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**Fault Liability Today  
A Critical View of the Cathedral**

by

**Gert Brüggemeier**

# FAULT LIABILITY TODAY A CRITICAL VIEW OF THE CATHEDRAL

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These essays are the text of the first two lectures given by Prof. Gert Brüggemeier in Pisa within the *Lezioni Pisane di Diritto Civile* Seminar series 2014.

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*Fault Liability Today.  
A Critical View of the Cathedral*

*Industrialisation, Risks, Strict Liability. The Diverse Paths  
of Germany and the US*

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Codifying Civil Liability Law.  
The Examples of China, Brazil and Russia*

*Contratto o Delitto?  
Due Questioni della Corte Federale Tedesca  
alla Corte di Giustizia Europea*

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## I. INTRODUCTION

For the Roman law maker of the *lex Aquilia* in the 3<sup>rd</sup> century B.C., the situation was easy: A Roman citizen, who caused property damage had to compensate this damage, provided that he/she had committed an unlawful act. Initially, this covered only the direct wilful infliction of physical damage. Only subsequently, under the broadened heading of *iniuria*, *dolus* and *culpa* became doctrinally separated categories as deliberate and blameworthy acts. Liability for intentional injuries and for negligence developed as two forms of fault or even as two distinct types of delict/torts, with the corollary that there was no liability for *casus*, that is non-blameworthy behaviour. Later on the obligation to pay damages was extended to bodily injuries. The fault principle, however, kept its paramount standing throughout the centuries, especially after the reception of Roman law in the Middle Ages.

This also remained unchanged, when in 1804, more than 2000 years later, the French legislator, under the impact of the revolution, reformulated the rule of the *lex Aquilia* as follows: A person who causes by his/her fault a damage is bound to compensate this damage (Art. 1382 C.civ.). Fault (*faute*) in Art. 1382 was conceived as intent. The delict was an intentional injury of protected legal interests. This dominance of intent is due to a long history of close relationship between the law of delict and criminal law, stemming from Roman law as well.<sup>1</sup> Imprudence appeared as a minor form of fault. Imprudent injuries were derogatorily considered as quasi-delicts (Art. 1383 C.civ.). The hidden revolutionary element of this French law of delict was to be found somewhere else. The category of damage (*damnum/dommage*) was now released from its historical restrictions to property damage and bodily injuries. Recoverable was everything: injury to the human body and health, damage to things, pure economic loss, non-pecuniary losses (pain & suffering, impairment of dignity and personality rights). The French law of delict can be characterised as ambivalent: traditional, as far as fault is concerned, revolutionary with respect to the generalisation of damage as recoverable loss *per se*.<sup>2</sup> Leaving aside the damage category, this lecture, however, is going to scrutinize the fate of the traditional fault element.

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<sup>1</sup> Most torts of the pre-industrial world were intentional wrongs: murder/homicide, rape, beating up, arson, theft, apostasy, counterfeiting etc. Nowadays private law is by far dominated by negligent wrongs.

<sup>2</sup> The Italian legislator later on tried to de-generalise the damage category by referring to 'danno ingiusto' (Art. 2043 Cod. civ. of 1942). In a similar way the Draft Common Frame of Reference is actually focusing on 'legally relevant damage' (Arts VI-1:101, 2:101 DCFR).

In the middle of the 19<sup>th</sup> century the fault principle, despite its impressively long history, was still far from losing its attraction.<sup>3</sup> Quite the reverse: against the background of enlightenment philosophy and economic liberalism it sparkled brighter than ever before. The autonomous, rational individual was in the centre of nearly all social theories of those days. Fault won the status of an almost eternal principle. In private law this corresponded with freedom of contract and personal liability only in cases of misuse of free will (that is fault). "It is not damage, but fault which obliges one to compensation", was a famous saying by *Rudolf von Jhering* in mid 19<sup>th</sup> century Germany. In the Austrian natural law-codification of 1811 the degree of fault determined the extent of damages. Only gross negligence and intent led to full compensation.<sup>4</sup>

As is well known, the codifications of private law during the 19<sup>th</sup> century by most of the nation states in continental Europe, East as well West, followed more or less narrowly this French model as far as the law of delict is concerned, especially the Netherlands, Italy and Spain. A notable exception was Austria-Hungary with its natural law-oriented General Civil Code of 1811. The Germans, however, broke new ground at the end of the 19<sup>th</sup> century with their law of delict in the BGB of 1896. Its path was then followed by private law codifications outside of Europe in developing countries like Japan, China or Brazil.

The BGB's law of delict has in common with the French model the distinct focus on fault, but differs from it in that intent and negligence are treated on an equal footing. But conceptualists that they were, they tried to perfect the law. Both forms of fault found themselves embedded in one rigid, three-layered concept of delict: (i) injury of protected interests, (ii) unlawfulness and (iii) fault.<sup>5</sup> Additionally the two forms of fault were structured in the same way: Intent meant injuring knowingly and willingly, negligence/imprudence meant foreseeability and avoidability.

The German conceptualists intended to create a perfect doctrinal world. In hindsight, they messed it up completely instead.

An actual restatement of fault liability<sup>6</sup> starts with four basic assumptions:

1. Intentional injuries and negligence are *two distinct types of delict* and are to be treated differently and separately. This is in accordance with the French law and the Common law of torts. The

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<sup>3</sup> See on this the large comparative research project of J. Bell and D. Ibbetson, summarised in Bell/Ibbetson, *European Legal Development: The Case of Torts*, 2012 with further references.

<sup>4</sup> Especially of loss of profits. §§ 1323, 1324 General Civil Code (ABGB).

