; *Danzl* in KBB[3] § 1325 no 21.

37 On this *Koziol,* Die Tötung im Schadenersatzrecht, in: Koziol/Spier (eds), Liber Amicorum Pierre Widmer (2003) 203 ff; agreeing with this *B.A. Koch,* Der Preis des Tötens, Barta-FS (2009) 188.

38 For which the supporters of the law and economics school, stressing the notion of deterrence, see the generation of a duty to compensate as urgently necessary, see above no 2/51.

39 See *Neuner,* AcP 133 (1931) 306.

40 For the completely dissatisfactory attempts of law and economics see *F. Bydlinski,* Die »Umrechnung« immaterieller Schäden in Geld, in: Koziol/Spier, Liber Amicorum Pierre Widmer (2003) 43 ff.

41 This is also an argument against the Japanese solution of recognising a claim on behalf of the deceased to future lost income, which is passed on to his heirs. See on this *Marutschke,* Einführung in das japanische Recht[2] (2010) 171 f; *Nitta,* Die Berechnung des Schadens beim Unfalltod eines minderjährigen Kindes, in: Müller-Freienfels et al (eds), Recht in Japan 11 (1998) 80 ff; as well as against the related theories put forward by *Pfeifer,* Schadensfall Tod: Zur Ersatzfähigkeit entgangenen Gewinns bei Tötungsdelikten, AcP 205 (2005) 807 ff.

III. Penalty function

It is a matter of ongoing discussion whether the concept of penalty is still[42] relevant to tort law today. It could – if at all – only apply within the field of *fault liability,* as only conduct subject to censure can be designed to trigger penalties in the strict sense. 3/12

In Germany, the importance of the concept of penalties is controversial even within the area of fault liability[43]. *J. Hager*[44] rightly points out that the German law of damages has *no penal function,* though elements of some rules may also have a penal character.

In Austrian law, the starting position is seen somewhat differently: according to §§ 1323, 1324 ABGB, in the case of gross negligence the whole interest, in particular also any loss of profits (lucrum cessans), must be compensated; in the case of slight negligence, on the other hand, only the actual loss (damnum emergens). This *gradation of the extent of compensation* according to the degree of fault – naturally in too schematic a manner – ordered by the »graduated notion of damage«[45] shows, so it has been argued, that the notion of penalty does play a role[46]. In other legal systems too, the notion of penalty is recognised as having a certain significance[47]. 3/13

However, in my opinion the rule in § 1324 ABGB is far from unduly deviating from the notion of compensation, or from transplanting a penal element of criminal law into tort law or providing for a penalty in the strict, criminal law sense; rather it very appropriately takes into account the *gravity of the grounds for liability* for the assessment of compensation (eg whether there was gross or slight negligence)[48]: the graver the grounds for liability, the more readily or the more severely can the legal consequence of duty to compensate be applied. In this context, penalty is not to be understood in the criminal law sense but only in the broad sense of the legal system's response consisting in imposing a burdensome legal consequence. This gradation of the liability and thus the compensation owed cannot be explained by the criminal law concept of penalties because the relevant consideration

42 On the historical developments see *Jansen* in HKK zum BGB II §§ 249–253, 255 no 15 ff; *Meder,* Kann Schadensersatz Strafe sein? Rüping-FS 125 ff.

43 See on this *Deutsch,* Fahrlässigkeit 20 ff; *Schiemann,* Argumente und Prinzipien bei der Fortbildung des Schadensrechts 193 ff.

44 *J. Hager* in Staudinger, BGB[1999] Vor §§ 823 ff no 11; likewise *Spickhoff* in Soergel, BGB XII[13] Vor § 823 no 35; *G. Wagner,* AcP 206 (2006) 451 ff; *idem,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS 929 f.

45 *Wilburg,* Elemente 249 f; *Koziol,* Haftpflichtrecht I[3] no 1/16; *Karner* in KBB, ABGB[3] § 1293 no 3.

46 *Koziol,* Haftpflichtrecht I[3] no 1/16.

47 *Magnus,* Comparative Report on the Law of Damages, in: Magnus, Unification: Damages 186 f.

48 See *von Jhering,* Das Schuldmoment im römischen Privatrecht (1867), reproduced in an extended form in: *von Jhering,* Vermischte Schriften juristischen Inhalts (1879) 155 ff; *Pfaff* in: Pfaff/Randa/Strohal, Drei Gutachten über die beantragte Revision des 30. Hauptstücks, im II. Theile des a.b. Gesetzbuches (1880) 89 ff; *Wilburg,* Elemente 249 f.

of the gravity of the ground for liability must likewise be applicable in the field of strict liability[49]. Above all, however, *no legal consequence exceeding the compensation of the damage* is imposed[50], even in the case of gross negligence no more than full compensation can be ordered; in the case of merely minor liability criteria, on the other hand, liability is *reduced,* so that in any case only harm caused by the liable party must be compensated[51]. Therefore, the legal consequence is *always justified by the notion of compensation* and hence by the private law structural principle of *bilateral* justification of legal consequences (see above no 2/59); no true penalty going beyond this or without any compensatory purpose is imposed.

3/14 When it comes to the significance of the concept of penalty in the strict sense, it must also be considered that this could not possibly express the primary function of tort law. This is already obvious on the basis that Continental European tort law does not provide for any penalty triggered exclusively by proscribed conduct[52]; instead a duty to compensate can only arise when damage has been sustained[53]; an attempt to inflict damage thus cannot be addressed by tort law.

All of this speaks – as already emphasised above in no 2/58 ff – against the recognition of punitive damages as a legal consequence within the framework of tort law.

IV. Economic optimisation?

3/15 The law and economics school[54] is not as new as is often emphasised and neither do its basic principles originate from the USA. In fact this school was already

49 See *Koziol,* Haftpflichtrecht I[3] no 10/10.

50 *Schiemann* in Staudinger, BGB[2005] Vor §§ 249 ff no 3.

51 All of this is not taken into adequate consideration, for example, by *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag (2006) 6, when he cites the gradation of compensation according to the degree of fault as set out in the ABGB as an example of punitive damages.

52 *Deutsch,* Fahrlässigkeit[2] 83; *Mertens,* Der Begriff des Vermögensschadens im bürgerlichen Recht (1967) 93 ff.

53 *Magnus* in: Magnus, Unification: Damages 187.

54 See on this in German language literature, for example, *Adams,* Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung (1985); *Eidenmüller,* Effizienz als Rechtsprinzip (1995); *Schäfer/Ott,* Lehrbuch der ökonomischen Analyse des Zivilrechts[4] (2005) 121 ff, each with further details, which above all build on the fundamental works of *Calabresi,* The Costs of Accidents (1970); *Coase,* The Problem of Social Cost, (1960) Journal of Law and Economics 1, 3 and *Posner,* Economic Analysis of Law[7] (2007). A very good overview of the most recent state of the theory is given by the contributions in the book *Faure,* Tort Law. Criticism of the economic approach is voiced, for example, by *F. Bydlinski,* Fundamentale Rechtsgrundsätze (1988) 283 ff; *Taupitz,* Ökonomische Analyse und Haftungsrecht – Eine Zwischenbilanz, AcP 196 (1996) 114.

founded in the 19th century inter alia by *V. Mataja*[55], a member of the Vienna school of economics, and has been re-imported as a modernised American development[56].

Furthermore, it should be highlighted that it has long been a matter of course for lawyers to take economic factors[57] into account in the entire field of private law[58] and thus also in the context of tort law, in particular when it comes to the liability for damage and the determination of the scope of the duty to compensate: accordingly, the – economic – *onerousness* is a very important factor when it comes to establishing duties of care (see below no 6/41); it may, however, also be of decisive importance when deciding on the duty to compensate (§ 1310 ABGB, § 829 BGB) or reduction of the duty to compensate. Moreover, the legislator also considers it appropriate to take the *economic effects* into account when several solutions of largely equal value come into question; this may be relevant when it comes to the question of whether in the case of terrorism damage tort law should be partly or completely superseded by insurance or special fund-based solutions.

Although this means that economic considerations were and are familiar to lawyers, it must nonetheless be acknowledged that the economic analysis of law approach has promoted the *awareness of expediency considerations* in a valuable manner[59].

The economic analysis approach has nonetheless also provoked strong rejection due to excesses. This is true not least of the allegation by pious economists that *only* economic aspects are relevant[60]. This viewpoint has, however, already been abandoned many times over[61], even by *Posner*[62], and quite rightly so, since 3/16

55 Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie (1888).

56 This is laudably pointed out by *Englard,* Victor Mataja's Liability for Damages from an Economic Viewpoint: A Centennial to an Ignored Economic Analysis of Tort, 10 Int'l Rev L & Econ (1990) 173 ff; *Taupitz,* AcP 196 (1996) 154; *Schilcher,* Zukunftsperspektiven des österreichischen Schadenersatzrechts, in: Aktuelle Entwicklungen im Schadenersatzrecht, Richterwoche 2002 (2003) 16; *Hinteregger,* Stellungnahme zum Gutachten von *Karner/Koziol,* »Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform«, in: Verhandlungen des Fünfzehnten Österreichischen Juristentages 2003 II/2 (2004) 11 ff, and *Grechenig/Gelter,* Divergente Evolution des Rechtsdenkens – Von amerikanischer Rechtsökonomie und deutscher Dogmatik, RabelsZ 72 (2008) 540 ff.

57 On the economic considerations of the drafters of the BGB see *Taupitz,* AcP 196 (1996) 149 ff.

58 For instance, the concept of »Wegfall der Geschäftsgrundlage« (mistake as to basic assumption and/or frustration of the common purpose of the contract), which takes regard of the changes of economic conditions, and the acknowledgement of the unreasonableness of requiring performance, must be called to mind.

59 This is emphasised, for example, also by *F. Bydlinski,* Fundamentale Rechtsgrundsätze 283 ff.

60 See on this *Eidenmüller,* Effizienz als Rechtsprinzip (1995) 12, 317 ff, 455 f, where he stresses that the attempt to justify the goal of economic efficiency as solely objective has failed. Cf also *Towfigh/Petersen,* Ökonomische Methoden im Recht (2010) 4.

61 On this *Taupitz,* AcP 196 (1996) 126 f.

62 *Posner,* Economic Analysis of Law[7] (2007) 27.

economic analysis can at best deliver one of several aspects[63]. In particular, the fundamental principles of law[64], for instance commutative justice and legal certainty, and also the constitutionally protected civil rights and liberties,[65] must be taken into consideration.

3/17 This also means that the *judge* cannot be entitled to interpret *open value concepts (offene Wertbegriffe),* such as those of negligence, solely in terms of economic analysis[66]: as the historical legislator by no means only pursued the aim of efficiency and our present legal system is thus not generally directed at this goal, the recognised methods of historical, systematic and teleological interpretation cannot lead to the exclusive decisiveness of the concept of efficiency. Thus, the economic analysis of law is, as *Eidenmüller*[67] emphasises, in any case only one *theory of legislation* in Continental European legal systems, in contrast to the common law systems based on case law[68]. The judge would frequently not be in any position to conduct comprehensive economic analyses[69], whereby it must also be taken into consideration that the concept of efficiency only has limited heuristic utility and thus does not produce any real gain in rationality[70].

3/18 Economic analysis also raises concerns due to the fact that in its current form it proceeds on the basis of *models that are remote from real life*[71]. This is true, for instance, of the emphasis on the steering function of tort law when this is based on the parties involved being comprehensively informed about the costs caused by their conduct and the advantages from society's perspective[72]. When *Calabresi*[73] for instance, demands that such party must be held liable – due to his negligence – as could with least cost have avoided the damage (»cheapest cost avoider«), it must be countered that almost nobody will be able at the time of acting to even come close to calculating the total costs and advantages of the

63 *F. Bydlinski,* Fundamentale Rechtsgrundsätze 289 f; *Taupitz,* AcP 196 (1996) 135 f; cf also *J. Hager* in Staudinger, BGB[1999] Vor §§ 823 ff no 15; *Spickhoff* in Soergel, BGB XII[13] Vor § 823 no 33; *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 58.

64 On these *F. Bydlinski,* Fundamentale Rechtsgrundsätze 291 ff.

65 See on this, for example, *Bost,* Effiziente Verhaltenssteuerung durch den Ersatz von Nichtvermögensschäden (2009) 369 ff with additional references.

66 In more detail on this *Eidenmüller,* Effizienz 397 ff, 417 ff.

67 Effizienz 414 ff. See also *Bost,* Effiziente Verhaltenssteuerung 262 ff, 361 ff.

68 On the different influence of law and economics theories in American and German law, see *Grechenig/Gelter,* RabelsZ 72 (2008) 513 ff.

69 *Schäfer/Ott,* Ökonomische Analyse[4] 178, 183 f; *Eidenmüller,* Effizienz 398 f, 426 ff.

70 *Eidenmüller,* Effizienz 167.

71 See on this recently *Faure,* The Impact of Behavioural Law and Economics on Accident Law (2009) 13 ff with additional references. Further, *Schäfer/Müller-Langer,* Strict liability versus negligence, in: Faure, Tort Law 13, certainly admit that »in the real world« there may be a certain amount of uncertainty. Cf also *Wilhelmi,* Risikoschutz 23 ff.

72 Cf *Schäfer/Müller-Langer* in: Faure, Tort Law 11 f; *Boccara,* Medical Malpractice, in: Faure, Tort Law 341.

73 On this *Schäfer/Müller-Langer* in: Faure, Tort Law 16 f, who also address these difficulties.

effects of his actions for society, and that thus the duties of care can only be painstakingly determined ex post – which does not make sense if the aim is to create incentives for certain behaviour[74]. This also applies to the famous *Learned Hand* formula[75], which is based on the probability of damage occurring, the costs of inflicting damage and the costs of stopping the damage from occurring.

3/19 Neither is the starting point that *every member of society is exclusively oriented by economic aspects* very close to reality. It can hardly be assumed that – for instance in the field of non-fault-based liability – everyone will observe the standard of care that is optimal in societal terms[76], since experience shows that very often it is the individual's own personal advantage that is accorded priority. It has also been established that people over-estimate their own abilities and the means of avoiding risks, but on the other hand under-estimate the probability of damage manifesting[77].

3/20 Moreover, it is problematic that economic analysis – in accordance with its approach – can only provide exact information about economic associations[78]. This gives rise to concern because our legal systems are clearly not purely economically oriented and neither do they strive solely towards the creation of highest possible economic efficiency; rather and indeed above all they promote and protect *non-pecuniary interests,* in the context of which monetary value is not decisive[79]. Accordingly, life and other important personality rights rank highest, ie far *above* pecuniary interests. This is shown by human rights conventions, state constitutions and not least by criminal law. Law and economics does not neglect these non-pecuniary interests but it is not *able* to establish definitive *value relations between economic and personal goods,* as non-pecuniary goods by their very nature cannot be measured in money[80].

3/21 This fact cannot be assuaged by the argument that lawyers have been adequately coping with this for centuries by awarding appropriate compensation in money for *non-pecuniary damage.* On the one hand, substantial problems when it comes to the assessment of such awards are openly acknowledged and the legal system is consequently rather cautious when granting compensation. On the other hand, the assessment of compensation for non-pecuniary damage does not

74 *J. Hager* in Staudinger, BGB[1999] Vor §§ 823 ff no 16.
75 Judge *Learned Hand* in *United States v. Carroll Towing Co,* 159 F.2d 169 (2d Cir. 1947).
76 Thus, however, for instance *Schäfer/Müller-Langer* in: Faure, Tort Law 10. See, on the other hand, the concerns openly addressed by *Faure,* Impact of Behavioural Law and Economics 15 ff, 22 ff.
77 This is pointed out by *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 60, who nonetheless proceeds on the basis that economic theory integrates these behavioural anomalies and will be able to process them more productively in more complex models.
78 This is pointed out, for example, by *F. Bydlinski,* Fundamentale Rechtsgrundsätze 285.
79 In this sense also *Wilhelmi,* Risikoschutz 26 with additional references; cf also *Spickhoff* in Soergel BGB XII[13] Vor § 823 no 33.
80 *F. Bydlinski,* Fundamentale Rechtsgrundsätze 285.

concern the fundamental question of whether protection is to be granted at all and ultimately this problem is solved by lawyers in a manner largely conforming to the system. It is not the value of the non-pecuniary good which is compensated but instead – in simplified terms – the award made is intended to enable the victim to enjoy appropriate »positive feelings« in compensation for the negative feelings suffered[81].

Besides this, however, economic analysis wants to resolve the fundamental issue of whether and when non-pecuniary goods should be granted *protection against interference* in the first place by *evaluation of the good itself.* Accordingly, *Kötz*[82] for instance contends that the law and economics theory could show that prevention of accidents only makes sense and consequently an incentive to take measures to prevent an accident should only be created provided the costs of the measures to prevent the accident are lower than the costs of the accident avoided. Hence, in his opinion this economic evaluation is of pre-eminent significance even in respect of unlawfulness and thus in relation to the existence of claims for damages. If regard is had to the results of the economic analysis, the problems involved in such evaluation are obvious. *Ott/Schäfer*[83]*,* for instance, want to deduce the value of life from risk premiums actually paid. Taking into account the readiness to pay for precautions promoting security, they come to estimated values for life lying between 11 and 809 times the social product per head. Evaluation with this degree of subjective discretion is not appropriate and indeed amounts to pure arbitrariness[84].

3/22 With respect to the above-mentioned theory that incentives to take measures to avoid accidents should only be created provided the costs of preventing accidents are less that the costs of the accident, it must moreover be objected[85] that it would of course be out of the question to limit, for instance, the civil law protection of old age pensioners because their death would be cheaper than preventive measures to avoid the damage. This problem cannot be eliminated by discarding the economic value of a person, which would often be zero in the case of a pensioner, as a basis and instead basing the evaluation on how much someone's life is worth to him personally, ie how much he is willing to pay to keep it[86].

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81 On this below no 5/10 ff.

82 Ziele des Haftungsrechts, Steindorff-FS (1990) 647. Cf also *Schäfer/Müller-Langer,* Strict liability versus negligence, in: Faure, Tort Law 22 f; *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 61.

83 Schmerzensgeld bei Körperverletzung, JZ 1990, 563. Cf also the assessment methods in *Visscher,* Tort Damages, in: Faure, Tort Law 160 ff; further *Bost,* Effiziente Verhaltenssteuerung 231 ff.

84 Rightly critical, therefore, *F. Bydlinski,* Die »Umrechnung« immaterieller Schäden in Geld, in: Liber Amicorum for Pierre Widmer (2003) 43 ff.

85 *Koziol,* Haftpflichtrecht I[3] no 1/10.

86 The problem of how this amount should be determined after the death of the victim will regularly crop up. Moreover, the question is why everyone should be allowed to determine his »worth« as he pleases; in the case of economic assets this is certainly not permissible.

Apart from the fact that the amount an individual is willing to pay for his life greatly depends on his financial situation and that protection of life would have to be adapted to the paying power of the person at risk, it may be assumed that even this subjective amount is typically low in the case of elderly pensioners since their »remaining term« is short. In the case of people suffering from infirmity or depression or people who have lost their zest for living, the amount might be close to nothing. Furthermore, even if the value of a person still active in working life was deemed high, it could nonetheless turn out that another person would derive an even greater economic benefit from the first person's demise, for example if one entrepreneur could gain substantial profits from the death of a rival. Should the duties of care towards this rival then really be eliminated? Even to ask the question is to negate it[87]. This is a matter of course for lawyers because some goods, in particular life and health, *cannot be disposed of,* not even by the individual to whom they belong. This is now also recognised by the economic analysis of law[88], but this school has difficulty in justifying this standpoint within the logic of its system[89] since it requires a departure from economic principles and consideration of the liberty of others, ie the person at risk[90].

3/23 Parallel problems emerge ultimately not only with regard to the fundamental personality rights but also in a more diluted form as regards *pecuniary assets.* As already emphasised by *Calabresi*[91]*,* rules on indemnification are not intended simply to forbid conduct likely to cause damage but to allow the actor a choice as to whether or not he wishes to engage in the activity in question. He should engage in the activity if the benefit to be expected is greater than the harm to be anticipated. In end effect, however, this means that there is no ban on interfering with third-party goods if such corresponding benefit beckons. This becomes particularly clear when it is premised that decisions should »be taken so as to achieve the allocation of resources that would arise if the same person received both the disadvantage and the advantage and this person made the decision in question«[92].

This exclusive reference to the ratio of costs and benefits in the interest of the general good and the dismissal of the legal allocation of the goods to another person unavoidably leads to a far-reaching *disregard for the allocation of goods under*

87 On this in principle *Fezer,* Nochmals: Kritik an der ökonomischen Analyse des Rechts, JZ 1988, 223 ff.

88 See *Eidenmüller,* Effizienz als Rechtsprinzip (1995) 363 ff.

89 See on this *Eidenmüller,* Effizienz 207 ff, 480 ff.

90 *Eidenmüller,* Effizienz 350 ff; *Mathis,* Effizienz statt Gerechtigkeit (2004) 126 ff, with reference to *Rawls* and *Mill*.

91 *Calabresi,* The Decision for Accidents, 78 Harv L Rev (1975) 715 ff. On this *Taupitz,* AcP 196 (1996) 146 f.

92 *Schäfer/Ott,* Lehrbuch der Ökonomischen Analyse des Zivilrechts² (1995) 32 f. Cf also *Adams,* Ökonomische Analyse 165.

the legal system[93]*:* if the costs of avoiding the damage or society's gain from the interference with third-party rights are greater than the damage sustained by the owner of such, then according to the economic analysis of law, the interference with third-party property is permissible[94], and there is no necessity for the procedural and substantive law restrictions applicable in the case of dispossessions or consideration of the common good. Allowing interference with third-party property because of greater profits would mean a negation of property, indeed of all subjective rights, to the extent that the owner is deprived of defensive rights and the decision on how to use his property[95].

3/24 But also apart from this: even if third-party goods must be respected according to the principles of the economic analysis of law, substantial uncertainty remains as regards the definition of the duties of conduct in specific cases. *Taupitz*[96] showed this very vividly using the example of the German *game fencing to protect wildlife case*[97]*.* It does not seem that arguments sufficiently precise to persuade lawyers[98] and thus facilitate the desired predictability and transparency of decisions can be achieved by means of the economic analysis of law.

3/25 Ultimately, it is hard to dismiss the impression that the economic analysis of law suffers from a certain internal conflict, connected with its basic *ex ante perspective,* which it juxtaposes to the ex post approach of tort law[99]. In this vein *Boccara*[100]*,* for instance, writes*:* »On the one hand, economists look at the tort problem from an ex ante perspective whereas, on the other hand, lawyers look at the tort problem from an ex post perspective. Looking at the tort problem from an ex ante perspective means to establish incentives to doctors in order to prevent damage while looking at the tort problem from an ex post perspective means determining to what extent a victim can recover. The dichotomy between ex ante-ex post leads to the two main functions of the civil liability: the deterrent function and the compensatory function.«

It seems the solution offered by the economists is at least less than ideal[101] when they nonetheless deploy the *ex post oriented law of damages* approach for

93 Cf *Wilhelmi,* Risikoschutz 26.

94 Cf *Schäfer/Ott,* Lehrbuch der Ökonomischen Analyse des Zivilrechts[4] (2005) 160; *Schäfer/Müller-Langer,* in: Faure, Tort Law 8; cf also *de Mot,* Pure Economic Loss, in: Faure, Tort Law 204.

95 See, for instance, *Schäfer/Müller-Langer* in: Faure, Tort Law 7.

96 AcP 196 (1996) 156–163.

97 BGH in BGHZ 108, 273. On this also *Schäfer/Ott,* Ökonomische Analyse[4] 187 ff.

98 *Bost,* Effiziente Verhaltenssteuerung 258 f, still extols by contrast in recent times the »cogency and precision« of the economics and law theory, as well as its »mathematically precise analysis«.

99 On this *Eidenmüller,* Effizienz 400 ff.

100 See, for instance, *Boccara,* Medical Malpractice, in: Faure, Tort Law 344 f.

101 Against this objection *G. Wagner,* Präventivschadensersatz im Kontinental-Europäischen Privatrecht, Koziol-FS 934 f, however, at least in the case of intentional infliction of damage his arguments do not hold true.

their goals and accordingly want to tie the application of their deterrent measures to the occurrence of damage. This means, after all, that conduct highly likely to result in damage is not penalised and consequently no incentive to desist from this conduct in future is created, as long as the risk does not manifest in the specific case. As, however, only conduct can be influenced, it is this that should be the crux and not the more or less coincidental occurrence of damage as otherwise the deterrent effect is weakened. A logical progression of the ex ante approach and a far-reaching as possible realisation of the objective of deterrence thus requires that the penalty be attached to any dangerous *conduct* that is censured, regardless of whether damage actually occurs, simply because the conduct is highly likely to lead to a reduction of public prosperity and is thus proscribed pursuant to the considerations of the economic analysis of law.

3/26 The incomplete implementation of the basic principle by attaching the penalty to the occurrence of damage also gives rise to another problematic consequence: while the causation of the damage is declared to be an essential prerequisite for the imposition of the penalty, the *penalty is not based on the damage.* If the deterrent effect of damage compensation is really too weak, because not all victims take legal action, some victims do not prevail with their claims, or the advantage gained by the tortfeasor exceeds the damage to be compensated, then the damages awarded as a deterrence ought to be greater than the damage sustained[102]; moreover in some such cases the imposition of »punitive damages« is suggested[103]. The award is no longer linked to the damage when the extent of the compensation payment is not based on the damage but instead on the advantage gained[104]. On the other hand, it is also emphasised that the compensation must not cover the entire damage as long as there is still sufficient incentive for people to avoid negligently inflicting damage[105]. This begs the question of why the occurrence of damage should be decisive in order for the penalty providing the deterrence to apply when such penalty is not ultimately based on the damage sustained.

3/27 Excessive compensation on grounds of deterrence leads – as has already been explained – to results that contravene a fundamental principle of private law, namely that of *bilateral justification* (see above no 2/59): in the event that the victim receives more than indemnification of the damage he suffered, while there may be reasons to impose such payment duties on the damaging party, there can certainly be no justification for why exactly the victim receives such payments.

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102 *Visscher,* Tort Damages, in: Faure, Tort Law 167; *G. Wagner,* AcP 206 (2006) 451 ff; *idem,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag 2006 (2006) 98 ff.

103 *Polinsky/Shavell,* Punitive Damages, in: Faure, Tort Law 228 ff; *Schäfer/Müller-Langer,* Strict Liability Versus Negligence, in: Faure, Tort Law 12 f; *Visscher* in: Faure, Tort Law 166 ff.

104 *Visscher* in: Faure, Tort Law 170 f.

105 *Schäfer/Müller-Langer* in: Faure, Tort Law 11; *Visscher* in: Faure, Tort Law 155 f.

If, on the other hand, the victim is not awarded full compensation because this is not required for the purposes of deterrence, this would contravene the notion of commutative justice that has been accepted for millenia. Neither would it be possible adequately to justify why the specific victim – who could not prevent the damage, which consequently cannot be imputed to him – should have to bear part of the damage himself merely because potential tortfeasors do not require any additional incentive to conduct themselves duly and properly in the future. In the relationship between damaging party and victim, which is the decisive relationship from the perspective of private law, all arguments speak in favour of having the damaging party bear the damage and an individual cannot be expected to bear the damage for general social reasons. Imposing such a burden on the individual would undoubtedly also contravene the principle of equal treatment.

3/28 Economists have a tendency to meet all these concerns with the argument that the primary aim of tort law is quite simply *deterrence* and not compensation[106]. However, in so doing they expose themselves, inter alia, to the critique that tort law in its specific form today in all legal systems primarily serves the end of *compensation,* and thus the economic analysis of law comes into conflict with positive law and legislative intent. Moreover, any redesign of tort law as an instrument primarily aimed at deterrence would open up a regulatory gap: as legal history shows, there is a need for rules that are primarily aimed at the compensation of damage. Hence, it would not seem wise to alienate present-day tort law, aimed as it is at compensation of damage, from the task it has served hitherto, thus creating the necessity for a new branch of law dealing with the compensation of damage, which would correspond essentially to the currently existing laws.

3/29 Despite all these objections, which the economic analysis of law may be able to clear up in the future, the focus on economic considerations deserves significant credit for having forcefully brought into focus the expediency principle, which can play a role, not on its own, but certainly besides other, fundamental and higher-ranking fairness criteria[107].

106 *G. Wagner,* AcP 206 (2006) 451 ff; *Visscher* in: Koziol/Wilcox, Punitive Damages 222 ff.
107 *F. Bydlinski,* Fundamentale Rechtsgrundsätze 289 f.

Chapter 4

The area between tort and breach of an obligation

I. Tort, breach of contract and the interim area

Torts and breaches of contract have often and long been viewed as *opposites*[1]*:* torts concern conduct that breaches the duties owed to somebody; breaches of contract, on the other hand, concern conduct that is impermissible due to a special legal relationship with the relevant contractual partner. It is overly simplistic to refer to breaches of contract as the opposite of torts: at issue are not merely contractual duties towards the contractual partner but far more generally the duties arising out of a special relationship to a certain other person; ie above all also the duties arising out of legal obligations between parties. 4/1

However, the view that tort and the infringement of special legal relationships represent two, strictly separate areas over-emphasises the actual difference between them. Increasingly, it is rightly being realised[2] that they are merely the two extremities of a *chain of interim steps.* Convincing evidence that a large area cannot either be classified entirely as contractual liability or clearly assigned to tort law but instead lies between the borders is delivered by comparative law: allocation to one of the two categories varies from jurisdiction to jurisdiction, thus demonstrating the existence of significant uncertainty[3]. 4/2

The recognition of an interim area is substantially more appropriate because it means that cases do not have to be sorted stringently into one of the two categories »breach of contract« or »tort« and thus suddenly require different treatment. 4/3

1 On this in detail *Krebs,* Sonderverbindung und außerdeliktische Schutzpflichten (2000) 47 ff; *Immenhauser,* Das Dogma von Vertrag und Delikt (2006).

2 See above all *Canaris,* Schutzgesetz – Verkehrspflichten – Schutzpflichten, Larenz-FS (1983) 27 ff; *Medicus,* Die culpa in contrahendo zwischen Vertrag und Delikt, Keller-FS (1989) 205; *Koziol,* Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 209; *Krebs,* Sonderverbindung 555 ff.

3 See on this, *von Bar,* Deliktsrecht I no 414, 459 ff; *Brieskorn,* Vertragshaftung und responsabilité contractuelle (2010) 58 ff; *Krebs,* Sonderverbindung 28 ff, 47 ff.

The denial of the interim area has meant, for example in the German legal sphere, that breaches of pre-contractual (special) duties of care and contractual duties of special care in favour of third parties have been unreservedly allocated to the field of contractual liability even though they do not concern the breach of agreed obligations to perform but duties that serve to protect legal goods and thus actually belong to the field of tort[4]. On the other hand, the breach of duties to protect others against risks one has established by one's activity or property (Verkehrsicherungspflichten) are seen as torts although substantial deviations from tort rules are recognised. Thus, as a result of the interim areas being forced into a rigid two-category system, not only are relevant gradations and differences neglected, classification into one of the two core areas and thus exclusive application of one system's rules sometimes appears arbitrary.

4/4 This classification is highly significant in many legal systems as the law in some jurisdictions strictly separates torts from breaches of contract and provides for very different rules. Thus, while *German* law applies the provisions on the nature, content and extent of compensation (§ 249 ff BGB) to both fields, §§ 276 ff BGB only cover the breach of duties to perform arising out of obligations within special relationships; §§ 823 ff BGB, on the other hand, covers only the actions proscribed in relation to everybody, ie torts. The extensive allocation of the breach of (special) duties of care to the field of contractual liability is clearly aimed at overcoming the constraints of tort liability and affording the victim the substantially farther-reaching protection offered under contractual liability[5]. This is a motive that does not arise, for instance, in French law because its tort liability is so extensive; accordingly, the allocation in this respect to breach of contract is often criticised in France[6].

Swiss law also separates contractual liability (Art 97 ff OR) and tortious liability (Art 41 ff OR). Austrian law, on the other hand, does not seem to accord particular significance to classification within one of these two areas; in § 1295 (1) the ABGB stipulates that everyone is entitled to seek compensation from the injuring party for culpably inflicted damage and emphasises: »the damage may have been caused by the breach of a contractual duty or in a manner unrelated to any contract.« Ultimately, nonetheless, the situation is not very different to that in Germany or Switzerland, as individual questions relating to torts and breach of contract are dealt with differently under the ABGB too. Thus, § 1298 ABGB provides for a reversal of the burden of proof at the expense of the injuring party in the case of special legal relationships: the obligor must prove that he was not at fault

4 Cf on this, recently again, *Bälz,* Die vertragliche Erfüllung im System der privatrechtlichen Haftung, Picker-FS (2010) 39 ff.

5 Cf *Börgers,* Von den »Wandlungen« zur »Restrukturierung« des Deliktsrechts? (1993) 32 f.

6 See on this *Brieskorn,* Vertragshaftung und responsabilité contractuelle 66.

in relation to the non-fulfilment of the obligation. Furthermore, the principal – as in German and Swiss law – has comprehensive vicarious liability for negligent conduct on the part of auxiliaries he deploys to fulfil his duties to perform obligations (§ 1313 a ABGB), while vicarious liability for auxiliaries is very restricted in the field of tort (§ 1315 ABGB).

Moreover, with respect to the area of *unlawfulness,* the acknowledgment of the fluid transition area between tort and breach of an obligation is important above all for two reasons: firstly, in the field of tort, duties to behave (Verhaltenspflichten) in such a manner as to protect the purely pecuniary interests of third parties exist only within very narrow limits[7]; those who have entered into obligations with a partner, however, also have far-reaching duties to take care in relation to the pure pecuniary interests of such parties. Secondly, those who have entered into obligations are subject to more comprehensive and stricter duties of care. They must in particular also take action in order to avert damage being suffered by the respective obligee, eg by providing information and warnings. **4/5**

The reasons for the *different levels of protection* are manifold. Insofar as the protection of pure economic interests is concerned, the main reason is that the freedom of individuals to act would be unreasonably restricted if there was comprehensive protection for economic interests under the law of tort because each and every case of damage would lead to a completely unforeseeable increase in the number of those entitled to seek compensation and thus to an incalculable risk in relation to every action taken[8]. Equally, freedom of movement would be severely limited by comprehensive duties to actively avert damage to everybody in general. Furthermore, it must be taken into consideration that someone who enters into an obligation towards another has great influence not only on the legal goods but also on the pure economic interests of such other person[9]. Such greater influence, in other words also greater risk which may be posed, calls for increased duties of care. Ultimately, in the context of obligations based on legal transactions, it is significant that both parties are pursuing their own business interests by means of the contract[10]. If other people or their interests are exposed to greater risk in the pursuance of someone's business interests, it is reasonable to impose

7 On this in more detail *Koziol,* Schadenersatz für reine Vermögensschäden, JBl 2004, 274 ff, and below no 6/48.

8 See on this also *Krebs,* Sonderverbindung 78 ff, 213 f; further *Picker,* Positive Forderungsverletzung und culpa in contrahendo – Zur Problematik der Haftung »zwischen« Vertrag und Delikt, AcP 183 (1983) 476 ff; *idem,* Vertragliche und deliktische Schadenshaftung, JZ 1987, 1052 ff, who, however, over-emphasises this notion of restricted liability insofar as he neglects the further grounds for different liability.

9 *Krebs,* Sonderverbindung 212 f, 263.

10 Cf *Welser,* Vertretung ohne Vollmacht (1970) 76 f; *F. Bydlinski,* Zur Haftung der Dienstleistungsberufe in Österreich und nach dem EG-Richtlinienvorschlag, JBl 1992, 345.

stricter requirements of care and it lies in both parties' interests to minimise damage as far as possible[11].

4/6 The basic principles behind the different treatment of tort and the breach of obligations are true in each case only for a *core area.* In the context of an extended interim area, however, only some criteria decisive in relation to liability apply; moreover these may either apply in full or be attenuated. Hence, it makes sense to view the two areas merely as core zones stipulated by the law with a fluid transition between them rather than as clearly demarcated areas diametrically opposed and irreconcilable with one another[12]. Proceeding precisely along these lines, *Canaris*[13] persuasively elaborated the idea of liability for breaches of special duties of care (Schutzpflichtverletzungen) as a »third lane« between tort and contractual liability, basing this liability on the principle of reliance (Vertrauenshaftung). In his comprehensive investigation of liability based on principles of reliance, *Loser*[14] also arrives at the conclusion that this is similar to contractual liability and must accordingly be stricter than tort liability, thus also creating a »third lane«.

4/7 Still, the notion of liability based on principles of reliance leads to a limitation in respect of the area of legal transactions[15]. However, this is not justified as some basic principles advocating stringent contractual liability also moreover in the case of a proximate relationship[16] justify the imposition of stricter liability, for instance in the field of exclusively social contacts[17], eg when it comes to joint mountaineering[18], or also when it comes to opening facilities to the public[19]. The fact that this relates not to the protection of pure economic interests

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11 See *Canaris,* Schutzgesetz – Verkehrspflichten – Schutzpflichten, Larenz-FS 88.

12 This is also explicitly recognised by the OGH in 3 Ob 509/95 in JBl 1995, 522 = ÖBA 1995, 986.

13 Larenz-FS 84 ff; *idem,* Täterschaft und Teilnahme bei culpa in contrahendo, Giger-FS (1989) 96, 99 f. Cf also *Medicus,* Keller-FS 205; G. *Wagner,* Grundstrukturen des Europäischen Deliktsrechts, in: Zimmermann, Grundstrukturen: Deliktsrecht 233 ff.

14 *Loser,* Die Vertrauenshaftung im schweizerischen Schuldrecht (2006) in particular 693 ff.

15 *Canaris,* Die Vertrauenshaftung im deutschen Privatrecht (1971) 439 ff, 538; *idem,* Larenz-FS 107. *Krebs,* Sonderverbindung 236 ff, 635, and *Loser,* Vertrauenshaftung 163 ff, also only consider this area. *Picker,* JZ 1987, 1055 f, bases his arguments on the existence of a performance relationship – even if this is merely de facto. Taking a different view, however, *Koziol,* JBl 1994, 215 with additional references; *Bälz,* Picker-FS 44 ff.

16 Thus the description by *Bälz,* Picker-FS 44 ff; cf also *idem,* Rücksichtspflichten kraft sozialer Nähe, Kübler-FS (1997) 370 ff.

17 *Hoffmann,* Der Einfluß des Gefälligkeitsmoments auf das Haftungsmaß, AcP 167 (1967) 400 f. Hence, the standpoint taken by the OGH 2 Ob 557/93 in SZ 67/17 = JAP 1994/95 (critical of this *Lanczmann*), is problematic; it held that when sexual relations are commenced not even deliberate misinformation as regards the possibility of conception leads to liability for the resulting child maintenance obligations.

18 On this *Koziol,* Haftpflichtrecht II² 60 f; further *Michalek,* Die Haftung des Bergsteigers bei alpinen Unfällen (1990) 48 ff. Critical of this approach *Galli,* Haftungsprobleme bei alpinen Tourengemeinschaften (1995) 67 ff, who unconvincingly seeks to proceed on the basis of a contractual relationship between the participants.

19 See *Koziol,* Haftpflichtrecht II² 57 ff.

but to goods such as life, health and property that also enjoy absolute protection under tort is no argument against increasing protection in the context of a special relationship[20]: in the area of tort there are only very limited duties to *actively do something,* which nonetheless are of decisive importance when it comes to joint undertakings such as mountain hiking, and which may be deduced from the meaning and purpose of the special relationship at issue. Moreover, at stake in this respect are not only minor injuries that ought to be avoided. Ultimately, the counterargument that those involved do not intend to create any such judicial format cannot prevail[21]: the legal system often imposes duties of (special) care that were not considered and thus not desired by the parties but are nonetheless appropriate in the light of the interests involved and therefore supplemented by the legal system.

4/8 If the interests concerned in the interim zone are such that, on the one hand, some value judgements relevant in the field of tort, and on the other hand, some basic principles decisive in the field of contract, are applicable, it would not be in line with the law if this fact were disregarded and only the rules applicable in tort or alternatively those applicable under contract law were applied. The only type of solution in harmony with the legal value judgements would be to apply the rules of one or other core area in the interim area in full or to combine the rules of both according to whether the decisive basic principles apply. In the following pages, some groups of case will be elaborated as examples; it must be clearly emphasised that the aim thereby is not the formation of rigid, conclusive categories.

II. Groups of cases in the interim area[22]

4/9 In advance it must be emphasised that the elaboration of the decisive basic principles in respect of the core areas may also lead to a sharper distinction or correction of the borders. In this manner, above all the non-fulfilment of agreements to donate something *(Schenkungsverträge),* although this clearly concerns the breach of contractual duties, will not be counted as belonging to the core area of contractual liability. The fact that the party making the gift or donation is not pursuing any economic interests on his/her part, ie the donor's *altruism,* is an argument for limiting this party's liability in the event that the duties to perform are breached. This is intended by § 521 BGB in that it provides for liability on the

20 Thus, however *Krebs,* Sonderverbindung 237 f.
21 This is emphasised, however, by *Krebs,* Sonderverbindung 238 f.
22 See on this also *Krebs,* Sonderverbindung 275 ff.

part of the donor only in the case of gross negligence; although Austrian law contains no such explicit provision, it is assumed that similar applies[23]. Nonetheless, it would be more correct to proceed on the basis that the objective duties of care are reduced[24], albeit only insofar as these affect the fulfilment of the agreement to transfer ownership (Schenkungsvertrag) but not in relation to the protection of absolutely protected interests of the donee[25]. Furthermore, the fact of non-remuneration is an argument that neither the burden of proof rule under § 1298 ABGB nor the stricter rule on vicarious liability for auxiliaries under § 1313 a ABGB should apply[26].

4/10 Closest to the breach of contractual duties to perform are the so-called positive Forderungsverletzungen (violations of duties of care between the partners to a contract, other than by delay or supervening impossibility); these concern the protection of the goods of the partner in the obligation (Integritätsinteresse). It is decisive, firstly, that even if the contract turns out to be null and void[27], there is a special relationship to a certain person and therefore no unreasonable proliferation as regards the compensation of pure economic loss must be feared; secondly, there is a greater possibility of influence on the sphere of the other party and the obligor will have been pursuing his/her own economic interests in the context of entering into the obligation. The duties to protect the pure economic interests of the other and to actively avert risks are thus to be imposed as in the framework of contract law. On the other hand, the concept of guarantee (see below no 6/88), which supports the objective standard of fault for breaches of contract, does not apply in the field of (special) duties of care, so that as in the case of tort fault must be assessed subjectively. In relation to the shifting of the burden of proof under § 1298 ABGB at the expense of the obligor, on the other hand, it must be taken into account that the duties of (special) care are not part of the consideration and therefore the concept of an attenuated guarantee declaration does not carry water. Therefore, a differentiated solution is appropriate, taking as its base the existence of an objective defect within the sphere of the obligor[28]. For similar reasons, the far-reaching liability for auxiliaries (§ 1313 a ABGB), which applies to obligations, does not apply to its full extent either: while the principal is also liable

23 Cf *Stanzl* in Klang IV/1², 618; *Schubert* in Rummel, ABGB I³ § 945 no 1.

24 See *Koziol,* Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 216; in agreement *Bollenberger* in KBB, ABGB³ § 945 no 1.

25 Thus, also *Bollenberger* in KBB, ABGB³ § 945 no 1; *Schubert* in Rummel, ABGB I³ § 945 no 1; OGH 4 Ob 140/77 in SZ 50/137.

26 See on this *Wilburg,* Elemente 147 f, 171, 223; *Spiro,* Erfüllungsgehilfen 104 ff; *Koziol,* JBl 1994, 216.

27 See *Canaris,* Ansprüche wegen »positiver Vertragsverletzung« und »Schutzwirkung für Dritte« bei nichtigen Verträgen, JZ 1965, 475.

28 On this *F. Bydlinski,* Zur Haftung der Dienstleistungsberufe in Österreich und nach dem EG-Richtlinienvorschlag, JBl 1992, 347 ff; *Koziol,* Haftpflichtrecht I³ no 16/30 ff.

for intentional conduct on the part of the auxiliaries when duties to perform are breached, this is not the case when it comes to breaches of the (special) duties of care[29].

4/11 The same as for »positive Forderungsverletzungen« applies when it comes to cases of culpa in contrahendo (ie fault in the conclusion of a contract, specifically in the negotiations; negligence prior to the conclusion of a contract)[30]: the interests at issue here are exactly the same as after a contract has been either successfully concluded or ultimately turns out to be ineffective. Likewise, the same should apply where »a deed is done out of courtesy« (Gefälligkeitsverhältnisse)[31], which lie in both parties interests.

4/12 *Prospectus liability* mainly involves cases in which the party responsible for the prospectus and the potential investor have no contact that is directed at the conclusion of a contract, thus meaning that culpa in contrahendo is precluded[32]. Nonetheless, there is liability for pure economic loss on the part of the party responsible for the prospectus: the prospectus declaration made by this party, presenting him or herself as proficient in the relevant field, is directed at investors, inspires their special trust and endangers pecuniary interests; it is aimed at influencing the business decisions of the potential investors and is always made in the offeror's own economic interests[33]. Hence, prospectus liability is equated with contractual liability in respect of liability for auxiliaries and the reversal of the burden of proof too[34].

4/13 A special relationship may also be based on entrusting someone with tasks, which akin to business contact exerts a *greater possibility of influence* on the sphere of others. Nonetheless, aligning liability in this case to that under contract law would require that there be consideration. An example is provided by § 81 (3) of the Austrian Insolvency Code (IO), which corresponds to § 60 (1) of the Germany Insolvency Code (InsO): The *insolvency administrator* (»Insolvenzverwalter«) is responsible to all parties involved for the pecuniary harm which he causes by breaching the duties of his office. Thus, there are special duties of care towards

29 See below no 6/112 f, and *Koziol,* Haftpflichtrecht II² 343 ff with additional references.

30 See on this *Welser,* Vertretung ohne Vollmacht 73 ff. Cf also *Jansen,* The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law, JETL 2010, 40 ff.

31 On these *Kramer* in MünchKomm, BGB II⁵, Einleitung no 31 ff.

32 The rationale for prospectus liability as a further development of the basic principle of culpa in contrahendo (thus, for example *Welser,* Prospektkontrolle und Prospekthaftung nach dem KMG, ecolex 1992, 301) is therefore not sufficient.

33 On this *Canaris,* Schutzgesetz – Verkehrspflichten – Schutzpflichten, Larenz-FS 92 f, 94; *Brawenz,* Die Prospekthaftung nach allgemeinem Zivilrecht² (1992) 82 ff, 160 ff; *Koziol,* Das Emissionsgeschäft, in: Apathy/Iro/Koziol, Österreichisches Bankvertragsrecht VI² (2007) no 1/95 ff.

34 *Koziol* in Apathy/Iro/Koziol, Bankvertragsrecht VI² no 1/99.

the pure pecuniary interests of the creditors[35]. Liability for his own auxiliaries is regulated according to the rules for contractual relationships, ie pursuant to § 1313 a ABGB, § 278 BGB[36].

There is also a similar special relationship between a *court-appointed expert witness* and the parties to a dispute[37].

4/14 Somewhat more limited is the liability arising out of *contracts with a protective purpose in favour of third parties.* Insofar as third parties are integrated within the protective scope of a contract, regard must be had to the fact that each such third party has independent economic assets. If pure economic interests are also included in the protective scope, there is a risk that liability would be extremely far-reaching. Thus, it appears reasonable that the majority in Austria support the view that the pure economic interests of the third party are only included within the protective scope if the main performance is owed to such third party[38]. Another justification for this attenuation as compared with contractual liability is that the tortfeasor did not pursue his own interests in relation to the third party. The rights of the third party, in particular to bodily integrity and in rem rights, on the other hand, are protected to the same degree as in the context of breaches of contract. This means, in particular, that there is also an active duty to prevent damage occurring. Predominantly, the application of the far-reaching rules on vicarious liability for »performance agents« (Erfüllungsgehilfen) is advocated when it comes to breaches of special duties of care towards third

35 On this *F. Bydlinski,* Schadenersatz wegen materiell rechtswidriger Verfahrenshandlungen, JBl 1986, 638 f; *Shamiyeh,* Die zivilrechtliche Haftung des Masseverwalters (1995) 57 ff; *Welser,* Sachverständigenhaftung und Insolvenzverfahren, NZ 1984, 95 ff.

36 *Chalupsky/Duursma-Kepplinger* in Bartsch/Pollak/Buchegger (eds), Österreichisches Insolvenzrecht Kommentar III[4] (2002) § 81 KO no 95; *Hierzenberger/Riel* in Konecny/Schubert (eds), Kommentar zu den Insolvenzgesetzen (1997) §§ 81, 81a KO no 12; *Eickmann* in Eickmann/Flessner/Irschlinger/Kirchhof/Kreft/Landfermann/Marotzke (eds), Heidelberger Kommentar zur Insolvenzordnung[4] (2005) § 60 no 15.

37 Cf *Welser,* NZ 1984, 95.

38 This is the case when it comes to contracts to the benefit of third parties, indirect representation or factual rendering of performance to third parties. See on this *Apathy/Riedler* in Schwimann, ABGB IV[3] § 882 no 10; *Koziol,* Haftpflichtrecht II[2] 87 f; further OGH 2 Ob 613/89 in ÖBA 1990, 726; 1 Ob 672/90 in SZ 63/187 = ÖBA 1991, 525 *(Canaris);* 1 Ob 503/92 in SZ 65/20 = JBl 1992, 713 *(Iro)* = ÖBA 1992, 841; 1 Ob 631/92 in WBl 1993, 264; 8 Ob 287/01s in JBl 2003, 379; 2 Ob 128/09a in JBl 2010, 445. *Harrer* in Schwimann, ABGB VI[3] § 1295 no 121 f, considers it at least conceivable that pure economic interests in principle cannot be included in the protective scope. In favour of the comprehensive protection of pure economic interests, on the other hand, *Welser,* Die vorvertraglichen Pflichten in der Rechtsprechung des OGH, Wagner-FS (1987) 378. In German law, a stricter standard is applied when assessing whether pure economic damage is to be included; liability for pure indirect third-party damage (Reflexschäden) is rejected: see *Gottwald* in MünchKomm, BGB II[5] § 328 no 128a; *Liebmann,* Der Vertrag mit Schutzwirkungen zugunsten Dritter (2006) 279 f. In Switzerland *Loser,* Die Vertrauenshaftung im schweizerischen Schuldrecht (2006) 624, 772 ff, suggests not limiting the compensation of pure pecuniary damage.

parties[39]; the burden of proof in relation to the fault corresponds to that of (special) duties of care in the cases of »positive Forderungsverletzung« (§ 1298 ABGB)[40].

4/15 The stage when business contacts are only being *initiated* prior to contract negotiations must be treated in the same manner as the inclusion of third parties in the protective scope of a contract[41]: typically, only the person and his/her absolutely protected interests are exposed to increased risk at this stage, but not their pure pecuniary interests.

If contact is initiated *not for economic purposes,* there is still an increased possibility of influence on the sphere of the other party[42], but due to the lack of economic interests behind it, no stricter duty to preserve the pure economic interests of the other party is assumed; nonetheless there are duties actively to prevent damage to the absolutely protected interests of the other party[43]. Vicarious liability for auxiliaries is based only on tort law principles[44].

4/16 A corresponding standard of liability also applies when it comes to *opening facilities to the public*[45]*;* the vicarious liability for auxiliaries only covers auxiliaries that do not act independently (cf § 1319 a ABGB) and the burden of proof is based on the rules of tort. It is possible that similar applies to *co-ownership and neighbourhood relationships*[46]*.* If the *opening of the facilities to the public is in the general interest* of the parties involved, then any intensification of the tortious liability would seem justified only to a minor extent: the duty to take active measures would be limited to non-onerous warnings; vicarious liability for auxiliaries would be regulated under § 1315 ABGB.

4/17 The last link in the chain is ordinary *tortious liability,* which applies when there is no proximate relationship between tortfeasor and victim.

39 *Karner* in KBB, ABGB[3] § 1295 no 19 with additional references; *Grundmann* in MünchKomm, BGB II[5] § 278 no 17.

40 *Karner* in KBB, ABGB[3] § 1295 no 19 with additional references.

41 On this *Koziol,* Haftpflichtrecht II[2] 60 f, 72 f with additional references.

42 Likewise *Hoffmann,* Der Einfluß des Gefälligkeitsmoments auf das Haftungsmaß, AcP 167 (1967) 400.

43 On this *Michalek,* Die Haftung des Bergsteigers bei alpinen Unfällen (1990) 97 ff.

44 See *Michalek,* Haftung des Bergsteigers 106 f; *Koziol,* Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 220.

45 On this *Koziol,* Haftpflichtrecht I[3] no 4/60 and II[2] 57 ff.

46 See *Spiro,* Erfüllungsgehilfen 395 ff, 400 ff; *Kerschner,* Zur Haftung nach § 26 WRG und zum Deliktsstatut des IPR, JBl 1983, 343 f.

III. The problem of concurrent claims

A. Concurrent claims, concurrent bases for claims or uniform basis of claims

4/18 If an absolute right or legal good is injured by breach of a contractual duty, it is usually also possible to qualify the infliction of the damage as a tort[47]. For instance, if someone rents a car and damages it, this would constitute at the same time breach of the duties arising out of the rental contract and tortious infringement of property rights. If injury is suffered by a passenger in a taxi this could simultaneously fulfil the factual elements of the tort of violating bodily integrity and at the same time the breach of secondary obligations under the contract for services. Hitherto, it has been assumed in Germany and Austria either that contractual and tort claims exist independently of one another *(concurrent claims)*[48] or, that there was just one claim but with multiple bases *(Anspruchsnormenkonkurrenz)*[49]. In France, on the other hand, the principle of *»non-cumul«* is endorsed[50].

4/19 It seems more appropriate not to assume different, concurrent bases for the claim but instead a *uniform basis for the claim*[51]*:* as described above, the starting point is that the rules for contractual liability and tortious liability are the two ends of a chain of rules, which are based on the proximity of the relationship between victim and damaging party. In respect of each interim link, an appropriate *overall rule for the liability criteria and the consequences of liability* must be determined on the basis of an evaluation, by reference to one of the two areas of rules or by combining the principles of tortious and contractual liability. Thus, only one *uniform* basis for the claim applies to the damage.

4/20 This must also hold true when there is a contractual relationship between the victim and the damaging party but at the same time a tort has been committed by the infringement of an absolutely protected good and thus the damage, at least prima vista, would seem to fall both within the core area of contractual liability and that of tort liability. It must be noted that not every injury inflicted upon the

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47 Cf *Larenz/Canaris,* Schuldrecht II/2[13] § 83 VI 1. An example from the case law of the OGH can be found in 2 Ob 58/67 in JBl 1968, 88.

48 As regards Germany see *Dietz,* Die Anspruchskonkurrenz bei Vertragsverletzung und Delikt (1934); *Arens,* Zur Anspruchskonkurrenz bei mehreren Haftungsgründen, AcP 170 (1970) 392; *Schlechtriem,* Vertragsordnung und außervertragliche Haftung (1972) 57 ff; *G. Wagner* in Münch-Komm, BGB V[5] Vor § 823 no 68. For Österreich cf *Reischauer* in Rummel, ABGB II/1[3] § 1295 no 25.

49 *Georgiades,* Die Anspruchskonkurrenz im Zivilrecht und Zivilprozeßrecht (1968); *Larenz/Wolf,* Allgemeiner Teil[9] § 18 no 38 ff.

50 *Ferid/Sonnenberger,* Das französische Zivilrecht II (1986) no 2 O 41 ff; *Stoffel-Munck* in: Tourneau, Droit de la Responsabilité et des Contrats[7] (2008) no 1017 ff; *Brieskorn,* Vertragshaftung und responsabilité contractuelle 218 ff.

51 See *Koziol,* JBl 1994, 221 ff. Similar also *Bälz,* Picker-FS 76 ff.

contractual partner inevitably falls within the core area of contractual liability; one of the interim areas may be at issue here too: if failure to comply with (special) duties of care is concerned, ie cases of so-called »positive Forderungsverletzungen«, then this is an area which must be considered to lie between breach of contract and tort, in respect of which a uniform rule must be derived from a combination of the principles of tort and contractual liability.

4/21 Hence, the core area of contractual liability only includes *breaches of performance duties* arising out of legal transactions and based on mutual consideration; accordingly, pure contractual liability applies in such cases. Even if the breach of contract also fulfils the factual elements of a tort – for example, if the custodian actively damages the thing left in his keeping, this does not fall into any interim area between tort and breach of contract but into both core areas. If the relevant rules are not in harmony, the problem is the same from a value judgement perspective as with liability in the interim area: neither tort nor contractual liability rules may be applied in isolation; instead an appropriate combination of the two norm areas must be defined. In my opinion, however, this means neither that the duty to compensate in this respect for specific damage must be assessed separately under both tort and contract law, nor that there are two competing norms in respect of the claim, but that only one applicable complex of norms is valid as regards the specific damage, and this must accordingly be applied alone as is the case within the interim area[52].

4/22 If, then, no concurrence of different norms will arise, the only decisive question is how to find the particular combination out of the different norm areas which alone is appropriate and proportionate to the intensity of the relationship. In this respect, the following problem emerges: liability arising out of a more distant relationship is not necessarily milder than that based on a stronger relationship und vice versa the liability arising out of a more intense relationship is not always stricter than that based on a weaker relationship. Rather, the positive laws laid down by the legal system may mean that tort liability is further-reaching than contractual liability (see below no 4/26 ff).

Therefore, it is always necessary to examine whether the protection provided in the tort area must be seen as a minimal level of protection, below which the contractual claim for compensation may not generally sink, so that the tort norms apply in a supplementary fashion, or whether the liability rule applicable to the special relationship is aimed at limiting the tort protection by means of a lex specialis. The interests at stake in a special relationship can lead to the value judgement that the protection provided under the law of damages must be attenuated

52 In effect this corresponds largely to the French »principe du non-cumul«; on this from a comparative perspective *Immenhauser,* Das Dogma von Vertrag und Delikt 32 ff.

not only in relation to other special relationships but indeed also in relation to the area of tort. One example is supplied by the reduction of employee liability under the DHG. This value judgement of the legislator may certainly not be circumvented by granting independent, tort claims for compensation.

4/23 Nonetheless, it is not the case that the liability rule applicable to a more intensive relationship between damaging party and the victim may always be understood as a comprehensive, conclusive lex specialis in relation to all the rules for less intense relationships, ie in particular to the tort rules. Instead it is always vital to consider how far the special nature extends and whether more general norms might not also be relevant. Thus, for instance, the less strict liability imposed on the donor applies only to the protective scope of the contract but not to goods protected under tort law[53] (see no 4/9).

Admittedly, the view propagated here will lead as a rule to the same conclusions as the theory of concurrent claims or concurrent bases for claims[54]. The solutions, however, are more natural if a single claim is awarded, assessed according to a uniform liability rule applicable only for the respective special relationship.

B. Individual questions

4/24 As fault gives rise in principle to liability, and the extent of the duty to compensate and the prescription period in relation to the claim are subject to the same rules, the question of which of several norms is applicable will often have no particular significance under Austrian law. Under German law, the differences between contract and tort liability were significantly greater, above all since damages for pain and suffering were formerly only available under tort law and consequently the debate regarding the norms to be applied were substantially more heated[55]. Now § 253 (2) BGB provides for the compensation of non-pecuniary damage in respect of both types of claim, hence there has been harmonisation in this sense. Nonetheless, there are still significant differences in both legal systems.

4/25 Under § 708 BGB, for instance, a *member of a partnership* is only liable for the same care as he customarily exercises in his own affairs when fulfilling the duties

53 Cf also *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 71 f.

54 In international private law, however, it can have significant impacts, as there will not be two different claims at issue to be established.

55 On the problems of concurrence in German law *Dietz,* Das Problem der Konkurrenz von Schadensersatzansprüchen bei Vertragsverletzung und Delikt, Deutsche Landesreferate zum VI. Internationalen Kongreß für Rechtsvergleichung in Hamburg 1962 (1962) 192 ff; *Eichler,* Die Konkurrenz der vertraglichen und deliktischen Haftung im deutschen Recht, AcP 162 (1962) 401 ff; *Schlechtriem,* Vertragsordnung und außervertragliche Haftung (1972) 289 ff; *Grunewald,* Eigentumsverletzung im Zusammenhang mit fehlerhaften Werkleistungen, JZ 1987, 1098.

incumbent upon him. This amounts to a less stringent standard as compared with the objective measure provided for in general under § 276 BGB. According to prevailing German opinion[56], this preferential standard is also applicable if the damage caused by the partner is also qualifiable as a tort. This is justified by the close ties of the partners in relation to the pursuance of corporate aims and the degree of care to be taken in relation to the corporate assets, but not, on the other hand, with respect to other damage caused in the context of tort[57]. Other liability-related privileges are also granted priority over general tort rules[58].

In Austrian law, the starting point is that a subjective standard is applicable to fault within the realm of tort, and an objective measure in relation to breach of contract. As the use of an objective standard under contract law is based on the attenuated notion of guarantee (see below no 6/88), the stricter, objective standard must be applied when there is concurrent breach of contract and tort insofar as the notion of guarantee is relevant to the rendering of the promised performance. Beyond this, however, the rules applicable to tort apply.

4/26 A limitation on fault-based liability for breach of contractual duties is assumed in the case of *mora creditoris (Gläubigerverzug)* under § 1419 ABGB: in such a case the obligor is only liable in respect of serious fault[59]. If one wanted to take this view, this could certainly apply for breach of contract but not as regards tortious conduct. There is no reason why the liability in relation to everyone should be limited merely because the obligee is in default. Even taking this view, there is enough scope for the application of this limitation on liability as it is by no means the case that a tort concurs with a breach of contract in every case or even regularly[60]. In truth, however, this issue would not seem to concern a limitation of liability to serious fault in contravention of the general principle. Instead, it should be understood in the sense that the transferor's duties of care are limited in consequence of the mora creditoris[61], but that if these limited duties of care are infringed, there is liability for all pertinent fault. Since the extent of the obligor's duties of care are certainly not limited to less than generally exist under the law of tort in relation to third-party property, tortious liability will not ultimately be more onerous than contractual: according to both rules, all fault gives rise to liability and the contractual duties of care are certainly not more restricted than those under tort, indeed they are possibly more extensive.

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56 *Larenz/Canaris,* Schuldrecht II/2[13] § 83 VI 2 a; further details in *Dietz,* Landesreferate 197.

57 *Schlechtriem,* Vertragsordnung 418 ff, 442.

58 *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 69 ff.

59 See *Gschnitzer* in Klang VI[2] 392; *Mayrhofer,* Schuldrecht I[3] 462; *Schey,* Begriff und Wesen der mora creditoris (1884) 120 ff; OGH 7 Ob 639/80 in SZ 54/90.

60 Above all *Dietz,* Landesreferate 198 f has pointed this out.

61 *Koziol* in KBB, ABGB[3] § 1419 no 5.

4/27 Corresponding considerations must apply to the assumption that *donors* are only liable in case of serious fault (see no 4/9). In this respect too – as already mentioned above – it is in fact a limitation of the duties of care relevant to the donor and not an exclusion of liability for slight negligence that is at issue. If liability is mitigated due to the fact of non-remuneration, this favourable treatment of the donor can only apply to the breach of special duties of performance arising out of the obligation entered into. No reduction of the liability otherwise applicable in relation to everyone would be appropriate[62] as the gratuitous donation can certainly not be allowed to function as a license – even to a limited degree – to inflict damage by tort. In the case of »positiven Forderungsverletzungen«, therefore, there will be no favourable treatment of the donor[63]. The same must also apply to liability arising out of *culpa in contrahendo,* since this concerns the breach of duties of conduct that emerge upon the initiation of business contact and are independent of whether a contract actually results or is valid; therefore, the gratuitous nature of the transaction at issue cannot play a decisive role in this context either.

4/28 If the limitation of liability results not from the legal system but out of a contractual arrangement, it is a question of interpretation whether this affects only liability in respect of breach of contractual duties whereas tort liability is left unaffected or whether the intention is to limit liability in general. Often[64], but not always[65], the intention is to limit the overall protection under the law of damages within the special relationship as regards the criteria for liability or the consequences thereof, ie to limit tort liability as well.

4/29 There are often differences in relation to the *limitation* of claims arising from breach of contract and tort, or *short periods are set* in respect of taking action for contractual claims. For instance, under § 967 ABGB the claims between depositor and custodian must be raised within 30 days; the same applies to loans under § 982 ABGB; pursuant to § 1111 ABGB, the landlord must seek compensation within one year; under § 414 UGB claims against a haulier are prescribed within one year. The prevailing view is that only the periods set for breach of contract are decisive, in other words that they also apply to tort claims. This view is supported by the argument that otherwise the specific purpose of the respective norms would be frustrated[66].

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62 Thus, also *Schlechtriem,* Vertragsordnung 332 ff; *idem,* Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, herausgegeben vom Bundesminister der Justiz II (1981) 1618 ff.

63 Thus, also *Bollenberger* in KBB, ABGB[3] § 945 no 1; *Schubert* in Rummel, ABGB I[3] § 945 no 1; OGH 4 Ob 140/77 in SZ 50/137.

64 *Dietz,* Landesreferate 200 f; *Larenz/Canaris,* Schuldrecht II/2[13] § 83 VI 2 a; *Schlechtriem,* Deliktsansprüche und die Sonderordnung der Haftung, ZHR 133 (1970) 141 ff.

65 *Schlechtriem,* ZHR 133 (1970) 141 ff, rightly emphasises that this concerns, above all, a problem of how far liability exemption clauses may extend.

66 See, eg, *Helm,* Haftung für Schäden an Frachtgütern (1966) 309; *Schlechtriem,* ZHR 133 (1970) 108.

Dietz[67] has rightly pointed out that this fear is unfounded since it is not always the case that there is a tort besides the breach of contractual duties and thus sufficient scope remains for the special contract law rules. All damage inflicted upon pure economic interests, ie without infringing an absolute right, that does not infringe a protective law and almost all damage caused by omission only leads to liability as breach of contract; moreover, the victim only benefits from a reversal of the burden of proof under § 1298 ABGB and the far-reaching vicarious liability for auxiliaries under § 1313 a ABGB within the framework of contractual liability[68]. In my opinion, there is moreover no discernible reason why a damaging party should receive preferential treatment merely because he has a contractual relationship with the victim.

4/30 Thus, it must be assumed that – insofar as nothing else can be deduced from the aim and purpose of the norm – within the short limitation periods set under contract law, it is only the compensation claims based on principles of contract law that are limited whereas the tort law claims for compensation may still be pursued after the expiry of these periods. As the burden of proof is reversed in the case of breaches of contract (§ 1298 ABGB), the short limitation periods also fulfil their purpose from this perspective: the victim can only take advantage of this alleviation of the burden of proof within said short time periods; thereafter he must prove the fault of the damaging party in order to assert his claims for compensation under tort (§ 1296 ABGB)[69].

The same must apply for the same reasons to the compensation claims taken by corporations against their executive bodies, which are time-barred after five years under Austrian law pursuant to § 25 (6) GmbHG[70] and § 84 (6) AktG[71] and under German law pursuant to § 43 (4) dGmbHG[72] and § 93 (6) dAktG[73].

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67 Landesreferate 202, 198 f.

68 Thus, also the OGH 6 Ob 698/89 in EvBl 1990/62 = RdW 1990, 112. Likewise, in principle, 2 Ob 606/84 in JBl 1986, 248 = ZVR 1985/86 = RdW 1985, 244 and 5 Ob 568/85 in SZ 59/147 = JBl 1986, 793 *(Ch. Huber)* = RdW 1986, 367, however, in these decisions the OGH still overlooked the different liability for auxiliaries; cf on this *Ch. Huber,* Zur Verjährung des Schadenersatzanspruchs gegen den Frachtführer, JBl 1986, 227.

69 Likewise OGH 5 Ob 568/85 in SZ 59/147.

70 *Feil* in Gellis (ed), GmbH-Gesetz. Kommentar[7] (2009) § 25 no 30; *Koppensteiner/Rüffler* (eds), GmbH-Gesetz. Kommentar[3] (2007) § 25 no 23.

71 *Nowotny* in Doralt/Nowotny/Kalss (eds), Kommentar zum Aktiengesetz (2003) § 84 no 38; *Strasser* in Jabornegg/Strasser (eds), Kommentar zum Aktiengesetz[4] (2001) § 84 no 110.

72 *Altmeppen* in Roth/Altmeppen (eds), GmbH-Gesetz. Kommentar[6] (2009) § 43 no 137 f; *Wicke* (ed), GmbH-Gesetz. Kommentar (2008) § 43 no 20; *Zöllner/Noack* in Baumbach/Hueck (eds), GmbH-Gesetz. Kommentar[18] (2006) § 43 no 57.

73 *Hüffer* (ed), Aktiengesetz[8] (2008) § 93 no 36 with additional references.

Chapter 5

The basic criteria for a compensation claim

I. Damage

A. Introduction

5/1 If the *compensatory function* is recognised as the primary function of the law of damages, the existence of *damage* must accordingly be a clear prerequisite for any right to compensation to arise and the size of the claim must depend on the extent of the damage. The imposition of »punitive damages« must consequently – as stated above in no 1/23 and 2/55 ff – be rejected within the framework of tort law as the imposition of such does not serve to cover the disadvantage suffered by the victim but instead goes beyond this in order to punish the perpetrator.

With the aim of compensation of harm, tort law is also distinguished on the basis of its fundamental principle from the law on *unjust enrichment,* which while it also deals with interference with third-party goods – insofar as actions for unjust enrichment by interference (Eingriffskondiktionen or Verwendungsansprüche) are concerned – nonetheless is not directed at the compensation of harm suffered by the claimant but instead at the disgorgement of the *advantage* gained unjustly by the enriched (see above no 2/26).

5/2 Only a few legal systems *define* what is to be understood as damage[1]. The ABGB provides one such rare exception with its § 1293: »Damage is any harm that has been inflicted on someone to his patrimony, rights or his person. This is distinguished from loss of profit, which someone is entitled to expect in the normal course of events.« This Austrian tradition is continued by § 1293 (1) of the Austrian Draft: »Damage is any harm that a person suffers to his person, patrimony or any other of his protected interests. If such harm can be measured in money then there is pecuniary damage, otherwise it is non-pecuniary damage«. Inspired by the

1 See *Magnus,* Comparative Report on the Law of Damages, in: Magnus, Unification: Damages 190; further the country reports in the chapter »General Overview« in: Winiger/Koziol/Koch/Zimmermann, Digest II.

ABGB, a definition was also included in the PETL; under the heading »Recoverable Damage« Art 2:101 provides: »Damage requires material or immaterial harm to a legally protected interest«[2].

B. Recoverable damage

5/3 The PETL express the idea very clearly by the heading: in the context relevant here, the question is not what can be understood as damage under the most various aspects; rather, under tort law only such damage is relevant as is deemed *recoverable* in principle by the legal system. The criteria for recoverability are clearly expressed in all the descriptions laid out above: there must be impairment of *interests* recognised and therefore *protected* by the legal system. The ABGB, which does not expressly address the protected interests also takes this as a basis: this results, firstly, from the fact that reference is had to the impairment of rights, and, secondly, from the fact that comprehensive protection is granted to the person under the legal system and only such goods are understood as patrimony as are allocated to the individual by the legal system and thus may be used or consumed subject to the legal possibilities in this respect. Accordingly, *K. Wolff* describes damage as »any state that is to be deemed a disadvantage in legal terms, ie in which a lesser legal interest exists than in the former state«[3].

5/4 This criterion derives from fundamental principles of our legal systems: the goods are allocated by the legal system to individual persons or legal entities and thereby such system also grants the owner of the subjective right – as so eloquently expressed by § 354 ABGB – »the authority to dispose freely over the substance and uses of a thing and to exclude everyone else from such«. Tort law serves – alongside many different rules – to *protect the allocation of goods* and thus the owners of such goods. When the legal system allocates the goods, it recognises therewith that interests are at stake, which are legitimate according to its value judgements and thus also require protection. Hence, tort law certainly does not have the task of protecting interests that are censured by the legal system.

This is shown by very simple and self-evident examples: naturally a disadvantage is suffered by a thief when the thing he went to so much trouble to steal is destroyed by a third party and he consequently loses the use of it. For a gang of criminals it may come to substantial »losses in turnover« if another group enters into unfair competition with it – in terms of the relevant standards valid in the

2 The Acquis Communautaire and case law of the ECHR also take a similar notion of damage as their premise if the basis is harm to legally protected interests; see *Vaquer,* Damage, in: Koziol/Schulze, EC Tort Law 23 ff; *Oskierski,* Schadensersatz im Europäischen Recht (2010) 74.

3 *K. Wolff* in Klang, ABGB VI² 1.

criminal world. While there is undoubtedly an interest in not allowing such harm to occur, this interest is not recognised and accordingly not protected by the legal system, either in the form of preventive or reparative injunctions, actions for unjust enrichment or indeed claims for compensation. In the following (no 6/18 ff) there will be a discussion of the extent to which the legal system does not censure infringements of interests due to their minor nature or at least does not foresee the provision of compensation for such.

5/5 A special area with specific problem issues is formed by those interests that are recognised by the legal system but not allocated to any individuals in particular, ie *general interests.* The most important example in practical terms is the general interest in an intact *environment.* These interests are, however, predominantly not allocated to individual persons or entities – specifically insofar as they are not attached to any ownership right – and thus the available *private law* protective mechanisms cannot be applied: said mechanisms require an interest-holder, who is granted claims against another because such other is accountable for an interference censured by the legal system, understood very broadly. This criterion derives from the private law structural principle of bilateral justification already highlighted above in no 2/92: it is not sufficient to justify why a duty – in this case to compensate – should be imposed; it is also necessary to justify why another subject of the law is granted the entitlement corresponding to such duty.

An obvious solution to the problem would be to allocate these interests in the environment to the public sector – ie to such organisation as is charged with realising and safeguarding the general interests – and thus to fulfil an essential requirement for asserting claims for compensation. However, there are still further problems in connection with the criterion that there be damage because the impairment of the environment per se does not constitute any loss measurable in monetary terms and it is also necessary to resolve the question of whether the public sector as a legal entity is capable of sustaining non-pecuniary damage and, if so, whether it has standing to assert such (on this below no 5/21 f). On the other hand, there should be no great obstacle to taking action for a claim to restoration of the previous state (restitution in kind) or for the expenses incurred in restoration. This notion clearly influenced the EU Directive[4] and its implementation, leading to a very public law focus.

4 2004/35/CE. On this *Duikers,* Die Umwelthaftungsrichtlinie der EG (2006) 53 ff; *Hille,* Die EU-Richtlinie über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden (2007) 99 ff; *Köhler,* Öffentlich-rechtliche Umwelthaftung (2008) 35 ff.

C. Natural, legal or economic definition of damage?

5/6 The above discussions have already shown that tort law *cannot* be based on a *natural* definition of damage[5]: not everything which may be perceived as a disadvantage may also be qualified as damage under tort law. If it is much more decisive whether a legally protected interest is infringed, this also makes it clear that the relevant *definition of damage is legally based.* This becomes even clearer when it is taken into account that tort law – as will be discussed in more detail later – distinguishes between pecuniary and non-pecuniary, real damage and damage established by way of calculation in money, objective-abstract or subjective-concrete damage, and damage measured according to reliance and expectation loss. Thus, the term »damage« is certainly no natural term in any sense predetermined by the law, but rather a *legal term*[6] – as is ultimately the case with all other terms used in legal norms, the meaning of which depends on the aim and purpose of the respective norms.

5/7 For analogous reasons, *neither* is »damage« a purely *economic* term. As European legal systems do not primarily pursue economic goals according to their fundamental value systems and instead it is the individual with all his/her non-pecuniary interests that provides the focus, and social goals and non-economic general interests are taken into account, legal systems cannot be equated to economic systems. Hence, the meaning of the term »damage« cannot be determined by purely economic concepts either.

D. Pecuniary and non-pecuniary damage[7]

1. In general

5/8 The legal system recognises not only pecuniary but also non-pecuniary interests, which indeed may even be accorded a higher rank than economic interests. Therefore, the fundamental personality rights take the highest place in the hierarchy of interests; this is expressed in particular by their special protection under the provisions of the constitution, the European Convention on Human Rights and the UN Charter of Human Rights.

Depending on which interests are infringed, the terms non-pecuniary (immaterial) and pecuniary (material) damage are used. This is expressed in Art 2:101 PETL and in § 1293 (1) of the Austrian Draft.

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5 For the discussion see the detailed description in *Lange/Schiemann,* Schadensersatz[3] 26 ff; further *Magnus,* Schaden und Ersatz (1987) 11 ff; *Koziol,* Haftpflichtrecht I[3] no 2/6 ff.

6 In this sense too, eg, *Lange/Schiemann,* Schadensersatz[3] 38 ff.

7 On the following cf with further references above all *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 173 and 237; *Karner/Koziol,* Ersatz ideellen Schadens 11 ff; *Schobel,* Frustrierte Aufwendungen.

Due to the nature of interests infringed, non-pecuniary damage represents such harm as do not lead to any reduction of economic assets[8]. Instead emotional damage is suffered, which cannot be measured directly in money or assessed by reference to real market processes in economic categories[9]. At the same time, as elaborated by *Schobel*[10] in an astute analysis of the various theories, the crucial criterion for classifying damage as pecuniary is that there is a loss of value in an item that can be *disposed of* on the market for money according to the estimation of the general public – and not merely that of the specific holder of the right. 5/9

2. The special nature of non-pecuniary damage

The compensation of non-pecuniary damage is not only particularly important because this often involves grave damage affecting the core area of personality rights but also because if compensation is refused for non-pecuniary harm, serious *infringements of personality rights* would often remain completely unsanctioned under private law unless they also give rise to consequential damage in the pecuniary context[11]. This kind of outcome would satisfy neither the compensatory nor the deterrent purpose of tort law[12]. 5/10

Nonetheless, most legal systems are restrictive when it comes to granting *damages* in respect of non-pecuniary harm[13]. In the light of what has just been said, this greater reluctance to make awards for non-pecuniary damage is certainly not based on any lower ranking of non-pecuniary interests as opposed to pecuniary interests[14]. Rather, this reservation derives from the difficulties – to a greater and lesser extent – posed by assessing non-pecuniary harm in money or even in determining such in the first place. 5/11

As far as the *assessment* is concerned, it must first be taken into account that non-pecuniary damage cannot be directly evaluated in money but that only a *balancing* of the non-pecuniary harm in money or a certain restitution is possible[15]. Hence, the compensation of non-pecuniary harm in money necessarily requires a discre- 5/12

8 See *Koziol,* Haftpflichtrecht I³ no 2/102 ff with additional references.
9 *F. Bydlinski,* System und Prinzipien 221; *Koziol,* Haftpflichtrecht I³ no 2/11; *Magnus,* Schaden 311.
10 *Schobel,* Frustrierte Aufwendungen 47 ff.
11 *Canaris,* Grundprobleme des privatrechtlichen Persönlichkeitsschutzes, JBl 1991, 220; *F. Bydlinski,* Der immaterielle Schaden in der österreichischen Rechtsentwicklung, von Caemmerer-FS (1978) 785.
12 *F. Bydlinski,* System und Prinzipien 223.
13 Cf *W.V.H. Rogers,* Comparative Report of a Project Carried Out by the European Centre for Tort and Insurance Law, in: W.V.H. Rogers, Non-Pecuniary Loss no 5 ff; *Zimmermann,* Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest II 13/30 no 1 ff.
14 This is also emphasised by *F. Bydlinski,* System und Prinzipien 222.
15 On this in particular *F. Bydlinski,* Die »Umrechnung« immaterieller Schäden in Geld, Liber amicorum for Pierre Widmer (2003) 27 ff; *Schobel,* Frustrierte Aufwendungen 187 f.

tionary decision[16]: the »first assessment« of non-pecuniary harm can only be done very freely and in an arbitrary manner, though an appropriate relation between the compensation awards for different non-pecuniary harm should be striven towards. Naturally, there is not so much free discretion when it comes to awarding compensation in subsequent, comparable cases. The amount of compensation awarded finds its justification in comparison with similar cases already decided. Accordingly, the Austrian OGH[17] considers it to be a decisive question of law whether the non-pecuniary damages awarded by the lower courts fit within the framework of the Supreme Court's case law. The fairness of the damages for non-pecuniary damage thus depends on whether comparable cases are evaluated the same and different cases differently and there is at least a rough proportion between the sums of compensation, which corresponds to the rank of the interests infringed.

5/13 It is often feared that the widespread compensation of non-pecuniary damage will lead to the *commercialisation* of immaterial goods. Even if there is such a danger in individual cases – for instance, an example might be found in the Caroline von Monaco decisions in Germany[18] – it should nonetheless not be over-estimated. Decisions that are in accordance with the system and take into account the fundamental values can certainly counteract it adequately[19].

5/14 In connection with non-pecuniary damage, however, another, a more difficult problem arises, more serious than that of the assessment problems: it is often only *very difficult to establish* whether and to what extent someone has suffered non-pecuniary damage[20]. Hence, when it comes to awarding damages particular importance is attached to objective indicators that help to ascertain whether and to what extent non-pecuniary damage has occurred[21]. The varying degree to which non-pecuniary damage *can be objectivised* is dependent in this respect on the type of right infringed, which must certainly also be taken into account with respect to recoverability.

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16 See on this *F. Bydlinski,* System und Prinzipien 222 f, 224 FN 230.

17 From more recent times, eg, in the decision 2 Ob 135/07b in JBl 2008, 182 = ZVR 2008/59 *(Ch. Huber).*

18 After a fictional newspaper report, Caroline von Monaco was awarded DM 180,000 compensation for non-pecuniary damage suffered (Caroline von Monaco I: BGH in BGHZ 128, 1; OLG Hamburg in NJW 1996, 2870). On this *Karner/Koziol,* Ersatz ideellen Schadens 27 ff; *G. Wagner,* The Protection of Personality Rights against Invasions by Mass Media in Germany, in: Koziol/Warzilek, Persönlichkeitsschutz 175, which refers to the pecuniary aspects when it comes to the personality rights of famous persons.

19 Critical on the objection of commercialisation also *Schobel,* Frustrierte Aufwendungen 191 f.

20 Cf *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 242 f; *Schobel,* Frustrierte Aufwendungen 188 ff; *Stoll,* Empfiehlt sich eine Neuregelung der Verpflichtung zum Geldersatz für immateriellen Schaden? Gutachten für den 45. DJT I/1, 143 f.

21 See *F. Bydlinski,* System und Prinzipien 222 ff; *Karner,* Ersatz ideeller Schäden 81 ff, 84 ff; *Koziol,* Haftpflichtrecht I³ no 11/7 ff. OGH 4 Ob 281/98x in MR 1998, 345 *(M. Walter).* Cf also *Funkel,* Schutz der Persönlichkeit durch Ersatz immaterieller Schäden in Geld (2001) 196 f, 247.

