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liability and insurance**

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The Impact of Liability Insurance on Tort Law Developments

Gerhard Wagner

Sociological Approach

Not the law of tort „on the books“ but the law of tort „in action“ as vantage point

Considerable **Differences** between American and (continental) European Systems:

- No separate category of **intentional torts**
- Issue of **collectibility** is of less importance
 - **Prescription period** for a claim is 30 years in most European countries
 - **No contingent fee**; poor parties are entitled to legal aid

Torts Model

► Putting Tort Law First

Tort law provides **incentives** to take efficient precautions against harm

The **shifting of the costs** of harm to insurance companies **destroys the incentives** tort law generates

Exceptions from the principle of separateness of tort law and insurance in marginal areas only

Instruments to **counteract the effects of moral hazard**: risk-rating, monitoring, caps, deductibles, exclusions

Insurance Model

► Putting Insurance (Compensation of Victims and Distribution of Costs) First

Placing **insurance in the front seat** pursuant to the goal of optimal protection of victims

Broad strict liability

Generous compensation of **personal injury**

Shifting the costs of accidents to **liability insurers**

No compensation for **damage to property** but coverage by voluntary first-party insurance

Contributory negligence only where the victim acted intentionally or with gross negligence

No-Fault Schemes

- **Comprehensive schemes** of social/public first-party insurance displacing the law of tort

- **Problems of No-Fault:**
 - weakened deterrence incentives
 - exploding administrative costs explode
 - low level of compensation

- **Market-Style Substitute:** Combination of Strict Liability and Mandatory Liability Insurance