<sup>5</sup> *Iniuria* and *culpa*, whose relationship in Roman law remained diffuse, were thus re-established as two independent, clearly separated categories.

<sup>6</sup> On the fault principle in the heterogeneous tort law at the EU level cf. M. Lukas, *Fault Liability*, in Koziol/Schulze (eds.), *Tort Law of the European Community*, 2008, pp. 81.

French code says nothing about the respective doctrinal structure of the two delicts. German law and common law are more detailed here, but nevertheless they are both misleading.

2. The shifting concept of *duty of care* seems to be at the core of negligence liability. This view, which is strongly determined by common law, needs to be clarified. The duty of care serves to impute remote injuries.
3. Fault liability is responsibility for personal wrongdoing. In the civil law world it is today restricted to wrongdoing in one's private sphere, at home, on holiday, while playing sports, etc.<sup>7</sup> Defendants brought to courts are instead businesses held responsible for damages caused by their activities or by acts of their employees. The wrongs of impersonal bodies have to be addressed. Negligence has here taken the form of *quasi-strict enterprise liability* for insurable losses.
4. Next to personal fault and enterprise 'negligence' liability, the national legal systems, be they civil law or common law regimes, have developed diverse hybrid forms of stricter liability. A prominent example worldwide is products liability. 'Strict liability' for the risks of industrialisation will be discussed in the second lecture.

## II THE TWO DELICTS OF PERSONAL WRONGDOING

### 1. INTENTIONAL INJURIES

An individual's civil liability for intentional wrongs has six preconditions: 1) injury to a protected interest; 2) wilful comportment ('conduct'); 3) causation; 4) intention; 5) unlawfulness of the injury; and 6) knowledge of unlawfulness by the actor.

The first three preconditions will not be touched upon here. Intentional behaviour belongs to the logic of instrumental acting: a given consequence – damage/injury to an interest – is consciously and wilfully sought. The US Restatement (Third) of Torts gives a dual definition: "A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result."<sup>8</sup> Intent for liability law is,

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<sup>7</sup> Traffic liability of owners of automobiles is governed by fault and/or strict liability in continental Europe. Accidents by employed drivers lead to enterprise liability.

<sup>8</sup> ALI, Restatement (Third) of Torts: Liability for Physical and Emotional Harm, vol. 1, 2010, § 1: Intent. See also J. Finnis, Intention in Tort Law, in D.G. Owen (ed.), *Philosophical Foundations of Tort Law*, 1995, pp. 229. See also ALI (ed), Restatement (Third) of Torts: Intentional Torts to Persons (discussion draft 2014).

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in other words, *the knowing and voluntary injury of an interest*. Contingent intent, *dolus eventualis*, is treated as ordinary intent.

Unlawfulness is here and only here where responsibility for intentional injuries is the issue, an essential precondition for liability. Intention and unlawful action must concur to constitute an intentional wrong. Many everyday professional activities from barbers to medical surgeries and demolition of buildings imply intentional injuries. Here, unlawfulness functions as a criterion to differentiate between the legally relevant and irrelevant cases. Any intentional injury to a legal interest obtains a rebuttable presumption of unlawfulness ("*per se* wrong"). As a question of law, it is only to a certain extent admissible of proof, and therefore a less suitable object for the distribution of burden of proof. In particular, under the influence of conflicting fundamental rights (e.g. freedom of opinion versus protection of personality) such schematisations are less useful. Here, unlawfulness can often only be determined through complex procedures of balancing rights and interests. Nevertheless in everyday litigation it is still up to the defendant to rebut the presumption of unlawfulness by proving justification. – When focusing on this procedural aspect there are approximations to the common law of torts which does not explicitly recognize an analytical category of unlawfulness. Instead, it acknowledges various affirmative defences for intentional torts (e.g., self defence, consent, etc.), all eventually leading to the same outcome: exclusion of liability.

Intentional wrongdoing requires *knowledge of unlawfulness*. Knowledge of unlawfulness can be absent in cases of error of fact or law. A factual error exists in cases of confusion (mix ups): The doctor pulls the wrong tooth. The employees of a demolition company err as to the house number and demolish the wrong building. We talk about an error of law when a person errs as to the legality of his/her action. A journalist publishes an article which is damaging to another's professional reputation, wrongly thinking that it is justified due to freedom of press and opinion. The avoidability of both, the error of fact and of law, leads to liability for negligence. If the error was unavoidable, however, there is no liability.

Another important marker of liability for intentional delicts is that here – unlike in cases of negligence and strict liability – no problem of imputation of remote injuries arises. Liability depends on the respective plan of the actor.<sup>9</sup> Implicitly it is also clear then that no issue of 'presumption of intent' exists, unlike in the internationally common concept of presumption of 'fault'. Intent and plan of the actor must be proven. Evidence of these 'subjective facts' is always shown through the evocation of provable external actions by the defendant.

Further characteristics of intentional delicts as opposed to liability for negligence are the external individual liability of employees, i.e. they are in their personal capacity liable to damaged third parties, the

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<sup>9</sup> *Quinn v Leathem* [1901] AC 495, 537: '(the) intention ... to injure the plaintiff disposes of any questions of remoteness.'

possibility of aggravated damages on the basis of preventive grounds, and the absence of liability insurance coverage.

## **2. NEGLIGENT BEHAVIOUR**

From the middle of the 19<sup>th</sup> century onwards liability for negligence governed the entire field of accidents – at home, at the workplace, in traffic. In common law, negligence became ‘the’ law of torts. Today, in continental Europe, accidents are to a large extent covered by diverse regimes of strict liability, especially automobiles, and even by schemes of social security.

