The Work of the European Centre of Tort and Insurance Law in the Field of Comparative Law: Research Projects, Methods, Results

1. The European Centre of Tort and Insurance Law

In 1993, Jaap Spier, professor at that time at the University of Tilburg, Netherlands, called together a work group[1], which met for the first time in Tilburg in 1994 to discuss fundamental issues of tort law in a comparative law context. The first step was to examine the limits of liability and the results of this research have been published in two volumes[2]. Then the group embarked on an ambitious and difficult project which had never been attempted before[3]: the drafting of Principles of European Tort Law which would serve as a basis for discussion of a future European tort law. The work group, which is made up of university professors, already has more than twenty members[4] and is known as the European Group on Tort Law[5].

In 1999, ECTIL (European Centre of Tort and Insurance Law)[6] was founded in Vienna in order to provide a secure institutional basis for the drafting of the Principles but also to conduct further research in the field of tort law. Since November 2000 ECTIL has been organized in the form of an association[7].

At the beginning, ECTIL was funded by the Austrian Ministry of Justice, the Austrian Ministry of Education, Science and Culture, Munich Re and the Austrian Insurance Association; later on also by the Swiss Federal Office of Justice. The Austrian Ministry of Science and the Swiss Federal Office have unfortunately ceased their support but we have been pleased to welcome the Swiss Insurance Association and the Austrian Chamber of Civil Law Notaries as supporters.

ECTIL co-operates with the Institute for Transnational Legal Research (METRO) at the University of Maastricht (the Netherlands), the Centre for European Private Law at the Westfälischen Wilhelms-Universität Münster (Germany), and the European and Comparative Private Law Observatory at the University of Girona (Spain). There is particularly close co-operation with the Research Unit for European Tort Law of the Austrian Academy of Sciences (ETL), which was founded in Vienna in 2002; most research projects are conducted in co-operation.

2. Research topics

The first most comprehensive and also most important project was the drafting of Principles of European Tort Law, which took several years. The results were presented to the public at a conference in Vienna in spring 2005 and have also been published together with a commentary[8]. The Principles and their commentary were preceded by several basic comparative studies on the prerequisites of liability and other fundamental
issues of tort law, which have also been published[9]. The aim of these research projects conducted on a broad comparative basis was to develop an overall concept for a future harmonization of tort laws within the European Union, in particular regarding a possible codification of European private law. However, the idea of a European Code or merely of a European tort law regime meets with ample rejection at present, which makes any realization of the idea within the next ten years most unlikely. However, as things stand, it is doubtful even whether a European law will come into existence in the future. That does not mean that the Principles were drafted in vain as they may serve as guidelines for national legislation, courts’ decisions and academic discourse and thus can have a harmonizing effect, working from the inside, so to speak. They can also provide an example to the institutions of the European Union of what a consistent system could look like. Much would be achieved if EU directives and regulations were based on a coherent concept, which would reduce the present number of unfortunate contradictions.

Of course one might ask why harmonization should be attempted at all. First, one would have to reply that the question is futile; harmonization is already in progress and we can no longer decide whether to go for it or not – just think of the vast numbers of directives and regulations issued by the European Union. Furthermore, there is an urgent need for harmonization of European tort laws, in particular to avoid a distortion of competition (e.g. through differences in enterprise liability) but also to achieve equal treatment of victims (avoiding highly divergent awards for traffic accidents).

Apart from the Principles project, several other comparative research projects have been completed. They were initiated mostly by our sponsors but also by others, for instance Ecclesia Versicherungsdienst GmbH, the German Hospital Federation, the Dutch Ministry of Health and the Austrian Chamber of Certified Public Accountants. Thus practical relevance of the issues that ECTIL works on is ensured, especially as regards the insurance industries.