5/15 The special status provided by the ABGB and BGB for compensation for pain and suffering in the case of *bodily injury* can be explained by its relative transparency: compensation for the infliction of physical pain is historically the oldest form of compensation for non-pecuniary damage, in comparative law terms it is indeed a fundamental element of the development of every tort law. Prior to the reform of the law of damages in 2002, § 847 BGB only provided for pain and suffering claims in the case of injury to the body, health or liberty of the person. In Austria its special position is expressed by the fact that under § 1325 ABGB compensation for non-pecuniary damage in the form of pain and suffering damages is owed for injury to bodily integrity even in the case of slight negligence and such claims are also provided for in all non-fault-based strict liability constellations while other non-pecuniary harm only leads to compensation claims in the case of serious fault on behalf of the injuring party (§ 1324 ABGB). This special status of damages for non-pecuniary harm in the case of bodily injuries is based not only on the special rank of the injured legal good but above all on the fact that the pain suffered as well as the duration thereof can be relatively easily determined on the basis of the type and severity of the injury and thus it is particularly amendable to the objectivisation so important for the monetary compensation of non-pecuniary harm[22]. This applies also to the emotional distress that must be taken into consideration: in this context the actual impediment to or frustration of the day-to-day style of living aspired to by the victim serves as the objective basis[23].

5/16 On the other hand, objectivisation supplies an argument supporting the stance of the amended versions of § 253 BGB and the ABGB pursuant to § 1330 ABGB in excluding awards of damages for non-pecuniary harm consisting in pure *libel:* such non-pecuniary harm is particularly inaccessible to objectivisation[24]. The exclusion of damages under § 1330 ABGB for non-pecuniary harm in this respect goes too far, of course. *F. Bydlinski*[25] has pointed out that this may seem justified in the case of everyday libel cases but not when it comes to such infringements as lead to an objectively determinable, serious injury to the reputation of the victim, ie consist in a grave impairment of his social standing. Naturally, the draconian limitation on compensation under § 1330 ABGB can be mitigated de lege lata by restricting the exclusion of compensation to cases of pure libel whereas non-pecuniary harm will be compensated when the person's dignity is

22 See *F. Bydlinski,* JBl 1965, 243; *Karner,* Ersatz ideeller Schäden 81 ff.

23 *Karner,* Ersatz ideeller Schäden 85 ff, 93 f with additional references.

24 *Koziol,* Haftpflichtrecht I³ no 11/8.

25 Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 252 ff; *idem,* Der immaterielle Schaden in der österreichischen Rechtsentwicklung, von Caemmerer-FS (1978) 798. Also critical *Hinteregger,* Der Schutz der Privatsphäre durch das österreichische Schadenersatzrecht de lege lata et de lege ferenda, Liber amicorum for Pierre Widmer (2003) 159 ff.

injured[26]. This serves to defuse § 1330 ABGB somewhat, though it does not of course completely free the Austrian system of any contradictions[27]. § 1316 of the Austrian Draft now provides for a harmonious, general rule. In Germany, the BGH has invoked the Basic Law (Grundgesetz) to override the narrow confines of the BGB and also grants monetary compensation for non-pecuniary harm in cases where general personality rights are infringed and there is serious fault or substantial violation[28]; a corresponding development can also be detected in Italian law[29].

5/17 Finally, it must be stressed that for corresponding reasons – analogous to those in relation to objectivisation – the compensation of non-pecuniary damage is all the more likely when the personality rights injured are relatively *clearly demarcated. Pure emotional damage,* such as diffuse negative emotions or feelings of aversion[30], that are not based on the impairment of a personality right, on the other hand, are in principle irrecoverable[31]. Under German law, this limitation derives from the wording of § 253 (2) BGB, which only mentions injury to body, health, freedom or sexual self-determination, and the narrow containment of compensation for interferences with the general right of personality.

5/18 A further argument against compensating non-pecuniary damage lies in the subjectively distasteful *combination of non-pecuniary values with money*[32]. This idea has played a significant role when it comes to the issue of compensation for non-pecuniary harm in cases where sexual self-determination is concerned or reputation and led to the rejection of compensation under §§ 1328 and 1330 ABGB. Within this field, however, a striking change of view can be detected, which has led to the amended version of § 1328 ABGB, which now provides for »appropriate compensation for the impairment suffered«, which can be understood as meaning the compensation of non-pecuniary harm[33]. Within the field of libel, the change in values has after all impacted on the Media Act (Mediengesetz) in relation to libel by the mass media and the Austrian Draft provides for damages under § 1316 very generally in relation to serious and objectively traceable injuries to personality rights.

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26 *F. Bydlinski,* von Caemmerer-FS 798; *idem,* JBl 1965, 253 f. Following this line, *Canaris,* Grundprobleme des privatrechtlichen Persönlichkeitsschutzes, JBl 1991, 220; *Aicher* in Rummel, ABGB I³ § 16 no 34.

27 On this *Karner/Koziol,* Ersatz ideellen Schadens 98 f.

28 On this *Larenz/Canaris,* Schuldrecht II/2¹³ § 80 I; *Kötz/G. Wagner,* Deliktsrecht¹⁰ (2005) no 363 ff.

29 See *Christandl,* Eine kurze Darstellung der neuesten Entwicklungen im italienischen Nichtvermögensschadensrecht unter besonderer Berücksichtigung des danno esistenziale, in: Patti/Stein/Bariatti/Becker/Slazar/Nehm (eds), Jahrbuch für Italienisches Recht 18 (2005) 277 with additional references; *Bargelli,* Schmerzengeld, danno biologico, Nichtvermögensschaden, Personen-Schaden-Forum 2006 (2006) 15 ff.

30 See on this *Kegel,* Haftung für seelische Schmerzen (1983) 16 ff.

31 See *F. Bydlinski,* JBl 1965, 243 f; *idem,* System und Prinzipien 223; *Karner,* Ersatz ideeller Schäden 79 f; *Koziol,* Haftpflichtrecht I³ no 11/10.

32 See on this *Schobel,* Frustrierte Aufwendungen 190 f.

33 *Danzl* in KBB, ABGB³ § 1328 no 8.

Schobel[34] has persuasively shown that a *consistent value system* of comparative rules can be elaborated on the basis of the values that can be deduced from the law, in which besides the above-discussed criteria that speak against awarding compensation, the grounds in favour of compensation consisting above all in the value of the endangered goods and their worthiness of protection as well as the seriousness of the grounds for liability play a decisive role. 5/19

The grounds speaking for restraint in adjudicating damages for non-pecuniary harm do not apply when it comes to *restitution in kind* (§ 1323 ABGB). Hence, non-pecuniary harm is recoverable to the same extent as pecuniary harm when it comes to this type of compensation, ie whenever restitution in kind is possible and appropriate (see below no 8/14). 5/20

3. Non-pecuniary harm to legal entities

When it comes to compensation of non-pecuniary harm, a special problem arises because legal entities by nature *cannot* have negative *emotions.* Thus, the issue is whether they can in fact sustain non-pecuniary harm. The OGH has affirmed[35] the compensation of non-pecuniary harm to legal entities at least under § 16 (2) UWG[36] and under § 8 (3) MRG[37]. In Germany § 253(2) BGB cannot serve as a basis for the compensation of non-pecuniary harm to legal entities because only natural persons can be entitled to the legal goods listed in this provision. However, even within the framework of the protection of personality rights based on the Grundgesetz (Basic Law) going beyond this, no compensation of non-pecuniary harm is granted to legal entities[38]. 5/21

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34 *Schobel,* Frustrierte Aufwendungen 171 ff.

35 4 Ob 49/95 in SZ 68/17 = ÖBl 1996, 134; in this case a fine of € 4,360.37 was stipulated; 5 Ob 234/10p in JBl 2011, 519: if it is not possible exactly to allocate specific impairments to specific gross negligent violations, a rough estimate of appropriate compensation for hardship suffered may be considered suitable. The OGH had already affirmed the compensation claim of legal entities under § 16 (2) UWG (in JBl 1927, 362; 4 Ob 126/89 in MR 1990, 69 = SZ 62/192; 4 Ob 135/90 in ÖBl 1991, 58). Cf further *Koziol/Warzilek,* Der Schutz der Persönlichkeitsrechte gegenüber Massenmedien in Österreich, in: Koziol/Warzilek, Persönlichkeitsschutz 12 f, 14.

36 § 16 (2) UWG provides: »Besides this, the court may award a reasonable sum of money as compensation for the insults suffered or other personal harm if this is justified in the particular circumstances of the case.«

37 § 8 (3) MRG reads: »All maintenance, improvement, alteration and construction works that a tenant must allow hereunder shall be realised in such a manner as to protect as far as possible the affected tenant's tenancy right; for substantial impairments the landlord, but if it is a tenant that executes the works then such tenant, shall compensate the tenant whose rights have been impaired appropriately, although if there is an at least grossly negligent violation of the duty to protect the tenancy right as far as possible any hardship suffered must also be taken into account.«

38 See on this – very critical – *Rixecker* in MünchKomm I/1[5] § 12 Anh no 21 f and 233. For information on other legal systems see the chapter on »Collective Damage« in: Winiger/Koziol/Koch/Zimmermann, Digest II.

The ECtHR, on the other hand, does in principle award compensation for non-pecuniary damage to legal entities[39].

5/22 As *Fellner*[40] has persuasively argued, very substantial reasons support also granting legal entities protection under the law of torts for the infringement of non-pecuniary rights: she firstly points out that personality rights are intended to regulate co-existence within society and that legal entities are also members of this society and participate in legal relations. When their interests are infringed, she argues that they must be protected in the same manner as natural persons; in this sense she also invokes § 26 ABGB, which proceeds on the basis of the basically equal standing of natural persons and legal entities. *Fellner* does concede of course that legal entities cannot suffer offence. Nonetheless, she emphasises that neither can legal entities themselves conclude contracts or commit unlawful acts, but that the conduct of natural persons, namely their executive bodies, is attributed to them. The attribution principle determining legal capacity may not apply exclusively to the disadvantage of legal entities, she argues, but must also act in their favour when so required by the protective purpose of the norm at issue. Thus, she advocates attributing the negative emotions of their executive bodies to legal entities in the event that non-pecuniary interests are infringed. Above all, the consideration that otherwise infringing the non-pecuniary rights of legal entities would be completely sanction-free, and that the legal system therefore could not exert any deterrent effect, speaks in favour of this solution.

4. Problems when it comes to distinguishing between pecuniary and non-pecuniary damage

5/23 Due to the limited possibilities of restitution in kind when it comes to non-pecuniary damage, reservations as regards awarding damages and the problems discussed in the last section concerning non-pecuniary damage and legal entities, the distinction between pecuniary and non-pecuniary damage is of considerable significance. The relevant classification is particularly contentious when it comes to loss of use, loss or impairment of leisure time and holiday and in the case of frustrated expenses.

5/24 If an object of utility is damaged, the owner is entitled to rent a replacement item in order to avoid suffering further disadvantages as a result of the *loss of use.* The damaging party must compensate the expense he caused, which is clearly

39 ECtHR judgement 6.4.2000, no 35382/97; 16.4.2002, no 37971/97. For further details cf *Kissling/Kelliher,* Compensation for Pecuniary and Non-Pecuniary Loss, in: Fenyves/Karner/Koziol/Steiner (eds), Tort Law in the Jurisprudence of the European Court of Human Rights (2011) no 11/114 ff.

40 Persönlichkeitsschutz juristischer Personen (2007) in particular 200 ff.

pecuniary damage. However, there is a widespread tendency to award the owner compensation even if he does not rent a replacement and does not suffer any pecuniary damage through the loss of the use. Sometimes, this compensation is advocated as *»fictitious expenses for car rental«*[41]*;* but this is not persuasive as an expense that merely might have been incurred but in fact was not, does not indeed lead to any pecuniary loss.

The *»commercialisation theory«*[42] seeks to argue the existence of recoverable pecuniary loss on the basis that such also includes loss of enjoyment, when such enjoyment is to be had for money, for instance, the use of a motor vehicle. When this theory is based decisively on loss of leisure time and of the convenience of use, it must be countered, along with *Larenz,*[43] that convenience and leisure time as such do not constitute pecuniary assets. Another theory, on the other hand, sees the *hindrance of use* as such as pecuniary damage, since the use of a motor vehicle is open to objective evaluation[44]. The owner's right of use is, however, just one aspect of ownership and is already included in its evaluation; the loss of value through damage therefore already includes the pecuniary loss resulting from loss of use and such must not be compensated again separately[45].

Thus, no theoretical twist can disguise the fact that *loss of convenience and leisure time* brought about by deprivation of the possibility of use does not constitute independently recoverable pecuniary damage but instead *non-pecuniary damage*[46]*.* Conceptual jurisprudential type re-labelling and classifications cannot provide a foundation for the recoverability of such; in fact such actually obscure the true value judgement issues. Instead the crucial value judgement issue must be 5/25

41 *Flessner,* Geldersatz für Gebrauchsentgang, JZ 1987, 271.

42 BGH in BGHZ 98, 212. See further the overview of theory and case law in *Ströfer,* Schadensersatz und Kommerzialisierung (1982) 61 ff. The commercialisation theory is persuasively criticised, inter alia, by *Schobel,* Frustrierte Aufwendungen 61 ff; see also *Martens,* Schadensersatz für entgangene Theaterfreuden? AcP 209 (2009) 449 ff.

43 Der Vermögensbegriff im Schadensersatzrecht, Nipperdey-FS I (1965) 496.

44 See *Wiese,* Der Ersatz des immateriellen Schadens (1964) 19 with additional references. Similar *Hadding,* Keine Nutzungsausfallentschädigung bei fiktiver Kraftfahrzeug-Schadensberechnung? Koziol-FS (2010) 663 f, who seeks to view the prevention of the possibility of use as pecuniary damage because the victim's economic expenses (contingency costs) are subsequently devalued.

45 On this *Larenz,* Nipperday-FS I 497; *F. Bydlinski,* Der unbekannte objektive Schaden, JBl 1966, 440; *Mayer-Maly,* Schadenersatz für Gebrauchsentbehrung? ZVR 1967, 286 f; *Koziol,* Haftpflichtrecht I³ no 2/110 ff; *Würthwein,* Schadensersatz für Verlust der Nutzungsmöglichkeit einer Sache oder für entgangene Gebrauchsvorteile? (2001) 251. On loss of value resulting from loss of usability see also *Bitter,* Wertverlust durch Nutzungsausfall? AcP 205 (2005) 777 ff.

46 This is also pointed out by the ECtHR, cf *Kissling/Kelliher,* Compensation for Pecuniary and Non-Pecuniary Loss, in: Fenyves/Karner/Koziol/Steiner (eds), Tort Law in the Jurisprudence of the European Court of Human Rights (2011) no 11/108. *Würthwein,* Schadensersatz für Verlust der Nutzungsmöglichkeit 442 ff seeks to escape this conclusion by correcting the difference theory to make items compensable that are not covered by the difference theory.

addressed: is this category of non-pecuniary damage different, are there objective reasons for why the usual reticence displayed by the law when it comes to compensating non-pecuniary damage should be abandoned in precisely these cases and would such further-reaching compensation be reconcilable with positive law?

The starting point of the deliberations must be that the compensation of non-pecuniary damage is limited because the incurrence of such damage can hardly be objectivised and assessing it is particularly difficult. If these obstacles do not apply or do not apply to the same extent in this type of case, then this would represent a decisive argument for why compensation should be awarded to the same extent as in cases of pecuniary damage. The starting point of the argument should be that the loss of convenience and leisure time constitutes non-pecuniary damage that is more easily *objectivised* because – as the theory of commercialisation highlights – on the market money is usually expended in order to cover such non-pecuniary interests, whether in order to procure such items of use or by rental. At the same time, this defuses the assessment issue: the usual expenditure on the market in this respect provides objective indications for the assessment of appropriate compensation for the non-pecuniary damage.

5/26 Under Austrian law, such compensation may well be based on the general rule of § 1324 ABGB[47], which nonetheless only provides for a *paying off of the »insult suffered«,* and thus the non-pecuniary damage, in cases of serious fault[48]. Compensation pursuant to this provision is not opposed either – contrary to my earlier view[49] – by § 1331 ABGB, which only refers to the compensation of the value of special affection when it comes to damage to things and attaches the compensation of such to a specially qualified fault. This may be understood as meaning that stricter requirements, ie specially qualified fault, only apply to the value of special affection; whereas the general rule of § 1324 ABGB continues to apply to other non-pecuniary damage associated with the damage to the thing that can be objectivised. It would be contrary to the spirit of the law to exclude the compensation of non-pecuniary damage other than the value of the special affection and the provision cannot be interpreted in this manner.

5/27 In Germany, however, damages for the mere loss of the conveniences of use or of leisure time continues to conflict with the strict rule under § 253 BGB, so that

47 It must be taken into account that the compensation of non-pecuniary damage usually may not substantially exceed the expenses which would have been necessary in order to rent a replacement article: if the non-pecuniary damage threatens to exceed the expense of rental, then on the basis of his duty to mitigate damage (§ 1304 ABGB, § 254 BGB) the victim must procure a replacement.

48 On this *Karner/Koziol,* Ersatz ideellen Schadens 18 with additional references. Fundamental *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 179 f, 182, 240, 247. Following this line *Karner,* Ersatz ideeller Schäden 76 ff; *Koziol,* Haftpflichtrecht I³ no 11/6; *Mayrhofer,* Schuldrecht I³ 323; *Schobel,* Frustrierte Aufwendungen 23.

49 Haftpflichtrecht I³ no 2/115.

awarding compensation means a clear *circumvention of the law; nevertheless,* this has hitherto not stopped case law and literature from affirming such claims[50].

In the well-known sea journey case[51], the German BGH referred to »commercialisation« and saw the loss of enjoyment of a holiday trip as pecuniary damage and accordingly awarded compensation. The *impairment of leisure time and holiday* per se is, however, undoubtedly non-pecuniary harm[52]. The »trick labelling« can certainly not offer any persuasive justification for awarding compensation; instead, as in the case of deprivation of use, the crucial issue is whether there are objective grounds for extending the scope for compensating non-pecuniary damage. The greater than usual capacity for objectivisation and quantification may indeed provide adequate justification.

5/28 Within the field of *contractual liability,* in particular in the case of travel contracts, it was hitherto already possible to obtain compensation for non-pecuniary damage under Austrian law in the case of gross negligence (§ 1324 ABGB), if the contract was actually aimed at promoting non-pecuniary interests[53]. The rigid preclusion of compensation for non-pecuniary damage in the field of contractual liability under § 253 BGB, on the other hand, did not allow this; the legal value judgement was more or less deliberately circumvented by the conceptual jurisprudential trick of designating the loss pecuniary damage[54].

That this is nothing more than a dogmatically untenable attempt at circumvention is shown by the fact that § 651f BGB now provides for appropriate indemnification in the case of travel contracts when the enjoyment of the holiday is impaired and this is regarded as compensation for *non-pecuniary* damage[55]. However, this new rule has created an inexplicable contradiction in German law between travel contracts and other agreements. In Austria, the compensation of non-pecuniary harm has also been explicitly provided for under § 31 e (3) KSchG[56]. However, this rule – which is based on the degree of the impairment – clearly fits into the overall system: if damages are awarded for loss of holiday enjoyment only in the case of *substantial* violations of the travel contract, but – despite § 1324 ABGB – even in cases of *slight* negligence, this does not conflict with the general rules but is in line with the general principle that the gravity of the impairment[57] required for the compensation of non-pecuniary harm in money can be based either on the degree of fault or the extent of the damage.

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50 Critical, however, *Martens,* AcP 209 (2009) 449 ff.
51 BGH in NJW 1956, 1234.
52 See OGH 3 Ob 544/88 in SZ 62/77 = JBl 1989, 792 *(Siegl); Koziol,* Haftpflichtrecht I³ no 2/116.
53 *Karner/Koziol,* Ersatz ideellen Schadens 109 f with additional references.
54 Cf on this *Stoll,* JZ 1975, 255.
55 *Geib* in Bamberger/Roth, BGB II² § 651f no 17 with further references.
56 On this *Karner/Koziol,* Ersatz ideellen Schadens 114 f.
57 Cf *F. Bydlinski,* System und Prinzipien 224.

5/29 *Frustrated expenses* are manifestly pecuniary damage in some cases, for instance when it comes to expenses made in fulfilment of or in return for performance, on the basis of reliance on the validity of a contract and which miss their purpose because of the invalidity of the agreement or the impossibility of performance. This senseless pecuniary expenditure is caused by the partner to the transaction[58] and must thus be compensated as pecuniary loss if such was at fault[59].

In other cases, however, precisely the *causation* of the frustrated expenses and thus the *pecuniary loss* seem to be missing: if the damaging party damages a motor vehicle and this must go to the workshop for two weeks, the owner of the motor vehicle still has to pay third-party liability insurance premiums, motor vehicle tax and garage rental for this period. However, these expenses were not caused by the damaging party as the owner would have had to pay them even had the damage not occurred; the damaging party merely brought about the circumstance that these expenditures were frustrated because the owner could not use the motor vehicle[60].

5/30 According to widespread opinion, however, such frustrated expenses are deemed equivalent to pecuniary damage and the damaging party must render compensation even though one of the basic requirements for duties to compensate, namely the *causation* of the pecuniary damage, has not been fulfilled[61]. This unconvincing approach also camouflages the real problem: the harm caused by the damaging party does not lie in the pecuniary expenses but in the deprivation of the use of the car. Insofar as the loss of use leads to monetary loss – for example, because business operations are interrupted – there is certainly pecuniary damage; insofar as this is not the case only non-pecuniary damage is involved, namely the loss of the conveniences associated with the use and of leisure time. This would place frustrated expenses under the general restrictions that the law applies when it comes to the compensation of non-pecuniary damage in the field of tort. The actual and really crucial value judgement issue – that is circumvented by the fictional assumption of causation of pecuniary damage – is there-

58 *Koziol,* Haftpflichtrecht I³ no 2/87 ff, 99 ff and 119 with additional references.

59 § 284 BGB now provides expressly for the compensation of frustrated expenses but it violates previously recognised principles in two respects: on the one hand, it does not take the breach of pre-contractual (special) duties of care as its starting point but instead non-performance or inadequate performance of an existing duty to perform; as the creditor would also have paid these costs had performance been duly and properly realised, the contractual breach consisting in the non-performance or inadequate performance does not represent a conditio sine qua non in respect of these costs, meaning that such compensation in principle does not even come into consideration within the framework of positive contractual interests. Furthermore, he also arrives in end effect at monetary compensation for non-pecuniary damage that was caused by non-performance or inadequate performance. See also on this *Ernst* in MünchKomm II⁵ § 284 no 6, 7, 10 and 11.

60 A detailed description of the problem can be found in *Schobel,* Frustrierte Aufwendungen 1 ff.

61 See on this *Koziol,* Haftpflichtrecht I³ no 2/120 f; *Schobel,* Frustrierte Aufwendungen 61.

fore whether there are sufficient objective reasons to abandon the customary reticence when it comes to far-reaching compensation of non-pecuniary damage and to award compensation in the case of frustrated expenses to the same extent as for pecuniary damage.

5/31 This issue is resolved persuasively by *Schobel*[62] who developed a differentiated comparative-flexible overall concept on the basis of the discernible legal value judgements (see above no 5/19) and assessed the different categories of frustrated expenses cases on this basis. In relation to the oft-discussed and practically relevant case of the frustrated general expenses for a motor vehicle, *Schobel*[63] considers the proximity to pecuniary damage, the relatively good measurability of the non-pecuniary damage on the basis of the frustrated expenses, the high degree of adequacy and the strong connection to unlawfulness and thus arrives at the conclusion that such expenses are recoverable even in the case of slight fault.

E. Real and calculable damage

5/32 The actual negative change of goods can be referred to as *real injury:* the dent sustained by a motor vehicle in a rear-end collision, the destruction of a book in a fire, the wound inflicted by a knife, the damage to reputation caused by libellous statements. The broad definition of damage under § 1293 ABGB also includes such real damage.

5/33 The concept of real damage is relevant as regards the legal consequences: *restitution in kind,* ie the restoration of the previous state (§ 1323 ABGB) or of the position that would have otherwise existed (§ 249 (1) BGB), is always aimed at the compensation of real damage. The question of whether or not there is real damage does not depend on whether there has been impairment of assets measurable in money or of non-pecuniary goods. Therefore, it is also of especial relevance when it comes to compensating non-pecuniary damage as real damage by its nature does not give rise to the problem of assessment in monetary terms (see above no 5/20 and below no 8/14).

5/34 Vice versa, *calculable damage* involves harm measured in monetary terms. It is always calculated by means of *computing the difference,* although the values compared may differ. The so-called difference method (Differenzmethode) going back to *Mommsen*[64] is directed at determining the harm sustained in the overall assets plus what will be sustained in the future, thus comparing the hypothetical state of the assets in the absence of the damaging event with the actual state as a result of

62 *Schobel,* Frustrierte Aufwendungen 171 ff.
63 *Schobel,* Frustrierte Aufwendungen 307 ff.
64 *Mommsen,* Zur Lehre von dem Interesse (1855) 11.

the damaging event. As this harm, which is referred to as an interest, includes all effects on the individual victim's assets it is referred to as *subjective-concrete damage.* If at the time the damage is detected the negative effects on the victim's assets are still ongoing, this does not mean no conclusive award can be made under the law provided there are sufficient indicators to estimate the harm that will be sustained in future (§ 1293 ABGB, § 252 BGB; see for more detail no 8/18 ff below).

5/35 If, on the other hand, only the disadvantageous change in a certain asset is determined according to the notion of continuation of a right (Rechtsfortsetzungsgedanken) on the basis of the general value in the market (market value, ordinary value); §§ 305, 1332 ABGB), this is referred to as *objective-abstract* damage. When determining the damage in this manner, the relations to the victim's other goods, the effects on the overall existing assets and the growth of such in the absence of the damaging event, for example the procurement of profit, are not taken into consideration. Likewise, this damage can only be determined by calculating the difference. However, unlike the so-called difference method that serves to determine the interest, this is not directed as the overall assets of the specific victim. The subjective possibilities of use and thus also the opportunities to obtain profits are thus disregarded but they are taken into account in an objectivised fashion in the market value of the damaged good since this – as is expressed by § 305 ABGB – is based on the benefit derived from a thing, »which it renders with regard to time and place usually and in general«. The degree of objectivisation is thus even higher than when it comes to the assessment of lost profit according to the »usual course of things«, as in such case the subjective circumstances of the specific victim are taken as a basis.

Determining the objective-abstract damage is also different in time terms – as obvious even in the context of loss of profits – from assessing subjective-concrete harm. No regard is had to the future consequences for the victim's assets, instead the damage is – in the words of § 1332 ABGB – »compensated according to the ordinary value of the thing at the time of the damage.« According to the notion of continuation of a right, it is after all only the present, ordinary value that is decisive and this determines the amount of compensation, which replaces the good destroyed.

5/36 It is only possible to speak of calculable damage in the context of pecuniary harm since non-pecuniary harm per definition cannot be measured in monetary terms (see above no 5/12). Nonetheless, non-pecuniary damage is compensable in money – in the absence of other alternatives – insofar as the victim is awarded a sum of money that allows him to obtain positive feelings as compensation for the negative feelings he suffered, as far as possible in corresponding proportions[65].

65 See on this issue *F. Bydlinski,* Die »Umrechnung« immaterieller Schäden in Geld, Liber amicorum for Pierre Widmer (2003) 27, and below no 8/16 f.

F. Positive damage and loss of profits

5/37 The time-honoured distinction between actual loss (damnum emergens) and loss of profit (lucrum cessans) is also addressed in § 252 BGB. However, it is no longer accorded any significance as it is expressly provided that the damage to be compensated includes lost profits.

5/38 The ABGB is very different in this respect, distinguishing in § 1293 between actual loss and lost profits and also accords this distinction *great significance* in §§ 1323, 1324 ABGB: if there was slight negligence on the part of the damaging party there is merely a claim to the compensation of the actual loss; only when there was serious fault are lost profits recoverable. Behind this position is the notion – hardly applicable at this level of generality – that the victim is more seriously affected by the loss of already existing goods than by the loss of merely anticipated inflows. The overly rigid attachment of the extent of compensation to the degree of fault has however rightly been subject to criticism in academic literature[66]. The case law also clearly sees this strict distinction as inappropriate and has expanded the concept of actual loss so far that the compensation of lost profits only retains minor significance. Specifically, actual loss also includes any chance of profit that will be realised with probability approaching certainty in the opinion of the market[67]. In the Austrian Draft the strict limitation of compensation to actual loss in the case of slight negligence causing the damage has consequently been abandoned and full compensation is provided for in principle for every degree of fault.

G. Damage in the case of unwanted birth?

1. The various approaches[68]

5/39 In polemic and emotional discussions it is often misleadingly alleged that this concerns the issue of whether an unwanted child can be seen as damage or not. However, that is absolutely not the crux of the debate as naturally all opinions to be taken seriously[69] accept that the *child itself constitutes no damage.* The

66 See *F. Bydlinski,* System und Prinzipien 225 ff.

67 OGH 1 Ob 315/97y in SZ 71/56; further references in *Karner* in KBB, ABGB[3] § 1293 no 5.

68 Comparative law aspects are treated by *Brüggemeier,* Haftungsrecht 225 ff; *van Dam,* Tort Law 156 ff; *Hogg,* Damages for Pecuniary Loss in Cases of Wrongful Birth, JETL 2010, 156 ff; *Koziol/B.C. Steininger,* Schadenersatz bei ungeplanter Geburt eines Kindes, RZ 2008, 140 ff; *B.C. Steininger,* Wrongful Birth and Wrongful Life: Basic Questions, JETL 2010, 125 ff; see also the reports in Winiger/Koziol/Koch/Zimmermann, Digest II in chapters 20 and 21.

69 In this manner it is emphasised by the OGH in its decision 5 Ob 148/07m in JBl 2008, 490 *(Pletzer)* = RZ 2008, 161 section 4.2.2.: »Self-evidently, the birth and existence of a child cannot be seen as damage.« In the same sense, the BGH in BGHZ 124, 128. *Picker,* Schadensersatz für das

OGH[70] rightly holds, however, that even the emergence of a commitment, ie every additional expense or additional burden, is deemed to be damage and stresses: »The fact that in the ordinary sense of § 1293 ABGB the maintenance costs for an unwanted child also represent damage is not only beyond doubt but is self-evident.« The decisive question is thus merely whether compensation may be sought for these maintenance costs. The basic criteria and thus the fundamental value judgements which decide the answer have been clearly pointed out by *F. Bydlinski*[71]*:* the crux is the consistent pursuance of either a family law or a law of damages approach.

5/40 *The family law approach* proceeds on the basis that the personal and financial legal consequences of the birth of a child are conclusively regulated under family law; hence this already cuts off at the roots the issue of whether the child, or at least the financial consequences of its existence, can trigger consequences under the law of damages. Such *approach* is different; it examines the recoverability of the financial effects of the child's existence according to the criteria of liability under the law of damages. This second approach arrives in line with the »difference method« to the conclusion that there is damage as the imposition of maintenance obligations upon the parents certainly reduces their financial assets; this disadvantage must be compensated by the causer if such has acted unlawfully and was at fault.

5/41 While the view that the maintenance costs for an unplanned child are recoverable in principle is very widely supported as regards German law[72] and Swiss law[73], the OGH[74] has largely embraced a mixed and thus *a mediatory solution*[75]*;* this was also adopted subsequently by the Austrian Draft (§ 1321 (1)). The mediatory solution takes a family law approach on the one hand, and does not deem the disadvantage lying in the emergence of maintenance costs to be recoverable. This is based above all on the argument that the tortfeasor did not merely cause the

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▹▹ unerwünschte Kind (»Wrongful birth«), AcP 195 (1995) 501 ff, speaks of an undisputed iron rule to the effect that a person may never even indirectly be evaluated as »damage« or »harm«. Nonetheless, with unconvincing arguments he then rejects the possibility of differentiating between the child and the maintenance costs and thus rejects the recoverability of such; on this critically *Koziol,* Haftpflichtrecht I³ no 2/25.

70 In the decision 5 Ob 148/07m under section 4.2.1.

71 *F. Bydlinski,* Das Kind als Schadensursache im Österreichischen Recht, Liber amicorum for Helmut Koziol (2000) 34 ff. See also the detailed analysis by *Ch. Hirsch,* Arzthaftung bei fehlgeschlagener Familienplanung (2002) 23 ff; further *Koziol/B.C. Steininger,* RZ 2008, 138.

72 BGH in BGHZ 76, 249; BGHZ 124, 128; *Oetker* in MünchKomm, BGB II⁵ § 249 no 33 ff; *G. Wagner* in MünchKomm, BGB V⁵ § 823 no 86 ff.

73 BGE 132 III 359 with literature references.

74 See on this *Koziol/B.C. Steininger,* RZ 2008, 138 ff; with additional comparative law references. Most recently on this OGH 6 Ob 148/08w in JBl 2009, 108.

75 *Koziol,* Haftpflichtrecht I³ no 2/28 f; agreeing and providing more detailed rationale *Ch. Hirsch,* Familienplanung 50 ff. Critical on this *Griss,* Unerwünschte Geburt – Ein Fall für die Gerichte? Koziol-FS (2010) 644 ff; *Schwarzenegger,* (Keine) Haftung bei wrongful birth? Posch-FS (2011) 719 f.

emergence of maintenance obligations; rather a comprehensive family law relationship has also been created, consisting of pecuniary and also non-pecuniary duties and rights. As the pecuniary and non-pecuniary components are inseparably interwoven, no one duty may be viewed in isolation, it is always necessary to look at the *overall relationship,* which however cannot in principle be viewed as a disadvantage. On the other hand, this mediatory solution does allow a claim for compensation if the parents' maintenance costs represent a truly exceptional burden and thus the overall relationship can no longer be considered balanced.

In this respect, however, the issue is not whether the maintenance must be paid for a child with or without a disability[76], the only decisive factor is whether an exceptional burden is constituted by the maintenance obligations due to the financial situation of the parents. Such a burden can even be the case when it comes to average maintenance costs for a child without a disability and may, vice versa, not necessarily be the case even if very high costs for a child with a disability emerge depending on the parents' respective financial capacity.

The mediatory solution not only gives rise to difficulties in drawing the distinction between usual and exceptional burdens[77], but also fundamental questions of how such a combined approach can be justified. This will be looked at in more detail.

2. The methodological justification

5/42 As *F. Bydlinski*[78] emphasises, the problem is that there is a clash between two countervailing basic values: the principle of human dignity and that of family care speak for a personal interpretation of the concept of damage; the liability functions and grounds for liability under the law of damages, conversely, for the isolated consideration of the financial aspects. *F. Bydlinski* feels that it is necessary in this context to draw on the general principles of law; at issue is the thorny problem of balancing conflicting principles. Thus, it is necessary to optimise the approach: as the colliding principles cannot be implemented in full due to the conflict, they must be balanced against each other to obtain a hierarchical relation. It must be determined to what extent and in the case of which factual characteristics within the conflict area, either of the two principles should prevail. Limitations on one of the principles are in any case only permissible insofar as

76 This is rightly emphasised by *Ch. Hirsch,* Familienplanung 51; The OGH, however, tends in some decision towards such differentiation, cf the case law analysis by *Koziol/B.C. Steininger,* RZ 2008, 138 ff, and by *B.C. Steininger,* Wrongful birth revisited: Judikatur zum Ersatz des Unterhaltsaufwands nach wie vor uneinheitlich, ÖJZ 2008, 436.

77 On this in detail *Ch. Hirsch,* Familienplanung 82 ff.

78 *F. Bydlinski,* Liber amicorum for Helmut Koziol 39 ff. Critical *Kletečka,* Wrongful Birth, Wrongful Conception, JBl 2011, 749 ff.

this is required in order to optimise the fulfilment of the other, conflicting principle (»rule of balancing«). Furthermore, none of the conflicting principles may be allowed to have no effect whatsoever in the course of this balancing, as this would mean it was not recognised as an equally valid principle of the legal system.

5/43 *F. Bydlinski* points out that both the family law solution and the approach under the law of damages are inadequate: the former completely ignores the basic law of damages functions and liability principles at issue in rejecting any form of compensation. The pure law of damages approach, on the other hand, neglects the intrinsic personal value of the »source of damage« by focussing on the financial consequences in isolation. Thus, both models only have regard to their preferred principles when it comes to a specific problem, and override those of the other model; this does not constitute any kind of balancing of the »priorities«.

5/44 The combination idea can thus find its methodological justification in the *balancing of principles*[79]*:* the law of damages does not have the purpose of steamrolling disadvantages governed by family law that only represent one side of the existence and thus the intrinsic personal value of the child. Insofar, as *F. Bydlinski* emphasises, the principles of personal dignity and family bonds have priority over the compensatory functions and grounds for liability when it comes to balancing them against each other. In turn, on the other hand, these first-named principles must be subjected to a certain restriction in order to allow the principles of the law of damages to come into effect if the maintenance costs for the child mean a really exceptional burden for the parents.

5/45 However, the methodological justification of the mediatory solution must not only be considered at the abstract level of the general principles of law but also, in my opinion, at the more concrete methodological level, specifically within the context of *the law of damages.*

The combination approach proceeds on the basis that the parents are not usually entitled to any compensation for unwanted birth because the burden of obligations imposed by the maintenance costs cannot be seen in isolation as comprehensive family law relations have emerged and thus various pecuniary and non-pecuniary dimensions must be taken into account[80]. The establishment of such a comprehensive parent-child relationship can as a rule not be regarded as pecuniary damage. As material and immaterial rights and duties are inseparably intertwined and constitute a unified whole, no obligation can be taken out in isolation and classified as damage.

5/46 In conclusion then, it is suggested that an approach well-tried in the field of pecuniary damages be taken, namely the adjustment of damages due to benefits received *(Vorteilsanrechnung).* This arises in part at least from the method of

79 *F. Bydlinski,* Liber amicorum for Helmut Koziol 45 f, 65.
80 See *Koziol,* Haftpflichtrecht I³ no 2/28 with additional references; *Ch. Hirsch,* Familienplanung 53 f.

calculating the damage according to the so-called »difference method«: the damage constitutes the difference between the hypothetical pecuniary state in the absence of the damaging event and the actual pecuniary state as a result of the damaging event[81]. As the entire financial state is taken into account in this assessment, it is a matter of course that the benefits also caused by the damaging event have the effect of reducing the damage. Nonetheless, this adjustment of the damages accordingly may not be carried out mechanically, rather it is necessary to carry out an evaluative analysis[82].

5/47 However, this adjustment of damages to take account of benefits received is only recognised within the *pecuniary field.* On the other hand, it is generally assumed that a pecuniary advantage shall not be deducted from a claim for pain and suffering and equally pecuniary disadvantages are not set off against non-pecuniary advantages[83]. The rationale in this respect as regards the second variation at issue here is that if non-pecuniary advantages were offset, the victim would only receive compensation for part of his pecuniary damage whereas he would have to bear the other part himself; the pecuniary losses sustained would therefore not be indemnified in full. This would seem untenable in view of the compensatory function of the damages claims, which carries full force when it comes to pecuniary damage.

However this argument is not compelling as it requires what must be proved: if reference is had to the compensatory function then the question is whether this is ever separately directed at the pecuniary and the non-pecuniary fields respectively[84]. The compensatory function could after all also be understood as meaning that the damage should be regarded as a whole and, accordingly, that only the *sum of the pecuniary and non-pecuniary disadvantages and advantages must be compensated.* It is also possible to argue that the notion of prohibition on enrichment will not be adequately taken into consideration if another approach is adopted, as the victim gains a non-pecuniary advantage and thus is put in a better position overall than in the absence of the damage. It is by no means clear that all non-pecuniary advantages should be left disregarded when making an overall assessment, even though the legal system provides for the – admittedly difficult – calculation of non-pecuniary interests and orders their compensation in money.

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81 See *Karner* in KBB, ABGB³ § 1293 no 9 with additional references.

82 *Karner* in KBB, ABGB³ § 1295 no 16 with additional references.

83 See on this *Pletzer,* Vorteilsausgleich beim Schmerzengeld? JBl 2007, 428 ff.

84 Likewise this rests on an unproven requirement, eg, when *Engel,* Haftung Dritter für die unerwünschte Geburt eines Kindes, ÖJZ 1999, 627, states that like can only be offset against like and this is interpreted as meaning that non-pecuniary interests cannot be balanced by pecuniary interests. Naturally, it is only possible to offset interests of a like nature; however, this can be facilitated by evaluating non-pecuniary interests in money as is a matter of course when such are compensated in money.

5/48 Hence, this counter-argument is not persuasive. Nevertheless, it must be conceded that the counter-theory of general offsetting also appears problematic. Specifically, when the legal system by no means always considers non-pecuniary interests to be recoverable and certainly not according always on the same basis as pecuniary interests, then at least the corresponding reticence must be exercised when offsetting such interests as an advantage. Hence, greater *differentiation* is clearly necessary. Nonetheless, this conclusion does indicate that it is permissible to ask whether the issue at stake here does not display special features that speak for the offsetting of non-pecuniary advantages against pecuniary disadvantages[85].

The cases discussed here certainly do display a relevant specificum in my opinion: the damaging party causes not only duties of maintenance but also a comprehensive family law relationship, in which pecuniary and non-pecuniary components are inseparably interwoven. The family law relationship, caused by the damaging party, is not as such accessible to classification under either the pecuniary or the non-pecuniary category. Hence, it would consequently be utterly arbitrary to consider just one aspect and leave all others aside. This would certainly contravene the principle of comprehensive assessment of damage.

5/49 *Engel*[86], on the other hand, argues for the *autonomy* of the pecuniary maintenance aspects and seeks to justify this with reference to examples that in his opinion show that the autonomy of the maintenance law relationship is always assumed. It is true that pursuant to § 1327 ABGB and likewise under § 844 BGB, surviving dependants may take action based on the right to maintenance in isolation. In such cases, however, the specificum relevant to our issue of simultaneous causation of non-pecuniary advantages – this would be happiness at the death of the person liable to pay maintenance – does not typically apply. The same applies for cases where the father may take separate action based on the increased maintenance costs incurred due to a child being injured: again, the injury to the child is unlikely to cause any non-pecuniary advantage to the parents. It must also be taken into account that this does not concern the causation of an overall family law relationship, as of course the conduct of the damaging party only causes the pecuniary expense to the parents but does not affect the other aspects of their relationship with their child and thus such other aspects cannot be relevant as there is no causal link.

85 Both *Engel,* ÖJZ 1999, 627, and *Pletzer,* JBl 2007, 430 as well as *Schwarzenegger,* Posch-FS 715 f, refer, however, to precisely the cases at issue here as examples supporting their rejection of the idea of adjusting damages to take account of benefits received.

86 ÖJZ 1999, 627.

3. Compensation of non-pecuniary damage due to frustration of family planning?[87]

F. Bydlinski[88] emphasises that even de lege ferenda *no* claim to non-pecuniary compensation for culpable »frustration of family planning« should be awarded. He does see that such a claim could make it possible to impose a penalty under the law of damages for culpable medical breaches of contract, thus obtaining a corresponding deterrent effect. Nonetheless, he considers this approach untenable: »This would require that the existence of the child itself be classified as separate non-pecuniary damage sustained by the parents, albeit not in those words, and this would not be at all reconcilable with the intrinsic personal value of the child.« 5/50

Ch. Hirsch[89] also concludes that recognising any protection for family planning based on the *right to self-determination (Recht auf freie Willensbildung)* could only enjoy very limited protection under the law of tort and that any claims in respect of negligent medical error must be precluded. The situation might be different under contract law, in her opinion, insofar as non-pecuniary disadvantages resulting from frustration of the family planning lay within the protective scope of the contract and the doctor was guilty of serious fault (§§ 1323, 1324 ABGB). *Ch. Hirsch,* however, sees the problem as lying in the question of what the non-pecuniary disadvantage consists of in the first place. She considers that there cannot be any entitlement to compensation for the consequential damage resulting from the frustration of family planning that arises from the need for childcare and the resulting impact on life planning and professional and leisure time interests; this because above all the non-pecuniary harm is balanced by non-pecuniary benefits. This leaves only the parent's annoyance that a child has been born against their will, she argues. Apart from the fact that such can hardly be objectivised, it is highly questionable that such harm really exists given the non-pecuniary advantages associated with the frustration of their plans, ie the existence of the child. 5/51

This argument does not give enough consideration to the aspect that it is not the non-pecuniary advantages and disadvantages in connection with the existence of the child that are at issue but the fact that the parents' right to decide has been frustrated[90]. If, furthermore, the advantages and disadvantages associated with the existence of the child balance out, then these advantages cannot once again be balanced against the issue of compensation for the frustration of the right to 5/52

87 A comparative law overview is offered by *Bagińska,* Wrongful Birth and Non-Pecuniary Loss: Theories of Compensation, JETL 2010, 171 ff.

88 Das Kind als Schadensursache im Österreichischen Recht, Liber amicorum for Helmut Koziol (2000) 63.

89 Arzthaftung bei fehlgeschlagener Familienplanung 210 ff.

90 See on this *B.C. Steininger,* JETL 2010, 148 ff.

decide. According to present Austrian law, it is therefore very possible that compensation be awarded for the negative emotions associated with the frustration of the freedom to decide in the case of serious fault (§§ 1323, 1324 ABGB).

The Austrian Draft expressly provides for the compensation of such non-pecuniary damage[91].

II. Causation

A. The normative imprint of the notion of causation within tort law

5/53 Shifting the damage sustained from one person to another, in the sense that the victim is granted a claim against a person liable to pay compensation, requires under the private law structural principle of *bilateral justification* (see above no 2/92), not only that the obligee has compensation interests worthy of protection, but also that there are factual reasons for why the duty to compensate the victim should be imposed specifically on this obligor. Besides other criteria for liability, the basic condition that has to be fulfilled in order for a duty to compensate the victim to be imposed upon a particular person is that such person »has something to do with the damage«, ie that there is a *connection* between him or his legal sphere and the damage which has been incurred. Thus, in practically all legal systems[92] a connection between the liable party and the damage which occurred is more or less clearly required as a precondition for any obligation to compensate the damage: he himself or his sphere must have caused the damage. This extensive concurrence between systems is due to the realisation that – as *F. Bydlinski*[93] forcefully pointed out – it is causation which founds a concrete, relevant and tangible link between humans on one hand and external circumstances and events which affect humans on the other. Any notion of interpersonal responsibility has to rely on the criterion of causation in relation to external or immaterial factors. Only with the help of this criterion, can negative or positive happenings be imputed to a particular person.

5/54 As can be inferred from the above, and as is also emphasised by *F. Bydlinski,* causation is not a natural, everyday-theoretical or scientific term but a normative

91 § 1321 (1) reads: »A person who by improper performance of a contract thwarts the decision of parents to avoid the birth of a child in an admissible fashion must render appropriate compensation for the non-pecuniary damage caused by such injury of the parents' freedom of decision.«

92 *Zimmermann,* Conditio sine qua non in General – Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 1/29 no 1 ff; *Durant,* Causation, in: Koziol/Schulze, EC Tort Law 47 ff.

93 *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 8 f. Cf already *idem,* System und Prinzipien 185 ff.

value, ie a *legal concept*[94], because it serves the attribution of legal responsibility. This legal nature of the concept of causation is expressed very clearly in a number of ways[95].

For instance, in a natural or scientific sense, the term »causation« could only be used in relation to the real damage, which is only relevant in the context of restitution-in-kind. Insofar, however, as the far more practically significant aspect of monetary compensation is concerned, the relevant damage can only be assessed by calculation and expressed in numbers. Under the law of damages, the relevant damage is thus the difference between two financial situations, one real and the other hypothetical. When a lawyer speaks of the causation of damage, he therefore means the causation of a real situation which is then taken as a basis for assessing the damage; this assessment must, moreover, either apply a subjective-concrete or an objective-abstract method according to the respective legal provisions[96].

5/55 The normative imprinting of the concept of causation under tort law also shows itself, however, in the generally recognised causation of damage by *omission* (see below no 5/64 ff) and in cases of so-called cumulative, superseding and alternative causation (on this no 5/75 ff and 108 ff).

5/56 The widespread understanding of *»legal causation«* includes, however, something completely different to this normative imprinting of the concept of causation, namely prerequisites for liability based on value judgements, such as adequacy or the protective purpose of the norm. By these means, despite a causal link in the sense of the conditio sine qua non, liability for the damage is denied on the basis of very different criteria[97].

B. Cause as a necessary condition

5/57 The cause is considered in present-day Austrian[98] and German[99] law to be a necessary condition and causation is examined using the *conditio-sine-qua-non* formula[100]: a circumstance is causal for a result if it cannot be imagined away with-

94 In this sense also *von Bar,* Deliktsrecht II no 438; *van Dam,* Tort Law 270; *Hart/Honoré,* Causation in the Law[2] (1985) 101 ff.

95 Cf on this and the following also *Koziol,* Natural and Legal Causation, in: Tichý, Causation 51 ff.

96 See *F. Bydlinski,* Schadensverursachung 21; *Koziol,* Haftpflichtrecht I[3] no 3/2; *Schulin,* Der natürliche – vorrechtliche – Kausalitätsbegriff im zivilen Schadensersatzrecht (1976) 164 ff.

97 On this *Koziol* in: Tichý, Causation 59 ff.

98 *Koziol,* Haftpflichtrecht I[3] no 3/5 ff with additional references.

99 *Lange/Schiemann,* Schadensersatz[3] 79 ff with additional references.

100 On the problem of the doctrine of regular condition advocated by some, see *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 15; *Koziol,* Haftpflichtrecht I[3] no 3/7. Clearly, *Gebauer,* Hypothetische Kausalität und Haftungsgrund (2007) 8 also has the theory of the regular

out the result also disappearing. The Austrian Draft also follows this line (§ 1294). Similarly, in almost all other legal systems, causation is established using the conditio-sine-qua-non formula or the but-for test, which is in fact similar[101] and is also used by the Court of Justice of the European Union[102]. Finally, the PETL of the EGTL expressly adopt the conditio-sine-qua-non formula (Art 3:101 PETL).

5/58 The wide-ranging recognition of the causal link prerequisite as a criterion for liability is based on it ensuring that only such harm is imputed as was *avoidable,* at least in an abstract sense[103]. The condition formula ensures that a loss is not imposed upon someone on the basis of his behaviour if the loss would have occurred even had he behaved in a different manner. If someone would not have been able to prevent the loss, then he is free from any blame; his behaviour cannot be considered deficient even on the most abstract plane, and thus cannot be deemed a ground for liability. In precisely this sense, *Schulin*[104] writes*:* »If the person liable to pay damages did not have any means of preventing the loss for which the claim against him is asserted, then neither can he be held liable to that extent.«

5/59 Criticism of the condition formula is often expressed because it includes an extremely broad, almost *boundless* field of events: each occurrence of damage is based on countless conditions and this criterion would point above all to the victim having to bear the damage too, as his existence is an essential condition for the occurrence of the damage. Nonetheless, it must be considered that causation alone can never be enough for liability for damage. Rather, there must be an interrelation with further criteria for liability, in particular fault or the control of some special source of danger. On the other hand, causation is at least the first filter and marks the *outermost limits for liability for damage*[105]*:* responsibility for the damage is precluded if there was no influence at all on the emergence of the damage even in the most abstract sense.

▹▹ condition in mind when he alleges that the causal link can be established even if an action is not a conditio sine qua non; in conclusion he points to the law-like nature of a consequence.

101 See *von Bar,* Deliktsrecht II no 411 and 413; *Brüggemeier,* Haftungsrecht 27 ff; *van Dam,* Tort Law 268 f; *Deakin/Johnston/Markesinis,* Markesinis & Deakin's Tort Law[6] (2007) 244; *Zimmermann,* Conditio sine qua non in General – Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 1/29 no 1 and 4. There are, however, also some critical voices, see eg *Wright,* Causation in Tort Law, 73 Cal L Rev 1985, 1775 ff.

102 Cf C-358/90 *Compagnia Italiana Alcool Sas di Mario Mariano & Co.* [1992] ECR, I-2457; *Wurmnest,* Grundzüge eines europäischen Haftungsrechts (2003) 177 f; *Durant,* Causation, in: Koziol/Schulze, EC Tort Law no 3/29 ff.

103 See *F. Bydlinski* in: Tichý, Causation 14 f; *Röckrath,* Kausalität, Wahrscheinlichkeit und Haftung (2004) 8, 12 ff.

104 Kausalitätsbegriff 27.

105 Cf on this also *Spickhoff,* Folgenzurechnung im Schadensersatzrecht: Gründe und Grenzen, in: E. Lorenz (ed), Karlsruher Forum 2007 (2008) 15 ff; *Frei,* Der rechtlich relevante Kausalzusammenhang im Strafrecht im Vergleich mit dem Zivilrecht (2010) 35 ff.

Furthermore, the theory of the necessary condition is often criticised because the conditio-sine-qua-non formula only sets out a requirement but cannot *answer* the question of the relationship of the condition[106]. While this criticism is true, it mistakes the true task of the conditio-sine-qua-non formula and does not diminish its value[107]: if an event is imagined away[108] and we ask if the result would then also disappear, one decisive question naturally remains unanswered, namely whether the hypothetical facts would have led to the same result or not. Hence, the true task is to draw on all of the rules of experience and scientific findings to examine the impacts of both the real events that took place and also the hypothetical events. The conditio-sine-qua-non formula therefore only clarifies *how* this question should be examined but naturally cannot substitute the examination. For this reason, however, it is no more senseless than a guidebook, which guides a hiker along the route but does not actually bring him to his destination. 5/60

The condition formula also has a significant *warning function:* it exposes problematic constellations and necessitates fundamental consideration of how to deal with them. This is significant in particular when it comes to cases of so-called alternative, cumulative and superseding causation. 5/61

C. Causation through someone's sphere

Vicarious liability for auxiliaries and strict liability for special sources of danger seem to indicate that responsibility under tort law does not necessarily depend on causal, damaging conduct on the part of the liable party him/herself. However, *Wilburg*[109] rightly emphasises that the liable party is often involved, at least indirectly, in the chain of causation in that he/she engaged the auxiliaries that later caused the damage, holds the things which caused the damage or put the dangerous undertaking into operation. *Wilburg*[110] and *F. Bydlinski*[111] nonetheless also point out that in some cases indirect causation by the liable party him/herself cannot even be affirmed in that such party or his/her representatives could 5/62

106 See *Burgstaller,* Das Fahrlässigkeitsdelikt im Strafrecht (1974) 34; *Gottwald,* Kausalität und Zurechnung, Karlsruher Forum 1986, 6; *Schulin,* Der natürliche Kausalitätsbegriff 105 ff.

107 See on this and on the weak points in the theory of the regular condition *Koziol,* Haftpflichtrecht I³ no 3/5 ff.

108 More detail on imagining away and imagining in events when it comes to examining causation in *Riss,* Hypothetische Kausalität, objektive Berechnung bloßer Vermögensschäden und Ersatz verlorener Prozesschancen, JBl 2004, 423, in particular 427 ff; *Koziol,* Wegdenken und Hinzudenken bei der Kausalitätsprüfung, RdW 2007, 12.

109 Elemente 6 f, 40 ff.

110 Elemente 6.

111 *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 9.

have removed the auxiliaries who directly caused the damage or the relevant thing prior to the occurrence of damage. Specifically this argument does not hold true, for instance, if a small child inherits a railway company without already having a legal representative who could have exerted any influence on the sphere of auxiliaries and things.

5/63 In this context – as rightly emphasised by *F. Bydlinski* – it is clear that at least in some cases mere causation by the *sphere of auxiliaries and things* is sufficient even in the absence of any possibly relevant conduct on the part of the actual liable party or his/her representative. According to *F. Bydlinski,* this approach is supported, inter alia, by the pragmatic aspect, that in any other case the decisive issue would be the often unanswerable question of whether the liable party in person or his/her representative had any real (but not at all indicated) possibility of influencing the events giving rise to the damage. The principle of commutative justice points in any case towards liability, ie the idea that the party who enjoys the advantages must also bear the disadvantages[112].

Thus, besides causation by one's own behaviour, causation by one's sphere is also a highly significant form of causation.

D. Omissions as cause

5/64 It is generally recognised – also in other legal systems – that omissions can be causal for damage[113] and, thus, that someone may be liable not only on the basis of his active conduct but also due to his omissions. It is often rightly pointed out that a non-event cannot be causal in a natural sense but only in a *legal sense*[114].

5/65 It must also be taken into consideration that the conditio-sine-qua-non formula must be applied in a different manner depending on whether omission or active conduct is concerned[115]: if the question is whether active conduct was causal, the test looks at what would have happened in the absence of this conduct

112 On this *F. Bydlinski* in: Tichý, Causation 9; *Wilburg,* Elemente 5 f, 40 f.

113 *von Bar,* Deliktsrecht II no 94; *Brüggemeier,* Haftungsrecht 25; *Koziol,* Liability for Omissions – Basic Questions, JETL 2011, 130 f; *Zimmermann,* Damage Caused by Omission – Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/29 no 1.

114 On this problem area *Larenz,* Die Ursächlichkeit der Unterlassung, NJW 1953, 686; *Traeger,* Der Kausalbegriff im Straf- und Zivilrecht (1904, Nachruck 1929) 61 ff; *E.A. Wolff,* Kausalität von Tun und Unterlassen (1965) 33 ff; cf also *Hart/Honoré,* Causation in the Law[2] (1985) 447 ff; *Wright,* Acts and Omissions as Positive and Negative Causes, in: Neyers/Chamberlain/Pitel (eds), Emerging Issues in Tort Law (2007) 287 ff; *Widmer,* Es nihilo responsabilitas fit, or the Miracles of Legal Metaphysics, JETL 2011, 136 ff.

115 *Zimmermann* in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/29 no 3; *Durant,* Damage Caused by Omission – Belgium, in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/7 no 5. Likewise *von Bar,* Deliktsrecht II no 413; *Koziol,* Haftpflichtrecht I[3] no 3/14; *Magnus,* Causation by Omission, in: Tichý, Causation 97; *Markesinis/Unberath,* The German Law of Torts[4] (2002) 104.

without imagining another conduct instead; on the other hand, if the causality of an omission is at issue the test must *imagine active conduct instead*[116]. Therefore, as *Zimmermann*[117] points out, the test involves fictional substitution and not fictional elimination.

5/66 A view widely held internationally[118] is based on a further peculiarity of causation by omission that is very clearly outlined by the German BGH[119]: »Pursuant to established case law, an omission is only causal in respect of a result if actions required by duties would certainly have prevented the occurrence of the result.« Hence, the court ties the question of whether an omission was causal to the question of whether there was a duty to act, ie whether a *duty of care* was infringed. In line with this, *Zimmermann* emphasises that an omission is causal if there was a duty to act and that, therefore, it is primarily a duty to act which must be established[120].

5/67 If the infringement of a duty to engage in certain conduct and thus, in fact, unlawfulness were indeed a requirement for causation, the concept of causation would be normatively designed to a very high degree. In my opinion[121], however, there is no necessity for such a connection, quite the contrary. Naturally, the perpetrator in the field of fault liability is only liable if his conduct contravened a duty to act and was accordingly unlawful; it is equally self-evident that the courts will only take into consideration such omissions as could conceivably have infringed such duty to act. To use a familiar image from *Engisch*[122]*:* the judge looks alternately at the problem of causation and that of infringement of a duty to act. But the same applies to active conduct and, nonetheless, there is consensus in this respect that it is necessary to look separately at causation and violation of duties of care.

No good reason to proceed differently in the case of omissions can be identified: in line with the conditio-sine-qua-non formula, an omission is the cause of damage if the relevant harm could have been avoided by taking conduct and the question of whether there was a duty to engage in this conduct is a separate

116 On this *Riss,* JBl 2004, 428 f; *Koziol,* RdW 2007, 12.

117 *Zimmermann* in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/29 no 3.

118 *Zimmermann,* Damage Caused by Omission – Germany, in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/2 no 3; *Durant* in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/7 no 5; *van Boom/Giesen,* Damage Caused by Omission – The Netherlands, in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/8 no 4. See further *von Bar,* Deliktsrecht II no 413; *Brüggemeier,* Haftungsrecht 25; *Oftinger/Stark,* Haftpflichtrecht I[5] 126.

119 BGH in BGHZ 34, 206, see *Zimmermann* in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/2 no 2; *Lange/Schiemann,* Schadensersatz[3] 155.

120 *Zimmermann* in his commentary on the afore-mentioned BGH decision in: Winiger/Koziol/Koch/Zimmermann, Digest I 2/2 no 3.

121 *Koziol,* Haftpflichtrecht I[3] no 3/15. In agreement *Magnus* in: Tichý, Causation 101 f.

122 Logische Studien zur Gesetzesanwendung[3] (1963) 15.

issue. One argument in favour of cleanly separating these two very different liability criteria may also be inferred from the fact that liability for omissions comes into question not only in the case of unlawful conduct but naturally also in cases where a violation of any conduct duty is not relevant. This is, for example, the case when it comes to liability for interferences: anyone who operates a permitted undertaking is liable under § 364 a ABGB, § 14 BImSchG for the damage caused by permitted emissions, regardless of whether the emissions were caused by active conduct or by omission.

E. Exceptions from the requirement of causation?

5/68 Hitherto it has been emphasised that in principle the requirement of causation may not be disregarded. Nonetheless, doubts arise in this respect in the light of decisions and literature dealing with the problem of the *costs prior to the damaging event*[123]*:* a public transport company acquires a *backup vehicle.* A third-party motorist damages one of the company's vehicles; the company puts the backup vehicle into operation while the damaged vehicle is being repaired. Does the damaging party have to pay part of the costs for acquiring the backup vehicle?

5/69 In Germany, but also in other legal systems, this claim has been affirmed on the basis of tort law[124], albeit in clear disregard of the conditio-sine-qua-non formula: it is beyond doubt that the tortfeasor's actions were not causal since the costs for the acquisition of the backup vehicle were already incurred prior to the damaging event[125]. Hence, it is obvious that the tortfeasor could in no way have impacted on the earlier purchase and thus incurrence of expense by means of his misconduct. Even in the absence of the accident for which he is accountable, the same backup vehicle would still have been bought.

5/70 This is also the reason why the OGH[126] awarded compensation not on the basis of the rules of tort law but instead those of negotorium gestio (Geschäftsführung ohne Auftrag – §§ 1036, 1037 ABGB). It cited as grounds the fact that it is

123 This case was cited under Category 3 of the questionnaire in Winiger/Koziol/Koch/Zimmermann, Digest I 2 a; cf also Case 6 in the questionnaire in *Spier,* Unification: Causation 4; further *von Bar,* Deliktsrecht II no 423 ff.

124 See *Zimmermann,* Preventive Expenses Incurred before the Damaging Event – Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 3/29 no 1.

125 *Niederländer,* Schadensersatz bei Aufwendungen des Geschädigten vor dem Schadensereignis, JZ 1960, 617; ebenso *B.A. Koch,* Preventive Expenses Incurred before the Damaging Event – Austria, in: Winiger/Koziol/Koch/Zimmermann, Digest I 3/3 no 6. *Ch. Huber,* Fragen der Schadensberechnung[2] (1995) 392 ff, on the other hand, made an interesting attempt to level the way for a compensation claim by introducing abstract damage assessment.

126 8 Ob 5/86 in SZ 59/95.

in the interest of the tortfeasor if the transport company takes such preventive measures against interruption of business insofar as the costs to be compensated by the perpetrator are lower than the alternative costs for the rental of a substitute vehicle. This shows – as emphasised in the introductory chapter – that regard must be had to the application of the appropriate legal protection system and that the principles of tort law should not be flouted.

5/71 The requirement of causation is also disregarded according to one widespread understanding when it comes to the resolution – already discussed in another context above in no 5/29 ff – of the issue of *frustrated expenses.* This concerns cases such as the following example: the tortfeasor culpably damages a third party's vehicle; the owner of such cannot use it while it is being repaired but must continue to bear the expenses of garage rental and pay his insurance policy during this period. These expenses were not, however, caused by the tortfeasor; rather they would have been incurred even in the absence of the damaging event. Thus, there can be no duty to compensate in this respect under the principles of tort law due to lack of a causal link. The tortfeasor has not caused pecuniary damage but merely frustrated the enjoyment of conveniences that should have been procured by virtue of these expenses. The correct question is thus whether there are not special grounds for the compensation of such non-pecuniary damage. Non-pecuniary damage has after all been caused and – as already emphasised above – it is only the compensation of such that is really at issue (see above no 5/30).

5/72 By way of exception, however, our legal system does allow in fact for *attenuation* – but not complete disregard – of the causation requirement: on the one hand, in particular in rules on strict liability, assumptions are made as regards causation; on the other hand, merely potential causation is regarded as sufficient when it comes to a majority of damaging parties that come into question (eg in the case of alternative or cumulative causation). This will be discussed in more detail below.

F. The attenuation of the causation requirement

1. Liability of several tortfeasors

5/73 Pursuant to §§ 1301, 1302 ABGB, §§ 830 (1) sentence 1, 840 BGB there is joint and several liability in the case of intentional joint action regardless of whether the parts of the damage caused by the individuals in question can be determined[127]. This liability has often been seen as liability for actual causation on the basis of

127 Further comparative law references are offered by *Winiger,* Multiple Tortfeasor, in: Tichý, Causation 79 ff.

the joint will of the parties[128]. However, *F. Bydlinski*[129] has pointed out that as a rule it is not really possible to ascertain whether the joint decision taken was really a conditio sine qua non in respect of the damage which occurred or whether the act would nonetheless have been committed. As the psychological exertion of influence can seldom be established in retrospect, these cases almost always concern merely a *suspicion of causation.* However, the attenuation of the causation requirement is compensated, so he argues, by the fact that an especially serious degree of fault, specifically intention, must be shown[130]. If, by way of exception, a joint-perpetrator manages to defuse the suspicion of causation, he is not liable since this means there is not even any possible causation[131].

5/74 It must be pointed out that departing from the rather mechanical application of the conditio-sine-qua-non formula, liability becomes a values issue[132], involving several material factors. One aspect that might seem to justify the attenuation of the causation requirement is that each of the co-perpetrators acted, in a manner for which they may be held responsible, to create a situation in which the issue of causation is irresolvable as far as the victim is concerned. Moreover, the conduct of each individual perpetrator was highly likely to give rise to damage, ie it was dangerous. The culpable creation of an irresolvable situation connected with the likelihood that the intentional conduct gave rise to the damage that occurred justifies the assumption of causation and thus the liability for merely potential causation.

2. Alternative causation

a. The problem

5/75 The issue here is when a victim suffers damage that was certainly caused either by event 1 or event 2, but it cannot be established which of the events was in fact the cause.

We shall start with an example of no great practical significance but very suitable for variations: the claimant K, a mountain climber, was hit and injured by a falling stone; at the same time another stone flew past, just missing his head. One of these stones fell because of the carelessness of mountain climber B1 and the other because of the carelessness of mountain climber B2; however, it cannot

128 Cf *K. Wolff* in Klang, ABGB VI² 54, and the references in *Weckerle,* Die deliktische Verantwortlichkeit mehrerer (1974) 86 f.

129 *F. Bydlinski,* Haftung bei alternativer Kausalität, JBl 1959, 10 f; *idem,* Mittäterschaft im Schadensrecht, AcP 158 (1959/60) 411 f.

130 According to *F. Bydlinski,* AcP 158 (1959/69) 429 f, gross negligence is also sufficient.

131 *F. Bydlinski,* AcP 158 (1959/69) 417 ff. Against this, eg, *Weckerle,* Verantwortlichkeit 85.

132 Special value is seen by *Gebauer,* Hypothetische Kausalität und Haftungsgrund 9 f, in this for all cases of hypothetical causation.

be ascertained which stone was knocked down by which mountain climber and which of these hit K.

The following case, which once came before the Austrian OGH[133] and which also has its parallels in other legal systems[134] has become famous: the hunters B1 and B2 were standing close to each other, both wanted to shoot a partridge and they shot at the same time. They overlooked the fact that the line of fire crossed a pathway. A person walking on this pathway was hit by a pellet; it cannot be ascertained whether this came from B1's gun or B2's gun.

Of greater practical significance may be a case from the medical field: the victim was treated with a particular medication in hospital and after some time adverse side-effects emerged. In the hospital at the time, medication from either the pharmaceutical manufacturer B1 or the pharmaceutical manufacturer B2 was used for this kind of treatment; both medications contained the ingredient which was harmful to the patient. It can no longer be established which of these medications was used in the instant case.

The solutions applied to such problems of causation have been very different in different legal systems in the course of development and continue to be very variable[135].

b. Joint and several liability under Austrian and German law

5/76 According to Austrian[136] and equally according to German law (§ 830 (1) sentence 2 BGB), the defendants B1 and B2 are always liable jointly and severally. In this context it must be emphasised that, in order to be held liable in this fashion, both B1 and B2 must fulfil all other prerequisites for liability – apart from the establishment of causation. Thus, one may say that each of the defendants would certainly be held liable if one could establish that he/she had caused the damage.

133 GlUNF 4329.

134 On the Californian case *Summers v. Tice* see *Geistfeld,* The Doctrinal Unity of Alternative Liability and Market-Share Liability, U Pa L Rev 155 (2006) 453 f.

135 See on this *Kruse,* Alternative Kausalität im Deliktsrecht – Eine historische und vergleichende Untersuchung (2005). On European and non-European legal systems *B.A. Koch,* Comparative Analysis, in: B.A. Koch (ed), Damage Caused by Genetically Modified Organisms (2010) 897 f with references to the country reports; on European legal systems *Koziol,* Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 6a/29 no 1 ff, as well as *B.A. Koch,* Medical Liability in Europe: Comparative Analysis, in: B.A. Koch (ed), Medical Liability in Europe (2011) 635, in each case with references to the country reports; on English, Dutch and Austrian law see *Oliphant,* Proportional Liability, in: Verschraegen (ed), Interdisciplinary Studies of Comparative and Private International Law I (2010) I 181 ff.

136 On this *F. Bydlinski,* Haftung bei alternativer Kausalität, JBl 1959, 1; *Koziol,* Haftpflichtrecht I³ no 3/26 ff; *idem,* Auf dem Weg zur Vereinheitlichung des Europäischen Schadenersatzrechts (2005) 59 ff (Korean), 201 ff (German).

5/77 *F. Bydlinski*[137] sees the foundation for liability in the case of alternative causation in the fact that the entitlement of the victim to compensation has been established in principle and it merely cannot be ascertained whose conduct gives rise to his claim. This justifies recognising as sufficient grounds for liability an unlawful, culpable action which is in fact dangerous and *potentially causal. Canaris*[138] also emphasises the following arguments in support of liability for the person who acted unlawfully and culpably: »Since the conduct of the party involved was possibly causal and moreover in fact likely to cause damage, it would constitute undeserved good fortune for him should he be spared liability simply because someone else may have caused the damage.« A further aspect worthy of mention is that both parties' unlawful, culpable conduct has contributed to create a situation which cannot be clarified[139].

5/78 It is sometimes assumed[140] that cases of liability for alternative causation merely concern a problem of the *burden of proof:* due to unlawful, culpable behaviour, the perpetrators are obligated to prove that they did not cause the damage. However, this line cannot be followed: in cases of alternative causation, the causation by each relevant behavioural factor must be taken as proven when viewing both events in isolation due to the high, concrete risk such behaviour posed. The victim would thus have produced the evidence and a presumption of causation would not be required. The evidence only seems unsuccessful when we depart from examining the events in isolation and consider the two events simultaneously; then causation could no longer be assumed proven. Hence, a rule on the burden of proof could play a role; but would in precisely such case – as *F. Bydlinski*[141] has pointed out – be inappropriate: the presumption would apply to both perpetrators so that causation by both would have to be assumed, although it is known that only one of them caused the damage[142]. Thus, this cannot be a matter of the burden of proof and accordingly presumption of causation, but instead the fact that under substantive law *merely potential* causation is deemed sufficient.

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137 *F. Bydlinski,* Aktuelle Streitfragen um die alternative Kausalität, Beitzke-FS (1979) 3.

138 *Larenz/Canaris,* Schuldrecht II/2[13] § 82 II 3b.

139 *Larenz/Canaris,* Schuldrecht II/2[13] § 82 II 1b; *Wilhelmi,* Risikoschutz 306, 309 with additional references.

140 *Reischauer,* Der Entlastungsbeweis des Schuldners (1975) 113. Recently *Kletečka,* Alternative Verursachungskonkurrenz mit dem Zufall – Die Wahrscheinlichkeit als Haftungsgrund? JBl 2009, 140, has picked up on this notion again.

141 Beitzke-FS 8.

142 *Kletečka,* JBl 2009, 140 FN 26, seeks to counter this persuasive argument with the excuse that this does not apply in case of an event triggering liability competing as cause with coincidence. In this context, however, the issue is the justification for establishing liability when it comes to events alternatively triggering liability and in this respect the argument of the causation presumption does not fit. The reference to the cases where an event triggering liability competes as cause with coincidence is, moreover, unconvincing for another reason also; this will be dealt with in more detail below no 5/90.

If, in cases of alternative causation, liability is attached even to merely potential causation on the parts of the two perpetrators in question, then this constitutes a decisive exception to the fundamental rule that the defendant must only compensate such damage as is proven to have been caused by him. This value judgement can be justified by *Wilburg's*[143] flexible system: when it comes to establishing liability, the question is not only which factors speak for liability, but also to what degree they are present and what total weight is necessary for the establishment of liability. Liability can, therefore, also be affirmed even if one of the factors is absent or only present to a minor degree, but the total weight of the other factors is greater than is normally required. In other words: it is to be based on the »basic values« of the law[144]. It may be assumed that liability only exists if the weight of all given grounds for liability corresponds to the weight required by the basic values of the law. In principle, the law only actually requires all grounds for liability to be fulfilled in the least degree respectively possible, ie causation, slight negligence and adequacy to a slight degree. 5/79

In cases of alternative causation, *causation is not present in full strength* but only to a slight degree, namely in the form of potential causation[145]. Thus, it is necessary for the justification of liability that other grounds for liability be present to a greater degree and that the total necessary weight required according to the basic values is thus attained. Hence, *F. Bydlinski* emphasises that alternative tortfeasors are only liable if the conduct of each posed *a very acute, concrete risk* in the given situation. In other words, adequacy must be present not only in the usual, very weak form but instead to the greatest possible degree.

Hence, in cases of alternative causation it must be examined whether, when each individual event is considered in isolation, ie if the other potentially causal actions are imagined away, its causation is so probable on the basis of space and time relations and the concrete risk it created that it would have to be deemed proven. The requirement of a *high degree of concrete risk posed* further means that events with a low degree of probability for causing damage are not taken into consideration. The sometimes voiced fear that no victim would ever again be compensated in full under the rule presented here, as there are always some kind of far-removed alternative causes, is thus completely unjustified. 5/80

In the event of acute, concrete danger posed by one perpetrator, the existence of a second, equally concretely dangerous perpetrator should not preclude *that liability* of the first perpetrator *which would otherwise be affirmed* and vice versa. It

143 See above all *Wilburg,* Elemente; *idem,* Bewegliches System.

144 *Schilcher,* Schadensverteilung 204.

145 This is stressed by *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 19; and neglected by *G. Wagner* in his review of the German version of this book, JETL 2011, 338, when he tries to point out, that my »theory of normative causation may allow a court to find causation where there is none«.

is preferable that uncertainty of causation be borne by the possible perpetrators rather than by the victim, who has a claim for compensation in any case: firstly, both perpetrators have acted unlawfully and culpably and, secondly, they have also precipitated the uncertainty regarding the causation by their specifically dangerous conduct[146]. Thus, the material arguments are similar to those in the case of the liability of joint-perpetrators (see above no 5/73 f); one difference nonetheless is that in the case of joint-perpetrators there is suspicion of causation in relation to each of the several joint-perpetrators in addition to each other, whereas in cases of alternative causation there is simply the suspicion that one of the two caused the damage.

5/81 An interesting line of reasoning, on the surface very different, is proposed by *Geistfeld*[147]*:* he argues that the liability of alternative perpetrators can be justified by the notion that the causation requirement is still observed insofar as the victim is obliged to prove that his injury was caused by the *group consisting of the defendants.* However, this line of argument is problematic because compensation claims are always directed against particular persons, as the damage can only be attributed to particular persons. If claims are directed against groups of people, the question arises as to how such groups are to be formed, and whether persons might not also be included with respect to whom there are not sufficient grounds for liability and thus whether the grounds for liability under tort law are not circumvented. If, for example, a pedestrian is knocked down by a motor vehicle in Vienna, and all that is known about said motor vehicle is that it had a Hungarian registration plate, declaring the group comprised of all Hungarian motor vehicles liable would certainly be out of the question. Naturally, this is not what *Geistfeld* is suggesting either; rather he limits the group to such persons as are responsible for a risk that was likely in the concrete situation to bring about the damage which was incurred. With that, however, *Geistfeld* too is in end effect pointing to the potential causation and the requirement of an acute, concrete risk for liability for damage. His conceptual approach is nonetheless valuable in that he makes it clear that the causation requirement is by no means simply discarded, rather one can speak of causation in the sense of a *conditio sine qua non* with respect to the group in which those who posed a concrete endangerment are collected.

5/82 It must also be pointed out that a perpetrator who has compensated the victim has a right of recourse against any jointly liable perpetrator, so that – presuming both perpetrators are solvent – in end effect each of them bears half of the damage. If one of the perpetrators is not solvent, then on the basis of the joint and several liability the other perpetrator, and not the victim, must bear this risk in full.

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146 On the related argumentation in English law see *Oliphant,* Alternative Causation: A Comparative Analysis of Austrian and English Law, Koziol-FS (2010) 801.

147 U Pa L Rev 155 (2006) 460 ff.

c. *Freedom from liability under Swiss law*

5/83 Analysis of Switzerland's prevailing rejection of joint and several liability for alternative perpetrators, unless they acted in concert[148], is informative as it can vividly reveal some core issues and misunderstandings.

In support of the general rejection of liability of alternative perpetrators, the following example is often cited[149]; it is intended to demonstrate the terrible consequences of affirming liability in the case of alternative causation: G invited a large number of people to a reception in his house. Something was stolen from a room which was open during the reception. It has been established that only guests A, B and C entered this room. It is argued that if liability in the case of alternative causation is accepted, then these three persons would be obliged to pay compensation and that this result is inacceptable. However, this view totally overlooks the fact that of course no one who advocates liability for alternative causation would grant the victim a claim for compensation in this case. For liability to be justified it would be necessary that each of the possible perpetrators had firstly acted in a manner justifying liability, ie *unlawfully* and *culpably,* and that each perpetrator's conduct *posed a concrete danger,* in other words was highly adequate for the occurrence of the damage[150]. If these principles are applied to the Swiss horror example, it means that while only guests A, B and C entered a room from which an item was stolen but it cannot be established which of the three guests stole such item, liability is already precluded on the basis that they were allowed to enter the room and thus not even unlawful and culpable conduct has been proven on behalf of each of the three potential perpetrators. Neither is the acute, concrete danger posed by the conduct of each of the three suspects established in any way.

d. *The partial liability solution of the European Group on Tort Law*

5/84 Whether the perpetrators are liable jointly and severally or only partially is usually not of any great significance, it is true, because in the case of joint and several liability he who pays has recourse against those jointly liable and thus in end effect each has only to compensate in part. In fact, therefore, solely the question of who bears the *risk of insolvency* is at issue: should this be imposed upon the victim or the potential tortfeasors?

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148 See *von Tuhr,* Allgemeiner Teil des Schweizerischen Obligationenrechts I³ (1979) 94; *Quendoz,* Modell einer Haftung bei alternativer Kausalität (1991) 9 ff, 39; *Wyss,* Kausalitätsfragen unter besonderer Berücksichtigung der hypothetischen Kausalität, SJZ 93 (1997) 315, 317; *Brehm* in Berner Kommentar, OR VI/1/3³ Art 41 no 8 and 145; cf also *St. Weber,* Kausalität und Solidarität – Schadenszurechnung bei einer Mehrheit von tatsächlichen oder potenziellen Schädigern, HAVE 2010, 115. With a different opinion, however, *Loser,* Schadenersatz für wahrscheinliche Kausalität, AJP 1994, 964; *Oftinger/Stark,* Haftpflichtrecht I⁵ 151.

149 *Von Tuhr,* Allgemeiner Teil I³ 94.

150 See *Koziol,* Haftpflichtrecht I³ no 3/31.

5/85 The EGTL sets out in Art 3:103 para 1 of the PETL a liability in proportion to the degree of likelihood and thus a distribution of the insolvency risks between the solvent tortfeasors and the victim[151]. *Stark*[152] has also hitherto advocated partial liability. He emphasises that in the case of alternative causation we are talking about liability without proven causation, and that thus milder consequences of liability are appropriate. A further argument is that otherwise the victim might have had to bear the insolvency risk alone in the event that it had been possible to prove that the insolvent wrongdoer had caused the damage: If both A and B come into question as perpetrators and A is insolvent, then the victim would not have been able to enforce his compensation claim at all if A had been the tortfeasor. The victim should not be entirely relieved of this potential risk if it is uncertain whether A or B caused the damage, ie if the tortfeasors are liable on the basis of merely potential causation.

The Austrian Draft has followed the approach of partial liability: the damage is to be apportioned between those who potentially caused it according the weight of the respective grounds for liability and the likelihood of causation (§ 1294 Austrian Draft).

e. Event which would trigger liability and »coincidence« as competing causes

5/86 A variation of the mountain climber case will serve to illustrate this particular problem: the claimant K, a mountain climber, was hit and injured by a falling stone; at the same time another stone flew past, just missing his head. But in this variation of the example, the fall of one stone was caused by the carelessness of mountain climber B, whereas the other stone was knocked down by a chamois; however, it cannot be ascertained which stone was knocked down by the mountain climber and which by the chamois.

Other examples are certainly of more practical significance, especially those in the field of medical malpractice: after being discharged from hospital K falls ill. It cannot be established whether this illness is the result of a proven medical error or of his equally demonstrable medical predisposition. The English case *Hotson v. East Berkshire Area Health Authority*[153] is also illustrative. 13-year-old Hotson fell from a tree and was seriously injured; even had he received immediate, correct treatment his chances of recovery would only have been 25 %. However, the hospital only began the necessary treatment after a delay and the boy was disabled

151 On this *Oliphant* in: Verschraegen (ed), Interdisciplinary Studies of Comparative and Private International Law I 197 ff. In favour *Pfeiffer,* Die Entwürfe für ein neues österreichisches Schadensersatzrecht – Fortschritt für Österreich und Vorbild für Deutschland? (2011) 118 ff.

152 *Oftinger/Stark,* Haftpflichtrecht I[5] 148.

153 In 3 WLR 1987, 232.

for life. Quite a controversy was also caused by decisions in Zurich[154], which concerned liability for the delay in treatment of a cancer patient. It could not be established whether the delay in question was in fact causal for the death of the patient; nonetheless the chances of recovery would have been substantially higher had the treatment been administered without delay.

5/87 *F. Bydlinski*[155] combines his approach towards solving cases of alternative causation with the principles of § 1304 ABGB (§ 254 BGB; Art 44 sec 1 OR), according to which damages are apportioned if there is *contributory responsibility* of the victim. He reaches the conclusion that, even in the case of an event triggering liability competing as cause with coincidence, the victim must be compensated for part of the damage, and thus that the potential tortfeasor is *partially liable.*

5/88 With respect to how *F. Bydlinski* places cases in which two potential perpetrators come into question as tortfeasors and cases in which either a responsible perpetrator or a coincidence caused the damage on an equal footing, it may be objected that only in the former case has it been established that the victim would definitely not have to bear the loss himself, but not in the second case[156]. Thus, it is sometimes concluded that K ought not to be granted a partial claim. The view in many legal systems[157] is, therefore, that it is decisive as regards the claim to damages, whether the doctor is *proven* to have brought about the patient's deterioration in health or even his death by a medical error. If the claimants can prove causation they will be granted full compensation; if they fail to prove it, they get nothing.