Negligence liability is restricted to injuries caused by careless conduct of individuals. It has four preconditions: 1) damage/injury, 2) conduct, 3) causation and 4) negligence/imprudence. According to a commonly accepted rule the plaintiff has to prove all four elements. There are, however, exceptions to this international mainstream approach. For instance, in the Russian law of delict it is up to the defendant to supply the evidence that it was not by his/her wrongdoing that the injury occurred.<sup>10</sup> – In this lecture we are exclusively concerned with the forth element: negligence as a kind of fault. What is negligence about? As a kind of human wrongdoing, it means the *judicial assessment that a proven injuring behaviour does not correspond to the standard of required conduct/ due care in the case at hand.*

To determine negligence in a specific case where harmful behaviour has occurred, a reasoning in three steps is necessary:

The first is clarification of the facts. What happened? How did the defendant behave and what were the specific circumstances? This is the realm of the law of evidence.<sup>11</sup>

The second and most important step consists of determining the standard of due care. This standard is to be determined by the court objectively with regard to the relevant circumstances of the specific case as available from the evidence shown. It involves the definition of proper behaviour which would have been required by law in the given situation, under the concrete circumstances. *This is a normative question, not a question of fact.*

The third step consists of a simple subsumption: the application of the standard of care to the specific injuring behaviour. The issue is one of assessing whether the defendant’s empirical behaviour complies with the standard of care or not. If it does not, negligence is given. In other words: *Negligence is substandard conduct;* or – to quote *Benjamin Cardozo*: ‘Negligence is absence of care according to

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<sup>10</sup> Art. 1064(2) Civil Code of the Russian Federation (CCRF).

<sup>11</sup> On the ‘burden and standard of proof’ see the comparative contributions in H. Koziol/B. Steininger (eds), *European Tort Law 2008, 2009*, pp. 1-105 with further references.



circumstances.<sup>12</sup> Thus negligence as a precondition of liability is not a 'simple fact' that can be proven, but the result of the evaluation of empirical behaviour on the basis of a normative standard.<sup>13</sup> An injury which occurs despite the exercise of care does not lead to liability on the basis of negligence.

The objective standard of negligence has without doubt certain points in common with strict liability. It implies that individuals are also liable when they do not subjectively/personally meet the required objective standard. It is nonetheless recognized in most private legal systems. The Draft Common Frame of Reference (DCFR), Book VI, explicitly regulates negligence emphatically in this way.<sup>14</sup> Private law, in contrast to penal law, focuses on role expectations and does not look on a person's individual attributes. Compensation of damage, then, is proper whereas it would be improper to be obliged to go to jail. In penal law, where it is a question of individual punishment, a subjective standard is indispensable. That holds true worldwide. In private law, the subjective standard is still applied by some national legal regimes which do not recognize any particularized rules for legal capacity in wrongdoing. For children and the mentally ill (lunatics) in fact, a differentiated treatment must be provided for. However, even those who argue for a subjective negligence standard also stress that differences in practical outcome are ultimately limited.<sup>15</sup>

Another important point has to be made clear: *Unlawfulness/illicéité/illegalità/Rechtswidrig-keit* is no longer a precondition for determining negligence liability. Thereby, the overdue consequence of the flawed unitary structure of fault of the 19th century (so-called will theory)<sup>16</sup> has finally been realized. This concept determined the legislative structure of a delict in the Germanic and Dutch law.<sup>17</sup> What is valid for intentional wrongs does not hold true for liability in negligence. The *negligent* injury (in common law terms: the breach of duty of care) constitutes a civil wrong. In other words, it is the negligence of the injuring behaviour that transforms the conduct into a forbidden – and thus an unlawful(!) – act, an *onrechtmatige daad* in Dutch law<sup>18</sup> or a *fatto illecito* in Italian law<sup>19</sup>.

However, at second regard it must be stated that this only true for the regular torts – causation of damage or injury of legally protected interests. For the special tort of *breach of a protective statute*

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<sup>12</sup> *Palsgraf v. Long Island R. Co.* 248 N.Y. 339, 162 N.E. 99. This is still the dominant view in US law. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 3 Negligence: 'A person acts negligently if the person does not exercise reasonable care under all the circumstances.'

<sup>13</sup> To this extent, it would be correct to speak relating to negligence (as a kind of fault) of "mixed questions of law and fact".

<sup>14</sup> Art. VI-3:102 DCFR.

<sup>15</sup> Cf., prominently, H. Koziol, Liability Based on Fault: Subjective or Objective Yardstick?, 1998 Maastricht Journal 111; but see also the comparative account by P. Widmer (ed), Unification of Tort Law: Fault, 2003.

<sup>16</sup> See above in the text.

<sup>17</sup> Especially § 823(1) BGB.

<sup>18</sup> Art. 6:162 Dutch Civil Code (BW).

<sup>19</sup> Art. 2043 Cod. civ.

(*Schutzgesetzverletzung* à la § 823(2) BGB; breach of a statutory duty; *violation des dispositions impératives*) unlawfulness is an indispensable condition for liability. Here the breach of law/unlawfulness plus fault<sup>20</sup> is the ground of liability. To trigger liability then damage and causation are additionally required. The non-contractual liability of the European Union for breach of EU law by its institutions (Art. 340(2) TFEU) is a prominent example for in principle no-fault liability for unlawfulness.<sup>21</sup>

True, the dubious prominence of *Rechtswidrigkeit* has its most evident instance in the Germanic legal systems, next to the *BGB* especially in the Austrian<sup>22</sup> and Swiss<sup>23</sup> law and doctrine. It must be stressed, however, that it also influenced the middle and eastern European laws of delict.<sup>24</sup> In contrast, French law, Scandinavian law and Anglo-American common law as well as the recent codifications of the law of delict in China, Brazil and Russia do not recognize such importance of unlawfulness as an independent presupposition of private law's negligence liability.<sup>25</sup>

### III NEGLIGENCE, DUTY OF CARE AND REMOTENESS OF INJURY

The common law tort of negligence is a product of the 19<sup>th</sup> century, even if its roots go back further.<sup>26</sup> It developed independently, though at the same time, in England and in the US. In England, this 'new' tort originated from three sources<sup>27</sup>:

- (i) the writ of trespass on the case for indirect injuries,
- (ii) the concept of duty of care in Natural Law ('Every man ought to take reasonable Care that he does not injure his Neighbour', 1781), and
- (iii) the dominant influence of continental categories of fault in the 19<sup>th</sup> century.