It would be impossible to present all research projects in detail. However, just mentioning the topics may give some impression of the variety of issues under research: medical malpractice[10]; compensation for non-pecuniary loss[11]; the impact of social security on tort law[12]; compensation for personal injury[13]; liability for and insurability of biomedical research[14]; no-fault compensation in the health care sector[15]; compensation for pure economic loss[16]; terrorism, tort law and insurance[17]; auditors’ liability[18]; the protection of personality rights against invasions by mass media[19]; children in tort law[20]; liability in tort and liability insurance[21]. Research on the topics just mentioned has already been completed or will be finished soon; the results are or will be published. A study on the impact of public law regulations on tort law, especially regarding environmental protection and product safety,
is currently in progress. A research project on problems connected with mass torts and long-term damage is planned.

Of particular interest to practitioners is the Annual Conference on European Tort Law which focuses on recent developments in the field of tort law and is organized by ECTIL and the Research Unit on European Tort Law. This conference has a two-fold purpose: Firstly, country reports give an overview of the most important developments in legislation, case law and academic writing in the member states of the European Union, Switzerland and Norway. Secondly, there are lectures on current issues of high relevance; also, every year there is a presentation of a different non-European tort law regime. The results of the conference are published in a yearbook[22]. The project started with an overview of the year 2001.

3. Working method

When drafting the European Principles, the European Group on Tort Law developed the following working method: First, a questionnaire was drawn up and, after thorough discussion, submitted to all members in order to gain the necessary overview of the situation in the different legal systems. The group members then drafted country reports on core issues of tort law in their respective legal systems, dealing with abstract questions as well as with cases.

The two-level approach of discussing abstract questions on the one hand and cases on the other is useful and even necessary since the theoretical approaches taken by the various legal systems often differ considerably while the results are quite similar, or, on the contrary, the results differ despite a uniform approach. For instance, in some countries causation is the relevant factor in limiting liability, in others it is adequacy and the protective purpose of the rule. On the other hand, nearly all legal systems base liability on wrongfulness and/or fault; however, the concepts of wrongfulness and fault differ in each legal system. The discussion of actual cases also helps to avoid misconceptions of theoretical approaches and to identify the effects theories have in practice. This method is particularly helpful in recognizing and clarifying terminological difficulties.

In drafting the Principles, the legal systems of most member states of the EU at that time and Switzerland were taken into account. Switzerland has recently been gaining significant experience in its attempt to reform its tort law regime. The legal systems of the US, South Africa and Israel provided many valuable impulses. South Africa, in particular, has gained valuable insight into the process of law harmonization through its mixed system of continental European law and English law; in Israel we see a transition from English case law to statutory law.

In a second step, a comparative report was drawn up which pointed out the similarities and differences in national tort law rules. It became the basis for formulating
principles which, it was hoped, would find acceptance in all legal systems. Since the legal systems under investigation differed widely, it was only in rare cases that one could resort to already existent rules. Rather, it was often necessary to improve the present rules or to look for new approaches.

It is essentially the same method that has also been applied in other research projects: Contributors are leading experts on the particular field of research of each legal system under investigation. Today, ECTIL and ETL have more than seventy contributors from all member states of the EU, Switzerland, Norway, the US, South Africa, Israel, Korea and Japan.

4. Some examples from the area of medical malpractice

a) Diversity of approaches

The European legal systems differ substantially even in the fundamental principles of tort law: While Austria, England, France, Germany, Switzerland und Spain, for example, have an essentially fault-based liability regime[23], the Scandinavian countries have introduced a no-fault compensation system based on a patient insurance[24], which was influenced by the law of New Zealand[25]. However, since the no-fault compensation systems do not cover cases of uniformed consent and compensation requires that – to put it simply – there is a causal link between damage and malpractice[26], in the end, it does not make as much difference to the patients as one might expect at first glance[27].

It is also remarkable that, while in most countries compensation claims are governed by private law, in France, Switzerland and Spain claims for damage suffered in public hospitals are subject to public law and thus to different enforcement proceedings[28].