This leaves us with the dissatisfying consequence that doctors are always free of any liability in spite of clear medical negligence if the claimant cannot meet the difficult challenge of proving causation. It is true that this would be avoidable if the *burden of proof* were *reversed* for causation, as is advocated for instance in German law in the case of serious fault on the part of the doctor[158]. Nonetheless, this

154 I. Zivilkammer des Zürcher Obergerichtes, ZR 1989, Nr 66; Zürcher Kassationsgericht, ZR 1989, no 67.

155 *F. Bydlinski,* Beitzke-FS 30 ff; *idem,* Haftungsgrund und Zufall als alternativ mögliche Schadensursachen, Frotz-FS (1993) 3; following this line *Koziol,* Haftpflichtrecht I³ no 3/36 ff; *idem,* Auf dem Weg zur Vereinheitlichung des Europäischen Schadenersatzrechts 67 ff (Korean), 209 ff (German); *Karner* in KBB, ABGB³ § 1302 no 5; *Heinrich,* Haftung bei alternativer Kausalität mit Zufall (2010); *idem,* Teilhaftung bei alternativer Kausalität mit Zufall, JBl 2011, 277 ff, in each case with additional references. *Taupitz,* Proportionalhaftung zur Lösung von Kausalitätsproblemen – insbesondere in der Arzthaftung, Canaris-FS I (2007) 1233 ff, 1238 ff, agrees with the solution in terms of determining the scope of liability but not for establishing liability.

156 Against the decisiveness of this argument rightly *Röckrath,* Kausalität 179 ff, 185 ff.

157 See on this *Faure,* Medical Malpractice in a Comparative Perspective, in: Faure/Koziol, Medical Malpractice 276 ff.

158 See, mainly very critical, *Stoll,* Haftungsverlagerung durch beweisrechtliche Mittel, AcP 176 (1976) 147 f; *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag 2006 (2006) 60; *Sträter,* Grober Behandlungsfehler und Kausalitätsvermutung (2006); *Spickhoff,* Folgenzurechnung im Schadensersatzrecht: Gründe und Grenzen, in: E. Lorenz (ed), Karlsruher Forum 2007,

solution does not resolve the main objection: *Hans Stoll*[159] has already pointed out that the *all-or-nothing principle* leads to completely contrary results when there are slight differences in the likelihood of the causal link, which however can be decisive for the satisfaction of the burden of proof, the results being namely full liability or complete freedom from liability. Reversing the burden of proof would only mean that in case of doubt the tortfeasor is liable; it would change nothing with respect to the abrupt switch from full freedom from any liability to comprehensive liability.

5/89 However, not only the dissatisfying consequences of the all-or-nothing solution[160] but also weighty dogmatic grounds support the partial liability approach suggested by *F. Bydlinski:* the solution of joint and several liability for alternative perpetrators, which is generally recognised in Austria, is based on merely *potential causation* by those liable. If in such cases potential causation is sufficient grounds for liability, then the same must consequently apply if only one responsible perpetrator may have caused the damage and the victim must bear the risk of the other potential cause of the damage. If the potential tortfeasor and the victim must jointly bear the consequences of the damage, then this means – as in cases of contributory responsibility (§ 1304 ABGB, § 254 BGB) – that the potential tortfeasor must compensate in part. The proportion to be borne by the victim must be set higher if he has himself been negligent than if the alternative cause is mere coincidence[161].

5/90 Nonetheless, it is often argued against the partial liability approach[162] that it would lead to a fundamental rearrangement of tort law, which cannot be justified by the reference to § 1304 ABGB, § 254 BGB. It is submitted that *F. Bydlinski's* theory means that absolutely everybody who acted in an unlawful and culpable manner and thus only possibly caused damage would be liable for such damage.

▹▹ 73 ff. *Schiemann,* Kausalitätsprobleme bei der Arzthaftung, Canaris-FS I (2007) 1161; *idem,* Problems of Causation in the Liability for Medical Malpractice in German Law, in: Tichý, Causation 187, argues that the notion of risk allocation justifies the reversal of proof at every degree of fault.

159 *Stoll,* Schadensersatz für verlorene Heilungschancen vor englischen Gerichten in rechtsvergleichender Sicht, Steffen-FS (1995) 466. Against the all-or-nothing principle more recently also, for example, *Faure/Bruggeman,* Causal Uncertainty and Proportional Liability, in: Tichý, Causation 105 ff; *Seyfert,* Mass Toxic Torts: Zum Problem der kausalen Unaufklärbarkeit toxischer Massenschäden (2004) 63 ff; *Stremitzer,* Haftung bei Unsicherheit des hypothetischen Kausalitätsverlaufs, AcP 208 (2008) 676 ff.

160 On this more recently *Taupitz,* Canaris-FS I 1231 ff.

161 See on this below no 6/216 ff and *Schobel,* Hypothetische Verursachung, Aliud-Verbesserung und Schadensteilung, JBl 2002, 777 f.

162 *Welser,* Zur solidarischen Schadenshaftung bei ungeklärter Verursachung im deutschen Recht, ZfRV 1968, 42 ff. Recently his line of argument was followed again by *Kletečka,* Alternative Verursachungskonkurrenz mit dem Zufall – Die Wahrscheinlichkeit als Haftungsgrund? JBl 2009, 141 f, an. Against *Welser's* line of argument already *Quendoz,* Modell einer Haftung bei alternativer Kausalität 65; recently also *Heinrich,* Haftung bei alternativer Kausalität mit Zufall 59 f.

For – the critics say – *any doubt* as to causation constitutes an alternative cause competing with coincidence: coincidence is namely everything that does not lead to liability. In all cases in which causation cannot be established with 100 % certainty, *Bydlinski* is said to consider the damage to have been caused by something else with a probability difference out of 100; consequently, the apportionment theory must indeed lead to liability according to the degree of probability.

However, this line of criticism deliberately ignores[163] the fact that partial liability does not apply as soon as there is any difficulty at all with respect to proof of causation but only when two particular events pose an *extremely high degree of concrete risk* and thus were potentially causal. As long as there are only general difficulties in proving the causality of culpable conduct on the part of the perpetrator, it is firstly not the case that viewing the conduct in question in isolation would mean causation must be taken as proven given the spatial and chronological connections as well as the specific, very high probability that the conduct would give rise to the damage. Thus, there is neither sufficiently weighty potential causation to justify liability nor the necessary counterweight – necessary according to basic values – for the weakness of this liability criterion in the form of a high degree of specific risk. On the other hand, not every obstacle of proof against the perpetrator is matched by an event imputable to the victim, which when viewed in isolation would have to be deemed proven causal due to the spatial and chronological connections as well as the specific probability that it would give rise to the damage and the only obstacle to the proof that the perpetrator's conduct was causal is the consideration of this specific, dangerous event. There are sill very many, completely undetermined possibilities as regards the causal chain, for instance, that the perpetrator's conduct constituted a conditio sine qua non, or that he merely brought about the damage jointly with another responsible perpetrator, or was alternatively causal with another perpetrator, an unknown third party was the solely responsible cause or indeed a circumstance imputable to the victim was a joint or sole decisive cause for the damage. In the case of general evidential difficulties, therefore, it is not justifiable to shift the damage to the perpetrator as the liability criterion of merely potential causation and as a counterweight to the weakness of said criterion the required high degree of specific risk is not satisfied to the degree required by the underlying basic evaluation.

A further, fundamental consideration is that it hardly seems justifiable to limit 5/91
»*proportional liability*« only to just one of the facts on which the claim is based, namely the causation. The question that arises is why someone, who can represent the facts decisive in showing unlawfulness or fault with a certain probability,

163 *Kletečka,* JBl 2009, 141, hardly engages with the counter-arguments already made against *Welser* by *Koziol,* Haftpflichtrecht I³ no 3/37 and 38.

which nonetheless lies below the usual standard of proof, should not always also bear a *proportion corresponding to the relevant probability* of his damage[164]. In this respect it must firstly be said that the allegation that all liability criteria are gradable alike must be shown and cannot simply be stated without giving any rationale. In positive law there are certainly starting points for causation, as § 830 BGB and § 1302 ABGB recognise the liability of several perpetrators for potential causation. If one of specifically dangerous, potential causes is imputable to the victim, as is the case to a wide extent due to the principle »casum sentit dominus« and not just in the case of fault on the victim's own part, then it is possible to proceed on the basis of partial liability under appropriate application of the value judgements in § 1304 ABGB, § 254 BGB. Our legal systems also provide beyond this for presumed and thus potential fault or for presumed negligence (see, for example § 1319 ABGB, § 836 BGB); however, this is usually only the case when the weakness of the ground for liability thus constituted is balanced by increased dangerousness (see below no 6/90). If these criteria are satisfied in relation to several persons, for example by co-owners of a building, then this would also lead to the liability of all potential negligent parties. If – as however is very rarely the case and thus probably of almost no practical significance – the same criteria are satisfied in respect of the victim, then apportionment of damage would undoubtedly apply in this case too in accordance with §§ 1304 ABGB, 254 BGB. Nonetheless, this also shows that the legal system does not simply do away with any and all sorts of evidential difficulties, here in relation to negligence, by means of proportional liability, but – in consideration of the underlying values – always provides for a counterweight to the weakness of one liability criterion by an additional element or a higher standard with respect to another required ground for liability. Thus, there are no indications in our legal system that in every case of evidential weakness in respect of liability criteria a corresponding reduction of the compensation must per se ensue, ie that liability is always made proportional to the weakness of the grounds for liability and such a theory, contravening the discernible underlying values, has not yet been seriously advocated by anyone. *Kletečka's* concerns are therefore – as unfortunately very frequently is the case – traceable to a misunderstanding of the flexible system and neglect of the underlying values (on this see above no 5/78 f), as well as to insufficient consideration of the principles of §§ 1304 ABGB, 254 BGB.

5/92 The Austrian OGH rightly found the criticism voiced unpersuasive and followed *F. Bydlinski's partial liability theory;* it reasoned in detail on this in a 1995 decision[165]. The case in question dealt with injury caused at the birth of the claimant

164 *Kletečka,* JBl 2009, 142.
165 OGH 4 Ob 554/95 in JBl 1996, 181.

either by a medical mistake or an illness of the mother; it was impossible to establish which of the two circumstances was in fact causal. The OGH emphasised that only *F. Bydlinski's* doctrine provided a solution compliant with the principle of fairness, because otherwise in the case of competing causes constituted by a culpable action and a coincidence only unintelligible and inequitable extreme solutions were conceivable: »One would otherwise be forced either to the view that the victim must lose any entitlement to compensation because of the impossibility of proving which of the two events was in fact causal, or that the tortfeasor must compensate the victim in full regardless of the fact that it has not been established at all that his action caused the injury. Either solution would contravene the fundamental principles of the Austrian law of damages.«

The partial liability approach has also been meeting – albeit with different reasoning – increasing *international* resonance[166], for example with *Canaris*[167], *Seyfert*[168], *G. Wagner*[169] and *Wilhelmi*[170] in respect of German law; *Akkermans*[171] from the Netherlands came to the same conclusion and *Stark*[172] as well as *Loser-Krogh*[173] advocate the same for Switzerland; in England partial liability has at least been recognised for cases in which the potential causal events have given rise to »the same kind of risk«[174]. From a comparative law perspective partial liability is also supported by *Kadner Graziano*[175]. The EGTL has adopted this idea and incorporated it in the PETL (Art 3:106). Likewise, the Austrian Draft provides for partial liability of the potential tortfeasor; coincidence must be imputed to the victim, who consequently shall bear the proportion of damage corresponding thereto (§ 1294 Austrian Draft). This solution is also supported by the economic analysis

166 On European legal systems see *Koziol,* Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 6b/29 no 4 ff; on Austrian, English and Dutch law see the description by *Oliphant* in: Verschraegen, Interdisciplinary Studies of Comparative and Private International Law I 181 ff. From a comparative law perspective for the medical area *B.A. Koch,* Medical Liability in Europe: Comparative Analysis, in: B.A. Koch, Medical Liability in Europe 635 with references to the country reports.

167 *Larenz/Canaris,* Schuldrecht II/2[13] § 82 II 3c.

168 *Seyfert,* Mass Toxic Torts 105 ff.

169 *G. Wagner,* Proportionalhaftung für ärztliche Behandlungsfehler de lege lata, Hirsch – FS (2008) 453.

170 *Wilhelmi,* Risikoschutz 305 ff.

171 Proportionel aansprakelijkheid bij onzeker causal verband (1997) 70 ff; *idem,* Theorie en praktijk van proportionele aanspraklijkheid, in: Akkermans/Faure/Hartlief (eds), Proportionele aanspraklijkheid[2] (2000) 85 ff.

172 *Oftinger/Stark,* Haftpflichtrecht I[5] 152.

173 Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung, Schweizerischer Juristentag 2003, Heft 2, 169.

174 See *Fairchild v Glenhaven Funeral Services* [2002] United Kingdom House of Lords 22 [2003] 1 AC 32, and on this *Oliphant,* Koziol-FS 805 f.

175 The »Loss of a Chance« in European Private Law. »All or Nothing« or Partial Compensation in Cases of Uncertainty of Causation, in: Tichý, Causation 143 ff.

of law approach[176]. On the other hand, the partial liability solution is rejected vigorously in many countries[177].

f. Excursus: the doctrine of loss of a chance as the better means to a solution?

5/93 Especially in cases in which, while it cannot be established whether the correct treatment would have made it possible to prevent the illness or death of a patient, in retrospect there would at least have been a chance of avoiding the harm, then the argument is increasingly put forward that the doctor can be held liable in any case even though the causation of illness or death could not be proven against him, if he demonstrably caused the *loss of a chance of recovery.*

Corresponding arguments are put forward in cases of lawyers' liability: a lawyer misses the deadline for submitting an appeal; as a consequence the judgement becomes final. It cannot be established whether the appeal would have been successful had it been filed on time; there was however, a substantial chance of success at appeal. And finally, the loss of a chance of succeeding also plays a significant role in the discussion. The Austrian OGH[178] had to decide on the compensation claim of a claimant who had wrongfully been denied a license to trade in foreign currency by the National Bank of Austrian (central bank). The assessment of the amount of future profit lost could present substantial difficulties thereby and make an assessment of the chance of profit thwarted at the time of the damaging action an attractive basis for the assessment.

5/94 The doctrine that the loss of a chance can be used as a basis comes from France but has already spread to other countries[179] and has also been adopted in the UNIDROIT-Principles of International Commercial Contracts (Art 7.4.3. para 2)[180]:

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176 *Faure/Bruggeman,* Causal Uncertainty and Proportional Liability, in: Tichý, Causation 108 ff.

177 See *Koziol,* Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 6b/29 no 3. Parts of the Austrian theory also object to the partial liability solution: *Welser,* ZfRV 1968, 42 ff; *idem,* Bürgerliches Recht II[13] (2007) 335; *Lukas,* Anmerkungen zu OGH 1 Ob 2139/96g, JBl 1997, 395 f.

178 OGH 1 Ob 8/95 in ÖBA 1996, 213; cf also the article by *Rebhahn,* Schadenersatz wegen nicht erteilter Devisenhandelsermächtigung? ÖBA 1996, 185.

179 Cf on all this *Müller-Stoy,* Schadenersatz für verlorene Chancen (1973); *Kasche,* Verlust von Heilungschancen (1999); *Koziol,* Schadenersatz für verlorene Chancen? ZBJV 2001, 889; *Großerichter,* Hypothetischer Geschehensverlauf und Schadensfeststellung – Eine rechtsvergleichende Untersuchung vor dem Hintergrund der perte d'une chance (2001); *Mäsch,* Chance und Schaden (2004) 156 ff; *Kadner Graziano,* The »Loss of a Chance« in European Private Law. »All or Nothing« or Partial Compensation in Cases of Uncertainty of Causation, in: Tichý, Causation 133 ff; *idem,* Ersatz für »Entgangene Chancen« im europäischen und im schweizerischen Recht, HAVE 2008, 63 f; further for country reports and the comparative report in section 10 in Winiger/Koziol/Koch/Zimmermann, Digest I 10/1 no 1 ff.

180 On this *Koziol,* Europäische Vertragsrechtsvereinheitlichung und deutsches Schadensrecht, in: Basedow (ed), Europäische Vertragsrechtsvereinheitlichung und deutsches Recht (2000) 199 f; *Mäsch,* Chance und Schaden 224 f.

»Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.«

5/95 The examples show that the cases resolved by application of the loss of a chance theory could also be discussed as applications of the theory of alternative causation, more precisely the *competition between an event which triggers liability and coincidence as alternative causes.* Nevertheless, the starting points for the two theories are quite different. As opposed to alternative causation, the theory of loss of a chance begins with the definition of damage[181] thus removing all obstacles of causation in the sense of a *conditio sine qua non*[182]. In cases of bodily injury, for example, it is no longer the doubtful causation of the impairment to the victim's health that is at issue but the loss of a chance to be healed; such loss undoubtedly having been caused or at least increased by the medical error in question. The doctrine of loss of a chance thus shifts the issue from the causation level to that of the damage.

5/96 In support of this doctrine it is always being pointed out that otherwise the slightest difference in the facts leads to completely *contrary results:* if the claimants can prove causation, they receive full compensation; if they fail to prove it, they get no compensation at all. The slightest differences in the probability with which causation is deemed to have been given or not lead to contrary results. Very similar concerns are also voiced by the Austrian OGH[183]; it sought the solution, however, via the rules on alternative causation.

Undoubtedly, the »perte d'une chance« theory[184] is satisfying from the point of view of the results insofar as it leads to compensation for the loss of a chance in proportion to the probability of its happening, thus avoiding extreme solutions for very slight differences in the assessment of probability[185]. It appears *doubtful,* however, that this doctrine offers a *dogmatically appropriate* solution that is in

181 Cf the country reports in Winiger/Koziol/Koch/Zimmermann, Digest I: Austria (10/3 no 6); Belgium (10/7 no 5); Ireland (10/14 no 5); Scotland (10/13 no 4); Slovenia (10/26 no 3); Italy (10/9 no 4). The Portuguese courts, however, sometimes proceed on the basis of a causation problem (10/11 no 6), cf also the commentary on Case 1 (1/11 no 8).

182 Some countries use the loss of a chance theory to overcome the problem with establishing a causal link, see the country reports on England (10/12 no 2) and Ireland (10/14 no 5) in Winiger/Koziol/Koch/Zimmermann, Digest I.

183 OGH 4 Ob 554/95 in JBl 1996, 181.

184 See *Viney/Jourdain,* Traité de Droit Civil. Les obligations: Les conditions de la responsabilité[3] (2006) 316 ff, 421 ff; *Galand-Carval,* France, in: Faure/Koziol, Medical Malpractice 114 ff; in German literature in particular *Kasche,* Heilungschancen 3 ff, 119 ff; *Mäsch,* Chance und Schaden 143 ff.

185 *Bieri/Marty,* The Discontinuous Nature of the Loss of Chance System, JETL 2011, 23 ff, show, however, that the theory of loss of a chance yields substantially different results in the case of slight changes in facts and moreover, by no means leads to the same results as the proportional liability systems.

harmony with the overall system[186]. The reasons for this scepticism can be clearly demonstrated with reference to the sub-problem: loss of a *chance of recovery.*

5/97 Firstly, the following must be pointed out: there are certainly cases in which the defendant has *not destroyed any chance* by his wrongful conduct, rather it simply can no longer be established whether the defendant brought about the illness or the claimant was already ill. For instance, in the above-mentioned case the Austrian OGH[187] had to decide on the claim of a child whose deformity was caused either by a medical error at the time of his birth or had already been brought about incurably by an illness of the mother. If the child was already deformed before the birth, then there was no more chance of recovery and the medical error did not even destroy any chance (of recovery). If, however, the child was healthy up until the birth, then the medical error not only thwarted said chance, it actually caused the injury to the child's health.

In such cases, in which one cannot speak of destroying a chance but which in fact are clearly concerned only with the problem of the *impossibility of clarifying the cause* of the deformity, it is clear that the doctrine of »perte d'une chance« cannot offer any help on the basis of its fundamental idea. Thus, this doctrine must admit the criticism that it is not capable of solving cases which are of similar merit, in the same fashion. For both the above-described case of injury existing as of the time of birth and in cases in which the doctrine of »perte d'une chance« is applicable, the same problem is at the core: namely that it is not possible to establish whether the doctor caused the health injury by his malpractice or not. No persuasive evaluation criteria are discernible for why the victim's compensation claim should depend on whether the injured party still had a chance of recovery at the time of the medical malpractice or not. In both cases the real issue is only that it is not humanly possible to know how the damage was really caused.

5/98 A further, very decisive problem is addressed by *Stoll*[188]*:* the chance of recovery is not an independent *legally protected good,* such as could trigger duties to compensate when injured. Rather, it is only bodily integrity that is comprehensively protected. *Stoll*[189] and also *Kasche*[190] are nonetheless of the opinion that the lack

186 Thus, in 2007 also the Swiss Federal Court: BGE 133 III 462. The decision was discussed in detail in ERPL 2008, 1043 ff; thus also by *B.A. Koch,* Der Verlust einer Heilungschance in Österreich 1051 ff and *Oliphant,* Loss of Chance in English Law 1061 ff.

187 OGH 4 Ob 554/95 in JBl 1996, 181.

188 *Stoll,* Schadensersatz für verlorene Heilungschancen vor englischen Gerichten in rechtsvergleichender Sicht, Steffen-FS (1995) 475 f. Cf also *Kadner Graziano,* The »Loss of a Chance« in European Private Law. »All or Nothing« or Partial Compensation in Cases of Uncertainty of Causation, in: Tichý, Causation 143 ff; *Kasche,* Heilungschancen 250 ff; *Müller-Stoy,* Schadenersatz für verlorene Chancen (1973) 233 f; *Röckrath,* Kausalität 180 f; *Taupitz,* Proportionalhaftung zur Lösung von Kausalitätsproblemen – insbesondere in der Arzthaftung, Canaris-FS I 1234.

189 Steffen-FS 475.

190 Heilungschancen 224 ff.

of an independent protected legal good only poses difficulties in German law but not in French law with its blanket tort provision. At least in relation to Austrian law[191], which has in § 1295 ABGB a blanket clause very similar to Art 1382, 1383 of the French Code civil, and equally for Swiss law[192] with its general rule in Art 41 OR, this consideration ultimately does not apply: according to the ABGB too – as explicitly stipulated in §§ 1294, 1295 – the tortfeasor only has a duty to compensate if he had acted *unlawfully* and *culpably.* It is in answering the question as to which conduct is unlawful in the field of tort that the so-called *absolutely protected interests* play their really decisive role in the ABGB, but also in most other legal systems[193]. As a result, the German legal system with its individual elements of the offence, which provide for the protection of certain legal interests, and the Austrian legal system with its general clause, do not differ so radically as might appear at first glance.

As far as chances of recovery are concerned, they have hitherto in principle not been seen as independent interests legally protected against infringements. Nowadays, only bodily integrity, health and life are seen as protected legal interests which must be compensated in case of infringement, but not – or at least not to the same extent – the chance to become healthy, which must be qualified as a pure economic damage[194]. The unlawfulness of the perpetrator's conduct could, therefore, arise in the field of tort only from the endangerment of the victim's bodily integrity and accordingly, it would also be the detrimental change of health and not the loss of a chance which were decisive in establishing the duty to compensate. *Mäsch*[195] takes this into consideration in that he generally only recognises a duty to compensate for destruction of a chance in the field of contractual liability, where he takes the existence of contractual duties to preserve chances as a starting point.

5/99 However, basing the claim on the chance also presents other significant problems[196]: the overcoming of those difficulties which can be mastered with the doctrine of the loss of a chance requires the application of an *objective-abstract* damage assessment justified by the notion of the continuing effect of the right *(Rechtsfortwirkungsgedanken).* The doctrine of loss of a chance is supposed to block out precisely the – improvable – future development and takes as its sole basis the chance at the point in time of the faulty conduct. This is only possible by not taking the subjective pecuniary loss calculated according to the difference

191 In more detail *Koziol,* Generalnorm und Einzeltatbestände als Systeme der Verschuldenshaftung: Unterschiede und Angleichungsmöglichkeiten, ZEuP 1995, 359.

192 See, eg, *Honsell,* Schweizerisches Haftpflichtrecht[4] (2005) § 4 II; *Widmer,* Switzerland, in: Koziol, Unification: Wrongfulness 117 f.

193 See the individual country reports and the summary in *Koziol,* Unification: Wrongfulness.

194 Cf *Mäsch,* Chance und Schaden 295 ff.

195 *Mäsch,* Chance und Schaden 237 ff, 294 ff.

196 On the following cf already *Koziol,* Schadenersatz für verlorene Chancen? ZBJV 2001, 902 ff.

method as a basis, since this calculation is based on the hypothetical development of the pecuniary interest in the absence of the damage event and would thus involve precisely the difficulties which it intends to avoid. The doctrine of loss of a chance can, therefore, only attain its objective if it is based solely on the point in time of the tortfeasor's faulty conduct and does not consider the future development. Accordingly, *Mäsch*[197] speaks quite correctly of a »momentary snapshot«. An assessment of the positive damage based on the point in time of the injury, and disregarding the future development, is in fact known to Austrian law (§ 1332 ABGB)[198], but is rejected under German law[199] and can thus of course not be drawn on selectively either, just for the cases of loss of a chance.

5/100 But even in the event that an objective-abstract assessment based on the point in time of the injury is recognised, further substantial problems remain, making it appear highly doubtful that the doctrine of loss of a chance can really attain its goal. The objective-abstract assessment of damage is based on the notion of the continuing effect of the right *(Rechtsfortwirkung)* and requires as its object an independent interest with pecuniary worth which has a market value. So solving the situation by using the chance destroyed as a basis does not work if this chance does not constitute a pecuniary interest with a market value. This requirement has not been satisfied, however, if the chance is not yet clear and secure enough to be perceived as a separate, independently evaluable interest on the market.

Moreover, the limited effectiveness of this approach as a solution is demonstrated also in cases such as the following[200]: a farmer ordered a pesticide, which had it been used in time might have been able to save his harvest which was infested by pests. The supplier delayed with the delivery so that pest control was started too late; it can no longer be ascertained whether the plants would have been saved had the pesticide been delivered on time. This case does not concern the loss of a chance which constituted an independent pecuniary good, but instead negative effects on property. This is why the claim cannot be based on the value of the chance of saving the plants according to its probability; rather the loss of property is decisive. However, the thorny problem of unclear causation arises when it comes to awarding compensation in this respect.

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197 *Mäsch,* Chance und Schaden 293. He argues, however, that this kind of »snapshot« cannot be a good starting point for a claim to compensation. This assertion, nonetheless, means he cannot solve the problem triggered by the impossibility of clarifying the causation question – as shall be discussed below.

198 *Neuner,* Interesse und Vermögensschaden, AcP 133 (1931) 277 ff; further references in *Koziol,* Haftpflichtrecht I³ no 2/56 ff.

199 *Esser/Schmidt,* Schuldrecht I/2⁸ § 32 III; *Lange/Schiemann,* Schadensersatz³ 30 f, 248 ff. However, see, eg, *F. Bydlinski,* Schadensverursachung 24 ff, and *Larenz,* Lehrbuch des Schuldrechts I¹⁴ (1987) § 29 I b.

200 Already mentioned in *Koziol,* Europäische Vertragsvereinheitlichung und deutsches Schadensrecht, in: Basedow (ed), Europäische Vertragsrechtsvereinheitlichung und deutsches Recht (2000) 200.

5/101 Basing the claim on chance of recovery as a compensable interest would moreover – as also pointed out by *Stoll*[201] – lead to another consequence which is hardly likely to meet with broad approval: as the claim does not depend on the causation of bodily injury, but on the destruction of a chance which existed at the time of the unlawful action, this will mean that the patient would be entitled to obtain *damages* for the destruction of the chance of recovery existing at the time in question even if, in end effect, he did *not suffer any damage to his health*[202].

Jansen[203] and now likewise *Mäsch*[204] seek to get around this problem by pointing to the transience of the chance; the merely diminished but still realisable chance is a »snapshot«, they argue, and this alone renders it unsuitable as a basis for a claim for damages. Both, therefore, want to distinguish between the loss and the diminishment of a chance and only have regard to the total *loss* of a chance. However, this way they can only avoid abrupt solutions in part: if only the complete destruction of a chance – but not the mere diminishment thereof – provides a basis for claims to compensation, then a new boundary will be drawn, which is decisive for compensability. Furthermore, the distinction is hardly persuasive, as otherwise not only the complete destruction of an interest but also its diminishment in value is generally considered a detriment. The exclusion of a chance-reduction is, moreover, of very decisive significance, as chances are regularly not completely destroyed but merely diminished. This is precisely what happens in the cases of delayed commencement of medical treatment, which obviously have great practical significance. The application scope of the doctrine of loss of a chance is thus reduced almost to zero, if the mere diminishment of the chance is not to be taken into account. In addition, the impossibility of clarifying causation, precisely the problem the chance doctrine is intended to neutralise, means that it will *never be possible to establish* whether the chance was completely lost as a result of the misconduct or merely diminished. The attempts to

201 Schadensersatz für verlorene Heilungschancen vor englischen Gerichten in rechtsvergleichender Sicht, Steffen-FS (1995) 475 f.

202 This solution is obviously actually supported in France; see *Kadner Graziano,* »Alles oder nichts« oder anteilige Haftung bei Verursachungszweifeln? – Zur Haftung für perte d'une chance/loss of chance und eine Alternative, ZEuP 2011, 182. Also critical of such results is *Riss,* Hypothetische Kausalität, objektive Berechnung bloßer Vermögensschäden und Ersatz verlorener Prozesschancen, JBl 2004, 440, who uses arguments like the principle of compensation and the prohibition on enrichment. The economic analysis also speaks against the possibility of obtaining compensation for loss of a chance when no damage has actually occurred; see *Visscher,* Tort Damages, in: Faure, Tort Law 177 f.

203 *Jansen,* The Idea of a Lost Chance, OJLS 19 (1999) 282. With this standpoint it is natural that, for instance, *Jansen,* OJLS 1999, 295 f, wishes to distinguish between increasing risk and losing a chance; only in the latter case should compensation come into question. On the other hand, I consider it is important to point out that the increasing of a risk inherently diminishes chances and thus any differentiation remains unconvincing.

204 *Mäsch,* Chance und Schaden 289 ff.

delineate the doctrine of chance appropriately have thus actually led to the theory's irrelevance.

5/102 The opposite problem also remains unsolved, namely whether the victim can seek compensation for the loss of a chance as well as for the impairment of health which actually occurred. If these were really two independent legal goods, then a *double claim for compensation* would hardly be avoidable.

5/103 This problem of compensation for the lost chance in cases in which the damage ultimately never occurs, and that of compensation for both the chance and the injury which really occurred, reveal in my opinion the *inherent flaw* in the chance theory very clearly: the merchantability and thus the value of any pecuniary good depends on the degree of probability with which such good can be exploited. The value of a claim, for instance, depends on the probability of its realisation; the value of a thing depends on its prospective useful life. If the chance of the enforceability of the claim or the long-term use of a thing is reduced, then the market value of the good is diminished. The diminishment or destruction of a chance is thus reflected in the objectively calculable reduction in the value of the pecuniary good. Hence, the existence of a chance of use cannot be considered an independent good to be evaluated separately in addition to the pecuniary good[205]; in the event of destruction of the chance it *may not be included as a separate loss of value* in the pecuniary balance: this would clearly mean the same interest was counted twice, thus leading also to a doubling of the damage and hence to the risk of double compensation[206].

In my opinion, this all speaks very clearly *against* adopting the doctrine of loss of a chance. This applies all the more because there is in any case a system-compliant, dogmatically sound solution available, namely the doctrine of alternative causation and its application to cases where an event which triggers liability and one which falls within the sphere of the victim are competing causes[207]. The EGTL and also the Austrian Draft have, therefore, with good reason not adopted the doctrine of »perte d'une chance« but instead aim to solve the problem according to the general rules on liability in the case of potential causation.

5/104 A passing remark on all of this: it is astounding that manifold dogmatic difficulties, theoretical contortions and inconsistencies are merrily accepted in order to propagate an approach which offers only an insufficient, partial solution and is

205 This is also addressed by *Taupitz,* Proportionalhaftung zur Lösung von Kausalitätsproblemen – insbesondere in der Arzthaftung, Canaris-FS I (2007) 1234.

206 In this respect, the same mistake is made as when the possibility of use is granted a life of its own, see above no 5/24 f.

207 Thus, also *Kadner Graziano,* The »Loss of a Chance« in European Private Law. »All or nothing« or partial compensation in cases of uncertainty of causation, in: Tichý, Causation 143 ff; *idem,* ZEuP 2011, 196 ff; *B.A. Koch,* ERPL 16 (2008) 1059; *Heinrich,* Haftung bei alternativer Kausalität mit Zufall 85 ff.

unknown in our legal system; yet on the other hand, it is represented as untenable when the existing rules are thought through to their logical end.

g. Alternative perpetrators and alternative victims[208]

5/105 Let us turn to another variation of the mountaineering example for illustration: just as in the original case, the mountain climbers B1 and B2 each culpably caused a stone to fall. Now we assume that one stone injured claimant K1 and the other stone claimant K2; however, it cannot be ascertained which stone hit which claimant.

Naturally, cases of greater practical significance can also be found in this context. Worldwide for instance, the diethylstilbestrol cases (in short DES cases) have been discussed[209]: several pharmaceutical companies produced very similar medicines, which contained DES. The pills caused an illness that only broke out after an incubation period of several years. After this long period, the individual claimants were no longer able to identify the manufacturer of the particular medication they took.

5/106 At first glance it might seem that this addresses the same problem as the first group of cases: B1 and B2 are alternatively causal for the damage suffered by K1 and the same applies to the damage suffered by K2. Hence, under present Austrian and German law, we would proceed from the joint and several liability of both defendants towards both K1 and K2[210]; according to the rules of the PETL and the Austrian Draft, on the other hand, from a partial liability of both perpetrators towards both victims.

There are, nonetheless, important specifics of the group of cases under discussion here that must also be taken into account[211]: each of the two perpetrators has in this case *definitely caused damage,* namely either the injury to K1 or to K2. For the sake of simplicity let us assume that the damage to both is equally high, then we know that B1 and B2 have both caused damage and the extent of the

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208 On this in particular *Bodewig,* Probleme alternativer Kausalität bei Masseschäden, AcP 185 (1985) 505; *J. Koch,* Haftungsprobleme bei Produktspätschäden (1987) 97 ff; *T. Müller,* Wahrscheinlichkeitshaftung von Alternativtätern (2001); *Otte,* Marktanteilshaftung (1990); *Seyfert,* Mass Toxic Torts (2004); also the country reports and the comparative report on 6d in: Winiger/Koziol/Koch/Zimmermann, Digest I 6d/8 no 1 ff.

209 On this *Green/Hanner;* Aggregation and Divisibility of Damage in the United States: Tort Law and Insurance, in: Oliphant, Aggregation no 45 ff.

210 This solution was advocated by the Netherlands Hoge Raad in its decision of 9.10.1992, Nederlandse Jurisprudentie 1994, 535. See on this *Spier/Wansink,* Joint and Several Liability of DES-Manufacturers: A Dutch Tort Crisis, Int Insur Law Rev 1993, 176.

211 See on this *J. Hager,* Die Kausalität bei Massenschäden, Canaris-FS I (2007) 411 ff; *Koziol,* Haftpflichtrecht I³ no 3/39 ff; *Loser-Krogh,* Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung, Schweizerischer Juristentag 2003, Heft 2, 166 ff; *Nieuwenhuis,* Eurocausality, Dufwa-FS (2006) 860 ff; *Röckrath,* Kausalität 111, 135.

damage is known. The uncertainty present in the case of simple alternative causation, of whether B1 or B2 respectively have caused any damage, does not arise in this case. Hence, the starting point is that each of the two perpetrators has definitely caused damage to a measurable extent, in other words neither is being made liable for damage for which they may not be responsible. It only remains questionable which of the equally high amounts of damage is to be reckoned against which of the perpetrators; in other words who must compensate whom? This is why the additional prerequisites of liability for merely potential alternative causation are not necessary in this case. Neither is it necessary that causation by the perpetrator would have to be assumed due to a concrete endangerment of precisely that particular victim when looking at the relationship between the perpetrator and the individual victims in isolation[212]. The *proven causation* of damage by the perpetrator responsible thus mitigates a problem which otherwise is inherent to cases of alternative causation.

5/107 On the other hand, it must also be taken into account that each of the defendants has injured at most only one of the claimants, and thus can *definitely not be held liable for both parties' injuries.* Joint and several liability of both perpetrators for the injuries to both victims and thus liability for damage which was certainly not caused is precluded on the basis of all accepted precepts[213]. Nonetheless, it must be taken into consideration that neither of the perpetrators can be linked to one specific victim. Insofar then, this is a case of alternative perpetration, meaning in turn that the risk of whether a particular tortfeasor will pay up cannot be imposed on one individual victim alone. Hence, only the *proportionate liability* of both perpetrators to both victims can come into question in this case[214].

5/108 The solution described here undoubtedly involves very substantial practical problems when a large number of parties are involved, ie in the case of so-called *mass torts.* The best-known example is offered by the afore-mentioned DES cases: when similar and equally damaging medicines were offered by several manufacturers, the victims frequently can no longer prove which manufacturer produced the medication they personally took, meaning several perpetrators come into question for the injury to each victim. Thus, it is actually relatively seldom that it can be proven that a particular manufacturer put a particular victim at a concrete risk. Hence, not even the requirements of liability for alternative causation are satisfied. These cases are also special, however, in that while causation by any

212 Similar *Röckrath,* Kausalität 171.

213 This is also emphasised by *Seyfert,* Mass Toxic Torts 237 f; *T. Müller,* Wahrscheinlichkeitshaftung 80 f.

214 If the damage suffered by K1 and K2 is not equally high, then the tortfeasors shall not be made liable for any share of the damage going beyond that suffered by the victim who incurred the lesser injury, except according to the principles of alternative causation, ie only if it is possible to prove concrete endangerment by the tortfeasor of the victim who suffered more damage.

particular perpetrator cannot be proven in relation to any individual victims, it can collectively be assumed that in all likelihood each of the manufacturers has caused damage[215]: in the case of equally dangerous products it can be assumed that they have all led to damage in equal measure. The proportion of the entire damage caused will, therefore correspond to the market share of each medication[216]. Uncertainty remains only in relation to which individuals were injured by which individual manufacturers, as far as that is concerned any allocation is largely impossible.

5/109 In support of the liability of each manufacturer, it can be argued that each of them has certainly caused damage, to be precise that proportion of the entire damage as corresponds to its market share. Any liability going beyond this share is impermissible because nobody must bear responsibility for damage which he certainly did not cause or at least on the balance of probabilities did not cause. This also precludes any joint and several liability of all manufacturers towards all victims: such would lead to each manufacturer being liable to an extent that went far beyond the damage it caused. Thus, even according to existing Austrian law only proportionate liability of the manufacturers towards each victim can present a solution[217]. This is also provided for in the Austrian Draft and the PETL.

With that, each victim is obviously confronted with considerable enforcement difficulties: each must sue all manufacturers who come into question for their respective share in the damage. That is not only laborious, it is also expensive. However, the existing law provides no alternative. One solution in particular is precluded, namely that each victim be allotted his full claims against a certain tortfeasor: this would mean that the risk of non-payment would affect victims very unequally; some victims might be left with an insolvent defendant company, others with defendants that have no solvency problems. Practical help is at hand, however, when the victims organise themselves or assign their claims to a trustee, who enforces the collected claims against the individual tortfeasors.

5/110 Furthermore, the definition of the individual manufacturers' share is difficult: if some victims can prove they were damaged by a particular medication, then these victims can seek full compensation from the corresponding manufacturers. But this must be taken into account when defining the manufacturers' shares of the damage to the other victims. Further, it may be that in some regions only the products of certain manufacturers and not others were used; this

215 This is also emphasised by *T. Müller,* Wahrscheinlichkeitshaftung 108, 122 f, 220 ff. However, this aspect is often neglected, see, eg, *Geistfeld,* The Doctrinal Unity of Alternative Liability and Market-Share Liability, U Pa L Rev 155 (2006) 477 ff.

216 The market is to be understood as that territory in which the same providers distributed their products and had the same market shares. More on this immediately below.

217 Thus, also *Karner/Riss,* Aggregation and Divisibility of Damage in Austria: Tort Law, in: Oliphant, Aggregation no 68 f.

too must be taken into account as the other manufacturers are not even potentially causally responsible for the damage in these regions. The calculation of the shares is thus very difficult and complex. Finally, it must be taken into consideration that the calculation of the shares can change over time, for instance if injuries deviant from the market shares are proven.

As long as no process-related provisions are made for such cases, it is certainly still better to take this difficult path than to deprive the victims of all compensation. Moreover, some alleviation is already available in the present-day when all the sub-claims are collected together by means of assignment to one claimant[218].

3. Cumulative causation

5/111 Cumulative causation is when two real events take effect simultaneously and both of them would have brought about the same damage on their own; ie each event was highly likely to cause the damage. A well-known example illustrates the problem: B1 and B2 inflict fatal shooting injuries simultaneously upon K. More practically relevant examples would be the simultaneous default of several suppliers, whose deliveries were essential for the commencement or continuation of the client's production process, or the simultaneous introduction of toxic wastewater by two companies when either amount of wastewater would already have killed the fish on its own.

Although in such cases neither of the two events is a *conditio sine qua non* for the occurrence of the damage[219], as in each case the other event would have brought about the same harm anyway[220], it would certainly not be appropriate to refuse compensation to the victim due to the coincidence of several events, of which each alone would already have been a basis for liability. It is undisputed in Austrian law as well as in other legal systems that all should be jointly and severally liable and, thus, this aspect will not be discussed any further here. This prevailing view is followed by the Austrian Draft (§ 1294).

5/112 Cumulatively causal perpetrators are jointly and severally liable as opposed to partially liable as in the case of alternative causation according to some theories (see above no 5/84 f) because in this constellation *each* of the perpetrators undoubtedly would have caused the entire damage in a manner for which he is accountable; thus, his liability is established when the other cause is imagined away and when there is no appropriate reason to exempt him from liability. In

218 On this, eg, *J. Hager,* Die Kausalität bei Massenschäden, Canaris-FS I (2007) 413 ff.

219 See, eg, *Apathy/Riedler,* Bügerliches Recht III[4] no 13/61; *Koziol,* Haftpflichtrecht I[3] no 3/52 ff with additional references; further *Neethling,* Element of Causation in South African Law of Delict, in: Spier, Unification: Causation 102; *Koziol,* Causation under Austrian Law, ibid 20.

220 Therefore, it does not make much sense to say that each of the actors was »fully causal«; thus, *Deutsch/Ahrens,* Deliktsrecht[5] no 60.

the case of alternative causation, on the other hand, it is certain that *not each* of the two would have otherwise caused the damage; only one of them did, but it is uncertain which of them this was.

As *F. Bydlinski*[221] rightly points out, the application of joint and several liability in the case of cumulative causation does not mean that the requirement of causation is abandoned; it is merely altered: in lieu of the necessary condition comes the *sufficient condition.* Each of the two events is a sufficient condition for the damage to occur.

4. Superseding causation

5/113 In contrast to cumulative causation, superseding causation means it is not the case that two events bring about damage simultaneously but that instead event E1 first really causes damage, which would later otherwise have been brought about by event E2 if such had not been preceded by E1. An example would be if K is injured by B1 and loses his capacity to work; subsequently he is injured anew by B2 and this injury would also have caused him to lose his capacity to work. Other, very realistic cases: B1 damages K's car; shortly afterwards B2 writes off the same car. The supplier B1 defaults with his delivery so that K cannot continue production in his plant; two months later the sub-contractor B2 is also in default and this would also have meant K had to suspend production processes.

The problem is always that the respective first perpetrator B1 *did not cause* the damage according to the necessary condition formula, since it would otherwise have occurred in any case when brought about by B2. When B1 caused damage to the car, the corresponding loss of value would have been sustained later anyway when the car was written off by B2; as regards the injury causing K's loss of working capacity, the victim would have lost his earnings anyway by reason of the subsequent injury and as regards the suppliers, K's production would have had to be suspended due to the second supplier's default in any case. Accordingly, B1 did not provide the conditio sine qua non for the damage which ensued in any of the above cases; in the last two cases the first damaging party is at least causal for the earlier infliction of the damage, ie for the damage caused during this earlier period.

5/114 In contrast to the approach to cases of cumulative causation, the approach to resolving cases of superseding causation is hotly disputed[222]. It is predominantly advocated that B1, who *in reality caused* the damage in an unlawful manner, no

221 *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 21 f.

222 See the discussion of the problem and further references in *Apathy,* Zur Haftung bei überholender Kausalität, Koziol-FS (2010) 515 ff; *F. Bydlinski,* Schadensverursachung 32 ff; *Karner* in KBB, ABGB[3] § 1302 no 9; *Koziol,* Haftpflichtrecht I[3] no 3/58 ff; *Lange/Schiemann,* Schadensersatz[3] 180 ff; *Oetker* in MünchKomm, BGB II[5] § 249 no 201 ff; *Schobel,* JBl 2002, 775 with additional references.

longer be exempted from liability if B2 would subsequently also have brought about said damage[223]. However, this does not give sufficient regard to the fact that monetary damages are not compensation for a real change but for the pecuniary loss calculated in money according to the difference method (Differenzmethode)[224]. In the case of permanent damage, in particular when earning capacity is impaired, it is at least usually taken into account that the damage would have occurred in any case at some point in time due to a pre-existing susceptibility to such damage, eg an illness. In the context of causation of loss of earning capacity, it is equally taken into account that this would also have ended due to the victim reaching a certain age limit or due to death. Therefore, it is taken into account that a legal good limited as to time has been impaired. Further, it is widely advocated that the loss of profit is only recoverable up to the particular point in time as when the accrual of the advantage would also have been frustrated by coincidence. The rationale behind this is that the profit should be measured according to the usual course of things (§ 1293 ABGB; § 252 BGB).

5/115 As *F. Bydlinski*[225] has persuasively shown – looked at analytically – superseding causation is nothing other than cumulative causation stretched out chronologically: when the later event intervenes, there is cumulative causation; up until this point there is merely the usual necessary condition provided by the earlier damaging party. Accordingly, for example, only the earlier damaging party B1 is accountable for K's losses in terms of working income until the second event intervenes, ie the action attributable to B2, and as of this point in time both damaging parties are jointly and severally liable, as is otherwise undisputedly the case when there is cumulative causation.

In § 1294, the Austrian Draft largely follows the principle developed by *F. Bydlinski* and – deviating from the still prevailing view that only the real damaging party should be liable – provides that in cases of superseding causation, multiple perpetrators are jointly and severally liable insofar as both events are potentially causal.

5/116 It must be emphasised that according to the Austrian Draft, the hypothetical second causer can understandably only be held liable when *all other criteria for liability* are satisfied. If the first perpetrator has already destroyed the legal good, then the hypothetical second causer *no longer has any duties of care* towards the already destroyed good and his conduct will not be unlawful[226]: if B1 has already

223 Thus, recently also OGH 7 Ob 238/07m in JBl 2009, 247 (critical *Bumberger*).

224 Thus, neither can it be said that the first perpetrator caused the damage and the second perpetrator no longer posed a risk; in this sense also recently once again *Röckrath,* Kausalität 26 f.

225 *F. Bydlinski* in: Tichý, Causation 18 ff; *idem,* Schadensverursachung 68 f. Following this line to a large extent *Koziol,* Haftpflichtrecht I³ no 3/67 ff. Cf also *Apathy,* Koziol-FS 520 ff.

226 On this *F. Bydlinski,* Schadensverursachung 75; *Koziol,* Haftpflichtrecht I³ no 3/76 and *idem,* Schaden, Verursachung und Verschulden im Schadenersatzentwurf, JBl 2006, 772 f.

killed K, then B2 who shoots at the corpse no longer acts negligently with respect to K's life. In this case, even according to this view, the second perpetrator cannot be liable and the first perpetrator is liable on his own; he, as it were, conclusively inflicted the damage. The liability of the second perpetrator in cases in which such only acts after the damage has been brought about by the first perpetrator is also precluded on the basis that the later event can no longer pose a specific risk to the destroyed good. The liability criteria of negligence and a high degree of specific risk thus mean that only such subsequent events can be taken into consideration as occurred when the destroyed good still existed. The ever repeated fears that the view advocated here would lead to all possible further causes of damage having to be taken into consideration in future, is thus baseless.

5/117 The same must apply analogously, however, if the legal good still existed at the time of the second event but was already damaged as a result of the first event. An example: K's vehicle, worth € 20,000, is damaged by B1 and is reduced in value by € 3,000; prior to it being repaired the same vehicle is damaged so badly by B2 that it is written off. The question is whether B1 and B2 are jointly and severally liable for € 3,000, and B2 besides this for the remaining € 17,000 and thus in total for the entire € 20,000, or whether B1 is liable on his own for € 3,000 and B2 is only liable for € 17,000. As the situation is the same as if the thing were destroyed completely by B1, applying the same values would mean that the same solution is applicable as in the case of complete destruction, ie the second solution. This solution is appropriate although B2's conduct can be deemed negligent in respect of the still existing thing in this case of inflicting damage, but it must be remembered that B2 is only negligent in relation to an already damaged thing and his conduct can no longer be considered specifically dangerous with respect to that part of the thing that has already been destroyed by B1.

5/118 If the second event is a *coincidence* or was brought about by the victim, then it is the victim in principle who must bear the resulting consequences. In competition with an event triggering liability, such second event leads – as *F. Bydlinski* shows[227] – in application of the principle of contributory responsibility (§ 1304 ABGB; § 254 BGB) – to apportionment of damage. The same position is taken by the Austrian Draft. Nonetheless, it must also be observed that, just as in the case of events triggering liability, the potential causation of the second, chance event is only to be taken into consideration if a high degree of specific risk is posed. Therefore, just as in the case of unlawful conduct on the part of the second perpetrator, only such chance events are to be taken into account as ensue during the existence of the good damaged by the first event. The same principles apply – although negligence cannot be at issue – as in the cases of a second event triggering liability.

227 Schadensverursachung 78 ff, 95 ff.

5/119 *F. Bydlinski*[228] has defended the position that in the case of *objective assessment* of the damage, cases of superseding causation do not present any difficulties as the time of the damage is determined and, consequently, subsequent events cannot be taken into consideration. However, he thus reaches conclusions that he does not wish to accept when it comes to compensation of interests and for which he criticises the prevailing view: due to the possibly minimal time interval between the first and second event, the result is that in the case of cumulative causation both perpetrators are jointly and severally liable whereas in the case of superseding causation only the first perpetrator is liable and the second perpetrator escapes liability. While *F. Bydlinski* regards this result as unavoidable and justified by the objective assessment, other voices have expressed intense criticism of how it conflicts with the approach to cumulative causation[229]. This concern can, in my opinion, be accommodated at least for a substantial part by aligning the results[230]: if the thing at stake was already threatened by the second event at the time the real damage was inflicted, then this is no longer a question of purely future events but there has already been an actual reduction of the ordinary value of the thing. A thing threatened by an external event is valued at less than a thing not subject to any specific risk. Therefore, both perpetrators are potentially causal with respect to the value loss relevant at the time of the evaluation and, accordingly, they are jointly and severally liable as in the case of cumulative causation.

5/120 The *PETL* seem at first glance, in contrast to the Austrian Draft, to follow the still prevalent view, providing in Art 3:104 (1) that the first perpetrator is fully liable and not the second. However, this is followed by a very decisive limitation: this rule only applies if the second action, which would also otherwise have brought about the damage, ensued only after the damage really brought about by the first perpetrator has occurred[231]. The sole liability of the first perpetrator thus only applies to cases in which the second perpetrator did not in fact act unlawfully because the legal good of which the destruction is in question no longer existed due to already having been destroyed by the first perpetrator. Nonetheless, the provision does not expressly stipulate what is to happen if the second act takes place before the final occurrence of the damage; it must, however, then be applied in accordance with Art 3:102, so that as in the case of cumulative causation the

228 Schadensverursachung 26 ff. The objective assessment of damage based on the notion of continuing effect of a right (Rechtsfortsetzungsgedanken) was drawn in recently by *Gebauer,* Hypothetische Kausalität und Haftungsgrund 221 ff, in order to solve the problem of hypothetical causation.

229 *Raber,* Fragmente zum allgemeinen Teil des Haftpflichtrechts, JBl 1977, 27 f; *Kramer,* Multikausale Schäden, in: Fenyves/Weyers (eds), Multikausale Schäden in modernen Haftungsrechten (1988) 94 f; *Kleewein,* Hypothetische Kausalität und Schadensberechnung (1993) 87 ff, 120 f, 197 f.

230 *Koziol,* Haftpflichtrecht I³ no 3/71.

231 On this *Spier/Haazen,* Comparative Conclusions on Causation, in: Spier, Unification: Causation 141 f.

joint and several liability of the perpetrators is assumed. Pursuant to Art 3:104 (2), subsequent acts are to be taken into account if they led to additional damage and, in the case of lasting damage also as of the point in time when they would also have brought about the damage.

All the above-cited solutions encounter difficulties, however, when the only reason the second perpetrator cannot be accused of unlawful conduct is that the protected good no longer exists: in this constellation too, the first perpetrator has not in fact provided a necessary condition for the damage and thus is liable merely for potential causation. At least at first glance it would be strange if the first perpetrator were nonetheless conclusively liable for the entire damage even though he would have been jointly and severally liable if the second perpetrator's act had still been unlawful and in such case would have had recourse against the second perpetrator in respect of half of the damage. On the other hand, taking the view that the second event – in point of which quite apart from causation the other criteria for liability are not satisfied either due to the lack of unlawfulness – falls as coincidence into the victim's sphere of risk also seems problematic. It seems illogical because the victim would have had a claim under tort law against the second damaging party had it not been for the first event: thus, the victim would certainly have had a claim for compensation, just as in the cases of cumulative causation – if the other event were imagined away – but would still have to bear half of the damage. 5/121

To find an appropriate solution, it would seem worthy of consideration that the first damaging party's act also brought about the fact that the victim can *no longer bring any claim for damages* against the second damaging party[232]. This idea is extremely problematic, however,[233] and appears only to lead to the first damaging party being liable for the loss of the compensation claim against the second perpetrator, or not, for example, if such was insolvent. Moreover, it is highly questionable whether the removal of the claim for damages against a hypothetical damaging party is covered by the protective purpose of the norm that prohibited the first damaging party from destroying the thing. Ultimately, only a pseudo-solution is achievable on the basis of this idea: it could be asserted with exactly the same justification that the second perpetrator had frustrated the compensation claim based on the damage to property inflicted by the first perpetrator; thus, leaving the question of why precisely the first perpetrator should be liable for the loss of a compensation claim but not the second perpetrator. Ultimately, the approach fails completely when there are two hypothetical perpetrators[234]. 5/122

232 This is taken as a base, eg, by *Kramer,* Das Problem der überholenden Kausalität im österreichischen Schadenersatzrecht, DRdA 1969, 144 ab.

233 On this *Koziol,* Haftpflichtrecht I³ no 3/64.

234 Thus, also *F. Bydlinski,* Schadensverursachung 78.

5/123 However, the following considerations may help towards reaching an appropriate solution: as regards the first perpetrator, all liability criteria were satisfied at first at the time the damage was inflicted, including that of causation – which was only diluted to potential causation by the subsequent second event. The full liability of the first perpetrator is, nonetheless, not terminated in principle by a second event triggering liability, rather the first perpetrator continues to be liable and the second perpetrator is jointly and severally liable with him. If the second event does not satisfy the criteria for liability, then the *first perpetrator remains fully liable* to the victim, the only difference is that no second party is liable besides him and, thus, he loses possibilities of recourse against such second liable party. The risk as to whether there are further liable parties and whether recourse claims exist and are enforceable always affects the perpetrator, who is fully responsible for damage: the fact that no other perpetrator is liable and, thus, that the one liable party has no claims of recourse, or that existing recourse claims are not enforceable, cannot exonerate a responsible perpetrator. The liability of the second perpetrator is irrelevant to the establishment or termination of the first perpetrator's liability; it is only material in relation to any internal relief based on recourse claims. Insofar, it may be said that the question of whether there is a further liable party falls within the first perpetrator's sphere of risk and not that of the victim.

III. Summary

5/124 As already highlighted by *F. Bydlinski*[235], it is appropriate to affirm liability in cases of alternative, cumulative and superseding causation, even though there is no conditional link according to the conditio-sine-qua-non formula. However, this does not mean that the causation requirement is completely disregarded[236]: instead, the event triggering liability must be highly likely to cause the damage which is at issue. Causation must, therefore, still be demonstrated albeit in the diluted form of potential causation; however, as a result of this attenuation of the causation required, it is only sufficient as a foundation for liability provided it is associated with a high degree of specific risk, ie with strong adequacy. It must always be considered that a potential causer can, of course, only be liable if all the

235 *F. Bydlinski,* Causation as a Legal Phenomenon, in: Tichý, Causation 17 ff.

236 Attempts are also made to surmount these difficulties by another type of examination, see, eg, *Wright,* Causation in Tort Law, 73 Cal L R 1985, 1788 ff, who proposes the »Necessary Element of a Sufficient Set« test. On this see, eg, *Röckrath,* Kausalität 20 f, 32 ff.

other liability criteria are satisfied; in this respect it is particularly important to remember that there can no longer be any duty of care towards things that have already been destroyed, so that the criterion of unlawfulness is not satisfied in relation to the second perpetrator if the protected good was already destroyed by the first event prior to the occurrence of the second event.

5/125 In conclusion, it must also be said that the issue of superseding causation is related to that of *lawful alternative conduct* (see below no 7/22 ff). In both cases, the issue is that unlawful and culpable conduct has in fact brought about harm, which would otherwise have been caused by an event that did not trigger liability. The difference is simply that in the case of superseding causation, the second event actually ensues, whereas in the cases of lawful alternative conduct it is merely hypothesised. In the latter case, therefore, the prevailing view is that there is no causation issue but instead another kind of liability problem: this concerns the link between the unlawfulness and the resulting consequence and, thus, the question of whether according to the protective purpose of the norm governing the conduct at issue, the damaging party should also be liable on the basis of his unlawful conduct for the harm that would likewise have been brought about by lawful conduct. This applies, nevertheless, only to causation of damage by *active conduct.* On the other hand, if the perpetrator omitted to do something, his liability would be rejected on the basis that there is no causal link when the same harm would have arisen in the case of positive action in line with applicable duties because an *omission* is only causal if taking certain action would have prevented the occurrence of the consequence and taking this certain action would have been possible (no 5/64 ff).

5/126 Even the fact that the distinguishing line between damage inflicted by action and by omission, which can only be drawn with significant difficulty, should be decisive as regards determining whether the problem is one of protective purpose or causation, reveals the close relationship between the two problem areas[237]. However, even cases of damage inflicted by actions concern the same value judgement issue in cases of the lawful alternative conduct as those of superseding causation, namely whether the real causer should be exonerated by an event not triggering liability that did not have any real impact. The question of whether the damaging party who acted unlawfully – pursuant to the purpose of the norm applicable to his conduct – should also be liable for damage caused or potentially caused by him but which would otherwise have been brought about by an event not triggering liability, thus arises in the case of hypothetical causation and lawful

237 *Koziol,* Rechtmäßiges Alternativverhalten – Auflösung starrer Lösungsansätze, Deutsch-FS (1999) 179 ff. In this sense now also *Grechenig/Stremitzer,* Der Einwand rechtmäßigen Alternativverhaltens – Rechtsvergleich, ökonomische Analyse und Implikationen für die Proportionalhaftung, RabelsZ 73 (2009) 336 ff.

alternative behaviour alike and should accordingly be decided alike as there are no relevant differences between the two areas that would provide a basis for treating them differently.

The references[238] to the *parallels of the decisive value judgements* are, therefore, well-founded. Consequently, it should also be possible vice versa to deal with the problem of superseding causation not in the context of causation but with respect to the protective purpose of the norm and to ask the same question in respect of lawful alternative behaviour and superseding causation[239]: the issue is always a value judgement as to whether, according to the purpose of the violated conduct rule, the real causer, who acted unlawfully and culpably, should also be liable for the damage in the event that such damage would also have been brought about anyway by an event for which he is not accountable. This underlying value judgement issue must, therefore, be the same regardless of the dogmatic categorisation of the question so that, for example, the relevant notion of continuing effect of the right may be applied as part of both approaches even when the damage is assessed objectively.

238 See *Riss,* Hypothetische Kausalität, objektive Berechnung bloßer Vermögensschäden und Ersatz verlorener Prozesschancen, JBl 2004, 430 f; *Gebauer,* Hypothetische Kausalität und Haftungsgrund 221 ff; *Oetker* in MünchKomm, BGB II[5] § 249 no 212.

239 See already *Koziol,* Deutsch-FS 183.

Chapter 6

The elements of liability

I. Wrongfulness

A. Introduction

6/1 *Canaris*[1] emphasises that *liability for wrong caused by fault,* ie for imputable misconduct, »is in principle self-evident from a legal and ethical point of view because it is based on a legal condemnation«. In his great book[2] on the Roman foundations of civil law, *Zimmermann,* again, persuasively argues that in the law of tort the terms wrong and fault are of fundamental significance. Finally, a look around at other legal systems shows that *»misconduct«* and thus »wrongfulness« – albeit subject to very different understandings in the different systems – does in fact play a decisive role in all legal systems when it comes to establishing liability[3]: in the field of fault-based liability, the perpetrator is only liable for the damage caused if his conduct was in some way incorrect.

The consensus with which the significance of wrongfulness is affirmed from the legal-ethical, legal-historical and comparative law perspective when it comes to the liability for damage and, therefore, the establishment of liability, is starkly in contrast to the diversity of views as to what wrongfulness actually means and the fundamental principles it is based on.

1 Die Gefährdungshaftung im Lichte der neueren Rechtsentwicklung, JBl 1995, 16. Cf also *F. Bydlinski,* System und Prinzipien 189 ff; *von Caemmerer,* Das Verschuldensprinzip in rechtsvergleichender Sicht, RabelsZ 42 (1978) 5 ff.

2 Obligations 902, 907.

3 See on this *Koziol,* Conclusions, in: Koziol, Unification: Wrongfulness 129 ff. However, cf also the somewhat sceptical discussion by *Horwart,* The General Conditions of Unlawfulness, in: Hartkamp/Hesselink/Hondius/Mak/du Perron (eds), Towards a European Civil Code[4] (2011) 845 ff, in particular 874 ff.

B. The different concepts of wrongfulness

6/2 Even a quick glance reveals how different the understanding of the liability criterion »wrongfulness« is in the individual legal systems[4]. Some countries even decline to distinguish between wrongfulness and fault; this applies in particular to France[5]. Above all, however, the term wrongfulness is accorded extremely different levels of significance. This leads, eg, to most legal systems only regarding wrongfulness as significant in the field of *fault-based liability,* though it is also considered significant particularly in Switzerland[6] and sporadically in Germany[7] in the field of *strict liability.* Likewise, the Swiss Draft of a general part of the Swiss Tort Law regards wrongfulness as a very general requirement for any kind of liability[8].

6/3 Yet even in the field of fault-based liability, there are very different views as to what wrongfulness means. This can even be demonstrated with reference to two relatively closely related legal systems such as the Austrian and German: according to the *»theory of wrongfulness of conduct« (Verhaltensunrechtslehre),*[9] which prevails in Austria, wrongfulness arises from a violation of rules or prohibitions laid down by the legal system. The assessment of wrongfulness always relates to human behaviour and not to a damaging result, because wrongfulness means nothing other than the finding that there has been infringement of a rule. Legal rules can only be infringed by the behaviour of legal subjects, as they alone are the addressees of such rules. Accordingly, a result or a state of affairs may not be referred to as wrongful; a result can be evaluated as undesired but cannot be required or forbidden in the same sense[10]. An example: if someone speeds down the piste on skis without any control and rams another person, who is skiing carefully, from behind, then the result, namely the injury to both skiers, is certainly undesired. Yet only in the case of the careless skier going too fast can we speak of wrongful conduct. It is true that the careful skier also caused the damage suffered

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4 An overview can be found in *Koziol* in: Koziol, Unification: Wrongfulness 129 f. See also *G. Wagner,* Grundstrukturen des Europäischen Deliktsrechts, in: Zimmermann, Grundstrukturen: Deliktsrecht 213 ff.

5 *Galand-Carval,* Fault under French Law, in: Widmer, Unification: Fault 92 f.

6 See *Oftinger/Stark,* Haftpflichtrecht I[5] 172; *Widmer,* Switzerland, in: Koziol, Unification: Wrongfulness 115 f.

7 BGH in BGHZ 117, 110; *von Bar,* Verkehrspflichten. Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht (1980) 131 ff.

8 In the new Art 41 only wrongfully inflicted damage is deemed imputable and in the section on the general requirements for liability, Art 46 regulates wrongfulness. See on this also *Widmer,* Reform und Vereinheitlichung, in: Zimmermann, Grundstrukturen: Deliktsrecht 158 f.

9 On this *Koziol,* Haftpflichtrecht I[3] no 4/2 with additional references. However, a certain tendency towards wrongfulness of the result can be detected in *E.A. Kramer,* Schockschäden mit Krankheitswert – noch offene Fragen, Koziol-FS (2010) 755 f.

10 This is called for very forcibly by *Münzberg,* Verhalten und Erfolg 3, 53, 61 ff, also in respect of German law.

by the careless skier simply by being present on the slope, but her conduct cannot be considered wrongful so long as she has not infringed any duties of care.

6/4 In Germany, by contrast, the *»theory of wrongfulness established by the result« (Erfolgsunrechtslehre)* is still widespread[11]. In its original form – which still prevails in Switzerland – this proceeded solely from the result. Nowadays, however, regard is had to the argument that the legal system can only classify human behaviour[12] and not a result as wrongful in that it is postulated that the result is not the object of but merely the criterion for the assessment of wrongfulness[13]. Accordingly, conclusions regarding behaviour are inferred from the negative result of such: whoever causes injury to an absolutely protected good or right, such as the right to bodily integrity or property rights, has acted wrongfully unless he had a special justification. The theory of wrongfulness of the result is moreover only advocated in respect of so-called direct infringements of absolute rights and legal goods; it is contended that such infringements are certainly wrongful[14]. Nonetheless, even in this form it would not only be the conduct of the speeding skier, who rams the other skier from behind in the above example, that was wrongful but also the conduct of the careful skier because the collision with her effected a direct interference with the health of the speeding skier. Despite the theory of wrongfulness based on the result producing such dissatisfying conclusions, support for the theory of wrongfulness of conduct is only growing very gradually in Germany[15].

6/5 A further significant difference in interpretation that shows itself in European legal systems relates to the *distinction between wrongfulness and fault,* which – as already indicated – is not drawn at all in France. In some countries there is a very clear distinction; in others the lines are blurred. If, as in German law[16], an objective fault standard is applied, there is hardly any difference in the case of indirect infringements between relevant objectively unlawful behaviour and subjective negligence as far as the conduct of a person with capacity to commit torts is concerned. This is different, for example, in Austria[17] and in the Netherlands[18], where

11 This still applies today in particular for intentional injury to legal goods, see *Brüggemeier,* Haftungsrecht 37 f.

12 Against this, however, once again recently by *Jansen,* Das Problem der Rechtswidrigkeit bei § 823 Abs. 1 BGB, AcP 202 (2002) 544 ff, who, however, in a strange contrast to taking the result as a basis argues that only the results of actions must be taken into account; cf further *Jaun,* Haftung für Sorgfaltspflichtverletzung (2007) 391 ff.

13 See *Larenz/Canaris,* Schuldrecht II/2[13] §75 II 3 b.

14 On all this *G. Wagner* in MünchKomm, BGB V[5] § 823 no 5 ff with additional references.

15 Besides *Münzberg,* Verhalten und Erfolg, more recently *Wilhelmi,* Risikoschutz 112 ff, 141 ff, and *Bernhard,* Das rechtsverletzende Handeln als Grundlage der deliktischen Haftung in § 823 Abs. 1 BGB, Picker-FS (2010) 83 ff, are worthy of mention.

16 On this in particular *Deutsch,* Fahrlässigkeit[2] 229 f, 282.

17 *Koziol,* Haftpflichtrecht I[3] no 5/35 ff.

18 Cf *Spier,* The Netherlands. Wrongfulness in the Dutch Context, in: Koziol, Unification: Wrongfulness 88 f.

fault is in principle assessed according to a subjective standard; the same applies to the Swiss minority opinion and the Swiss Draft of a new law of tort[19].

C. The search for a comprehensive concept

6/6 At first glance it seems that the above-cited diversity of opinion is based on irreconcilable differences. A closer look shows, however, that the different standpoints taken in European legal systems are always well-founded and that no particular one of the concepts of wrongfulness can be preferred in general. Furthermore, it must be noted that the different understandings of the concept also have *different purposes* in mind for wrongfulness and thus are not mutually exclusively but instead complement each other[20].

When it comes to gathering these different purposes in one overall concept, the *flexible system* (see above no 1/28 ff) can provide good service[21]. Its approach is that the individual liability elements, ie also the element of the defect in the sphere of the damaging party, can be present in varying intensity; the legal consequences depend on the respective degree of this intensity and the interaction with other elements. These ideas could lead to a harmonious overall concept of the element of misconduct, by unifying the seemingly irreconcilable views on wrongfulness. Within this concept, there are essentially three different levels to be distinguished[22].

6/7 At the first level: the *theory of wrongfulness of the result* emphasises that the legal system is aimed at protecting certain goods, such as life, health, liberty and property (protected interests[23]), and preventing damage to them. Thus, it is established at a very high abstraction level whether conduct conflicts with the legal system. In order to avoid misunderstandings, one could speak here of *fulfilment of the factual elements of the offence (Tatbestandsmäßigkeit)* instead of wrongfulness[24]. In basing his uniform model of liability law on responsibility for the result,

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19 *Widmer,* Die Vereinheitlichung des Schweizerischen Haftpflichtrechts – Brennpunkte eines Projekts, ZBJV 1994, 410 with additional references.

20 On this in more detail *Koziol,* Rechtswidrigkeit, bewegliches System und Rechtsangleichung, JBl 1998, 619 ff.

21 The rejection by *Jansen,* Die Struktur des Haftungsrechts (2003) 593 ff, is based to a large extent on the fact that he does not take into account the further elaboration and development of *Wilburg's* theory by *F. Bydlinski.* In any case, his own theories correspond largely to those of *F. Bydlinski*.

22 See also *G. Wagner,* Grundstrukturen des Europäischen Deliktsrechts, in: Zimmermann, Grundstrukturen: Deliktsrecht 217 ff, who seeks to distinguish between the function of wrongfulness, to define the protective scope of the interests protected against infringement and to regulate the criteria for designating an act wrongful.

23 *K. Oliphant* (ed), The Law of Tort[2] (2007) 9 ff. A broad, comparative law overview is offered by *van Dam,* Tort Law 141 ff.

24 See *Larenz/Canaris,* Schuldrecht II/2[13] §75 II 2.

Jansen[25] presumably also in fact drew on this idea of fulfilment of the factual elements of the offence, ie the result impugned by the legal system.

6/8 However, this wrongfulness of the result, as it were, is *not* in itself suitable to serve as a decisive *liability criterion under the law of tort*[26]*:* from a legal-ethical perspective, liability for fault is based on some accusation against the perpetrator; this indicates that the assessment of wrongfulness is primarily based on the misconduct of the damaging party – and not on the result. As already mentioned, *only human behaviour* can infringe the law as only people are subjects of the law. If the idea was only to take account of this by drawing inferences as to the previous behaviour based on the subsequent result, this would lead to an ex post assessment of the behaviour. Weighing in against such a retrospective assessment it must be taken into account that the person acting should be motivated to engage in certain conduct *in advance* and that subjecting the already completed conduct to a subsequent classification cannot be the point either. This is taken into consideration in more recent times by already defining the *endangerment* of protected interests as a decisive result[27].

Furthermore, the theory of wrongfulness of the result cannot explain what the damaging party may be *accused of* if he acted as reasonably as could be expected of anyone. Without culpability there is no legal-ethical foundation for fault-based liability.

Finally, it must also be taken into consideration that even legal goods such as life, health, liberty and property are *not protected against any and all infringements.* Minor impairments of health must often be tolerated due to super-ordinated interests[28]; one only has to think of the negative effects of car exhaust fumes. Outside of the context of the classic absolute rights, the negative result, for example, loss of profit and thus pure economic loss, ultimately cannot even provide an indication that there was wrongfulness.

6/9 While wrongfulness of the result per se cannot even provide an appropriate justification for why someone should bear the damage, it nonetheless has a very important function outside of the law of tort: if someone fulfils the factual elements of unlawfulness in that he endangers or damages legal goods or interests that are allocated by the legal system to another and which the legal system in principle aims to protect against interferences, then in a very abstract sense he engages in behaviour that the legal system seeks to prevent as far as possible. While such factual fulfilment of wrongfulness being established at this high level

25 *Jansen,* Struktur des Haftungsrechts 561 ff in particular.

26 *Jansen,* AcP 202 (2002) 544 ff, at first gives the impression of supporting another view; however, he simply shifts the decisive considerations as regards liability to the question of grounds for excluding liability; cf on this *Jansen,* Struktur des Haftungsrechts 581 ff.

27 *Deutsch,* Haftungsrecht[2] no 237; *Larenz/Canaris,* Schuldrecht II/2[13] §75 II 3 b.

28 See on this also below no 6/18 ff and 27.

of abstraction still does not imply any serious accusation against the perpetrator and thus cannot justify imposing liability for the damage on him, it is nonetheless sufficient at least to trigger lesser legal consequences, namely the recognition of *defensive rights,* ie rights to act in self-defence and preventive injunctions: if protected interests are endangered and thus the elements of an offence are realised, the person at risk has a right to defend himself against the infringement. Furthermore, suchlike abstract undesired situation can trigger reparative injunctions and also actions for unjust enrichment by interference (*Eingriffskondiktionen,* Verwendungsansprüche). Finally, in the event that widely protected interests, ie the so-called absolute rights, are infringed, fulfilment of the factual elements of wrongfulness is an indication of careless behaviour.

6/10 At the second level of incorrectness of conduct it must be examined more closely whether the damaging party engaged in conduct that must be qualified as careless in the given situation and measured according to an objective standard[29]. In this respect the deficiency of the conduct is still examined at an objective but nonetheless far more *concrete* level. This step corresponds largely to the »breach of duty« theory[30] recognised in English law, as well as the *theory of wrongfulness of the conduct* advocated in some legal systems of Continental Europe.

The theory of wrongfulness of the conduct is repeatedly criticised for failing to distinguish between wrongfulness and *fault.* However, this criticism is misplaced[31]: the standard for wrongfulness is objective, whereas according to the basic principles fault is assessed according to a subjective yardstick. This has implications even in those legal systems that take an objective standard of fault as a basis (see below no 6/83 ff): children and the mentally ill may act in an objectively careless manner even though no subjective fault is at hand due to their lack of capacity to understand.

6/11 At this level of objective carelessness, the incorrectness of the conduct in question attains such a significance that it may already be sufficient in combination with less significant elements to trigger *liability* for the damage caused. Thus, objectively careless conduct may be sufficient to establish liability in combination with increased degree of danger; this is the case, for instance, as regard the liability of the owner of a defective building or an animal (§§ 1319, 1320 ABGB). Furthermore, the objectively careless behaviour of children or mentally ill persons may lead to full or partial liability under consideration of additional factors, above all the economic circumstances (§ 1310 ABGB, § 829 BGB).

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29 It is clearly a misunderstanding when *Jansen,* AcP 202 (2002) 544 FN 139, assumes that according to my view liability always requires wrongful conduct; this requirement is only valid in the field of liability for misconduct, naturally it does not apply when it comes to strict liability.

30 *Van Dam,* Tort Law 189 f; *Koziol,* Introduction, in: EGTL, Principles 25; *W.V.H. Rogers,* Winfield & Jolowicz on Tort[17] (2006) 337 ff.

31 See *Koziol,* Haftpflichtrecht I[3] no 5/42 and 44.

The third level of incorrectness of the conduct looks at whether the objectively careless act can be counted against the specific perpetrator on the basis of *subjective* abilities and circumstances. This addresses the issue of *fault.* This is an even weightier criterion for liability and sufficient in itself to establish liability for the damage caused. 6/12

In summary, the following can be noted: the three levels of the element of incorrectness of conduct are weighted differently and the more abstract the level at which they are established, the less weight is attached to them in establishing liability; vice versa, the greater the weight attached to them, the more concrete the assessment. If in the specific circumstances and on the basis of his subjective abilities, the perpetrator was in a position to recognise the endangerment to third-party interests and could have avoided it or if he actually strove towards the damaging result, then the personal and thus especially serious accusation of blameworthy will (Willensmängel) may be added. 6/13

The legal consequences are also graded accordingly: if merely the *fulfilment of the factual elements of the wrong* is established at the highest level of abstraction, ie the general undesirability of the conduct in question, this aspect is only enough to justify defensive rights, ie rights of self-defence and preventive injunctions, as well as reparative injunctions and claims for unjust enrichment. At the next level of *objective carelessness,* the incorrectness acquires enough weight to suffice in combination with other less significant liability criteria to trigger liability for the damage caused. Subjectively assessed *fault* is an even weightier liability criterion and sufficient per se to justify the liability for damage.

D. Delimitation of protected interest

When it comes to delimiting the protective scope of the interests recognised by the legal system, it must be kept in mind that *countervailing interests* are at issue[32]. When the legal system grants protection to the rights and interests of one person, it thereby requires all other persons to respect this area. The holder of a protected interest is not required to tolerate interferences; he can take actions for preventive injunctions and exercise his rights of self-defence. In consequence, every time the legal system recognises a protected area this means everyone else's freedom is accordingly limited[33]. The definition of protected areas thus requires that the countervailing interests be weighed up in a value judgement: on the one hand, 6/14

32 Cf *Alexy,* Begriff und Geltung des Rechts (1992) 120.

33 This aspect was emphasised again recently by *Peukert,* Güterzuordnung als Rechtsprinzip (2008) 895 ff, in explaining the question of recognition of property rights; further *Wilhelmi,* Risikoschutz 12 ff, 230 ff.

there is an interest in greatest possible protection, on the other hand an interest in greatest possible freedom[34].

6/15 The legal system can define the protective areas in two different ways, namely either more *conduct-based* or more *result-based:* it can forbid a more or less definite sort of conduct; this would imply that the legal system is aimed at protecting such interests as are otherwise endangered. Or the legal systems define the protected rights and interests and require they be observed in a rather general manner, insofar as this is reasonable and appropriate. These two approaches are usually combined, for example, in Germany with the two paragraphs of § 823 BGB and § 826 BGB and in Austria with § 1295 (1) and (2) and § 1311 sentence 2 case 2 ABGB.

6/16 The question of how far a person's interests should be protected and what conduct must correspondingly be required from all others can be answered relatively easily as far as there is an *express behavioural rule* prohibiting the endangerment of rights and interests by specific proscribed behaviour (protective rule; § 823 (2) BGB, § 1311 sentence 2 case 2 ABGB). Resolving the issue is considerably more difficult, however, if the legal system merely prohibits *behaviour contrary to bonos mores* (see § 826 BGB, § 1295 (2) ABGB). The extent of the protection is, moreover, more difficult to determine if the legal system merely *describes the rights and interests* that must be observed insofar as this is reasonable and appropriate (§ 1295 (1) ABGB, § 823 (1) BGB)[35]. It is obvious that the more narrowly defined the fundamental rule based on the protected interest is, the more significance is accorded to the conduct-oriented description of protection[36]. Thus, under Austrian law the infringements of protective laws and damage inflicted contrary to bonos mores are accorded considerably less significance than in German law, which seeks to overcome the narrowness and rigidity of § 823 (1) BGB in this manner.

6/17 The *EGTL* has attempted a comparative analysis of the *decisive factors* for the determination of the protective scope (Art. 2:102 PETL). According to this, the following must be taken into account: the value of the protected interests; how clearly the interests are delineated and their obviousness; the type of liability affecting the perpetrator, in particular whether he is accountable on the basis of careless or intentional damage; the interests of the perpetrator, in particular in his freedom of movement and the exercise of his rights, and ultimately also public interests. The Austrian Draft has largely leaned on these results (§ 1293 (2) and (3)), and even in academic literature, corresponding attempts are increasingly being made[37].

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34 *Larenz/Canaris,* Schuldrecht II/2[13] §75 I 1; *van Dam,* Tort Law 715 f; *Schilcher,* Der Regelfall als Verbindung von Tatbestandsmodell und Beweglichem System, Koziol-FS (2010) 869 ff.

35 Cf also on this *Koziol,* Conclusions, in: Koziol, Unification: Wrongfulness 132.

36 See on this *Spickhoff,* Gesetzesverstoß und Haftung (1998) 16 ff, 24 ff, 49 ff.

37 In recent times, eg, by *Wilhelmi,* Risikoschutz 230 ff.

It must be emphasised that the extent of the protection depends on whether one or more factors are fulfilled and what weight they are accorded; furthermore, the interplay with other factors is also decisive. As the protective scope depends on the total weight of all the factors, it is certainly possible that even high-ranking interests do not enjoy any protection if the countervailing interests outweigh them. Thus, for example, a threatened impairment to health may be very minor (common cold), but the pecuniary disadvantage to the relevant actor may be enormous if he is required to respect the health of others to the outermost limits.

E. Protection against insignificant infringements?[38]

1. Recognition today of the de minimis rule

6/18 Voices are frequently raised – particularly by insurance companies – to the effect that compensation should no longer be awarded for trivial damage. This issue has also been addressed in the course of German and Austrian reform of the law of damages. The old notion[39], that trivial matters should be ignored has also found endorsement recently and was incorporated into a draft for a European code: the *Study Group on a European Civil Code* provided in its PEL Liab Dam in the field of extra-contractual liability in Art 6:102[40] under the heading »De Minimis Rule«: »Trivial damage is to be disregarded.«

At first glance, this maxim appears thoroughly persuasive, especially as there are a number of starting points for it in applicable law. On closer consideration, however, doubt arises as to whether these individual provisions are really so capable of generalisation.

6/19 In the *law of neighbours (Nachbarschaftsrecht)* § 906 (1) BGB provides that the owner of a piece of land may not prohibit the effects originating from another piece of land insofar as such »does not impair or only insignificantly impairs the use of his own property«. This approach is followed by § 364 (2) ABGB which provides that an owner of land can only forbid emissions by the neighbour if such »significantly impairs the use of the land as customary in the location«; hence, the owner is not protected against insignificant impairments under the law of damages. In Swiss law it can be inferred from the ban only on »excessive impacts« (Art 684 (1) ZGB) that neighbours must tolerate moderate emissions[41].

38 Already in more detail on this *Koziol,* Geringfügigkeitsschwellen im Schadenersatzrecht? Bucher-FS (2009) 419 ff.

39 On the little significance of the principle in Roman law see *Klingenberg,* Minima non curat praetor, Knütel-FS (2009) 559 ff; *idem,* Das modicum-Kriterium, Savigny-Z 126 (2009) 187 ff.

40 On this PEL/*von Bar,* Liab Dam, Chapter 6 Art 6:102, Comments.

41 *Rey* in BSK, ZGB II[4] Art 684 no 1.

6/20 Further, in respect of *product liability* Directive 85/374/EEC provides in Art 9 lit b) for a threshold of € 500 in cases of damage to property. Accordingly, the national legal systems also stipulate such thresholds in their laws on non-fault-based product liability (§ 2 of the Austrian, § 11 of the German and Art 6 of the Swiss Product Liability Acts). As a result of these provisions, damage to property that falls below the given threshold is not compensated pursuant to the strict product liability rules. As compared with an actual de minimis rule, however, there is a difference in that not only will trivial damage be disregarded but even serious damage is not compensated in full due to the imposition of the threshold.

