

# Austria

by Willibald Posch  
Professor of Law  
University of Graz, Austria

This revision was provided by Mag. Thomas Petz, LL.M. (Berkeley)

2004  
Kluwer Law International  
The Hague • London • New York

*Published by Kluwer Law International*  
P.O. Box 85889  
2508 CN The Hague, The Netherlands  
Tel.: +31 70 308 1500  
Fax: +31 70 308 1515  
E-mail: sales@kluwerlaw.com  
<http://www.kluwerlaw.com>

*Sold and distributed in North, Central and South America by*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704, USA  
Customer Care: +1 877 529 5427  
Direct Dial: +1 301 698 7100  
Fax: +1 301 698 7159  
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Extenza-Turpin Distribution Services  
Blackhorse Road  
Letchworth  
Hertfordshire SG6 1HN, United Kingdom  
Tel.: +44 1462 672555  
Fax: +44 1462 480947  
E-mail: kluwerlaw@extenza-turpin.com

*Printed on acid-free paper*

9888000470

The monograph *Austria* is an integral part of *Tort Law* in the *International Encyclopaedia of Law* series

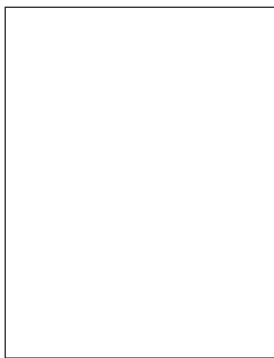
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*Tort Law* was first published in 2001

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## The Author



Willibald Posch was born on 18 August 1946 in Graz, Austria. He studied at the university of Graz and became Dr. iuris there in 1969. He worked at the University of Salzburg School of Law and taught at the McGeorge School of Law in Edinburgh and Salzburg before being appointed in 1983 Assistant Professor and in 1988 Full Professor for Civil Law and Comparative Private Law at the University of Graz.

From 1991 until 1999 Professor Posch was Director of the Research Institute for European Law at the University of Graz School of Law. Since 1984 he is the head of the Department for Private International Law, Comparative Private Law and Uniform Private Law in Graz.

Professor Posch is the author of numerous books and articles and he contributed to several books, journals and looseleaves.

**The Author**

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## List of Abbreviations

ABGB	<i>Allgemeines Bürgerliches Gesetzbuch</i>
ABIEG	<i>Amtsblatt der Europäischen Gemeinschaft (Official Journal)</i>
AHG	<i>Amtshaftungsgesetz</i>
Arb	<i>Sammlung arbeitsrechtlicher Entscheidungen</i>
ARD	<i>ARD-Betriebsdienst</i>
AVSG	<i>Allgemeines Sozialversicherungsgesetz</i>
AtomHG	<i>Atomhaftpflichtgesetz</i>
AUVA	<i>Arbeitsunfallversicherungsanstalt</i>
AVG	<i>Allgemeines Verwaltungsverfahrensgesetz</i>
BGB	<i>Bürgerliches Gesetzbuch</i>
BGBI	<i>Bundesgesetzblatt</i>
BGH	<i>Bundesgerichtshof</i>
Blg	<i>Beilage, -n</i>
B-VG	<i>Bundesverfassungsgesetz</i>
Cal.	<i>California</i>
CC	<i>Code civil, Codice civile</i>
cf.	<i>compare</i>
Ch	<i>Chapter</i>
DRdA	<i>Das Recht der Arbeit</i>
dRGBI	<i>Deutsches Reichsgesetzblatt</i>
EC	<i>European Community</i>
EC	<i>European Council</i>
ECJ	<i>European Court of Justice</i>
ECU	<i>European Currency Unit</i>
ed	<i>edition</i>
EEA	<i>European Economic Area</i>
e.g.	<i>for example</i>
EKHG	<i>Eisenbahn- und Kraftfahrzeug-Haftpflichtgesetz</i>
EU	<i>European Union</i>
EvBl	<i>Evidenzblatt der Rechtsmittelentscheidungen</i>
FPO	<i>Freiheitliche Partei Österreichs</i>
GewO	<i>Gewerbeordnung</i>
GNP	<i>Gross National Product</i>
GP	<i>Gesetzgebungsperiode</i>
HGB	<i>Handelsgesetzbuch</i>
IPrax	<i>Praxis des Internationalen Privat- und Verfahrensrechts</i>
JBl	<i>Juristische Blätter</i>

