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liability and insurance**

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Layout & Distribution: Valéria Kozakova

Mainstreams in the Development of European Tort Law

Gerhard Wagner

Consumer Autonomy vs. Producer Responsibility

Tobacco Litigation

➤ Germany

Negative effects of tobacco products are common knowledge



- Ordinary cigarettes are not defectively designed
- No duty to warn

➤ France

Liability of the state for failure to adequately protect the health of its citizens

➤ United Kingdom

In *McTear v. Imperial Tobacco (Outer House, Court of Session, 31.5.2005, [2005] CSOH 69)* the court recently denied both a breach of duty and causation.

Consumer Autonomy vs. Producer Responsibility

World Health Organization Convention on Tobacco Control, October 2003, Art. 19 para 1:

- *“For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate”*

Private Enforcement of European Law

EuGH, Urt. v. 10.4.1984 – RS 14/83,
(Sabine von Colson und Elisabeth Kamann ./.
Land Nordrhein-Westfalen), ER 1984, 1891,
1908 Nr. 23;

EuGH, Urt. v. 10.4.1984 – RS 79/83,
(Dorit Harz ./. *Deutsche Tradax GmbH),* ER
1984, 1921, 1941 Nr. 23

EuGH, Urt. v. 20.9.2001 – RS C-453/99,
(Courage ./. *Crehan),* ER 2001, I-6297 Nr.
26 u. 27


EuGH, Urt. v. 17.9.2002 – RS C-253/00,
(Antonio Muñoz y Cia SA ./. *Frumar Ltd.),* ER
2002, I-7289, 7322 Nr. 19

Formula of „**effective, proportional and deterrent**“ sanctions leads to semi-strict liability under national tort law to enforce community rules

Limits of Strict Liability: Terror Risks

Problem: Liability of the Keeper of a Thing for Damage Caused by Terrorists Abusing it as a Weapon?

- **Traditional Approach:** strict liability covers intentional torts committed by third parties.
- **Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Ground (7/10/1952):** strict liability, extends to damage caused by unlawful user.
- **ICAO Draft Convention on Damage Caused by Foreign Aircraft to Third Parties (26/11/2003):** caps on strict as well as fault-based liability in cases of „unlawful interference“ with a „Supplementary Compensation Mechanism“

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Compensation of Non-Pecuniary Losses

Trend Towards Compensation of Non-Pecuniary Losses

- accordingly
- The notion of incommensurability loses force
 - There is a growing willingness to dispense with the notion of a „perfect measure“

examples:

Germany

The **tort law reform** of the year 2002 expanded the availability of damages for pain and suffering into the areas of strict liability and contractual liability

Italy

Concept of „**danno biologico**“ leads to a more comprehensive compensation of damage to health.

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Beyond Personal Injury and Damage to Property

1) Infringements of Non-Physical Personality Rights

- ECHR (Caroline von Hannover), 24th June 2004, Application No.59320/00

Redefined the **right of privacy** in comparison to German courts by dispensing with the concept of all-purpose public figures and **limiting the freedom of the press** to the dissemination of photographs and „facts... contributing to a debate in a democratic society“!

- BGH, Urt. v. 1.12.99 – I ZR 49/97, BGHZ 143, 214 = NJW 2000, 2195 (Marlene Dietrich)

- Recognition of a “**right of publicity**”, similar to an intellectual property right.
- **Compensation for pecuniary losses**, including disgorgement of ill-gotten gains.
- **Passive transmissibility** in case of death; time limit unclear.

Beyond Personal Injury and Damage to Property

2) Pure Economic Loss

- Decreasing relevance of real estate and chattels as cushions of security
- Retreat of social pension schemes run by the state
- Expansion of all sorts of private investments as source of retirement benefits
- Burst of the internet bubble exemplifies the vulnerability of this sort of strategy

- **Tort and insurance law are necessary means to make investments in all sorts of assets as secure as possible**
- **Growing importance of liability for pure economic loss**

A European Civil Code?

No European law of delict or tort currently exists, but European law has already shaped the national systems of tort law:

- Reform of the Law of Delict in Germany (2002)
- *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] 3 WLR 89, 110 seq. (H.L.(E.),2002)

The Principles of European Tort Law and competing frameworks of other groups are expected to become the **focal points for law reform and discussion** throughout Europe.