The result was an unstructured *actio culpa*, holding liable for every kind of damage. It appeared alongside the well established pigeonhole torts such as trespass, battery, libel, slander, conversion, etc. and

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<sup>20</sup> The breach/unlawfulness is here often the basis for a presumption of negligence (statutory negligence or negligence *per se*).

<sup>21</sup> On this in greater detail see, G. Brüggemeier, in R. Blanpain (ed.), *European Union, International Encyclopaedia of Laws (IEL), Tort Law* (ed. I. Boone), forthcoming.

<sup>22</sup> Cf. W. Posch, *Austria, International Encyclopaedia of Laws (IEL), Tort Law* (ed. I. Boone), 2001. See also H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, 2012.

<sup>23</sup> Cf. F. Werro, *La responsabilité civile*, 2005. See also the 'Rapport de la Commission d'Etude pour la Revision Totale du Droit de la Responsabilité Civile', 1991: According to Art. 46(1) of this (non implemented) Swiss draft bill, each infringement of a legally protected interest is unlawful (*contra legem; rechtswidrig*), even regardless of whether caused by human conduct or by a (non-human) source of danger such as, for example, a dog bite.

<sup>24</sup> Cf. A. Menyhárđ, *Eastern Tort Law*, in M. Bussani/F. Werro (eds.), *European Private Law: A Handbook*, 2<sup>nd</sup> edn 2014, pp. 335.

<sup>25</sup> Cf. Brüggemeier, *Modernising Civil Liability Law in Europe, China, Brazil and Russia*, 2011, pp. 167-247.

<sup>26</sup> See esp. E.J.H. Schrage (ed.), *Negligence. The Comparative Legal History of the Law of Torts*, 2001.

<sup>27</sup> See, inter alia, D. Ibbetson, *The Tort of Negligence in England*, in N. Jansen (ed.), *The Development and Making of Legal Doctrine*, 2010, pp. 46.

developed into the most important common law tort in the industrial world. Five requisites were ultimately formulated as the complete tort of negligence: damage, duty of care, breach of duty of care, causation and proximity. Breach of duty means personal wrongdoing, negligence in the narrow sense of fault. As unstructured and incoherent as it may be, with these five requisites the negligence tort became a juristic doctrine of quasi-eternal value, comparable to the German concept of a three-layered delict. Throughout the common law world, from Australia to the US, every lawyer is familiar with this doctrine. Nevertheless, like the German concept, this doctrine of negligence has its shortcomings.

Sore points are the perplexing category of duty of care and the understanding of fault as a breach of duty. This approach has also dramatically affected the continental European civil law systems, causing doctrinal irritations there. Historically, within the common law writ system, the duty of care belonged to the plea of trespass on the case, when the plaintiff was claiming indirect injuries. Since the mid-19<sup>th</sup> century it has lost this context with relational torts and has become an ordinary element of negligence liability, covering both cases – direct and indirect harm. Finally, the duty category has connotations with the affirmative duties which constitute liability for omissions.

## 1. DIRECT AND INDIRECT INJURIES

### a) *Direct Injuries*

Against this historical background what needs to be clarified is: The tort of negligence covers two types of torts, direct injuries and indirect – remote - injuries, with different prerequisites.

Given the traditional situations of accidents causing harm – bus driver hits pedestrian, doctor commits mistake during surgery on patient –the general principles of negligence liability apply as shown above. Damage, conduct, causation, imprudence constitute the tort of negligence, also in common law. A duty of care is redundant or just purely formal, because it is self-evident that persons are not allowed to injure 'their neighbours' or damage their property if it can be avoided. In these cases, a legal duty of care is a "non-issue", as the late G.T. Schwartz put it.<sup>28</sup> It "adds nothing to ... the tort of negligence itself", as P.S. Atiyah aptly formulated.<sup>29</sup>

### b) *Indirect Injuries*

With regard to indirect injuries, which are caused by negligent conduct, the search for liability takes on the material *question of imputation*: that is whether a caused remote injury is attributable to the given

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<sup>28</sup> Restatement (Third) Torts: General Principles (Draft), 1999, § 6 (p. 83).

