



Annual Report 2012

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1. Research

Scientific Projects

The *European Centre of Tort and Insurance Law* (ECTIL), an independent association based in Vienna, is a research institute undertaking comparative studies in the field of national, international and common European tort and insurance law. The results of the research are published in the series *Tort and Insurance Law* and *European Tort Law – Yearbook*. Until the end of 2009 the series were published by Springer (Vienna/New York), from the beginning of 2010 by de Gruyter (Berlin/New York). These series were originally founded by ECTIL; since 2002 they have been edited together with the Institute for European Tort Law of the Austrian Academy of Sciences (ETL).

Projects Completed in 2012

Loss of Housekeeping Capacity (eds. Ernst Karner/ Ken Oliphant)

Tort and Insurance Law Series, Vol. 28 (ISBN 978-3-89949-813-4)

Compensation for loss of housekeeping capacity is one of the main heads of damages awarded for personal injury, and therefore of great practical importance to both accident victims and liability insurers. Yet it has so far received little scholarly attention from a comparative perspective. This study examines national approaches to the award of such damages and draws comparative conclusions, addressing both the concepts employed in different national systems and, through practical case studies, the quantum of compensation in individual cases.

Employers' Liability and Workers' Compensation (eds. Ken Oliphant/ Gerhard Wagner)

Tort and Insurance Law Series, Vol. 31 (ISBN 978-3-11-026996-3)

This large-scale comparative study analyses the two principal mechanisms employed in modern legal systems to deal with the social problem of occupational illness and injury, namely, employers' liability and workers' compensation. It provides a detailed description of the systems in operation in twelve countries around the world, investigating the complex legal structures and their interaction with other social institutions, as well as their inter-jurisdictional coordination through private international law. Current international trends are identified and assessed and the fundamental political issues highlighted and explored. The study's ultimate goals are not only descriptive but also to answer the question of how

compensation and liability systems can best be adapted to meet society's needs in the 21st century.

Projects in Progress

Mass Torts in Europe deals with mass torts, meaning for example cases where a great number of claimants have suffered harm for which compensation is sought in an action against the same defendant. In such cases European jurisdictions often tend to ad hoc resolutions established for a specific case which do not always fit in the traditional system of tort law. These classic rules of tort law on the other hand are made for individual damages of one or a few persons and do not always provide solutions for cases of mass torts. At least on the level of civil procedure it seems reasonable in such cases to strike a different path than the usual one. Be it through a joinder of claims, be it through the famous class actions which are recently intensively discussed for European jurisdictions. This new research project shall discover whether the existing instruments of tort law are sufficient or should be adapted to solve cases of mass torts or whether specific rules would be better. Rather than focussing on country reports and a comparative synthesis, the project is intended to be split up in two main parts. The first part will consist of case studies of particular incidents of mass tort provided by experts in their field for an insight into the practical operation of the law in the cases at hand. The second part will cover general issues, written by outstanding scholars with a broad and comparative vision on the issue at hand. Project leaders are Willem van Boom (University of Rotterdam) and Gerhard Wagner (University of Bonn). Munich Re is cooperating with ECTIL and ETL on this project.

In 2012 the questionnaire was finalised and both practitioners and scholars started their reports. In 2013 a working meeting in May will be dedicated to the discussion of the case studies and a concluding conference in Munich will present the most important research results. Publication is planned for early 2014.

The Basic Questions of Tort Law from a Comparative Perspective

This project, which is funded by the Austrian Science Fund (FWF) and led by Helmut Koziol, seeks answers to the basic questions of tort law in Europe from a comparative perspective. The project commenced in July 2011 and will end by June 2014. 2012 saw the completion of the translation of the *Grundfragen des Schadenersatzrechts* (based on the German, Austrian and Swiss legal systems) from German to English. This was followed by the publication in English of the Basic Questions of Tort Law from a Germanic Perspective and its

dissemination to the other reporters involved in the project. This publication thus provides a basis for comprehensive responses by representatives of other European legal families (namely, the Common Law, Scandinavian, Eastern European and Romance families) and jurisdictions outside Europe (that is, the US and Japan) on the fundamental ideas elaborated in the book. A number of individual meetings between the Project Leader and the other project participants preceded their drafting of the responses. In 2013 a second series of individual meetings will be held. The results of the study will be presented in a public conference in Graz in 2014 and a further publication, the Basic Questions of Tort Law: Critical Comparative Statements and Conclusions – which will be available in both English and German – will follow.

Compulsory Liability Insurance

Statutory obligations to take out liability insurance are, in practice, the most important means to ensure compensability of damage arising from dangerous activities. This project surveys compulsory liability insurance from ten national or regional perspectives. It considers in particular: the overall scheme for the law of liability insurance; available empirical data on statutory obligations to take out liability insurance; the details of the different compulsory liability insurance systems; the purpose of provisions stating an obligation to take out liability insurance; attitudes and concerns about the compulsory liability insurance systems; compulsory liability insurance from a constitutional and a European perspective; compulsory liability insurance and economic analysis of law; and aspects of insurability.