6/21 Besides this, it is very often acknowledged that there is a de minimis threshold for the compensation of *non-pecuniary damage in the case of infringements of personality rights*[42]. For instance, Art 49 OR only provides for satisfaction in the case of interference with personality rights if *»the gravity of the injury justifies such«*[43].

In Germany, on the other hand, the attempt to include a de minimis threshold in the amended version of § 253 (2) BGB was ultimately abandoned[44]; nonetheless, it was assumed that the courts would be able to observe the minimal threshold by reference to the »equity« of the compensation[45]. Moreover, a grave interference continues to be required in the case of violations of general personality rights not covered by § 253 BGB[46].

In Austria, numerous individual provisions explicitly limit the compensation of non-pecuniary losses to gross violations (§ 150 (3) PatG; § 53 (4) MarkSchG; § 34 MuschG; § 41 GMG; § 16 (2) UWG[47]). Accordingly, courts also only award compensation of the non-pecuniary harm for infringements of the Copyright Act under § 87 (2) UrhG in the case of very sensitive offences[48].

Ultimately it should be noted that under § 1316 (2) Austrian Draft »insignificant harm« is not to be compensated. The insignificance of harm must be ascer-

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42 See *Karner/Koziol,* Ersatz ideellen Schadens 36 ff with additional references.

43 Art 49 sec 1 OR: »Any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made.«

44 On this *G. Wagner,* Das Zweite Schadensersatzrechtsänderungsgesetz, NJW 2002, 2056.

45 See on this *Oetker* in MünchKomm, BGB II[5] §253 no 29.

46 Settled case law of the BGH, see in particular BGHZ 26, 349 (»Gentleman rider case« – Herrenreiterfall); BGHZ 35, 363 (gingseng root case); BGHZ 39, 124 (television announcer); BGHZ 128, 1 (Caroline von Monaco I); on this *Rixecker* in MünchKomm, BGB I/1[5] § 12 Anh no 226. Critical *Funkel,* Schutz der Persönlichkeit durch Ersatz immaterieller Schäden in Geld (2001) 192 f with additional references; *Witzleb,* Geldansprüche bei Persönlichkeitsverletzungen durch Medien (2002) 105 ff.

47 See OGH 4 Ob 126/89 in SZ 62/192; 4 Ob 135/90 in ÖBl 1991, 58; 4 Ob 49/95 in MR 1996, 74 = ÖBl 1996, 134.

48 OGH 4 Ob 101/93 in SZ 66/122 = MR 1994, 239 *(W. Michael)* = ÖBl 1993, 279; 4 Ob 281/98x in MR 1998, 345 *(W. Michael);* 4 Ob 175/08a in MR 2009, 81.

tained according to the criteria cited in the first sentence of this provision[49]: the question of whether damages are to be awarded depends on the significance of the damaged good, the objective traceability, its extent and the length in time of the impairment as well as the weight of the grounds for liability. Hence, compensation shall be awarded for impairments that are not classifiable as serious only if their triviality is balanced by the weight of other factors. Para 3 of this provision cites, for example, results of such balancing, for instance, based on the rank of the damaged good and the objective transparency – in the case of bodily injury damages for pain and suffering must always be paid.

2. Reasons for a de minimis threshold

6/22 In the *law of neighbours,* the duty to tolerate insignificant encroachments is rationalised with reference to the social adequacy of the encroachment and emphasis that this rule is necessary so that under consideration of their different interests, it is possible for neighbours to have the most extensive, economically useful enjoyment of their properties[50].

It is further highlighted that the owner's duty to tolerate insignificant encroachments of the use of his property has a teleological basis in the consideration that exclusivity and arbitrariness of an owner's authority to use the property finds its natural limitations in the exclusivity and arbitrariness to which the other owner is likewise entitled[51].

6/23 As far as *product liability* is concerned, the preamble to the Directive merely states that the deductible was introduced in the interests of industry and in order to avoid litigation in an excessive number of cases[52]. In the comments, there is talk of the exclusion of bagatelle cases[53], although one can hardly still talk of a bagatelle when the amount goes up to € 500. However, the obvious question of

49 *Christandl/Hinghofer-Szalkay,* Sinn und Funktion einer gesetzlichen Erheblichkeitsschwelle im Nichtvermögensschadensrecht, JBl 2009, 284 ff, in their criticism of the Austrian Draft wrongly equate insignificant damage with minimal damage and thus overlook the fact that no rigid, absolute de minimis threshold applies to insignificant damage (thus 294) and that instead the interplay of different criteria is decisive. Examples for the result of this weighing up are provided by para 3 of § 1316 Austrian Draft. According to this, damages for pain and suffering must certainly be paid in the case of bodily injury, ie even when the damage is minor; hence the criticism of the exclusion of compensation of minimal damage in the case of bodily injury is baseless. In fact, the Austrian Draft provides for precisely the flexible de minimis threshold adaptable to the weight of the individual material factors for which *Christandl/Hinghofer-Szalkay* (ibid 294) call.

50 *Säcker* in MünchKomm, BGB VI[5] § 906 no 30.

51 See *Säcker* in MünchKomm, BGB VI[5] § 906 no 2.

52 *Taschner,* Produkthaftung (1986) Art 9 no 17.

53 *Schmidt-Salzer/Hollmann,* Kommentar EG-Richtlinie Produkthaftung I (1986) Art 9 no 58.

why it is only reasonable to curtail the victim's claims in this manner when it comes to property damage caused by defective products, and why other damaging parties do not also enjoy such favourable treatment is not even asked.

6/24 The notion of social adequacy is also used to justify the requirement for a threshold of significance when it comes to the compensation of *non-pecuniary damage* – as in the law of neighbours – insofar as mere disagreeableness does not exceed a certain threshold of significance, it must be attributed to the general risks of life[54] and does not give rise to any sanctions under the law of damages. *Stoll*[55] points out that everybody must be expected to accept a certain degree of emotional distress as part of his participation in social life. Any other view would lead to boundless extension of liability and an inacceptable restriction of general freedom of movement as well as flood the courts hopelessly with trifling matters.

6/25 One major reason for the reticence in compensating non-pecuniary damage is also that it is very hard to determine whether and to what extent someone has suffered non-pecuniary harm. For this reason, the recoverability of such harm is contingent on a certain minimum degree of *objectifiability,* which, however, is not sufficient in cases of pure emotional distress[56]. Furthermore, *F. Bydlinski*[57] points out that simple emotional injury is largely dependant upon the will of the victim; a duty to compensate all injuries of this type would promote self-pity and inability to cope. Merely negative emotions, which upset one, impair one's sense of wellbeing and inspire anger, are quite simply an unavoidable part of everyday life; therefore, the arousal of such does not in principle involve any consequences under tort law[58].

Thus, it may be stated as a general principle that compensation for non-pecuniary damage only enters into consideration when there are *significant infringements of personality rights*[59], but it must be remembered that the gravity of the infringement can be substituted by especially strong grounds for liability on the side of the damaging party. Consequently, targeted interferences must not be tolerated without indemnification even if there is no grave impairment of a clearly defined personality right. Hence, even mere emotional distress can be compensable

54 Cf on this *Mädrich,* Das allgemeine Lebensrisiko (1980); *Deutsch,* Das »allgemeine Lebensrisiko« als negativer Zurechnungsgrund, VersR 1993, 1041 ff.

55 Empfiehlt sich eine Neuregelung der Verpflichtung zum Geldersatz für immateriellen Schaden? Gutachten, 45. Deutscher Juristentag I/1 (1964) 143.

56 *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 243 f; *idem,* System und Prinzipien 223; *Koziol,* Haftpflichtrecht I³ no 11/10; *Karner,* Ersatz ideeller Schäden 79 f; see already *Stoll,* Gutachten 45. DJT I/1, 143 f.

57 JBl 1965, 243; cf also *Stoll,* Gutachten 45. DJT I/1, 143.

58 *Reischauer* in Rummel, ABGB II/1³ §1325 no 1.

59 See *F. Bydlinski,* System und Prinzipien 224, rightly with the supplement »and in any case when it comes to bodily injury«. Likewise *Stoll,* Gutachten 45. DJT I/1, 144.

if the damaging party acted specifically in order to cause such non-pecuniary damage or if the damage was inflicted by an immoral act[60].

3. A general de minimis threshold for non-pecuniary damage?

6/26 Even if one thus acknowledges that in principle only significant infringements of personality rights justify compensation of non-pecuniary damage, the question nonetheless arises as to whether there should not be a *gradation* according to the ranking of the personality rights. For these can also be ranked in a hierarchy: the rights to bodily integrity, liberty and sexual self-determination have more significance for the protection of the personality than the rights to one's image or the right to use one's name. Due to the differing levels of objectifiability of the non-pecuniary harm, the significance threshold must also be assessed very differently when it comes to the violation of physical personality rights as opposed to non-physical personality rights.

6/27 This difficulty is particularly clear when it comes to cases of *bodily injury:* this affects an especially high-ranking personality right, moreover the non-pecuniary damage incurred can largely be objectified on the basis of the type and seriousness of the injury and the recovery time. Both speak for comprehensive compensation. Accordingly, small amounts for pain and suffering are awarded in Austria even for relatively slight physical injuries, nevertheless even Austrian court rulings are familiar with a certain bagatelle threshold[61]. While a significance threshold is called for in order to preclude bagatelle cases from the beginning[62], Austrian law does not provide for any institutionalised, rigid significance threshold for bodily injuries[63].

In Switzerland, on the other hand, it is emphasised that the compensation of non-pecuniary damage for bodily injury under Art 47 OR is a case for the application of Art 49 OR, which only provides for compensation in the case of grave violations of personality rights[64]. Hence, no satisfaction is due for bagatelle injuries[65].

6/28 As this short overview has already shown, a significance threshold is indeed widely recognised in the case of injury to *non-pecuniary interests.* When it comes to

60 *Koziol,* Haftpflichtrecht I³ no 11/10; *Karner,* Ersatz ideeller Schäden 79 f.

61 See *Karner/Koziol,* Ersatz ideellen Schadens 40 f.

62 Cf *Karner,* Ersatz ideeller Schäden 70.

63 *Danzl,* Schmerzengeldansprüche nach HWS-Verletzungen im Strassenverkehr, Dittrich-FS (2000) 723.

64 *Brehm* in Berner Kommentar, OR VI/1/3/1³ Art 47 no 5, 27, 29, 161 ff; *Hütte,* Art 47 OR – Genugtuung? Versuch einer Anleitung zur Harmonisierung der Genugtuungsentschädigungen, SJZ 1974, 275; *Schnyder* in BSK, OR I⁴ Art 47 no 13; *Tercier,* L'évolution récente de la réparation du tort moral dans la responsabilité civile et l'assurance-accidents, SJZ 1984, 56. BGE 110 II 163, 166.

65 *Hütte,* Genugtuungsrecht im Wandel, SJZ 1988, 176.

bodily injuries, however, there are definite differences, as the de minimis threshold is also applied unreservedly in this respect in Switzerland, whereas in Germany and Austria there is a certain reservation in this context.

A general, *rigid, significance threshold based on a specific amount,* as was originally conceived for the reform of the German law of obligations, is *not to be advocated* when it comes to the infringement of non-pecuniary interests*:* the argument that everyone must be expected to bear a certain amount of emotional distress as a result of their participation in social life is certainly persuasive. It must also be acknowledged that self-pity would indeed be promoted if damages could be sought for any and all minimal emotional injuries. On the other hand, it must not be forgotten that different non-pecuniary interests are of differing rank, which implies a lower significance threshold should be set for higher-ranked rights; accordingly very low in the case of the fundamental personality right to bodily integrity. Finally, the notion of deterrence also speaks in favour of setting a lower minimal threshold when the grounds for liability are more serious. In the case of intention, therefore, a duty to compensate for very minimal injuries should be recognised. Ergo, only a *flexible significance threshold* can be appropriate.

4. A general de minimis threshold for pecuniary damage?

6/29 In the field of pecuniary damage, the short overview above (no 6/19 f) has shown that a significance threshold is recognised in the law of neighbours and product liability law.

As far as the *law of neighbours* is concerned, it seems that the significance threshold is justified by the fact that very normal life events and processes can easily lead to an inconvenience of the neighbour and it would be an unreasonable limitation of freedom of movement if everyday life had to be directed at not encroaching upon the neighbour in any even minimal way. Without doubt, it also works in the interest of peaceful co-existence if all who are part of the neighbourhood are required to exercise a certain tolerance – which ultimately benefits them all mutually – and their often long-term relationships are not strained by continual litigation. Thus, the following ideas play a decisive role in this respect:

The often lengthy co-existence within a *community relationship,* which makes peaceful co-existence particularly important; the hindrance of the economically usefully enjoyment of property otherwise due to excessive duties to consider the interests of the neighbour; the unreasonable limitation of freedom of movement by extensive duties of care, in particular also in the private sphere, which should serve the development of the personality and also relaxation; the mutual high risk of inconveniencing the neighbour in everyday life and thus of triggering defensive and compensation actions; the »trade-off« of inconveniences tolerated on both sides seen over the long-term.

These specific arguments, very weighty as a whole with respect to the law of neighbours, can nonetheless definitely not justify the general introduction of a significance threshold outside of such context. However, it would be worth considering whether corresponding de minimis thresholds should apply in *other community relationships* for similar reasons, for example, within the *family* or within associations based on close personal relationships. 6/30

The BGB has followed this line of thinking insofar as it has lowered the *standard of care* between married persons (§ 1359 BGB) and between parents and children (§ 1664 BGB): such are required in this context only to exercise the care which must be used in their own affairs. In Austria, the liability for damage within the family is subject to milder handling in the same manner though without any express statutory rule[66]. It is true that Art 332 (3) ZGB does stipulate that the head of the family must keep the things brought into the family by those living in the household with the same care as his/her own things and protect them against damage in the same way; however this is not always understood as a restriction to the diligentia quam in suis rebus adhibere solet standard[67].

The same method of limiting liability by reducing the duty of care was also chosen by the BGB in § 708 for *partners* in a partnership[68]. Likewise, Art 538 (1) OR stipulates that in the simple partnership (einfache Gesellschaft) each partner is merely obliged to exercise in the affairs of the partnership the same diligence and care that he exercises in his own affairs. In Austrian law, on the other hand, the ABGB does not provide for any comparable limitation of partners' liability (cf § 1191). 6/31

It should be noted that there are in any case important reasons for thresholds of liability within the community relationships cited above; however, this is not the case outside of such community relationships or at least not to the same extent. Furthermore, another argument against a general significance threshold for *pecuniary damage,* like that for non-pecuniary damage, as suggested by the *Study Group*[69]*,* is that there can be no issue of having to check self-pity – which is always subject to influence at least to some degree – and reasonably requiring the victim to »swallow his anger«, as monetary losses are always palpable. Thus, the issue is whether the victim or the damaging party should have to bear a *financial burden.* If all grounds for liability are fulfilled, then everything speaks for having the damaging party bear the damage and there is no good reason for making an 6/32

66 Cf *Selb,* Schädigung des Menschen vor der Geburt – ein Problem der Rechtsfähigkeit? AcP 166 (1966) 76 ff; *S. Hirsch,* Children as Victims under Austrian Law, in: Martín-Casals, Children II 9.

67 *Tuor/Schnyder/Schmid/Rumo-Jungo,* Das Schweizerische Zivilgesetzbuch[12] (2002, Nachdruck 2006) 469.

68 This rule applies under §§ 105 and 161 HGB also in respect of general partnerships (OHG) and limited commercial partnerships (KG).

69 On this *Schmidt-Kessel,* Reform des Schadenersatzrechts I (2006) 172.

exception to the principle of compensation in the case of minor damage[70]; one could even say, on the contrary, that in the case of small compensatory amounts there is even less reason to free the damaging party from liability.

6/33 Moreover: whereas objective measurement is necessary in the case of non-pecuniary damage because the subjective non-pecuniary injuries are not quantifiable, it is also logical to proceed from the comparability of the immaterial situation for all victims and in general to assume a – nonetheless elastic – bagatelle threshold, which applies to all victims equally. Pecuniary damage, on the other hand, can be *measured precisely;* above all, however, the *economic situations* of victims are extremely *various.* Therefore, self-evidently it cannot be assumed that the exclusion of compensation for minimal damage would affect all victims in a like manner[71]. Thus, a general de minimis threshold as to amount would be unjustifiable because it would hit victims in difficult financial circumstances substantially harder than better-off victims[72]. On the other hand, distinguishing cases according to financial circumstances would lead to well-off victims always having to bear a more or less substantial deductible. However, deviating from the general principle of compensation in the case of one group of victims on such a basis is out of the question; such a deviation could only be appropriate in exceptional cases and under consideration of both the weight of the respective grounds for liability and the capacity of those concerned to bear the economic burden (wirtschaftliche Tragfähigkeit) (cf Art 10:401 PETL).

6/34 As far as *product liability* is concerned, it was established that there are no good reasons for making an exception to the principle of compensation. Nevertheless, in this case the deductible is prescribed by the relevant Directive; in the field of fault-based liability not covered by the Directive, on the other hand, no such limitation on the claims of victims is to be recognised.

In this area, as otherwise, the usual inhibitions counteract any overwhelming litigation of minimal claims for compensation: on the one hand, the general pro-

70 This could be considered, if at all, with the aim of avoiding an over-burdening of the courts, however, the efforts and costs for the claimant means that court action is only taken anyway when compensation of the damage outweighs these burdens.

71 This fundamental difference between pecuniary and non-pecuniary damage is overlooked by *Christandl/Hinghofer-Szalkay,* Sinn und Funktion einer gesetzlichen Erheblichkeitsschwelle im Nichtvermögensschadensrecht, JBl 2009, 290 and 296.

72 The Study Group (see PEL/*von Bar,* Liab Dam, Chapter 6, Art 6:102, Comments 2) seeks to take this into account, emphasising that »economic considerations are not decisive, but rather the legally protected interests of those involved, the type of grounds for attribution and the other conditions of damage causation.« Thus, it is not trivial damage if a child's old and almost economically worthless doll is destroyed or when the dog of an old lady living alone is killed. However, this means that non-pecuniary values are regarded as decisive when it comes to whether material damage is trivial, which appears somewhat contradictory. Moreover, the victim is exposed to a substantial litigation risk due to the uncertainty of the term »trivial damage«, which does not appear appropriate.

hibition of chicanery (the exercise of a right is not permitted if the only possible purpose is to cause damage to another) and, on the other hand, as a rule, the *risk involved in litigation* is a factor which prevents most people from taking action for minimal claims. Moreover, it would be practically impossible to formulate a clear and easily applicable distinction for access to the courts without precipitating subjective unfairness.

6/35 Besides this it must also be remembered that there is in any case a general, flexible de minimis threshold due to the requirement of *violation of a duty of care:* it may be assumed that under normal circumstances there is no duty of care to avoid extremely minimal impairments to other people. Where the line is to be drawn depends of course on the relations between the factors decisive for determining whether there has been a violation of such duties, ie in particular on the rank of the endangered good, the extent of the threatened damage and also the reasonableness of requiring the damaging party to behave differently (see below no 6/40f).

5. The dogmatic status of significance thresholds

6/36 Looking at these rules on liability, within neighbourhood relations on the one hand, and family and corporate partnerships on the other hand, it is striking that two different methods to restrict liability have been chosen: in the law of neighbours the *result,* ie the impairment, is taken as the starting point; in family law, and – apart from Austria – also in the corporate field, the starting point is the *care* which must be exercised, ie a ground for liability.

In *the law of neighbours* each property owner must put up with minimal nuisances; thus, he also has no right to *injunctive relief.* Since preventive injunctions do not require any violation of a duty of care but only the wrongfulness of the result or the realisation of factual elements of the offence (see above no 2/7) it may be assumed that the law of neighbours restricts the *protective scope* of the property interests: minimal impairments do not fulfil the factual elements of the infringement. The same may be assumed in relation to the de minimis threshold when it comes to the infringement of *non-pecuniary interests.*

According to *product liability law,* on the other hand, even minor impairments of the things belonging to the acquirer of the product fulfil the factual elements of the infringement, hence the prerequisites for liability are satisfied; it is simply the *compensation claim* which is limited by a deductible.

6/37 Insofar as only the *duties of care* are limited, eg in the case of damage caused within the *family* or – outside of the Austrian context – within corporations, the factual elements of the infringement are also fulfilled and thus the party at risk is also entitled to *preventive injunctions;* it is only the law of damages liability criterion of breach of duty of care that is not satisfied. The same applies when such

breach of duty of care is rejected due to the minimal nature of the impairment under consideration of further factors.

6/38 Thus, the type of de minimis threshold to be chosen by the legislator depends on what limitation it is intended to achieve:

If the protective scope of property should be subject to a general limitation, ie not only compensation claims but also preventive injunctions should be excluded, then the acceptance of certain impairments must be stipulated, in other words the *result* must be taken as the starting point.

If, on the other hand, the intention is not to limit the protective scope but only the duty to compensate, then the *duties of care* should be restricted[73].

F. The objective conduct standards

1. Establishing the required standard of conduct

6/39 The starting point is the self-evident fact that the interest in as far as possible protection of one person's goods is juxtaposed to the interest of all others in far as possible freedom of movement to develop (freedom of action)[74] and, thus, the issue is how to find the most *appropriate balance between the conflicting interests.* The *EGTL*[75] has not only attempted to elaborate the factors material to the abstract scope of the protection of interests, but has also taken on the approach generally taken in England[76] and compatible with *Wilburg's* concept and tried to set up a guide to elaborate the material factors justifying the specific breach of duty of care to be established; § 1296 of the Austrian Draft largely follows the PETL[77].

6/40 Para 1 of Art 4:102 PETL begins with the somewhat vague statement that the required standard of conduct is that of the »reasonable person«. Nonetheless, this at least makes it obvious that it is not the perpetrator himself who serves as the yardstick and also not the average person or the statistically determined »Mehrheitsperson« (»a person complying with the majority«). The fact that a reasonable person is to be taken as the standard is significant, inter alia, because such person pursues not only his own interests but also keeps those of others in mind. Further, it must be highlighted that the hypothetical behaviour of a reasonable person in

73 When corporate partners' duties of care towards other partners are restricted, this is in part also based on the idea that those who join together in an association know each other and wish to accept each other the way they are; cf on this purpose of the rule *Ulmer/Schäfer* in MünchKomm, BGB V[5] §708 no 1.

74 *Wilhelmi,* Risikoschutz 67 ff.

75 *Widmer,* Required Standard of Conduct, in: EGTL, Principles 76 ff.

76 *W.V.H. Rogers,* Winfield & Jolowicz on Tort[17] (2006) 253 ff; *van Dam,* Tort Law 194 ff.

77 Cf on this *Koziol,* Schaden, Verursachung und Verschulden im Entwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 775 f.

the given circumstances is to be taken as the basis, ie the actual specific circumstances do play a role[78].

The article goes on to list the relevant factors. Thus, required care standards are to be set higher in proportion to increased dangerousness[79]. This depends, on the one hand, on the rank of the endangered good; a higher degree of care is appropriate towards the classical personality rights such as life, health and freedom than towards property or pure economic interests. A decisive role is also played of course by the gravity of the injury threatened to these goods and the dangerousness of the situation, ie the degree of probability of an injury.

6/41 On the other hand, the value of the interest pursued by means of the action posing the risk must be taken into account. The greater this is, the less appropriate a limitation of freedom of movement due to strict standards of care towards others seems appropriate. However, the gravity of the limitation on freedom of movement by observance of the duties of care must also be taken into account: in this respect the duty not to engage merely in specific conduct that poses a risk is less limiting than the duty to engage in certain conduct, as in this case the subject of the rule has no options at all. Furthermore, the consideration of third-party interests is all the easier and thus appears all the more reasonable, in proportion to the obviousness and clear delineation of such interests. Therefore, the duties to respect life, health and properties of others are stricter than those to respect third parties' rights of claim or the interests of others in gaining profits or other pure economic interests or indeed non-pecuniary interests.

Also particularly important as regards determining the degree of care required is the closeness of the relationship between the parties involved. Finally, the costs and efforts required to avoid the damage play a decisive role in assessing the reasonableness of requiring a certain type of conduct[80].

2. The general significance of breach of duties of care in relation to liability for misconduct

6/42 The assessment of objective breach of duty of care besides fulfilment of the factual elements of the offence is not only necessary when it comes to the infringement

78 On this and on the normative correction leaving out self-inflicted ills see *F. Bydlinski,* System und Prinzipien 198.

79 In detail on this *Münzberg,* Verhalten und Erfolg 141 ff; *Widmer,* Gefahren des Gefahrensatzes – Zur Problematik einer allgemeinen Gefährdungshaftung im italienischen und schweizerischen Recht, ZBJV 1970, 302 ff; on English law: *W.V.H. Rogers,* Winfield & Jolowicz on Tort[17] 253 ff; comparative law *van Dam,* Tort Law 806 ff.

80 Cf *van Dam,* Tort Law 200 ff. On the influence exerted by the financial situation on the duties of care see *Katzenmeier,* Kostendruck und Standard medizinischer Versorgung – Wirtschaftlichkeitspostulat versus Sorgfaltsgebot?, G. Müller-FS (2009) 237 ff with additional references.

of *absolute rights,* but also otherwise: if a *protective rule,* for instance, requires or forbids certain conduct in order to minimise an abstract risk, then conduct deviating from this certainly fulfils the factual elements of the infringement but does not necessarily objectively constitute breach of a duty of care[81]. For instance, the driver of a motor vehicle fulfils the factual elements of the infringement in question if he fails to observe a stop sign totally obscured by a parked lorry, but in such case cannot usually be accused of any breach of duty of care.

6/43 It is possible to take the view that when assessing the duty to compensate, the damaging party's *fault* will in any case be examined and rejected in this case as there was not even objective carelessness. Nonetheless, it still makes sense in this context to separate the assessment of objective breach of duty of care from that of fault[82], because the former is assessed according to an objective yardstick, whereas the latter is assessed subjectively. In this manner, for instance, the liability of persons without the capacity to commit torts based on a consideration of the economic circumstances according to § 1310 ABGB, could not be justified by fulfilment of the factual elements of the infringement alone, ie the failure to engage in the conduct abstractly required by the protective law, on the one hand, but on the other hand, subjective culpability would not be required either, instead precisely the objective carelessness would be at issue[83].

Similar applies when it comes to *breaches of contract*[84]*:* the failure to render the promised performance fulfils the factual elements of non-performance; nonetheless, the obligee is in principle only liable if he acted carelessly. If the performance became impossible due to chance, there is no duty to compensate because there was also no breach of duty of care.

6/44 The distinction between non-compliance with abstract conduct requirements that are aimed at securing the protective scope of third-party interests in a general manner and the breach of objective duties of care may overlap largely with the distinction between *»äußerer Sorgfalt«* and *»innerer Sorgfalt«.* This pair of terms was developed by *Engisch*[85] for the field of criminal law and introduced by *Deutsch*[86] to the law of tort. The difficulty in comparing this approach with the ideas applied here arises, however, from the fact that the terms »äußere Sorgfalt« (literally: exterior

81 *Esser/Weyers,* Schuldrecht II/2[8] §56 I; *Karollus,* Schutzgesetzverletzung 159 ff; *Reischauer* in Rummel, ABGB II/1[3] §1311 no 6. Differentiating *Spickhoff,* Gesetzesverstoß und Haftung 202 ff.

82 Cf on this *Oswald,* Analyse der Sorgfaltspflichtverletzung (1988) 91 ff, 100 ff.

83 Cf OGH 6 Ob 553/81 in JBl 1982, 375; 7 Ob 533/84 in ZVR 1985/127; further OGH 2 Ob 36/95 in JBl 1996, 388; 391 *(Harrer);* 4 Ob 65/99h in JBl 1999, 604.

84 On this *Oswald,* Sorgfaltspflichtverletzung 104 ff; *Neumann,* Leistungsbezogene Verhaltenspflichten (1989) 113 ff. Cf also *Schermaier* in HKK zum BGB II §§ 280–285 no 1 ff.

85 Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht (1930).

86 Unerlaubte Handlungen, Schadensersatz und Schmerzensgeld[3] (1995) no 30, 121, 226; *idem,* Haftungsrecht[2] no 385 ff; *idem,* Die Fahrlässigkeit als Außerachtlassung der äußeren und der inneren Sorgfalt, JZ 1988, 993.

care) and »innere Sorgfalt« (literally: interior care) are used in very different ways[87]. Basically, however, this dichotomy also concerns a distinction between an act that only outwardly breaches a rule, ie fulfils the factual elements of the wrong, and conduct which is based on carelessness.

G. Special aspects of the wrongfulness of omissions

6/45 Omissions are wrongful if there is a duty to preserve another from damage by positive action. It is accepted that there is no general, comprehensive duty to save others from damage by taking action. This reticence on the part of the legislator in stipulating *duties to actively prevent* damage is based on the fact that it seems more reasonable to require someone to avoid damage by omitting certain actions than to prescribe that he engages in a particular course of conduct: in complying with a *prohibition* of certain conduct, the subject of a rule still has numerous courses of conduct open to him; when he is *obliged* to engage in a particular course of conduct, on the other hand, this leaves him with no freedom as to how to act[88]. This explains why no European legal system today prescribes a general duty to prevent damage to others by taking action[89]. When it comes to the exceptions to this basic rule, however, there are considerable differences between the systems; the most restrictive would seem to be England[90].

6/46 The PETL (Art 4:103[91]) go further than most legal systems: they not only impose special duties to take action in order to prevent damage upon the creator or keeper of a source of danger according to the *Ingerenzprinzip* (duty of someone who creates a dangerous situation to undertake something to avert the danger), they also provide for further duties under consideration of the *proximity of the relationship,* the gravity of the threatened damage and the reasonableness of taking action.

§ 1297 Austrian Draft has also extended the duty to actively prevent danger accordingly[92]. For doing so, the Austrian Draft has not only earned hefty criti-

87 See on this in detail *Fabarius,* Äußere und innere Sorgfalt (1991) 61 ff.

88 Cf *van Dam,* Tort Law 206; *Deutsch,* Haftungsrecht² no 108; *Koziol,* Haftpflichtrecht I³ no 4/60; *P. Widmer,* Ex nihilo responsibilitas fit, or the Miracles of Legal Metaphysics, JETL 2011, 139 f.

89 Cf the country reports on Case 10 in: *Koziol,* Unification: Wrongfulness; further *van Dam,* Tort Law 205 ff; *Magnus,* Causation by Omission, in: Tichý, Causation 102 ff.

90 See *W.V.H. Rogers,* Wrongfulness under English Tort Law, in: Koziol, Unification: Wrongfulness 52 ff. *Quill,* Affirmative Duties of Care in the Common Law, JETL 2011, 151 ff.

91 See on this the commentary by *Widmer,* Duty to Protect Others from Damage, in: EGTL, Principles 86 ff.

92 On this provision *Fenyves,* Haftung für schuldhaftes oder sonst fehlerhaftes Verhalten, in: Griss/Kathrein/Koziol, Entwurf 50 f; *Koziol,* Schaden, Verursachung und Verschulden im Entwurf

cism[93], but also support[94]. According to the Austrian Draft, it is decisive in terms of a duty to act that there is a close relationship, opening of facilities to the public, a source of danger has been created or kept or there is gross disproportion between the threatened damage and the burden associated with preventing it. The afore-mentioned close relationship does not have to be a contractual or other legal type of special relationship, instead it may simply be a social relationship. Thus, ordinarily there is no contractual relationship between friends that go mountain-climbing together but the joint undertaking, the inter-dependency and the trust in the necessary help by the other leads to an increased duty to preserve such friend against damage also by actively doing something[95]. The duties to act when facilities have been opened to the public or if a source of danger has been created or kept correspond largely with the approach usually taken up until now. The reference to the gross disproportion between the interests may seem somewhat less familiar. The following well-known case was in mind in this respect: B sees how K, who is blind, is walking directly towards an unsecured, deep pit, and B is aware that K may sustain extremely serious or even fatal injuries if he falls in. In the light of the circumstance that while K cannot protect himself against this risk in this context whereas B could save the health or life of K merely by shouting out to him, ie with very little effort indeed, there should be no doubt as to B's duty to perform this action to save K[96]. *Widmer*[97] writes in this sense: »§ 1297 of the Draft deserves unreserved approval for the *positive duty of help in the case of threatened damage,* which one could also call the ›good Samaritan principle‹. This is flawless fault-based liability for a violation of an elementary loyalty and solidarity requirement – the visible expression that not only are there human *rights* but also human *duties.*[98] The law of tort need show no shyness in helping to make them into positive law.«

▹▹ eines neuen österreichischen Schadenersatzrechts, JBl 2006, 776; *idem,* Liability for Omissions – Basic Questions, JETL 2011, 132 f.

93 *Spielbüchler,* Dankt der Gesetzgeber ab? JBl 2006, 348 ff; with counter-criticism see *Koziol,* JBl 2006, 784 ff.

94 *Widmer,* Der österreichische Entwurf aus der Sicht des Auslandes, in: Griss/Kathrein/Koziol, Entwurf 132; *L. Tichý,* Prävention im Haftungsrecht: Ansatz zu einer Revision, Koziol-FS (2010) 919 ff.

95 Thus, rightly *A. Michalek,* Die Haftung des Bergsteigers bei alpinen Unfällen (1990) 48 ff.

96 Thus, also much longer ago *K. Wolff* in Klang, ABGB VI² 18. Hence, the very different results in the individual country reports on Case 10 are rather astonishing in: *Koziol,* Unification: Wrongfulness.

97 *Widmer* in: Griss/Kathrein/Koziol, Entwurf 132.

98 *Saladin,* Menschenrechte und Menschenpflichten, in: Böckenförde/Spaemann (eds), Menschenrechte und Menschenwürde (1987) 267 ff.

H. Protection of pure economic interests[99]

1. Introduction

6/47 We talk of damage to pure economic interests when there are disadvantageous changes to assets sustained without any violation of so-called absolutely protected rights – ie in particular personality rights, in rem rights and intellectual property rights[100]. In most jurisdictions[101] pure economic interests enjoy comparatively *limited protection* because they do not concern the infringement of already specified and legally recognised interests, further, the interests are not discernible to third parties and if there was farther-reaching protection there would be a danger of boundless duties to compensate.

6/48 Nonetheless, there is considerable uncertainty as to when a damaging party is liable for causing pure economic loss. The inclusive formulation of § 1295 (1) ABGB corresponds, on the one hand, with the elastic formulation used by the Austrian Supreme Court[102] to the effect that inflicting pure economic loss is wrongful and thus gives rise to liability for compensation if the interests of the damaging party are to be assessed as worth substantially less than those of the victim. On the other hand, the case law of the Supreme Court often expresses the very radical view that pure economic loss outside of obligations is only recoverable when so stipulated by a protective law or if the damaging party acted contra bonos mores[103]. This is manifestly incorrect as the law itself expressly provides for the compensation of pure economic loss within the field of tort, for instance when false advice or misinformation is given knowingly (§ 1300 ABGB) or someone is knowingly misled (§ 874 ABGB). Moreover, numerous cases are recognised in case law and theory, in which the violation of pure economic interests triggers liability. Apart from the duties to compensate due to culpa in contrahendo, such duties –

99 The following statements are based on my previous publications: *Koziol,* Compensation for Pure Economic Loss from a Continental Lawyer's Perspective, in: van Boom/Koziol/Witting, Pure Economic Loss 141; *Koziol/van Boom/Witting,* Outlook, in: van Boom/Koziol/Witting, Pure Economic Loss 191; *Koziol,* Schadenersatz für reine Vermögensschäden, JBl 2004, 273; *idem,* Recovery for Economic Loss in the European Union, Ariz L Rev 48 (2006) 871.

100 See *Koziol,* JBl 2004, 273 with additional references.

101 More detail on this in the comparative law investigations: *Banakas* (ed), Civil Liability for Pure Economic Loss (1996); *Bussani/Palmer* (eds), Pure Economic Loss in Europe (2003); *idem,* The Frontier between Contractual and Tortious Liability in Europe: Insights from the Case of Compensation for Pure Economic Loss, in: Hartkamp/Hesselink/Hondius/Mak/du Perron (eds), European Civil Code[4] 945 ff; *van Boom/Koziol/Witting,* Pure Economic Loss. Cf also *Faust,* Der Schutz vor reinen Vermögensschäden – illustriert am Beispiel der Expertenhaftung, AcP 210 (2010) 555 ff.

102 8 Ob 587/93 in SZ 66/82.

103 Cf OGH 2 Ob 193/78 in SZ 52/93; 8 Ob 78/83 in SZ 56/199; 7 Ob 598/86 in JBl 1986, 650; 2 Ob 151/88 in SZ 61/279; 2 Ob 557/93 in SZ 67/17 = JBl 1994, 687; 1 Ob 251/05a in SZ 2006/53.

albeit only within narrower limits[104] – within the framework of contracts with protective purposes in favour of third parties must be noted. Nevertheless, both these instances fall within the proximity of obligations. That is not true, however, of the further examples provided by liability for prospectuses and that of auditors towards third parties as recognised now by the OGH[105]: this does not require either an existing or an intended obligation between liable party and victim.

2. Reasons for limiting protection

6/49 One of the main arguments against comprehensive protection of pure economic interests is the *incalculable number* of the victims[106] and the incalculable extent of the possible damage. Thus, it is not the extraordinary amount of the damage suffered by a specific victim – also possible in the case of injury to the absolute rights – that causes concern, but instead the circumstance that any and all conduct may endanger the pure economic interests of a great number of people and thus, overall, the sum of claims would lead to unforeseeable liability risks[107]. This would constitute an unreasonable restriction on the freedom of movement of all individuals.

6/50 A look at both Austrian law and also other legal systems also shows that when it comes to weighing up which protection should be granted to certain interests, the characteristics of such interests can be of decisive importance. In particular the *obviousness* of the goods to be protected and their *clear demarcation* are decisive[108]. The far-reaching protection of pure economic interests, that are neither clearly defined nor obvious, would lead to a very considerable burden on interaction in daily life and thus noticeably restrict freedom of movement.

6/51 A look at the so-called absolutely protected goods, ie in particular life, health, liberty and property, also shows that the *rank of the good* is material for the degree of protection afforded by the legal system[109]. The core personality rights enjoy the most comprehensive protection; their rank derives from human rights

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104 See on this *Karner* in KBB, ABGB[3] § 1295 no 19.

105 OGH 5 Ob 262/01t in SZ 74/188 = ÖBA 2002, 824 (*W. Doralt);* 7 Ob 269/07w in ÖBA 2008, 584 f. As to German law see *Zenner,* Die zivilrechtliche Verantwortlichkeit des Abschlussprüfers für den Bestätigungsvermerk (2011) with further details.

106 Cf *Koziol,* Generalnorm und Einzeltatbestände als Systeme der Verschuldenshaftung: Unterschiede und Angleichungsmöglichkeiten, ZEuP 1995, 363 with additional references.

107 See the opera-singer example cited by *Reinhardt,* Der Ersatz des Drittschadens (1933) 96 ff.

108 See on this, eg, *Fabricius,* Zur Dogmatik des »sonstigen Rechts« gemäß § 823 Abs. I BGB, AcP 160 (1961) 273; *Karollus,* Schutzgesetzverletzung 48 f; *Picker,* Positive Forderungsverletzung und culpa in contrahendo – Zur Problematik der Haftung »zwischen« Vertrag und Delikt, AcP 183 (1983) 480 ff; OGH 1 Ob 516/88 in SZ 61/64. Comparative law references in *Koziol,* Conclusions, in: Koziol, Unification: Wrongfulness 132.

109 Comparative law references here too in *Koziol* in: Koziol, Unification: Wrongfulness 132; See also *Koziol,* Haftpflichtrecht I[3] no 4/29.

conventions and fundamental rights. The in rem rights and the intellectual property rights are ranked somewhat lower. Pure economic interests, for example to obtain a profit or acquire a thing, come at the bottom of the hierarchy. This is an argument against far-reaching protection. Moreover, it must be considered that a person's pure economic interests are juxtaposed not only by everyone else's interests in as great as possible freedom of movement but also frequently the economic interests of said others, which occupy at least the same rank.

3. Examples for the recognition of duties of care

6/52 None of these arguments, however, mean that pure economic interests do not enjoy any protection at all; they speak *only against any very far-reaching protection* that would be equivalent to that enjoyed by the recognised absolute rights. The material valuations answering the question of when and to what extent such protection is appropriate can be deduced from indications in positive law[110].

6/53 It is very telling that all legal systems recognise comprehensive liability of *contractual partners* for the pure economic loss inflicted upon the other contractual partners. In my opinion, the following ideas are behind this remarkable difference between contractual and tortious liability[111]: firstly, in the case of breach of contract, only the economic interests of the partners involved are at issue; there is no danger of an incalculable number of claimants. Secondly, only duties of conduct towards the other party are imposed by a contract and thus, freedom of movement is restricted to a far lesser degree than in the context of duties owed to everyone. Thirdly, the pure economic interests of the contractual partners are known or usually more obvious and, moreover, more clearly delineated than is true of those of third parties. Fourthly, the partners to a contract also need greater protection of their pure economic interests to a special degree because they must open up their sphere of interests to a large extent to the other party and thus are more exposed to the influence of such other party. Fifthly, it must be noted that within the context of contract, both parties are generally pursuing business interests. If someone pursues his own interests and in so doing puts the interests of another at high risk, greater duties of care would seem appropriate.

6/54 Besides this, it is accepted that pure economic interests also enjoy increased protection within the context of other *special legal relationships.* Hence, those engaged in contacts aimed at legal transactions are also subject to special duties of care as regards the pure economic interests of others: one party is liable to

110 For comparative law references see the works cited herein above no 6/48 FN 103.

111 *Koziol,* Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 209 ff; *idem,* ZEuP 1995, 359 ff. See also *Picker,* AcP 183, 476 ff; *idem,* Vertragliche und deliktische Schadenshaftung, JZ 1987, 1052 ff.

the other on the basis of culpa in contrahendo, for pure economic loss which he caused by misrepresentation[112]. This is especially interesting here because it does not represent contractual liability in the strict sense but instead liability in the interim area between contract and tort (see above no 4/2 ff). These duties of care also survive beyond the conclusion of the contract, whether such is valid or not[113], this again concerns the so-called »positiven Forderungsverletzungen«.

6/55 This willingness to recognise liability for pure economic loss extends also to other fields, in which there are *close relationships* or a special relationship. In particular, cases of the actual provision of information without contractual basis come to mind[114]. This also applies to cases where someone who provides information is liable, in particular a hired expert if such is aware that third parties will rely on his statement and be guided by his explanation when it comes to making their decisions; furthermore if the information was also specifically intended for third parties[115]. The issue of a prospectus[116] provides a classic example.

6/56 It is noteworthy that Austrian courts, taking their line from academic consensus, proceed on the basis that *the protective scope of contracts to the benefit of third parties* generally does not include the pure economic interests of the third parties[117]. An exception is made when the main performance is rendered to the third party and thus, when such damage could only accrue to such. This is clearly because this prerequisite negates the argument about opening the floodgates of a boundless duty to compensate.

This indicates that the grounds for distinguishing between tort and breach of contract only apply in full to the core areas of such; they may or may not apply, in full or in part, in the *interim areas* (cf above no 4/9 ff). There is no sharp dividing line between the core areas of breach of contract and tort, instead there is a fluid transition with many interim gradations in respect of which it is necessary to re-examine the extent to which the principles of one or both of the core areas apply.

6/57 Furthermore, there is consensus that economic loss must be compensated when such constitutes *consequential loss* deriving from the infringement of an absolutely protected right[118].

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112 Cf *van Boom,* Pure Economic Loss: A Comparative Perspective, in: van Boom/Koziol/Witting, Pure Economic Loss 22 f.

113 See fundamentally on this *Canaris,* Ansprüche wegen »positiver Vertragsverletzung« und »Schutzwirkungen für Dritte« bei nichtigen Verträgen, JZ 1965, 475 ff.

114 Cf regarding information provided by banks *Koziol,* Bankauskunft, Raterteilung und Aufklärung, in: Apathy/Iro/Koziol, Österreichisches Bankvertragsrecht I² (2007) no 3/10.

115 On this *Canaris,* Schutzgesetz – Verkehrspflichten – Schutzpflichten, Larenz-FS (1983) 91 ff; see also OGH 8 Ob 51/08w in JBl 2009, 174.

116 In more detail *Koziol,* Das Emissionsgeschäft, in: Apathy/Iro/Koziol, Österreichisches Bankvertragsrecht VI² (2007) no 1/91 ff with additional references.

117 Cf *Karner* in KBB, ABGB² §1295 no 19.

118 *Koziol,* Haftpflichtrecht I³ no 8/35.

As far as the *intentional infliction* of pure economic loss is concerned, a duty to compensate is far more widely recognised than in the case of careless damage (cf §§ 874 and 1300 ABGB), yet by no means always: every participant in competition has, eg, very naturally the intention of expanding his business and of taking away some of the business of his competitors, ie literally of damaging them; however, there is only liability if the means employed are unfair (see § 1 UWG). Elsewhere, liability for deliberate infliction of pure economic loss usually requires that the harm sustained was out of all proportion to the promotion of the damaging party's interests[119]; this is recognised to be the deciding factor when it comes to deliberating on whether someone acts contra bonos mores[120]. 6/58

While *contractual relationships* are not counted among the absolutely protected rights, it is nonetheless recognised that the obligee enjoys a certain amount of protection, specifically against the deliberate inducement of the obligor to breach of contract[121] and according to widespread opinion also against deliberate exploitation of any breach of contract[122]. Unfair means or a gross disproportion of interests are not required. Moreover, it is questionable whether the infringement of third-party contracts actually constitute a violation of pure economic interests since a protected right actually does exist to a certain degree. The answer to this rather semantic question does not seem important; however, the contrary is true of the finding that the protection of these economic interests goes farther than that of other pure economic interests: their consolidation in a right would seem to be the material factor. 6/59

Furthermore, compensation is awarded for pure economic interests when *damage is shifted:* if the damage is shifted to a third party on the basis of an arrangement on the shifting of damage between the direct victim and such third party and if such sustains pure economic damage, then prevailing opinion today considers that this must be compensated by the damaging party[123]. A well-known example of this is the employee who is injured and thus can no longer perform his work. The employer must continue to pay for the work in the form of the employee's salary and sustains pure economic loss, which however must be compensated in the end – via different legal constructions. 6/60

§ 1327 ABGB and § 844 (2) BGB – as is the case in most other legal systems – grant *surviving dependants* an independent claim to compensation for the loss of 6/61

119 *Koziol,* Haftpflichtrecht II² 20 f.

120 Thus, eg OGH 2 Ob 569/95 in SZ 70/137; See also the references in *Bollenberger* in KBB, ABGB³ § 879 no 5.

121 *Koziol,* Die Beeinträchtigung fremder Forderungsrechte (1967) 159 ff; settled case law, see, eg OGH 4 Ob 562/82 in SZ 55/170.

122 See OGH 3 Ob 87/93 in SZ 66/141; 6 Ob 174/00g in ÖBA 2001, 910 *(Karollus)* = JBl 2002, 182 *(Dullinger/Riedler); Harrer* in Schwimann, ABGB VI³ §1295 no 156 with additional references.

123 More detail in *Koziol,* Haftpflichtrecht I³ no 13/3 ff.

maintenance against the liable perpetrator when the party obliged to pay maintenance to them is killed. This concerns pure economic loss suffered by such surviving dependants as none of their absolutely protected rights has been violated. This represents a clear contradiction to the case of when something which has already been sold but not handed over is destroyed: general opinion considers then that the buyer has no claim for compensation against the perpetrator on the basis of the pure economic loss sustained.

4. The 10 commandments of liability for economic loss

6/62 On the basis of this short overview, it is possible to set out rules for establishing liability for pure economic loss[124]; these are largely followed in § 1298 Austrian Draft.

6/63 The arguments regarding the dangers of opening the floodgates to compensation duties and the undisputed liability for pure economic loss in contractual relationships as well as in cases of culpa in contrahendo, lead us to the first rule: *The lower the risk of an unlimited number of victims, the more justified is the liability for pure economic loss.*

6/64 Even under tort law, pure economic loss must be compensated by the perpetrator if the loss is consequential to the violation of absolutely protected rights. Furthermore, pure economic loss must also be compensated in cases where damage is merely shifted. Hence, the second rule can be expressed as follows: *The less the protection of economic interests leads to additional duties of care and thus further restrictions on others' freedom of movement, the more justified is the liability for pure economic loss.*

6/65 As contractual liability and liability for culpa in contrahendo prove, the factor of proximity or special legal relationship is of great importance when establishing liability for pure economic loss. Thus, the third rule is: *the closer the relationship between the parties involved, the more justified is the liability for pure economic loss.*

6/66 It is a generally accepted rule that the greater the dangerousness or risk of the situation, the more care must be exercised. Accordingly, liability for misinformation is assumed in particular in cases when an expert has given a statement because people tend to trust in the opinion of an expert and to use it to guide their own behavior. The same applies when the statement is made by someone who is not an expert but claims to have special knowledge. Therefore, the fourth rule is: *the greater the probability that other people's actions will be guided by the incorrect statement, the more justified is the liability for pure economic loss.*

6/67 A further relevant factor appears to be dependency on the information. This is related to the element of dangerousness: if the recipient of information is depen-

124 In greater detail *Koziol,* Compensation for Pure Economic Loss from a Continental Lawyer's Perspective, in: van Boom/Koziol/Witting, Pure Economic Loss 149 f.

dent on such information when it comes to how he proceeds, then he is more likely to let this information guide his actions and this makes the misguidance provided by the misstatement especially dangerous. This notion appears to be particularly decisive when it comes to cases involving issue prospectuses. Hence, the fifth rule can be formulated as follows: *the less the possible victim can protect himself and thus the more he requires special protection, the more justified is the liability for pure economic loss.*

6/68 It is also a widespread view internationally that far-reaching protection of interests requires the interests be obvious. Pure economic interests are not typically obvious; however, obviousness may be substituted by actual knowledge. This is why inducement to breach of contract leads to liability if the inducer knew of the third-party contract or the third-party claim against other persons was obvious due to possession. Thus, the sixth rule can be inferred as follows: *if the damaging party knew of the economic interests or these were at least obvious, liability for pure economic loss is more likely to be justified.*

6/69 Clear definitions of rights facilitate comprehensive protection, as this makes it more possible for third parties to respect them. Hence, the seventh rule provides that: *the clearer the delimitation of the economic interests is, the more justified the liability for pure economic loss.*

6/70 §§ 874 and 1300 ABGB, but also comparative law[125] show that intention is a decisive factor when establishing liability for pure economic loss. The idea behind this is that an especially weighty ground for liability overrides the usual grounds for reticence in this respect. Accordingly, the eighth rule is: *if the perpetrator acted with intent, the liability for pure economic loss is more likely to be justified.*

6/71 In cases when the primary victim is killed, surviving dependants are usually granted a compensation claim against the perpetrator. Two reasons would seem to be decisive in this respect: firstly, the perpetrator has violated rights of the highest rank, namely the life of the person liable to pay maintenance. Secondly, the surviving dependants' financial interests thus infringed are particularly important because they represent the dependants' resources for existence. Thus, these economic interests must be accorded a higher rank than many other pure economic interests, for example, to gain a profit. Consequently, the ninth rule is: *the more important the financial interests typically are for the victims, the more justified is the liability for pure economic loss.*

6/72 Finally, another significant factor is the fact of the perpetrator pursuing his own business interests. This is one of the main arguments for the far-reaching contractual liability for pure economic loss. In the context of experts' liability, the fact of remuneration is also material in founding liability for misinformation, in

125 *Van Boom,* Pure Economic Loss: A Comparative Perspective, in: van Boom/Koziol/Witting, Pure Economic Loss 15 ff.

particular when it comes to information from banks. Therefore, the tenth rule is: *the more it is the case that the damaging party acted in his own financial interests, the more the liability for pure economic damage is justified.*

II. Fault

A. Concept, prerequisites and meaning

1. Concept

6/73 When we talk of the fault of the perpetrator, this means he is to blame for misconduct. In the following we will be looking at the more specific criteria behind such accusation in more detail. Regardless of the differing views in this respect – as already mentioned above – it is self-evident from a legal-ethical point of view that the perpetrator be liable for misconduct imputable to him (see above no 6/1).

2. Prerequisites

6/74 Conduct is blameworthy in principle only if it was controlled by will[126]; this is expressed by § 1294 ABGB when it refers to »*voluntarily* inflicted damage« (willkürliche Beschädigung). The movements of someone who is unconscious, uncontrollable reflexes or movements compelled by force are not actions in the legal sense.

6/75 Nonetheless, even voluntary conduct cannot trigger any blame when it is not in conflict with the legal system. Therefore, fault requires that the conduct be *wrongful*[127]. The fact that an action fulfils the factual elements of a wrong is not enough in order to fulfill this prerequisite. This even applies under German law, even with respect to direct interferences in absolutely protected goods insofar as the wrongfulness of the result is taken as a basis (no 6/4), since the perpetrator still may be able to rely on a ground for justification[128]. Insofar as the theory of wrongfulness of the conduct is observed, carelessness is always the decisive factor.

6/76 Ultimately only such persons can be blamed for their conduct as are in possession of the necessary *powers of discernment,* ie who are in a position to recognise the wrongfulness of their conduct and to behave duly and properly. However, various different legal systems take account of subjective abilities to differing degrees; this

126 *Deutsch,* Haftungsrecht[2] no 84 ff; *Larenz,* Rechtswidrigkeit und Handlungsbegriff im Zivilrecht, Dölle-FS I (1963) 169; *Larenz/Canaris,* Schuldrecht II/2[13] § 75 II 1.

127 *Koziol,* Haftpflichtrecht I[3] no 5/2 with additional references.

128 Cf *Larenz/Canaris,* Schuldrecht II/2[13] § 75 II 2 c.

will be looked at more closely below (see no 6/83 ff). Nevertheless, it is accepted that the necessary ability to reason may depend on age and mental state.

6/77 § 153 ABGB provides that the capacity for fault arises upon attaining the age of responsibility, ie upon completion of the 14th year of life. However, this is not a rigid age limit; in fact the necessary powers of discernment may also have developed earlier, making it possible to impute fault accordingly (§ 1310 ABGB). Hence, attaining the age of responsibility in fact leads to a reversal of the assumption as to whether there is capacity for fault as follows: prior to age 14 incapacity for fault is presumed, thereafter capacity for fault is assumed. Those who have passed the age of responsibility may be deemed incapable of fault due to mental illness; however, this must be examined on a case-by-case basis in order to establish whether in the specific case the person may have had the necessary powers of discernment after all.

In Germany, § 828 (1) BGB precludes the responsibility of persons under seven years of age completely. Between the 7th and 10th completed year of life, responsibility for damage caused by accidents with cars, railways or cable cars is bizarrely excluded. Moreover, when the damaging party is a person under 18 years of age, liability may be precluded due to lack of the necessary powers of discernment. The exclusion of imputability due to pathological disturbances of mental processes is provided for in § 827 sentence 1 BGB.

In both jurisdictions, the exclusion of liability due to lack of understanding on the basis of age or mental disturbances is mitigated by *equitable liability* (§ 1310 ABGB, § 829 BGB; on this see below no 6/86).

3. Reference point for fault

6/78 Prevailing opinion is that fault must only relate to the *»primary damage«,* not all of the consequential damage[129]. Thus, such is imputed even if the damaging party could not foresee or avoid it; in other words it suffices that it results from the damage for which he is at fault. However, liability is restricted by objective criteria, in particular adequacy and the protective purpose of the rule on which liability is based.

In the case of *protective laws,* which forbid even abstract, dangerous behaviour, even lower degrees of fault will be regarded as sufficient[130]: the fault need only relate to the violation of the conduct rule; it is irrelevant whether the damage was foreseeable for the specific perpetrator.

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129 See *Karollus,* Schutzgesetzverletzung 278 ff.

130 *Von Bar,* Verkehrspflichten. Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht (1980) 160 ff, 169 ff; *Karollus,* Schutzgesetzverletzung 269 ff; *Schmiedel,* Deliktsobligationen nach deutschem Kartellrecht I (1974) 73 ff; *Spickhoff,* Gesetzesverstoß und Haftung 221 ff, in each case with additional references; OGH 4 Ob 216/99i in EvBl 2000/41.

4. Meaning of fault

6/79 It still holds true today that fault may be regarded as the most important *liability criterion*[131]. Most codes of legislation, including also the ABGB and the BGB, only provide for comprehensive rules on fault-based liability; provisions on other types of liability are scattered in special laws. Nevertheless, it would be wrong today to view fault-based liability as standard liability and all other types of liability, particularly strict liability, merely as exceptions to fault-based liability. Strict liability has gained considerably in significance over the last decades and it has been recognised as a form of liability equal in status to fault-based liability, which is why – at the very least – we speak in this context of the two-lane nature of liability (see above no 1/21)[132].

6/80 The degree of fault and thus the gravity of the ground for liability are, furthermore, also of material importance when it comes to the *extent of the liability.* This can be said not only of the applicable Austrian law[133] that in the case of slight fault imposes on the damaging party at most liability for actual damage (§§ 1323, 1324 ABGB). The degree of fault can also be material when it comes to imputing consequential damage because the adequacy concept is extended in the case of serious fault and indeed does not apply at all when it comes to intention (see below no 7/11 ff). Similar applies to the delimitation of the protective purpose[134].

B. Subjective or objective assessment of fault?[135]

1. The principle of subjective assessment

6/81 According to § 1294 ABGB there is negligence if the perpetrator acted without exercising due care and diligence.

The finding that the perpetrator has acted negligently encompasses in its original meaning the accusation that there has been *blameworthy will*[136]. Such an accusation can only be levelled against the specific perpetrator in the event

131 This predominantly applies also to the actual treatment of this topic by the courts, cf *Kolb,* Auf der Suche nach dem Verschuldensgrundsatz. Untersuchungen zur Faktizität der Culpa-Doktrin im deutschen außervertraglichen Haftungsrecht (2008) 22 ff.

132 *Esser,* Die Zweispurigkeit unseres Haftpflichtrechts, JZ 1953, 129. As regards a multi-lane nature *Wilburg,* Elemente 1 ff.

133 The Austrian Draft does not contain any such rigid classification any more.

134 On this see *Wilburg,* Elemente 242 f; *Koziol,* Haftpflichtrecht I³ no 8/15 ff and 21 with additional references.

135 On this already in more detail *Koziol,* Objektivierung des Fahrlässigkeitsmaßstabes im Schadenersatzrecht? AcP 196 (1996) 593 ff; *idem,* Liability Based on Fault: Subjective or Objective Yardstick? MJ 1998, 111 ff.

136 *Wilburg,* Elemente 43 ff. On the changes of the concept of fault, very impressive *Meder,* Schuld, Zufall, Risiko (1993); cf also *van Dam,* Tort Law 219; *Jaun,* Sorgfaltspflichtverletzung 7 ff; *Schermaier* in HKK zum BGB II Vor § 276 no 5 ff, §§ 276–278 no 7 ff.

that had he exercised his will duly and properly, he would have recognised that he was acting dangerously and wrongfully and also provided it would have been possible for him to act differently.[137] Therefore, fault is contingent upon a *subjective* assessment of blameworthy will. Hence, in principle a subjective standard of assessment must also be applied: it is necessary to examine whether the specific perpetrator on the basis of his personal abilities would have been able to recognise the occurrence of the damage and the wrongfulness and been able to act accordingly[138]. Only if his individual abilities would have been adequate to avoid the damage, can a *personal accusation* of blameworthy will be levelled; and only then can fault in the strict sense be affirmed[139].

6/82 With respect to the *degree of care and diligence,* however, the law requires that the assessment standard be objective[140]: § 1294 ABGB stipulates that due diligence and care must be exercised. Likewise § 1297 ABGB provides that anyone who does not exercise the degree of diligence and care that can be exercised by someone with ordinary abilities is guilty of error. § 1300 Austrian Draft follows the traditional Austrian line.

6/83 A widely held opinion[141], prevailing nowadays in Germany[142] and predominantly advocated in Switzerland[143] takes the view that in relation to the subjective

137 It is not possible to enter into the fundamental question of free will in more detail here. See on this in more recent times *Herzberg,* Willensfreiheit und Schuldvorwurf (2010); his view (83 ff, 125) can be endorsed in that it is not freedom of will that is decisive insofar as everyone is responsible for his own character and everyone must allow decisions, actions and omissions to be imputed to him when such are attributable to this character.

138 Cf § 6 StGB.

139 Thus, also the prevailing Austrian view: *F. Bydlinski* in Klang, ABGB IV/2² 173; *Ehrenzweig,* Die Schuldhaftung im Schadenersatzrecht (1936) 226; *Reischauer,* Der Entlastungsbeweis des Schuldners (1975) 201 f; *Wilburg,* Elemente 17, 53; OGH 5 Ob 536/76 in SZ 49/47. Also *von Zeiller,* Commentar III/2, 711 ff, and *Dniestrzanski,* Die natürlichen Rechtsgrundsätze, FS zur Jahrhundertfeier des ABGB II (1911) 27, mention the objective standard for the degree of diligence and care. Taking another view *Kramer,* Das Prinzip der objektiven Zurechnung im Delikts- und Vertragsrecht, AcP 171 (1971) 422, who wishes to follow the prevailing German opinion; further *Lewisch,* Die ökonomische Analyse des Rechts und das ABGB, FS 200 Jahre ABGB (2011) 1232 ff.

140 *Mayrhofer,* Schuldrecht I³ 295 f; OGH 8 Ob 227/76 in ZVR 1978/167. Cf also *von Zeiller,* Commentar III/2, 711. On the corresponding objective standard in criminal law cf *Burgstaller,* Das Fahrlässigkeitsdelikt im Strafrecht (1974) 189 f.

141 See the comparative law explanations in *van Dam,* Tort Law 219 ff; *Koziol,* MJ 1998, 112 f.

142 In detail *Deutsch,* Fahrlässigkeit² in particular 137 ff, 299 ff. See furthermore *von Bar,* Verkehrspflichten. Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht (1980) 137 f, 177 ff. *Jansen,* Struktur des Haftungsrechts 445 ff; *Larenz,* Über Fahrlässigkeitsmaßstäbe im Zivilrecht, Wilburg-FS (1965) 119; *Wieacker,* Rechtswidrigkeit und Fahrlässigkeit im Bürgerlichen Recht, JZ 1957, 535; *Wiethölter,* Der Rechtfertigungsgrund des verkehrsrichtigen Verhaltens (1960) 45 ff.

143 *Guhl/Koller/Druey,* Das Schweizerische Obligationenrecht⁹ (2000) 181; *Jaun,* Sorgfaltspflichtverletzung 135 ff, in particular 258 ff; *Keller,* Haftpflicht im Privatrecht I⁶ (2002) 119 f; likewise for feasability reasons *Oftinger/Stark,* Haftpflichtrecht I⁵ 205 ff. Against this *Fellmann,* Der Verschuldensbegriff im Deliktsrecht, ZSR 106 (1987) 339; Also critical *R.H. Weber,* Sorgfaltswidrigkeit – quo vadis? ZSR 107 (1988) 39.

abilities of a person too, the normative carelessness standard must always be *objective.* According to this view, it is not the individual abilities of the person which are decisive but rather the average abilities and knowledge typical for such group of persons. However, this departs from the basis for personal culpability in respect of blameworthy will[144] and attaches liability to an objectively established lack of understanding or lack of abilities:

Someone equipped by nature with below average abilities is thus subject to a type of strict liability – albeit contingent upon objectively deficient conduct[145], such liability being based on the increased dangerousness emanating from a person not adequately equipped with ability[146].

Ultimately this leads – at least insofar as the participation in general interactions necessary for an existence compatible with human dignity is concerned – to liability for existing, which will affect such a person particularly seriously given that he is already disadvantaged. This standpoint has rightly been subjected to hefty criticism, also in respect of German law[147].

6/84 The widespread objective assessment of carelessness also contrasts oddly with the treatment of *intention:* the knowledge that the intended act is forbidden and that it may cause damage, which is a condition for intention, naturally depends on the intender's subjective abilities; without such knowledge and without the ability to discern such, the forbidden nature and threat of damage occurring remain invisible to the perpetrator. Nonetheless, none of the advocates of an objective assessment of carelessness would assume there is intention if the perpetrator merely failed to recognise wrongfulness and damage due to his below average abilities.

6/85 Some writers attempt to justify departing from subjective assessment by evoking the notion of *trust (Vertrauensgedanken)*[148]. However, this overlooks the fact

144 Thus, also *Larenz,* Lehrbuch des Schuldrechts I[14] (1987) § 20 III; *Köndgen,* Haftpflichtfunktionen und Immaterialschaden am Beispiel von Schmerzensgeld und Gefährdungshaftung (1976) 43; *Oftinger/Stark,* Haftpflichtrecht I[5] 205 ff.

145 Thus, eg, *Reimer Schmidt* in Soergel, BGB II/1b[10] § 276 no 17. *Jansen,* Struktur des Haftungsrechts 445 ff, writes of a guarantee liability as everyone must be accountable for the care required in the interaction in daily life.

146 Thus, *von Bar,* Verkehrspflichten 138.

147 *Brodmann,* Über die Haftung für Fahrlässigkeit, AcP 99 (1906) 346 ff; *Leonhard,* Fahrlässigkeit und Unfähigkeit, Enneccerus-FS (1913) 19 ff; *Siber* in Planck, BGB II/1[4] 221; *von Tuhr,* Der Allgemeine Teil des Deutschen Bürgerlichen Rechts II/2 (1918) 489; *Dölle,* Empfiehlt es sich, im Zusammenhang mit der kommenden Strafrechtsreform die Vorschriften des bürgerlichen Rechts über Schuldfähigkeit, Schuld und Ausschluß der Rechtswidrigkeit zu ändern? Gutachten zum 34. Deutschen Juristentag I (1926) 113 ff; *Enneccerus/Nipperdey,* Allgemeiner Teil des Bürgerlichen Rechts[15] II (1960) 1322; *Nipperdey,* Rechtswidrigkeit, Sozialadäquanz, Fahrlässigkeit, Schuld im Zivilrecht, NJW 1957, 1780 ff; *Wilhelmi,* Risikoschutz 317 ff.

148 Cf *von Bar,* Verkehrspflichten 137 f; *Esser/Schmidt,* Schuldrecht I/2[8], 26 II 1 b; *Larenz,* Schuldrecht I[14] § 20 III; thus also *Kramer,* AcP 171 (1971) 428.

that the trust aspect cannot play any role[149] in the law of tort[150] in this respect, as nobody exposes himself to damage on the basis of trust in the typical abilities of the damaging party and thus in such party's duty to compensate. The fact that at least in the area of tort, the concept of trust plays no role as regards application of an objective standard of fault is also shown in that in our legal system the mentally ill are not in principle liable; this applies even if third parties are believed to have relied on their ability to exercise care. Neither can the theory that proceeds on the basis of an objective standard explain convincingly why precisely in the case of incapacity to commit torts, the principle of trust protection should be departed from. This means that a very obvious conflict is simply accepted without any attempt at explanation.

6/86 However, the consequences of subjective assessment are *mitigated* in the Austrian Draft by § 1301*:* if persons under 14 years of age, who are assumed not to have the necessary powers of discernment, or persons who cannot use their faculty of reason, act in a manner that is objectively careless, it is still possible to hold them *fully or partially liable;* this decision must be based in particular on any advantage gained by them in inflicting the damage as well as their pecuniary circumstances and those of the victim. This rule is based mainly on principles already common in today's law (see § 1310 ABGB; § 829 BGB). However, these have a *very broad field of application* and consequently in the Austrian Draft § 1301 sentence 2 provides that similar applies even if someone has acted in an objectively wrongful manner but is generally capable of fault, yet in view of the lack of the necessary abilities and knowledge, *in the specific case* cannot be accused of fault[151].

2. Objective standard for breach of contract

6/87 In contrast to tortious liability, the application of an objective standard of responsibility may well be justified in the context of *contractual liability*[152]*;* this is also broadly accepted by those who in principle defend taking subjective abilities as

149 The rejection of this argument by *Wilhelmi,* Risikoschutz 69, seems to be based on a misunderstanding caused by my overly wide formulation: I do not reject the concept of protection based on reliance for the law of damages in general, instead I only rejected the importance of the reliance in respect of applying an objective standard of fault. In this respect, *Wilhelmi* (337) would actually seem to take the same view.

150 See *Fellmann,* ZSR 106, 358; *U. Huber,* Zivilrechtliche Fahrlässigkeit, E.R. Huber-FS (1973) 274; *Reischauer,* Entlastungsbeweis 202.

151 Thus, also *Wilhelmi,* Risikoschutz 343 f.

152 *Von Caemmerer,* Die absoluten Rechte in § 823 Abs. 1 BGB, Karlsruher Forum 1961, 25 ff = Gesammelte Schriften I (1968) 572 ff; *idem,* Das Verschuldensprinzip in rechtsvergleichender Sicht, RabelsZ 42, 16; *U. Huber,* E.R. Huber-FS 260 f, 281 ff; *Fellmann,* ZSR 106, 339; critical also *R.H. Weber,* ZSR 107 (1988) 358 f; *idem,* Selbstverantwortung und Verantwortlichkeit im Schadenersatzrecht, SJZ 91 (1995) 46 f.

a basis[153]: special contractual duties are taken on voluntarily, each party to a contract exposes the other to the possibility of such damage in the first place by concluding the contract and in this respect it typically really plays a role that there is *trust* that the contractual relationship will be handled duly and properly. In this respect, the assumption that each party to the contract may rely on their partner having the usual abilities would seem justified for several reasons, insofar as the contract does not provide otherwise[154]: on the one hand, the value of every obligee's claim depends on the secondary claims that are triggered by the obligor's failures to perform the contract duly. If the obligor was not responsible for the consequences of his omission or the inadequacy of his performance simply because he does not possess the respective abilities, then the obligor's liabilities in this respect would ultimately depend on his abilities, which are generally not transparent to the partner.

6/88 On the other hand, when it comes to obligations based on legal transactions a role is also played – admittedly in a somewhat attenuated manner – by the *concept of guarantee*[155]*:* if the obligor promises to render a certain performance, this may be understood by his partner in the transaction as a guarantee – unless otherwise expressly agreed – that the obligor is capable of exercising the usual care and thus has the usual capacity for performance. This idea has been incorporated into positive law by Art 79 of the UN CISG[156].

However, it seems contradictory that the »guarantee« for usual performance capacity not be applicable in particular in respect of serious deviations from the promised standard, namely in respect of the mentally ill and young people under the age of responsibility. In this context, it is outweighed by the notion of special needs for protection on the part of those who are seriously disadvantaged mentally. Moreover, in such cases there is usually a legal representative whose responsibility it is to make sure that the mentally unable are not involved in the performance of the contract. If the legal representative fails to do this, the mentally ill or under-age person is accountable for the violation of this duty of care under § 1313 a ABGB, § 278 BGB. The contractual party who suffered the damage

153 See *Enecceru/Nipperdey,* Allgemeiner Teil 1322 with additional references. Cf further also *Brodmann,* AcP 99 (1906) 373.

154 *U. Huber,* E.R. Huber-FS 286.

155 See *von Caemmerer,* Karlsruher Forum 1961, 26; *Larenz,* Schuldrecht I[14] § 20 I; *Koziol,* Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 214; *Grundmann* in MünchKomm, BGB II[5] § 276 no 26 ff; *U. Huber,* Leistungsstörungen II (1999) 524 ff; *Schermaier* in HKK zum BGB II § 275 no 56, §§ 276–278 no 2. *Dölle/Stoll,* Kommentar zum Einheitlichen Kaufrecht (1976) Art 74 no 39, emphasises that the objective standard of negligence leads to convergence with the obligor's guarantee of performance, familiar above all in English law.

156 On this *Karollus,* UN-Kaufrecht (1991) 206; *Rummel,* Schadenersatz, höhere Gewalt und Fortfall der Geschäftsgrundlage, in: Hoyer/Posch (eds), Das Einheitliche Wiener Kaufrecht (1992) 178; *Schlechtriem/Stoll,* Kommentar zum Einheitlichen UN-Kaufrecht[2] (1995) Art 79 no 6.

is thus sufficiently well-protected under the law of damages as a rule. Precisely this cannot be said, however, of the contractual partner of someone who lacks the usual powers of reasoning merely to a minor extent: such persons are not normally supervised by anyone who stops them from intervening in a damaging way in the performance of the contract and thus are not accountable for any omission in respect of such prevention. When it comes to contractual partners with lesser deviations from the usual standard of reasoning abilities, the victim would hence typically be left without protection. Thus, no conflict of value judgements is generated by the application of an objective standard of fault in the field of contract.

3. Objective standard for experts

6/89 Another important field where an objective standard is applied is that of *»experts' liability« (»Sachverständigenhaftung«):* according to § 1299 ABGB, an objective standard must be used to assess fault on the part of experts[157]; an expert must be held accountable for failing to meet the requirement of necessary diligence and necessary, not merely usual, knowledge. Anyone who engages in a specialist activity must therefore guarantee that he has the necessary abilities.

The fact that experts' actual individual abilities are not taken into account is justified by the following considerations: anyone who exercises an activity that requires special knowledge and powers of reasoning in spite of the lack of relevant ability, creates a source of special danger precisely by so doing, not just for any specific contractual partners, but also for any third parties[158]. These »experts« could *avoid* creating the increased risk by desisting from the challenging activity that they are not in fact up to performing. Furthermore, they gain a *benefit* from the exercise of the expert activity. Creating a special source of danger, controllable nature of the risk and the financial interest in the source of danger all speak clearly in favour of a strict standard of liability. In this respect, the imposition of strict liability serves deterrent purposes: the threat of liability when activities are engaged in despite the fact that the relevant person does not possess the special abilities necessitated by such, creates an incentive not to take on such activities in the first place or to refrain from them in the future.

157 See on this *Karner* in KBB, ABGB[3] § 1299 no 1 f; *Reischauer* in Rummel, ABGB II/1[3] § 1299 no 2 and 5; OGH 6 Ob 521/81 in JBl 1982, 534; 1 Ob 605/84 in SZ 57/140 = JBl 1985, 625; 10 Ob 501/89 in JBl 1990, 49; 9 Ob 23/07h in ÖBA 2008, 658 *(Madl)*.

158 The structural engineer who calculates the bridge so that it is in danger of collapse; the roof-tiler who attaches the tiles so badly that they threaten to fall down onto the street and the doctor in hospotal who treats the patients of his employee so that they sustain long-term health damage, usually endanger people who are not their contractual partners.

4. Objective standard when dangerous things are used

6/90 There is also a third area in which liability for objective carelessness seems justified: if the accusation of merely objectively deficient conduct is considered to be a lesser liability ground[159], then this cannot justify liability on its own but only in combination with another criterion, in particular with the element of an *increased risk.* This is also recognised by the ABGB[160], in that it does not impose strict liability but does impose liability in the case of even objectively careless behaviour – due to the special risk – upon the keeper of a defective construction (§ 1319 ABGB) or an animal (§ 1320 ABGB). Accordingly, it may be assumed in general that when damage occurs in association with the use of an especially dangerous thing, an objective standard of care is sufficient[161].

5. Conclusion

6/91 *In summary* it can be noted as follows: within contractual relationships, when activities requiring special abilities are exercised and in combination with the especial risk posed by something, it is entirely appropriate to apply an objective standard.

In the field of torts, on the other hand, subjective misconduct must be required for the imposition of a duty to compensate on the basis of culpable damage. It must be emphasised that the denial of fault due to below average abilities does not necessarily lead to full exclusion of the perpetrator's liability: even those incapable of committing a tort may be liable under § 1310 ABGB, § 829 BGB[162] when various factors are taken into consideration. The relevant value judgements must be all the more valid if the perpetrator is not incapable of committing a tort due to grave lack of understanding but instead has merely slightly below average abilities that mean in some cases he should not be deemed at fault[163].

6. Wrongfulness and negligence

6/92 Insofar as negligence is thus measured according to a *subjective* standard in the field of torts, there is a *clear boundary* between wrongfulness and negligence: only objective criteria are relevant in deciding whether there has been wrongfulness; hence the assessment of wrongfulness must be made according to a general yard-

159 *Wilburg,* Elemente 56, 284.
160 See on this *Koziol,* Bewegliches System und Gefährdungshaftung, in: F. Bydlinski/Krejci/Schilcher/V. Steininger (eds), Das Bewegliche System im geltenden und künftigen Recht (1986) 54 f.
161 *Von Caemmerer,* Die absoluten Rechte in § 823 Abs 1 BGB, Karlsruher Forum 1961, 27, tends to consider objective carelessness enough for third-party liability competing with strict liability.
162 See *Koziol,* Haftpflichtrecht I³ no 7/5.
163 Thus, *U. Huber,* E.R. Huber-FS (1973) 273 with reference to BGHZ 39, 281.

stick, looking at what is reasonable behaviour for the subjects of the rule[164]. When it comes to fault, on the other hand, »ability« must be determined on a strictly subjective basis according to the individual's real abilities. Therefore, by no means all wrongful behaviour is also culpable[165]. The difference is revealed when it comes to damage caused by people with below average abilities; the clearest example is that of the mentally ill, whose behaviour is wrongful but who usually (§ 1310 ABGB) cannot be deemed culpable. In the case of those capable of committing tort, however, it must be assumed that they possess the subjective abilities at issue (cf § 1297 ABGB), so that when objective duties of care are infringed it is assumed that they acted culpably; thus, the perpetrator has the burden of proof to show that he was not subjectively at fault. This is also in tune with the generally accepted division of the burden of proof in respect of exclusion or reduction of the capacity to commit torts under §§ 827 f BGB, so that under German law too there is an assumption in favour of subjective fault if duties of care are objectively breached[166]. In central and eastern European legal systems, this kind of assumption is often anchored expressly in legislation[167].

6/93 The application of a subjective standard would also seem to suggest that in assessing fault *extraordinarily good abilities* should also be taken into account so that negligence might even be affirmed if no subjective accusation could be levelled against the average person[168]. From the objective establishment of the duties of care that form the basis for the assessment of wrongfulness, however, it must in principle be inferred: if someone would have been able to exercise a greater degree of care or to identify the risk of damage only because of his extraordinary abilities, he will in such cases usually not be liable to compensate as his conduct will not have been wrongful[169]. This is because wrongfulness depends on whether the requirements in respect of conduct are appropriate in relation to the average subjects of the rule. Nonetheless, there may be protective laws that exceed

164 On this in detail *Münzberg,* Verhalten und Erfolg 191 ff.

165 Cf OGH 8 Ob 165/76 in ZVR 1989/64. Hence, the view taken by *Hannak,* Die Kanalisierung der Haftung, JBl 1961, 540, that every infraction of a protective rule is culpable, is wrong.

166 *Wilhelmi,* Risikoschutz 346 f.

167 See *Will/Vodinelic,* Generelle Verschuldensvermutung – das unbekannte Wesen. Osteuropäische Angebote zum Gemeineuropäischen Deliktsrecht? Liber amicorum for Helmut Koziol (2000) 307; *Koziol,* Die schadenersatzrechtlichen Bestimmungen des Entwurfs eines Tschechischen Zivilgesetzbuchs in rechtsvergleichender Sicht (Czech), in: Švestka/Dvořák/Tichý (eds), Sborník statí z diskusních fór o rekodifikaci občanského práva (2008) 22.

168 Under German law, the above average abilities of the specific perpetrator are taken into consideration – in the face of all logic – despite the objective standard of fault; cf *Deutsch,* Der Begriff der Fahrlässigkeit im Obligationenrecht, Keller-FS (1989) 111 f; *Grundmann* in MünchKomm, BGB II[5] § 276 no 56 with additional references.

169 Cf *K. Wolff* in Klang, ABGB VI[2] 46; OGH 1 Ob 50/70 in EvBl 1970/294; 8 Ob 165/76 in ZVR 1975/269. Taking a different view *Zeuner,* Gedanken über Stellung und Bedeutung des Verschuldens im Zivilrecht, JZ 1966, 8 f.

these boundaries or also rules that govern the conduct of especially qualified persons and thus factor in extraordinary abilities from the beginning (cf §§ 1299, 1300 ABGB)[170]. Apart from this, people may enter into legal agreements that provide explicitly for the deployment of special abilities, which then naturally must be taken into account when examining whether obligations have been breached[171]. Beyond this, it must generally be assumed that actual, real, above average knowledge must be taken into account and thus, that the perpetrator has acted wrongfully and culpably if he neglects such[172].

6/94 If negligence must be assessed *objectively,* for example in the case of breach of contract or that of experts, it would seem that a finding that behaviour has been wrongful simultaneously means there has been fault. However, this is not the case: even in this field, the perpetrator's incapacity to commit a tort may mean that the perpetrator has engaged in wrongful behaviour but is not at fault[173]. Moreover, grounds for excluding fault may preclude subjective liability despite the fact that behaviour was wrongful. Wrongfulness and fault must accordingly be distinguished in this field as well.

III. Other defects in the damaging party's own sphere

A. Misconduct of persons

1. Introduction

6/95 § 1313 ABGB starts with the self-evident fact that: *»As a rule no one is responsible for unlawful acts of third parties in which he had no part.«* Thereafter, however, the law recognises significant exceptions to this rule, based on the notion of liability for damage due to defects in the relevant party's sphere of responsibility[174]: as already indicated by the wording of § 1313 ABGB, this entire section of the law deals exclusively with »third-party *wrongful* acts«. There is general consensus, internationally as well, that objective misconduct, ie conduct breaching duties, on the part of auxiliary may give rise to vicarious liability[175]. Thus, an especially *grave defect* within the

170 See on this in *Koziol,* Haftpflichtrecht II² 182 ff.

171 Cf *Zeuner,* JZ 1966, 8 f.

172 *Reischauer* in Rummel, ABGB II/1³ § 1297 no 3; *P. Bydlinski,* Gedanken zur Haftung der Abschlußprüfer, Ostheim-FS (1990) 356 f; OGH 10 Ob 501/89 in JBl 1990, 48.

173 Cf *Stathopoulos,* Bemerkungen zum Verhältnis zwischen Fahrlässigkeit und Rechtswidrigkeit im Zivilrecht, Larenz-FS (1983) 645 f.

174 *Wilburg,* Elemente 43 und 225; *F. Bydlinski,* System und Prinzipien 214 ff.

175 This requirement is obviously common to all legal systems, cf *Galand-Carval,* Comparative Report on Liability for Damage Caused by Others, in: Spier, Unification: Liability for Others 300; *Giliker,* Vicarious Liability in Tort (2010) 27 ff.

principal's sphere of responsibility is required as an indispensable criterion for liability in this respect[176]. This complies with a basic concern laid out below:

Liability for the conduct of a third party can only be justified within a consistent overall system if there are grounds for liability that are of similar weight to those that are provided in respect of liability for one's own fault or liability for dangerous things. Indeed, the *overall framework of grounds for liability* must be taken into account and vicarious liability may not be based on less substantial grounds than all other types of liability.

6/96 These ideas are important in relation to the more specific definition of *liability for auxiliaries (Gehilfenhaftung):* the reference point is – as just highlighted – the objective *misconduct of the auxiliary.* This is connected to the consideration that defect-free and thus due and proper conduct by the auxiliary that results in damage cannot trigger the liability of the principal because the victim does not in principle enjoy any protection against suchlike conduct and thus the principal would not have been liable had he engaged in this conduct himself either. The simple fact that someone acted in third-party interests may certainly not on its own constitute an independent ground for liability. Ultimately, this also applies to damaging processes that are not based on any action directed by will, for instance, a heart attack or the sudden unconsciousness of the auxiliary. In this context, it is certainly still possible to speak of an objective defect within the principal's sphere of responsibility. Nonetheless such cannot suffice either to impose liability upon the principal: so long as such bears no blame in respect of the selection or supervision of the auxiliaries and so long as the auxiliary cannot be accused of any careless behaviour, the damage is the result of an accident that cannot trigger any claims for compensation on the part of the victim, even had it not occurred in connection with an auxiliary.