<sup>29</sup> P.S. Atiyah, *Accidents, Compensation and the Law*, 3<sup>rd</sup> ed. 1980, p. 66; see also at pp. 70/71.

negligent behaviour of the defendant. This question is dressed in the clothes of duty of care/*Verkehrspflicht*, etc. However, duty of care and breach of duty have, strictly speaking, nothing to do with negligence as fault. The talk of duty of care is simply a way of limiting the scope of liability.<sup>30</sup> In addition, remote wrongs are not a problem of causation. The existence of both factual causation *and* wrongful conduct (fault) is a necessary precondition to qualify the injury of a legal interest as an indirect or remote wrong. The problem raised by *relational wrongs* is exclusively a matter of *normative imputation* of the remote (primary or secondary) injury. In other words, it is a matter of a legal evaluation (*normative causation*) – and not a factual question (*causation in fact*). The latter would require factual proof and thus be immune against review by appellate courts.<sup>31</sup> The concept of causation and the term “legal cause” should be completely avoided in this context. Questions of causation and of scope of liability (proximity/remoteness) have to be clearly separated, in order to obtain more conceptual clarity. This clarity is now present in the Restatement (Third) of Torts.<sup>32</sup> It is completely lacking in book VI of the DCFR. There, the subject of relationality is treated at least twice: clandestinely at the outset under the broad heading of “legally relevant damage”<sup>33</sup>, and later under the category of causation.<sup>34</sup> The ‘Principles of European Tort Law (PETL)’ deal with the normative aspects of proximity more appropriately under the separate title ‘scope of liability’.<sup>35</sup>

In other words: The term *duty of care* serves to tackle the problem of normative imputation. Like a statutory duty it is used to define the scope of protection or range of liability: *Who and which interests are protected against what kind of risks?* Instead of duty of care, the notion of ‘liability context’ (*Haftungszusammenhang*) is sometimes taken up. It is free from irritating connotations. It makes it clear that it is a matter for the court of balancing all relevant circumstances to make the reasoned determination that the remote injury should be a basis for liability or that instead it should be seen as too remote for consideration. In the 1990ies the former House of Lords<sup>36</sup> formulated an interesting three-stage test to determine the duty of care issue or the problem of relationality:

- (i) foreseeability of the damage;
- (ii) a sufficiently proximate relationship between the parties; and

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<sup>30</sup> *Dorset Yacht Co. Ltd v Home Office* [1969] 2 QB 412, at 426, per Lord Denning.

<sup>31</sup> Cf. A.M. Honoré, Causation and Remoteness of Damage, in A. Tunc (ed.), *International Encyclopedia of Comparative Law (IECL)*, vol. XI: Torts, ch. 7 (1971).

<sup>32</sup> Restatement (Third) of Torts: Liability for Physical and Emotional Harm, §§ 26-28: Factual Cause, §§ 29-36: Scope of Liability (Proximate Cause).

<sup>33</sup> Arts. VI-1:101 and 2:101 paras. 2/3 DCFR.

<sup>34</sup> Art. VI-4:101 DCFR.

<sup>35</sup> European Group on Tort Law (ed.), *Principles of European Tort Law*, 2005, Art. 3:201 (p. 59).

<sup>36</sup> The judicial department of the House of Lords has been replaced as court of last instance by the Supreme Court of the United Kingdom. Established in 2005, it started work in 2009.

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(iii) it must be *fair, just and reasonable* to impose a duty.<sup>37</sup>

This test contains equally broad and abstract notions for the courts, enabling them to exercise their discretion as to the creation of legal liability.

## 2. DUTY OF CARE ISSUE IN TWO LANDMARK CASES

Internationally famous examples of the judicial treatment of negligence and relationality are the American *Palsgraf* and the British *Wagon Mound* (No. 1 and No. 2) cases.

### a) *Palsgraf*

In the bizarre *Palsgraf* case of the 1920s it was a matter of whether a railway company could be held legally responsible for the remote secondary personal injuries from the explosion of fireworks which was caused by the alleged negligence of a railway employee.<sup>38</sup> The railway guard helped a passenger to catch a leaving train. By pushing him into the train he touched a package which contained fireworks. When the package fell, the fireworks exploded. Due to the explosion scales dropped far away on the station and injured Ms. *Palsgraf*. Unlike the lower courts, New York's highest court, the N.Y. Court of Appeals, denied liability.

Chief Justice B. Cardozo made it clear, that the problem raised by this case was neither a question of causation nor of negligence (as a kind of fault). Both have been affirmed by the lower courts. Rather, he emphasised the *relational* aspect of the tort by focusing on the normative aspect of *duty of care*.<sup>39</sup> Speaking for the four-judges majority of the court, he denied the finding of a liability context – that is, of a corresponding duty of care on the part of the railway employee with respect to the remote Ms. *Palsgraf*. Her injuries and the circumstances under which they happened lay beyond the scope of risks which the railway employee had set into motion by his behaviour.

On the other hand, justice *Andrews*, writing for the minority of three judges, made the classic point: By law there is a universal duty of care towards everybody. A breach of this duty, that is the railway guard's negligence, makes liable for *every direct or natural consequence*, foreseeable or not.<sup>40</sup> Whether the fall of the scales and its inherent risk of injury was a direct consequence of the explosion is a matter of fact and of

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<sup>37</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617-618, per Lord Bridge.

<sup>38</sup> *Palsgraf v. Long Island R.Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>39</sup> To this day, American doctrine mainly adheres to this Cardozo approach. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 6: Liability for Negligent Conduct, and § 7: Duty.

<sup>40</sup> This doctrine goes back to English law. It is the so-called 'Polemis rule'. Cf. *Polemis and Furness Withy & Co.* [1921] 3 KB 560 (CA).

‘practical politics’. Therefore it should be up to the civil jury of the trial court and not to the appellate court to decide this question.