However, differences occur also in a number of specific questions, e.g. regarding the issue of informed consent, the required duty of care or the burden of proof. I cannot deal with them here[29]. However, I would like to discuss one example in greater detail which shows very well, in my opinion, how strongly theoretical approaches and results differ in the various legal systems.

b) Uncertain causation

(1) First, I will deal with those cases where two events are both very likely to have caused the damage, and all other prerequisites of liability are fulfilled. However, it is not possible to determine whether event 1 or event 2 actually caused the damage. For example: Doctor A and doctor B both made a mistake in the treatment of patient P, which also includes the case that they examined P too late, for instance. It is no longer possible to determine which of the two mistakes actually caused the injury. Another
example: In hospital the victim was administered a drug which produced harmful side effects after some time. In that particular hospital patients were treated with the specified drug produced either by maker A or B. Both A’s and B’s drug contained the harmful component which the makers negligently had not discovered. Retrospectively, it is impossible to determine whether A’s or B’s drug was administered in that particular case.

Under German law (Art. 830 para. 1 sentence 2 German Civil Code)[30] and Austrian law (Art. 1302 Austrian Civil Code)[31], the defendants A and B are held liable jointly and severally. However, this applies only if both A and B have violated the required standard of care, or if all necessary requirements of liability are fulfilled, except for proof of the causal link.

In Switzerland this approach is widely rejected. Joint and several liability of tortfeasors who are both likely to have caused the damage is generally denied, except if the tortfeasors acted in concert[32]. However, recently there have also been voices in favour of holding both tortfeasors liable if both their acts could have caused the damage[33]. While even among German-speaking countries the solutions found are completely opposed to each other, the approaches taken under the other European legal systems also differ widely: In Belgium, Greece, Italy and South Africa, liability of both possible tortfeasors is rejected whereas under English, French, Dutch, and possibly also US law the tortfeasors are held jointly and severally liable – as under German and Austrian law[34].

Lately, there has been a tendency to hold both potential tortfeasors only partly liable corresponding to the likelihood with which they may have caused the damage. This trend manifests itself in Art. 56d of the Swiss Draft of a Federal Law on the Revision and Unification of Tort Law, in the Austrian draft of a new tort law (new Art. 1294) and also Art. 3:103 para. 1 of the Principles of European Tort Law drafted by the European Group on Tort Law. A good reason in favour of partial liability is that the victim would have had to bear the risk of insolvency, if it were possible to prove that the insolvent tortfeasor had caused the damage: In a case where either A or B could equally well have caused the damage and A is insolvent, the victim could not have enforced his compensation claims if it had become evident that A was not the tortfeasor. The victim should not be discharged of this potential risk in cases where it is not clear whether A or B has caused the damage, i.e. the tortfeasors are liable only for potential causation.

(2) I will now turn to another case of even higher practical relevance. Let us take the case of patient P who falls ill after having been discharged from hospital. It is not possible to determine whether the illness was caused by medical malpractice, of which there is evidence, or by P’s pathological condition, of which there is also evidence. Again,
there are two events which might have caused the damage, but one of them – P’s pathological condition – falls into the victim’s sphere.

A good example is the English case Hotson v. East Berkshire Area Health Authority[35]: Thirteen-year-old Hotson fell from a tree and suffered serious injuries; even if he had been properly treated at once he would only have had a 25 per cent chance of recovery. However, necessary treatment was delayed in hospital; the boy remained handicapped for his whole life. Also two decisions by Zurich courts, which dealt with liability for delayed treatment of a patient suffering from cancer, attracted quite some attention[36]. In these cases, it was not possible to determine whether the delay had indeed caused the patient’s death. However, the chance of recovery would have been significantly higher if treatment had been administered in good time.

In the cases dealt with here, where on the one hand a third party may have caused damage imputable to him and on the other hand an event in the victim’s sphere could have caused the damage, and it cannot be said with certainty which of the two events actually caused the harm, more problems arise than in the cases previously mentioned, where two tortfeasors are equally likely to have caused the damage: If it were possible to resolve the question of causation, the victim would either receive full compensation or no compensation at all. If the chance event had caused the damage he would have to bear the damage himself; only if the other event had caused the damage could he claim compensation.