6/97 In respect of liability for auxiliaries, it is also of decisive significance that the principal is accountable for misconduct on the part of an auxiliary because he firstly deploys such person to discharge his affairs and thus *to pursue his (the principal's) own interests* and, secondly, he involves the auxiliary in *his (the principal's) sphere of responsibility*[177]. The question of when auxiliaries are to be included in the principal's sphere of responsibility and the further criteria that the principal's liability is based on is answered differently in the Austrian and German as well as other legal systems too, depending on whether the auxiliary is an *Erfüllungsgehilfe* (performance agent, employed by the principal to perform some contractual obligation for him) or a *Besorgungsgehilfe* (vicarious agent, an auxiliary who performs a task for the principal under his instruction and supervision outside a contractual obligation) or one of the *executive organs* (leading auxiliaries) of legal entities.

176 *Wilburg,* Elemente 43 und 225; *F. Bydlinski,* System und Prinzipien 214 ff.
177 *F. Bydlinski,* System und Prinzipien 206 f.

6/98 Besides the liability for the auxiliaries deployed, there may also be liable for other persons. In some legal systems the misconduct of *children* in particular is imputed to the parents[178]. However, very predominantly[179], also in Austria (§ 1309 ABGB)[180] and Germany (§ 832 BGB)[181], liability is only imposed upon parents and other people with a duty to supervise children for their own negligence as regards the supervision necessary. Thus, the liability of parents is considerably less stringent than that of principals for their auxiliaries, principals being largely liable for the imputed misconduct of their auxiliaries without committing any fault themselves. This can easily be justified by reference to the fact that it is not only in the parents' interests that they bring up their children but also in the public interest; furthermore, parents do not generally derive any financial or material benefit from their children, on the contrary they bear considerable expenditure for them.

6/99 Absolutely in line with this, those in charge of supervising *people with mental disabilities* are only liable for damage caused by their actions if they culpably neglect their supervision duties; there is no liability for the conduct of the mentally ill. The supervision of such persons is also in the interests of the public and furthermore, these persons do not serve the promotion of their supervisors' interests.

2. Auxiliaries' personal liability

6/100 Before we look in more detail at the liability for the different types of auxiliary, an important question for all auxiliaries will be discussed, namely that of their *personal liability.* This issue is resolved differently in the various national legal systems[182], namely as to whether the auxiliary is personally liable alongside the principal for the damaging behaviour of the auxiliary – insofar as all the relevant criteria are fulfilled – and thus the two are liable jointly and severally. Austrian and German law does not provide for any exclusion of the personal liability of auxiliaries; in principle, this solution seems fair: there is no reason why a perpetrator should be freed from his liability merely because someone else is made liable. But also from the perspective of the victim, there is no convincing reason why he should have no claim against the auxiliary solely because liability is imposed

178 Thus, in particular in France, see *Franco-Terminal/Lafay/Moréteau/Pellerin-Rugliano,* Children as Tortfeasors under French Law, in: Martín-Casals, Children I 193 ff; cf further ibid *Martín-Casals,* Comparative Report 441 f.

179 See *Martín-Casals* in: Martín-Casals, Children I 441 f; *Giliker,* Vicarious Liability 196 ff.

180 On this *S. Hirsch,* Children as Victims under Austrian Law, in: Martín-Casals, Children I 39 ff.

181 On this *G. Wagner,* Children as Tortfeasors under German Law, in: Martín-Casals, Children I 235 f.

182 *Brüggemeier,* Haftungsrecht 119 ff; *van Dam,* Tort Law 151 ff; *Galand-Carval* in: Spier, Unification: Liability for Others 304 f; *Giliker,* Vicarious Liability 30 ff; *Schelp,* Die Haftungsbelastung des Arbeitnehmers bei Schädigung Dritter (2003) 8 ff.

upon the principal. While the principal may typically be better able to pay compensation than his auxiliary, this is not necessarily the case and it would not be justifiable if the victim had no claims against the primary perpetrator because someone else was – also – liable. It is very much in line with the general rules that if the damage is imputable to several persons, such are jointly and severally liable and no good reason presents itself as to why this should be any different in this case. The protection considered necessary for auxiliaries against excessively onerous burdens can be obtained by excluding recourse claims by the principal against the auxiliaries and by the auxiliary's recourse claims against the principal. Such recourse claims are provided for in Austrian law, on the one hand, by § 3 DHG[183], on the other hand, they can also be based on the risk liability rule under § 1014 ABGB in the case of activity-specific increased danger[184]. If the latter should not be enforceable due to the economic circumstances of the principal, it still seems fairer that the *perpetrator,* who has acted unlawfully and culpably, should bear the risk that the principal be insolvent and not the innocent victim. In many cases, however, this problem does not arise because the third-party liability insurance taken out by the principal covers his liability and that of the auxiliary.

6/101 Nonetheless, it must be acknowledged that there may be unacceptable burdens for the auxiliary if the principal is insolvent, there is no cover by a third-party liability insurance policy and the damage is enormous in scope as a direct result of the circumstances of the principal's sphere of responsibility. This may happen in particular if the auxiliary works in a – dangerous – plant belonging to the principal. A small lapse of concentration could lead to disproportionate, ruinous duties to compensate. In such individual cases, the reduction clause – presented in more detail below – would be an appropriate way to facilitate a solution in proportion to the interests at issue.

3. Liability for performance agents (Erfüllungsgehilfen)

6/102 Before entering into the liability for Besorgungsgehilfen (vicarious agents) relevant to the field of tort, a glance at liability for Erfüllungsgehilfen would seem useful, as material aspects of the evaluation will become clearer.

According to § 1313 a ABGB, a person who is obliged to render performance to another and uses another in the performance of his obligations is liable for the fault of persons who he deploys *for such performance, just as for his own.* This

183 German case law reaches similar conclusions, see BAG in 8 AZR 300/85 = NJW 1989,854. *Otte/Schwarz,* Die Haftung des Arbeitnehmers[3] (1998) no 455 ff; *Sandmann,* Die Haftung von Arbeitnehmern, Geschäftsführern und leitenden Angestellten (2001) 10 ff and 51 ff in each case with additional references.

184 On this in detail *B.A. Oberhofer,* Außenhaftung des Arbeitnehmers (1996) 123 ff.

comprehensive liability of the auxiliary's fault corresponds to § 278 of the German BGB and a comparative law overview shows that this sort of far-reaching accountability is also set out by other legal systems[185].

6/103 This relates to the use of auxiliaries to fulfil already existing *performance obligations;* these may either be based on a transaction or the law[186]. According to the prevailing Austrian understanding of § 1313 a ABGB not only – as is indeed suggested by the wording – performance obligations are included but also other legal special relationships, above all those arising from pre-contractual contact[187]. Understood this way, § 1313 a ABGB largely corresponds to the somewhat more broadly formulated provision in § 278 BGB, which speaks more generally of the performance of obligations.

6/104 Nonetheless, the *non-commercial character* of the obligations within special legal relationships may also be material. This is not meant to apply to statutory obligations within special legal relationships, such as those under the law of damages and the law on unjust enrichment, as these are not based on generosity and must largely be treated like commercial relationships[188]. Rather it only applies to donations (Schenkungen); in such cases it is recognised that liability is limited in that the objective duties of care are reduced[189]. This limitation applies, however, only to the performance duties but not to (special) duties of care[190]. Insofar as the duties of performance are concerned, liability for performance agents must also be mitigated[191].

6/105 The *reason* for the far-reaching accountability of the principal for the misconduct of the auxiliaries deployed by him can be found in the following considerations[192]: obligors are allowed by the legal system – except in rather unusual highly personal obligations – to deploy auxiliaries in order to carry out their obligations. This complies – as *F. Bydlinski*[193] highlights – with the maxim of *commutative justice:* someone who can and may increase his financial benefits and economic opportunities by deploying auxiliaries, ought also to bear the damage

185 See *Galand-Carval,* Comparative report, in: Spier, Unification: Liability for Others 290 f.

186 *Karner* in KBB, ABGB³ § § 1313 no 2.

187 On this, eg, *F. Bydlinski,* Zur Haftung des Erfüllungsgehilfen im Vorbereitungsstadium, JBl 1995, 477 ff; *Koziol,* Haftpflichtrecht II² 336 ff; *Welser,* Vertretung ohne Vollmacht (1970) 79 ff; *M. Wilburg,* Haftung für Gehilfen, ZBl 1930, 644 ff.

188 Cf *Koziol,* Haftpflichtrecht I³ no 9/5 und 6.

189 See *Koziol,* Haftpflichtrecht I³ no 4/41; likewise *Bollenberger* in KBB, ABGB³ § 945 no 1. Usually there is no reference to a limitation of the duties of care, instead it is assumed that the donator is only liable in the case of gross negligence (*Stanzl* in Klang, ABGB IV/1² 618), which indeed leads largely to the same results.

190 *Welser,* Bürgerliches Recht II¹³ (2007) 193; OGH 4 Ob 140/77 in SZ 50/137.

191 Thus *Wilburg,* Elemente 224, 226; in the same sense *F. Bydlinski,* System und Prinzipien 208.

192 On this, eg, *Iro,* Besitzerwerb durch Gehilfen (1982) 215 ff; *Koziol,* Haftpflichtrecht II² 336; *Spiro,* Erfüllungsgehilfen 57 ff; *M. Wilburg,* ZBl 1930, 648 f; OGH 4 Ob 251/06z in SZ 2007/1.

193 System und Prinzipien 207 f. Cf also *Giliker,* Vicarious Liability 237 ff.

associated with the involvement of auxiliaries; benefit and foreseeable disadvantage go together in this respect.

6/106 It must also be taken into account that the obligee's position would be *substantially disimproved* by the involvement of auxiliaries, if the obligor was only liable for his own fault, for example fault in selection. A carefully selected auxiliary may also make a mistake and then the victim would suffer damage and only have a compensation claim against the usually less well able to pay auxiliary but not against the principal. Apart from this difficulty, the obligee's position would be weakened above all by the fact that the performance agent would often not be liable at all towards him because the duty within the special relationship only concerns the obligor but not the auxiliary executing it. Thus, the auxiliary is not in breach of contract. His conduct would merely be wrongful and thus he could only be at fault if he infringed duties which he owed to everyone. For this reason, the obligor's option to have other parties execute the obligation in his interest must be tied to an extension of liability to include the auxiliaries as otherwise the obligor would be able to improve his own position at the cost of the obligee. The unilateral reduction of liability could frustrate the partner's reliance on correct performance[194].

6/107 It is the general view that the principal is not accountable for all damage caused by his auxiliaries but only when there is a link to the task transferred to the auxiliary: the damage must be brought about *in the course of* the performance and not merely *on the occasion of* the performance[195]. However, this distinction is not easy in practice. It is not a logical or constructively clearly resolvable problem but rather a value judgement as to which misconduct on the part of auxiliaries may fairly be imputed to the principal, something which cannot be inescapably decided. In other legal systems too, all acts by auxiliaries are by no means imputed to the principal, instead there are limitations; nonetheless these are not clear and satisfactory statutory stipulations either and similar problems arise[196]. Reference is had firstly to the related legal systems of Germany[197] and Switzerland[198], as well as the Netherlands[199]. In Italy[200] too, it is a requirement that the transferred task has been a necessary cause (occasionalità necessaria) of the dam-

194 This aspect is emphasised by *F. Bydlinski,* System und Prinzipien 208 f.

195 Cf *M. Wilburg,* ZBl 1930, 660 ff; *Kletečka,* Mitverschulden durch Gehilfenverhalten (1991) 38 ff; *Koziol,* Zurechnung ungetreuer Bank-Mitarbeiter (2004) 35 ff with additional references.

196 See on this also the country reports in Spier, Unification: Liability for Others, in particular: *W.V.H. Rogers,* English Law 69; *Galand-Carval,* French Law 93 f; *Haentjens/du Perron,* Dutch Law 176; *Widmer,* Swiss Law 270.

197 *Grundmann* in MünchKomm, BGB II[5] § 278 no 46 ff with additional references.

198 *Spiro,* Erfüllungsgehilfen 233 ff; *Wiegand* in BSK, OR I[4] Art 101 no 10.

199 *Asser/Hartkamp,* Verbintenissenrecht III[12] (2006) 149 ff.

200 Cf on this the country report by *Scarso,* Zurechnung ungetreuer Bankmitarbeiter nach italienischem Recht in: Koziol, Zurechnung 116 no 7 and 9.

age inflicted, thought the interpretation of this requirement likewise varies. In France, Art 1384 (5) Code civil only requires in respect of the tortious liability of the principal that the auxiliary must have brought about the damage in exercising the activity transferred to him (dans les fonctions auxquelles ils les ont employés), but in the case of the abus de fonctions a corresponding limitation in the field of liability for performance agents is widely advocated[201]. Not all damaging acts by auxiliaries are imputed to the principal under English law either; it is not sufficient that the auxiliary gained the opportunity to bring about the damage by being deployed by the principal[202].

6/108 A merely partly satisfactory demarcation of liability is required by taking into consideration the above-mentioned basic principles: the far-reaching liability of the obligor for his performance agents is the necessary consequence of allowing him to use auxiliaries, as anything else would weaken the position of the obligee. This justification is certainly very valid when the misconduct concerned took place in the very course of the performance of the *duties to perform* deriving from the obligation within the special legal relationship between obligee and obligor, ie, for example, the delay in rendering performance. On the other hand, it seems natural that the principal should not be held to account for the damaging conduct of the persons he has deployed as auxiliaries if such conduct was engaged in without any kind of spatial, chronological or factual connection with the tasks the principal transferred to such. Difficulties arise, however, in the interim area, when the protection of the other goods of the obligee *(Integritätsinteresse)* and thus the failure to observe (special) duties of care is concerned: which duties should also be observed otherwise by auxiliaries. An example would be the damage to things in the flat of the customer who ordered something. In this field, the above-cited grounds do not suffice for the comprehensive liability of the auxiliary's conduct without further ado[203]: in this respect, the tort liability of the auxiliary is triggered in any case. On the other hand, the connection with the performance of the duties arising from the principal's obligation is already much weaker as it is no longer the protection of the principal's partner's interest in performance which is at issue but instead the protection of his other goods and the special risk arises because the partners opened up their spheres of interest to each other.

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201 *Viney/Jourdain,* Les conditions de la responsabilité[3] (2006) Nr 824; cf also *Viney,* Introduction à la responsabilité[3] (2007) Nr 170-3. Against the opportunity to refer to abus de fonctions *Le Tourneau/Cadiet,* Droit de la responsabilité et des contrats[7] (2008) Nr 3481 f, 7533 and *Malaurie/Aynès,* Les Obligations II[11] (2001) Nr 572, 618.

202 See the country report by *Elliot,* Institutional Responsibility for Employee Frauds in the Banking Sector: The Position in English Law, in: Koziol, Zurechnung 104 no 12; further *Dutzi,* Haftung für Hilfspersonen im englischen Vertrags- und Deliktsrechtrecht (2001) 98 ff.

203 On this in particular *E. Schmidt,* Zur Dogmatik des § 278 BGB, AcP 170 (1970) 503 ff; *Esser/Schmidt,* Schuldrecht I/2[8] § 27 I 4.

6/109 The aspect that the *risk is increased* is often deemed to be the decisive criterion in deciding the question of liability in this critical area, ie whether the principal's deployment of the auxiliary leads to an increase of the risk that the business partner suffers damage[204]. In the Netherlands, the law of torts takes it as a specific basis when in Art 6:170 (1) BW it requires that the probability of misconduct be increased by the transfer of the task[205]. When the usual criteria for liability are drawn on this could also be transcribed to the effect that the principal's liability requires *an increased degree of adequacy,* ie the harm caused must be a typical consequence[206]. However, the problem remains that the increase of the probability and the adequacy can be graded, thus leaving open the decisive issue of what degree of risk increase is required[207].

6/110 The difficulties show up above all in the practically very relevant issue of imputing *intentional acts* performed by auxiliaries. This group of cases has a special peculiarity, however: in particular *Larenz*[208] has elaborated that the liability for damage is not justified if the harm derives from an independent decision by the victim himself or a third party, not provoked by the process which would provide a basis for liability, such decision-maker is accountable for such harm on his own. One could also – to refer back to adequacy – say that intentional damage by the auxiliary is not a typical consequence of involving such in performance. In the cases in this interim area at issue, however, the auxiliary gains the opportunity to carry out this intentional damage precisely by being entrusted with the task by the principal; this is at least a significant argument in favour of allocating such misconduct to the principal's sphere of risk after all[209].

6/111 In Austrian teaching and case law there is consensus – in harmony with the above-stated principles – that the principal is in any case accountable under § 1313 a ABGB for violation by auxiliaries of the *main performance duty* characteristic for the obligation within the special legal relationship to the obligee[210]. This applies both to negligent and intentional violations of the main performance

204 See, eg, *Grundmann* in MünchKomm, BGB II[5] § 278 no 46. Against this, however, eg *Spiro,* Erfüllungsgehilfen 232.

205 Cf on this *Spier/Hartlief/van Maanen/Vriesendorp,* Verbintenissen uit de wet en Schadevergoeding[5] (2009) Nr 90.

206 See *Wilburg,* Elemente 224 f; *Koziol,* Haftpflichtrecht II[2] 345 f.

207 This is why *E. Schmidt* (*E. Schmidt,* AcP 170, 503 ff; *Esser/Schmidt,* Schuldrecht I/2[8] § 27 I 4) cannot be endorsed when he does not see any way to differentiate and thus wants to impute auxiliaries' conduct when special duties of care are violated in any case.

208 *Larenz,* Lehrbuch des Schuldrechts I[14] (1987) § 27 III b 4; *idem,* Zum heutigen Stand der Lehre von der objektiven Zurechnung im Schadensrecht, Honig-FS (1970) 79. See on this also *Koziol,* Haftpflichtrecht I[3] no 8/77 ff with additional references.

209 This is stressed, eg, by *Spiro,* Erfüllungsgehilfen 240 ff.

210 Thus, eg, OGH 1 Ob 711/89 in SZ 63/201; *Koziol,* Haftpflichtrecht II[2] 344 ff with additional references from case law and doctrine.

duty. The principal is also accountable for the violation of independent ancillary performance duties.[211] This is not distinguished from liability for violation of main performance duties.

6/112 As far as the *duties to inform and exercise (special) care* are concerned, the OGH[212] has held that the intentional nature of the auxiliary's act does not preclude the possibility that a prohibited action may still be qualified as the fulfilment of a contractual duty of the obligor; this corresponds to a view defended forcefully in teaching[213], as well as Italian[214] and English law[215]. However, in these cases too, the Supreme Court requires that there be an internal factual connection between the auxiliary's damaging act and the performance of the contract. A trend can be distinguished in case law towards making this connection contingent upon the violation of »special duties of care specific to the contract«[216]. In this manner, the OGH rightly takes into account the fact that in cases where contract-specific duties of care have been violated there is generally no tortious liability of the auxiliary towards the principal's contractual partner, who bears the loss as the violated special duties of care did not exist towards everyone. Besides this, the fact that the violation of contract-specific duties of care is even weightier than the violation of duties existing towards everyone must weigh in: the recognition of special contractual duties of care is based after all precisely on the fact that the business partner is exposed to special risk and accordingly, that special duties of care seem necessary.

6/113 In sum, this view also substantially corresponds to the standpoint taken in other jurisdictions: German[217] and Italian[218] case law seems to follow the same line on the whole; as does English case law[219]. Indeed French law goes even further[220]: liability for auxiliaries would even be applicable in the case of a murder that the auxiliary committed at the workplace during working hours. For instance, the conduct of an insurance inspector who embezzled money collected for his company was imputed to the principal[221]. Likewise, the liability of the principal

211 Thus, eg, *Larenz,* Schuldrecht I[14] § 20 VIII (301).
212 OGH 1 Ob 643/84 in EvBl 1978/113; 1 Ob 643/84 in JBl 1986, 101 *(Koziol);* 3 Ob 296/98w in ZVR 2000/102.
213 See, eg, *Spiro,* Erfüllungsgehilfen 240 ff with additional references.
214 See *Scarso,* Zurechnung ungetreuer Bankmitarbeiter nach italienischem Recht, in: Koziol, Zurechnung ungetreuer Bank-Mitarbeiter (2004) 116 no 7.
215 Cf *Elliott,* Institutional Responsibility for Employee Frauds in the Banking Sector: The Position in English Law, in: Koziol, Zurechnung 105 no 13 ff.
216 Insofar the OGH – quite rightly – goes beyond *my* (Haftpflichtrecht II[2] 345 f) earlier position that intentional conduct of auxiliaries only be imputable when duties to perform are violated.
217 On this, eg, *Grundmann* in MünchKomm, BGB II[5] § 278 no 47 with additional references.
218 See the country report by *Scarso* in: Koziol, Zurechnung 120 no 15 ff.
219 On this *Elliott* in: Koziol, Zurechnung 105 no 15.
220 Cf *Galand-Carval,* French Law, in: Spier, Unification: Liability for Others 93 f.
221 Cass ass plén 19. 5. 1988, D 513.1988 *(Larroumet).*

for embezzlement committed by the employee of a notary[222] and by a bank employee[223] was affirmed.

The Austrian Draft seeks to take these ideas into account by drawing on adequacy as a basis in that the liability of the principal applies not only when duties to perform are violated but also in the case of other misconduct that is not extraordinary in respect of the performance agent's activity (§ 1305 (1) sentence 2 Austrian Draft).

6/114 In conclusion, it should be recalled to mind that the principal may even be liable if the auxiliary's conduct is no longer imputable under § 1313 a ABGB, as the principal is also held to account for *his own fault* when it comes to the organisation, selection and supervision of auxiliaries.

4. Liability for vicarious agents (Besorgungsgehilfen)

6/115 In the extra-contractual field, ie when it comes to liability for Besorgungsgehilfen, there are far more differences between the various legal systems than in relation to liability for performance agents. A *comparative law* overview shows up very considerable differences[224]. These become manifest even when the German and Austrian rules are compared, since these diverge significantly from each other. There is broad consensus again, nonetheless, insofar as objective misconduct, ie conduct by the auxiliary that violates duties, is generally taken as a basis[225] and thus, an especially grave defect in the principal's sphere of responsibility is required[226]. This requirement arises out of necessity because otherwise the principal might be liable for damage caused by auxiliaries even though he would not have been liable had he himself engaged in the same conduct due to lack of unlawfulness.

6/116 Pursuant to § 831 of the German BGB, a person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. However, the principal is not liable if he proves that he exercised the necessary care in the activity when selecting the auxiliaries, procuring equipment and supervision. This narrow provision has been considerably expanded by case law[227]; however, it remains

222 *Flour/Aubert/Savaux,* Le fait juridique Nr 218; Cass civ 2e 4.3.1999, R C Ass 1999, no 124.

223 *Flour/Aubert/Savaux,* Le fait juridique Nr 218; Cass com 14.12.1999, RTD civ 2000, 336 *(P. Jourdain).*

224 See the comparative law report by *Galand-Carval* in: Spier, Unification: Liability for Others 289 ff; further *Brüggemeier,* Haftungsrecht 119 ff; *van Dam,* Tort Law 437 f, 448 ff; *G. Wagner,* Vicarious Liability, in: Hartkamp/Hesselink/Hondius/Mak/du Perron (eds), European Civil Code[4] 907 ff.

225 Cf *Galand-Carval,* Comparative Report on Liability for Damage Caused by Others, in: Spier, Unification: Liability for Others 300; *Giliker,* Vicarious Liability 27 ff.

226 *Wilburg,* Elemente 43 und 225; *F. Bydlinski,* System und Prinzipien 214 ff.

227 Cf *G. Wagner* in MünchKomm, BGB V[5] § 831 no 2. A comparison with the common law is offered by *Giliker,* Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective, JETL 2011, 34 ff.

largely a provision of fault-based liability, though it is at least made stricter by the reversal of the burden of proof.

In Austria, § 1315 ABGB provides – besides the liability for fault in selection or supervision of auxiliaries on the basis of the general rules – for non-fault-based liability of the principal at least when he deploys an incompetent or, knowingly deploys[228], a dangerous auxiliary. The strict liability for incompetent auxiliaries is based on the idea that there is a defect in the principal's sphere of responsibility that generates a considerable risk[229]. The ABGB does not, however, consider the notion that the person who derives the benefit from deploying the auxiliary should also bear the harm as a sufficient ground for liability by itself.

6/117 Nevertheless, most legal systems that provide for liability for every culpable infliction of damage by the auxiliaries in the field of tort as well as for performance agents go considerably further, following the internationally increasingly popular approach of *»respondeat superior«*[230]. This broad, non-fault-based accountability is laid down also by the *EGTL* in Art 6:102 PETL[231], as well as by the *Study Group on a European Civil Code* in Art 3:201 PEL Liab Dam. The Alternative Austrian Draft[232] developed by a working group also takes this approach with a proposal for the amendment of § 1315 ABGB.

The widespread principle »respondeat superior« is problematic nonetheless and does not contain any justification[233]. The starting point for analysis must be a notion that was clearly expressed by the ABGB almost 200 years ago in § 1313 and which is, in fact, self-evident: »As a rule no one is responsible for unlawful acts of third parties in which he had no part.« In order to make a case for liability for third-party conduct within a consistent overall system, it is necessary to require grounds for liability that have a similar weight to those that are provided for liability in respect of one's own faulty conduct or for liability for dangerous things.

6/118 As is otherwise generally the case, liability for Besorgungsgehilfen cannot be based on one ground but requires a package of grounds[234] that can interact with

228 In this case too, it is not fault-based liability which is at issue since only the knowledge of dangerousness is required but not fault in relation to the occurrence of the damage, see *M. Wilburg,* Haftung für Gehilfen, ZBl 1930, 724 f.

229 *Koziol,* Haftpflichtrecht II² 355.

230 See on this *Galand-Carval* in: Spier, Unification: Liability for Others 306; *Giliker,* Vicarious Liability 6 ff; *Harrer/Neumayr,* Die Haftung des Unternehmers für Gehilfen, in: Reischauer/Spielbüchler/Welser (eds), Reform des Schadenersatzrechts II (2006) 137 ff; *Jaun,* Sorgfaltspflichtverletzung 378 ff; *Renner,* Die deliktische Haftung für Hilfspersonen in Europa (2002); *G. Wagner,* Reform des Schadenersatzrechts, JBl 2008, 11 f.

231 See *Moréteau,* Introduction, in: EGTL, Principles 112 ff.

232 *Reischauer/Spielbüchler/Welser* (eds), Reform des Schadenersatzrechts III – Vorschläge eines Arbeitskreises (2008) 16 ff. In favour *Pfeiffer,* Die Entwürfe für ein neues österreichisches Schadensersatzrecht – Fortschritt für Österreich und Vorbild für Deutschland? (2011) 92 ff.

233 See *Giliker,* Vicarious Liability 13 ff, 228 ff.

234 Thus, rightly *Giliker,* Vicarious Liability 244 ff.

varying weight. In this respect the starting point is that vicarious liability for auxiliaries requires *liability grounds of the same weight* as for personal liability. Thus, it would firstly appear natural to require that the auxiliary has engaged in objectively careless behaviour; this has indeed hitherto always been taken into consideration by the legislator: as already mentioned, the legally recognised departures from the principle that one is not liable for third parties is based on the notion of imputing damage due to defect in one's sphere of responsibility and thus the objective misconduct of the auxiliary is taken as a starting point. A damaging but due and proper action on the part of the auxiliary is not sufficient to justify the principal's liability: the victim does not enjoy any protection against such *error-free conduct,* it does not fulfil the factual elements of the wrong and thus the principal would not be liable either if he himself had engaged in this action[235].

6/119 Even though liability for auxiliaries is based on the notion that the principal is accountable for *misconduct* on the part of an auxiliary because he has deployed this person in his own interests to perform his affairs and thus incorporated them into his sphere of responsibility, *F. Bydlinski*[236] emphasises rightly that until now *no* persuasive arguments have been produced as to why this notion should suffice *on its own* to justify liability and to justify imputing all kinds of misconduct by auxiliaries[237]. Some do attempt to justify the liability by arguing that every deployment of auxiliaries leads to an *increase of risk* that is decisive for justifying liability[238]. This assumption is certainly not correct, however: by no means does entrusting a Besorgungsgehilfe with a task necessarily lead to an increase in risk, rather risk is often reduced by entrusting a more competent person with the task.

6/120 Strong doubt as to whether there are sufficient grounds for imputing the damage to the principal is aroused if one thinks of the everyday case that someone asks his friend to deliver something and this pedestrian friend causes a traffic accident due to carelessness. Clearly the principal in this case creates no *special danger,* as the messenger was simply a usual general road user. Hence, we are left solely with the circumstance that a third party undertakes action by the will of the principal and in his interests; this cannot, however, justify on its own imputing

235 This also applies to damaging processes that are based on an action not controlled by will, for example if the auxiliary suffers a heart attack or suddenly loses consciousness. In this respect it would still certainly be possible to speak of an objective defect within the principal's sphere but this cannot be sufficient to impose liability on the principal. If no blame can be attached to such as regards the selection or supervision of the auxiliary and if the auxiliary cannot be accused of any unlawful behaviour then this is counted as an accident which otherwise also cannot trigger any compensation claims for the victim when it does not occur in connection with an auxiliary.

236 System und Prinzipien 212.

237 Also *Harrer/Neumayr* in: Reischauer/Spielbüchler/Welser, Reform II 142 ff, only point to comparative law findings but do not offer any theoretical justification.

238 *Renner,* Deliktische Haftung für Hilfspersonen in Europa 181 ff.

to such principal the misconduct which occurred in the course of pursuing his interest in the absence of any other criteria. The weight of this ground for liability certainly seems far less substantial than the weight of those grounds required to establish liability for one's own culpable behaviour or – insofar as such is recognised in the first place – for sources of special danger.

6/121 As is confirmed by a comparative law overview, this idea that the principal can be held accountable for *any and all misconduct* on the part of persons active in his interests is not by any means actually applied at this level of unlimited generality. This is even shown by the fact that both in legal systems with comprehensive as well as those with restrictive liability of auxiliaries it is recognised that the principle is *not* accountable for all conduct by persons who have been employed to carry out some errand but are supposed to carry out this task *independently* and without further instructions[239]. This limitation of liability seems justified because the principal cannot exercise influence in the sense that he has no means of directing the auxiliary and thus does not control the danger. Therefore, it is widely recognised that the auxiliary's actions are generally only included in the principal's sphere of responsibility if the principal is *able to direct* the auxiliary, as this is what incorporates such into his sphere and also what gives him the power to control the danger by means of this steering influence[240].

These principles are also taken into account by § 1306 (3) Austrian Draft, which provides that liability for the misconduct of *independent* auxiliaries is not governed by the special rules on liability for auxiliaries but by the general principles and this requires personal fault on the part of the principal in selecting or supervising the auxiliary. This assures consistency with the general principles of liability and – as is by no means to be taken for granted – simultaneously makes it clear that a principal may be subject to *duties of care* when it comes to the selection and supervision of independent auxiliaries.

6/122 In relation to *non-independent auxiliaries,* however, § 1306 (1) Austrian Draft does not keep to the unproblematic liability of the principal for his own fault, which is clearly in line with the general principles. On the other hand, it does not follow indiscriminately the principle of »respondeat superior« either, but instead proposes a *differentiated, mediatory solution.* This seems appropriate because it seeks to incorporate liability for auxiliaries into the overall system by taking into account the overall weight of the grounds for liability.

Besides the principal's liability for his own fault, the Austrian Draft also provides specifically – following the applicable § 1315 ABGB – for a stringent, non-fault-based liability for damage caused by auxiliaries if the auxiliary is *incompetent.*

239 See on this *Galand-Carval,* Comparative Report on Liability for Damage Caused by Others, in: Spier, Unification: Liability for Others 306; *Giliker,* JETL 2011, 39 ff.

240 See *F. Bydlinski,* System und Prinzipien 212.

This provision is based on the idea that the principal has created a *special source of danger* by entrusting the task to a person who is unsuitable[241]. Hence, the general requirement that there be a serious defect in the principal's sphere has been satisfied by the fact that the auxiliary's conduct objectively violated duties and additionally this ground is complemented by another: the incompetence of the auxiliary. Since the principal causes the increased risk by means of his objectively defective appointment of an incompetent auxiliary, which then leads to the occurrence of the damage, it would seem this damage is also imputable to him.

6/123 The Austrian Draft does not follow the provision in § 1315 ABGB that provides for liability for *dangerous* persons, when the principal knows of the dangerousness. This is because there are concerns about imputing the damage in this respect: as the auxiliary is habitually dangerous, this dangerousness would also have had an impact had he not been entrusted by the principal with a task; possibly, however, affecting different victims. Nonetheless, the principal would only really have created a liability triggering *additional* danger if he had actually procured for the auxiliary the means of manifesting his dangerousness by involving him in the activity. In such cases, however, the auxiliary would generally be unsuitable for the task transferred to him, so that liability could be imposed in any case on the principal for engaging an incompetent auxiliary. Ultimately, it must be taken into account that the stricter standard of accountability applied when the principal knows of the auxiliary's dangerousness necessarily makes it considerably more difficult to re-socialise convicted criminals. Therefore, those who employ such people should not be threatened with greater liability risks but only required to exercise reasonable care in order to avoid damage being caused by dangerous persons. Hence, it seems more appropriate to recognise liability only subject to fault in selection or supervision.

6/124 These general rules on liability for Besorgungsgehilfen apply more strictly to *entrepreneurs* due to the reversal of the burden of proof (§ 1306 (1) sentence 2 Austrian Draft). The distinction between entrepreneur and non-entrepreneur as well as the more stringent liability for auxiliaries imposed upon entrepreneurs would seem justified because enterprises represent more complex organisations and thus outsiders may have considerable evidential difficulties. Moreover, the enterprise can shift the liability burden onto clients and ultimately the principle that as far as possible the same person should have both advantages and disadvantages applies with full effect (see no 6/105).

6/125 Furthermore, § 1306 (2) Austrian Draft, also provides in the manner of provisions already found in strict liability rules and also applied analogously[242] for a further tightening of the liability for auxiliaries, in this case not limited to entre-

241 See *Ehrenzweig,* System II/1² 688; likewise *Iro,* Besitzerwerb durch Gehilfen (1982) 206.
242 On this *Karner* in KBB, ABGB³ § 1315 no 6 with additional references.

preneurs: in the case of *special danger* the principal is liable in any case for the misconduct of his Besorgungsgehilfen. It is often argued with good reason that the damage inflicted by auxiliaries is imputable to the principal if the auxiliaries' damaging activity is linked to a source of abstract danger in the principal's sphere of responsibility, thus giving rise to increased risk[243]. In such case, the damage which occurs is not only imputable to the auxiliaries' conduct but also to the principal's sphere, as his source of danger has contributed to the damage or to the special extent of such. Similar applies also, however, if instead of an abstractly dangerous thing or plant there is a specific dangerous thing involved due to a defect in the principal's sphere, which endows the auxiliaries' activity with a special risk[244]: whilst the defect-dangerousness may be less weighty than a general dangerousness[245], the principal is nonetheless additionally compromised by this defect within his sphere.

5. Directors and officers liability

6/126 Legal entities cannot act on their own behalf, instead they always require the help of natural persons; thus, there can be no liability for their own conduct. However, it would not be sufficient if legal entities were only liable for the misconduct of their auxiliaries within the bounds of general liability for auxiliaries (§§ 1315 ABGB, 831 BGB). The decisive concepts behind the liability of auxiliaries to legal entities are expressed by § 26 ABGB with its *equality requirement* in relation to legal entities and natural persons[246]. Legal entities would after all be placed in a better position than natural persons if they were only subject to the usual liability for auxiliaries, since – in contrast to natural persons – they have in principle no liability for their own fault and therefore damage would only be imputable to them to a considerably lesser degree. For this reason, § 31 BGB stipulates that associations are liable for all their constitutionally appointed organs. There is no such express provision under Austrian law, but it is generally inferred from the equality requirement under § 26 ABGB that legal entities are liable for all fault on behalf of their organs[247].

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243 Cf *F. Bydlinski,* System und Prinzipien 213; *Ehrenzweig,* System II/1², 691; *Koziol,* Haftpflichtrecht II² 359 ff.

244 See *Wilburg,* Elemente 88; likewise *Jabornegg,* Die Dachlawine als Haftungsproblem, ZVR 1974, 327 f.

245 See on this *B.C. Steininger,* Verschuldenshaftung 35 ff.

246 On this *F. Bydlinski,* Die Verantwortung juristischer Personen in der Gesellschaft, in: Götz/Seifert (eds), Verantwortung in Wirtschaft und Gesellschaft 55 ff; *Kleindieck,* Deliktshaftung und Juristische Personen (1997) 231, 478.

247 *F. Bydlinski* in: Götz/Seifert, Verantwortung 3 ff; *Koziol/Welser,* Bürgerliches Recht I¹³ (2006) 74 f; *B.A. Koch* in KBB, ABGB³ § 26 no 16, in each case with additional references.

Organs in this context in Austria do not mean just the constitutionally appointed representatives of the legal entity[248], as this position is only relevant when it comes to entering into transactions. Moreover, confining liability to constitutionally appointed organs would allow legal entities to manipulate their liability to a large extent. The prevailing view today is that organs also include the *power-holders* in the sense of § 337 ABGB, ie the persons who exercise a responsible, leading or supervisory function within the organisation[249]. In Germany too, case law and doctrine have long departed from the statutory restriction of § 31 BGB to constitutionally appointed representatives[250].

6/127 The liability of legal entities for the fault of their power-holders can be relevant not only when these power-holders themselves engage in the damaging act but in particular also when the damage is brought about by other auxiliaries and this is not imputable to the legal entity either according to § 1313 a ABGB or § 1315 ABGB, but the power-holders are accountable for a fault in organisation, selection or *supervision* in relation to the relevant auxiliaries[251].

6/128 § 1306 (5) Austrian Draft provides in an interesting extension of the notion developed for legal entities, also for a corresponding expansion of liability for auxiliaries in relation to *natural persons;* this would mean a not insignificant expansion of the liability of auxiliaries in comparison to the present situation: just as legal entities are subject to comprehensive liability in a »core area«, the liability of natural persons must also be made equivalent to that of legal entities according to the persuasive arguments by *Ostheim*[252] if such persons expand their radius of action by delegation of powers. Accordingly, the Austrian Draft now provides that the principal – be it such a legal entity or a natural person – is also comprehensively liable for the misconduct of persons who have a leading position and their own authority to make decisions and give directions within the principal's field of activity.

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248 Unlike in Swiss law, see *Oftinger/Stark,* Haftpflichtrecht II/1[4] 274 f. On the earlier case law in England see *Elliot,* Institutional Responsibility for Employee Frauds in the Banking Sector: The Position in English Law, in: Koziol, Zurechnung ungetreuer Bankmitarbeiter (2004) 103 no 8.

249 *B.A. Koch* in KBB, ABGB[3] § 26 no 16 with additional references; further *Ostheim,* Organisation, Organschaft und Machthaberschaft im Deliktsrecht juristischer Personen, Gschnitzer-GedS (1969) 328 ff; from the more recent case law of the OGH cf 7 Ob 271/00d in JBl 2001, 525; 2 Ob 273/05v in RdW 2007, 725.

250 Cf *Reuter* in MünchKomm, BGB I/1[5] § 31 no 3 ff and 20 ff.

251 See *Aicher* in Rummel, ABGB I[3] § 26 no 26; *Ostheim,* Gschnitzer-GedS 331 ff. Cf on this also *Spiro,* Erfüllungsgehilfen 410 ff.

252 *Ostheim,* Weisungsdelegation als Haftungsgrund, JBl 1969, 535; *idem,* Gedanken zur deliktischen Haftung für Repräsentanten anlässlich der neueren Rechtsprechung des OGH, JBl 1978, 64 ff. See further *F. Bydlinski,* Die deliktische Organhaftung juristischer Personen: Europäisches Rechtsgut oder überholte Theorie? Koppensteiner-FS (2001) 569 ff (580 f).

B. Defective things

6/129 The defective condition of things is often drawn on when it comes to imputing damage. In Austrian law, the following contexts are particularly worthy of note: the liability of the owner of a building (§ 1319 ABGB); the keeper of a road (§ 1319 a ABGB); the keeper of a motor vehicle (§ 9 (1) EKHG) and product liability (§ 1 (1) PHG). The significance of the defectiveness in relation to establishing liability varies extremely. Under German law there are corresponding rules in §§ 336, 837 BGB, § 7 (1) StVG and §1 ProdHaftG.

6/130 The defectiveness of a *building* per se does not automatically lead to the liability of the owner under § 1319 ABGB in respect of the harmful results of its defective condition. Instead there must also be *objective carelessness*[253] on the part of the owner, although the burden of proof is on such to show that he exercised the necessary care. As compared with the fault-based liability otherwise provided for by the ABGB, this is a very considerable tightening of liability: instead of fault, objective carelessness is enough and even in this respect the burden of proof is reversed. The particular abstract dangerousness of the building as a result of the defectiveness is often referred to as an argument in favour of this stricter standard[254].

6/131 Following on from the above representation of liability for defects in relation to people in the principal's sphere, the question arises as to why in those cases the inappropriate behaviour on the part of the auxiliaries and the resulting increased danger are sufficient for establishing liability whereas here it is also required that the owner be *careless.* Nonetheless, it must be remembered that in the case of liability for auxiliaries there must always be the weighty accusation of unlawful behaviour on the part of the auxiliaries in order for the damage caused by them to be imputed. In the case of things, there can be no talk of such accusations and thus there will be no such corresponding serious defect. Hence, an additional criterion must be fulfilled in order to attain a corresponding weight of grounds for liability overall and this additional criterion is considered by § 1319 ABGB to be the objective carelessness of the thing's keeper[255]. Thus, there is a liability criterion to correspond with that for liability for auxiliaries and the liability system preserves its consistency.

6/132 As far as the *distribution of the burden of proof* in relation to carelessness is concerned, this would not seem to make for any additional, substantially stricter standard of liability as it already arises from the general rules: when a building

253 *Koziol,* Haftpflichtrecht II[2] 400 f; *B.C. Steininger,* Verschuldenshaftung 92; *Terlitza,* Aktuelle Rechtsprechung zur Bauwerkehaftung (§ 1319 ABGB), immolex 2001, 186.

254 On this *B.C. Steininger,* Verschuldenshaftung 94 ff.

255 This can in turn be replaced by objective carelessness of a »Besorgunsgehilfe« imputable under § 1315 ABGB, see *Danzl* in KBB, ABGB[3] § 1319 no 5 with additional references.

is defective this means that it is in a state undesired by the legal system because of its tendency to pose risks and furthermore in such a state as the owner should redress. Omission to redress this state can thus be seen as the fulfilment of the factual elements of the wrong, so that there is a »wrongful result«, such as is recognised to point to carelessness (see above no 6/9). Hence, even the general rules require that the owner prove he exercised the necessary care.

6/133 The extra-contractual liability of the keeper of a *road* (§ 1319 a ABGB) does not accord quite so harmoniously with the overall system. Besides the defectiveness of the road and the danger posed by such defectiveness, misconduct on the part of the keeper is also required[256]; however, in this case the failure to exercise objectively necessary care is not sufficient and instead serious fault is required. Hence, the defective state of the road astoundingly leads in this respect to a limitation of the normal fault-based liability instead of to a stricter standard. One reason for this may be the fact that the road is used without any special fee falling due[257] in the victim's own interest. Above all, however, taking serious fault as a basis may only be intended in truth – as otherwise also at times[258] – to mean a limitation of the objective duties of care[259]. This assumption is also supported by the fact that, in reality, subjective fault is often not the issue: when the basis taken is fault of the people involved, this ultimately only means objective carelessness as in this precise respect the subjective knowledge and abilities of the auxiliaries deployed are not at issue[260]. Ultimately the keeper – provided such is a natural person – will be classifiable as an expert (Sachverständiger), so that simple objective fault is decisive, which largely corresponds to the requirement of objective carelessness[261].

6/134 Defectiveness also plays a significant role when it comes to liability for *railways* and *motor vehicles.* According to § 9 (1) EKHG, the duty to compensate is in principle precluded if an accident is caused by an unavoidable event; this no longer applies, however, if this derives from a defect in the state of the vehicle or failure in its operation. The already stringent, non-fault-based liability for railways and motor vehicles due to their dangerousness is thus further tightened if the vehicle in question is defective by excluding the exemption for unavoidable events.

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256 This too can be replaced by the misconduct of auxiliaries, but § 1319a ABGB not only imputes the »Besorgungsgehilfen« in the sense of § 1315 ABGB but also all other people in the keeper's sphere.

257 When the ground is used on the basis of a commercial contract, § 1319a ABGB does not apply, instead the unlimited contractual liability applies; see *Reischauer* in Rummel, ABGB II/1³ § 1319a no 26.

258 Cf *Bollenberger* in KBB, ABGB³ § 945 no 1; *Koziol* in KBB, ABGB³ § 1419 no 5; *Koziol,* Haftpflichtrecht I³ no 4/41, 17/16.

259 This is also the basis of § 1326 2 Austrian Draft.

260 Cf *Koziol,* Haftpflichtrecht II² 358; expressly in favour of liability for the people in § 1319a ABGB *Reischauer* in Rummel, ABGB II/1³ § 1319a no 16.

261 See *Karner* in KBB, ABGB³ § 1299 no 1.

This is based on the idea that the general dangerousness of vehicles is aggravated by the danger deriving from the defect and that a tightening of the liability is thus appropriate[262].

6/135 Product liability takes as its starting point the fact that the damage is brought about by a defect of the *product* (§ 1 (1) PHG). As the description of defectiveness shows, the crux is that the defectiveness leads to a dangerousness which is not generally a common feature of suchlike products; specifically, a product is defective under § 5 (1) PHG only if the product does not offer the safety that one is entitled to expect taking all the circumstances into account. The dangerousness emanating from the defect cannot, however, in general be classified as very high since many products are not likely even in a defective state to bring about extensive damage or to substantially increase the frequency of damage occurring. Typical examples are bent paper clips or spoilt food, which can only bring about harmless scratches or temporary nausea. A comparison with other rules makes it clear that, accordingly, the dangerousness of the defect on its own cannot be the justification for such strict liability as is provided for by the PHG. Therefore, in this context too other reasons must be decisive in respect of the increased liability, for example, the notion of solidarity (see below no 6/181); nonetheless, defectiveness is certainly the lynchpin.

It must also be considered that when it comes to product liability, different ideas are behind the *affiliation to someone's sphere* than may otherwise be the case. In the case of buildings, roads and vehicles, the defective things are imputed to their keeper's sphere; the keeper is the person whose interests are served by the thing and who has the power to exercise influence on them[263]. Neither criterion applies to the producer once he places the thing at issue on the market. He could only exercise influence in advance on the production process and thus in this sense towards the product being as free as possible from defects.

C. Technical equipment replacing people

6/136 In more recent times there has been – especially in the field of banking[264] – debate as to whether entrepreneurs are also subject to *non-fault-based liability* for disturbances of hardware and software when they use *computers* or *robots.* Under consideration comes an analogous application of §§ 1313 a, 1315 ABGB, §§ 278, 831

262 Thus, *B.C. Steininger,* Verschuldenshaftung 130.

263 See *Koziol,* Haftpflichtrecht I³ no 6/11.

264 On this *H. Berger,* Schadensverteilung bei Bankbetriebsstörungen (1980); *Köhler,* Die Problematik automatisierter Rechtsvorgänge, insbesondere von Willenserklärungen, AcP 182 (1982) 126; *U.H. Schneider,* Das Recht des elektronischen Zahlungsverkehrs (1982); *Koziol,* Die Haftung der Banken bei Versagen technischer Hilfsmittel, ÖBA 1987, 3 with additional references.

BGB[265]. In favour of this analogy it may be submitted that the principle of liability for auxiliaries[266] is also applicable when technical equipment is used: by using such, the principal expands his activity field – just as by using auxiliaries – in his own interest and would thus be able to improve his position if the functional defectiveness of the machines in contrast to his own fault or that of auxiliaries did not trigger any liability. On the other hand, it must be remembered that our legal system basically attaches the liability of principals to human behaviour and to the serious accusation of unlawful conduct. Strict liability, independent of fault or even objective carelessness is only stipulated in the case of the use of an especially dangerous things, eg motor vehicles; IT systems certainly do not belong to this category.

In favour of stricter liability it can be argued that the Austrian legislator has introduced non-fault-based liability in more recent times for computer-supported data processing in respect of administering both the land register and the commercial register (§ 27 GUG, § 37 FBG) as well as for dunning processes (§ 89e GOG). These provisions show that out legal system does recognise liability for technical equipment if such *replaces* human auxiliaries.

6/137 The justification for this liability runs into difficulty, however, in that the grounds for liability for technical equipment seem to be less weighty than those that are required for liability for human auxiliaries: specifically, the serious charge of wrongful behaviour on the part of the auxiliaries is lacking. *F. Bydlinski*[267] highlights, nonetheless, that this issue involves cases where in the process of technical development certain things take over intellectual functions previously discharged by humans and that this on its own, ie randomly from a normative point of view, would otherwise also change the position as regards liability. This issue might be referred to as »function change«, in the context of which new interpretations or changes in law are necessary, he argues, precisely in order to maintain the existing legal evaluations and results in the new factual circumstances, in this case leading to an analogous application of the rules on liability for auxiliaries to things with intellectual functions.

In favour of this *analogy* it can be said that even in the field of liability for auxiliaries the crux is not whether the auxiliary can be accused of having engaged in conduct that is careless and culpable but instead that this conduct would have been culpable had it been engaged in by the principal himself. Insofar a hypothetical accusation, namely when projected onto the principal, can also be levelled in the event that computers and corresponding technical equipment is used:

265 Thus, eg, *Canaris,* Bankvertragsrecht I³ (1988) no 367; *G. Graf,* Rechtsfragen des Telebanking (1997) 67; *Janisch,* Online Banking (2001) 241; *Möschel,* Dogmatische Strukturen des bargeldlosen Zahlungsverkehrs, AcP 186 (1986) 197 ff; *Spiro,* Erfüllungsgehilfen 209 ff; against this *U.H. Schneider,* Zahlungsverkehr 82 f.

266 See *Koziol,* Haftpflichtrecht II² 336; *Spiro,* Erfüllungsgehilfen 57 ff.

267 System und Prinzipien 215 f.

there must be a defect which would have led to an accusation against the principal if such had occurred to him. Thus, it is decisive in such cases that a defect occurs within the principal's sphere of responsibility, which would be construed as wrongful conduct had the principal himself performed the process at issue.

This idea has also largely been adopted by the Austrian Draft and the rule has been laid out analogously to liability for auxiliaries. § 1306 (4) of the Austrian Draft provides that the principal is also liable for failure of technical equipment that he uses in the same way as Besorgungsgehilfen; however – in line with the rule on liability for auxiliaries – only when the victim proves[268] that the equipment was unsuitable, the principal did not exercise reasonable care in selecting it or did not adequately monitor it.

6/138 One question remains with respect to the Austrian positive law provisions on liability for computers. The above-mentioned provisions on non-fault-based liability for computer-supported data processing actually exclude liability when the damage is caused by an *unavoidable event,* which derives neither from a defect in the state nor failure of the means of the equipment. Hence, it includes a ground for exemption from liability that is otherwise only usual in the context of strict liability. As, however, this particular issue does not concern liability for a generally posed, specific danger and, moreover, liability for auxiliaries does not know any corresponding ground for exemption, it is advisable to abstain from adopting this ground for exculpation.

IV. Dangerousness

A. Introduction

6/139 The principles behind »liability based on dangerousness« (Gefährdungshaftung)[269] are, on the one hand, that it is more appropriate to impute the damage to someone whose interests are served by the special, permitted source of danger at issue. This is in line with the widespread conviction that those who derive the

268 If the principal is an entrepreneur the burden of proof is reversed.

269 *Müller-Erzbach,* Gefährdungshaftung und Gefahrtragung, AcP 106 (1910) 365 ff, 413 ff; *Esser,* Grundlagen und Entwicklung der Gefährdungshaftung (1941) 97 ff; *von Caemmerer,* Reform der Gefährdungshaftung (1971) 15 f; *Hübner,* Noch einmal: Gefährdungshaftung und Verantwortung, Müller-Freienfels-FS (1986) 335 ff; *Larenz/Canaris,* Schuldrecht II/2[13] § 84 I 2 a; *Gimpel-Hinteregger,* Grundfragen der Umwelthaftung (1994) 31 ff; *Koziol,* Österreichisches Haftpflichtrecht I[3] no 6/11; *Oertel,* Objektive Haftung in Europa (2010) 284 ff; further the Comparative Conclusions of *B.A. Koch/Koziol,* in: B.A. Koch/Koziol, Unification: Strict Liability 412 with additional references. Takign a different view *Blaschczok,* Gefährdungshaftung und Risikozuweisung (1993) 53 ff, 63 ff, 356 ff.

benefit should also bear the *harm* (more on this below no 6/169). Here too, it must be kept in mind that conflicting interests of personal freedom are at stake: while the victim has a general, recognised interest in not being impaired by external influences, the keeper of the source of danger has an understandable interest in carrying out an activity that is per se permitted.

On the other hand, it is assumed that it is all the more reasonable to impose liability on someone if he has the means to exercise influence (control the danger)[270]. A strict liability based on dangerousness thus cannot come into question if the dangerousness is not objectively recognisable, because the source of danger is not imputable and thus control of the danger is not possible either[271]. Nonetheless, it is fair to provide for stricter liability if at least the impossibility of knowing about the danger is known, ie a known potential risk area is at issue[272].

6/140 Truly strict liability for dangerousness is of considerable practical importance as such claims for compensation can be enforced much more easily than those based on fault liability since neither subjective fault nor objective carelessness is material. In particular, the economic analysis of law also emphasises that liability based on dangerousness is an important instrument when it comes to *general damage deterrence* (see above no 3/6).

6/141 The scattered provisions on liability based on dangerousness in present-day Germany and Austria, incorporated in very diverse special laws, invoke the *particular dangerousness involved;* this is recognised as depending firstly on the likelihood of the causation of damage – which cannot be avoided by application of care – and secondly the extent of the harm threatened[273]. Rightly, it is further emphasised that the controllability of the risk also plays a decisive role: the more controllable a danger is, the less dangerous it is[274].

The rules on dangerousness liability have different *levels* of strictness, depending on the degree of dangerousness involved.[275] The strictness of the lia-

270 *Jaun,* Sorgfaltspflichtverletzung 261 ff, considers that strict liability was developed out of the subjective concept of fault and with reference to the insufficiency of such also that liability based on dangerousness loses its justification as the second lane of liability law. This view is not very convincing as liability based on dangerousness is based on completely different principles and has its own justification alongside both subjective and objective misconduct.

271 *F. Bydlinski,* System und Prinzipien 215.

272 On this *Koziol,* Erlaubte Risiken und Gefährdungshaftung, in: Nicklisch (ed), Prävention im Umweltrecht (1988) 148 ff.

273 On all of this *F. Bydlinski,* System und Prinzipien 201 ff; *Canaris,* Die Gefährdungshaftung im Lichte der neueren Rechtsentwicklung, JBl 1995, 2; *Koziol,* Haftpflichtrecht I³ no 6/1 with additional references; *B.C. Steininger,* Verschuldenshaftung 25 ff.

274 *B.C. Steininger,* Verschuldenshaftung 27 f.

275 See on this *Koziol,* Bewegliches System und Gefährdungshaftung, in: F. Bydlinski/Krejci/Schilcher/V. Steininger (eds), Das bewegliche System im geltenden und künftigen Recht 51; *Jansen,* Struktur des Haftungsrechts 384; *Schilcher,* Schadenstragung und Schadensverteilung als Haftungsgründe, Posch-FS (2011) 683.

bility is expressed above all in the increasing denial of grounds for exculpation. This can be expressed as follows »the higher the risk, the fewer defences are available«. This also highlights the principle that the victim should be allowed to shift the damage sustained to someone who has a closer relationship with the source of danger. The greater the threat imputable to the defendant is, the truer it is that this goal can only be reached by allowing the defendant just a few means of exemption. The best example of this is the introduction of nuclear power liability without the possibility of any defence in some countries[276].

6/142 It is largely a feature of the special rules in Austria and Germany that liability is limited to a certain *maximum sum* in contrast to fault-based-liability. The problems associated with this type of restriction have often been pointed out[277] and happily the Austrian legislature has taken account of this criticism in recent times.

6/143 Another clarification: the concept of »Gefährdungshaftung« (liability based on dangerousness) is often used in a very broad sense to describe *non-fault-based* liability, ie strict liability in general. However, this is not entirely accurate since liability based on dangerousness in reality only makes up a – albeit very significant – part of non-fault-based liability. In English law – and also in the PETL by the EGTL[278] – the field of liability not based on fault is always referred to as »strict liability«, which is a more fitting label. Admittedly, most cases of non-fault-based liability take as their starting point the special dangerousness of the things or activities at issue, nonetheless this is certainly not always the case. Thus, for example, the harmonised law on product liability within the European Union is a form of non-fault-based liability, however it does not represent liability based on dangerousness in the stricter sense[279], as it is not based on any generally posed, high degree of dangerousness but on individual cases of defectiveness of products. For instance, an ineffective pesticide[280] cannot be seen in this respect as posing a general danger because it does not adequately protect plants against a particular pest in contrast to what is claimed in the product description.

In the following, in any case, only the criterion of general dangerousness and its significance for the liability for damage will be discussed.

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276 See *B.A. Koch/Koziol,* Comparative Conclusions, in: B.A. Koch/Koziol, Unification: Strict Liability 424.

277 Cf also *Koziol,* Haftpflichtrecht I³ no 6/24 ff with additional references.

278 Chapter 5 is headed »Strict liability«.

279 In this sense, eg, *Fitz/Purtscheller/Reindl,* Produkthaftung (1988) § 1 no 7; *Grau,* Produktfehler (2002) 50 ff; *Koziol,* Grundfragen der Produktehaftung (1980) 53 ff. In favour of its classification as liability based on dangerousness, however, *Canaris,* JBl 1995, 6; *Welser,* Produkthaftungsgesetz¹ (1988) 30 (only referenced in the second edition of *Welser/Rabl,* Produkthaftungsgesetz² [2004] 11).

280 On the applicability of product liability law in the case of non-functioning products see *Grau,* Produktfehler 88 ff with additional references; OGH 6 Ob 162/05z in SZ 2007/98.

B. An informative look at Europe[281]

Even a quick glance shows that the *differences* between different European jurisdictions[282] are greater in the case of liability based on dangerousness than in the field of fault-based-liability. One extreme is presented by the far-reaching, non-fault-based liability of the keepers (gardien) under French law, then comes the German system's rules on a multitude of sources of danger and the other extreme is represented by English law with its very hesitant recognition of liability based on dangerousness, not even imposing non-fault-based liability on keepers of motor vehicles. Thus, there is little overlap between the European jurisdictions except where international conventions or EU directives have pioneered the way. 6/144

This makes it all the more surprising that despite the very different theoretical starting points in the individual legal systems, the practical *results are by no means poles apart.* The reason behind this phenomenon is above all that the courts in those legal systems that do not recognise any far-reaching liability based on dangerousness tend to set the duty of care requirements so high in the case of dangerous activities that liability becomes almost inevitable[283]. Thus, the liability still falls under the umbrella of fault-based liability but in effect constitutes non-fault-based liability[284], as the *duties of care are stretched* to such a degree that they could no longer be fulfilled by any average or even especially careful subject of the law[285]. From a theoretical point of view, it is nonetheless extremely regrettable that the real grounds for liability are not disclosed: this leads to the same conduct being assessed differently and the differing treatment of such cases is inexplicable. 6/145

In many legal systems that recognise liability based on dangerousness to a great extent, there is no one general rule but instead this field is governed by *indi-* 6/146

281 On this *Brüggemeier,* Haftungsrecht 103 ff; *van Dam,* Tort Law 255 ff; *B.A. Koch/Koziol,* Unification: Strict Liability; *Koziol,* Die Vereinheitlichung der Gefährdungshaftung in Europa, Michalek-FS (2005) 217 ff; *Oertel,* Objektive Haftung 49 ff; *Werro,* Liability for Harm Caused by Things, in: Hartkamp/Hesselink/Hondius/Mak/du Perron (eds), European Civil Code[4] 921 ff.

282 See on this in detail the country reports in *B.A. Koch/Koziol,* Unification: Strict Liability, and the editors' Comparative Conclusions 395 ff.

283 Cf on this, eg, for Germany *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 25, who writes of a hidden liability based on dangerousness.

284 In this sense very clearly *Gilead,* Israel, in: B.A. Koch/Koziol, Unification: Strict Liability 184; likewise *Martín-Casals/Ribot/Solé,* Spain 282; *du Perron/van Boom,* Netherlands 227 both in B.A. Koch/Koziol, Unification: Strict Liability; *Galand-Carval,* France, in: Spier, Unification: Liability for Others 85 ff; likewise *van Dam,* Tort Law 260 f.

285 This is also seen by *Jansen,* Struktur des Haftungsrechts 545 ff; *idem,* Das Problem der Rechtswidrigkeit bei § 823 Abs. 1 BGB, AcP 202 (2002) 517 ff, however, he does not wish to draw the conclusion that liability based on dangerousness should be generally accepted but instead wishes to resort generally to a result-based understanding of wrongfulness; in this way, however, he obscures the difference between liability based on misconduct and on dangerousness.

vidual laws.[286] The negative impacts of this approach are overcome at least in part in Austria by the courts adopting cautious analogies and thus closing the most obvious gaps and contradictions in value judgements[287]. On the other hand, the disadvantages of resorting to individual rules are particularly obvious when, as in Germany[288] and Switzerland[289], the analogical method of application for special laws is rejected and thus it is not possible to close obvious gaps in legislation in this manner. The attempts to circumvent the resulting inevitable contradictions in evaluation by over-stretching duties of care[290] or even by taking the wrongfulness of the result as a sole basis[291] are certainly much more dubious from a theoretical perspective than using analogies as is otherwise generally accepted to fill the gaps.

6/147 French law takes a different route, both inferring a general non-fault-based liability of the keeper (gardien) of things from Art 1384 Code civil and very liberally applying special laws, eg loi Badinter. Polish law follows this example (Art 435 Civil Code)[292].

C. Dangerousness as a ground for liability

6/148 The recognition of non-fault-based liability may be based on *several reasons* and often more than one of these play a role in any particular case. However, dangerousness is certainly the most significant liability criterion in this field, which – as already mentioned – is referred to accordingly in the German language legal systems as »liability for dangerousness«.

6/149 The dangerousness does not always emanate from a *thing,* sometimes instead it derives from human *conduct.* Moreover, human conduct is often also decisive

286 See *Oertel,* Objektive Haftung 49 ff.

287 From more recent times, eg, OGH 1 Ob 306/99b in JBl 2000, 790 = SZ 73/118; 10 Ob 7/05k in JBl 2005, 588 = SZ 2005/28. Cf on this *Koziol,* Umfassende Gefährdungshaftung durch Analogie? Wilburg-FS (1975) 173.

288 Cf *G. Wagner* in MünchKomm, BGB V[5] Vor § 823 no 24 with additional references.

289 *Honsell,* Schweizerisches Haftpflichtrecht[4] (2005) § 1 no 22.

290 On approaches to over-stretching in German case law see *Kolb,* Auf der Suche nach dem Verschuldensgrundsatz. Untersuchungen zur Faktizität der Culpa-Doktrin im deutschen außervertraglichen Haftungsrecht (2008) 57 ff.

291 Thus, eg, *Jansen,* AcP 202 (2002) 544 ff; *idem,* Struktur des Haftungsrechts 545 ff, who, however, does not answer the decisive question of which additional criteria may lead to liability. In reality, regard would have to be had to all valuations that are decisive in respect of liability based on dangerousness, yet all of this would ensue under the cover of liability for wrongfulness under § 823 (1) BGB, which would be highly dubious from a theoretical perspective and does not seem very constructive.

292 Details and references can be found in the country reports in *B.A. Koch/Koziol,* Unification: Strict Liability; a summary and references to the individual countries can be found in this volume in the Comparative Conclusions 395 ff.

even when the effect of a thing is material. *F. Stone*[293] has rightly emphasised that things become dangerous due to some act or omission on the part of people, namely due to them being simply possessed or due to conduct. He concludes that it would not make sense to make liability solely contingent on the dangerousness of the things or solely on that of the conduct.

It has already been mentioned above that three criteria are relevant in assessing dangerousness: the *probability* that damage will occur, the *extent* of the possible damage and the *controllability* of the risk. These three criteria may have different influences on the outcome; however, they must always be examined together: if there is a high risk of injury then liability based on dangerousness may even be justified if the possible damage is relatively minor; in this connection the damage caused by motor vehicles comes to mind. On the other hand, liability based on dangerousness is also appropriate if the probability of damage is minor but the damage that could occur in the event may be massive; an example in this respect would be nuclear power plants. 6/150

D. Defences

The defence most often allowed by the legal systems against liability based on dangerousness is that there was an external influence that caused the damage or at least contributed to it. The most extreme form of such an influence is referred to in English-speaking legal circles as an *»act of God«,* though this usually refers to natural phenomena, while the term *»force majeure«* seems to be broader in scope, also including other substantial, external influences. The first (narrower) exemption ground is found in relation to all variations of liability based on dangerousness – insofar as any exemption at all from liability is possible, which is not the case, for example, under some countries' rules on the effects of atomic energy. The second (broader) defence also includes war, unrest, terrorist attack and similar unavoidable events. 6/151

Nonetheless, it must be borne in mind that such external influences can rarely entirely displace the special dangerousness of a thing, in particular if the type and extent of the damage which ensues is facilitated precisely by the special dangerousness of this thing (eg, in the event of accidents in nuclear power plants). Thus, it would seem highly problematic if the special dangerousness of a certain thing were to be fully disregarded in such cases to leave the victim to bear the entire damage by himself. 6/152

An entirely different type of external influence that may be involved as a ground for exemption from liability is the *influence exerted by a third party* on a 6/153

293 *Von Caemmerer/Schlechtriem* (eds), International Encyclopedia of Comparative Law IX/5, 5-299.

sequence of events. If causation by such third party can be proven, the individual legal systems are confronted with the problem of deciding how the liability based on dangerousness and that based on the third party's fault relate to each other proportionately.

6/154 In some cases of liability based on dangerousness, Austria and Germany allow the defence that the damage could not have been prevented even if »all *care required* in the circumstances of the case« were taken. On the one hand, this does implicate certain elements of liability for misconduct as the defendant's conduct is taken as the basis and measured against a normative standard of care. On the other hand, the rules of liability based on dangerousness are clearly distinguished from the concept of carelessness, in this case by the requirement that the defendant must not only have exercised the usual care in order to escape liability but rather must prove that not even the exercise of *maximum possible care* would have been enough to prevent such damage. This defence is sometimes referred to under the heading *»unavoidable event«.*

6/155 There are another two defences for the defendant that relate to the claimant. Firstly, most – but by no means all – legal systems take into account any *contributory responsibility* of the victim with a view to at least reducing the keeper's duty to compensate. The second defence is the claimant's *consent* to the risk posed or to the damage.

E. The regulation of liability based on dangerousness

1. Introductory considerations

6/156 The arguments presented above indicate, on the one hand, that rules should be found to allow the strictness of the liability to be graded according to the gravity of the grounds for liability, in particular of the dangerousness. On the other hand, it has been shown that non-fault-based liability really is based on uniform ideas; thus, fairness demands that it also be uniformly regulated. Ultimately this can only be realised by means of a *blanket clause*[294], because the often suggested listing of sources of danger – as demonstrated by all previous attempts – always remains incomplete, as is indeed inevitable due to ongoing technical advances.

In the applicable legal systems of Europe, however, it is hard to find suitable examples for a general rule on liability based on dangerousness.

294 In this sense, above all, *Kötz,* Haftung für besondere Gefahr, AcP 170 (1970) 19 ff; *Widmer,* Die Vereinheitlichung des Schweizerischen Haftpflichtrechts – Brennpunkte eines Projekts, ZBJV 1994, 405 f; *Will,* Quellen erhöhter Gefahr (1980) 70 ff. Likewise recently taking the reform drafts into consideration *Pfeiffer,* Entwürfe für ein neues österreichisches Schadensersatzrecht 36 ff.

2. Approaches to general rules

French law does in effect have a blanket clause for all keepers (gardien) of a thing; however, for all this it does not take into account the principles as it fails to consider the dangerousness and the different gradations thereof but instead provides simply that possessing the thing triggers strict liability. It is hard to find a persuasive justification for this approach. 6/157

On the other hand, the *Swiss* Draft for an overall reform of liability law may offer a suitable role-model; in Art 50 it contains a blanket clause for liability based on dangerousness: »A person operating a particularly dangerous activity is liable for compensation of damage resulting from an event which constitutes the realisation of a risk characteristic of such activity, even if such activity is tolerated by the legal order.« Para 2 of this provision describes the special dangerousness and para 3 contains a caveat in favour of special provisions on liability for a certain typical risk[295]. This blanket clause also regularly reaps praise outside Switzerland as a courageous and exemplary step[296]; however, despite its undeniable benefits it still has plenty of opponents[297]. 6/158

The draft proposed by the law on damages department of the *Study Group on a European Civil Code* led by *von Bar* now proposes – in contrast to a preliminary draft – using the existing methods of individual regulation[298]. 6/159

The course of the discussions within the *EGTL*[299] on the rules for non-fault-based liability were both very fierce and very interesting and also showed forcefully the difficulties involved in finding a common approach in this field at a European level. The *EGTL* was, however, at least able to find consensus for a »small blanket clause« for sources of extraordinarily high danger, which should be complemented by the national individual regulation on sources of high danger[300].

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295 *Widmer,* the author of the Swiss Draft, opened up the debate on a blanket clause early on; see: Gefahren des Gefahrensatzes – Zur Problematik einer allgemeinen Gefährdungshaftung im italienischen und schweizerischen Recht, ZBJV 1970 289 ff.

296 See, eg, *B.A. Koch/Koziol,* Austria 37; *Galand-Carval,* France 142; *Fedtke/Magnus,* Germany 172, all in: B.A. Koch/Koziol, Unification: Strict Liability.

297 Cf, eg, *du Perron/van Boom,* Netherlands 251 f; *W.V.H. Rogers,* England 123, both in B.A. Koch/Koziol, Unification: Strict Liability.

298 DCFR, PEL Liab Dam 3:202 ff; on this PEL/*von Bar,* Liab Dam, Chapter 3, Art 3:202 ff; *Widmer,* Europa ohne Verschulden. Verschuldensunabhängige Haftungen in den Entwürfen eines europäischen Deliktsrechts, Posch-FS (2011) 836 ff.

299 *European Group on Tort Law* (ed), Principles of European Tort Law. Text and Commentary (2005) 101 ff; *Widmer,* Posch-FS 831 ff.

300 On the two drafts see *Jansen,* Principles of European Tort Law? Grundwertungen und Systembildung im europäischen Haftungsrecht, RabelsZ 2006, 732 ff; *Koziol,* Die »Principles of European Tort Law« der »European Group on Tort Law«, ZEuP 2004, 234 ff; *Oertel,* Objektive Haftung 261 ff; *Schmidt-Kessel/S.B. Müller,* Reform des Schadenersatzrechts I: Europäische Vorgaben und Vorbilder (2006) 74 ff; *G. Wagner,* Deliktsrecht, in: Schulze/von Bar/Schulte-Nölke (eds), Der akademische Entwurf für einen Gemeinsamen Referenzrahmen (2008) 161 ff; *Widmer,* Posch-FS 827 ff.

6/160 The Austrian Draft contains a blanket rule for liability based on dangerousness. § 1304 of the Austrian Draft[301] does draw on previous models – in particular the Swiss Draft – but also sets out considerable changes on the basis of critical, further-reaching and fertile debate.

V. Permitted interference

A. Liability in the case of permitted interference

6/161 In certain cases the legal systems not only allow people to put others at increased risk, under consideration that the infliction of damage must be avoided as far as possible, it even permits certain infliction of damage or *deliberate interference*[302]. The most important example of this is liability for *authorised installations* (§ 364 a ABGB; § 906 (2) BGB): the entrepreneur may impact his neighbours negatively and deliberately within the scope covered by the authorisation. As the neighbour who suffers the nuisance is denied the usual defensive actions, a link to expropriation is also emphasised. A further example is that of the defence of necessity, which according to § 1306 a ABGB, § 904 BGB gives rise to a duty to compensate.

If the legal system allows interference with third-party goods against compensation for the damage so inflicted, then this is a case of *diminished protection* of recognised interests: such are no longer protected against real interferences, the owner of the goods is denied their defensive rights. The legal system nonetheless continues to protect the allocated value of these goods and grants the victim of the interference compensation for his loss. The principle is thus the same as in cases of expropriation: due to overriding interests the owners are required to tolerate interferences, but are still entitled to compensation of their loss; they should retain the value of their goods.

B. Difference between liability based on dangerousness and liability for permitted interference

6/162 In the case of liability for dangerousness, the legal system only allows an abstract *endangerment* at the most, but not the actual infliction of damage; in cases of lia-

301 On this, eg, *Griss,* Gefährdungshaftung, Unternehmerhaftung, Eingriffshaftung, in: Griss/Kathrein/Koziol, Entwurf 57 ff; *Apathy;* Schadenersatzreform – Gefährdungshaftung und Unternehmerhaftung, JBl 2007, 205 ff with additional references.

302 On this *F. Bydlinski,* System und Prinzipien 204 f; *Koziol,* Haftpflichtrecht I³ no 6/13.

bility for permitted interference, on the other hand, it is the actual *infliction of damage* which is allowed[303]. As *Rummel*[304] highlights, this difference is material in understanding when an interference and when an endangerment is to be allowed: as even intentional damage infliction is allowed in cases of liability for interference, it must be required that the legal good injured in the specific case is of less value than the interest being enforced. On the other hand, if the issue is the permit for a dangerous plant, not only the goods endangered and the interest in the dangerous activity must be compared but the probability of the damage occurring must also be taken into consideration.

6/163 In the law, however, these two types of liability are not always distinguished clearly. *Jabornegg*[305] has convincingly argued that § 364 a ABGB not only regulates an instance of liability for interference but also of liability for dangerousness. He assumes that when it comes to permitting plants, not only the nuisance necessarily emanating from the plant is taken into account but also the dangers posed by the plant; it would be strange indeed when such specific dangerousness remained completely disregarded, for example under § 364 a ABGB, he argues.

VI. Economic capacity to bear the burden

6/164 The Austrian law of damages only takes into account financial circumstances in two exceptional cases: liability of those who act out of *necessity* (§ 1306 a ABGB) and the liability of *young people under the age of responsibility* or the mentally ill (§ 1310 ABGB); in respect of the latter field, § 829 BGB also takes the – economic – circumstances into consideration. In both cases the crux is that the damaging party cannot be accused *of any subjective fault.* However, someone who acts out of necessity interferes with third-party goods, ie acts in a manner *fulfilling the factual elements of the wrong:* young people under the age of responsibility and the mentally ill can at least be accused of not complying with the objective duties of care, ie acting wrongfully. In these cases, the liability criterion of their capacity to bear the economic burden steps in in place of subjective fault as the additional ground[306]:

303 Cf on this *Esser,* Grundlagen und Entwicklung der Gefährdungshaftung (1941) 91; *Rummel,* Ersatzansprüche bei summierten Immissionen (1969) 81 ff; OGH 8 Ob 501/92 in ÖZW 1994, 109 *(Rummel).*

304 Ersatzansprüche 96 ff.

305 Bürgerliches Recht und Umweltschutz, Gutachten zum 9. ÖJT (1985) 74 ff. Following this line *Gimpel-Hinteregger,* Grundfragen der Umwelthaftung (1994) 320 ff.

306 See on this *F. Bydlinski,* System und Prinzipien 218 ff; *Koziol,* Haftpflichtrecht I³ no 7/1 ff; *Schilcher,* Posch-FS 672 ff.

the financial circumstances of the victim and the damaging party must be considered. The issue is whether this idea of taking the economic circumstances into consideration should be applied more generally; in particular it could be useful when it comes to recognising subjectively understood fault in order to cushion this liability-restricting criterion (see above no 6/86), and above all be incorporated into a »reduction clause«[307].

6/165 In particular when the stringent liability of larger enterprises is concerned, the argument of *economic capacity to bear the burden,* ie the »deep-pocket argument«, often plays a significant role. However, such arguments do not apply in most cases, even from an economic perspective: if an entrepreneur is sued for damages, recourse is had first to his assets but it must be borne in mind that the entrepreneur will pass on the damage he has to bear by means of price increases to his clients. This means ultimately that precisely such group of persons has to bear the damage as was supposed to be protected from it[308].

VII. Realisation of profit

A. The abstract possibility of realising profit

6/166 As already explained above (no 6/139), it is a common view that someone who holds an especially dangerous thing to his *advantage,* must also bear the associated disadvantage; this is one of the foundations for recognising *liability based on dangerousness.*

6/167 Another important example for the material nature of the idea of who realises the profit can be found in Austria in the non-fault-based *risk liability* of the principal[309]. § 1014 ABGB contains not only the rather self-evident rule that the principal must compensate the contractor for culpably inflicted damage but also the far more significant provision that the principal must also compensate the contractor for the damage associated with the fulfilment of the contract. This includes such damage as results from the *typical risks* involved in the performance of the contract[310].

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307 See *F. Bydlinski,* System und Prinzipien 225.

308 Cf *Faure,* Economic Analysis, in: B.A. Koch/Koziol, Unification: Strict Liability 382.

309 *Canaris,* Risikohaftung bei schadensgeneigter Tätigkeit in fremdem Interesse, RdA 1966, 42; *Fitz,* Risikozurechnung bei Tätigkeit in fremdem Interesse (1985); *F. Bydlinski,* Die Risikohaftung des Arbeitgebers (1986); *W. Faber,* Risikohaftung im Auftrags- und Arbeitsrecht (2001); *Apathy,* Risikohaftung des Arbeitgebers für Personenschäden? JBl 2004, 746; *Kissich,* Risikohaftung des Arbeitgebers analog § 1014 ABGB auch für Personenschäden, ZVR 2005, 184.

310 *Fitz,* Risikozurechnung 82 ff; *F. Bydlinski,* Risikohaftung 63 ff.

Unger[311] has already shown that § 1014 ABGB can be traced back to the Roman law principle that he who enjoys an advantage must also bear the risk (ubi commodum, ibi et periculum esse debet). The fact that advantages and risks fall to the same party is considered to be a principle of commutative justice[312].

6/168 As to the limitation to the typical risks involved with the transaction being carried out, *Stanzl*[313] further stresses that this concerns the principal's liability in the context of *»operational risk«.* Insofar as this creates the impression that it is a form of the usual liability for dangerousness, then this can only partially be affirmed: the reason for the liability based on dangerousness is seen above all in the fact that the damage can be imputed better to the person whose interests are being served by the source of special danger. Thus, it is decisive that the endangerment of third-party goods in the interests of one's own advantage gives rise to the duty to compensate the resulting harm[314]. This idea is certainly also the basis for the principal's risk liability towards the contractor as stipulated by § 1014 ABGB. However, another additional criterion is decisive in respect of liability based on dangerousness, specifically the power to exercise influence on the source of danger (above no 6/139). This requirement is not fulfilled, however, when it comes to the principal's risk liability[315], as the dangers lie outside the sphere of the principal.

6/169 However, in lieu of this second criterion relevant in the context of liability for dangerousness, comes the *»idea of the enterprise«* in respect of liability under § 1014 ABGB according to *Wilburg:* the enterprise combines the advantages and disadvantages of an activity in its economic association[316]. If the contractor takes a risk upon himself, then this is a means to serve the purpose of the entrepreneur, writes *Wilburg.* The assumption of the risk represents a cost in the broader sense, which in case of doubt should be borne by the principal.

F. Bydlinski[317]*presents* a very similar argument*:* risk liability for an activity in the interests of a third party is based on the combination of two liability criteria, specifically the idea of advantage and the idea of a specific risk being produced. The risk liability is imposed on the person who posed a specific risk by delegating an activity and who draws an advantage from this, he writes. *F. Bydlinski*[318] also clarifies what is special in this case and leads to risk liability precisely in the case

311 Handeln auf fremde Gefahr, Jherings Jahrbücher 33 (1894) 325 ff.
312 See *F. Bydlinski,* System und Prinzipien 202.
313 *Stanzl* in Klang, ABGB IV/1² 849.
314 *Wilburg,* Elemente 30; *Reinhardt,* Verhandlungen des 41. Deutschen Juristentages (1955) 276 ff; *Canaris,* Die Gefährdungshaftung im Lichte der neueren Rechtsentwicklung, JBl 1995, 6.
315 *Fitz,* Risikozurechnung 47 f.
316 *Wilburg,* Elemente 32 and 136 f; cf also *idem,* Der Unternehmer im Schadensrecht, Jahrbuch der Universität Graz (1940) 58 and 64; *idem,* Zusammenspiel der Kräfte im Aufbau des Schuldrechts, AcP 163 (1964) 346.
317 Risikohaftung 56 f, 80 f.
318 Risikohaftung 83 ff.

of such a mandate: the remuneration is paid merely for the activity, the effort, but not for a particular outcome; apart from the remuneration all advantages and disadvantages of the activity should affect the principal. The contractor thus acts overall »at the account and risk« of the principal.

6/170 These arguments already provide indications that the notion that *advantages and risks should fall to the same party* is material for a much broader field than just liability for risk under § 1014 ABGB, namely for the recognition of a more stringent enterprise *liability*[319]. However, further criteria are also decisive in this respect; this is looked at more closely below under no 6/192 ff.

B. Concrete gain of an advantage

6/171 Until now there has been little discussion[320] of how much a *concrete advantage* that the damaging party has gained can influence the justification and scope of liability. It is noteworthy that the ABGB even sets out the very general principle that no one should profit from the damage to another (§§ 921, 1447 ABGB). However, this sentence is merely a general guideline requiring a great deal of specification, as is shown even by permitted competition: the fair, successful competitor derives profit from squeezing out his rivals, but is of course not obligated to compensate those who lost out, ie the victims. Nonetheless, the principle still provides a certain guidance, namely that when the basic grounds for liability are satisfied, the gaining of an advantage may be relevant for the scope of liability or the compensation.

Moreover, § 1306 a ABGB is based on the notion of gaining an advantage: someone who acts out of necessity avails of third-party goods to avert his need, ie certainly derives an advantage from so doing. This criterion is important in relation to liability in necessity because the damaging party (in the case of necessity as justification) cannot even be accused of infringing a duty of care but only of injuring third-party goods.

6/172 There should be consideration of whether regard to *advantages gained* by the damaging party should be recognised as a *general principle,* both when it comes to establishing any duty to compensate and also in assessing the extent of compensation due. It is true that the compensation claim will often be relatively insignificant because profit can be disgorged in any case via an action for unjust enrichment – which is subject to less stringent requirements. Nonetheless, there are certainly cases in which the law on unjust enrichment does not offer any solutions. For instance, in the case of competition violations, claims for unjust enrichment

319 Thus, also, eg, *Jansen,* Struktur des Haftungsrechts 626 f.

320 However, see *Wendehorst,* Anspruch und Ausgleich (1999); *Koziol,* Die Bereicherung des Schädigers als schadenersatzrechtliches Zurechnungselement?, F. Bydlinski-FS (2002) 175 ff.

by no means always arise[321]; furthermore, claims for unjust enrichment are often precluded when it comes to destruction of third-party goods or when contractual duties to desist from doing something are infringed; likewise probably when the mass media increase their turnover with completely made-up reports about people in the public eye.