## List of Abbreviations

KFG	<i>Kraftfahrgesetz</i>
KRSIlg	<i>Sammlung von Entscheidungen in Krankenanstaltenfragen</i>
KSchG	<i>Konsumentenschutzgesetz</i>
LFG	<i>Luftfahrtgesetz</i>
LIF	<i>Liberales Forum</i>
LuftVG	<i>Luftverkehrsgesetz</i>
MP	Member of Parliament
MR	<i>Medien und Recht</i>
N.	Number
NATO	North Atlantic Treaty Organisation
NJW	<i>Neue Juristische Wochenschrift</i>
No.	Number
NR	<i>Nationalrat</i>
NZ	<i>Österreichische Notariats-Zeitung</i>
OBA	<i>Österreichisches Bankarchiv</i>
OBI	<i>Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht</i>
OGH	<i>Oberster Gerichtshof</i>
O.J.EC	Official Journal of the European Community
OJZ	<i>Österreichische Juristenzeitung</i>
OLG	<i>Oberlandesgericht</i>
OR	<i>Obligationenrecht</i>
OrgHG	<i>Organhaftpflichtgesetz</i>
OVP	<i>Österreichische Volkspartei</i>
p.	page
PatG	<i>Patentgesetz</i>
PHG	<i>Produkthaftungsgesetz</i>
RAO	<i>Rechtsanwaltsordnung</i>
RdW	<i>Österreichisches Recht der Wirtschaft</i>
RGBI	<i>Reichsgesetzblatt</i>
RHPfIG	<i>Reichshaftpflichtgesetz</i>
seq.	the following
SPÖ	<i>Sozialdemokratische Partei Österreichs</i>
Sten.Prot.	<i>Stenographische Protokolle</i>
StGB	<i>Strafgesetzbuch</i>
StPO	<i>Strafprozessordnung</i>
SZ	<i>Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen</i>
UrhG	<i>Urheberrechtsgesetz</i>
UWG	<i>Bundesgesetz gegen den Unlauteren Wettbewerb</i>
VersVG	<i>Versicherungsvertragsgesetz</i>
VfGH	<i>Verfassungsgerichtshof</i>
viz.	namely
VwGH	<i>Verwaltungsgerichtshof</i>
WBI	<i>Wirtschaftsrechtliche Blätter addendum to Juristische Blätter</i>

### List of Abbreviations

ZfRV	<i>Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht</i>
ZPO	<i>Zivilprozessordnung</i>
ZVR	<i>Zeitschrift für Verkehrsrecht</i>

## List of Abbreviations

# General Introduction

## §1. THE GENERAL BACKGROUND OF THE COUNTRY

### I. Geography

1. Austria is a small country located in the centre of Europe. Dominated by the Eastern Alps, Austria covers an area of 83,888 square kilometres. The country is land-locked with borders to Switzerland, Germany, the Czech and Slovak Republics, Hungary, Slovenia, Italy, and the Principality of Liechtenstein. The Capital of Austria is Vienna with a population of 1,550,123, among them 248,264 foreign citizens (latest census date: 15 May 2001).

On 15 May 2001, Austria had a population of 8,032,962, that is about 97 inhabitants per square kilometre. This figure includes about 761,000 foreign citizens, which amounts to 9.4 per cent of the population. The ethnic composition of persons with Austrian citizenship shows a 98 per cent majority of German speaking persons and a number of small minorities (approx. 22,000 Croats, 16,000 Slovenes, 12,000 Hungarians). Among the foreign inhabitants refugees and migrant worker families from the Balkans and Turkey are predominant with a rising number of Africans. As of fall 2003, Austria is a Member State of the European Union which has the highest percentage of residents with a non-EU citizenship.