Under Austrian law, the prevailing opinion is that liability has to be divided in line with the cases of alternative causation and in consideration of contributory negligence rules: The victim has to bear a portion of the damage himself corresponding to the degree of probability with which he may have caused the damage[37]. Under German[38], Dutch[39] and Swiss[40] law there are also proponents of this solution; however, the respective supreme courts have not yet taken it up. The European Group on Tort Law has adopted this idea and included it in the Principles (Art. 3:106). The Austrian draft also provides for partial liability of the potential tortfeasor; the victim has to account for the chance event and thus has to bear the respective share himself.

Under many legal systems[41], however, the decisive question is whether the doctor’s malpractice harmed the patient’s health or even caused his death. If the claimant is able to prove the causal link between injury and medical malpractice he receives full compensation; if he is not able to establish proof the claim fails. An unfortunate consequence of this approach is that doctors are free from any liability despite evident malpractice if the victim fails to establish the difficult proof of the causal link. The effect of this all-or-nothing approach[42] is that minor differences in the probability of causation, which may, however, be decisive for succeeding to establish proof, lead to totally opposed results, i.e. full liability or no liability at all.

However, another approach to avoid this result is offered by the doctrine of loss of chance (perte d’une chance), which was developed in France[43], but has now infiltrated other legal systems as well[44]. It is applied in particular when it is not possible to determine whether proper treatment could have prevented illness or death of the patient but there was retrospectively at least some chance of avoiding damage. Increasingly it is
argued that even if it cannot be proven that the doctor caused the patient’s illness or death he evidently caused the loss of a chance of recovery.

There is no doubt that the doctrine of “perte d’une chance” leads to satisfactory results because the loss of a chance is compensated for according to the probability of its occurrence and thus extreme results are avoided if the appraisal of probability differs only minimally. I doubt, however, whether this doctrine offers an approach consistent with legal doctrine and the legal system: Until now, the chance of recovery has not been regarded as a distinct legal interest which can be independently assessed and which the laws protect against infringements. Furthermore, one has to point out that there might well be cases where the defendant has not destroyed any chance through his misconduct; rather, it is simply no longer possible to determine whether the defendant caused the illness or the claimant was already ill at that time. The Austrian Supreme Court had before it a case where a child’s physical deformation was either caused by medical malpractice at its birth or by its mother’s illness and thus was incurable. If the child was already deformed at its birth then there was never any chance of recovery and the doctor’s malpractice did not even destroy a chance of the child’s recovery. If, however, the child had been healthy up to its birth then malpractice did not merely destroy a chance but caused injury to the child’s health. In such cases the underlying idea of the doctrine of “perte d’une chance” is not able to help in finding a solution. Therefore, the doctrine is prone to criticism that it is not able to solve like cases alike. In the end, the crucial problem in both cases is that human cognition is not sufficient to resolve the actual course of damage.

5. Some examples from the area of liability for damage caused by children

There are substantial differences in the provisions under the various legal systems governing claims for compensation of damage caused by children. They occur not only in less fundamental issues, e.g. whether an age limit is decisive and if so, which, but also affect core principles of the liability of children on the one hand and the liability of parents or other persons in charge on the other.

a) Liability of children

Fault-based liability requires capacity which children or mentally disabled persons do not have, at least not to the same extent, as mentally sound adults. The provisions in the various legal systems differ quite substantially as to when children gain capacity. Under some legal systems an age limit, which again varies, is set down which determines capacity and thus liability (Austria, Germany, the Netherlands, Portugal and Russia); other legal systems do not provide for a fixed age limit but apply an individual test (Belgium, the Czech Republic, England and Wales, France, Italy, Spain, Sweden, Switzerland). However, the two systems are not irreconcilable; rather, they blend into each other. For instance, the Austrian age limit does not lead to a rigid separation between children having capacity and those not but is only a presumption: Until the age of 14 children are presumed not to have the necessary insight to be legally capable; from that age on they are presumed to have capacity. Both presumptions are rebuttable.