6/173 In my opinion, the fact that a damaging party gains a *specific advantage* as a result of his conduct cannot by itself lead to liability to compensate the disadvantage caused in the absence of any further criteria; and fair competition shows very clearly that this is not the case. Nonetheless, it would be worth considering whether the specific gaining of an advantage should mean that the damaging party should become liable to pay compensation *in the absence of subjective fault,* ie for merely objectively unlawful conduct (see above no 6/11).

Furthermore, it should be debated whether any specific profit gained by the damaging party should also play a role when it comes to establishing the *extent of the damages.* For instance, the victim might be entitled to compensation for loss of profit if and insofar as the damaging party gained an advantage. This could be relevant when no comprehensive compensation is due according to the general rules – for example, in the case of slight negligence (§ 1332 ABGB).

Finally, it should also be examined whether the compensation of *non-pecuniary damage* should be awarded in greater measure if the perpetrator gained an advantage. This would be particularly relevant if non-pecuniary damage was only recoverable under the general rules in the case of serious fault.

VIII. Insurability and having insurance cover

A. Feasibility of insurance

6/174 For a long time it has been argued that the *feasibility of insurance cover* may be decisive as a liability element in respect of legislating on liability[322]. Basically, this idea is related to that of capacity to bear the economic burden. The difference, however, is that it is not the actual financial circumstances of the parties involved that are material but general considerations regarding the stipulation of a rule on bearing the damage.

321 On this *Rummel,* Zur Verbesserung des schadenersatzrechtlichen Schutzes gegen unlauteren Wettbewerb, JBl 1971, 385.

322 *Wilburg,* Elemente 24 ff; *Ehrenzweig,* Versicherung als Haftungsgrund, JBl 1950, 253; *Rodopoulos,* Kritische Studie der Reflexwirkung der Haftpflichtversicherung auf die Haftung (1981) 32 ff; *Jansen,* Struktur des Haftungsrechts 385 f, 630 f; *Schilcher,* Posch-FS 687 f.

It should be highlighted that this liability ground does *not* have the power to bear liability *by itself.* Nonetheless, it can contribute decisively in connection with other factors, to establishing liability. Thus, the notion of insurability certainly plays a role when it comes to liability based on dangerousness but also in the case of product liability: it is more possible and reasonable for someone who holds a source of danger, eg a motor vehicle, or the entrepreneur who places the products on the market, to procure insurance cover against the risk known to him and thus to make such risk calculable. In the field of product liability, the producer is really in a better position to take out third-party liability insurance. However, the decision on the propitiousness of third-party liability insurance on the one hand, and of self-insurance on the other, will not always be so easy to take and other aspects must also be taken into account.

6/175 It must be emphasised that not only can better insurability on the part of the damaging party be decisive to establish liability, but also that better insurability on the part of the victim can be a valid argument against finding for liability[323]. The administration costs that would be associated with the relevant system choice would however be very weighty[324].

B. Actual insurance cover

6/176 While insurability may be a decisive argument in favour of a general stipulation of liability, the *actual existence* of third-party liability insurance cover in the *specific case* does not mean per se that a duty to compensate should be imposed[325]: according to the »Trennungstheorie« (separation theory), third-party liability insurance is intended only to cover an existing liability – justified by other reasons, it does not serve to establish liability[326].

323 On all of this *M. Fuchs,* Versicherungsschutz und Versicherbarkeit als Argument bei der Schadensverteilung, AcP 191 (1991) 339.

324 *Brüggemeier,* Haftungsrecht 639; *Calabresi,* The Costs of Accidents (1970) 28 f; *G. Wagner,* Comparative Report and Final Conclusions, in: G. Wagner, Tort Law 351 f; *Wantzen,* Unternehmenshaftung 124.

325 Nonetheless, it is probable that courts – without disclosing this – do take the existence of third-party insurance into account when deciding on the liability for damage; cf *G. Wagner,* Tort Law and Liability Insurance, in: Faure, Tort Law 402.

326 On this *von Bar,* Das »Trennungsprinzip« und die Geschichte des Wandels der Haftpflichtversicherung, AcP 181 (1981) 289 ff; *Becker,* Der Einfluß der Haftpflichtversicherung auf die Haftung (1996) 76 ff; *M. Fuchs,* AcP 191 (1991) 318; *Kerschner,* Freiwillige Haftpflichtversicherung als »Vermögen« iS des § 1310 ABGB? ÖJZ 1979, 282: *Rodopoulos,* Reflexwirkungen 38 ff. Cf, however, the counter-examples provided by *Armbrüster,* Auswirkungen von Versicherungsschutz auf die Haftung, NJW 2009, 187 ff.

6/177 This may be different[327], however, in the cases of §§ 829 BGB, 1310 ABGB, ie when it comes to the *equity-based liability of children or mentally ill persons*[328]. Austrian case law[329] in any case always takes into consideration the existence of third-party liability insurance in deciding whether liability should be imposed on someone below the age of responsibility in spite of heavy criticism by supporters of the separation theory. In justification thereof, the OGH has pointed out that the decisive factor is who can less onerously bear the damage[330]; it would seem logical to include the fact that the risk was insurable and that this option was actually availed of[331]. The OGH has received very little endorsement in academic literature[332].

German case law draws a distinction in this respect: only the existence of compulsory insurance is regarded as a decisive aspect when establishing liability; voluntary third-party insurance, on the other hand, should only impact the scope of the compensation. The BGH has predominantly reaped support for this in academic literature[333]. The conflict with the separation theory is resolved by reference to the fact that § 829 BGB expressly instructs the judge to take the economic circumstances into account and that this is because § 829 BGB does not deal with the setting of incentives to take cases but instead the liabitily for costs to the party better able to bear the risk[334].

6/178 In more recent times, *Rubin*[335] has presented an interesting attempt at justifying the consideration of third-party liability insurance when imposing liability under § 1310 ABGB, § 829 BGB. Support for his opinion can already be found in the case law when reference is had to the insurability of the risk and whether this opportunity is availed of as well as to the ability to bear the damage. In response to the accusation that the case law is based on circular reasoning, *Rubin* stresses that in fact only the insuree's entitlement to benefits depends on liability under the law of tort, which has already been triggered, whereas according to § 1310 ABGB

327 See on this from a comparative perspective *Martín-Casals,* Comparative Report, in: Martín-Casals, Children I 433 and the country reports cited.

328 On this fundamentally *F. Bydlinski,* System und Prinzipien 218 ff.

329 From more recent times, eg OGH in 4 Ob 65/99h in JBl 1999, 604; 7 Ob 200/98g in ZVR 2000/25. See further *S. Hirsch,* Children as Tortfeasors under Austrian Law, in: Martín-Casals, Children I 18 ff with additional references.

330 5 Ob 76/74 in SZ 47/43.

331 6 Ob 631/79 in SZ 52/168.

332 *Harrer* in Schwimann, ABGB VI[3] § 1310 no 22; *Deutsch,* Haftung und Versicherung, JBl 1980, 299 f; *Schilcher,* Posch-FS 675 f.

333 On this *G. Wagner* in MünchKomm, BGB V[5] § 829 no 19 ff.

334 *G. Wagner* in MünchKomm, BGB V[5] § 829 no 21.

335 *Rubin,* Billigkeitshaftung Deliktsunfähiger und Versicherungsschutz, in: Koban/Rubin/Vonkilch (eds), Aktuelle Entwicklungen im Versicherungsrecht (2005) 102 ff. In agreement *Schilcher,* Posch-FS 676.

and § 829 BGB the insurance cover as state of »being insured« is decisive and this does not depend on the liability but on the insurance policy. Furthermore, *Rubin* assumes with good reason that the insurance policies do indeed cover the »equity-based liability« of children not yet capable of committing a tort.

IX. The notion of a risk community

6/179 Whereas the individual advantage is taken as the starting point above under »G. Realisation of profit« (no 6/166 ff), the idea of a *risk community* is based on the notion that a *group of people* derive benefits from the source of danger. This notion plays a decisive role above all in regulating cover of damage in the context of motor vehicle accidents, and more recently for applying product liability more strictly.

6/180 Initially, it was certainly the fear of technical development that was in the foreground when it came to *motor vehicle liability* and the dangerousness of the vehicles was seen primarily as decisive. Nowadays, however, more regard is had to the activity, namely the use of the vehicle; on the whole, the more people take part in traffic, the more danger vehicle use gives rise to, since usually everyone makes mistakes. As, on the other hand, all road users profit from means of transport, not only the criterion of dangerousness speaks in favour of stricter, non-fault-based liability but also the notion of spreading the risk among all motor vehicle drivers. Ultimately this is also largely achieved by the association of a stringent liability with compulsory third-party liability insurance[336].

6/181 In more recent times, the notion of the risk community has acquired greater significance in our legal system, above all due to *product liability.* All European legal systems provide for non-fault-based liability for damage caused by *defective products,* this is largely in implementation of Directive 85/374/EEC. Germany also introduced a special regime of product liability for medications.

The grounds cited in respect of product liability are various; the probability of damage occurring and the extent of the damage threatened, ie the dangerousness, are only ancillary arguments here, however. It has rightly been pointed out[337] that product liability only concerns the less grave dangerousness of defects in the individual product and not general liability for all of this type of thing[338]. *Widmer*[339], on the other hand emphasises the organisational risk of the entrepreneur, which

336 See on this in particular *Gilead,* Israel, in: B.A. Koch/Koziol, Unification: Strict Liability 196.
337 *Fedtke/Magnus,* Germany, in: B.A. Koch/Koziol, Unification: Strict Liability 157.
338 See on this *B.C. Steininger,* Verschuldenshaftung 38 ff.
339 Switzerland, in: B.A. Koch/Koziol, Unification: Strict Liability 333.

certainly may also play a certain role. Others, nonetheless, highlight the notion of a *risk community* of entrepreneur and buyers: when consumer goods are produced, economic factors dictate that the highest technical safety and quality standards are not observed, but this does not mean that the processes involved are wrongful. The lower production costs resulting from the lowered safety standards lead to lower prices for the products but also in an increased risk of damage. However, the idea is that the consumer who is injured by a defective product is asked to bear the harm while the other consumers are beneficiaries because they were able to purchase the goods at lower prices precisely because of the lower safety requirements. If all purchasers enjoy the advantage of the lower prices, the few purchasers who suffer damage due to defects should not be left alone with the damage sustained. Their harm should be compensated by the producer as such is in a position to shift these costs via price changes onto all clients and thus all beneficiaries[340]. This means that all purchasers bear the disadvantages jointly as a kind of risk community. This rationale does not justify the liability of the producer towards external third parties, however.

X. The interplay of liability criteria

A. In general

6/182 It is an essential requirement for any duty to compensate that there is a *causal link* – at least a potential one – between the sphere of the person who is being made liable and the damage which occurred. Some of the additional, above-mentioned criteria are sufficient on their own, provided damage has been caused, to establish liability. This is true, for instance of *subjective culpable misconduct* (fault) or *high degree of endangerment.* Other factors, such as the capacity to bear the economic burden, the gaining of an advantage or insurability can only justify liability in *interplay* with other factors; the same also applies if the inappropriatness of the damaging party's own conduct does not extend right up to fault (eg no subjective culpability but only objective deficiency) or the degree of dangerousness is not especially high.

6/183 The more substantial the individual factors are and the more factors that interplay together, the more likely that liability can be imposed and the more serious may the legal consequences be. For instance, it is shown above (no 6/30) that

340 See *Gilead,* Israel 194 and 197, as well as *B.A. Koch/Koziol,* Austria 20, in: B.A. Koch/Koziol, Unification: Strict Liability.

the intensity of the close relationship has considerable effects on the duties of care and their scope of protection: In contractual relationships, the duties are more comprehensive and also include the protection of pure economic interests. Many legal systems, on the other hand, show that even in the field of torts, for instance when it comes to knowing infliction of damage, there is liability even for pure economic loss although this is not normally the case outside of legal special relationships. In the case of intentional damage, ie misconduct of the most serious degree, on the other hand, even distant damage must be compensated as the adequacy limits and the protective scope of the norm are extended further. Vice versa, the insubstantiality of the grounds for liability fulfilled may lead to a limitation of liability, as is set out in the ABGB, eg, in respect of liability for slight negligence (only the actual loss is recoverable).

6/184 Finally, it must also be pointed out that almost all legal systems recognise a more or less broad area in which while the justification for compensation claims is still seen in fault, the liability stipulated is stricter than traditional fault-based liability. In this context, we may think of above all of the *reversal of the burden of proof* in respect of fault which leads to liability for merely assumed misconduct, or the *elevation of the duties of care* far above the normal standard. This interaction is important because – as we shall see – there is no clear borderline between fault-based liability and non-fault-based liability, in particular in the context of liability based on dangerousness; rather there are also interim areas.

6/185 A further example of the interplay of several factors: most European legal systems not only apply relatively strict liability based on dangerousness for motor vehicles, they also complement this by introducing *compulsory third-party liability insurance.* Two ideas are material in this context: on the one hand, the *high degree of danger* posed by fast travelling vehicles is taken into consideration, on the other hand, also the *spread of risk* (cf above no 6/180). The latter is emphasised by *Gilead* when he explains that the stringent liability for motor vehicles was conceived in order to shift the burden of road traffic accidents to insurance companies[341]. The notion of spreading the risk among all of those who enjoy the advantages of road traffic thus seems significant.

6/186 It is also highlighted[342] that the legislature tends toward liability independent of fault when the victim is faced with structurally-conditioned *obstacles to proving fault.* Such situations arise typically when the victim takes action against a complex organisation that controls access to all evidence. Examples would be the fields of producers' or environmental liability. However, it must be remembered that it is not necessary that recourse is had to non-fault-based liability solely to

341 *Gilead,* Israel, in: B.A. Koch/Koziol, Unification: Strict Liability 192.
342 See *Fedtke/Magnus,* Germany, in: B.A. Koch/Koziol, Unification: Strict Liability 156.

resolve this problem: reversing the burden of proof would be sufficient to eliminate the typical obstacles faced by the victim, without straightaway abandoning the requirement of fault.

In the following, the *interplay* of the various liability criteria is demonstrated by reference to a number of examples. This is to illustrate above all that a holistic consideration of all criteria and the varying degree of fulfilment of the individual criteria is necessary. Furthermore, it should be shown that not only are the grounds for liability gradable but the legal consequences must also be defined elastically in accordance with the overall weight of the liability grounds. 6/187

B. The interplay of misconduct and dangerousness

One already time-honoured, very complex example is offered by the interplay between the element of deficient conduct and that of dangerousness. It shows that *between the core area of fault liability and that of liability based on dangerousness there is a broad interim area with many gradations.* This is true in all legal systems, but – as shown by a comparative law study[343] – the starting points in the individual countries are very different: on the one hand, *Neethling* in particular highlighted in respect of South Africa that the boundary between fault-based and danger-based liability was clearly drawn and that there was no grey area[344]. *W.V.H. Rogers,* on the contrary emphasised that in England[345] strict liability and fault liability were traditionally understood as alternatives but that on closer examination there were not two separate categories but instead a continuing series. This view is shared by many[346]. 6/188

The position that there are two *clearly separate areas* may derive from the fact that fault-based liability and liability based on dangerousness are based on two very different concepts[347]: fault-based liability goes back to the idea that the damaging party must be held to account for the damage resulting from his culpable misconduct. In the context of liability based on dangerousness, this kind of culpability is not decisive: if someone enters into the abstract risk of endangering

343 *B.A. Koch/Koziol,* Unification: Strict Liability.

344 *Neethling,* South Africa, in: B.A. Koch/Koziol, Unification: Strict Liability 269. In the same sense also here the Czech report by *Tichý,* 75 ff and 80; and the Israeli report by *Gilead,* 183.

345 *W.V.H. Rogers,* England, in: B.A. Koch/Koziol, Unification: Strict Liability 101.

346 See references for German, French, Italian, Dutch, Austrian and Spanish law in the Comparative Conclusions in: *B.A. Koch/Koziol,* Unification: Strict Liability 432. Further, *Gilead,* The »Continuum« of Tort Liability and Israeli Law, Koziol-FS (2010) 623 ff; *Jansen,* Struktur des Haftungsrechts 14 ff, 551 ff.

347 On this *Canaris,* Die Gefährdungshaftung im Lichte der neueren Rechtsentwicklung, JBl 1995, 15 ff.

others, this is frequently not forbidden by the legal system; quite to the contrary, operating a railway or a nuclear power plant[348] is in fact desired due to the overriding interests of the public. Nevertheless, liability is set out in this respect, based on the notion that he who derives the advantage from a dangerous activity must also bear the disadvantage.

6/189 However, in the end most supporters of the separation theory admit that the areas of fault liability and liability based on dangerousness do not form uniform, closed units and that in fact there are many levels of differentiation. Thus, with respect to *fault-based liability,* even *Neethling*[349] emphasises that the more dangerous the things used are, the greater the *care* required. He is right of course when he stresses that even still the primary question is whether the damaging party acted culpably, ie engaged in misconduct. Nonetheless, it must be accepted that in such cases it is precisely the dangerousness of the things used by the damaging party that renders the duties of care exacting and thus the liability more stringent.

Furthermore, *Gilead*[350] points out that all forms of fault-based liability deviate from its basic principle and approach »strict« liability when fault is assessed *objectively;* for the specific perpetrator this leads to liability even without personal culpability and thus is similar to strict liability. *Gilead* also emphasises that the limits of fault-based liability are crossed when the objective standard of care can be complied with by no one or by very few people. These very true statements show that there is no clear boundary between fault and strict liability.

6/190 It must also be noted that *protective laws,* which prohibit even abstract endangerment involve a more stringent standard of fault liability, as the fault must no longer be related to the concrete endangerment of a good (above no 6/78). Similar applies to *Verkehrssicherungspflichten* (duties to protect interests of others against risks one has established by his activity or property). Furthermore, the reversal of the *burden of proof* in relation to fault also leads to more stringent liability: if the damaging party does not succeed in proving he was not at fault, he is liable merely on the basis of presumed fault.

6/191 Just as fault-based liability varies, so too can *liability based on dangerousness,* which does not primarily concern conduct, have *different levels of strictness* according to different levels of dangerousness. This results above all from the various kinds of defence allowed, which display a considerable range. The strictest gradation of liability include those rules which take as a sole base the keeping of a

348 There is an exception in Austria: the erection and operation of nuclear power plants is not allowed.

349 *Neethling,* South Africa, in: B.A. Koch/Koziol, Unification: Strict Liability 269; likewise *du Perron/van Boom,* Netherlands 227 and 244; *B.A. Koch/Koziol,* Austria 9 and *G.T. Schwartz,* United States 351, ibid.

350 *Gilead,* Israel 184; likewise *Galand-Carval,* France 128; *Martín-Casals/Ribot/Solé,* Spain 282; *du Perron /van Boom,* Netherlands 227; all in: B.A. Koch/Koziol, Unification: Strict Liability.

source of danger and do not admit any defences at all. A somewhat milder gradation is when some very specific defences can lead to exemption from liability, eg war or slightly more expansively, force majeure. The defences can also be very extensive, even freeing the damaging party from liability if he has exercised every thinkable care – ie a very high standard of care; this already brings liability based on danger very much into the vicinity of fault-based liability. This milder version of liability based on dangerousness transits fluidly into fault-based liability[351].

C. Enterprise liability

1. International trends

6/192 Art 4:202 (1) of the PETL[352] provides for specific enterprise liability linked to a defect of the enterprise and objective carelessness – however, with reversal of the burden of proof[353]. In drafting this provision, the EGTL did not follow the example of the producer's liability in EU Directive 85/374 (on this see below no 6/201 ff)[354], instead choosing to provide for much milder general enterprise liability.

The EGTL took their inspiration from Art 49 a of the Swiss Draft for an overall reform of tort law. This rule covers the entrepreneurial risks of the organisation and renders liability more stringent by reversing the burden of proof in relation to whether there was a defect of the enterprise's organisation. Thus, it covers only the organisational risks but not other defects of the enterprise, such as in the technical equipment. This limitation to just part of the defects in the enterprise does not seem fitting[355], which is why the EGTL extended enterprise liability to all defects of the enterprise, its products and services. The PETL, in turn, influenced the Austrian Draft[356].

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351 Cf on this also *Englard,* The Philosophy of Tort Law (1993) 21; *Koziol,* Bewegliches System und Gefährdungshaftung, in: F. Bydlinski/Krejci/Schilcher/V. Steininger (eds), Das bewegliche System im geltenden und künftigen Recht 51.

352 The Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another from the Study Group on a European Civil Code do not contain any special rule on enterprise liability.

353 See on this *B.A. Koch,* Enterprise Liability, in: EGTL, Principles 93 ff.

354 *B.A. Koch* in: EGTL, Principles 95 f.

355 For further concerns see, eg, *G. Wagner,* Grundstrukturen des Europäischen Deliktsrechts, in: Zimmermann, Grundstrukturen: Deliktsrecht 302 f; *Koziol,* Der Schweizer Vorentwurf für einen Allgemeinen Teil des Haftpflichtrechts aus der Nachbarschaft betrachtet, SVZ 65 (1997) 151 f.

356 See on this with additional references *Griss,* Der Entwurf eines neuen österreichischen Schadenersatzrechts, JBl 2005, 278 f; *Griss,* Gefährdungshaftung, Unternehmerhaftung, Eingriffshaftung, in: Griss/Kathrein/Koziol, Entwurf 62 ff; *Koziol,* Die außervertragliche Unternehmerhaftung im Diskussionsentwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 18; *Apathy,* Schadenersatzreform – Gefährdungshaftung und Unternehmerhaftung, JBl 2007, 215 ff.

All of these proposals are based on a strong trend in Europe[357] but also the USA[358] towards a special, more stringent damage liability for entrepreneurs as compared with general fault-based liability. However, there is debate on whether a strict liability, independent of any misconduct, is appropriate or whether careless conduct should be the basis.

2. The decisive grounds for making liability stricter

6/193 In particular the principle of commutative justice speaks in favour of making enterprise liability stricter[359]; according to this principle the *advantages and risks* should fall to the same party (see above no 6/105) and thus be concentrated in the enterprise.

6/194 Furthermore, the *insurability* of the risk and accordingly the chance to socialise the liability risk via insurance cover are presented as arguments[360]. In the field of enterprise liability, however, it must be remembered that while the entrepreneur is often more likely to be in a better position to take out third-party liability insurance than his clients will be to cover their possible disadvantages by insurance, it will not always be easy to see whether third-party liability insurance on the one hand is more reasonable than personal insurance on the other – in particular social insurance that largely covers personal damage; therefore this aspect should not be weighed too heavily.

6/195 In particular when the stringent liability of larger enterprises is concerned, the argument of *capacity to bear the economic burden,* ie the »deep-pocket argu-

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357 Cf, eg, *Brüggemeier,* Haftungsrecht 119 ff with additional references; *idem,* Unternehmenshaftung – Enterprise Liability. Eine europäische Perspektive? HAVE 2004, 162 ff; *Faure,* Towards an Expanding Enterprise Liability in Europe? MJ 1996, 235 ff; *G. Wagner* in: Zimmermann, Grundstrukturen: Deliktsrecht 303 ff.

358 On the discussion as to whether this liability should be »strict liability« or based on »negligence« see *Priest,* The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, J Legal Stud 14 (1985) 461 ff; *G.T. Schwartz,* The Beginning and the Possible End of the Rise of Modern American Tort Law, Ga L Rev 26 (1992) 601 ff; *Keating,* The Theory of Enterprise Liability and Common Law Strict Liability, Vand L Rev 54 (2001) 1285 ff; *Henderson,* Why Negligence Dominates Tort, UCLA L Rev 50 (2002) 377 ff; *Wantzen,* Unternehmenshaftung und Enterprise Liability (2007) 136 ff. *Arlen/Kraakman,* Die Neustrukturierung der Unternehmenshaftung; *Ott/Schäfer* (eds), Die Präventivwirkung zivil- und strafrechtlicher Sanktionen (1999) 303 ff.

359 See *F. Bydlinski,* System und Prinzipien 202.

360 Cf on this in particular *Wilburg,* Der Unternehmer im Schadensrecht, Jb der Universität Graz (1940) 58 and 64; *idem,* Elemente 32; *idem,* Zusammenspiel der Kräfte im Aufbau des Schuldrechts, AcP 163 (1964) 346; *Ehrenzweig,* Negligence without Fault. Trends towards an Enterprise Liability for Insurable Loss (1951); *Canaris,* Die Gefährdungshaftung im Lichte der neueren Rechtsentwicklung, JBl 1995, 6 f, *Wantzen,* Unternehmenshaftung 72 ff, 152 ff. For comparative law details see *B.A. Koch/Koziol,* Comparative Conclusions, in: B.A. Koch/Koziol, Unification: Strict Liability 412.

ment«, repeatedly plays a significant role[361]. It has already been mentioned above that such arguments often do not hold true (no 6/165): an entrepreneur sued for damages will as far as possible shift the damage for which liability is imposed to the clients by means of price increases, so that in the end the same group of persons must bear the damage as were supposed to be protected against it.

6/196 More estimable is the idea that the victims of an enterprise are confronted on the opponent side with a *complex organisation* and typically have considerable difficulties in *proving* the facts that are material in relation to any carelessness that ensued within the company[362]. Specifically, the victim has no insight into the organisation, the deployment of auxiliaries and technical equipment, the maintenance of machines and control processes. This all speaks in favour of a reversal of the burden of proof in this respect, which makes liability more stringent.

6/197 The PETL and § 1302 of the Austrian Draft further require a *defect* in the sphere of the enterprise[363], which has led to the damage. They invoke a concept on which the present-day § 836 BGB, § 1319 ABGB are based: the increased dangerousness emanating from a *specific defect* of the building can justify increased liability. This consideration can be generalised as in other cases too it is recognised that the existence of a specific defect can lead to increased danger and thus to more stringent liability[364]. Unlike the *general* dangerousness of things or facilities, this concrete dangerousness posed by a defect can, however, *not* justify any liability completely detached from misconduct, ie any real liability based on dangerousness. This is because, as recently highlighted by *B.C. Steininger*[365], the general dangerousness generated by the high speed of motor vehicles, for example, serves the interest of the keeper; dangerousness and usefulness are thus inter-related[366]. The specific dangerousness presented in the individual case due to a defect is, on the other hand, usually not beneficial in any way to the entrepreneur; on the contrary, the defectiveness runs contrary to his interests.

6/198 Ultimately, it must be pointed out that the Austrian Draft additionally requires *misconduct* in the sphere of the entrepreneur: if the care necessary to prevent the

361 *B.A. Koch/Koziol* in: B.A. Koch/Koziol, Unification: Strict Liability 411.

362 *B.A. Koch/Koziol* in: B.A. Koch/Koziol, Unification: Strict Liability 411; *B.A. Koch,* Enterprise Liability, in: EGTL, Principles 94 f; *G. Wagner* in MünchKomm, BGB V[5] § 823 no 385.

363 On this ground for liability in particular *Wilburg,* Elemente 1 ff. I consider it too one-sided when *G. Wagner* in MünchKomm, BGB V[5] § 823 no 388 ff; *idem,* in: Zimmermann, Grundstrukturen: Deliktsrecht 290 ff, seems only to look at the inappropriate behaviour of the auxiliaries in the context of enterprise liability, but fails to mention other defects.

364 See *Koziol,* Haftpflichtrecht I[3] no 1/5 with additional references; *B.C. Steininger,* Verschuldenshaftung 91 ff.

365 *B.C. Steininger,* Verschuldenshaftung 35 ff.

366 Cf on this *Müller-Erzbach,* Gefährdungshaftung und Gefahrtragung, AcP 106 (1910) 365 ff; *Esser,* Grundlagen und Entwicklung der Gefährdungshaftung (1941) 97 ff; *Koziol,* Haftpflichtrecht I[3] no 6/11.

damage was exercised, the entrepreneur's duty to compensate is precluded under this provision. In this respect it is required that the entrepreneur is subject to »Verkehrssicherungspflichten« due to the dangerousness brought about by the specific defectiveness, which in particular stipulate that the entrepreneur must become active in order to prevent the realisation of the danger existing within his sphere[367].

However, even this link to defective, namely careless conduct does not mean that ordinary fault-based liability is at issue. In relation to such, this liability for damage is certainly *more stringent* to the extent that the entrepreneur – as already mentioned – can only free himself from liability by proving that the care necessary to prevent the damage was exercised. Moreover, the entrepreneur is not already exonerated by the proof that he was subjectively not at fault, instead he must also prove the exercise of the *care necessary* according to an objective evaluation[368]. Thus, he is still held accountable for the damage if he was prevented by subjective reasons (absence, illness) from hindering the damage[369]; this corresponds insofar with the present-day – at least according to widespread understanding – liability of the owner of a building (§ 1319 ABGB, § 836 BGB)[370] or of an animal (§ 1320 ABGB, § 833 sentence 2 BGB)[371].

6/199 Furthermore, the Austrian Draft does not rely solely on the exercise of the necessary care by the entrepreneur himself; rather it is decisive that the measures necessary to prevent the damage were taken as a whole within the enterprise. The entrepreneur is thus also liable if one of his *auxiliaries* did not take the necessary measures; hence, a farther-reaching accountability for the misconduct of auxiliaries is provided in the field of tort than under the general rules of liability for Besorgungsgehilfen (cf above no 6/115 ff).

6/200 Finally, it must be highlighted that under § 1302 (3) of the Austrian Draft the more stringent enterprise liability does not include the compensation of *pure eco-*

367 See on this above all *von Bar,* Verkehrspflichten. Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht (1980) 160 ff.

368 By means of this rule, the excessively close tie with breach of organisational duties, which is advocated in Germany to close the gaps left by § 831 BGB is avoided; see on this *G. Wagner* in MünchKomm, BGB V[5] § 823 no 388 ff, § 831 no 11 and 32 ff.

369 This is significant although the entrepreneur is frequently an expert and thus subject to an objective standard of fault both under today's law (§ 1299 ABGB) and the Austrian Draft (§ 1300 (4)). However, this only applies to the special abilities and knowledge for the exercise of the activity engaged in; impediments such as absence or illness, on the other hand, must also be considered when assessing the fault on the part of an expert.

370 Thus, also OGH 1 Ob 129/02 f in ZVR 2003/37; see further *Koziol,* Haftpflichtrecht II[2] 400 f; *Terlitza,* Die Bauwerkehaftung (§ 1319 ABGB) (2000) 279 ff. Going even further *Reischauer* in Rummel, ABGB II/1[3] § 1319 no 15.

371 See *Danzl* in KBB, ABGB[3] § 1320 no 4; *G. Wagner* in MünchKomm, BGB V[5] § 833 no 47 f (in the heading above no 36, on the other hand, he writes of fault-based liability).

nomic loss[372]*;* therefore, only the general liability rules apply to damage of this kind. This limitation is intended to ensure that the extended, extra-contractual[373] accountability of entrepreneurs does not lead to a proliferation of liability.

D. The example of product liability

6/201 Finally, a good example of the interaction of several liability criteria is offered by the special *product liability*[374] that goes beyond the above-described general enterprise liability. This liability is very strict due to its basis in Directive 85/374/EEC, being independent of any breach of duty of care and – apart from the development risks and statutory ordinances – the lack of any grounds for exemption from liability, in particular not even force majeure.

The objective justification for such strict liability for producers is by no means self-evident and neither does it present itself from the genesis of the rules. In fact, the Directive was neither based on a well-thought out and recognised overall concept for producer-liability nor on any theory-based, understandable justification of the legislators: in the recitals to the Directive, it very clearly states: »Whereas liability without fault should apply only to movables which have been industrially produced.« Thus, the non-fault-based liability provided for by the Directive for defective products was only intended to offer – as is also shown by the prior academic discussions – the purchasers protection against the special risks of »anomalies« associated with *industrial mass production.* This could indeed be justified by the argument that in spite of all reasonable measures, product defects can never be absolutely excluded when it comes to mass production nor can inspection always prevent defective products from being placed on the market. The wording of the Directive, however, drops the limitation to industrial products so that the liability set out also applies to agricultural, handicraft and artistic custom-made items. Moreover, the idea of the inevitable risk of anomalies in the case of industrial mass production does not justify the liability for damage deriving from defective construction or insufficient instructions. Thus, no justification was given for stipulating liability to the broad extent provided for; quite the contrary.

6/202 However, neither can the stringent liability be justified, or at least not solely, by the notion of *dangerousness:* unlike the general, *abstract* dangerousness presented

372 On this term see above no 6/47.

373 However, in the field of general contractual liability, which would often apply in this context, there is in principle also liability for pure economic loss.

374 The proposal by the Commission in 1990 for a corresponding directive on liability for services met strong resistance and was withdrawn. On this draft see *F. Bydlinski,* Zur Haftung der Dienstleistungsberufe in Österreich und nach dem EG-Richtlinienvorschlag, JBl 1992, 341 ff.

by things or facilities, the specific dangerousness of defects required under the product liability rules is *not* enough to justify a liability completely regardless of any misconduct, ie a real and, due to the lack of any possible defences, extremely strict liability based on dangerousness. This is because, as already explained in no 6/197 general dangerousness and usefulness are interrelated. The specific dangerousness posed by a defect in the individual case is not at all useful on the other hand; rather it runs contrary to the interests of the producer.

6/203 As shown in the previous section, the material ideas behind *enterprise liability* cannot justify such strict non-fault-based product liability. The extremely stringent liability for defective products can ultimately only be justified in respect of a sub-area, and this by combining the generally decisive criteria for enterprise liability with the notion of the *risk community:* if the producer serves as clearing house for all damage caused by his products, he can pass on all the compensation costs to his clients in general, who are the ones who draw advantages from the products. In particular, the non-fault-based product liability law has the effect that the position of the entrepreneur is approximated with that of an insurer, when seen from a functional perspective: the liability risks generated by this legal area are taken into account by the enterpreneurs in their price calculations, so that the clients may be understood as a risk community, who from an economic perspective end up bearing the costs of the provisions for liability risks on the part of the entrepreneur[375]. This idea only applies when the *acquirer* of the goods suffers damage, but not when damage is suffered by outside third parties. Given the fact that the factor of dangerousness due to the simple existence of a threat posed by the defect in the product is not present to the same degree as in other cases of strict liability, however, the circle of protected interests must be narrower and pure economic loss must be excluded; furthermore, defences (eg force majeure) should be admitted to a greater degree.

XI. Contributory responsibility of the victim[376]

A. Introduction

6/204 § 1304 ABGB and § 254 sec 1 BGB lay down the basic rule that the victim does not lose his entire claim to compensation in the case of contributory responsibility for the damage – as was often the case in the past[377], but that *damage will be appor-*

375 *Wantzen,* Unternehmenshaftung und Enterprise Liability (2007) 84 ff.

376 This section is based on *my* contribution: Die Mitverantwortlichkeit des Geschädigten: Spiegelbild- oder Differenzierungsthese? Deutsch-FS (2009) 781 ff.

377 *Brüggemeier,* Haftungsrecht 594 ff; *Hausmaninger,* Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift für H. Hofmeister (1996) 237 ff; *Koziol,* Die

tioned and the victim may only seek compensation for part of the damage. This principle is common nowadays to almost all legal systems[378].

It is assumed[379] that apportionment of damage in the case of contributory fault is based on the idea that the victim must allow to be imputed to himself any conduct that would have rendered him liable had a third party suffered damage; this is the logical inference from both the *principle of responsibility* and the liability of the damaging party for his fault. Connected with this is the idea that the contributory responsibility of the victim contributes like the liability of the damaging party to the goal of *prevention:* the risk of having to bear part of any damage which ensues oneself is an incentive to everyone to prevent the occurrence or aggravation of damage as far as possible[380].

Above all, however, it is emphasised that the internal justification for taking contributory fault into account lies in the *principle of equal treatment.*

B. The equal treatment theory (Gleichbehandlungsthese)

It is argued that if the damaging party is held responsible for the damage on the basis of particular grounds for liability, it would constitute unequal treatment of largely the same facts if corresponding grounds on the part of the victim were to be ignored. Accordingly, it is emphasised that damage is only apportioned »if exactly the same kind of facts are true in relation to the victim as may represent grounds for liability on the part of the damaging party«[381]. Accordingly, this is referred to as the *equal treatment* or *mirror image theory.* 6/205

The principle that damaging party and victim be treated equally requires that the fault relation be tightened at the expense of the victim too if protective laws 6/206

▹▹ Mitverantwortung des Geschädigten im Wandel der Zeiten. Gedanken zur Bedeutung der Selbstverantwortung, Hausmaninger-FS (2006) 139 ff; *Looschelders,* Die Mitverantwortlichkeit des Geschädigten im Privatrecht (1999) 6 ff.

378 See *Looschelders,* Mitverantwortlichkeit des Geschädigten 65 ff; *Magnus/Martín-Casals,* Comparative Conclusions, in: Magnus/Martín-Casals, Unification: Contributory Negligence 259 f. It is regrettable that the competent bodies in the EU are not always conscious of this and they provide for complete freedom from liability for the damaging party without any discernible reason, even in a regulation intended to protect passengers' rights, see Art 6 no 4 lit b Proposal for a Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM (2008) 817. Fortunately, this provision is not included in the final Regulation of February 2011.

379 See with further references *Looschelders,* Mitverantwortlichkeit des Geschädigten 116 ff.

380 On this in detail *Faure,* Economic Analysis of Contributory Negligence, in: Magnus/Martín-Casals, Unification: Contributory Negligence 233 ff; cf also *Fellmann,* Selbstverantwortung und Verantwortlichkeit im Schadenersatzrecht, Schweizer JZ 91 (1995) 45.

381 *F. Bydlinski,* System und Prinzipien 229; see *idem,* Gehilfenmitverschulden beim Arbeitgeber und betriebliche Hierarchie, Tomandl-FS (1998) 54 ff.

are violated (§ 823 (2) BGB; § 1311 ABGB), or when »equity-based liability« applies (§ 829 BGB; § 1310 ABGB)[382]. Moreover, this theory has led to the assumption that not only the contributory fault of the victim is to be taken into consideration but in analogous application of the legal rule *other grounds for liability* that impact from his side also[383]. The use of an especially dangerous thing by the victim may accordingly be imputed against him exactly as would be the case if a third party was injured on the basis of the rules of strict liability[384].

The currently prevailing understanding of contributory responsibility, based on the equal treatment theory, can thus be formulated very generally as follows: if not only the responsible damaging party but also the victim was causal for the damage and if there are grounds on both sides that would justify the liabiltiy for the damage caused in relation to a third party, then the victim must bear a part of the damage, which is to be determined under consideration of the grounds for liability on both sides.

6/207 This equal treatment or mirror image theory is very illuminating to the extent that *at least* those grounds for liability as trigger liability on the part of the damaging party lead to the victim having to bear damage himself. It would clearly be an inappropriate, unequal treatment of damaging party and victim if the corresponding liability grounds were only taken into account in relation to the damaging party but not in relation to the victim when determining who should bear the damage.

Going beyond this, however, this theory is by no means so convincing and it has consequently also been rejected. Criticism in this respect stresses above all the principle *»casum sentit dominus«* (§ 1311 (1) ABGB)[385] and thus contends there is no basis for fully equal treatment of damaging party and victim[386]: the initial situation on the two sides are completely different, so the argument goes, as the victim must also bear the consequences of chance events according to the fundamental rule, whereas the damaging party must only compensate the harm he causes to the victim if *special grounds for liability* are satisfied. Under applicable Austrian law[387] it must even be noted that due to the very rigid principle of damages graded according to the degree of the damaging party's fault (§§ 1323, 1324 ABGB), even slight negligence is not enough for the victim to get compensation for lost profit, instead he must bear this loss himself.

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382 See *Deutsch,* Haftungsrecht[2] no 564 f, 575.

383 *Deutsch,* Haftungsrecht[2] no 566, 579 f; *Koziol,* Haftpflichtrecht I[3] no 12/77; *Looschelders,* Mitverantwortlichkeit des Geschädigten 388 ff; *Magnus/Martín-Casals* in: Magnus/Martín-Casals, Unification: Contributory Negligence 271 f; *Lange/Schiemann,* Schadensersatz[3] § 10 VII.

384 *Oetker* in MünchKomm, BGB II[5] § 254 no 5 and 14 with additional references.

385 On this *Dullinger,* DRdA 1992, 415; *Koziol,* Haftpflichtrecht I[3] no 12/67; *Schiemann* in Staudinger, BGB [2005] § 254 no 43.

386 This is also emphasised by *Looschelders,* Mitverantwortlichkeit des Geschädigten 117.

387 The Austrian Draft does not provide for this kind of gradation of the damages.

C. The theory of differentiation (Differenzierungsthese)

On the basis of this unequal starting position, a minority opinion thus advocates a *differentiation theory (Differenzierungsthese),* which stands for different treatment, specifically at the expense of the victim[388]. 6/208

Proceeding on the basis that the parties do not have an equal starting position, differing solutions are deduced, to the effect that not only fault but any causation of the damage is imputable to the victim[389], or that at least the strict principle of endangerment ought to be applied[390]. Moreover, a smaller number of voices advocate simply that instead of subjective misconduct, any objective misconduct should be enough for the victim to be liabile[391]. This last theory would seem inconsistent, however, as the starting point – that the victim must bear any chance damage – can only justify very far-reaching liability but not precisely such a limitation, as after all goes »half way« towards the equal treatment theory.

The *differentiation theory* in all its variations in any case deserves note for drawing attention to the fact that the victim having to extensively bear the damage is a comprehensive and self-evident principle and thus that there is a considerable difference between the liability for damage to the victim himself and the shifting of such damage to another, and that this difference is based on value judgements of very different natures. This differentiation theory, however, is applied by some too rigidly insofar as the principle that the owner bears the damage is accorded so much weight that it is still relevant when juxtaposed by culpable or other imputable infliction of damage by another and thus *always* leads to apportionment of the damage. »Always« because in every case of damage the existence of the victim and the existence of the damaged good constitute a conditio sine qua non for the occurrence of the damage, so that the sphere of the victim is always causal without exception. This theory, which would necessarily mean that the victim can never obtain full compensation, is unfounded however, according to very predominant opinion[392]: in relation to wrongful and culpable conduct of the damaging party the necessarily factually existent causation of the victim's sphere does not play any role provided there are no further criteria speaking for the victim's liability. 6/209

388 See above all *Gernhuber,* Die Haftung für Hilfspersonen innerhalb des mitwirkenden Verschuldens, AcP 152 (1952/53) 76 f; cf further, eg, *Lange/Schiemann,* Schadensersatz[3] § 10 V 2.

389 Thus, eg, *Wieling,* Venire contra factum proprium und Verschulden gegen sich selbst, AcP 176 (1976) 349 f.

390 *Gernhuber,* AcP 152 (1952/53) 77.

391 Cf *Lange/Schiemann,* Schadensersatz[3] § 10 V 2; *Medicus,* Bürgerliches Recht[21] (2007) no 869; *Weidner,* Die Mitverursachung als Entlastung des Haftpflichtigen (1970) 27 f.

392 See, eg, *Unberath* in Bamberger/Roth, BGB I[2] § 254 no 12.

D. A mediatory approach

6/210 Both theories are insofar unsatisfactory as they each propagate a mental *monoculture* and only ever consider one argument in a very one-sided manner while fully ignoring the other. Accordingly, they reach very sketchy conclusions and simply discard differentiating evaluation aspects.

6/211 The *differentiation theory* is certainly correct insofar as in principle everyone must bear the risks in his own sphere and that shifting the damage to someone else is only allowed by the legal system subject to certain, relatively stringent requirements. However, it is by no means inescapable that merely because in principle the owner bears the damage every compensation claim of the victim against a responsible perpetrator be reduced with the argument that the damage is always imputable to both parties due to the fact that the victim is generally responsible for his own sphere and thus the damage must be borne by both. Specifically, it must be borne in mind that the various *grounds for liability can be weighted differently.* If the grounds for liability are weightier on one side than the other, then the damage should not be apportioned equally and when one side very strongly outweighs the other, the grounds on the other side can indeed be completely ignored so that just one of the parties bears all of the damage. This is also very much the currently accepted position on the merits. Nowadays, this *rule of predominance* is applied as a matter of course in those contributory fault cases in which there is *intention* on the part of either the victim or the damaging party and only slight negligence on the other side; apportionment of the damage is generally denied in these cases[393] and instead the intentional perpetrator must compensate in full.

Likewise, though, it also seems right – in contrast to the strict interpretation of the differentiation theory – to disregard the *mere causation* of the victim's sphere based simply on the principle »casum sentit dominus« as a ground for liability if the perpetrator is guilty of *fault,* and thus subject to serious reproach. This value judgement is in line with the law as is shown by the fact that the full compensation otherwise provided for by the law as the *standard* would in principle never be attainable, since – as already mentioned – the existence of the damaged thing and the injured person are always a cause of the damage sustained and such must be counted as belonging to the sphere of the victim. Therefore, if the victim and his sphere are only insofar a conditio sine qua non for the occurrence of the damages as that their existence made it possible, then any wrongful and culpable conduct on the part of the damaging party certainly *outweighs* this as a ground for liability so much that the perpetrator must bear the damage alone.

393 *Oetker* in MünchKomm, BGB II[5] § 254 no 11 with additional references; *Karner* in KBB, ABGB[3] § 1304 no 4 with additional references; *Koziol,* Haftpflichtrecht I[3] no 12/17.

On the other hand, however, the *equal treatment theory* is too inflexible when it assumes that *exclusively* such grounds for liability on the side of the victim can lead to apportionment of damage as correspond to the liability grounds set out by law when damage is inflicted on a third party. First, even the principle *»casum sentit dominus«* shows that the issue cannot be a logically precise and thus purely mechanical mirror image equal treatment of damaging party and victim. Instead and as stressed above, there is a *value judgement* at issue as to when the victim can shift the damage sustained in full or only in part or indeed not at all to the damaging party when his own sphere was causal. 6/212

Secondly, the equal treatment theory certainly formulates its basic rule too rigidly when it only wants to recognise damage apportionment provided the liability criteria on both sides are the *same.* The elasticity of the damage apportionment rule by no means necessarily requires the liability grounds to be the same, instead it clearly offers the means to apportion damage even if the liability criterion on the victim's side is less substantial than that on the side of the perpetrators, though in this case not in equal parts but with proportionately less damage to be borne by the victim. And indeed this is already applied in practice today: if the perpetrator is held accountable for gross negligence and the victim only for slight negligence, damage is still apportioned but not in equal halves, instead so as that the damaging party must bear the greater part. Naturally, the same also applies vice versa.

Once it is seen that the question of damage apportionment is not dealt with by mechanical application of the mirror image rule but represents a very complicated value judgement issue, the way is free for *solutions that combine the mirror image theory and the more stringent differentiation theory.* As already mentioned, it is very largely recognised that the notion of the owner bearing the risk plays no role when there is fault on the side of the damaging party and the victim, on the other hand, is not accused of any negligence: in this case it is assumed that the grounds for imputing the damage to the damaging party so strongly outweigh the general rule for risk-bearing on the part of the victim that such no longer has any relevance. 6/213

Nevertheless, it is not the case that with no exception every time the victim is not guilty of any fault, the damaging party must bear the damage alone; within this context further differentiation is certainly possible, as even when there is no fault it is still possible that there are criteria for liability in varying degrees of substance. Due to the fact that the victim is generally accountable for risks within his own sphere, it could certainly be argued from a value judgement perspective that when the grounds for liability on the side of the perpetrator are only present in attenuated form or, on the other hand, there are other minor grounds apart from the notion of risk to support the victim's liability, this may be considered sufficient reason to require that the victim bear part of the damage.

6/214 The argument that in the case of *weak grounds for liability* as regards the damaging party and any consideration of the financial circumstances coming out in favour of the damaging party, regard should be had to the causation of the victim's sphere or the neutral sphere that is imputable neither to damaging party nor to victim, has been put forward persuasively by *F. Bydlinski*[394]*:* where consideration of the financial circumstances and slight weight of the grounds for liability of the damaging party speak in the specific case for mitigating the duty to compensate, he finds that under broad comparison of the overall picture the *causes* of damage on the side of the victim come into stronger focus as independent factors to be taken into consideration. Likewise in such cases, »external« causes could be taken into consideration.

F. Bydlinski[395] also argues for partial liability of the victim in cases of alternative causation, in which a possibly causal, liability-triggering event competes with a potentially causal event for which the victim is accountable or with *chance,* although the weight of the criteria for liability must also be taken into account. *F. Bydlinski* has justifiably collected many supporters of this theory[396], in particular also at the Austrian Supreme Court[397]. The fact that in this respect even chance in the victim's sphere can lead to the victim having to bear part of the damage must be based on the idea that when it comes to alternative causation the requirement of causation is only satisfied in an extremely diluted form, namely as merely potential causation; due to the weakness of the grounds for liability even the victim's general obligation to bear the risk in his own sphere, ie the principle »casum sentit dominus«, comes into effect.

6/215 Largely subconsciously, the principle »casum sentit dominus« is in fact taken into account very generally even in the undisputed cases of damage apportionment foreseen by the law and it is recognised that the further criteria in favour of the victim's liability only need to be of considerably less weight than those on the side of the damaging party in order to lead to apportionment of the damage. For while wrongful, culpable behaviour is required on the side of the damaging party, even careless but by *no means necessarily unlawful behaviour* is sufficient on the side of the victim[398]*:* the endangerment of one's own goods is not prohibited by the legal system: hence there is no duty to avoid such endangerment but simply

394 System und Prinzipien 229 f.

395 *F. Bydlinski,* Aktuelle Streitfragen um die alternative Kausalität, Beitzke-FS (1979) 30 ff; *idem,* Haftungsgrund und Zufall als alternativ mögliche Schadensursachen, Frotz-FS (1993) 3.

396 See on this the details in *Koziol,* Schaden, Verursachung und Verschulden im Entwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 773.

397 OGH 7 Ob 648/89 in JBl 1990, 524; 4 Ob 554/95 in JBl 1996, 181; taking a different line, however, OGH 6 Ob 604/91 in JBl 1992, 522; 2 Ob 590/92 in JBl 1994, 540 *(Bollenberger).*

398 Cf, eg, *Deutsch/Ahrens,* Deliktsrecht[5] no 162; *Koziol,* Haftpflichtrecht I[3] no 12/3 ff.

an *Obliegenheit* (duty of care for oneself), the violation of which does not establish wrongfulness, but nevertheless leads to having to bear the damage[399].

6/216 It is of decisive importance for the question at issue here that precisely the infringement against the legal system, ie the *wrongfulness* of specific conduct, is accorded special weight within the context of grounds for liability, considerably outweighing that of a simple breach of an Obliegenheit as the Obliegenheit is a legal duty of a much lesser degree[400]. Specifically, wrongfulness of conduct means an *especially serious* defect is considered to weigh in on the side of the damaging party[401]. In the case of carelessness with respect to one's own goods, ie so-called contributory fault, however, in principle there can be *no* talk of such a serious defect: the legal system leaves it up to each individual how much care he wishes to exercise for himself and his goods and does not interpret conduct in this respect as wrongful even if there is a lack of care.

Nothing changes in relation to this assessment of the victim's conduct if, besides his own behaviour, also the liability-triggering conduct of a third party presents a conditio sine qua non for the damage sustained by the victim. In this case too, there is no accusation against the victim of conduct censured by the legal system, which leads to a reduction of the compensation claim against the liable damaging party, rather the issue is again only that the victim also has to bear the risk of his own *permitted* conduct – appropriately in this situation. Thus, the victim is merely prevented from shifting the consequences of his disposition over his sphere completely onto others; ie no serious accusation is made against him on the basis of his behaviour, which indeed in principle cannot come into question as his behaviour was not wrongful[402].

6/217 Thus, the issue of contributory fault on the part of the victim is in fact *not* about taking into consideration a serious accusation or about the liability for damage to the victim himself requiring special grounds but in truth about the self-evident bearing of risk from one's own sphere. The mirror image theory hence gives far too little heed to a *fundamental difference* between imputing damage that has been inflicted upon a third party and the bearing of disadvantageous changes in one's own sphere: liability towards third parties requires special, narrowly defined, relatively serious grounds for liability; bearing responsibility for disadvantages arising in one's own sphere, on the other hand, does not require any special grounds for liability but applies inevitably without the need for any further prerequisites.

399 See, eg, *Hähnchen,* Obliegenheiten und Nebenpflichten (2010) 53 f, 306.
400 *Deutsch,* Haftungsrecht² no 567.
401 The special weight of this criterion is emphasised, eg, by *F. Bydlinski,* System und Prinzipien 214, in connection with the justification of liability for auxiliaries.
402 Cf *F. Bydlinski,* System und Prinzipien 190.

Therefore, the mirror image theory inaccurately blurs the difference between the shifting of damage to another party, which requires special justification, and the self-evident bearing of the risk for one's own sphere, which does not require any further justification. *Fault* on the part of the damaging party and *»contributory fault«* on the part of the victim are in fact *by no means of the same nature* and so-called contributory fault is significantly less substantial than real fault due to the absence of wrongfulness[403].

6/218 The view prevailing today thus satisfies itself very obviously with considerably *less substantial grounds for liability* on the side of the victim than on the side of the damaging party, but does apply apportionment of damage in equal parts nonetheless in case of slight fault on the part of the damaging party and slight contributory fault on the part of the victim. In fact, this can only be explained by assuming that the notion of bearing one's own risk *additionally* falls into the balance on the side of the victim, and therefore the grounds for liability may be deemed *overall* to be of the same weight. This also proves that on the side of the victim *besides* the element of risk-bearing for one's own sphere, *less substantial* grounds for liability – than are required to trigger liability in relation to third parties – are sufficient to put him on an equal level with the damaging party.

This conclusion must be taken into account very generally against the background of the above explanations and should, firstly, lead to damage apportionment falling more to the disadvantage of the victim if he also acted *wrongfully,* because he infringed rules of conduct that the legal system laid out – at least also – for his protection, eg road traffic rules.

6/219 Above all, it must also be taken into consideration when the victim cannot be accused of any careless conduct but there is *another defect* or a *source of increased danger* in his sphere, that on his side, besides the risk he must bear for his own sphere, further liability criteria are sufficient even when only of minor nature to impute the damage to him, and it is not required that the liability grounds on his side have the same weight as those on the side of the damaging party.

This applies in particular for the liability for damage that was caused by sources of increased danger. According to the equal treatment theory, only such sources of danger must be imputed to the victim as keeper as would also trigger his liability in relation to third parties[404]. This is a relatively small circle of sources of danger, as they must firstly involve very high degrees of danger and, secondly, there is currently no general rule either in Germany or in Austria[405] but only individual rules on liability for dangerousness. Proceeding from the above explanations, however,

403 This is also pointed out by *Dullinger,* Zum Mitverschulden von Gehilfen ex delicto, JBl 1992, 407.
404 *Oetker* in MünchKomm, BGB II[5] § 254 no 14.
405 The Austrian Draft, however, provides for a general rule, see on this *Apathy,* Schadenersatzreform – Gefährdungshaftung und Unternehmerhaftung, JBl 2007, 205 ff.

it must be assumed also in relation to the liability criterion of dangerousness that for the victim's liability even a source presenting considerably less danger is sufficient than is required for liability towards third parties[406]. Above all, it must be highlighted that on the side of the victim the very general principle of liability for risks in one's own sphere prevails and thus not only individual, specially regulated sources of danger are imputable but also simply – as already advocated by *Gernhuber*[407] and *Deutsch*[408] – *all sources of increased danger.* Just as even the violation of an Obliegenheit is sufficient for the victim's liability in lieu of seriously wrongful conduct and real fault, even a simple increased risk that would never justify strict liability towards third parties and is not limited to certain, statutorily stipulated groups of cases must be taken into consideration when deciding on who is to bear the damage in place of a source of high danger.

6/220 The problem that someone – above all a dependant – has compensation claims against the perpetrator based on the *killing* of a person, in particular *someone with a duty of maintenance,* but there was contributory fault of the deceased person, also involves liability for a defect in one's own sphere. It is assumed that the dependant must also allow the contributory fault of the deceased person to be counted against his claims[409] because this is assigned to his sphere of risk[410].

E. Liabilty for auxiliaries' conduct in particular

6/221 The thoughts just elaborated above can of course also be helpful when it comes to the resolution of the oft-discussed liability problem concerning *auxiliaries* when the principal suffers damage through a third party outside of special legal relationships. Due to the very narrowly-defined liability for Besorgungsgehilfen in Germany and Austria, the equal treatment theory leads only to a very minor liability for auxiliaries' conduct within the context of contributory responsibility. § 831 BGB provides for liability of the principal for unlawful infliction of damage by his auxiliaries exclusively when he is guilty of fault in the selection, equipment,

406 This is after all advocated by some writers, see *Deutsch,* Haftungsrecht² no 581; *Weidner,* Die Mitverursachung als Entlastung des Haftpflichtigen (1970) 43 ff; cf also the discussion of the problem in *Looschelders,* Mitverantwortung des Geschädigten 395 ff.

407 Die Haftung für Hilfspersonen innerhalb des mitwirkenden Verschuldens, AcP 152 (1952/53) 81 ff.

408 *Deutsch,* Haftungsrecht² no 581; see also *Esser/Schmidt,* Schuldrecht I/2⁸ § 35 I 4.

409 On the comparative law indications see *B.A. Koch/Koziol,* Vergleichende Analyse, in: B.A. Koch/Koziol, Personal Injury 380.

410 See also the corresponding arguments in relation to shock and bereavement damage: *Karner,* Anmerkung zu OGH 2 Ob 79/00g, ZVR 2001, 288 f; OGH 2 Ob 178/04x in ZVR 2004/105 *(Danzl);* BGH in BGHZ 56/113 and on this *Stoll,* Selbstbestimmung und haftungsrechtliche Verantwortung des Suizidenten, Koziol-FS (2010) 887 ff. Contra, however, *Beisteiner,* Angehörigenschmerzengeld (2009) 241 ff; *idem,* Geteiltes Leid ist halbes Leid?, ZVR 2010, 4 ff.

management or supervision of such, though on the other hand, it also provides for a reversal of the burden of proof. Besides the liability of the principal for his own fault, in respect of which no reversal of the burden of proof is stipulated, § 1315 ABGB only provides for liability in the case of the incompetence or – insofar as such is know to the principal – dangerousness of the auxiliary, thus taking account of the increase in risk due to deploying the auxiliary. However, a far-reaching liability for the operational staff is stipulated for railways and motor vehicles (§ 19 (2) EKHG).

6/222 At present the answer to the question of liability for the conduct of a Besorgungsgehilfe when the principal suffers damage due to a third party outside of the framework of any special legal relationships is extremely *controversial* both in Austria and Germany. Austrian teaching is divided; those who support the view that the victim is accountable for all fault of auxiliaries even outside of the framework of special legal relationships due to the fact that he generally bears the risk for his sphere[411] are matched more or less in numbers by the opponents of this view who insist on equal treatment for damaging party and victim[412]. The Austrian Supreme Court has tended towards broad imputation[413], which in respect of liability for auxiliaries entrusted with the principal's interests (Bewahrungsgehilfen) can also rely on several provisions on liability based on dangerousness (§ 7 (2) EKHG, § 1 a RHPflG; § 20 LuftVG); however, it recently held the equal treatment theory to be persuasive[414]. In Germany too, academic writers are divided[415], the case law, on the other hand, has long followed the equal treatment theory[416]. For an auxiliary entrusted with the principal's interests (Bewahrungsgehilfe), however, several rules of liability based on dangerousness also provide in Germany for comprehensive liability of the party who exercises control over the thing (§ 9 StVG; § 4 HPflG; § 34 Luft VG; § 27 AtomHG), however this is not extended to bodily injuries or to fault-based liability[417].

411 See *Dullinger,* Zum Mitverschulden von Gehilfen ex delicto, JBl 1990, 20 and 91; *Iro,* Besitzerwerb durch Gehilfen (1982) 221 f; *Koziol,* Die Zurechnung des Gehilfenverhaltens im Rahmen des § 1304 ABGB, JBl 1997, 201; *Reischauer* in Rummel, ABGB II/1³ § 1304 no 7 and 7d.

412 *F. Bydlinski,* Gehilfenmitverschulden beim Arbeitgeber und betriebliche Hierarchie, Tomandl-FS (1998) 54 ff; *Karollus,* Gleichbehandlung von Schädiger und Geschädigtem bei der Zurechnung von Gehilfenverhalten, ÖJZ 1994, 257; *Kletečka,* Mitverschulden durch Gehilfenverhalten (1991); *M. Wilburg,* Haftung für Gehilfen, ZBl 1930, 734 f.

413 OGH 7 Ob 27/91 in SZ 64/140.

414 OGH in 4 Ob 204/08s in ecolex 2009, 315 (in agreement *Kletečka*) = ZVR 2010/8 (critical *Ch. Huber*). Disagreeing with the new decision also *Karner,* Gehilfenzurechnung auf Seiten des Geschädigten, ZVR 2010, 9 ff.

415 See *Deutsch,* Haftungsrecht² no 577; *Looschelders,* Mitverantwortlichkeit des Geschädigten 505 ff; *Oetker* in MünchKomm, BGB II⁵ § 254 no 128 and 137 f with additional references.

416 BGH in BGHZ 1, 248; BGHZ 103, 338.

417 *Oetker* in MünchKomm, BGB II⁵ § 254 no 138.

A starting point for the considerations regarding liability for auxiliaries must also be that the *principal incorporates the auxiliary into his sphere*[418] and that, therefore, damage brought about by such auxiliary represents an event that belongs to the principal's risk area. It is true that the principal can under certain circumstances shift such damage onto the auxiliary, but only within relatively narrow limits and specifically not in the ultimately decisive contexts: firstly, the principal ultimately carries the full risk for the faultless infliction of damage by the auxiliary whom he has involved within his sphere, facilitating the damaging of his goods by said auxiliary in the first place by so doing. However, even in the case of culpable conduct on the part of the auxiliary, the principal in many cases ultimately carries the risk of the damage due to the far-reaching exemption from liability for employees[419]. Above all, however, the principal must ultimately bear the damage even if the damage infliction triggers the liability of the auxiliary when such is insolvent. 6/223

In turn, the question arises as to why the principal should simply be relieved of the whole risk in all of these cases just because, besides the auxiliary, another responsible third party provides a conditio sine qua non for the damage. Only then, namely, when the auxiliary is not at any subjective fault nor guilty of any objectively careless conduct, could one, in weighing up the grounds for liability against each other, assume that the side of the third party – who has acted wrongfully and culpably – weighs in so much more strongly that this damaging party must bear the damage in full: no defect increasing risk can be detected within the sphere of the principal who suffered the damage that could support liability to him if the auxiliary exercised *due care.* 6/224

In the case of *objectively careless* conduct on the part of the auxiliary, on the other hand, there is always a *defect* considerably increasing risk within the sphere of the principal, which speaks in favour of his bearing the damage in proportion. This must apply all the more if the auxiliary was additionally subjectively to blame, ie at *fault,* and above all also if the auxiliary is exempt from compensating under the rules of employee liability. It is noteworthy, because it offends against the principle of equal treatment that supporters of the equal treatment theory impute the auxiliary's conduct ultimately comprehensively to the principal in these very critical cases of the auxiliary being free from liability, ie going beyond the liability rules applicable to the damaging party under § 1315 ABGB and § 831 BGB[420]. 6/225

418 Independent entrepreneurs, who are not incorporated into the principal's sphere are not regarded as Besorgungsgehilfen (*Karner* in KBB, ABGB[3] § 1304 no 2; *G. Wagner* in MünchKomm, BGB V[5] § 831 no 14), so that this only affects auxiliaries bound by the principal's instructions.

419 In Austria this is stipulated by the »Dienstnehmerhaftpflichtgesetz«, in Germany it is advocated by settled case law and prevailing theory, see *Deutsch,* Haftungsrecht[2] no 433.

420 *Oetker* in MünchKomm, BGB II[5] § 254 no 6; *Kletečka,* Solidarhaftung und Haftungsprivileg, ÖJZ 1993, 787 ff; see on this in more detail *Koziol,* JBl 1997, 203 and 209.

6/226 In the cases in which the auxiliary is liable to the principal in full for the damage culpably caused, the answer to the question of liability is often without great practical significance: if the auxiliary is not imputed to the principal, then the auxiliary is liable jointly and severally with the third party, as each has provided in an imputable manner a conditio sine qua non for the damage. If the third party pays full compensation then he may take recourse against the auxiliary and thus only bear part of the damage. This procures the same result as when the auxiliary's conduct is fully imputed to the principal who suffered the loss, who is then only entitled to partial compensation. The liability question does acquire practical significance, however, when the auxiliary is *insolvent:* while this insolvency risk must be borne by the principal if there is extensive liability for the auxiliary, the advocates of the equal treatment theory impose this risk ultimately on the third party, who will not be able to enforce his recourse claim.

6/227 This complete shifting of the risk of the auxiliary's insolvency from the principal's sphere to the third party does not seem justifiable from a value judgement point of view. This can be illustrated once again with an example: if the principal G has entrusted A with his lorry, G bears the full risk that A will be insolvent if A carelessly drives the lorry into a tree and the lorry is damaged. Why should G be fully released from this risk if A, instead of driving the lorry into a tree, crashes into the car parked by D in contravention of the parking regulations in a manner impeding traffic. Why should G get full compensation in this case from D and D have to bear the total risk of A's insolvency though A is an auxiliary selected by G and against whom he then would only have an unenforceable recourse claim? Finally, it must be borne in mind that the principal also *controls* the *risk* that his auxiliaries cause damage insofar as he selects the auxiliaries and can also check their solvency. If the principal deploys a careless and insolvent auxiliary, this risk is created by his free disposition and he ought to bear this increased risk in his sphere, even if a third party causes the damage.

Therefore: the misconduct of an auxiliary must be imputed to the principal and the damage must be apportioned if the damage is brought about by both misconduct on the part of his auxiliary to whom he has entrusted his thing and liability-triggering conduct of a third party. He carries the risk that he may not be compensated for the outstanding damage allocated to the auxiliary.

Chapter 7

Limitations of liability

I. The basic problem of excessive liability

7/1 According to the *conditio-sine-qua-non* formula, all disadvantages which were contingent upon a damaging event are to be imputed to such party as is accountable for such event on the basis of fault or some other ground for liability. Thus, according to this so-called *equivalence theory (Äquivalenztheorie),* which holds all conditions to be of equal value, the damaging party is accountable not only for the »most direct« damage but also for any and all consequential damage caused, ie all further disadvantageous effects upon the victim. According to the equivalence theory, it makes no difference whether the damage only turned out to be so extensive because of extraordinary events; whether a chain of circumstances defying all rules of experience led to completely atypical consequential effects or whether the damage that occurred lies in a completely different direction to that which the behavioural rule breached by the perpetrator was intended to prevent. If the event triggering liability was a conditio sine qua non for this damage, then the *theory of causation* prevailing today will not provide for any limitation of liability.

7/2 A comprehensive, boundless duty to compensate is deemed, however, in almost all legal systems[1] to be inequitable and unreasonable. In civil law, the almost unanimous standpoint is consequently that the conditio sine qua non theory, which considers all conditions to be of equal value, is valid insofar as that in principle there is no liability for damage not caused[2], as the damaging party cannot avoid such damage even in a very abstract way and this thus cannot possibly be imputed to him. On the other hand, so the general understanding goes, there is also consensus that it would go too far if the liable party was made responsible for any and all damage for which the event triggering his liability was a condition.

1 Cf *Spier,* Conditio sine qua non, in: EGTL, Principles 43; *idem,* Scope of Liability, in: EGTL, Principles 59 f; *Wright,* The Grounds and Extent of Legal Responsibility, 40 San Diego L Rev 2003, 1425 ff.

2 A far-reaching attenuation of this principle is recognised, however, in the case groups on alternative, cumulative and supervening causation, insofar as merely potential causation is held to be sufficient; see on this above no 5/79.

In order to limit the responsibility of the liable party appropriately, *additional value judgements* in relation to reasonableness are applied alongside the examination of the causal link.

7/3 That unlike in *criminal law,* such a limitation proves necessary in civil law arises from the fact that in criminal law *fault* delivers an adequate limitation of liability: in criminal law fault must relate as a rule to all features of the offence, ie also the result. This means that only the harm foreseeable to the perpetrator is taken into consideration. The situation in *private law* is completely different, as fault need only relate to the violation of a duty or to the first »direct« damage that occurred, and does not need to relate to the further consequences (see above no 6/78); hence, fault is *only relevant as regards the justification of liability* but not as regards »liability for more remote damage«. Moreover, in private law, there is also *liability without fault.* Thus, in private law, fault does not constitute an adequate limitation on the imputable damage[3].

Neither can *wrongfulness* lead to a restriction on liability, as it likewise need only relate to the first result; the behaviour of the damaging party must not be separately wrongful in relation to all consequential damage[4].

7/4 Of the attempts[5] to develop limitation criteria in the German speaking countries[6], in particular the *theory of adequacy* and that of *protective purpose* of the rule on which liability is based have met with lasting success. They have also been taken up by the PETL in Art 3:201 lit a and e as well by the Austrian Draft (§ 1310 sec 1). Besides this, however, the theory of interruption of the causal link is also persistently advocated.

7/5 In other legal systems, it is often said that besides »natural causation«[7] – determined according to the conditio-sine-qua-non formula or but-for test – the more restrictive *»legal causation«* must be examined[8]. This formulation is justified insofar as the decision as to whether the damage caused is imputable or not concerns a legal evaluation. Hence, the legally relevant or liable causes are determined.

Nonetheless, this talk of »legal« causation does tend to lead to discussion of causation without making the necessary distinction between »natural« and

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3 Cf *F. Bydlinski,* Zum gegenwärtigen Stand der Kausalitätstheorie im Schadensrecht, JBl 1958, 2; *Larenz,* Lehrbuch des Schuldrechts I[14] (1987) § 27 III b; *Lindenmaier,* Adäquate Ursache und nächste Ursache, ZHR 113 (1950) 214 ff; *Mihurko,* Verursachung, Begünstigung, Rechtswidrigkeit (1915) 7.

4 Cf on this *Sourlas,* Adäquanztheorie und Normzwecklehre (1974) 152.

5 On the unpersuasiveness of the criterion of »directness« see *Koziol,* Natural and Legal Causation, in: Tichý, Causation 63 ff.

6 A short overview of approaches in other legal systems can be found in *Koziol* in: Tichý, Causation 59 ff.

7 See *Koziol* in: Tichý, Causation 56.

8 *Winiger,* Damage Caused by Psychological Influence – Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 4/29 no 48.

»legal« causation; this often – as shown by international discussions – results in very considerable confusion. Furthermore, this terminology can lead to causation in the sense of the conditio-sine-qua-non formula being neglected and, improperly, only »legal causation« being examined[9]. Therefore, it is preferable to speak of *causation* only when the conditio-sine-qua-non or but-for test are concerned and of *limitation of imputation* or liability limits when the issue is limitation of liability for damage on the basis of value judgements[10].

II. Interruption of the causal link?

7/6 Above all in the German speaking countries[11], but also in other legal systems[12], reference is regularly had to the interruption of the causal link when compensation for certain damage is to be excluded. Often, such an interruption is assumed when the *action of a third party* has intervened in the causal chain. However, this is anything but persuasive: if the conduct of the person sued for damages facilitated the influence of the third party in the first place, then he provided a conditio sine qua non for this other third party's damaging conduct so that without doubt the causal link must be affirmed.

Oftinger/Stark[13] have thus rightly highlighted the fact that the interruption of the causal link cannot refer to »natural« causation but only to the legal relevance of the condition, ie to adequacy. In any case, the theory of the interruption of the causal link cannot deliver *any explicable justification* for the irrelevance of a condition; it merely establishes a result. Therefore, this pseudo-justification for excluding liability should be avoided at all costs and instead adequacy should be examined[14].

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9 Cf *Zimmermann,* Conditio sine qua non in General – Comparative Report, in: Winiger/Koziol/Koch/Zimmermann, Digest I 1/29 no 2; *Koziol* in: Tichý, Causation 66 f.

10 Cf Art 3:201 PETL.

11 See *Deutsch,* Haftungsrecht[2] no 155 ff; *Oftinger/Stark,* Haftpflichtrecht I[5] 154 f; OGH 1 Ob 82/72 in JBl 1973, 151.

12 See *von Bar,* Deliktsrecht II no 462 ff; *Brüggemeier,* Haftungsrecht 30 f, emphasises that this legal concept is recognised in most private legal systems; *Wurmnest,* Grundzüge eines europäischen Haftungsrechts (2003) 159 ff, points to German, English and French law; on English law *Rogers,* Keeping the Floodgates Shut: »Mitigation« and »Limitation« of Tort Liability in the English Common Law, in: Spier (ed), The Limits of Liability (1996) 91 f; *Rogers,* Causation under English Law, in: Spier, Unification: Causation 40. With criticism of this theory *Hart/Honoré,* Causation in the Law[2] (1985) 495 ff.

13 Haftpflichtrecht I[5] 154.

14 Cf OGH 1 Ob 65/01t in JBl 2001, 656; 2 Ob 314/02v in ZVR 2004/37.

III. Adequacy

7/7 The theory of adequacy has gained the greatest acceptance as regards limiting the damage. It was originally understood as a theory of causation; in truth, however, it is – as already mentioned – a *theory of liability based on value judgements*[15]. It attempts to find *objective* criteria to determine which damage falls into the damaging party's area of responsibility; ie, which part of the damage caused is imputable to the liable party. The subjective abilities of the damaging party himself, which are relevant with respect to fault, play no role when it comes to this objective delimitation[16].

Although the adequacy theory comes in many variations, there is a common feature, as liability for *atypical damage,* which could only have arisen due to a coincidental, objectively unforeseeable combination of circumstances, is precluded. According to *Larenz*[17], the deeper reason for excluding responsibility for this sort of remote damage is that logically speaking it cannot be considered to have been controlled by the actor in question and thus is *not* traceable to his free *self-determination. F. Bydlinski*[18] also highlights the connection to the *notion of deterrence:* when it comes to consequences of damage that could not objectively have been expected to result from certain conduct, imposing liability for such cannot have any motivating influence on the conduct of potential liable parties[19].

7/8 This justification is sufficient, insofar as adequacy is applied as a restriction on fault-based liability. In the field of *liability without fault,* on the other hand, it is not enough since liability for dangerousness does not depend on the controllabil-

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15 *Bienenfeld,* Die Haftung ohne Verschulden (1933) 170; *F. Bydlinski,* Schadensverursachung 59 f; *Cantzler,* Die Vorteilsausgleichung beim Schadensersatzanspruch, AcP 156 (1957) 43 ff; *Larenz,* Schuldrecht I[14] § 27 III b; *Lindenmaier,* Adäquate Ursache und nächste Ursache, ZHR 113 (1950) 239; *Spickhoff,* Folgenzurechnung im Schadensersatzrecht: Gründe und Grenzen, in: E. Lorenz (ed), Karlsruher Forum 2007 (2008) 36. OGH 2 Ob 27/91 in JBl 1992, 255; 2 Ob 46/93 in ZVR 1995/73; 2 Ob 314/02v in ZVR 2004/37.

16 Thus, also expressly OGH 3 Ob 57/74 in JBl 1974, 372; 2 Ob 259/74 in ZVR 1975/158; 2 Ob 20/76 in ZVR 1977/58; cf further 4 Ob 216/99i in EvBl 2000/41.

17 *Larenz,* Schuldrecht I[14] § 27 III b; *idem,* Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung (1927). Likewise *Bienenfeld,* Haftung 170 f; *F. Bydlinski,* Schadensverursachung 60; *Cantzler,* AcP 156, 45 f; *H. Lange,* Begrenzung der Haftung für schuldhaft verursachte Schäden? Gutachten 43. Deutscher Juristentag I/1 (1960) 11.

18 Schadensverursachung 60; see also *Spickhoff* in: E. Lorenz (ed), Karlsruher Forum 2007, 40 with additional references.

19 *Kramer,* Das Kausalitätsproblem im österreichischen und schweizerischen Unfallversicherungsrecht, Floretta-FS (1983) 695, does not find this justification persuasive; rather the issue is the demarcation of spheres of risk. If *Kramer* does not wish to take the lack of liability of the damaging party as a basis and instead wants to impute non-adequate consequences to the victim's general risk of life (cf also *Mädrich,* Das allgemeine Lebensrisiko [1980]), then this merely looks at the same problem from the other side and the criteria decisive for drawing the boundaries are not disclosed.

ity of the damage. The notion of deterrence does play a role in the field of liability based on dangerousness (see above no 3/6), however, this is necessarily less significant than in the field of fault-based liability and hence, can hardly serve to justify the limitation on liability by itself. Some voices[20] accordingly support the opinion that the limitation on liability with the help of the adequacy theory lacks intrinsic justification, as soon as the duty to compensate is not based on misconduct.

In academic writing[21] and case law[22], however, the adequacy theory is often expressly drawn on in order to limit the consequences of damage in the field of liability based on dangerousness. This further-reaching view is in effect well founded. This is because a limitation appears to be just as appropriate in respect of liability based on dangerousness: in this context, liability is no longer justified either if in the specific case it was not foreseeable that such results of damage arise from the particular source of danger, as the danger was only rendered relevant to the damage that occurred by an extraordinary chain of circumstances. The connection to the dangerousness in respect of which liability was determined seems so remote in this respect, and the result of the damage so unusual, that the dangerousness typical in a completely different way can no longer justify liability.

7/9 However, adequacy does not always apply to restrict the liability for damage: in fact it is possible that on the basis of individual rules *liability* is also imposed for very *atypical damaging consequences*[23]. In this manner, eg, it is assumed that under §§ 460, 965, 979, 1311 ABGB there is also liability for non-adequate damage[24]. The statutory wording, however, does not provide any basis for this view. The phrase that there is liability for all harm that would not otherwise have ensued (§ 1311 ABGB) only expresses the criterion of conditio sine qua non. The further statement of the cited provisions, to the effect that there is also accountability for the coincidence occasioned by fault only means that the fault must not extend to any and all consequences of the damaging event (see above no 7/3).

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20 BGH in BGHZ 79, 259; NJW 1982, 1046 and 2669; *H. Lange,* Gutachten 43. DJT 11; cf also *Deutsch,* Haftungsrecht[2] no 797; *Larenz,* Verhandlungen des 43. Deutschen Juristentages II/C (1960) 50; *Michaelis,* Beiträge zur Gliederung und Weiterbildung des Schadensrechts (1943) 89 f, 100; *J.G. Wolf,* Der Normzweck im Deliktsrecht (1962) 2.

21 *Apathy,* EKHG – Kommentar zum Eisenbahn und Kraftfahrzeughaftpflichtgesetz (1992) § 1 no 10; *Bienenfeld,* Haftung 261; *Lindenmaier,* ZHR 113, 216; *Spickhoff* in: E. Lorenz (ed), Karlsruher Forum 2007, 43 ff; *Stoll,* Adäquanz und normative Zurechnung bei der Gefährdungshaftung, 25 Jahre Karlsruher Forum, Beiheft zu VersR 1983, 184. *Danzl,* EKHG[8] (2007) § 1 Anm 11.

22 OGH 6 Ob 14/60 in ÖRZ 1960, 101; RG in RGZ 158, 34.

23 Cf *H. Lange,* Adäquanztheorie, Rechtswidrigkeitszusammenhang, Schutzzwecklehre und selbständige Zurechnungsmomente, JZ 1976, 200; *Lange/Schiemann,* Schadensersatz[3] § 3 VII 3; *Larenz,* Lehrbuch des Schuldrechts I[14] (1987) § 27 III b 2; *Stoll,* 25 Jahre Karlsruher Forum, Beiheft zu VersR 1983, 187.

24 *F. Bydlinski,* Schadensverursachung 64 FN 149; *Gschnitzer* in Klang, ABGB IV/1[2], 687; OGH 8 Ob 187/80 in ZVR 1981/221; 2 Ob 49/89 in ZVR 1990/88.

F. Bydlinski[25] considers there is liability in the absence of adequacy under §§ 460, 965, 979 and 1311 because the damage is sustained by the direct object of the protection offered by the violated law. Following this line, however, there is not always liability without adequacy when it comes to the application of § 1311, as at least in the first two cases of § 1311 sentence 2 the damage must not always have been sustained by a direct object of protection but instead such may also be consequential damage.

7/10 For this reason it is necessary to use a somewhat different formulation: if the law prohibits certain actions in order to protect goods, the person breaching such law is also liable even if the damage incurred to the protected good was not adequate in the event that the *behavioural rule* is intended to avert any additional possibility of damage, however remote. By way of exception, the fact that the occurrence of the damage was not foreseeable even to an objective observer cannot exculpate the liable party, as the legislature has set a different boundary this time. The object of protection does not need to be any particular legal good; rather a protective law may simply be aimed at preventing damage to pecuniary interests by a particular type of conduct. Insofar as a norm is aimed at preventing even *abstract endangerment,* adequacy, which is based on specific endangerment, becomes irrelevant[26]. Examples of such behavioural rules include the protective rules laid out in §§ 460, 965 and 979 and in § 1311 sentence 2 case 2 as well as case 3: very particular types of conduct are described, that are intended to preserve the direct object of protection from additional, albeit unforeseeable, risks.

7/11 The idea that §§ 460, 965, 979, 1311 sentence 2 case 3 provide liability extending beyond the limits of adequacy is perhaps also based on the assumption that the perpetrator always acts intentionally in this context. In the case of intention, the adequacy boundary is indeed further-reaching (see below no 8/9). Due to the interplay between the degree of fault and the adequacy boundary, the following distinction must also be made: if the factual elements of the offence were realised merely negligently, then consequently, in my opinion, even in the above-cited cases the damaging party would only be liable for adequate damage.

7/12 The prevailing adequacy theory has a weakness, which above all *Wilburg*[27] has criticised: »Its weakness lies in the rigidity of the principle that only distinguishes between granting and denying compensation.« *Wilburg* expounds that in reality adequacy is only a relative term, which admits of *gradations.* Depending on the

25 Schadensverursachung 64 FN 149.

26 Thus, *Deutsch,* Begrenzung der Haftung aus abstrakter Gefährdung wegen fehlender adäquater Kausalität? JZ 1966, 556; *idem,* Haftungsrecht² no 315; *Brunner,* Die Zurechnung der Schadenersatzpflicht bei Verletzung eines »Schutzgesetzes« gem § 1311 ABGB, ÖJZ 1972, 116 f.

27 Elemente 242 ff; likewise *F. Bydlinski,* Zum gegenwärtigen Stand der Kausalitätstheorie im Schadensrecht, JBl 1958, 5 ff; *idem,* Schadensverursachung 62; *Karollus,* Schutzgesetzverletzung 380 ff. Cf also *H. Lange,* Gutachten 43. Deutscher Juristentag I/1 13.

foundations of the responsibility, *Wilburg* wants to extend liability to more or less adequate consequences and thus substitute the rigid either/or result with considerations having regard to the structure of the law of tort[28]. This idea was taken up by § 1310 (1) Austrian Draft: the weight of the grounds for liability and the advantages gained by the liable party must also be taken into consideration when determining the extent of responsibility.

Such efforts to make the notion of adequacy more *flexible* may also be observed in German law[29]. However, in Germany the connection between the question of what consequences should still be imputed to the perpetrator and the gravity of the grounds for liability has not been recognised; instead refuge has been taken to the vague ideas of equity and the principle of good faith (§ 242 BGB)[30], without any express indication of which criteria are material for the assessment.