The project leaders are Attila Fenyves, Prof. Stefan Perner, Daniel Rubin (all University of Vienna) and Christa Kissling (ECTIL).

Legal Implications of Third Party Liability for the European Security Industry

This project is part of an overall study which aims to investigate the impact of existing third party liability and regulatory structures on the Security Industry, broadly conceived, within Europe. The study as a whole is carried out on behalf of the European Commission by the University of Maastricht, Faculty of Law, METRO (Maastricht European Institute for Transnational Legal Research), in collaboration with the law firm Hunton & Williams and ECTIL and aims to form the foundation for policy suggestions that would further develop or re-cast the relevant structures.

To this end, as part of the new co-operation agreement between ECTIL and the University of Graz, Professors Monika Hinteregger (Graz), Helmut Koziol (ECTIL) and Ken Oliphant (ECTIL/ETL) are leading part of the study which investigates the current situation regarding

liability in the national legal systems of seven EU Member States - France, Germany, The Netherlands, Poland, Spain, Sweden and UK - drawing particular attention to any innovative or unique solutions in each jurisdiction. Resulting comparative conclusions will be used to develop a set of draft proposals for regulating the Security Industry throughout Europe. Other parts of the study aim to investigate the relevant international or EU law regimes, the regime put in place by the US Safety Act and the situation in other analogous industries.

Medical Malpractice and Compensation in Global Perspective

This project started as a joint venture of ETL and the Chicago-Kent College of Law (USA). Following the project conference in Vienna in December 2010, the papers that had been presented there in draft were revised, finalised and published in Volumes 86:3 (2011) and 87:1 (2012) of the Chicago-Kent Law Review.

During 2012 extensive preparation was made for the papers to be collected together and published as a single volume, along with comparative conclusions written by Ken Oliphant and Richard Wright, in the Tort and Insurance Law series (vol. 32, DeGruyter Berlin). Authors have been offered the opportunity to include a brief update to their papers to take into account changes in 2011 and 2012. These will be published as short supplements to the relevant chapters along with an additional conclusory chapter by Prof Oliphant which will draw together some of the emerging themes from the project. The publication of the volume is co-financed by ECTIL and is expected before summer 2013.

EUROTORT is the first comprehensive database of European cases on tort law (www.eurotot.org). This web-based research tool allows both researchers as well as practitioners to access the vast wealth of jurisprudence on tort law throughout Europe in a single language (English) and with a standardized index system. After registration, access to the database is free of charge at the moment. At present, the collection contains almost 3,000 decisions from 30 European countries, all categorized and indexed. One can search by jurisdiction, time period, keywords, full text, or a combination thereof. The materials stem from cases reported in the "Tort and Insurance Law Yearbook" series, co-published by ECTIL and ETL, as well as in the "Digest of European Tort Law" series of the latter institution. Further additions are being made continuously. The cases have been selected by experts from each respective jurisdiction, who have also drafted the English texts presenting the facts of the case and an abstract of the decision.

The Database has over 300 users.

World Tort Law Society (WTLS)

The World Tort Law Society was founded in 2012 as a cooperation between ECTIL, ETL and the Centre for Civil Justice of the Renmin University, Peking, China. The aim of the Society is to offer a forum to discuss current developments in tort law on a global basis.

The first President of the Society is Helmut Koziol (ECTIL); Yang Lixin (Renmin University), Ken Oliphant (ETL) and Michael D. Green (Wake Forest, USA) are members of the Board. Further members are outstanding scholars in the field of tort law from all corners of the world.

The first meeting of the Society will take place in September 2013 in Heilongjiang, China. The meeting will focus on the first project of the WTLS, which will examine the topic of „Product liability“. International reporters will give lectures on product liability, presenting and analysing the current problems of product liability. The results of the meeting will be presented in a publication which will mainly be prepared by ECTIL and ETL. It is hoped that WTLS meetings will be held every two years in different countries all over the world in order to discuss the most interesting topics in tort law.

2. Principles of European Tort Law (PETL)

This research programme aims to contribute to the enhancement and harmonisation of tort law in Europe through the framework provided by the **PETL** and related research, and in particular to provide a principled basis for rationalisation and innovation on national and EU level. The research is pursued by a network of scholars, the European Group on Tort Law, which is supported by ECTIL and ETL. Following the Group's original publication of the PETL (with commentary) in 2005, it reconvened in 2009 to work on expanding the PETL's scope and updating and refining its content in the light of subsequent scholarly debates and developments in national and EU law. In the years to come, the Group aims to publish a series of preliminary studies on topics not addressed in the initial edition of the PETL or otherwise warranting consideration, culminating with the publication of a revised and expanded edition of the PETL.