*b) Wagon Mound*

If *Palsgraf* can be seen as a positive didactic play of the treatment of ‘relational torts’, then the *Wagon Mound* case complex of the 1960ies<sup>41</sup> is a negative one. When the ship *The Wagon Mound* was fuelling in Sydney, furnace oil overflowed. Wind spread the oil across the surface of the water to the other side of the harbour where welders were working on a shipyard. Sparks hit waste on the water and caused fire which then ignited the oil. The fire spread so fast that both the docks and the ship in it were damaged. Two law suits were filed. For the finding of negligence the Australian trial courts tried to determine, whether it was foreseeable that the oil on the water would catch fire. In the first proceeding, the suit of the dock owner, foreseeability was denied, but the fire was recognised as a direct consequence of the negligence of the crew. This is the line of argumentation of the minority of the *Palsgraf* case. In the other suit - of the owner of the damaged ship - the court affirmed foreseeability. Both cases came before the former House of Lords (Privy Council). The Law Lords, misconceiving the normativity of the problem to impute the remote damage to the process of wrongfully fuelling *The Wagon Mound*, felt themselves bound by the different, supposedly ‘factual’ findings on foreseeability by the Australian courts. In the first suit they overruled the doctrine of responsibility for every direct consequence (so-called *Polemis*-rule of 1921). Because the Australian court here had denied foreseeability of the fire, they dismissed the action. With foreseeability affirmed in the other proceeding, here damages were granted.

The paradox that the Law Lords arrived at two opposite decisions on the same fact pattern is just one spectacular aspect of these cases. The main problem is the complete unpreparedness to meet the normative challenges of relationality in an adequate way.

#### IV QUASI-STRICT ENTERPRISE LIABILITY

Next to proximity or remoteness, the *Palsgraf* and *The Wagon Mound* cases encompass another – even more pressing – problem of negligence liability. In both cases individuals were acting wrongfully, but no individual has been sued. Rather, the defendants are businesses, mostly incorporated: in *Palsgraf* the

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<sup>41</sup> *Overseas Tankship (U.K.) Ltd v Marts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388; *Overseas Tankship (U.K.) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617.

G. Brüggemeier, "Fault Liability Today"...

railway company, in *Wagon Mound* the charterer of the ship. How does personal fault and impersonal addressees of liability go together? In *Palsgraf* it was a case of vicarious liability, in *Wagon Mound* it was rather a case of organisational shortcomings. Both findings lead to the phenomenon of negligence liability of enterprises.

## 1. VICARIOUS LIABILITY

### a) *Employer's no-fault liability*

A classical variant of enterprise responsibility is the vicarious liability of entrepreneurs/ employers for the delicts/torts of their employees. Vicarious liability is a mix of personal negligence liability (employee) and no-fault liability (employer). Internationally, there is wide consensus regarding the preconditions for this form of liability: The employee must be subject to command; the wrong must be committed within the scope of employment. Independent enterprises (including independent subsidiaries) do not fall within the field of application. Those cases are a problem of general enterprise liability, to be discussed later on. The same holds true for executive officers and members of the board of directors of corporations. The employee must have caused an injury by his/her own negligent action in the exercise of the work or employment. Even intentional conduct which leads to damage falls under this article and is the basis of liability on the part of the employer. - Unlike in the Germanic laws (and the Japanese law) of delict there is no necessity for the employer himself to be at fault. The delict/tort of workers/ employees is imputed automatically to the employer (*respondeat superior*). This is the point of view in French law and in common law. The European proposals to harmonise the law of civil liability unanimously take this position.<sup>42</sup> - The EU law itself remained ambivalent. Art. 340(2) TFEU refers for the liability of the Union for the delicts/torts of its staff to the general principles common to the – diverse – governmental liability laws of the Member States.<sup>43</sup>

### b) *Liability of Employees?*

To establish whether several and joint liability of employer/enterprise and employee is triggered, the question of the independent liability of employees to third parties must be answered first. This question comes up in cases of business insolvencies. It is a legally and socially sensitive and controversial topic.

The state of law in Europe is quite diverse. The personalised law of delict of the nineteenth century regarded an employee who injured a third party in the course of his/her activities the same as any other

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<sup>42</sup> Art. VI-3:201 DCFR; Art. 6:102 PETL.

<sup>43</sup> Cf. D. Fairgrieve/M. Andenas/J. Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective*, 2002.

private autonomous person. He/she would undoubtedly have to pay for the injuries attributed to him/her, regardless of the extent of the damage caused and regardless of the nature of his/her employment, which was arranged by the employer. Meanwhile in most European countries the legal situation has changed. An opposite tendency is pushing to the fore.<sup>44</sup> At least employees' rights to exoneration against the employer are recognised. In 2000 in France, the *Cour de Cassation* has ruled that only the employer is liable to injured third parties, thus transferring the principle of exclusive State liability to private law.<sup>45</sup> Negligence liability of the employee is thus obsolete as long as it is not for some act outside the scope of employment. Cases of intentional injury are special in so far as they trigger liability of both, the employer<sup>46</sup> and of the employee in his personal capacity. (The French reform proposal (*Avant-Projet* of 2005) considered in all events to introduce a sort of contingent liability of employees for those cases in which neither a business liability insurance nor a solvent employer are to be found to compensate the victim's damage.<sup>47</sup>) A similar state of legal affairs is found in the Scandinavian countries. According to Swedish and Finnish law, the liability of the employee towards third parties only comes into considerations when "particular reasons" are to be found.<sup>48</sup> Common law recognizes theoretically joint and several liability of employer and employee, though it is rare that the damaged party will execute against him or her.<sup>49</sup>

The solution in French and Swedish law appears convincing. A conflict between the protection of the victim on the one side and the protection of workers on the other can occur where there is no business liability insurance and the enterprise is insolvent. The bodily injuries of victims are in these remaining cases most often covered by social security schemes (accident and illness insurance). Pain and suffering and possible property damages, however, are not compensable under these insurance schemes. Alternatively the liability of employees could be extended to gross negligence, perhaps with a ceiling for the extent of damages.