7/13 In accordance with the theory of *Wilburg,* the limits of adequacy must often be set differently depending in particular on the *protective purpose* of the rule[31], the *gravity of the wrongfulness* and the *degree of fault.* For instance, if the damaging party acted intentionally, adequacy must be extended further than in the case of negligence[32]. It should be considered whether, when all other elements of liability are also fulfilled in full, there should be unlimited accountability even for very remote consequences in the case of intention and if the only limitation should be the purpose of the rule. This is in any case absolutely without doubt if the perpetrator deliberately tried to attain precisely the very improbable consequence in question[33].

7/14 According to *F. Bydlinski*[34]*,* increased adequacy is necessary for liability in the case of a *reduced causation requirement,* in order to balance out merely »potential« causation (see above no 5/79). The event must feature a strong, specific risk, he argues, in order to be able to found liability in the case of alternative, cumulative or supervening causation. If the damaging party accordingly is liable for potential causation only provided that his conduct presented the risk of damage in a

28 Thus, also *F. Bydlinski,* System und Prinzipien 199 f; *Schilcher/Kleewein,* Österreich, in: von Bar (ed), Deliktsrecht in Europa (1994) 67; *Kocholl,* Adäquanz – Anforderungen an die Vorhersehbarkeit, ÖJZ 2009, 583 ff.

29 However, cf also *van Dam,* Tort Law 277; references to other legal systems also in *Koziol,* Natural and Legal Causation, in: Tichý, Causation 65 f.

30 BGH in BGHZ 3, 261; NJW 1952, 1010; *von Caemmerer,* Kausalzusammenhang 19; *Lindenmaier,* Adäquate Ursache und nächste Ursache, ZHR 113 (1950) 242. Cf on this *F. Bydlinski,* JBl 1958, 5 f.

31 See *Stoll,* 25 Jahre Karlsruher Forum, Beiheft zu VersR 1983, 186 ff; *Karollus,* Schutzgesetzverletzung 381.

32 In positive law § 338 ABGB provides a clear basis for this: if the person in possession has delayed the return of the thing to the owner by malicious litigation, then he himself is liable for any coincidental deterioration of the thing, ie for any atypical consequence of his breach of the duty to surrender.

33 Cf *H. Lange,* JZ 1976, 200.

34 Schadensverursachung 75 f.

profound, concrete manner, then the question also arises as to whether he is also liable for the more remote consequential damages which arose then to an even narrower extent than in the case of fully proven causation. In my opinion this must be answered in the negative as the counterbalance to the reduced causation requirement is already provided for by the fact that a greater degree of dangerousness of conduct is already required to justify liability for the »direct« damage.

IV. The protective purpose of the rule

A. The theory of protective purpose in general

7/15 In Austria, academic theory has also propagated another limitation on liability[35], sometimes instead of and sometimes alongside adequacy; this second limitation proceeds from the *purpose of the rule on which liability is based*[36]. Above all *Ehrenzweig*[37] wanted to take the protective scope of the rule into account by reference to the relativity of wrongfulness. As, however, the assessment of wrongfulness is based on human conduct (see above no 6/3) and this can only be either wrongful or legitimate, it is better not to speak of wrongfulness being relative but instead say that wrongful behaviour only leads to liability for such damage caused as is covered by the protective purpose of the rule prohibiting such conduct, as this is directed against preventing precisely this harm. Austrian case law has also long recognised this theory of the protective purpose of the rule[38], but sometimes conceals it behind the distinction between direct and indirect damage[39].

The theory of protective purpose has also been largely taken on by German case law and theory[40]. However, significance is actually accorded by other legal systems too[41] to the theory of protective purpose of the infringed rule, although

35 *Rabel,* Das Recht des Warenkaufs I (1936) 495 ff; *Wilburg,* Elemente 244 ff; *F. Bydlinski,* Schadensverursachung 63; *Koziol,* Haftpflichtrecht I³ no 8/17 ff with additional references.

36 § 1310 Austrian Draft expressly mentions the protective purpose of the rule.

37 System II/1² 48; cf also *Esser,* Schuldrecht I² (1960) § 61 III.

38 See eg, 4 Ob 631/88 in SZ 61/269; 1 Ob 7/89 in SZ 62/73 = JBl 1991, 172 *(Rebhahn);* 1 Ob 44/89 in SZ 63/166; 1 Ob 173/03b in JBl 2004, 793.

39 Eg OGH 1 Ob 665/34 in SZ 16/202; 2 Ob 330/61 in SZ 34/112; 2 Ob 37/93 in RdW 1994, 103; 2 Ob 22/97t in ZVR 2000/40; 3 Ob 278/02g in JBl 2003, 582 = ÖBA 2004, 628 *(Karollus).*

40 *Von Caemmerer,* Kausalzusammenhang 12 ff; *H. Lange,* Gutachten 43. DJT 42 f; *Lange/Schiemann,* Schadensersatz³ § 3 IX.

41 *Von Bar,* Deliktsrecht II no 475 ff; *Cousy/Vanderspikken,* Causation under Belgian Law, in: Spier, Unification: Causation 25 f; *van Dam,* Tort Law 277 ff; *Deakin/Johnston/Markesinis,* Markesinis & Deakin's Tort Law⁶ (2007) particularly 389 ff; *Rogers,* Causation under English Law, in: Spier, Unification: Causation 40 f. Critically, however *Galand-Carval,* Causation under French Law, in: Spier, Unification: Causation 55.

this is obscured by talk of the necessity of a direct cause. Furthermore, the PETL mention the protective purpose in Art 3:201 lit e.

7/16 Some try to *integrate the adequacy theory into the protective purpose theory*[42]. This seems surprising insofar as the two theories seek to apply limitations from very different standpoints: the adequacy theory examines whether specific behaviour seems to present a risk in relation to certain damage in the eyes of an objective observer; the protective purpose of the rule theory, on the other hand, starts by asking what damage the legislature was reasonably trying to prevent by means of a particular behavioural rule. The dangerousness of conduct is thus subjected in one case to specific and in the other to general, abstract assessment.

Nonetheless, it could be argued[43] that ultimately the notion of the protective purpose alone is decisive as rules are not set up to protect against consequences of damage that lie beyond the bounds of all probability. Since, however, this is not inferred from the individual liability rule but is a very general rule, this opinion amounts to the same in the end, namely that in general according to meaning and purpose of the law of tort, there is only liability for adequate damage.

7/17 It is often assumed that the theory of protective purpose is only applicable in the field of fault-based liability and, thus, only the connection with wrongfulness is discussed. As the purpose of the rule theory is merely a facet of the very general principle of *teleological interpretation* of rules, it is however not only applicable to limit liability in this field but also in the entire field of the law of damages, above all also in the field of strict *liability*[44].

7/18 The purpose of the rule is always significant in a multitude of ways, namely for *different scopes of protection*[45]: firstly, the rules must be aimed specifically at the protection of the victim (*personal* scope of protection; *persönlicher* Schutzbereich)[46]; the victim covered by the protective scope of the rule may be designated the direct victim[47]. Secondly, the type of damage must also be covered by the purpose of the rule (*subject matter* protective scope; gegenständlicher Schutzbereich)[48]; thirdly, the way the damage was incurred is relevant, because it is necessary that

42 See on these attempts *Koziol,* Haftpflichtrecht I³ no 8/76; *Spickhoff,* Folgenzurechnung im Schadensersatzrecht: Gründe und Grenzen, in: E. Lorenz (ed), Karlsruher Forum 2007 (2008) 21 f.

43 Thus, eg, *Lange,* Gutachten 43. Deutscher Juristentag I/1 59.

44 This is emphasised, eg, by *Esser/Schmidt,* Schuldrecht I/2⁸ § 33 III 1 b; *Lange,* Gutachten 43. DJT, 54; *Hauss,* Referat, Verhandlungen des 43. DJT II/C (1960) 30; OGH 2 Ob 17/94 in ZVR 1995/135.

45 Thus, already *Rümelin,* Die Verwendung der Causalbegriffe im Straf- und Civilrecht, AcP 90 (1900) 304 ff; cf on this *R. Lang,* Normzweck und Duty of Care (1983) 33 f, 47 f, 82 ff; *Karollus,* Schutzgesetzverletzung 339 f; *Spickhoff* in: E. Lorenz (ed), Karlsruher Forum 2007, 24 ff; *G. Wagner* in MünchKomm, BGB V⁵ § 823 no 286 ff; OGH 7 Ob 53/82 in SZ 56/80.

46 Cf OGH 1 Ob 679/86 in SZ 60/2 = JBl 1987, 308. For public liability law see *Rebhahn,* Amtshaftung und Normzweck, JBl 1981, 512 with additional references.

47 Cf *Koziol,* JBl 1971, 106; OGH 1 Ob 34/82 in SZ 55/190.

48 Thus, also the OGH 2 Ob 361/66 in JBl 1968, 35; 7 Ob 53/82 in SZ 56/80.

the risk that manifested was also covered by the rule (*modal* protective scope; modaler Schutzbereich)[49].

7/19 The general limitation of liability for damage by the purpose of the rule, ie according to the aim and meaning of the provision imposing liability, arises – as has already been stated – very generally from the fact that it is recognised today that rules must be construed *teleologically*[50]*;* accordingly, the relevant protective purpose of the rules under tort law must also be determined[51], and thus the general purposes of the law of torts also come into play[52]. When it comes into question which consequences of damage are to be imputed to the liable party, therefore, it is always necessary to examine the motivation behind the rule imposing liability, to see which damage the purpose of the law targeted in imposing a duty to compensate[53].

7/20 It must also be stressed that the protective purpose of the rule does not create *any rigid boundaries* either: often, a small core area of damage, which is in any case covered by the protective scope as well as a large periphery that does not fall so clearly into the protective scope can be determined. Depending on the *weight of the other criteria for liability,* in particular the gravity of the fault, the damage must be imputed to a broader or narrower extent[54].

7/21 Very generally, when determining the protective scope the following must be taken into consideration: if due to an infringement against a protective rule or due to infringement of tortious or contractual duties of care, conduct is *wrongful,* then it seems *more reasonable also to impute consequential damages* to the damaging party, even though he would not be responsible for bringing them about separately. Hence, even in the tort area, damage to another person's property triggers liability for the pure economic losses subsequently sustained, eg lost profit (see above no 6/57). The fact that, eg, a far-reaching protection of pure economic interests is recognised in the field of consequential damage, although such would not be protected on their own, can be explained by the fact that the conduct of

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49 *Rümelin,* AcP 90, 306. Likewise OGH in 1 Ob 54/87 in SZ 61/43; 1 Ob 22/92 in SZ 66/77.

50 *Larenz/Canaris,* Methodenlehre der Rechtswissenschaft[3] (1995) 153 ff*; F. Bydlinski,* Methodenlehre[2] 436 ff. OGH eg 2 Ob 75/94 in SZ 67/198 = JBl 1995, 260. See further on determination of protective purpose *F. Bydlinski,* Schadensverursachung 63 f; *Karollus,* Schutzgesetzverletzung 347 ff, in particular 354 ff on the relationship between subjective-historical and objective teleological interpretation.

51 *Schmiedel,* Deliktsobligationen nach deutschem Kartellrecht (1974) 140 ff, and *R. Lang,* Normzweck 49 f, emphasises that it only concerns the determination of the protective purpose and thus that only one aspect of the task is looked at, construing rules according to their purposes.

52 See *R. Lang,* Normzweck 113 ff.

53 On the methodology of determining the protective purpose, see in detail *Schmiedel,* Deliktsobligationen 138 ff; cf further *Burgstaller,* Das Fahrlässigkeitsdelikt im Strafrecht (1974) 98 f; *Welser,* Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 43 ff.

54 See *Wilburg,* Elemente 245. Cf also OGH 2 Ob 575/91 in SZ 65/8.

the perpetrator is in any case already wrongful due to the infringement of other goods when it comes to consequential damage and the protection of the economic interests does *not* have to be achieved by first legislating for *additional behavioural duties* that would lead to further, considerable limitation of the freedom of movement[55].

B. The special problem of lawful alternative conduct

7/22 In the case of lawful alternative conduct[56], the issue is whether a perpetrator who has acted wrongfully is liable for the damage caused even if *he would have caused the same harm otherwise by lawful conduct*[57]. A well-known example is the case[58] in which a car driver overtakes a cyclist leaving too little space on the side and crashes into him, but the same damage would have occurred had he allowed enough space as the cyclist was drunk and did not keep to his side, instead lurching out far to the middle. Very often debate turns on situations when a doctor operates (without medical malpractice) on a patient without adequately informing him of the risks, but disadvantageous consequences ensue and the doctor defends himself against the patient's compensation claim by saying the patient would have consented in any case to the procedure had he been properly informed and the same negative results would have ensued[59]. A case where a trade union started a strike without observing the stipulated waiting period of five days intended for negotiations attracted a great deal of attention; their defence against the compensation claims was that the negotiations would certainly have failed[60]. Another controversial

55 On this argument cf already *Taupitz,* Haftung für Energieleiterstörungen durch Dritte (1981) 136, 140 ff; *Karollus,* Neues zur Konkursverschleppungshaftung und zur Geschäftsführerhaftung aus culpa in contrahendo, ÖBA 1995, 12 FN 48.

56 *P. Bydlinski,* Schadensersatzrechtliche Überlegungen anlässlich eines Verkehrsunfalls, ZVR 1984, 194 f; *von Caemmerer,* Überholende Kausalität 30 ff; *Gotzler,* Rechtmäßiges Alternativverhalten im haftungsbegründenden Zurechnungszusammenhang (1977); *Grechenig/Stremitzer,* Der Einwand rechtmäßigen Alternativverhaltens – Rechtsvergleich, ökonomische Analyse und Implikationen für die Proportionalhaftung, RabelsZ 73 (2009) 336 ff; *Hanau,* Die Kausalität der Pflichtwidrigkeit (1971); *Karollus,* Schutzgesetzverletzung 391 ff; *Keuk,* Vermögensschaden und Interesse (1972) 59 ff; *Kleewein,* Hypothetische Kausalität und Schadensberechnung (1993) 177 ff; *Koziol,* Rechtmäßiges Alternativverhalten – Auflockerung starrer Lösungsansätze, Deutsch-FS (1999) 179; *Lange/Schiemann,* Schadensersatz[3] § 4 XII 1 ff; *Münzberg,* Verhalten und Erfolg 128 ff; *Ulsenheimer,* Das Verhältnis zwischen Pflichtwidrigkeit und Erfolg bei den Fahrlässigkeitsdelikten (1965); *Welser,* ÖJZ 1975, 43 ff.

57 The simple possibility of bringing the damage about lawfully is by no means exculpatory; it is necessary that the same harm would otherwise in fact have been brought about by lawful behaviour: BGH in NJW 1993, 520; *Oetker* in MünchKomm, BGB II[5] § 249 no 215.

58 BGH in BGHSt 11, 1 = JZ 1958, 280.

59 See on this *Giesen,* Arzthaftungsrecht[4] (1995) 199 ff, 411 ff.

60 See the decision of the German Federal Labour Court (Bundesarbeitsgericht) BAGE 6, 321.

case was when a gendarmerie officer arrested a suspect without an arrest warrant and in the proceedings for state liability the state's defence was that the competent judge would in any case have ordered the arrest[61].

7/23 Above (no 5/122 f) it has already been mentioned that, at first glance, cases of lawful alternative behaviour seem to belong to the problem group of cumulative or hypothetical *causation*[62], but that there are differences[63]: in cases of supervening causation the issue is that two events, both of which really took place and were thus specifically dangerous, were potentially causal for the damage. The issue when it comes to lawful alternative behaviour is, however, that only one event really took place and this really brought about the damage; the second event never took place, it is *merely hypothesised* and has thus not in fact posed any specific risk.

7/24 This is why in cases of lawful alternative conduct the perpetrator can in principle only be considered liable for *causing* the damage if his conduct consists in *actions* (see above no 5/122). In the case of *omissions,* on the other hand, his liability would have to be rejected for *lack of causation* if the same harm would also have arisen had he taken action in accordance with his duties[64]: an omission is only causal if taking specific action would have prevented the occurrence of the damage and this action would have been possible[65]. Liability – at least partial – of the omitter can thus only come into question if the cases of lawful alternative behaviour are seen as a subgroup of potential causation and decided according to the rules of supervening causation (see above no 5/110 ff).

Insofar as in cases of lawful alternative behaviour the actual *actions taken* were a conditio sine qua non for the damage, then there is no question of causation at issue but instead a *different kind of liability problem*[66]*:* the widespread view is that this is a question regarding the connection between the wrongfulness and the ensuing result[67]. The question arises as to whether pursuant to the *purpose of the behavioural rule* the perpetrator who has acted wrongfully should be liable for the harm that would also have been brought about by lawful behaviour.

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61 OGH in 1 Ob 35/80 in SZ 54/108 = JBl 1982, 259; 1 Ob 30/86 in SZ 59/141.

62 In favour, eg, *Oetker* in MünchKomm, BGB II[5] § 249 no 211 f.

63 Cf *Deutsch,* Haftungsrecht[2] no 186; *Kleewein,* Hypothetische Kausalität 177 f; *Mayrhofer,* Schuldrecht I[3] 281.

64 *Burgstaller,* Das Fahrlässigkeitsdelikt im Strafrecht (1974) 131 f; *Karollus,* Schutzgesetzverletzung 392 f; *Mayrhofer,* Schuldrecht I[3] 281; *Welser,* Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 44; OGH eg 1 Ob 785/83 in SZ 56/181 = JBl 1984, 554; 1 Ob 520/93 in JBl 1994, 338 = ZVR 1994/38; 7 Ob 238/04d in JBl 2009, 247.

65 Cf on this *Koziol,* Wegdenken und Hinzudenken bei der Kausalitätsprüfung, RdW 2007, 12.

66 See on this also *Burgstaller,* Fahrlässigkeitsdelikt 132. Das Problem verkennend *Gotzler,* Alternativverhalten 104 ff.

67 Likewise *Deutsch,* Haftungsrecht[2] no 188; *Gotzler,* Rechtmäßiges Alternativverhalten im haftungsbegründenden Zurechnungszusammenhang (1977) 139 ff; *Welser,* ÖJZ 1975, 44. *Burgstaller,* Fahrlässigkeitsdelikt 78 f, 132, on the other hand, takes the position there is a separate liability problem.

7/25 The great majority take the view that the defence of possible lawful alternative behaviour is significant and leads to a *full exemption from liability* for the perpetrator: if certain behaviour is prohibited by the legal system or by contract and this happens only in order to prevent damage, then the basis for this behavioural rule no longer stands if the same damage would have been brought about anyway by lawful behaviour; as the aim of avoiding the damage cannot be achieved, the wrongfulness of the behaviour is irrelevant, according to this view[68]. Nonetheless, it must be take into consideration that even from this perspective there is no exemption from liability insofar as the damage was aggravated precisely by the wrongfulness of the behaviour.

7/26 According to the doubtless still prevailing view[69], however, the defence of lawful alternative behaviour does not lead to any exemption from liability, ie the perpetrator is *fully liable,* if the behavioural rule is not directed so much at preventing the damage but instead is intended to exclude certain *types of behaviour;* thus, if the rule definitely binds the interference with the third-party legal good to particular conduct. If one wanted to take into account the defence of lawful alternative behaviour in this context, it would be argued that this would give everybody the opportunity to circumvent the legal process stipulated by the legal system and endowed with many security safeguards that usually extends through several instances, or – in particular when it comes to medical interventions – the affected person's own decision. Hence, according to this view, the compensation claim also has a considerable deterrence function.

7/27 *Karollus*[70] rejects the approach taken by prevailing theory and case law and comes to some different conclusions by adopting the *»risk increase theory«*[71] developed in criminal law: he argues that for the objective liability of the result it is necessary, but also sufficient, that the specific, wrongful behaviour increased the risk of occurrence of the result as opposed to the hypothesised lawful alternative behaviour.

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68 Cf *von Caemmerer,* Überholende Kausalität 31 f; *Esser/Schmidt,* Schuldrecht I/2[8] § 33 III 2 a; *Gotzler,* Alternativverhalten 89 ff; *Münzberg,* Verhalten und Erfolg 137; OGH 2 Ob 52/56 in ZVR 1956/132; 8 Ob 38/78 in ZVR 1978/314; 1 Ob 8/78 in SZ 51/126 = JBl 1979, 487; 1 Ob 22/91 in JBl 1992, 316; 2 Ob 21/92 in ZVR 1993/122.

69 *W. Berger,* Die zivilrechtlichen Folgen von Grundrechtsverletzungen in Österreich, EuGRZ 1983, 241; *von Caemmerer,* Überholende Kausalität 31 f; *Deutsch,* Haftungsrecht[2] no 193; *Kleewein,* Hypothetische Kausalität und Schadensberechnung (1993) 181 ff; *Lange/Schiemann,* Schadensersatz[3] § 4 XII 4 ff; *Mayrhofer,* Schuldrecht I[3] 281; *Mertens* in Soergel, BGB III[12] Vor § 249 no 164 f; *Schiemann* in Staudinger BGB[2005] § 249 no 104 ff; OGH 1 Ob 35/80 in SZ 54/108; 1 Ob 30/86 in SZ 59/141 = JBl 1987, 244. Dagegen *P. Bydlinski,* Schadensersatzrechtliche Überlegungen anlässlich eines Verkehrsunfalls, ZVR 1984, 196; *Gotzler,* Alternativverhalten 94 f, 121 ff; *Grunsky,* AcP 178 (1978) 333 f; *Harrer* in Schwimann, ABGB VI[3] §§ 1301, 1302 f no 54; *Keuk,* Vermögensschaden und Interesse (1972) 68 f.

70 Schutzgesetzverletzung 399 ff. Following this line OGH 2 Ob 594/95 in RdW 1996, 114.

71 See above all *Roxin,* Pflichtwidrigkeit und Erfolg bei fahrlässigen Delikten, ZStW 74 (1962) 430 ff; *Burgstaller,* Fahrlässigkeitsdelikt 135 ff.

However, *Hanau*[72] has already rejected the adoption of this theory in civil law on the basis that in the present context the compensation of damage is at issue and not, as in criminal law, a penalty for aggravating a risk. This objection is persuasive despite attempts to counter it by *Karollus:* in criminal law, which is dominated by the penal notion, it may well be appropriate to attach the penalty to the simple engagement in dangerous conduct and not to the occurrence of any particular result. In the law of tort, on the other hand, a duty to compensate can only be imposed if a disadvantageous result, that has actually occurred, can be imputed to the perpetrator. The dangerous, risk-aggravating conduct in itself, ie in the absence of any damage occurring, cannot trigger a duty to compensate as a legal consequence; for in the law of tort – even in *Karollus'*[73] view – the penal and deterrence notions usually do not suffice to justify liability.

7/28 The decisive and correct core of *Karollus'* view, and which is clearly his main crux, consists in any case in the material securing of the result, that the party who has acted in a manner that poses a specific danger, ie increases a risk, and is wrongful, must bear the entire risk of clarifying this, ie the *burden of proof:* this party must prove that the increase of risk had no effect in the case at issue. The division of the burden of proof at the expense of the party who acted wrongfully can certainly be justified with reference to the penal and deterrence notions: behaviour that is dangerous and also presents difficulties in clarifying the issues should indeed be prevented; the risk that it cannot be clarified is better borne by the party who generated it by acting wrongfully than by the victim.

7/29 Thus, even though the basic approach of the prevailing view must still be followed, considerable corrections and clarifications must be made.

According to prevailing opinion, the proven defence that the damage would otherwise have been brought about by lawful alternative behaviour exempts – as already mentioned – the damaging party completely from liability. This outcome corresponds to the majority opinion on the problem of *supervening causation* when a liability-triggering event competes with a coincidence affecting the victim (see above no 5/115). This correspondence is appropriate insofar as the two problem areas are – as explained – not identical but do have *value judgement parallels:* in both cases the issue is that wrongful and culpable behaviour has really brought about harm, which would otherwise have been caused by an event not giving rise to liability. The difference is merely that in the case of supervening cause the second event actually does happen whereas in cases of lawful alternative behaviour

72 Die Kausalität der Pflichtwidrigkeit (1971) 130; cf also *Deutsch,* Begrenzung der Haftung aus abstrakter Gefährdung wegen fehlender adäquater Kausalität? JZ 1966, 557 f.

73 Schutzgesetzverletzung 400. The fact that mere increase of a risk that damage will occur is not enough to provide a basis for a duty to compensate is also shown by the fact that – even according to *Karollus* – liability must be rejected if harm occurred but it is proven that this would have arisen in any case even in the absence of the risk-increasing behaviour at issue.

it remains hypothetical. Both cases therefore concern the value judgement problem of whether the real causer should be exculpated by a coincidence that did not have any real impact. The question of whether according to the purpose of the behavioural rule the damaging party who has acted wrongfully should also be held liable for damage caused or potentially caused by him, which would otherwise anyway have occurred due to an event not triggering liability arises in both the cases of supervening causation and lawful alternative behaviour alike and must be decided alike as there are no relevant differences between the two areas to justify otherwise[74].

7/30 However, according to the view advocated here, this means that the solution in the case of lawful alternative behaviour also depends on whether there is subjective or *objective* – developed from the notion of continuation of a right – assessment. In the latter case it depends on the market value at the time the damage occurred; later – hypothetical – events will no longer be taken into account. Nonetheless, it must be taken into consideration that the value of a thing can already be reduced by the fact that a third party is entitled to eliminate, destroy or change it in a lawful manner.

If in the case of *subjective* assessment of damage in the case of hypothetical causation one assumes with *F. Bydlinski* that damage must be apportioned if an event triggering liability competes as a cause with coincidence analogously to § 1304 ABGB, § 254 BGB (see above no 5/87)[75], ie the damaging party is by no means fully exempt from liability, then this must also apply correspondingly for the area of lawful alternative behaviour: the merely hypothesised other behaviour cannot effect any more extensive exculpation of the perpetrator than a second, real event. The *damage apportionment* also seems appropriate here because the actual event triggering liability is imputable to the damaging party but the hypothesised behaviour which would not trigger liability is imputable to the victim's risk area. It must be borne in mind that the damage apportionment is adjusted to the disadvantage of the victim if, in the case of the hypothesised damage due to lawful alternative behaviour, fault were also to be found against the victim. For instance, if the cyclist veered so much due to culpable drunkenness that the car driver would also have hit him had he observed the regulations on space to be allowed when taking over, then the cyclist must not only bear the coincidence arising in his own sphere but is also liable due to negligent behaviour (see above no 5/88). The apportionment of damage would then be in a ratio of about 3 to 1, at his cost. On the other hand, if an unexpected gust of wind blew him in front of a car engaged in taking over in the proper manner, it would be appropriate to apportion the damage half half.

74 See *Koziol,* Rechtmäßiges Alternativverhalten, Deutsch-FS 180 ff.
75 In favour of apportionment of damage also *Grechenig/Stremitzer,* RabelsZ 73 (2009) 362 ff.

7/31 From the standpoint advocated here, the question at issue as to whether the lawful alternative behaviour does not exculpate the perpetrator at all if he failed to comply with stipulated *procedural rules,* is at least defused because the perpetrator must bear at least part of the damage, although the ratio of the damage apportionment would also depend on the weight of the procedural rule. This makes it all the more easy to accommodate the criticism[76] of the differentiation between rules that primarily seek to avoid the occurrence of damage and those that are aimed above all at compliance with a certain procedure. Specifically, it is very reasonably doubted whether it is possible clearly to distinguish between behavioural rules aimed at preventing a harmful result and behavioural rules that provide for a certain procedure: on the one hand, all rules are aimed at forbidding certain behaviour; on the other hand, every behavioural rule also serves to prevent damage. A clear division of the rules, such as could justify different legal consequences, is thus practically impossible; hence, a sudden switch from full liability to full exemption from liability would be anything but persuasive. It is nonetheless correct that differing significance can be accorded to the legal system's interest in compliance with a certain conduct and that this is highest when a stringently regulated procedure is intended specially to protect high-ranking goods.

7/32 It is in line with this ultimately, when *Karollus*[77] argues for recognising the exclusion of liability exemption in rare exceptional cases: if a result without compliance with the legally stipulated procedure should urgently be prevented, for example because of the ranking of the good at risk, for instance deprivation of liberty without court authorisation, then an exemption from liability based on the defence of lawful alternative behaviour could be precluded. However, this does not mean the defence of lawful alternative behaviour is fully excluded unless special procedures serving the protection of the victim, such as a court detention procedure, have not been complied with at all or fundamental procedural principles have been violated and consequently there has been a grave perversion of justice.

The simple infringement of competence rules or errors of form, on the other hand, cannot preclude the defence of lawful alternative behaviour[78]. Therefore, for instance, the defence would not be completely refused if the trade union began the strike without waiting for the expiry of the five-day deadline intended to provide time for all other possibilities to be exhausted[79].

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76 See in particular *P. Bydlinski,* Schadensersatzrechtliche Überlegungen anlässlich eines Verkehrsunfalls, ZVR 1984, 196; *Karollus,* Schutzgesetzverletzung 405 f.

77 Schutzgesetzverletzung 405 ff.

78 Thus, also *W. Berger,* Die zivilrechtlichen Folgen von Grundrechtsverletzungen in Österreich, EuGRZ 1983, 241; OGH 1 Ob 42/90 in SZ 64/23 = JBl 1991, 647.

79 Thus, *Karollus,* Schutzgesetzverletzung 407. Anders die Entscheidung des deutschen Bundesarbeitsgerichtes BAGE 6, 321. On this *Bötticher,* Zur Ausrichtung der Sanktion nach dem Schutzzweck der verletzten Privatrechtsnorm, AcP 158 (1959/60) 387 ff; *von Caemmerer,* Überholende

7/33 In somewhat more detail on the issue of medical interventions with or *without adequate disclosure to the patient:* if a patient, who was not informed sufficiently of the risks of the operation and thus did not give any effective consent, has suffered damage although there was no medical error, it would seem that prevailing opinion[80] is in favour of exculpation for the doctor if he can prove that the patient would also have consented to the procedure had he been informed duly and properly and thus, that the damage would have occurred in any case.

However, in the prevailing view[81] such a defence is not of significance. The duty to obtain consent has the purpose of preserving the patient's freedom of choice, to make it possible for him to have a detailed discussion and to give him the opportunity perhaps to involve another doctor. Accordingly, the doctor who fails to obtain this consent although it would have been possible, would be accountable for all disadvantageous results of the operation that he ought not to have carried out. In favour of this strict view it can be argued that the particularly highly-ranked right to self-determination over one's own body is at issue. On the other hand, however, it must be borne in mind that by no means all »procedural violations« are so serious as to allow the notion of deterrence to justify unlimited liability. An effective consent, for example, is missing even if the patient is not fully informed about all relevant circumstances, whether because the doctor overlooked something or because he – though not entitled to do so – refrained from giving a complete explanation in the interest of the patient. In the case of *more minor violations,* the generally applicable *apportionment of damage* advocated here is still applied, although the gravity of the violation against the duty to inform must be taken into account; only in the case of very grave violations of duty on the part of the doctor, eg, if he undertakes an operation without making any attempt to procure consent or after a completely inadequate explanation of the risks[82], should the doctor be refused the restriction on liability.

7/34 It may also come, in this respect as in other cases of lawful alternative behaviour, to liability for the *entire* damage: in my opinion, namely, the defence of the

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▹▹ Kausalität 33 f; *Larenz,* Präventionsprinzip und Ausgleichsprinzip im Schadensersatzrecht, NJW 1959, 865; *Niederländer,* Hypothetische Schadensereignisse, JZ 1959, 617.

80 *Schramm,* Der Schutzbereich der Norm im Arzthaftungsrecht (1992) 246 ff with additional references; OGH 1 Ob 42/90 in SZ 55/114 = JBl 1983, 373 *(Holzer);* 1 Ob 651/90 in SZ 63/152 = JBl 1991, 455; 5 Ob 1573/91 in JBl 1992, 391; 1 Ob 532/94 in SZ 67/9 = JBl 1995, 245 = RdM 1994, 121 *(Kopetzki);* 4 Ob 509/95 in JBl 1995, 453 *(J.W. Steiner)* = RdM 1995, 91 *(Kopetzki);* 1 Ob 254/99 f in SZ 72/183 = JBl 2000, 657 *(Jabornegg)*.

81 *Von Caemmerer,* Überholende Kausalität 34 ff; cf also *Deutsch,* Schutzbereich und Tatbestand des unerlaubten Heileingriffs im Zivilrecht, NJW 1965, 1985; *Giesen,* Arzthaftungsrecht[4] 199 ff, 411 ff.

82 Also the BGH in BGHZ 106, 391; NJW 1991, 2346; as well as *Medicus* in Staudinger, BGB[1980] § 249 no 114 hence want to exclude the defence only in the case of »significant infringement of doctors' duties«; *Mertens* in Soergel, BGB III[12] Vor § 249 no 166, only when consent is completely lacking.

lawful alternative behaviour is largely inapplicable if the perpetrator *deliberately* decided to engage in the prohibited behaviour although there was a lawful option available to him. When wrongful behaviour is chosen deliberately, the notion of deterrence has greater weight so that full liability of the damaging party is justified even when the violations of the behavioural rules are not so weighty. This is true not only when procedural rules are deliberately disobeyed but also when damage is intentionally inflicted by non-compliance with other behavioural regulations. Therefore, eg, those competitors who deliberately inflict harm by unfair competition practices must pay compensation without being able to invoke as a defence that the same damage would have been inflicted by fair methods of competition.

V. Intervening wilful act by a third party

7/35 Above all *Larenz*[83] has emphasised that the objective liability of consequences of damage can also be precluded due to grounds other than lack of adequacy or lack of protective purpose of the rule. He highlighted in particular those cases in which the consequences of damage are based on an *independent decision, not provoked by the process providing a basis for liability,* on the part of the victim himself or a third party. The victim or such third party, he explains, is solely responsible for the further damage brought about by their own independent actions. The liability of the further damage to the first damaging party should no longer be permissible[84] from a value judgement perspective because, on the one hand the secondary conduct of the victim or a third party was not provoked by his behaviour

83 *Larenz,* Lehrbuch des Schuldrechts I[14] (1987) § 27 III b 4; *idem,* Zum heutigen Stand der Lehre von der objektiven Zurechnung im Schadensersatzrecht, Honig-FS (1970) 79. On the matter, accordingly, *Deutsch,* Regreßverbot und Unterbrechung des Haftungszusammenhanges, JZ 1972, 551, who, however, does not seem happy about a »break in the causal line«; cf also *Friese,* Haftungsbegrenzung für Folgeschäden aus unerlaubter Handlung (1968); *Oetker* in MünchKomm, BGB II[5] § 249 no 151 ff; *Schiemann* in Staudinger, BGB[2005] § 249 no 58 ff. Kritisch *Niebaum,* Die deliktische Haftung für fremde Willensbetätigungen (1977) 57 ff; *Zimmermann,* Herausforderungsformel und Haftung für fremde Willensbetätigung nach § 823 I BGB, JZ 1980, 10. On the parallel criminal law liability problem see *Burgstaller,* Erfolgszurechnung bei nachträglichem Fehlverhalten eines Dritten oder des Verletzten selbst, Jeschek-FS (1985) 357.

84 A rather secondary question is whether the issue at stake here regarding exclusion of liability can be allocated to the field of protective purpose. It at least concerns one group dominated by a uniform idea that accordingly can be treated separately. Cf also *Deutsch,* JZ 1972, 553. In 2 Ob 227/21 in SZ 44/188 the OGH decided a case of this type by relying on the protective purpose of the rules.

and thus there is no »internal connection«, on the other hand the voluntary decision on the part of the victim or third party falls very clearly into their area of responsibility[85].

7/36 The formula regarding the provocation of the decision is, however, not enough on its own in order to provide a basis for the decision in the individual case. Just as when determining wrongfulness in cases of inducing a third party to engage in a damaging act, ie psychological causation[86], here too a *comprehensive evaluation of interests* must take place instead. If this shows that the criteria inculpating the victim or third party far outweigh those inculpating the first perpetrator, then it no longer seems appropriate still to impute the damage to such.

7/37 Criteria for liability usually do outweigh if the third party very deliberately, ie with intention, brought about certain damage[87]; but other criteria can lead to the opposite decision. If the custodian of a deposited thing does not keep it well, then he will by no means be freed from liability towards the depositor if a third party negligently damages the thing or deliberately takes it away[88]. The person who neglects his duty to supervise a child remains liable towards the child if the child is then intentionally injured by a third party. This is a necessary consequence in both cases as the breached duties have precisely the purpose of preventing such damage. The harm suffered thus lies in the core area of the protective purpose of the behavioural rule violated by the first perpetrator.

If someone is injured by the first perpetrator and then the consequences of the injury are aggravated by a medical error during treatment, then the damaging party who brought about this risk continues to be liable alongside the doctor for the consequences[89]. On the other hand, if the doctor intentionally treats the patient incorrectly, the first perpetrator is no longer accountable for the consequences[90]: firstly, the grounds for liability to the doctor are the strongest conceivable in respect of this part of the damage, secondly, the grounds for liability to the first perpetrator are very weak: his fault related only to the first injury and, moreover, only a very small degree of adequacy still applies.

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85 Cf *Friese,* Haftungsbegrenzung 247 f. Thus, in the so-called grass verge cases (»Grünstreifenfällen«) BGH in BGHZ 58; 162, 167 = NJW 1972; 904; on this *Oetker* in MünchKomm, BGB II[5] § 249 no 153 f with additional references.

86 On this *Koziol,* Haftpflichtrecht I[3] no 4/52 ff.

87 This has long been recognised in the field of contributory negligence: if the damaging party acted intentionally then the slight negligence of the victim is no longer relevant and such is entitled to compensation for the whole damage. See above no 6/211.

88 See *Deutsch,* JZ 1972, 553.

89 More reticent *Zimmermann,* JZ 1980, 15. *Burgstaller,* Das Fahrlässigkeitsdelikt im Strafrecht (1974) 119, considers the consequences should not be imputed against the first perpetrator if there is gross negligence by the doctor.

90 Thus, also *Burgstaller,* Fahrlässigkeitsdelikt 117.

7/38 A good example of the independent intervention of a third party, which excludes the liability of the first perpetrator, is presented by *Friese*[91]*:* a victim culpably injured by the first perpetrator is attacked and robbed precisely because he is physically disabled by the earlier injury. However, problems arise, on the other hand, in the event that the first perpetrator negligently injures someone and such is then robbed by a third party while lying unconscious[92]. Nonetheless, in this case too, the first perpetrator would have to be freed from liability for the theft: the *intentional* infliction of damage by the thief far outweighs the first perpetrator's fault, which related only to the injury and once again, there is only a small degree of adequacy.

7/39 Insofar as damage is brought about by a decision made by the *victim* himself, the exclusion criterion at issue here is relevant in cases of deliberate violation of the duty to mitigate damage or the deliberate and unnecessary aggravation of the damage[93]: the damage thus not prevented or additionally sustained is no longer imputed to the damaging party. Examples include the renting of a replacement vehicle although the victim is in hospital and neither he nor his relatives can use the car or, for instance, the rental of a luxury replacement vehicle although the victim's car is a mini. On the other hand, the damaging party is held liable for the death of a paralysed victim even if such dies as a result of the exercise of his free will because he – understandably – declines any more treatment[94].

7/40 As is mainly recognised in case law and theory[95], the perpetrator is liable under some circumstances for damage that the pursuers suffer during a *pursuit.* However, this does not apply to any and all damage. A pursuit is only considered to be in the public interest or the victim's interest provided that on the *balance of interests* the goods endangered by the pursuit are not higher ranked than those protected by the pursuit. If the pursuit is no longer justified because significantly higher-ranked interests are endangered than those being defended, then the pursuers are also guilty of deficient behaviour. If they continue with the pursuit despite being aware that their endangerment of themselves is no longer justified, then only the voluntary decision of the pursuers is material in respect of this increase of risk. The deliberate, clearly no longer reasonable, self-endangerment

91 Haftungsbegrenzung für Folgeschäden aus unerlaubter Handlung (1968) 245 f.

92 On this *Friese,* Haftungsbegrenzung 245 f with additional references; similar also BGH in NJW 1997, 865 (theft of transport cases from a money transport vehicle damaged in a road traffic accident) on this also *Schiemann* in Staudinger, BGB[2005] § 249 no 60 ff.

93 *Koziol,* Die Schadensminderungspflicht, JBl 1972, 225.

94 OGH 2 Ob 314/02v in ZVR 2004/37.

95 *Larenz,* Lehrbuch des Schuldrechts I[14] (1987) § 29 I b; *Koziol,* Haftpflichtrecht I[3] no 4/55 and no 8/42; *Oetker* in MünchKomm, BGB II[5] § 249 no 164 ff, in each case with further references.

can only be imputed to the pursuer and no longer to the perpetrator[96]. If the pursuit was still justified, then the liability of the perpetrator can also be reduced after all under § 1304 ABGB, § 254 BGB; the pursuers injured during the pursuit can in particular be held contributorily at fault if they should have seen that the interests endangered by the pursuit outweighed those defended by the pursuit.

7/41 When it comes to *rescue operations,* such considerations must also be made and, therefore, not all consequences can always be imputed to the first perpetrator[97].

Furthermore, the perpetrator is also liable if the person *disabled* due to the injury decided to undertake a rash course of action and is injured anew as a result; however, the duty to compensate may be mitigated due to contributory fault[98].

VI. Limits of liability

7/42 While in Switzerland, as in so many legal systems[99], there is no limit on the amounts awarded in the context of strict liability based on dangerousness[100], German and Austrian law very often provide for limits of liability in this field[101].

The explanatory comments on the EKHG[102] show that the limits are conceived as a balance to the stringent liability of the faultless operator or keeper. Mostly, the crux is presented as being that the risk faced by the keeper of a dangerous thing must remain *economically reasonable,* it also being contended that this is only possible if the third-party liability insurance premiums can be kept bearable by means of fixed maximum limits[103].

96 Thus, in conclusion also *Deutsch,* Haftungsrecht[2] no 173; *idem,* Regreßverbot und Unterbrechung des Haftungszusammenhanges, JZ 1967, 643; *Larenz,* Schuldrecht I[14] § 27 III b 5. BGH in BGHZ 57, 25; BGHZ 63, 189.

97 On this *Larenz,* Schuldrecht I[14] § 27 III b 5; *Lüer,* Die Begrenzung der Haftung bei fahrlässig begangenen unerlaubten Handlungen (1969) 148; *Niebaum,* Die deliktische Haftung für Willensbetätigungen (1977) 112; *Welser,* Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 6; OGH 2 Ob 15/05b in SZ 2005/40.

98 OGH 2 Ob 139/88 in ZVR 1989/130.

99 *B.A. Koch/Koziol,* Comparative Conclusions, in: B.A. Koch/Koziol, Unification: Strict Liability 428 f.

100 See *Oftinger/Stark,* Haftpflichtrecht I[5] 414 f.

101 See *Will,* Quellen erhöhter Gefahr (1980) 306 f; *Taschner,* Begrenzung der Gefährdungshaftung durch Haftungshöchstsummen, in: Schlechtriem/Leser (eds), Zum Deutschen und Internationalen Schuldrecht (1983) 77 f; *Koziol,* Haftpflichtrecht I[3] no 6/24.

102 470 BlgNR 8. GP zu den §§ 12 und 13.

103 *Esser,* Grundlagen und Entwicklung der Gefährdungshaftung (1941) 107; *Rodopoulos,* Kritische Studie der Reflexwirkungen der Haftpflichtversicherung auf die Haftung (1981) 28, 33 f.

7/43 Nonetheless, the limitation of liability by maximum limits is *objectively unjustifiable* because the special endangerment also represents an independent liability criterion that in its more serious form is as weighty as fault (see no 6/148 ff). If fault-based liability is in principle unlimited, then this must likewise be the case in respect of liability based on dangerousness[104]. It is difficult to justify imposing the risk of greater damage on the victim and not on the damaging party who uses the source of danger in his own interests[105]. The rigid limits on liability are highly dissatisfactory above all because precisely those victims who are most seriously injured in their health, ie the highest-ranked good, fail to get full compensation[106]. The desire to avoid inacceptable burdens on liable parties should therefore properly not be accommodated[107] – in the field of liability based on dangerousness either – by a rigid quantification of limits, but instead by another criterion, in particular the flexible reduction clause taking account of capacity to bear the economic burden (see below no 8/24 ff).

7/44 Finally, the argument of *insurability* is not persuasive either. *Von Caemmerer*[108] rightly objects that in other countries, eg Sweden, Switzerland and also in the Romance language countries, no such limitation is known and the risk is still insurable. It may be added to this that Austrian law also provides for instances of non-fault-based liability based on dangerousness without any limits on liability (ForstG, BergG, PHG), and even the EKHG – in a strange departure from its basic line – does not limit liability for damage to real property and this has clearly not led to any insurmountable problems with insurability. Furthermore, *Will*[109] in particular points out that in any case insurance has to cover fault-based liability which is always unlimited. Moreover, the contention that maximum amounts of liability are necessary for insurability for insurance-mathematical or other reasons[110] cannot constitute an effective argument against the elimination of limits on liability: the sums insured can be determined – as in the field of unlimited fault-based liability – so that potential maximum damage is covered so far as

104 Thus, also *Will,* Quellen 309 f.

105 On the concerns from the perspective of economic analysis of law see *Faure,* Economic Analysis, in: B.A. Koch/Koziol, Unification: Strict Liability 387 f.

106 *Will,* Quellen 317; *B.A. Koch,* Die Sachhaftung (1992) 159 f.

107 Thus, also *von Caemmerer,* Das Verschuldensprinzip in rechtsvergleichendem Licht, RabelsZ 42 (1978) 14 f; *Will,* Quellen 322 ff; *Kötz,* Gefährdungshaftung, in Gutachten und Vorschläge zur Überarbeitung des Schuldrechts II (1981) 1830 with additional references; *F. Bydlinski,* System und Prinzipien 204.

108 Reform der Gefährdungshaftung (1971) 23 f. Cf also *Larenz/Canaris,* Schuldrecht II/2[13] § II § 84 I 1 c.

109 Quellen 310 ff; likewise *Kötz,* Gutachten 1828; *Leser,* Zu den Instrumenten des Rechtsgüterschutzes im Delikts- und Gefährdungshaftungsrecht, AcP 183 (1983) 599; *Taschner,* in: Schlechtriem/Leser (eds), Zum Deutschen und Internationalen Schuldrecht 84.

110 *Bruck/Möller/Johannsen,* Kommentar zum Versicherungsvertragsgesetz[8] IV (1970) 305; *Späte,* Haftpflichtversicherung (1993) Vor no 50.

the rules of experience reach. The Swiss example shows also that even unlimited insurance is possible[111]. Due to the decreasing risk of major league damage, this would result in only a relatively minor increase in premium costs[112].

111 *Maurer,* Schweizerisches Privatversicherungsrecht[3] (1995) 370.
112 On this *Will,* Quellen 311 ff.

Chapter 8

The compensation of the damage

I. Extent of compensation

A. Comprehensive compensation as a basic principle?

8/1 The statutory provisions clearly support the recognition of the principle of *comprehensive compensation of damage.* For example, § 249 (1) BGB stipulates the liable party's obligation to »restore the position that would exist if the circumstance obliging him to pay damages had not occurred.« Likewise, the »difference method« *(Differenzmethode)* which accords with this provision and is generally accepted, leads to full compensation when it compares the current actual state of the legal good with the hypothetical state that would have existed but for the damaging behaviour and provides for the compensation of the balance[1]. This is why it is also stressed that compensation should lead to full recovery[2].

8/2 Very similarly, § 1323 (1) ABGB requires that the liable party return everything to the previous state, or if this is not appropriate, must remunerate the estimated value. However, the ABGB very substantially limits the principle of full compensation in the immediately following provision § 1324: only in the case of *serious fault* is full satisfaction, ie comprehensive compensation, to be awarded; in the case of slight negligence, on the other hand, the victim is merely entitled to the compensation of the actual loss, to be assessed pursuant to § 1332 ABGB in the case of damage to property according to the ordinary value, ie the market value (§ 305 ABGB).

This rule is certainly no indication that the penal notion is displacing the principle of compensation in Austrian law. Even in the case of serious fault, it does not provide for any penalty exceeding the damage caused to be imposed, rather the damaging party is granted some relief in the event that there was merely slight

1 Cf only *Deutsch/Ahrens,* Deliktsrecht[5] no 625.
2 *Deutsch,* Haftungsrecht[2] no 778.

fault in that he must only compensate a part of the overall damage caused[3]. Thus, in a per se appropriate manner, the balance between the gravity of the liability and the legal consequence is restored[4]. However, critics contend that by solely considering the degree of fault, the law considers the *overall weight of all grounds for liability* inadequately and in too inflexible a fashion[5]. Moreover, it is also pointed out that from the victim's perspective the compensation of lost profit may be more important than that of the actual loss, meaning that the gradation of the legal consequences is not appropriate. The Austrian Draft therefore does not include such a rule.

8/3 Besides the current, specifically Austrian limitation of the duty to compensate there are also other significant restrictions, both in Austrian and German law and also in other legal systems. It is widely recognised that not all harm caused by the damaging party is recoverable; liability of such is limited by application of the theories of *adequacy* and the *protective purpose* of the infringed rule; these limitations should be applied flexibly in accordance with the gravity of the grounds for liability (see above no 7/7 ff and 15 ff). Furthermore, in Germany and Austria, in the field of strict liability, *caps on liability* are presently still common; in Switzerland, on the other hand, such limitations are unknown, as in other legal systems (see above no 7/42 ff). Product liability law provides for a *threshold*[6]. Lastly, a de minimis threshold is applied when it comes to compensating non-pecuniary damage (see above no 6/28).

8/4 Finally, reference must be had to the rules on the *contributory responsibility* of the victim, which leads to merely partial compensation when there are also grounds for liability on the side of the victim (see above no 6/204 ff). This constitutes a deviation from the all-or-nothing principle. According to a view widely recognised in Austria but also supported elsewhere, this is reflected analogously in cases of alternative causation if the potentially causal, liability-triggering event competes as the cause with a potentially causal event imputable to the victim's sphere of risk (no 5/86 ff).

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3 This is not adequately taken into account by *G. Wagner,* Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag (2006) 6, when he cites this gradation of compensation according to the degree of fault as an example of punitive damages.

4 See *von Jhering,* Das Schuldmoment im römischen Privatrecht (1867), printed in extended form in: *von Jhering,* Vermischte Schriften juristischen Inhalts (1879) 155 ff; *Pfaff,* Zur Lehre von Schadenersatz und Genugthuung nach österreichischem Recht, in: Pfaff/Randa/Strohal, Drei Gutachten (1880) 89 ff; *Wilburg,* Elemente 249 f.

5 *Wilburg,* Elemente 249 f; *Koziol,* Haftpflichtrecht I³ no 1/16; *Karner* in KBB, ABGB³ § 1293 no 3.

6 See 85/374/EEC Art 9 b: »For the purpose of Article 1, ›damage‹ means: damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU, provided that the item of property is of a type ordinarily intended for private use or consumption, and was used by the injured person mainly for his own private use or consumption.«

There may also be partial compensation when those who cause the damage do not have the capacity to commit delicts due to their age or mental state: according to both § 829 BGB and § 1310 ABGB, such persons can be ordered to compensate the whole damage or a part of it if following consideration of all the circumstances, in particular the financial circumstances, this appears justified. This rule is – also under § 1301 (1) Austrian Draft – to be extended to cases in which the damaging party is not guilty of subjective fault due to lack of abilities and knowledge (see above no 6/86). 8/5

According to § 2 of the Austrian Employee's Liability Law (Dienstnehmerhaftpflichtgesetz), a judge can release an *employee* who has caused damage from liability in whole or in part. In so doing he must have regard, above all, to the extent of the fault but also to the extent of the responsibility associated with the activity exercised, the risk associated with the activity, the remuneration, the level of the employee's education, the conditions under which the employee was to work and the probability or near inevitability of the occurrence of the damage that experience shows attaches to the activity in question. The employee bears no liability at all for culpa levissima (»entschuldbare Fehlleistung«, slightest carelessness). Under German law, legal theory and case law have developed a very similar limitation of employee liability based on a balance between the mutual interests[7]. 8/6

The possibility of *reduction* of damages, to be described in more detail below under no 8/24 ff, must also be mentioned here; such already exists, for instance, under Art 43 OR. 8/7

Leaving aside the lower threshold under product liability law, which would seem to be based on a not quite accurate implementation of a de minimis threshold concept (see above no 6/20), the other cases of limited compensation do not really build a closed system but nonetheless a consistent basic principle can be discerned and is capable of generalisation: *the stronger the grounds for liability on the side of the damaging party, the more comprehensive the compensation,* although the countervailing grounds on the side of the victim must also be taken into consideration. The idea that the weakness of grounds for liability may lead to a limitation of liability was probably behind the original introduction of liability limits in the field of strict liability, as this area was at least formerly seen as a type of liability based on lesser grounds for liability. 8/8

Proportionality between liability grounds and the extent of the compensation has already been urged for by *Jhering,* followed later by *Wilburg* and now also by

7 BGH in NJW 1994, 852; NJW 1996, 1532; *Otte/Schwarze,* Die Haftung des Arbeitnehmers[3] (1998) no 25 ff and no 190; *Sandmann,* Die Haftung von Arbeitnehmern, Geschäftsführern und leitenden Angestellten (2001) 51 ff.

F. Bydlinski[8] but the legislature has not yet systematically followed up. This should be ascribed more weight in future.

8/9 As shown by comparative law, the criticism of the current Austrian solution and the Austrian Draft, the present-day view is that even in the case of slight negligence the victim is entitled to full compensation and not just recovery of his actual loss. Therefore, it may be noted as a *basic value* that the damaging party must *compensate the victim's entire interest in respect of every degree of fault and every equivalent liability,* this however within the bounds of average adequacy and the clear protective purpose. In the case of serious fault, the adequacy and protective purpose limits must be set wider, in the case of intention such may lose all relevance. On the other hand, weakness of the grounds for liability weighing against the damaging party may lead to more stringent adequacy and protective purpose requirements and also make partial liability seem appropriate under consideration of financial circumstances or other circumstances that support having the victim bear risk.

B. The objective value as minimum compensation

8/10 It has already been explained above (no 3/8 ff) that the *notion of continuation of a right* as a special form of the notion of deterrence supports allowing the victim to seek the objective-abstract evaluation of his disadvantage as the minimum damage sustained. This is very predominantly recognised in Austrian law[9]. Even in Germany, several important voices do endorse this approach[10]. The prevailing view, however, clearly expresses distaste for objective-abstract assessment[11]; nevertheless in substance this method is used, especially when it comes to compensating loss of market value[12].

8 System und Prinzipien 225 ff with additional references.

9 See *Koziol,* Haftpflichtrecht I³ no 2/76 with additional references.

10 See eg, *Larenz,* Lehrbuch des Schuldrechts I¹⁴ (1987) § 29 I b; *Hagen,* Zur Naturalrestitution, in: Lange/Hagen, Wandlungen des Schadensersatzrechts (1987) 80; *Stoll,* Haftungsfolgen im bürgerlichen Recht (1993) 194 ff.

11 *Lange/Schiemann,* Schadensersatz³ § 6 I with additional references.

12 On this *Koziol,* Haftpflichtrecht I³ no 10/21 and 60 ff.

II. Types of compensation

A. Restitution in kind

8/11 According to § 1323 ABGB, damage must primarily be compensated by restoration of the previous state. Only if this is impossible or inappropriate should the estimated value be remunerated. Thus, according to the ABGB, compensation should consist *in the first line* in *restitution in kind* and only secondarily in damages. This corresponds to the position under German law (§ 249 BGB)[13].

8/12 The primary rank accorded to restoration of the previous state is based on the notion that restitution in kind is the best and most complete form of compensation; it preserves the victim's *»Integritätsinteresse«* and is best suited to realise the notion of compensation[14]. Whereas damages only compensate the »value interest« in money, restitution in kind actually recreates the previous real state that would have existed but for the damaging event. Thus, not only is the victim relieved of having to make the efforts associated with reacquisition, non-pecuniary interests are also covered as far as is possible.

Since restitution in kind is the compensation form that offers the victim the most complete reparation and thus most corresponds to his interests, it must be implemented even if it is more expensive than damages. Hence, restoration of the previous state is only rejected as *inappropriate* if it requires a disproportionately high expenditure of costs and efforts.

8/13 The primacy of restitution in kind means that it is even to be preferred when it is not possible to compensate the entire damage in this manner. In such a case, the previous state must be restored so far as possible and the rest of the damage is to be compensated in money. *Restitution in kind and damages* may thus be due in combination. This is always the case if besides actual damage (alteration of the good) there is also pure pecuniary loss or monetary damage[15]. For instance, the destruction of a thing may also lead to loss of earnings or if something is damaged this may lead to »loss in market value«, which must be taken into account besides the repair.

8/14 § 1323 ABGB prescribes restitution in kind for the »damage caused« without distinguishing between different types of damage. As § 1293 ABGB includes *non-pecuniary damage* as damage[16] and § 1323 does not make any distinction with respect to restitution in kind, it must be assumed that non-pecuniary damage is

13 On the historic roots see *Jansen* in HKK zum BGB II §§ 249–253, 255 no 19 ff.

14 *Larenz,* Schuldrecht I[14] § 28 I; *Apathy,* Aufwendungen zur Schadensbeseitigung (1979) 46 f; *Brinker,* Die Dogmatik zum Vermögensschadensersatz (1982) 323; *Ch. Huber,* Fragen der Schadensberechnung[2] (1995) 141 ff; *Lange/Schiemann,* Schadensersatz[3] § 5 I 2.

15 *Larenz,* Schuldrecht I[14] § 28 II.

16 On this above all *Strasser,* Der immaterielle Schaden im österreichischen Recht (1964) 33 ff.

always to be redressed by restitution in kind if this proves possible and appropriate[17], for example by the withdrawal of untrue allegations. The same applies in German law (§§ 249, 253 BGB)[18], and likewise also for other legal systems[19] and the Austrian Draft (§ 1316 (1)).

The very problems that make monetary compensation of non-pecuniary damage seem so difficult, do not apply to restitution in kind: the difficulty associated with assessing non-pecuniary damage in money and the necessary but often deemed undesirable tying of non-pecuniary values to money play no role when it comes to restitution in kind. Accordingly, the limitation on compensation for non-pecuniary damage in § 253 BGB explicitly applies only to monetary compensation, meaning restitution in kind is unrestricted[20].

Nonetheless, restitution in kind is only feasible rather rarely although there are at least several cases of its application that hold practical relevance. Particularly worthy of mention is the revocation of unfounded allegations damaging to someone's credit, earnings or prospects[21]; the publication of judgements under § 8 a (6) MedG; the right of reply under § 9 MedG and the subsequent publication of the outcome of a penal proceeding under § 10 MedG. Other possible applications include the destruction of secretly recorded audio tapes or videos[22] that infringe the right to privacy[23].

8/15 The ECtHR may have developed an interesting new type of restitution in kind[24]: *F. Bydlinski*[25] emphasises that the Court's mere *finding of a violation* – especially in

17 *F. Bydlinski,* Der Ersatz ideellen Schadens als sachliches und methodisches Problem, JBl 1965, 181; *Koziol* Haftpflichtrecht I[3] no 9/14 f; *Karner,* Ersatz ideeller Schäden 73; *Reischauer* in Rummel, ABGB[3] § 1324 no 13. For an alternative view see, *Strasser,* Immaterieller Schaden 15 f.

18 *Lange/Schiemann,* Schadensersatz[3] § 5 II 2; *Magnus/Fedtke,* Germany, in: W.V.H. Rogers, Non-Pecuniary Loss 109 no 1; *Oetker* in MünchKomm, BGB II[5] § 249 no 309, 338, § 253 no 1; *Hans Stoll,* Empfiehlt sich eine Neuregelung der Verpflichtung zum Geldersatz für immateriellen Schaden? Gutachten 45. DJT I/1 (1964) 11, 138, 140 ff.

19 *Von Bar,* Deliktsrecht II no 128 ff; cf (for Germany) *Stoll,* Gutachten 45. DJT I/1, 11, 138, 140 ff; *Magnus/Fedtke* in: Rogers, Non-Pecuniary Loss 109 no 1.

20 On German law see *Lange/Schiemann,* Schadensersatz[3] § 7 II 1; *Wiese,* Der Ersatz immateriellen Schadens (1964) 5 ff.

21 § 1330 (2) ABGB expressly mentions the revocation of allegations; on German law see *Oetker* in MünchKomm, BGB II[5] § 249 no 309 f.

22 Cf already RG in RGZ 45, 170 (destruction of unlawfully obtained photographs of the deceased, Otto von Bismarck); RGZ 94, 1 (surrender of an unlawfully obtained letter); BGH in BGHZ 27, 284 (deletion of secret audio records). See also *Zeytin,* Zur Problematik des Schmerzengeldes (2001) 13 f with additonal references.

23 In the context at hand, preventive and reparative injunctions, which do not require any fault, must also be taken into account.

24 *Józon,* Non-Compensatory Remedies: Satisfaction by Finding a Violation, in: Fenyves/Karner/Koziol/Steiner (eds), Human Rights and Tort Law (2011) no 13/1 ff; *Oskierski,* Schadensersatz im Europäischen Recht (2010) 106 ff.

25 *Bydlinski,* Methodological Approaches to the Tort Law of the ECHR, no 2/244 ff; cf also *Berka,* Human Rights and Tort Law, no 3/32; *Koziol,* Concluding Remarks on Compensatory and Non-

cases concerning infringements of a merely procedural nature – could be understood as a sort of compensation in kind. According to today's predominant understanding, this type of compensation does not depend exactly on the restoration of the situation existing before the damaging action occurred; rather, this compensation is about restoring so far as possible the situation which would have existed in the absence of the damaging event. If and insofar as the negative psychological effects of the violation *per se* are directly concerned, ie the injury to the victim's sense of justice, ›satisfaction‹ in the strictest sense is obtained for the victim in that he is found authoritatively to be in the right, and his opponent to be in the wrong, which must cause positive reactions in the victim to counter the negative upset about the violation, or which come as near as possible to so doing. Insofar the mere finding of the breach can be an acceptable variant of compensation for certain non-pecuniary damage.

B. Damages

8/16 Insofar as restitution in kind is not to be made, the damaging party must compensate the damage in *money.* The *pecuniary damage* may be assessed either in an objective-abstract or subjective-concrete manner (no 3/8 ff and 5/34 ff).

As already touched on (see above no 5/11 ff), the question of damages for *non-pecuniary damage* presents far more difficulty. This is because non-pecuniary damage by its very nature cannot be evaluated in money, instead the non-pecuniary damage must be offset against money or a certain redress. Another problem is that it is very difficult to establish whether and to what extent someone has suffered non-pecuniary damage.

8/17 The overall *compensatory purpose* intrinsic to the law of damages (no 3/1 ff) is – contrary to widespread opinion – also decisive when it comes to the compensation of *non-pecuniary damage.* Any special satisfaction function is foreign to both Austrian and German law. The compensation award should counter-balance the negative feelings that were suffered, by putting the victim in a position to procure conveniences and relief to compensate his suffering and the loss of enjoyment of life.

Naturally, this offsetting of negative against positive feelings (»Lust/Unlust-Formel«) is merely a vivid but simplistic illustration and it should not create the impression that it is the judge's job specifically to research how one could give the victim in the respective individual case »pleasure« and use this to determine the amount of damages. Rather, it must be emphasised that the individual ability and

▹▹ Compensatory Remedies, no 22/19 ff; divergent *Józon,* no 13/65 ff; all in: Fenyves/Karner/Koziol/Steiner, Human Rights and Tort Law.

willingness of the victim to regard his suffering as compensated or mitigated by a monetary award must largely be assessed in the abstract. For the assessment of the damages, it is solely material which conveniences could typically be procured for the victim by means of the sum awarded[26]. Thus, it plays no role how the victim then actually uses the money and what subjective success he attains thereby.

III. Periodic or lump sum

8/18 At the time when the damage is established, the negative effects on the victim's patrimony have frequently not yet come to an end, for instance the *future* loss of profit or the future incurrence of expenditures, and also the disadvantageous effects on non-pecuniary goods. If the victim always had to bring a new claim when more damage was sustained in order to seek compensation in this respect, there could be repetitive actions over years or even decades, also involving uncertainty as to whether the damaging party would still be available to answer or still solvent.

8/19 In the light of these problems, the law provides for the *conclusive awarding* of compensation in the form of a *lump-sum award* in the event that future *loss of profits* is foreseeable, provided there is a sufficient basis to estimate the harm still to be anticipated. In § 1293 ABGB, the law expressly provides that the orientation point in this respect should be such loss of profit as »was to have been expected for the person according to the normal course of events.« § 252 BGB provides more specifically that such profit is deemed lost »that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.« This makes it clear that the special circumstances of the victim are to be taken into account as the starting point for the assessment[27]. It is noteworthy that the legislature makes it easier for the victim to seek lost profit in order to facilitate the conclusive termination of the compensation proceeding[28] and with regard to the uncertainty of future prognoses accordingly accepts less certainty with respect to the occurrence of the damage, namely simple probability.

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26 See *Karner,* Ersatz ideeller Schäden 135 f.

27 In this sense on loss of earning capacity see recently BGH in NJW 2011, 1145 as well as NJW 2011, 1148 *(Schiemann)*.

28 Cf on this *Rummel,* Zur Verbesserung des schadenersatzrechtlichen Schutzes gegen unlauteren Wettbewerb, JBl 1971, 393 f; *Koziol,* Zu schadenersatzrechtlichen Problemen des § 87 UrhG, in: Dittrich (ed), Beiträge zum Urheberrecht IV (1996) 57 ff.

8/20 The efforts to conclusively close cases of damage as far as possible is seen not only in the context of loss of profit[29]. When it comes to *personal injury,* the harm arising from the impairment of earning capacity or increased needs is in principle to be compensated by the payment of an annuity under German and Austrian law[30], however, it is also provided that the person entitled to compensation can seek compensation by a lump-sum payment in lieu of an annuity for good reasons[31], provided the one-off payment is not too onerous financially for the liable party[32]. The costs of future medical treatment can at least be requested in advance[33]. As the lump sum can only be determined on the basis of statistical findings and general rules of experience – ie also according to the normal course of events – this advance payment for future damage inevitably involves a certain randomness. Despite the risks associated with this, however, the law allows the victim the option of seeking a lump sum because this not only promotes procedural economy but also means the victim must not repeatedly take up the case anew, as would often be a great strain in the case of bodily injury.

8/21 The legal rules thus derive from *different value judgements* on the part of the legislature in cases of future lost profit, on the one hand, and future loss of income and costs due to increased needs, on the other hand. In the case of *lost profits,* the interest in concluding the compensation process and the criterion of procedural economy are accorded greater weight and the victim is not even given the choice between seeking an estimated sum and the losses occurring in fact in the individual periods of time. On the other hand, where compensation is typically of existential importance, namely in the case of loss of earnings and increased needs due to *bodily injury,* the law provides primarily for compensation by annuity, which can be adjusted to take account of real developments, as opposed to the inevitable risks of miscalculating the future that are associated with a lump-sum payments. However, it does grant the victim the option of seeking lump-sum compensation if good cause is discernible for so doing and such is not too onerous for the damaging party. A comparative law perspective shows, nonetheless, that the

29 Cf moreover § 980 ABGB: The lender may seek compensation from the borrower who is at fault in respect of the lost thing borrowed, even if there is a possibility that such be recovered.

30 § 843 (1) BGB. In Austria this is only expressly provided by § 14 (1) EKHG in respect of damage that is brought about by railways and motor vehicles, but similar is assumed for compensation under § 1325 ABGB, cf *Danzl* in KBB, ABGB³ § 1325 no 15; *Reischauer* in Rummel, ABGB II/1³ § 1325 no 27 ff.

31 § 843 (3) BGB.

32 § 14 (3) EKHG, which rightly also takes the interests of the damaging party into account; cf on this *Schauer* in Schwimann, ABGB VII³ § 14 EKHG no 18. In analogy to this provision, similar is assumed in turn for compensation under § 1325 ABGB; see *Reischauer* in Rummel, ABGB II/1³ § 1325 no 26.

33 *Danzl* in KBB, ABGB³ §1325 no 3; *Harrer* in Schwimann, ABGB VI³ § 1325 no 13 and OGH 2 Ob 82/97s in SZ 70/220.

legal systems assess the advantages and disadvantages of both types of compensation very differently and thus also decide very differently in this respect[34].

8/22 In the case of *non-pecuniary damage,* brought about by bodily injury, the majority opinion is that the trend towards a conclusive compensation award is prevailing again in Austrian law: *damages for pain and suffering* are in principle to be awarded in the form of a one-off lump-sum payment; according to settled case law suing for just part of the damages for pain and suffering at one time can only come into question by way of exception for special reasons to be presented by the claimant, if it is not possible to make an overall assessment by the end of the oral hearing at first instance[35]. This is the case above all when the effects of the injury and extent of the pain cannot be established with sufficient certainty at the time in question, and thus are not conclusively assessable[36].

Only in exceptional cases does Austrian case law grant an annuity for pain and suffering in lieu of a lump sum, for instance if the victim will suffer severe pain for the rest of his life due to especially serious bodily injuries with grave long-term consequences[37]. In practice, annuities in respect of pain and suffering are awarded extremely seldom[38]. Nonetheless, there are no persuasive reasons why such an annuity should not be awarded[39] and neither are practical concerns justified. This is shown not least by the example of Germany, where annuities for pain and suffering may be awarded at the request of the victim and are also awarded by the court if the victim has not expressed any objection in the case of irreversible permanent damage[40].

8/23 In Austria[41], above all *Danzl*[42] has presented weighty arguments in favour of more frequent awards of *annuities to compensate for pain and suffering* in the case of long-term consequences. For permanent damage which will cause suffering to

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34 See on this *B.A. Koch/Koziol,* Vergleichende Analyse, in: B.A. Koch/Koziol, Personal Injury 389 f; *B.A. Koch,* Medical Liability in Europe: Comparative Analysis, in: B.A. Koch (ed), Medical Liability in Europe (2011) 655 f with references to the country report.

35 See OGH 2 Ob 75/89 in ZVR 1990/158; 1 Ob 56/97 in ZVR 1997/67; 9 Ob 38/07i in ZVR 2008/154 *(Ch. Huber); Reischauer* in Rummel, ABGB II/1³ § 1325 no 49 with additonal references. Against this, with solid arguments *Ertl,* Teileinklagung von Schmerzengeldansprüchen, VR 1970, 108 ff; *idem,* Noch immer Veraltetes zur Teileinklagung von Schmerzengeldansprüchen, NO 1997, 146 ff; *Klicka,* Keine Teilklage bei Schmerzengeld? ÖJZ 1991, 435 ff. In detail on this also *Danzl/Gutiérrez-Lobos/Müller,* Das Schmerzengeld in medizinischer und juristischer Sicht⁹ (2008) 236 ff, 244 ff.

36 See *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld⁹ 236 ff with additonal references.

37 OGH 2 Ob 330/68 in SZ 41/159; 2 Ob 37/85 in ZVR 1986/50; 8 Ob 1/87 in ZVR 1988/66; 2 Ob 292/03k. *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld⁹ 266 f; *Reischauer* in Rummel, ABGB II/1³ § 1325 no 49a with additonal references.

38 *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld⁹ 267.

39 In depth *Danzl,* Schmerzengeldzusprüche ab S 1 Million in Österreich, ZVR 1992, 9 ff; *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld⁹ 267 ff.

40 *Oetker* in MünchKomm, BGB II⁵ § 253 no 56 ff.

41 On Switzerland see *Brehm* in Berner Kommentar, OR VI/1/3/1³ Art 43 no 7 ff.

42 ZVR 1992, 9 ff; *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld⁹ 267 ff.

the victim for his whole life, the advantage of awarding an annuity for pain and suffering is that the length of life, which determines the extent of the pain to be suffered, can be taken duly into account and at the same time the risk involved in predicting the life expectancy of the victim is eliminated[43].

Therefore, it seems most appropriate to provide relief to the victim in the form of a lump sum for non-pecuniary loss first and to award an annuity for the consequential damage[44]; ie to award both an annuity and a lump sum[45].

IV. Reduction of the duty to compensate

8/24 *Express stipulations* regarding a reduction of the duty to compensate are already found in some legal systems today. This applies above all to the Swiss system (Art 44 sec 2 OR), which provides in general that the judge shall decide the amount of compensation following a consideration of the circumstances and the gravity of the fault. This provision is only very rarely applied, however[46]. The law of the Netherlands (Art 6:109 BW)[47] provides for reduction of the compensation only in exceptional cases: the judge may reduce the legal obligation to remunerate for the damage if the requirement to pay full damages would lead to clearly inacceptable results in the given circumstances. According to the legal stipulation, the given circumstances mean the type of liability, the legal relationship between the parties and the capacity to bear the economic burden in respect of both parties. However, a reduction of the duty to compensate in exceptional cases is also advocated in other legal systems in the absence of any express legal stipulation[48].

The EGTL has included a reduction clause for extraordinary cases (Art 10:401) in the PETL. There is a corresponding clause in the Austrian Draft (§ 1318)[49]; this

43 *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld[9] 271 f with additonal references; *Ch. Huber,* Antithesen zum Schmerzengeld ohne Schmerzen – Bemerkungen zur objektiv-abstrakten und subjektiv-konkreten Schadensberechnung, ZVR 2000, 231 f.

44 *Reischauer* in Rummel, ABGB II/1[3] § 1325 no 49.

45 OGH 2 Ob 291/75 in ZVR 1976/370; 2 Ob 230/76 in ZVR 1977/169; 2 Ob 9/79 in ZVR 1980/159; 2 Ob 28/83 in ZVR 1984/95; *Danzl/Gutiérrez-Lobos/Müller,* Schmerzengeld[9] 269 with additonal references. For Germany see *Oetker* in MünchKomm, BGB II[5] § 253 no 58.

46 See *Roberto,* Schweizerisches Haftpflichtrecht (2002) no 864 ff.

47 On this *Abas,* Rechterlijke matiging van schulden[2] (1992); further *Spier/Hartlief/van Maanen/Vriesendorp,* Verbintenissen uit de wet en Schadevergoeding[5] (2009) Nr 258 ff.

48 *Canaris,* Verstöße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadensersatzrecht, JZ 1987, 995, 1001 f; *F. Bydlinski,* System und Prinzipien 226 and 233; *Koziol,* Haftpflichtrecht I[3] no 7/7 ff.

49 In agreement *Pfeiffer,* Die Entwürfe für ein neues österreichisches Schadensersatzrecht – Fortschritt für Österreich und Vorbild für Deutschland? (2011) 202 ff.

also makes it clear that the victim is usually due full compensation and only by way of exception, under consideration of various criteria, is a reduction permissible.

8/25 The reduction of the duty to compensate finds its justification in the notion of the *constitutional principle of proportionality. Canaris*[50] emphasises that it must be possible to reduce compensation duties otherwise ruinous to the damaging party subject to certain conditions. He highlights the fact that exorbitant duties to compensate not only affect the damaging party's freedom to act but also his constitutionally protected personality rights. The fundamental rights in combination with the constitutional principle of proportionality must also provide protection in the law of tort against disproportionate adverse effects on the damaging party. In his opinion, this principle can be realised even under current law via the blanket clauses with the help of the defence of abuse of a right. As *Canaris*[51] persuasively explains, seeking compensation in full is justified if the victim is dependant on the compensation payment. If, on the other hand, the victim can meet his needs without the compensation, then his claim should be reduced in the event that satisfying it would bring the damaging party to ruin for the rest of his life.

Canaris' proposed solution is also usable in Austrian law[52]: the constitutional principle of proportionality is also recognised here[53] and therefore can be applied to render blanket clauses more concrete, in particular those regarding the *abuse of a right*[54]. However, it is also inferable from §§ 1295 (2), 1305 ABGB even without recourse to constitutional principles, that the enforcement of subjective rights in a manner abusing a right is not supported by the legal system[55]. Abuse of a right is not only assumed in the case of vexatious conduct but also if there is gross disproportion between the benefit to the person exercising the right and the burden on the person affected[56]. When weighing up the interests of the damaging party and the victim, their financial circumstances in particular are to be taken into consideration. This is all the more logical in relation to Austrian and German law as the same approach is provided by § 1310 ABGB and § 829 BGB with respect to the duty to compensate on the part of those without capacity to commit a tort. The reason is that in such cases the grounds for imposing liability on the damaging party

50 JZ 1987, 995, 1001 f; *idem,* Die Verfassungswidrigkeit von § 828 II BGB als Ausschnitt aus einem größeren Problemkreis, JZ 1990, 679. Critical on this *Medicus,* Der Grundsatz der Verhältnismäßigkeit im Privatrecht, AcP 192 (1992) 53 ff; *Deutsch,* Haftungsrecht² no 633.

51 JZ 1987, 1002.

52 Thus, also *F. Bydlinski,* System und Prinzipien 226, 233.

53 *Korinek,* Das Grundrecht der Freiheit der Erwerbsbetätigung als Schranke für die Wirtschaftslenkung, Wenger-FS (1983) 249 ff; *Stelzer,* Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit (1991) 169 ff.

54 *F. Bydlinski,* Möglichkeiten und Grenzen der Präzisierung aktueller Generalklauseln, Wieacker-FS (1990) 204 f.

55 On this in particular *Mader,* Rechtsmißbrauch und unzulässige Rechtsausübung (1994).

56 *Mader,* Rechtsmißbrauch 224 ff with additional references.

are weak. In terms of value judgement, nonetheless, a similar approach must be applied to cases in which the grounds for liability are strong enough but a very extraordinary, ruinous burden on the damaging party is threatened and the consideration of the financial circumstances falls very heavily in favour of the damaging party.

8/26 *F. Bydlinski*[57] accordingly points out forcibly that the *efforts towards proportionality* are based on the correct observation that the grounds of liability specifying the principle of responsibility for oneself in the law of damages can be more or less strong, and ought to be taken into account when assessing the scope of liability for fairness reasons, as otherwise important differences would be neglected. He also points out that someone's economic existence cannot only be ruined by damage suffered but also by comprehensive obligations to compensate, and this is often due to chance. For whether and what sort of damage actually results from a process giving rise to liability is largely a question of coincidental circumstances. Finally, according to *F. Bydlinski* the »difference principle« of social justice also calls for institutional provisions to counter the effects of the circumstance that persons without means are at risk of becoming involved in large-scale liability on the basis of financial damage but this is far less the case vice versa and insofar there is largely only the risk of personal injury. All these maxims must be weighed up against the grounds supporting comprehensive liability, he argues: they are all the more relevant, the weaker the grounds for liability are in the individual case.

8/27 It is often contended that a reduction clause is not necessary because the damaging party already enjoys enough protection from all the rules in favour of debtors in general provided by *restrictions on execution and enforcement* and under *insolvency law*[58]. However, it must be remembered that in end effect it makes a considerable difference whether the damaging party is left only with the minimum subsistence level as a result of the provisions of the law of execution or whether his obligation in itself is already reduced on the basis of substantive law. Firstly, a reduction on the basis of the balance of interests can leave the tortfeasor with more than just the minimum subsistence level and thus still allow him a certain possibility for development. Secondly, the reduction under substantive law is also effective in relation to third parties: in the absence of the substantive law reduction, the compensation claims would be taken into account to its full extent in any bankruptcy of the victim; in contrast, a reduction of the compensation duty would mean only the reduced claim could be enforced.

8/28 It is sometimes criticised that the argument for a reduction clause is only made with respect to *compensation duties,* although other obligations can naturally

57 System und Prinzipien 226 ff.
58 *Schauer,* Die Reduktionsklausel im Entwurf des österreichischen Schadenersatzrechts, NZ 2007, 131 f.

also reach ruinous scale but no argument is made for corresponding mitigation options in this respect. In this context, very material differences must be borne in mind: *contractual obligations* are based on the free will of the obligor, in the case of a blameworthy will he has recourse to legal remedies and the same is true if there are unexpected developments (eg, the basis of the transaction ceases to exist [Wegfall der Geschäftsgrundlage], unacceptability). This range of remedies is not available in the context of non-contractual obligations.

Besides this, there are differences within this field too: in the *law on unjust enrichment* only an advantage taken without justification will be disgorged and if it has been expended in good faith the legal concept of balancing out disadvantages provides protection by mitigating grave consequences; thus, there is no threat of ruinous effects resulting from unjust enrichment actions. In the law of tort, on the other hand, the issue at stake is the duty to compensate damage suffered by third parties from one's own assets, which damage – as *F. Bydlinski* rightly emphasises – may reach enormous magnitude often due to very random circumstances. Therefore, under the law of tort the liable party has a *special need of protection.*

8/29 Nonetheless, it must be stressed again in conclusion[59] that according to the tenets of the applicable law, based on the principle of compensation and also on the notion of deterrence, *full compensation* can *usually* be sought provided the liability criteria are met with sufficient weight and, naturally, a reduction with mitigation of the duty to compensate can only be applied with great reticence in crassly *exceptional cases*.

59 Thus, also *F. Bydlinski,* System und Prinzipien 228.

Chapter 9

Prescription of compensation claims

I. The basic principles of the law on prescription

A. The basic problem regarding the concept of prescription

9/1 While prescription primarily serves to *protect alleged obligors against unfounded suits,* it also leads to *unenforceability of existing claims*[1]. As *F. Bydlinski*[2] rightly emphasises, the loss of an existing right simply due to the passing of time or at least the fact that such is rendered unenforceable, represents a serious impairment of the protection of well-founded rights, the principle of freedom and the theory of justice: »Without his will in this respect, ie involuntarily, the entitled person suffers the loss of his rights and the assets associated with such, without it being possible to justify such loss in relation solely to the respective obligor or person alleged to be liable: hence, in the absence of any counter-performance on his part, such person unilaterally obtains an advantage without the will of the person previously entitled and at the expense of this person.« Therefore, prescription is also referred to as a type of *dispossession*[3]*;* however, it must also be observed that the dispossession ought to serve »the general best interest« (§ 365 ABGB), whereas prescription only benefits a specific obligor and does not serve the public interest[4].

9/2 As *F. Bydlinski* further explains, the institution of prescription would be classified as a *violation of legal ethics* if seen purely from the perspective of the afore-

1 *Spiro,* Begrenzung privater Rechte I 10 ff.
2 System und Prinzipien 167 f.
3 *Von Bar,* Deliktsrecht II no 554; *Mansel,* Die Reform des Verjährungsrechts, in: Ernst/Zimmermann (eds), Zivilrechtswissenschaft und Schuldrechtsreform (2001) 348; *Zimmermann,* »... ut sit finis litium«, JZ 2000, 854; *Zimmermann/Kleinschmidt,* Prescription: General Framework and Special Problems Concerning Damages Claims, in: Koziol/B.C. Steininger, Yearbook 2007, 31 (a German version appeared under the title »Verjährung: Grundgedanken und Besonderheiten bei Ansprüchen auf Schadensersatz« in: Bucher-FS [2009] 861).
4 *Zimmermann,* JZ 2000, 857.

mentioned fundamental principles[5]. Nonetheless, he also notes that legal history and comparative law, ie the experience of jurisprudence in its entirety, hardly substantiate anything more clearly than the indispensability and naturalness of the institution of prescription[6]. This viewpoint can be supported by other fundamental legal principles, specifically the need for *legal certainty* in general[7] as well as *practicability* and *economic effectivity*[8].

9/3 As *B.A. Koch*[9] has rightly emphasised, however, it must in principle be the case that a claim once it arises can only become prescribed when other interests outweigh it. The decision as to when prescription should apply, as *Zimmermann*[10] highlights, hinges on a delicate *balancing of countervailing interests.* Besides the interests of the defendant, in particular in protection against increasing evidentiary difficulties, unexpected suits and in security as to what he disposes of, the interests of the general public in timely enforcement of rights, peace under law, legal certainty and ensuring that the courts are not overburdened are at issue, but above all of course, also the interests of the claimant in sufficient opportunity to enforce his rights[11].