However, one has to draw attention to the fact that children may be held liable, even if they are not at fault, for reasons of equity considering their financial means – although often only subsidiary to their parents. Equitable liability is known under Austrian, German, Italian, Portuguese, Russian, Swedish and also Swiss law.
French law, however, goes far beyond all that: In 1984, the French Cour de Cassation held that children are always liable for the damage they cause independent of their age and mental abilities. Thus, fault as a personal reproach is no requirement anymore for children being liable in tort.[47] It is obviously only a violation of an objective standard of care which is decisive in establishing liability. At least for someone who is not French this is an astonishing step away from fault-based liability which seems very problematic regarding the underlying principles: Children enjoy special protection in all other respects but are now subjected to a particularly strict no-fault liability in France. This also seems to contravene the Declaration of the Rights of the Child[48] which recognizes that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth” and adds in Principle 8 that “the child shall in all circumstances be among the first to receive protection and relief”.

The example shows once again that within Europe it is not civil law countries and common law countries that are most deeply divided but rather France and the rest of Europe.

b) Liability of persons in charge

Not only liability of children differs throughout the European legal systems but also parents’ responsibility[49]. Most common is the rule that parents are responsible for damage caused by their children only if they are at fault themselves. Parents’ fault usually lies in the neglect of their duty of supervision; under Italian law, however, also inadequate education may constitute fault. This fault-based liability regime applies in Austria, Belgium, the Czech Republic, Germany, Italy, the Netherlands (for children between 14 and 16 years of age), Portugal, Russia, Sweden and Spain. On points of detail, however, the provisions diverge strongly because in some countries parents’ fault is presumed while in others it is not.

In Spain parents are also subject to no-fault liability for damage caused by their children if the children have capacity and committed a criminal offence. In those cases children between 14 and 18 years of age are liable jointly and severally with their parents.

The strictest rules apply again in France: Parents are subject to a strict no-fault liability. While the Code Civil provided for fault-based liability, the arrêt Bertrand introduced this rigorous liability in 1997, the only defences against which are force majeure or sole fault of the victim. A step in the same direction was set by the Netherlands for damage caused by children under 14 years.
Rigorous liability is certainly not in the interest of families and neglects the fact that having children is in the interest of the general public. It is hard to find any convincing reason for it; in France the only argument put forward is that parents’ liability is nearly always covered by liability insurance and thus it is not the parents who have to bear it in the end. However, they will probably have to pay for it indirectly through a rise in insurance premiums.

The issue of liability of parents and other persons in charge also confirms the impression that it is in particular French law that sways from a common European line and thus may pose the biggest obstacle to harmonization.

[1] Members were C. von Bar (Germany); D.B. Dobbs (US); B. Dufwa (Sweden); K.D. Kerameus (Greece); H. Koziol (Austria); W.V.H. Rogers (England); J. Sinde Monteiro (Portugal); J. Spier (Netherlands); G. Viney (France); P. Widmer (Switzerland); M. Will (Switzerland/Germany).


[4] The founding members were joined by the following members: F. Busnelli and G. Comandé (Italy); H. Cousy (Belgium); M. Faure (Netherlands); S. Galand-Carval (France); I. Gilead (Israel); M. Green (US); B. Koch (Austria); U. Magnus (Germany); M. Martín-Casals (Spain); O. Moreteau (France); J. Neethling (South Africa); E. du Perron (Netherlands); G.T. Schwartz (US); L. Tichy (Czech Republic). Regular collaborators are W. van Boom (Netherlands); M. Nesterowicz (Poland); B. Winiger (Switzerland). C. von Bar left the group and founded his own; G. Schwartz has deceased.


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[38] Larenz/Canaris, Schuldrecht II/2 para. 82 II 3c.


[40] Oftinger/Stark, Schweizerisches Haftpflichtrecht I 152.


[49] In detail see country reports in Spier (ed.), Liability for Damage Caused by Others, and in Martín-Casals (ed.), Children in Tort Law. Part I.