## **2. ENTERPRISE NEGLIGENCE: ORGANISATIONAL 'FAULT' AND THE BURDEN OF PROOF**

The necessity to provide an enterprise liability independent of the personal wrongs of employees or the personal fault of executives is generally accepted. It concerns the liability for inadequate production

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<sup>44</sup> Cf. S. Galand-Carval, Comparative Report on Liability for Damages Caused by Others, in J. Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others*, 2003, pp. 289, at 304/305.

<sup>45</sup> Cass. ass. plén., 25.2.2000 (*Costedoat*), JCP 2000 II 10295.

<sup>46</sup> The employer has then a right to internal redress against the employee.

<sup>47</sup> *Avant-Projet de réforme du droit des obligations et de la prescription* (Catala), 2005: Art. 1359-1. – In 2013, this reform initiative of the law of obligations has been restricted to contract law.

<sup>48</sup> Chap. 4 (1) of the Swedish and Finnish Liability Act.

<sup>49</sup> Cf. the reports of H.V.H. Rogers (England) and G.T. Schwartz (USA) in J. Spier (ed.), *Unification* (fn 43), pp. 63 and pp. 279.



processes<sup>50</sup> and professional activities which cannot be traced back to an individualized failure. One finds such concepts in almost all recently presented reform proposals: Art. 49a of the Swiss reform draft<sup>51</sup>, § 1304 of the Austrian reform draft<sup>52</sup>, Art. 1353 of the French reform proposal<sup>53</sup> as well as in Art. 4:202 of the PETL. Only Book VI of the DCFR does not contain such a rule. It does not even mention enterprise liability.<sup>54</sup> At EU level, the non-contractual liability of the Union (for its institutions) according to Art. 340(2) TFEU, as developed by the ECJ, is a responsibility for depersonalised maladministration or mal-legislation by EU institutions. The requirement of a 'sufficiently serious breach' of EU law paraphrases the conditions of gross malfunctioning. Be that as it may, the boundaries of a liability, bound to personal fault, have here plainly been crossed.

All present proposals for the regulation of civil enterprise liability start from the case law developments of the twentieth century for which the non-contractual product liability has become a model. This is supported by the basic insights of economic analysis of law which sometimes reach back into the 19th century<sup>55</sup>: The enterprise/entrepreneur gathers financial capital, labour and tools into a process of production to generate profits. This involves hazards which can be controlled and limited through organisational management. It is economically sensible to place the burden of liability for the damage which may result from the production processes on the enterprise. Only this will create an incentive to prevent damages. These risks of damages are, moreover, insurable. Further, both the costs of insurance premiums as well as the damages which are not covered by liability insurance can be socialized through the prices of the products and services. This general enterprise liability does by no means lead straightaway to a liability for causation of injuries. In other words: It is neither absolute nor even strict – but 'quasi strict'. The enterprise always has the chance to prove that the damages were inevitable, that is, they could only have been prevented at unreasonably high costs. This liability affects only enterprises which pursue commercial or professional goals. It does not apply to non-profit organizations.

Common core elements of this quasi-strict enterprise liability are (i) a depersonalized notion of carelessness/'enterprise negligence', which is termed *organisational or systemic fault*, and (ii) the reversal of the burden of proof for this organisational fault in the case of injuries caused.

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<sup>50</sup> Cf. also American Law Institute (ALI), Reporters' Study: Enterprise Responsibility for Personal Injury, 2 vols., 1991. This study remained controversial and has never been approved by the ALI members.

<sup>51</sup> Cf. fn. 22.

<sup>52</sup> Cf. Griss/Kathrein/Koziol (eds.), Entwurf eines neuen österreichischen Schadensersatzrechts, 2006, pp. 1-15.

<sup>53</sup> Cf. fn. 47.

<sup>54</sup> In substance, however, *one* case of enterprise liability is provided for in DCFR-VI – environmental liability (Art. VI- 3:206).

<sup>55</sup> See (the student of the founder of the Austrian marginal utility school – C. Menger) V. Mataja, Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie, 1888.

*Organisational fault/colpa d'apparato*<sup>56</sup> is the category which "veils" the shift in focus from personal wrongdoing to impersonal organisational failure ("malfunctioning") and at the same time allows the imposition of liability within the nominal framework of a fault-grounded law. It is thus no longer a matter of imputing individual fault, e.g. of executive officers, – but rather a question of the technical and economic reasonability of further efforts to improve safety. To this end the French concept of 'organizational or functional failure' can be taken up here as well.<sup>57</sup> Reference can also be made to the US common law *Learned Hand test*.<sup>58</sup> True, *Hand's* test is by the 'law & economics' scholars regarded as a mathematical formula for the determination of negligence in general: Liability for negligence applies if a more expensive damage could have been prevented or limited by a less expensive preventive measure.<sup>59</sup> If the damage could only have been prevented or reduced at significantly higher costs it is regarded as inevitable.

A classic Learned Hand case scenario was present in the English case *Stovin v Norfolk County Council*.<sup>60</sup> Mr. *Stovin* suffered serious injuries when he was knocked off his motorcycle by a car at a dangerous injunction. The visibility of traffic was there hampered by a bank of earth which was topped by a fence. The council knew the junction was dangerous and the deficiency could have been rectified for less than UK£1000. Had this been done, the accident would not have arisen. After Mr. *Stovin* sued the council, the lower courts allowed Mr. *Stovin* to recover (partially). However, the 3 to 2 majority in their Lordships' House dismissed his action. Lord Hoffman, writing for the majority, held:

"(T)he creation of a duty of care upon a highway authority, even on the grounds of irrationality in failing to exercise a power, would inevitably expose the authority's budgetary decisions to judicial inquiry. This would distort the priorities of local authorities, which would be bound to try and play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents. They will spend less on education or social services ... (I)t is important, before extending the duty of care owed by public authorities, to consider the cost to the community of defensive measures which they are likely to take in order to avoid liability."<sup>61</sup>

The problem with the *Hand Formula* is, *inter alia*, that the necessary statistical information is generally unavailable to both, plaintiffs and court. It thus remains, generally speaking, a pure thought

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<sup>56</sup> Corte di Cassazione, Sez. Un., 22.7.1999, n. 500, in Foro it., 1999, I, 2487, with comments by A. Palmieri and R. Pardolesi, in Giur. Cost., 1999, 4045.