The first project on the agenda is **Proportional Liability**. Courts have, traditionally, required the plaintiff to prove to the requisite standard of proof that causation exists. This project addresses what has, to date, been a modest reform toward permitting recovery based on a probability that causation exists, discounting the damages awarded by the probability of causation. The approach was endorsed in the PETL of 2005. The central purpose of the Group's current inquiry is to employ a comparative methodology to better understand how different legal systems respond to causal uncertainty and to examine why,

how and in what situations rules of proportional liability can promote the goals of tort law. Work on the comparative conclusions commenced in 2012. Reports are currently being edited and prepared for publication in the ETL-ECTIL series Tort and Insurance Law in 2013. The book, entitled *Proportional Liability: Analytical and Comparative Perspectives*, will be edited by Israel Gilead, Mike D Green and Bernhard A Koch.

The second project is about the **Liability of Public Authorities**. In the last decades, the liability of public authorities has been one of the main focuses of development in tort law in Europe, with major reforms implemented or considered at national level, and a steady stream of major court decisions. During the same period, public authority liability has also been recognised in the law of the EU, and the interplay of principles of national and EU law – and additionally the case law of the ECtHR – evidently warrants close attention. At present, neither of the two European tort law harmonisation projects (the PETL and Book VI of the DCFR) addresses the topic, and a major study considering the current state of play across Europe and the possibility of harmonisation in this area is undoubtedly overdue. The project aims are to contribute to the understanding of the law of public authority liability in the legal systems of Europe, to facilitate its enhancement where necessary or desirable, and to consider the appropriateness of extending the European Group's PETL to cover public authority liability, and (if appropriate) the best means of effecting this. Ken Oliphant was appointed project leader.

In 2012 a meeting took place in Vienna on 12–14 April 2012 and another, hosted by the Swiss Institute of Comparative Law, in Lausanne on 5–6 October.

The EGTL will meet on two occasions in 2013. The spring meeting is scheduled to take place at the University of Graz between 7–8 April. In addition to Public Authority Liability the third project since the Group's reunification in 2009, on the interaction between contractual and non-contractual liability, will also be on the agenda. The meeting precedes a Conference on Public Authority Liability in which selected contributors to the project will report on the position in their respective jurisdictions.

3. Yearbook/Annual Conference on European Tort Law

ECTIL and ETL jointly publish the *European Tort Law Yearbook*, which provides a comprehensive overview of the latest developments in tort law in Europe.

It contains reports on most EU Member States alongside contributions from Norway and Switzerland. An overview of developments in the field of EU law is also provided. In

conclusion, a comparative analysis reviews the essential aspects of all the reports, which are written by scholars from their respective jurisdictions.

Focusing on the relevant year, the authors critically report on important court decisions, summarise new legislation and provide a literature overview.

The Yearbook "European Tort Law 2011", edited by Ken Oliphant and Barbara C. Steininger was published in December 2012 (ISSN 2190-7773).

The project is combined with an ***Annual Conference on European Tort Law***, where the highlights of the contributions to the Yearbook are presented and discussed. Last year's conference was held in Vienna from April 12-14, 2012.

The Conference, which was attended by 150 participants, began on Thursday evening with an opening lecture by Michael D Green (Wake Forest University, USA) and Olivier Moréteau (Baton Rouge, USA); the topic of the lecture was *Restating Tort Law: The American and European Styles*. The Conference concluded with a special session on ***Cultures of Tort Law in Europe*** on Saturday morning. The various papers presented were drawn from some of the leading or unique systems within the European legal tradition. Jean-Sebastien Borghetti spoke to the French tradition, Jörg Fedtke the German, Hakan Andersson the Scandinavian and Richard Lewis and Annette Morris the English common law.

The **12th Annual Conference** will be held from **April 4–6, 2013, in Vienna**. This year's special topic will be ***Tort Law and the Financial Crisis***.

4. Journal of European Tort Law (JETL)

JETL aims to contribute to the analysis and development of tort law in Europe by the publication of scholarly articles, comments and reviews. It has a primarily comparative focus, but willingly embraces all scholarly perspectives, including economic analysis of law and legal sociology. Its subject matter extends beyond substantive tort law to the wider tort system, including private and social insurance.

Members of the Editorial board are: Ken Oliphant as General Editor (ETL), Ernst Karner (University of Vienna/ETL), Bernhard A. Koch as Deputy General Editor (University of Innsbruck) and Christiane Wendehorst (University of Vienna).

All contributions to the JETL must be approved by the Editorial Board following a formal process of double blind peer review. The journal publishes articles and, from time to time, shorter comments on cases and legislation and book reviews.

JETL is published by de Gruyter (Berlin/Boston) – three issues annually. Every year, issue two contains the essays of the special session of the Annual Conference on European Tort Law.

5. Library

With the help of international experts all relevant tort law publications of the most important jurisdictions were compiled in a specialist library. The library, jointly built up with the resources of ECTIL and the ETL, has now almost 13,000 books and is constantly enlarged. There are important collections of decisions on CD, as well as 80 subscriptions to relevant journals. All individual books are electronically registered and there is a system of key-words which facilitates quick access to the publication in question. The specialist library is frequently used by academics working in the field of comparative tort law.