The weight and interplay of these grounds play a role in particular when it comes to the different prerequisites for prescription of compensation claims. Above all, the victim's knowledge of the existence of a claim against a certain liable party and thus the possibility to enforce such is of very decisive significance.

B. Protection against unfounded claims

9/4 The further back in the past the relevant facts lie, the more difficult it is to establish them reliably and thus also to determine the real legal situation. Because

5 The prescription of absolute rights is heavily criticised by *Peters/Zimmermann,* Verjährungsfristen, in: Bundesminister der Justiz (ed), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts I (1981) 186. In their view only secondary claims should be subject to prescription.

6 *Zimmermann,* JZ 2000, 854, also emphasises that all developed legal systems impose time limitations on the enforcement of claims.

7 *Grothe* in MünchKomm, BGB I/1[5] Vor §§ 194 ff no 7; *Piekenbrock,* Befristung, Verjährung, Verschweigung und Verwirkung (2006) 317 f.

8 Cf also *Peters/Zimmermann* in: Bundesminister der Justiz, Gutachten, Schuldrecht I 187 ff; *von Bar* denotes prescription in this sense as the »weakest defence morally speaking« (Deliktsrecht II no 545). *Keller,* Haftpflicht im Privatrecht II[2] (1998) 249, concludes that the ultimate aim of the legal system is not the enforcement of true rights but peace under the law.

9 Verjährung im österreichischen Schadenersatzrecht de lege lata und de lege ferenda, in: Liber Amicorum Pierre Widmer (2003) 174.

10 *Zimmermann,* JZ 2000, 857; *idem,* Comparative Foundations of a European Law of Set-Off and Prescription (2002) 76 ff.

11 See on this recently *Vollmaier,* Verjährung und Verfall (2009) 50 ff with additional references.

of these *evidentiary difficulties, F. Bydlinski*[12] concludes: »In the judgement of all developed legal systems, therefore, because of temporal considerations there must at some point be an end to the possibility of recourse back to the alleged and often also actually true legal situation«. The need to protect the defendant against unfounded claims is accordingly broadly regarded as an especially weighty argument[13]; however, this protection may only be understood as an ancillary purpose, as otherwise the result would be unjustified protection of real obligors and not only the justified protection of persons not really under any obligation, he argues[14].

On the other hand, however, it seems an obvious objection that the evidentiary difficulties[15] would in any case be borne by the *obligee,* who in principle would have to prove the elements of the claim. Nevertheless, the evidentiary difficulties also have a substantial impact upon the position of the alleged *obligor:* he can often no longer prove or adequately substantiate his defences and objections against the alleged claims. *Spiro*[16] consequently summarises the situation as follows: »Thus, the first task of prescription is not to revoke per se justified claims but to stave off alleged, but actually non-existing or no longer existing claims; not to free a real obligor from any performance but to protect the alleged obligor who is subjected wrongly to the action, albeit perhaps in good faith.«

C. Protection against unexpected suits

9/5 Nonetheless, it is of course possible that sometimes in spite of the passing of long periods of time, the elements of the claim can still be proven clearly. The fact that prescription still applies in such cases is defended on the grounds[17] that the obligor frequently requires protection against per se justified claims, especially such as were not known to him and of which he often could not have any knowledge[18].

12 System und Prinzipien 168. See also *Mader* in Schwimann, ABGB VI³ § 1451 no 2.
13 *Mansel,* Die Reform des Verjährungsrechts, in: Ernst/Zimmermann (eds), Zivilrechtswissenschaft und Schuldrechtsreform 348.
14 *B.A. Koch* in: Liber Amicorum Pierre Widmer 175.
15 On this *Piekenbrock,* Befristung 327 ff, 360, who only considers the obligor worthy of protection if he did not know of the respective claim.
16 Begrenzung privater Rechte I 10; following this line *Peters/Zimmermann,* Verjährungsfristen, in: Bundesminister der Justiz (ed), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts I 104, 189, 288; Cf also *Grothe* in MünchKomm, BGB I/1⁵ Vor §§ 194 no 6.
17 *Spiro,* Begrenzung privater Rechte I 11 f.
18 *Piekenbrock,* Befristung 333.

The law also protects, however, those obligors who must know of their obligation or in fact did know of such. It is submitted that not only innocently unknowing obligors are protected because otherwise the obligor would be required to rebut the allegation of male fides put by the obligee and thus would once again be exposed to evidentiary difficulties due to the passing of long periods of time.

9/6 A further decisive reason is that even such obligors are deemed worthy of protection as *no longer should have seriously had to anticipate* that a claim, which is per se founded and would have been enforceable in the usual manner, would still be actioned. The obligor cannot be blamed for the fact that after a certain amount of time he no longer expects the claim to be enforced against him, as *Spiro*[19] explains: »Anyone who wishes to manage his financial affairs sensibly must be able to make arrangements and have an overview of his obligations and cannot make resources available to meet unexpected claims ad infinitum. If the claim is then asserted after all after a long period of time, this often impacts upon the obligor no less than if he had not known of it in the first place.«

9/7 It is not only the surprised obligor who needs protection, however, but also those who fear being faced with claims that in end effect are never asserted by the obligees. The supposed obligation encumbers the obligor no less than a real one because it means he must keep resources available. In parenthesis, this assumes he knows how much of his resources to keep available which is not often the case. In any respect, it would not be acceptable for him to have to maintain this provision of resources for an unlimited time if the obligee does not seek satisfaction although he could do so[20]. On the other hand, the obligor also cannot be expected to conduct research as to uncertain claims or even to satisfy definite claims so long as the obligee shows no interest in their enforcement[21].

D. Protection of uninvolved parties against being burdened

9/8 A further aspect is closely related to that of the surprise element: if claims could still be asserted without limitation even after many decades, this would also very strongly increase the probability that *uninvolved persons* would also be burdened with duties to perform, such as had neither entered into the contractual obligation

19 Begrenzung privater Rechte I 14; following this line *Peters/Zimmermann* in: Bundesminister der Justiz, Gutachten, Schuldrecht I 104, 189, 288. Cf also *von Bar,* Deliktsrecht II no 545.

20 *Peters/Zimmermann* in: Bundesminister der Justiz, Gutachten, Schuldrecht I 189; *Piekenbrock,* Befristung 319 also sees an public economic interest in this connection in relation to the increased overall economic liquidity. The obligor is only worthy of protection in their eyes if he assumes he has already met his obligation *(idem,* Befristung 501).

21 *Spiro,* Begrenzung privater Rechte I 16.

nor obtained the unjust enrichment nor realised the wrong triggering the duty to compensate. At first glance, this appears only to be the case when the obligors are *natural persons.* Even then it could still be argued that the liable heirs as universal successors have also taken over the assets and besides enjoying the advantages should be the ones to bear the disadvantages. Nonetheless, it must also be borne in mind that heirs who know nothing of the claims would suffer a special disappointment of reliance and, on the other hand, in the case of unlimited liability, the assets inherited may not always suffice to cover the liabilities.

Besides this, the argument that in the absence of prescription above all uninvolved parties would be affected also applies ultimately to *legal entities:* while the liabilities in this respect do affect the same obligor, namely the legal entity, unexpected, substantial liabilities nevertheless naturally also affect the shareholders. Ultimately, under some circumstances the economic impact thus affects completely different natural persons than those who were burdened at the time of the damaging event. This is the case particularly if the shares of a company previously belonged to a sole shareholder (eg, the state) or several large shareholders, but these shareholders have changed or the company has since changed to a company offering shares for public subscription. Above all in the latter case, if claims that arose decades ago were actioned, this would often impact on small investors to whom the obligation could no longer be imputed in any way and in relation to whom there could no longer be any talk of a moral obligation to satisfy claims for unjust enrichment or compensation.

E. The notion of laches

9/9 Finally, the relationship between prescription and laches and renunciation is emphasised[22]. The obligee's conduct, namely his inactivity despite the possibility open to him of asserting his claim, can cause the obligor to *rely* on the fact that the obligee will no longer enforce his claim[23]. Therefore, the prerequisites for an implied renunciation are often satisfied. However, even if there is no transaction of renunciation, the inactivity of the obligee induces reliance and creates a difficult position for the obligor. In such cases too, the loss of the right is justified, as *Spiro*[24] persuasively highlights: »However, he should bear the consequences of his

22 *Spiro,* Begrenzung privater Rechte I 25 ff; *Piekenbrock,* Befristung 362 ff.

23 If this assumption of the obligor's is not only based on the time that has passed since the claim arose but also on the conduct of the obligee, and this assumption is objectively justified, the obligee's claim is *forfeit* under German law *(Grothe* in MünchKomm, BGB I/1[5] Vor §§ 194 no 13).

24 Begrenzung privater Rechte I 26. Cf also *Klang* in Klang, ABGB VI[2] 563.

own hesitation not only where he took them on but also in cases where he would have been able to avoid them without undue effort, hence when his silence if he wanted to preserve his right was incorrect.«

9/10 This addresses a very decisive requirement for the appropriacy of prescription, which *F. Bydlinski*[25] emphasises: the prerequisites for prescription and the prescription periods must be set out so that it is generally *possible* for the person holding the right, ie in the typical case, to enforce his right without excessive risks and efforts if he wishes. Then it may truly be said that such person has it in his power to keep the extent of the liable party's disappointment of expectations and inconvenience as regards the passage of time relatively low by undertaking reasonable measures, he writes. If such does not do this in the long-term then, it is argued, it is justifiable (also in the sense of the principle of responsibility for oneself) that he bears the acute negative consequences[26].

II. The present legal position and two problematic issues

A. The prescription period

1. Austrian law

9/11 § 1478 sentence 2 ABGB stipulates that as regards prescription »the simple non-use of a right, which per se could already have been exercised, over thirty years is sufficient«. § 1479 ABGB then further establishes: »All rights against a third party, whether included in the public registers or not, are thus extinguished as a rule at the latest after not being used for thirty years, or by silence in this respect observed for such a long time.«

Hence, claims are prescribed after *thirty years* at the latest; there are no longer prescription periods applicable to the rights of natural persons[27]. The thirty-year period is only departed from in the opposite direction: there are shorter periods for some claims or additionally a shorter period alongside the long period.

25 System und Prinzipien 168.

26 *Piekenbrock,* Befristung 364, supports the view that the question of whether lax pursuance of rights is already a sufficient prerequisite for the loss of the right, cannot be answered in theory but must be weighed up by the legislature.

27 Only for the rights of particularly protected entities, such as the public treasury, churches, muncipalities and other legal entities, does § 1485 (1) ABGB provide for a forty-year period. This differentiation between natural persons and legal entities conflicts the basic idea of equal status provided for by § 26 ABGB and should be redressed.

In this manner, § 1489 ABGB provides that claims for compensation are prescribed in principle within three years starting from the time when the victim becomes aware of the damage and the identity of the damaging party.

Only when the damage or damaging party is not known to the victim or if the damage derives from an action punishable under law that can only be committed intentionally and is subject to a possible penalty of more than one-year's imprisonment, does the thirty-year period apply[28].

9/12 The appropriacy of shorter prescription periods under tort law, depending on the victim's knowledge, as opposed to other kinds of claims seems rather dubious as other claims also – eg unjust enrichment claims and also contractual claims – may involve similar difficulties when it comes to discerning the existence of the claim or uncertainties in this respect. German law, with good reason, now provides for this kind of relative prescription in respect of all claims (§ 199 (1) BGB). This will not be dealt with in any more detail here. It is largely undisputed, however, that such prescription at least seems justified in the case of compensation claims[29]: if the victim still does not assert his claim within a reasonable time although he knows about the damage and damaging party, the serious charge that he has not acted in good time (Säumigkeit) may after all be levelled, meaning that his worthiness of protection is greatly reduced[30].

9/13 Criticism is levelled above all at the length of the thirty-year prescription period, in Austria particularly in the field of lawyers' liability for errors in advice or representation[31]. In particular reference is had to *evidentiary difficulties* that the lawyer is exposed to due to complex counsel-client relationships, the difficulty to evaluate handling of such and the clients' duties to cooperate. The corresponding call for the period to be shortened by a special rule exclusively for the field of lawyers' liability does not seem very persuasive, however; indeed it runs contrary to the principle of equality as very similar arguments could be submitted in respect of other fields, above all for other professions dealing with legal advice such as notaries, but also for the advising capacity of banks in investment matters and of course also in respect of medical advice.

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28 According to the unanimous view of theory and case law, a criminal law conviction of the damaging party is not a prerequisite for the application of this rule: OGH 5 Ob 560/87 in RdW 1988, 128; 1 Ob 532/93 in RdW 1994, 244; In more recent times 4 Ob 234/06z; *M. Bydlinski* in Rummel, ABGB II/1³ § 1489 no 5; *Mader/Janisch* in Schwimann, ABGB VI³ § 1489 no 24, *Dehn* in KBB, ABGB³ § 1489 no 8.

29 On this, eg, *Büning,* Die Verjährung der Ansprüche aus unerlaubten Handlungen (1964) 9; *Peters/Zimmermann,* Verjährungsfristen, in: Bundesminister der Justiz (ed), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts I 223; *Piekenbrock,* Befristung 338 f; *von Bar,* Deliktsrecht I no 395.

30 *Peters/Zimmermann,* Verjährungsfristen 297.

31 Thus, above all *Benn-Ibler,* Anwaltshaftung, Verjährung, Welser-FS (2004) 55.

2. German law

9/14 German law proceeds on the basis of a standard, *relative prescription period* of three years (§ 195 BGB), which starts to run at the end of the year in which the claim arose and the obligee gained knowledge of the circumstances giving rise to the claim and the identity of the damaging party or would have obtained such knowledge had he not been grossly negligent (ultimo-prescription[32]; § 199 (1) BGB)[33].

Besides this, an *absolute period* is stipulated, ie a maximum period after which a claim expires in any case regardless of the subjective prerequisites for prescription[34]. In respect of claims for compensation, distinctions are made according to the ranking of the legal good infringed: claims based on injury to life, the body, health or liberty are prescribed according to § 199 (2) BGB at the latest 30 years after the date on which the *act,* breach of duty or other event that caused the damage, *occurred*[35]. This rule also applies to all other compensation claims (§ 199 (3) no 2 BGB); however, such may also be prescribed earlier: pursuant to § 199 (3) no 1 BGB a compensation claim that is not directed at compensation for damage to life, the body, health or liberty, is barred at the latest ten years after such *arises.* The period that ends first is applicable[36].

3. Swiss law

9/15 Compensation claims are prescribed under Art 60 OR one year after knowledge is gained of the damage and the identity of the damaging party; the preliminary draft for a reform of tort law, on the other hand, provides for a period of three years[37]. Simple »constructive knowledge« is not sufficient for the commencement of the prescription period; the victim must actually know[38]. At the latest after 10 years have passed, the claim expires in any case[39], unless it is based on an action punishable under law in which case Swiss criminal law provides for a longer prescription period (Art 60 (2) OR).

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32 *Grothe* in MünchKomm, BGB I/1[5] § 199 no 41; *Heinrichs* in Palandt, BGB[68] (2009) § 199 no 38.

33 Cf on this *Grothe* in MünchKomm, BGB I/1[5] § 199 no 25 ff; *Heinrichs* in Palandt, BGB[68] § 199 no 2; *Piekenbrock,* Befristung 338 ff.

34 On the one hand, it must be borne in mind in this respect that these are special prescription rules and thus the ultimo-rule does not apply, ie the periods start to run exactly on the day; on the other hand, the rules on suspension, suspension of expiry and re-commencement of prescription also apply here (§§ 203 ff BGB), so that the maximum period may also be exceeded. Cf *Grothe* in MünchKomm, BGB I/1[5] § 199 no 43; *Heinrichs* in Palandt, BGB[68] § 199 no 39.

35 *Grothe* in MünchKomm, BGB I/1[5] § 199 no 46; *Heinrichs* in Palandt, BGB[68] § 199 no 42.

36 *Grothe* in MünchKomm, BGB I/1[5] § 199 no 47; *Heinrichs* in Palandt, BGB[68] § 199 no 44.

37 *Loser-Krogh,* Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung, ZSR NF 122 II (2003) 200.

38 *Keller,* Haftpflicht im Privatrecht II[2] (1998) 260; *Däppen* in BSK, OR I[4] Art 60 no 6 ff.

39 Insofar as the special rule in Art 60 OR corresponds to the general prescription provision under Art 127 OR.

B. Commencement of the prescription period

1. Austrian law

9/16 As provided by § 1478 ABGB, the prescription period in principle only begins to run as of the date on which the right *could first have been exercised.* This takes account of the idea that the obligee's claim should only become barred if he could already have asserted it by means of reasonable measures[40].

9/17 The requirement for the commencement of prescription highlighted by § 1478 ABGB to the effect that the right »could per se already have been exercised« must mean that the prescription period for compensation claims can only begin when *the damage is incurred* by the victim: prior to the incurrence of the damage the claim for compensation has not yet arisen and can accordingly not yet be asserted. This is now generally recognised in respect of the short prescription period which only commences when the victim knows of the damage and the identity of the damaging party[41] and is also widely advocated in respect of the long prescription period and is explicitly provided by § 20 AtomHG (Nuclear Liability Act)[42]. On the other hand, some academic literature as well as case law also takes the stance that the long prescription period already commences running when the *act is committed*[43].

Besides this, it is unanimously accepted that in relation to the long prescription period only the *objective* possibility of exercising the right is relevant, ie that there is no legal obstacle to asserting the claim[44]. Subjective obstacles or such as lie only within the person of the party with the claim, such as lack of knowledge of

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40 Thus also from a comparative perspective *Zimmermann/Kleinschmidt,* Presciption: General Framework and Special Problems Concerning Damages Claims, in: Koziol/B.C. Steininger, Yearbook 2007, 31 and 34 ff.

41 See *Dehn* in KBB, ABGB³ § 1489 no 4 with additional references; *Kletečka/Holzinger,* Die Verjährung von Schadenersatzansprüchen aus fehlerhafter Anlageberatung, ÖJZ 2009, 629.

42 Thus also OGH 2 Ob 58/91 in JBl 1993, 726 *(Ch. Huber); F. Bydlinski,* Schadensentstehung und Verjährungsbeginn im österreichischen Recht, Steffen-FS (1995) 74; *M. Bydlinski* in Rummel, ABGB II/1³ § 1489 no 6; *P. Bydlinski/Vollmaier,* Österreichisches Verjährungsrecht, in: Remien (ed), Verjährungsrecht in Europa – zwischen Bewährung und Reform (2011) 221; *Ertl,* Die Verjährung künftiger Schadenersatzansprüche, ZVR 1993, 33; *B.A. Koch* in: Liber Amicorum Pierre Widmer (2003) 191; *Koziol,* Haftpflichtrecht I³ no 15/19; *Madl,* Beginn der langen Verjährung nach § 1489 Satz 2 ABGB unabhängig vom Eintritt eines Schadens?, Koziol-FS (2010) 759 ff.

43 In Austria in particular *Klang* in Klang, ABGB VI² 637 f; *I. Welser,* Die lange Verjährungsfrist als zeitliche Haftungsschranke, ecolex 1993, 657; *R. Welser,* Schadenersatz statt Gewährleistung (1994) 87 f; OGH 4 Ob 57/78 in DRdA 1980, 27 *(Koziol);* 4 Ob 76/81 in DRdA 1983, 186 *(P. Bydlinski); Mader/Janisch* in Schwimann, ABGB VI³ § 1489 no 25. *Mader,* Grundprobleme des Verjährungsrechts, FS 200 Jahre ABGB (2011) 1286 f. On German law see *Moraht,* Verjährungsrechtliche Probleme bei der Geltendmachung von Spätschäden im Deliktsrecht (1996) 118.

44 See eg, OGH 1 Ob 563/85 in SZ 58/122 = JBl 1986, 317 *(Ch. Huber);* most recently 2 Ob 31/07h in ÖBA 2008, 1513; *M. Bydlinski* in Rummel, ABGB II/1³ § 1478 no 2; *Dehn* in KBB, ABGB³ § 1478 no 2; *Mader/Janisch* in Schwimann, ABGB VI³ § 1478 no 3.

the claim or a mistake, have no influence on the commencement of the prescription period[45].

2. German law

9/18 The commencement of the standard three-year prescription period requires either knowledge[46] or at least grossly negligent ignorance[47] of the claim and the obligor as well as that the claim has already arisen[48]. Thus, the *occurrence of the damage*[49] must also have ensued. This also applies to the ten-year period under § 199 (3) no 1 BGB[50].

The absolute limit of 30 years for the prescription of compensation claims commences according to the explicit rule under § 199 (2) and (3) no 2 BGB regardless of when such claims arose on the date the *act was committed,* the breach of duty or other event that caused the damage occurred; ie also prior to the occurrence of the damage[51].

3. Swiss law

9/19 Pursuant to Art 60 OR, compensation claims are prescribed one year after knowledge of the damage and identity of the damaging party. Thus, it is a prerequisite that the *damage has occurred* as otherwise it would not be possible to have knowledge of such[52]. With respect to the commencement of the absolute ten-year period, however, the date of the *action* causing the damage and not the occurrence of the damage is material[53].

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45 *M. Bydlinski* in Rummel, ABGB II/1³ § 1478 no 4; *Dehn* in KBB, ABGB³ § 1478 no 2; *Mader* in Schwimann, ABGB VI³ § 1478 no 6.

46 *Grothe* in MünchKomm, BGB I/1⁵ § 199 no 25 ff; *Heinrichs* in Palandt, BGB⁶⁸ (2009) § 199 no 23 ff.

47 *Grothe* in MünchKomm, BGB I/1⁵ § 199 no 28 ff; *Heinrichs* in Palandt, BGB⁶⁸ § 199 no 36 f.

48 A claim is deemed to have arisen when it could be asserted at the earliest and – if necessary – enforced by a court (in more recent times BGH in NJW-RR 2000, 647). Cf also *Grothe* in MünchKomm, BGB I/1⁵ § 199 no 4; *Heinrichs* in Palandt, BGB⁶⁸ § 199 no 2 ff.

49 *Von Bar,* Deliktsrecht II no 550; *Grothe* in MünchKomm, BGB I/1⁵ § 199 no 9; *Heinrichs* in Palandt, BGB⁶⁸ § 199 no 15 f.

50 *Grothe* in MünchKomm, BGB I/1⁵ § 199 no 47; *Heinrichs* in Palandt, BGB⁶⁸ § 199 no 40.

51 *Grothe* in MünchKomm, BGB I/1⁵ § 199 no 46; *idem* expresses constitutional law concerns in MünchKomm, BGB I/1⁵ Vor §§ 194 ff no 9 with respect to this rule; *Heinrichs* in Palandt, BGB⁶⁸ § 199 no 42.

52 In this sense BGE 126 III 163 f; *Däppen* in BSK, OR I⁴ Art 60 no 7.

53 *Keller,* Haftpflicht im Privatrecht II² (1998) 261; *Däppen* in BSK, OR I⁴ Art 60 no 9.

III. Attempt to find rules on prescription that are consistent with the system and value judgements

The rule on the *short* prescription period is in principle well accepted[54]. The *long* prescription period, in contrast, gives rise to very substantial debate above all regarding when the period starts to run and its long duration. Accordingly, these questions shall be looked at in more detail below. 9/20

A. Commencement of the long prescription period

As already mentioned, the popular view is that the thirty-year prescription period commences when the *act is committed* and not only upon the later occurrence of the damage. *Klang's*[55] rationale for this is highly contradictory and thus not persuasive: he concedes that the issue is not expressly regulated by the law, but argues that the solution derives from the general rule under § 1478 ABGB, »as the objective possibility to exercise the compensation claim exists as of the infliction of the damage«. However, the argument based on § 1478 actually speaks *against* the conclusion advocated by *Klang* as this provision requires that the claim could already have been asserted before the prescription period can start to run, and according to *Klang's* own – correct – explanations, the claim for compensation only arises when the damage is inflicted, ie upon the occurrence of the damage. *Ehrenzweig*[56] therefore rightly contends that the commencement of the prescription period even before the damage occurs constitutes an exception to the rule under § 1478 ABGB. Nonetheless, he does not offer any rationale for this deviation, he merely points to the earlier § 852 BGB, which expressly stipulated the same. 9/21

However, this reference does not prove anything as there is in fact no corresponding rule in Austrian law, instead only the general provision of § 1478 ABGB, which sets out precisely the opposite. As prescription is based on the idea that a claimant who does not act in good time ought to lose his claim after a certain time in order to ensure clarity in legal relationships, the concept clearly requires that the claimant could already have asserted the claim and that the obligor could have anticipated it. Neither of these is the case so long as no damage has occurred as no claim can have arisen until then either. Thus, the prescription period here can only start to run when *the damage occurs* as well.

54 See also *Zimmermann,* »... ut sit finis litium«, JZ 2000, 861.
55 *Klang* in Klang, ABGB VI² 637 f.
56 *Ehrenzweig,* System II/1² 79 FN 98a.

9/22 This solution does not, as *Rebhahn*[57] opines, ascribe too much significance and intrinsic value to the terms, in particular that of the occurrence of the damage; rather this is a decision based on *value judgements.* It is also very appropriate and in harmony with the basic values: once the tort law criteria are met, the victim in principle has a compensation claim. The awarding of a compensation claim is based on it being more reasonable for the damaging party ultimately to bear the damage when the grounds for liability are fulfilled; ie the victim appears more worthy of protection. If there are no grounds inculpating the victim in any way, not even objective failure to act in good time as regards enforcing a claim, then there is no reasonable justification for robbing the victim of his rights merely because of the passage of time and to release the damaging party from liability. *Rebhahn*[58] cannot rebut these arguments either by resorting to the terminological trick of construing the passage of time as a ground for liability and only accepting the claim has arisen provided it has done so prior to the expiry of the chronological limit on liability. By these means, he seeks to elude to the argument that he deprives the victim of his compensation claim even before such has arisen and thus before the victim has had any chance at all of asserting it; he simply refuses to accept that the claim has arisen. Such re-classifications cannot provide any persuasive answers to issues of value judgements.

9/23 Therefore, there is still no discernible reason why the victim should be any less worthy of protection and thus denied his claim if, for instance, due to slow-working chemical substances or radiation, damage only occurs more than 30 years after the action imputable to the damaging party[59]. Why should such victims be left without any compensation at all for their loss of earnings, medical costs and pain and suffering? With all due respect for the interests of the damaging party in having closure as regards past events at some point[60], the basic value determined by the legal system must be kept in mind, namely that when all grounds for liability are met, the victim is recognised as being more worthy of protection than the damaging party.

Exclusively taking into account the interests of the responsible damaging party is very one-sided and thus inappropriate: someone who is possibly exposed to the damaging effects of an event triggering liability can after all not demand that after a certain time the damage no longer be allowed to occur since he is now entitled

57 On the new prescription rule in the BGB and on the long prescription period for compensation claims, Welser-FS (2004) 867. Firmly against this view *Madl,* Koziol-FS 774 ff.

58 Welser-FS 867.

59 On other cases in which damage ensues long after the event triggering liability, see *Zimmermann/Kleinschmidt,* Prescription: General Framework and Special Problems Concerning Damage Claims, in: Koziol/B.C. Steininger, Yearbook 2007, 49 ff.

60 Thus, eg *Rebhahn,* Welser-FS 869; *Zimmermann,* Comparative Foundations of a European Law of Set-Off and Prescription (2002) 99.

to assume that no exposure will ensue. Nature does not admit of any human time limits in respect of how long damage is allowed to arise. Why then should the responsible damaging party be granted the security of not being exposed to any burden after a certain time although the victim cannot attain any security in precisely this respect? Why should the security interests of the damaging party, who has acted wrongfully and culpably, be prioritised over the security interests of the victim who is not responsible for bringing about the unfortunate situation?

9/24 This does not by any means constitute excessive efforts towards justice for individual cases[61] but in fact the implementation of the *basic value of the law of tort,* namely that when certain grounds for liability are met, the victim should not ultimately have to bear the disadvantage but instead may shift it to another who is more proximate to the damage, eg because of having acted in a wrongful and culpable manner. This is why the German and Swiss solutions which are based on the commission of the damaging act are not persuasive. Far better-founded would seem to be those rules, above all the French and Italian, that dispense with any long, objective time limit and simply attach the prescription period to knowledge on the part of the victim[62].

B. The length of the long prescription period

9/25 At 30 years the prescription period stipulated by the ABGB is certainly one of the longest of the common prescription periods in international comparison[63]. The BGB also provides for such a long period but this starts to run when the damaging event occurs and not – as is predominantly taken to be the case in Austria – only when the damage occurs. Moreover, the BGB differentiates according to the damaged good: compensation claims that are not raised on the basis of injury to life, the body, health or liberty are also subject to a second limitation of 10 years after the claim arises, ie as of occurrence of the damage. Switzerland only provides for a ten-year period, which starts to run as of the event triggering liability and not only once the damage has occurred.

9/26 This *differentiation according to the ranking of the damaged good* in the current BGB seems persuasive[64] as it takes account of an essential basic value in the legal

61 Thus, *Rebhahn,* Welser-FS 869.

62 *Zimmermann/Kleinschmid* in: Koziol/B.C. Steininger, Yearbook 2007, 55 f.

63 See *Zimmermann,* European Law of Set-Off and Prescription 99 ff.

64 In favour of differentiation also *Loser-Krogh,* Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung, ZSR NF 122 II (2003) 204; *Mansel,* Die Reform des Verjährungsrechts, in: Ernst/Zimmermann (eds), Zivilrechtswissenschaft und Schuldrechtsreform 384; *Zimmermann/Kleinschmidt* in: Koziol/B.C. Steininger, Yearbook 2007, 51 ff.

system. Therefore, it is not surprising that this idea also plays a significant role in English law: the proposal of the English Law Commission in 2001 sets out that personal injury claims should not be subjected to any special long prescription periods at all but only to the standard, short prescription periods that are based on when knowledge is gained[65]. In the Netherlands, there is a corresponding development[66]. The idea has also been adopted in the Austrian discussion on reform: pure economic loss is precluded from the thirty-year prescription period in § 1489 (1) Austrian Draft; a period of 10 years is stipulated instead in respect of such.

9/27 The German rule that provides for a ten-year period only starting with the occurrence of the damage in addition to the thirty-year period which runs from the date the event causing the damage occurred, also highlights the fact that the length of the period must be seen in connection with the *material point in time for its commencement.* If the commencement of the period is attached to the occurrence of the damage, then the victim at least has the abstract possibility of asserting his claim. In contrast, if the event triggering the damage marks the commencement of the prescription period, then there is a risk that the claim is barred even before it arises and the victim is deprived of any even abstract possibility to assert it. The interests of the victim are of course all the more massively impaired, the shorter the prescription period is, as then even his abstract chance to assert his compensation claim applies in respect of an ever-decreasing amount of the damage.

Vice versa, the lower the risk of an unfounded action due to expiry of time is for the defendant, the longer the prescription period may reasonably be set. This danger can, above all, as provided under § 933 a (3) ABGB for compensation claims due to the defectiveness of delivered goods and for consequential damage in this respect as well as in general the Austrian Draft (§ 1489 (2)), be reduced by a complete reversal of the burden of proof at the cost of the victim.

C. Approaches to regulation

9/28 A relative, *short prescription period* that attaches to the date of the knowledge or constructive knowledge (obviousness) of the damage and the liable party is largely undisputed and should be retained as appropriate. If the damage has already occurred and if the victim knows of the damage and damaging party, ie the main elements of the claim, then the victim at least objectively failed to act in good time if he does nothing. The heavier the accusation that he did not act in

65 *Zimmermann/Kleinschmidt* in: Koziol/B.C. Steininger, Yearbook 2007, 53 f; cf also *B.A. Koch* in: Liber Amicorum Pierre Widmer (2003) 197 ff.

66 *Zimmermann/Kleinschmidt* in: Koziol/B.C. Steininger, Yearbook 2007, 54 f.

good time weighs, the less worthy of protection the victim appears and the better the interests of the damaging party may be taken into consideration, so that a short prescription period is fair.

9/29 The objective, *long prescription period* should likewise be constructed in line with the value judgements expressed in other European legal systems. According to the basic principles of the law on prescription, it may therefore – contrary to widespread opinion – *not commence prior to the occurrence of the damage:* if the claim has not yet arisen, the victim cannot even in the most abstract sense be accused of not acting in good time. Thus, there is *absolutely no justification* for penalising the victim with loss of the claim and favouring the damaging party, who has brought about the damage in a liable manner, by releasing him from the obligation. The balance of interests must clearly come out against the responsible damaging party in this context.

9/30 If the prescription period only starts to run when the damage occurs, then some aspects support having an objective period shorter than 30 years. From a value judgement perspective, however, a great deal speaks in favour of taking the *worthiness for protection* of the damaged goods as a basis; preserving the long period of 30 years for damage to goods of the highest rank and only setting a shorter period of 10 years for the infringement of lesser interests, above all pure economic interests.

9/31 After all, the interests of potentially liable parties in not being confronted with irresolvable evidentiary difficulties due to the passing of time and being exposed to unfounded assertions of claims may be protected by reversing the *burden of proof* at the cost of the claimant once half of the prescription period has expired. This would also create an incentive to assert claims as soon as possible, as would be desirable in general.

Chapter 10

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I. General Part

Section 1 Principles of liability

Fundamental rule

§ 1292. (1) It is the task of tort law to compensate damage and at the same time to thereby create an incentive to avoid damage.

(2) A person is liable to compensate damage to another if that damage can be legally attributed to him.

(3) The consequences of mere chance are borne by the person whose patrimony or person is thereby affected.

Damage; protected interests

§ 1293. (1) Damage is any harm that a person suffers to his person, patrimony or any other of his protected interests. If such harm can be measured in money then there is pecuniary damage, otherwise it is non-pecuniary damage.

(2) The protection of interests depends in particular on the interest's rank and value, the precision of its definition and its obviousness, but also on the inter-

ests of others in free development and in the exercise of rights as well as public interests.

(3) The clearly defined and manifest personality rights such as above all, life and bodily integrity, the rights in rem and intellectual property rights, enjoy the highest protection. Pure economic interests outside of contractual relationships are only protected by way of exception.

Causation

§ 1294. (1) An act, an omission or another event is the cause of damage if it would not otherwise have occurred.

(2) Damage can be attributed to a person if he caused it or the causative event was otherwise within his sphere. This also applies if the event was highly likely to cause the damage but the same is true of another event (cumulative and superseding causation). If one of the events is a chance or caused by the victim or if only the one or the other of the events could have caused the damage (alternative causation) then the damage is to be apportioned according to the weight of the respective grounds for imputation and the likelihood of causation.

(3) To the extent that the same damage is attributable to multiple persons and nothing else arises from para. 2, they are solidarily liable. If multiple persons have acted wrongfully together, it is presumed that each of them caused the entire damage.

(4) In the case of multiple events, all of which may have caused the damage, if none has caused the entire damage or a determined part thereof, but each, however, is highly likely to have caused a part; it is presumed that the events have caused equal shares of the damage.

(5) Insofar as multiple persons are solidarily liable, recourse shall be according to the weight of the respective grounds for imputation, especially the gravity of the fault and the degree of the danger.

Section 2 Liability for fault or otherwise wrongful conduct

Conditions for fault liability

§ 1295. (1) A person is liable on the basis of fault if he unlawfully, that is by violating the objective standard of conduct (§ 1296), and culpably (§ 1300) injures a protected interest or contravenes a concrete duty of care (protective law) or acts contra bonos mores.

(2) A person violates bonos mores if he acts contrary to the fundamental values of the legal order or grossly offends against the general morality, if he acts only with the object of injuring another or if he pursues interests which are in gross disproportion to those of the victim.

Standard of conduct

§ 1296. (1) In general, the standard of conduct to be applied is that which is to be expected of a reasonable person having regard to the interests of others under the circumstances given. In this context, the rank and value of the interests endangered and the interests pursued, the hazardousness of the situation, the proximity between the parties involved, the possibility of averting the danger and the cost and effort associated therewith, shall be considered.

(2) A person who facilitates traffic or creates or maintains a source of danger shall apply all special care reasonable that is necessary in order to prevent damage.

Duty to act

§ 1297. Everyone has a duty to prevent damage which discernibly threatens another if there is a special relationship to the endangered person, if he facilitates traffic or creates or maintains a source of danger or if the threatened damage is grossly out of proportion to the burden of preventing it.

Protection of pure economic interests

§ 1298. (1) Duties of care to protect pure economic interests consist in particular in a contractual relationship, in the case of pre-contractual contact, of declarations on which the grantee is recognisably dependent and which are directed at arousing the trust of the grantee, as well as in the case of rules of conduct for the protection of patrimony. The same applies when the tortfeasor is aware of the threatened damage and there is a gross disproportion between the interests endangered and those pursued.

(2) A person who knows the claim a third party has may not consciously work towards a breach of contract by the debtor, unless he thus protects his own right which is founded earlier in time or in the absence of knowledge of the third party's claim. A person who merely takes advantage of the fact that a debtor is determined on breaching contract is only liable if he knows the debtor's obligation or if this obligation is manifest and he cannot prove that the damage would also have occurred regardless.

Defences based on justifications and necessity

§ 1299. (1) A person who defends himself or others in an appropriate fashion against a present or immediately threatening unlawful attack on life, bodily integrity, liberty or patrimony (justifiable defence of oneself or another person) or who acts in the non-postponable implementation of a right of his own (lawful self-help) or with the valid consent of the victim or in some other manner justified on the basis of the law, shall not be liable.

(2) A person who causes damage in circumstances of necessity in order to avert an immediate threat of danger to himself or others may have his liability reduced or extinguished. The relation of damage and danger, any omission of defence out of consideration for the endangerment as well as the pecuniary circumstances of both sides shall be taken into account thereby. There is full liability if the tortfeasor brought about the emergency culpably.

Fault

§ 1300. (1) A person is at fault if he should have acted differently and on the basis of his abilities and knowledge would have been in a position to do so and would have been able to foresee the damage.

(2) A person who culpably contravenes a concrete duty of care (protective law) is liable even when he could not foresee the damage. A person who knowingly acts unlawfully and who at the least approvingly accepts the damaging consequence of his conduct acts with intent, otherwise negligently.

(3) Persons over 14 years are presumed to have ordinary abilities and knowledge; in the case of persons between 7 and 14 years the opposite is presumed. Persons under 7 years are under no circumstances capable of fault.

(4) A person who enters into a contract to bring a performance must bear the consequences of lacking the abilities and knowledge necessary. The same applies when someone exercises without necessity an activity that requires special abilities and knowledge.

Defective conduct in the case of persons under 14 or lacking mental competence

§ 1301. (1) If persons below the age of 14 or mentally incompetent persons violate the objective standard of conduct, then the basis and extent of their liability depends on their being at fault after all by way of exception, on any benefit they derive from the injury and on any omission of defence out of consideration for them as well as their pecuniary circumstances and those of the victim. The same

applies when another person's conduct is not at fault because he lacks the necessary abilities and knowledge.

(2) A person who has voluntarily put himself in a condition of mental incapacity must compensate the damage another suffers as a result.

Defective conduct in enterprises

§ 1302. (1) A person who operates an enterprise out of commercial or vocational interests is also liable for damage caused by a defect in the enterprise or its products or services. The entrepreneur is not liable if he proves that the care necessary to avert the damage was exercised.

(2) A defect is any deviation from the standard that can be expected from the enterprise, its products or services according to the presentation, the state of the art of science and technology and the customary practice. The defect must be proven by the victim.

(3) Pure economic loss is not compensable under this provision.

Defective conduct in the case of special danger

§ 1303. (1) A person who creates or maintains a special danger is liable for the damage resulting therefrom, unless he proves that the care necessary to avert the damage was taken.

(2) A special danger can in particular be generated by animals, buildings, motor vehicles or activities like cycling or skiing at high speed.

Section 3 Strict liability

Liability for sources of high danger

§ 1304. (1) The keeper of a source of high danger is liable insofar as this danger results in damage.

(2) Who the keeper is depends on who has an especial interest in the source of danger, who bears the costs and who exercises the actual power of disposition.

(3) A source of high danger exists when a thing either in itself or in the course of its ordinary use or an activity involves the risk of frequent or serious damage in spite of the exercise of due care. Sources of high danger include in particular nuclear facilities, dams, oil and gas pipelines and electric power lines, ammu-

nition factories and depots, also aircraft, railway, cableway, motor vehicles and motor boats as well as mines and blastings.

(4) Liability is excluded if the damage is caused by force majeure or in spite of the thing being free from defect and exercise of the greatest possible care (unavoidable event); in particular when such damage is attributable to the conduct of the victim, of a third party not employed in the operation of the thing or of an animal. In cases of especially high danger, e.g. nuclear facilities, dams, aeroplanes or ammunition factories, liability can also merely be reduced in accordance with the degree of danger. The same applies when the unavoidable event substantially increases the danger posed by a thing in the concrete situation (exceptional operational risk).

(5) Liability can also be excluded or reduced if the victim has knowingly accepted exposure to the danger of a special nature.

Section 4 Liability for third parties and for technical equipment

Auxiliaries in the performance of obligations (Erfüllungsgehilfen)

§ 1305. (1) A principal is liable to his partner for the misconduct of his auxiliaries, who he uses in the performance of his obligations or who work for him on the basis of the law. This applies not only in the case of breach of performance duties but also to other misconduct not extraordinary for the activity of such performance agent (Erfüllungsgehilfe).

(2) A performance agent (Erfüllungsgehilfe) can also be someone who takes on an activity to carry it out independently.

(3) The principal is also liable for the failure of technical equipment which he uses in the same way as an auxiliary in the performance of his obligations.

Other auxiliaries (Besorgungsgehilfen)

§ 1306. (1) In the absence of a pre-existing obligation vis-à-vis the victim the principal is only liable for the damage caused by the misconduct of his auxiliaries if the victim proves that the auxiliary was inept or that the principal did not select him carefully or did not supervise him adequately. If the principal is an entrepreneur, then he bears the burden of proof.

(2) In the case of special danger (§ 1303) and sources of high danger (§ 1304) the principal is in any case also liable for the misconduct of his auxiliaries (Besorgungsgehilfen).

(3) A person who undertakes to carry out work independently is not an auxiliary in the sense of this provision (Besorgungsgehilfe). The principal is liable only if he has not selected him with reasonable care or not adequately supervised him.

(4) The principal is also liable for the failure of technical equipment which he uses in the same way as an auxiliary if the victim proves that the equipment was unsuitable, the principal did not select it with reasonable care or did not monitor it adequately. If the principal is an entrepreneur, he bears the burden of proof.

(5) The principal is furthermore liable for the misconduct of persons who have a leading position in his scope of activities with their own decision-making powers and the authority to issue directives. Corporate bodies must in any case answer for their constitutional organs.

Liability of the auxiliaries

§ 1307. The liability of auxiliaries under other provisions is unaffected by the liability of the principal (§§ 1305 and 1306). Insofar as principal and auxiliaries are both liable they must compensate solidarily.

Liability of supervisory persons

§ 1308. Supervisory persons are liable for the misconduct of the persons entrusted to them if they are negligent in their duties. Insofar as the supervisory persons must and can compensate for the non-culpable misconduct of persons below the age of 14 or mentally incompetent persons, the victim has no claim against these persons.

Section 5 Liability for encroachment upon another's right

§ 1309. A person who on the basis of an official or legal authorization encroaches upon another's right is liable for the damage thus caused, unless otherwise provided. The same applies to anyone who merely invokes such authorization.

Section 6 Restrictions of liability

Restrictions of imputation

§ 1310. (1) Compensation shall be paid for damage adequately caused and which is covered by the protective purposes of the norm that was infringed or

which in some other way was the basis for liability. The weight of the grounds for imputation and the benefits gained by the person liable are to be considered.

(2) If the tortfeasor has behaved unlawfully but the damage would also have occurred if he had behaved lawfully, the damage must be apportioned according to the weight of the grounds for imputation.

§ 1311. Material benefits which would have been gained through unlawful behaviour are not to be compensated unless the purpose of the prohibition norm is not opposed by this.

§ 1312. The victim can also claim compensation if the damage has been shifted to a third party, unless the tortfeasor ought thus to be relieved. Insofar as the third party renders to the victim, the right to compensation is transferred to him.

Contributory conduct or activity

§ 1313. (1) If the victim has contributed to his damage or neglected to mitigate it, then the damage is to be apportioned. In particular, the gravity of the fault, the degree of danger and the existence of several grounds for imputation shall be taken into account thereby. In case of doubt, the damage shall be apportioned evenly. In the event of causing death, the contributory conduct of the person killed is decisive.

(2) Even in the absence of a special legal relationship, the misconduct of persons to whom the victim entrusted the damaged goods is imputable to the victim. This does not apply to legal agents or to persons who have been assigned to carry out the work independently.

(3) If the grounds for imputation on one side far outweigh those on the other, then the damage shall not be apportioned. Also to be considered in this context is whether the tortfeasor was under the very obligation to prevent the damage which occurred.

Section 7 Type and extent of compensation

Restitution in kind

§ 1314. The victim can demand the restoration of the previous or a similar or an equivalent state as far as restoration in kind is possible and is not substantially outweighed by the interests of the tortfeasor in monetary compensation. The tort-

feasor can insist on restoration in kind if his interest therein substantially preponderates.

Compensation for pecuniary damage

§ 1315. (1) If restoration is not to be in kind, then the tortfeasor shall compensate the entire damage in money. The damage is to be calculated under consideration of all consequences, including loss of profit, precisely for the victim (concrete calculation). Benefits the victim gained from the damaging event reduce the claim for damages, with the exception of mere shifts of damage (§ 1312) or allocations intended to serve the interests of the victim.

(2) If no substantial interest of the person liable to pay compensation speaks against it, the victim can instead of restoration in kind (§ 1314) claim either reimbursement for the amount of money used for this purpose or an advance. The victim shall render account within a reasonable time for the disposal of this advance.

(3) If restoration in kind is not possible and if therefore the victim replaces the damaged item with a new one then the victim can claim for the replacement value of the damaged thing and the costs incurred by the earlier replacement. If a replacement value cannot be established, the costs of the acquisition or the making of the newer thing with a deduction for the possibility of longer use shall be decisive.

(4) If the damaged good has a market value, the victim can require that the damage be calculated according to the market price at the time of the damaging event (abstract calculation).

Compensation for non-pecuniary damage

§ 1316. (1) Non-pecuniary damage shall always be compensated insofar as the restoration in kind is possible and feasible (§ 1314).

(2) Whether damages are to be paid depends on the significance of the damaged good, the objective traceability, extent and length in time of the impairment and the weight of the grounds for imputation. For serious and objectively traceable injuries to personality rights, damages shall always be paid. Insignificant harm is not compensable.

(3) An appropriate compensation for pain and suffering is to be paid in the following cases in particular

1. bodily injury, injury to health or liberty,
2. for the suffering of closely related persons in the event of causing death or particularly severe injury of a person; in the case of spouses, parents

and children a close relationship is presumed, other persons must prove a comparable relationship,

3. in the case of sexual abuse or injury to the right to sexual self-determination by means of malice, threat or abuse of a relationship of dependence or authority,
4. in the case of intentional or serious discrimination because of gender, a disability, ethnic origin, religion or comparable reasons,
5. in the case of intentional or serious invasion of privacy or,
6. insofar as serious grounds for imputation exist, for the fear of dying or of being seriously injured if such fear has been caused by a concrete endangerment.

(4) In the case of intentional damage to items of property, the value of special affection shall be compensated. In the case of breach of a contract, the non-pecuniary damage is to be compensated if the contract is aimed above all at the satisfaction of non-pecuniary interests and these are substantially impaired and an appropriate compensation cannot be obtained anyway by the reversal of the transaction.

(5) In assessing damages, regard must be had to the circumstances listed in para. 2 and the benefits gained by the tortfeasor from the conduct establishing liability. In the case of compensation for the damage because of improper performance of a contract, the amount of the agreed contract price is to be considered.

(6) Claims for the compensation of non-pecuniary damage are transferable and hereditary.

§ 1317. Continuing damage is to be compensated by a lump sum for the past and by periodical payments for the future. For good cause, the victim can seek compensation by a lump sum if this is not an unreasonable economic burden on the tortfeasor. The lump sum is to be calculated according to the estimated length of time the periodical payments would be paid, with the interest discounted.

Reduction of damages

§ 1318. In exceptional circumstances, damages can be reduced if they would be an unreasonable and oppressive burden for the tortfeasor and a merely partial compensation would be reasonable to the victim. The weight of the grounds for imputation, the economic circumstances of the victim as well as those of the tortfeasor and the benefits gained by the latter are to be taken into consideration.

Section 8 Burden of proof

§ 1319. Insofar as not otherwise provided, the victim must prove all requirements of his claim. If the victim has a special legal relationship to the tortfeasor and if he proves a defect in the tortfeasor's sphere, then the latter must show that he complied with the required standard of conduct. If the victim desires compensation for non-performance of a contractual or legal obligation, then the tortfeasor must prove compliance with the required standard of conduct or the absence of fault.

II. Particular Part

Section 1 Special types of damage

Bodily injury

§ 1320. (1) A person who causes bodily injury or injury to the health of another must in particular compensate costs of treatment and care and increased expenses, loss of earnings including future loss of earnings, the impediment of better advancement (§ 1315) and for pain and suffering (§ 1316). Impairment of earning capacity shall also be compensated even while the actual earnings are not yet reduced.

(2) If the injury leads to death, the tortfeasor must reimburse those who paid the funeral costs and compensate those who were legally entitled to be maintained by the deceased or for whom the deceased would have paid the necessary maintenance, for the loss of this maintenance including future maintenance.

Unwanted birth of a child

§ 1321. (1) A person who by improper performance of a contract thwarts the decision of parents to avoid the birth of a child in an admissible fashion must render appropriate compensation for the non-pecuniary damage caused by such injury of the parents' freedom of decision.

(2) Such person must only compensate for the expenses of the child's maintenance if and insofar as such expenses lead to an exceptional burden for the parents and their standard of living is significantly reduced.

Interference with liberty

§ 1322. (1) A person who interferes with the liberty of another must restore it (§ 1314) and compensate the pecuniary (§ 1315) and non-pecuniary damage (§ 1316).

(2) If the deprivation of liberty stems from a non-public untrue communication, the tortfeasor is not liable if there was a justified interest in the communication and he proves that he did not know that it was untrue.

(3) If the victim does not obtain his liberty and cannot enforce his claim, the tortfeasor must compensate those who were legally entitled to be maintained by the victim or for whom the victim would have paid the necessary maintenance, for the loss of this maintenance including future maintenance.

Defamation

§ 1323. (1) A person who is defamed or whose credit, earnings or advancement is impaired by libel or slander can seek the retraction of the utterance (§ 1314), the compensation of the pecuniary loss (§ 1315) and in the case of serious impairment of his standing, also the non-pecuniary loss (§ 1316).

(2) The tortfeasor is not liable for the non-public distribution of untrue statements if there was a justified interest in the communication and he proves that he did not know they were untrue.

(3) The tortfeasor is liable for the distribution of true facts only if these were not generally known, there was no justified interest in their communication and the facts originate from the private sphere or if the distribution was manifestly designed to impair another person seriously.

Damage to property and injury to an animal

§ 1324. (1) If the tortfeasor destroys a thing he must at least replace its market value (§ 1315 para. 4), in the case of intent also the value of special affection.

(2) If a thing is damaged, the victim can also seek costs of repair exceeding the loss of its value (§ 1315 para. 2) insofar as a reasonable victim would have invested the costs, in particular because of a non-pecuniary interest in the thing.

(3) The same shall apply for the killing or injuring of an animal.

Providing incorrect advice and misinformation

§ 1325. (1) A person who in a contractual relationship or in pre-contractual contact culpably gives his partner incorrect advice or misinformation is also liable for pure pecuniary damage. The same applies to declarations on which the grantee

is recognisably dependent and which are directed at arousing the trust of the grantee; furthermore when the person making the declaration is aware that the information provided is wrong.

(2) If incorrect advice or misinformation provided leads to an injury of personality rights, rights in rem or intellectual property rights, then the tortfeasor is liable regardless of whether a contractual relationship or pre-contractual contact exists, if it is discernible to him that the grantee trusts in the declaration and is thereby put at risk.

Section 2 Liability for roads

Liability of the keeper of a road

§ 1326. (1) If at fault, the keeper of a road is liable for damage that occurs as a result of a permitted use because of the inadequate state of the road. Any use which is not opposed by precept or prohibition or the type of road shall be deemed permitted. Whether the state of a road is inadequate depends on the users' safety expectations justified by the type of road.

(2) The keeper's duty of care is reduced when the road serves above all the interest of the users. This is without prejudice to the contractual liability arising from special arrangement. Public authorities are liable as road keepers in the same way as an entrepreneur (§ 1302).

(3) A path consists of the ground area designated for the traffic including the constructions belonging thereto.

Section 3 Liability for means of transportation

Liability of the keeper

§ 1327. (1) If through an accident in the operation of means of transportation, that is railway, cable car or motor vehicle, a person is killed or injured (§ 1320) or a thing is damaged, the keeper is liable under § 1304.

(2) The keeper of a drag lift is liable for the damage which arises merely out of the condition of the drag track only on a fault basis.

§ 1328. (1) The keeper is not subject to strict liability if the injured or deceased person at the time of the accident was using the means of transportation (§ 1327) or was being transported therewith without the consent of the keeper.

(2) For damage to transported goods, the keeper is only subject to strict liability if at the time of the accident they were being carried by a passenger as hand luggage or on the passenger's person.

Liability in the case of illegal use of means of transportation

§ 1329. (1) A person who knowingly without the consent of the keeper, operates or takes part in the operation of means of transportation, is liable in place of the keeper. The keeper is liable solidarily with him if he or his auxiliaries who are engaged in the operation of the means of transportation made the illegal use possible through their fault.

(2) If the keeper has employed the user for the operation of the means of transportation or handed it over to him, then the user is not liable in place of the keeper provided that the non-consensual use was minimal or justified by a particular cause.

Reduction or exclusion of liability

§ 1330. The liability can be reduced or excluded under the rule of § 1304 para. 4 (unavoidable event).

Exclusion of liability

§ 1331. The liability for causing death or injury of paying passengers can neither be excluded nor reduced in advance.

Section 4 Product liability

Liability for defective products

§ 1332. (1) If a person is killed or injured by a defect in a movable, physical thing (product) (§ 1320) or if property separate from the product is damaged, the producer is liable. The same applies if the product is part of another movable thing or is attached to an immovable thing.

(2) Damage to property is only to be compensated under this section insofar as it exceeds EUR 500, and if such property is of a type ordinarily intended for private use or consumption, and if it indeed was used by the injured person mainly for his own private use or consumption.

(3) The provisions of this section are not to be applied to damage caused by a nuclear event that is covered by a treaty ratified by the member states of the Treaty on the European Economic Area.

Producer

§ 1333. The producer is the manufacturer of the product, or the person who

1. produced any raw material or a component part of the product,
2. presents himself as the producer by the putting of his name, his trade mark or other distinguishing feature on the product,
3. imports the product into the European Economic Area for sale, hire, leasing or any form of distribution in the course of his business (importer) or
4. supplied the product if the producer or importer cannot be ascertained and unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product, or, in case of an imported product, of the importer.

Defectiveness

§ 1334. (1) A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

1. the presentation of the product,
2. the use to which it could reasonably be expected that the product would be put, and
3. the time when the product was put into circulation,

(2) A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Limitation of liability

§ 1335. (1) The producer shall not be liable under this section if he proves

1. that the defect is due to compliance of the product with mandatory regulations issued by the public authorities,
2. that he did not put the product into circulation; or that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business,
3. that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards,

4. that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered, or
5. in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

(2) Liability under this section is extinguished, if not time-barred earlier, upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Exclusion of liability

§ 1336. The liability under this section cannot be excluded in advance.

Section 5 Environmental liability

Liability for environmental damage

§ 1337. A person is liable for a source of high danger (§ 1304) if he operates a facility or engages in an activity which involves the risk of frequent or serious environmental damage. In the same way, a person who operates a facility or engages in an activity for which the risk for the environment obviously cannot be assessed shall be liable for serious environmental damage.

Presumed causation

§ 1338. If, according to the circumstances of the case in point, in particular the type of the damage, time and place of the occurrence of the damage, the operating procedure, the equipment used, the type and concentration of the substances used and the meteorological conditions, a facility or activity which carries a risk for the environment is likely to cause the damage, it will be assumed that it did cause the damage. This assumption is rebutted if the keeper proves that there is a preponderant probability that his facility or activity did not cause the damage. In such a case, the damage can be apportioned under § 1294 para. 2.

Environmental damage

§ 1339. If damage to property at the same time constitutes an impairment of the environment, the importance of the damaged or destroyed thing for the envi-

ronment is to find appropriate consideration when assessing the claim for restoration in kind (§ 1314) or compensation for the amount of money used for restoration (§ 1315 para. 2).

...

Prescription

§ 1489. (1) Claims for damages are time-barred three years after knowledge or manifestness of the damage and the tortfeasor. If the victim does not gain knowledge of the damage or the identity of the tortfeasor, the period of limitation is 30 years, in the case of pure pecuniary damage 10 years. If the damage resulted from one or more criminal actions that could only be committed intentionally and that are punishable by more than one year imprisonment, the claims for damages expire in any case only when thirty years have passed after the occurrence of the damage.

(2) After ten years since the occurrence of the damage, the victim – except in cases of personal injury – must prove all requirements of the claim.

European Group on Tort Law

Principles of European Tort Law

As of October 16, 2004

TITLE I. Basic Norm

Chapter 1. Basic Norm

Art. 1:101. Basic norm

(1) A person to whom damage to another is legally attributed is liable to compensate that damage.

(2) Damage may be attributed in particular to the person
- a) whose conduct constituting fault has caused it; or
- b) whose abnormally dangerous activity has caused it; or
- c) whose auxiliary has caused it within the scope of his functions.

TITLE II. General Conditions of Liability

Chapter 2. Damage

Art. 2:101. Recoverable damage

Damage requires material or immaterial harm to a legally protected interest.

Art. 2:102. Protected interests

(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection.

(2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.

(3) Extensive protection is granted to property rights, including those in intangible property.

(4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.

(5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.

(6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

Art. 2:103. Legitimacy of damage

Losses relating to activities or sources which are regarded as illegitimate cannot be recovered.

Art. 2:104. Preventive expenses

Expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred.

Art. 2:105. Proof of damage

Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly.

Chapter 3. Causation

Section 1. Conditio sine qua non and qualifications

Art. 3:101. Conditio sine qua non

An activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred.

Art. 3:102. Concurrent causes

In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage.

Art. 3:103. Alternative causes

(1) In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage.

(2) If, in case of multiple victims, it remains uncertain whether a particular victim's damage has been caused by an activity, while it is likely that it did not cause the damage of all victims, the activity is regarded as a cause of the damage suffered by all victims in proportion to the likelihood that it may have caused the damage of a particular victim.

Art. 3:104. Potential causes

(1) If an activity has definitely and irreversibly led the victim to suffer damage, a subsequent activity which alone would have caused the same damage is to be disregarded.

(2) A subsequent activity is nevertheless taken into consideration if it has led to additional or aggravated damage.

(3) If the first activity has caused continuing damage and the subsequent activity later on also would have caused it, both activities are regarded as a cause of that continuing damage from that time on.

Art. 3:105. Uncertain partial causation

In the case of multiple activities, when it is certain that none of them has caused the entire damage or any determinable part thereof, those that are likely to have [minimally] contributed to the damage are presumed to have caused equal shares thereof.

Art. 3:106. Uncertain causes within the victim's sphere

The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere.

Section 2. Scope of Liability

Art. 3:201. Scope of Liability

Where an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
b) the nature and the value of the protected interest (Article 2:102);
c) the basis of liability (Article 1:101);
d) the extent of the ordinary risks of life; and
e) the protective purpose of the rule that has been violated.

TITLE III. Bases of Liability

Chapter 4. Liability based on fault

Section 1. Conditions of liability based on fault

Art. 4:101. Fault

A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct.

Art. 4:102. Required standard of conduct

(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.

(2) The above standard may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it.

(3) Rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct.

Art. 4:103. Duty to protect others from damage

A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty.

Section 2. Reversal of the burden of proving fault

Art. 4:201. Reversal of the burden of proving fault in general

(1) The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity.

(2) The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur.

Art. 4:202. Enterprise Liability

(1) A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct.

(2) „Defect“ is any deviation from standards that are reasonably to be expected from the enterprise or from its products or services.

Chapter 5. Strict liability

Art. 5:101. Abnormally dangerous activities

(1) A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.

(2) An activity is abnormally dangerous if
   a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and
   b) it is not a matter of common usage.

(3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.

(4) This Article does not apply to an activity which is specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention.

Art. 5:102. Other strict liabilities

(1) National laws can provide for further categories of strict liability for dangerous activities even if the activity is not abnormally dangerous.

(2) Unless national law provides otherwise, additional categories of strict liability can be found by analogy to other sources of comparable risk of damage.

Chapter 6. Liability for others

Art. 6:101. Liability for minors or mentally disabled persons

A person in charge of another who is a minor or subject to mental disability is liable for damage caused by the other unless the person in charge shows that he has conformed to the required standard of conduct in supervision.

Art. 6:102. Liability for auxiliaries

(1) A person is liable for damage caused by his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct.

(2) An independent contractor is not regarded as an auxiliary for the purposes of this Article.

TITLE IV. Defences

Chapter 7. Defences in general

Art. 7:101. Defences based on justifications

(1) Liability can be excluded if and to the extent that the actor acted legitimately
- a) in defence of his own protected interest against an unlawful attack (self-defence),
- b) under necessity,
- c) because the help of the authorities could not be obtained in time (self-help),
- d) with the consent of the victim, or where the latter has assumed the risk of being harmed, or
- e) by virtue of lawful authority, such as a licence.

(2) Whether liability is excluded depends upon the weight of these justifications on the one hand and the conditions of liability on the other.

(3) In extraordinary cases, liability may instead be reduced.

Art. 7:102. Defences against strict liability

(1) Strict liability can be excluded or reduced if the injury was caused by an unforeseeable and irresistible

a) force of nature (force majeure), or

b) conduct of a third party.

(2) Whether strict liability is excluded or reduced, and if so, to what extent, depends upon the weight of the external influence on the one hand and the scope of liability (Article 3:201) on the other.

(3) When reduced according to paragraph (1)(b), strict liability and any liability of the third party are solidary in accordance with Article 9:101 (1)(b).

Chapter 8. Contributory conduct or activity

Art. 8:101. Contributory conduct or activity of the victim

(1) Liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor.

(2) Where damages are claimed with respect to the death of a person, his conduct or activity excludes or reduces liability according to para. 1.
(3) The contributory conduct or activity of an auxiliary of the victim excludes or reduces the damages recoverable by the latter according to para. 1.

TITLE V. Multiple Tortfeasors

Chapter 9. Multiple Tortfeasors

Art 9:101 Solidary and several liability: relation between victim and multiple tortfeasors

(1) Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where:

a) a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim; or
b) one person's independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person.
c) a person is responsible for damage caused by an auxiliary in circumstances where the auxiliary is also liable.

(2) Where persons are subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him.

(3) Damage is the same damage for the purposes of paragraph (1)(b) above when there is no reasonable basis for attributing only part of it to each of a number of persons liable to the victim. For this purpose it is for the person asserting that the damage is not the same to show that it is not. Where there is such a basis, liability is several, that is to say, each person is liable to the victim only for the part of the damage attributable to him.

Art 9:102 Relation between persons subject to solidary liability

(1) A person subject to solidary liability may recover a contribution from any other person liable to the victim in respect of the same damage. This right is without prejudice to any contract between them determining the allocation of the loss or to any statutory provision or to any right to recover by reason of subrogation [cessio legis] or on the basis of unjust enrichment.

(2) Subject to paragraph (3) of this Article, the amount of the contribution shall be what is considered just in the light of the relative responsibility for the damage of the persons liable, having regard to their respective degrees of fault and to any other matters which are relevant to establish or reduce their liability. A contribution may amount to full indemnification. If it is not possible to determine the relative responsibility of the persons liable they are to be treated as equally responsible.

(3) Where a person is liable for damage done by an auxiliary under Article 9:101 he is to be treated as bearing the entire share of the responsibility attributable to the auxiliary for the purposes of contribution between him and any tortfeasor other than the auxiliary.

(4) The obligation to make contribution is several, that is to say, the person subject to it is liable only for his apportioned share of responsibility for the damage under this Article; but where it is not possible to enforce a judgement for contribution against one person liable his share is to be reallocated among the other persons liable in proportion to their responsibility.

TITLE VI. Remedies

Chapter 10. Damages

Section 1. Damages in general

Art. 10:101. Nature and purpose of damages

Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.

Art. 10:102. Lump sum or periodical payments

Damages are awarded in a lump sum or as periodical payments as appropriate with particular regard to the interests of the victim.

Art. 10:103. Benefits gained through the damaging event

When determining the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit.

Art. 10:104. Restoration in kind

Instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party.

Section 2. Pecuniary damage

Art. 10:201. Nature and determination of pecuniary damage

Recoverable pecuniary damage is a diminution of the victim's patrimony caused by the damaging event. Such damage is generally determined as concretely as possible but it may be determined abstractly when appropriate, for example by reference to a market value.

Art. 10:202. Personal injury and death

(1) In the case of personal injury, which includes injury to bodily health and to mental health amounting to a recognised illness, pecuniary damage includes loss of income, impairment of earning capacity (even if unaccompanied by any loss of income) and reasonable expenses, such as the cost of medical care.

(2) In the case of death, persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of loss of that support.

Art. 10:203. Loss, destruction and damage of things

(1) Where a thing is lost, destroyed or damaged, the basic measure of damages is the value of the thing or the diminution in its value and for this purpose it is irrelevant whether the victim intends to replace or repair the thing. However, if the victim has replaced or repaired it (or will do so), he may recover the higher expenditure thereby incurred if it is reasonable to do so.

(2) Damages may also be awarded for loss of use of the thing, including consequential losses such as loss of business.

Section 3. Non-pecuniary damage

Art. 10:301. Non-pecuniary damage

(1) Considering the scope of its protection (Article 2:102), the violation of an interest may justify compensation of non-pecuniary damage. This is the case in particular where the victim has suffered personal injury; or injury to human dignity, liberty, or other personality rights. Non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

(2) In general, in the assessment of such damages, all circumstances of the case, including the gravity, duration and consequences of the grievance, have to be taken into account. The degree of the tortfeasor's fault is to be taken into account only where it significantly contributes to the grievance of the victim.

(3) In cases of personal injury, nonpecuniary damage corresponds to the suffering of the victim and the impairment of his bodily or mental health. In assessing damages (including damages for persons having a close relationship to deceased or seriously injured victims) similar sums should be awarded for objectively similar losses.

Section 4. Reduction of damages

Art. 10:401. Reduction of damages

In an exceptional case, if in light of the financial situation of the parties full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Article 1:101), the

scope of protection of the interest (Article 2:102) and the magnitude of the damage have to be taken into account in particular.

Literature

- *Apathy/Riedler,* Bürgerliches Recht. Volume III[4]: Schuldrecht, Besonderer Teil (2010); cited: *Apathy/Riedler,* Bürgerliches Recht III[4].
- Bamberger/Roth (eds), Kommentar zum Bürgerlichen Gesetzbuch. Volume I[2] (2007); Volume II[2] (2008); cited: *Author* in Bamberger/Roth, BGB (Vol[2] § no).
- *von Bar,* Gemeineuropäisches Deliktsrecht. Volume I: Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnung (1996); Volume II: Schaden und Schadenersatz, Haftung für und ohne eigenes Fehlverhalten, Kausalität und Verteidigungsgründe (1999); cited: *von Bar,* Deliktsrecht (Vol).
- Basler Kommentar zum schweizerischen Privatrecht: Zivilgesetzbuch. Volume I[4] (2010); Volume II[4] (2011), edited by Honsell/Vogt/Geiser; cited: *Author* in BSK, ZGB (Vol[4] Art no).
- Basler Kommentar zum schweizerischen Privatrecht: Obligationenrecht. Volume I[4] (2007), Volume II[3] (2008), Honsell/Vogt/Geiser; cited: *Author* in BSK, OR (Vol[edition] Art no).
- Berner Kommentar zum schweizerischen Privatrecht: Obligationenrecht. Volume VI, 1. section, 3. part, 1. subsection[3] (2005), edited by Hausheer, cited: *Author* in Berner Kommentar, OR VI/1/3/1[3] (Art no).
- van Boom/Koziol/Witting (eds), Pure Economic Loss (2004); cited: *Author,* title, in: van Boom/Koziol/Witting, Pure Economic Loss.
- *Brüggemeier,* Haftungsrecht: Struktur, Prinzipien, Schutzbereich. Ein Beitrag zur Europäisierung des Privatrechts (2006); cited: *Brüggemeier,* Haftungsrecht.
- *Bydlinski, F.,* System und Prinzipien des Privatrechts (1996); cited: *F. Bydlinski,* System und Prinzipien.
- *Bydlinski, F.,* Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964); cited: *F. Bydlinski,* Schadensverursachung.
- *von Caemmerer,* Das Problem des Kausalzusammenhangs im Privatrecht (1956); cited: *von Caemmerer,* Kausalzusammenhang.
- *von Caemmerer,* Das Problem der Überholenden Kausalität im Schadensersatzrecht (1962); cited: *von Caemmerer,* Überholende Kausalität.
- *van Dam,* European Tort Law (2006); cited: *van Dam,* Tort Law.

- *Deutsch,* Allgemeines Haftungsrecht[2] (1996); cited: *Deutsch,* Haftungsrecht[2].
- *Deutsch,* Fahrlässigkeit und erforderliche Sorgfalt. Eine privatrechtliche Untersuchung[2] (1995); cited: *Deutsch,* Fahrlässigkeit[2].
- *Deutsch/Ahrens,* Deliktsrecht. Unerlaubte Handlungen, Schadenersatz, Schmerzensgeld[5] (2009); cited: *Deutsch/Ahrens,* Deliktsrecht[5].
- *Dreier,* Kompensation und Prävention. Rechtsfolgen unerlaubter Handlung im Bürgerlichen, Immaterialgüter- und Wettbewerbsrecht (2002); cited: *Dreier,* Kompensation.
- *Ehrenzweig,* System des österreichischen allgemeinen Privatrechts. Volume II/1[2]: Das Recht der Schuldverhältnisse (1928); cited: *Ehrenzweig,* System II/1[2].
- *Esser/Schmidt,* Schuldrecht. Volume I/1[8]: Allgemeiner Teil, Entstehung, Inhalt und Beendigung von Schuldverhältnissen (1995); Volume I/2[8]: Allgemeiner Teil, Durchführungshindernisse und Vertragshaftung, Schadensausgleich und Mehrseitigkeit beim Schuldverhältnis (2000); cited: *Esser/Schmidt,* Schuldrecht (Vol/part[8]).
- *Esser/Weyers,* Schuldrecht. Volume II/2[8]: Besonderer Teil, Gesetzliche Schuldverhältnisse (2000); cited: Esser/Weyers, Schuldrecht II/2[8].
- European Group on Tort Law, Principles of European Tort Law (2005); cited: *Author,* title, in: EGTL, Principles.
- Faure (ed), Tort Law and Economics (2009); cited: *Author,* title, in: Faure, Tort Law.
- Faure/Koziol (eds), Cases on Medical Malpractice in a Comparative Perspective (2001); cited: *Author,* title, in: Faure/Koziol, Medical Malpractice.
- Fenyves/Karner/Koziol/Steiner (eds), Tort Law in the Jurisprudence of the European Court of Human Rights (2011).
- Griss/Kathrein/Koziol (eds), Entwurf eines neuen österreichischen Schadenersatzrechts (2006); cited: *Author,* title, in: Griss/Kathrein/Koziol, Entwurf.
- *Karner,* Der Ersatz ideeller Schäden bei Körperverletzung (1999); cited: *Karner,* Ersatz ideeller Schäden.
- *Karner/Koziol,* Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform, Gutachten zum 15. Österreichischen Juristentag (2003); cited: *Karner/Koziol,* Ersatz ideellen Schadens.
- *Karollus,* Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992); cited: *Karollus,* Schutzgesetzverletzung.
- Klang/Gschnitzer (eds), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Volume IV 1. semi-volume[2] (1968); Volume IV 2. part[2] (1978); Volume VI[2] (1951); cited: *Author* in Klang, ABGB (Vol/part[2] no).

- B.A. Koch/Koziol (eds), Unification of Tort Law: Strict Liability (2002); cited: *Author,* title, in: B.A. Koch/Koziol, Unification: Strict Liability.
- B.A. Koch/Koziol (eds), Compensation for Personal Injury in a Comparative Perspective (2003); cited: *Author,* title, in: B.A. Koch/Koziol, Personal Injury.
- *Koziol,* Österreichisches Haftpflichtrecht. Volume I[3]: Allgemeiner Teil (1997); Volume II[2]: Besonderer Teil (1984); cited: *Koziol,* Haftpflichtrecht (Vol[edition]).
- Koziol (ed), Unification of Tort Law: Wrongfulness (1998); cited: *Author,* title, in: Koziol, Unification: Wrongfulness.
- Koziol/P. Bydlinski/Bollenberger (eds), Kurzkommentar zum ABGB[3] (2010); cited: *Author* in KBB, ABGB[3] (§ no).
- Koziol/Schulze (eds), Tort Law of the European Community (2008); cited: *Author,* title, in: Koziol/Schulze, EC Tort Law.
- Koziol/B.C. Steininger (eds), European Tort Law in 2001–2009 (2002–2010); cited: *Author,* title, in: Koziol/B.C. Steininger, Yearbook (Jahr).
- Koziol/Warzilek (eds), Persönlichkeitsschutz gegenüber Massenmedien. The Protection of Personality Rights against Invasions by Mass Media (2005); cited: *Author,* title, in: Koziol/Warzilek, Persönlichkeitsschutz.
- Koziol/Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009); cited: *Author,* title, in: Koziol/Wilcox, Punitive Damages.
- *Lange/Schiemann,* Schadensersatz[3] (2003); cited: *Lange/Schiemann,* Schadensersatz[3].
- *Larenz/Canaris,* Lehrbuch des Schuldrechts. Volume II/2[13]: Besonderer Teil (1994); cited: *Larenz/Canaris,* Schuldrecht II/2[13].
- *Larenz/Wolf,* Allgemeiner Teil des Bürgerlichen Rechts[9] (2004); cited: *Larenz/Wolf,* Allgemeiner Teil[9].
- Magnus (ed), Unification of Tort Law: Damages (2001); cited: *Author,* title, in: Magnus, Unification: Damages.
- Magnus/Martin-Casals (eds), Unification of Tort Law: Contributory Negligence (2004); cited: *Author,* title, in: Magnus/Martin-Casals, Unification: Contributory Negligence.
- Martin-Casals (ed), Children in Tort Law Part I: Children as Tortfeasors (2006); cited: *Author,* title, in: Martin-Casals, Children I.
- Martin-Casals (ed), Children in Tort Law Part II: Children as Victims (2007); cited: *Author,* title, in: Martin-Casals, Children II.
- *Mayrhofer,* Schuldrecht. Volume I: Allgemeiner Teil (1986) (3. edition des Systems des österreichischen allgemeinen Privatrechts von Ehrenzweig); cited: *Mayrhofer*, Schuldrecht I[3].

- Münchener Kommentar zum Bürgerlichen Gesetzbuch. Volume I 1. semivolume[5] (2006); Volume II[5] (2007); Volume IV[5] (2009); Volume V[5] (2009); Volume VI[5] (2009); Volume X[5] (2010), edited by Rebmann/Säcker; cited: *Author* in MünchKomm, BGB (Vol[edition] § no).
- *Münzberg,* Verhalten und Erfolg als Grundlagen der Rechtswidrigkeit und Haftung (1966); cited: *Münzberg,* Verhalten und Erfolg.
- *Oftinger/Stark,* Schweizerisches Haftpflichtrecht. Volume I[5]: Allgemeiner Teil (1995); Volume II/1[4]: Besonderer Teil, Verschuldenshaftung, gewöhnliche Kausalhaftungen, Haftungen aus Gewässerverschmutzung (1987); Volume II/2[4]: Gefährdungshaftungen: Motorfahrzeughaftpflicht und Motorfahrzeughaftpflichtversicherung (1989); Volume II/3[4]: Übrige Gefährdungshaftungen (1991); cited: *Oftinger/Stark,* Haftpflichtrecht (Vol[edition]).
- Oliphant (ed), Aggregation and Divisibility of Damage (2009); cited: *Author,* title, in: Oliphant, Aggregation.
- Plancks Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen. Volume II 1. Hälfte[4] (1914); edited by Strohal; cited: *Author* in Planck, BGB II/1[4] (§ no).
- W.V.H. Rogers, Damages for Non-Pecuniary Loss in a Comparative Perspective (2001); cited: *Author,* title, in: W.V.H. Rogers, Non-Pecuniary Loss.
- Rummel (ed), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. Volume I[3] (2000); Volume II 1. part[3] (2002); cited: *Author* in Rummel, ABGB (Vol/part[3] § no).
- *Schilcher,* Theorie der sozialen Schadensverteilung (1977); cited: *Schilcher,* Schadensverteilung.
- Schmoeckel/Rückert/Zimmermann (eds), Historisch-kritischer Kommentar zum BGB. Volume II 1. und 2. part (2007); cited: *Author* in HKK zum BGB (Vol/part § no).
- *Schobel,* Der Ersatz frustrierter Aufwendungen. Vermögens- und Nichtvermögensschaden im österreichischen und deutschen Recht (2003); cited: *Schobel,* Frustrierte Aufwendungen.
- Schwimann (ed), Praxiskommentar zum Allgemein Bürgerlichen Gesetzbuch. Volume I[3] (2005); Volume II[3] (2005); Volume IV[3] (2006); Volume VI[3] (2006); cited: *Author* in Schwimann, ABGB (Vol[3] § no).
- Soergel (ed), Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Volume III[13] (2002); Volume XIII[13] (2000); Volume XV 1. part[13] (2007); cited: *Author* in Soergel, BGB (Vol/part[13] § no).
- Spier (ed), Unification of Tort Law: Causation (2000); cited: *Author,* title, in: Spier, Unification: Causation.

- Spier (ed), Unification of Tort Law: Liability for Damage Caused by Others (2003); cited: *Author,* title, in: Spier, Unification: Liability for Others.
- *Spiro,* Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen I (1975); cited: *Spiro,* Begrenzung privater Rechte I.
- *Spiro,* Die Haftung für Erfüllungsgehilfen (1984); cited: *Spiro,* Erfüllungsgehilfen.
- Staudinger (ed), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen. §§ 249–254 Neubearbeitung 2005;; §§ 985–1011 Neubearbeitung 2006; cited: *Author* in Staudinger, BGB[Jahr] (§ no).
- *B.C. Steininger,* Verschärfung der Verschuldenshaftung. Übergangsbereiche zwischen Verschuldens- und Gefährdungshaftung (2007); cited: *B.C. Steininger,* Verschuldenshaftung.
- Tichý (ed), Causation in Law (2007); cited: *Author,* title, in: Tichý, Causation.
- G. Wagner (ed), Tort Law and Liability Insurance (2005); cited: *Author,* title, in: Wagner, Tort Law.
- Widmer (ed), Unification of Tort Law: Fault (2005); cited: *Author,* title, in: Widmer, Unification: Fault.
- *Wilburg,* Die Lehre von der ungerechtfertigten Bereicherung (1934); cited: *Wilburg,* Ungerechtfertige Bereicherung.
- *Wilburg,* Die Elemente des Schadensrechts (1941); cited: *Wilburg,* Elemente.
- *Wilburg,* Die Entwicklung eines beweglichen Systems im bürgerlichen Recht (1950); cited: *Wilburg,* Bewegliches System.
- *Wilhelmi,* Risikoschutz durch Privatrecht (2009); cited: *Wilhelmi,* Risikoschutz.
- Winiger/Koziol/B.A. Koch/Zimmermann (eds), Digest of European Tort Law I: Essential Cases on Natural Causation (2007); cited: *Author,* title, in: Winiger/Koziol/Koch/Zimmermann, Digest I.
- Winiger/Koziol/B.A. Koch/Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011); cited: *Author,* title, in: Winiger/Koziol/Koch/Zimmermann, Digest II.
- von Zeiller, Commentar über das allgemeine bürgerliche Gesetzbuch für die gesamten deutschen Erbländer der österreichischen Monarchie. Volume III 2. part (1813); cited: *von Zeiller,* Commentar III/2.
- *Zimmermann,* The Law of Obligations. Roman Foundations of the Civilian Tradition (1996); cited: *Zimmermann,* Obligations.
- Zimmermann (ed), Grundstrukturen des Europäischen Deliktsrechts (2003); cited: *Author,* title, in: Zimmermann, Grundstrukturen: Deliktsrecht.

Glossary ▸

Glossary

auxiliary	*see* Besorgungsgehilfe, Erfüllungsgehilfe.
Besorgungsgehilfe	auxiliary who deals with an actual or legal affair of the principal while instructed or supervised by such.
creditors avoidance	*see* Gläubigeranfechtung.
culpa in contrahendo	fault in the conclusion of a contract, specifically in the negotiations; negligence prior to the conclusion of a contract.
duties	*see* positive Forderungsverletzungen, Schutzpflichten, Verkehrssicherungspflichten.
Eingriffskondiktion	*see* Verwendungsanspruch.
Erfolgsunrecht	result-oriented theory; theory of unlawfulness established by the result.
Erfüllungsgehilfe	performance agent, agent employed by the principal to perform valid contractual obligations.
Gläubigeranfechtung	creditor's avoidance; the right of creditors with unsatisfied claims to the avoidance of debtor's transactions.
positive Forderungsverletzung	violation of duties of care between the parties of a contract, even if the contract is null and void; breach of a special duty of care other than by impossibility or delay.
protective purpose	*see* Schutzzweck.
Schadenersatzrecht	the notion of the German term »Schadenersatzrecht« not only comprises delicts but also contractual liability; further, not only the conditions and the bases of liability but also remedies; therefore neither the »law of damages« nor the »law of liability« would cover the same area as »Schaden-

	ersatzrecht«. As no English expression with similar meaning is available or at least common, it is referred to as »tort law« as this is the main topic, although the borderlines to contractual liability are discussed and remedies and even time limitations are dealt with.
Schutzpflichtverletzungen	breaches of special duties of care established by business contact.
Schutzzweck der Norm	protective purpose of a norm established according to the aim and meaning of the provision imposing liability, thus by teleological interpretation of the norm.
Tatbildmäßigkeit	fulfilment of the very abstract legal elements of a tort.
tort law	*see* Schadenersatzrecht.
unjust enrichment	*see* Eingriffskondiktion, Verwendungsanspruch.
Verhaltensunrecht	wrongfulness related to the behaviour of the tortfeasor; theory of unlawfulness of conduct.
Verkehrsicherungspflichten	duties to protect others against risks one has established by one's activity or property. *Markesinis*, A Comparative Introduction to the German Law of Torts (4th edn, 2002) 86 admits that the term *Verkehrssicherungspflicht* is not easy to translate. He thinks that it »could be summarized by saying that whoever by his activity or through his property establishes in everyday life a source of potential danger which is likely to affect the interests and rights of others, is obliged to ensure their protection against the risks thus created by him«.
Verrichtungsgehilfe	*see* Besorgungsgehilfe
Verwendungsanspruch	action for unjust enrichment by interference: claim of the owner of goods against a person, who drew advantages from goods allocated to the owner without any grounds for justification, to surrender his enrichment.
wrongfulness	*see* Erfolgsunrecht, Verhaltensunrecht.

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