<sup>57</sup> See Art. 1353 *Avant-Projet* 2005: "défaut d'organisation ou de fonctionnement" (failure of organization or function).

<sup>58</sup> *United States v. Carroll Towing Co. Inc.*, 159 F.2d 169 (2d Cir. 1947); but see already *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940).

<sup>59</sup>  $N = B < P \times L$ . Negligence (N) is found when the costs of prevention (B) are less than the probability of the damage occurrence (P) multiplied by the expected extent of the resulting damage (L). See, *inter alia*, R. Posner, A Theory of Negligence, 1 J Legal Stud 29 (1972); id., Economic Analysis of Law, 7<sup>th</sup> ed., 2007, pp. 167.

<sup>60</sup> *Stovin v Norfolk County Council* [1966] AC 923 (HL).

<sup>61</sup> *Ibid.*, at 958.

experiment of roughly determining the required precautionary standard in consideration of all available information of the individual case. This may be one of the reasons why the corrective justice theoreticians, when analysing the respective court decisions, denounce the Hand formula as a 'myth'.<sup>62</sup> The question which keeps the American juristic academia busy - whether the *Hand Formula* is an appropriate analytical concept for the broad tort of negligence as a whole - can here be left unanswered. *Hand* is less helpful in every-day cases of human inattention. It does not help to solve problems of attributability (remoteness/normative imputation)<sup>63</sup>. Here, the *Hand Formula* is used exclusively for the subcategory of 'enterprise negligence'. Being a form of cost benefit analysis, it is just conceived as a rough technical device to allow the courts to decide upon liability of businesses and public entities. It is an open secret that the courts here obtain a great margin of discretion. However, whether this still relates to *negligence* as a kind of personal fault (wrongful conduct) is more than questionable.

(ii) This enterprise liability – and that is why it is quasi-strict – is characterised by a shifting of the burden of proof for organisational fault on the defendant business. If it is a matter of an injury to legally protected interests by business processes or professional activities, then one proceeds from a presumption of organisational fault. The information about avoidance costs should be delivered by the one who has it on its records or can best provide it: the defendant enterprise. In other words: The business must exonerate itself by convincing the court of the inevitability of the damage occurrence. One may call this a *reverse Learned Hand test*<sup>64</sup>; that is, as far as businesses are concerned, there is a (rebuttable) presumption that the injury could be prevented at reasonable costs. Italian law applies this test in cases of risky activities<sup>65</sup> which mostly will be commercial undertakings. Interestingly the new Russian Civil Code of the 1990ies adheres to a model that goes further and proceeds from a general presumption of negligence in every case of proven causation of harm.<sup>66</sup>

To sum it up, general enterprise liability is *not* strict liability for sources of danger but rather remains formally bound to the structure of liability in negligence. Therefore an enterprise-related normative standard of good organisation and safe processes still functions as core element in this liability concept. It kept its character of liability for malfeasance or malfunction.

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<sup>62</sup> R.W. Wright, Hand, Posner, and the Myth of the 'Hand Formula', (2003) 4 Theoretical Inquiries in Law No. 1, Article 4.

<sup>63</sup> For this, see the second Wagon Mound judgment of the House of Lords: *Overseas Tankship (U.K.) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617.

<sup>64</sup> For variants of the Learned Hand test, see G. Calabresi & A.K. Klevorick, Four Tests for Liability in Torts, 14 J. Legal Stud. 585 (1985), with a different use of the term 'reverse Learned Hand'.

<sup>65</sup> Art. 2050 Cod.civ. This rule has been taken up as Art. 4:201 in the European Principles of Tort Law.

<sup>66</sup> Art. 1064 (2) CCRF. This concept was influential on the new civil codes in Eastern Europe.

## V CONCLUSIONS

What do we learn from this view of the cathedral? Roman law's grandeur lies in ruins. The universality and simplicity of the Aquilian *damnum iniuria datum* belongs to legal history. Nowadays personal fault has tremendously lost ground. Intentional injuries became rare cases in civil liability law. Individual responsibility for negligently caused damage is today restricted to the private world. Even here negligence has taken on a stricter – objective - character. Its structure has been streamlined. Remoteness is a problem of normative imputation ('just, fair and reasonable'), not of fault. Negligence at the workplace leads to no-fault employers' responsibility. In addition, a manifold variety of 'stricter' and strict forms<sup>67</sup> of liability have come to the fore. The most prominent example presented here is the quasi-strict enterprise liability (*reverse Learned Hand*). Availability of liability insurance since the end of the 19<sup>th</sup> century has supported this development. This is the '*brave new world*' of *quasi-strict fault liability*.

The rise of strict liability in reaction to the risks of industrialisation in civil law and its non-rise in common law will be the subject of the second lecture.

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<sup>67</sup> For a European (and beyond) stock-taking of strict liability cf. B. Koch/H. Koziol (eds), *Unification of Tort Law: Strict Liability*, 2002; see also Brüggemeier, *Risk and Strict Liability. The Distinct Examples of Germany, the US and Russia*, (2013) 21 ERPL 923.