### II. History<sup>1</sup>

2. The origin of present-day Austria, which was first mentioned as *ostarrichi* in a document of 996, can be traced back to the medieval union of the dukedoms of Austria and Styria in 1192. In 1278 the Swiss duke Rudolf of Habsburg took possession of this union of two small regions of the then 'Holy Roman Empire of German Nation' and made it the core of an extended aggregation of areas under the hereditary rule of The House of Habsburg. The rule of this dynasty survived until 1918.

By the end of the Middle Ages the Habsburg 'hereditary lands' had attained an autonomous status within the Holy Roman Empire which, as a result of protestantism, became increasingly disintegrated. In the Austrian territories administrative and legal systems began to develop separately, notwithstanding the fact that members of the Habsburg family continued to be elected kings and emperors of the German Empire for centuries. Under the reign of Maria Theresia (1740–1780) a comprehensive reform of the administrative and legal system was launched in the Habsburg

hereditary lands which at that time had become a huge agglomeration of regions in Central-Eastern Europe inhabited by a diversity of ethnic groups and peoples (Germans, several Slav peoples such as Czechs, Slovaks, Slovenes, Croates, Italians, Hungarians and Romanians).

The process of law reform continued and accelerated under Maria Theresia's son Joseph II (1780–1790) and his successors to the throne. At that time, at the end of the 18th and in the early 19th Century, the first comprehensive codifications were prepared in the fields of civil procedure, civil law and criminal law. The General Civil Code of Austria (*Allgemeines Bürgerliches Gesetzbuch*, 'ABGB') which finally entered into force on 1 January 1812, is derived from drafts of that period. The Criminal Code of 1803 had a long and lasting influence on the evolution of criminal law before the modern Criminal Code of 1975 was enacted.

The Napoleonic Wars led to the formal dissolution of the Holy Roman Empire of German Nation in 1806. But already in 1804 the last German Emperor of the Habsburg family, Francis II, had adopted the title of 'hereditary emperor of Austria'. As such he became Francis I of Austria. The Vienna Congress put an end to the period of the Napoleonic Wars, and the following period was characterized by absolutism. One result of this evolution was a retardation of law reform in the Austrian empire and a significant dissonance between the law in the books and in action.

1. For a recent description of the political history, the constitutional and political system and an introduction into the legal system, cf. Herbert Hausmaninger, *The Austrian Legal System*, 3rd ed. (Manz 2003).

3. Not until the revolution of 1848 severely threatened the absolute rule of the monarch was any sort of constitution available for the people. An attempt for a constitution (Constitutional Bill of Kremsier, *Kremsierer Verfassung*) failed in that revolutionary year, however, and in March 1849, for a short period only, a revisionist constitution was forcibly put into effect ('*oktroyierte Verfassung*') by the government. Subsequently, after wars against Italy and Prussia had been lost, the Austrian emperor could not avoid abandoning substantive portions of his absolute power. Thus, a high degree of independence had to be granted to the refractory Hungarians, and a constitution together with the system of a Dual Austro-Hungarian Monarchy ('k.u.k.') had to be accepted in 1867. The rules on fundamental rights of the citizens which were provided by the Basic Law of the State (*Staatsgrundgesetz*) of 1867, are still in force today.

During the following fifty years a gradual national disintegration of the Dual Monarchy took place, but it was not before the end of World War I, that The House of Habsburg was ousted and the Austrian Empire fell to pieces. Hungaria, Czechoslovakia, Yugoslavia, Romania and Poland emerged as new national(ist) states from the ruins of the Austro-Hungarian Monarchy. In the remaining rump of Austria the republic order was proclaimed on 12 November 1918. What was once a huge multinational empire ranking among the leading powers of the world had become a tiny country with little chances to survive in an economically feasible way.

Its inhabitants were German speaking people, including some small Slavic and Hungarian minorities in southern Carinthia and in the most eastern province, the

Burgenland, which originally was part of the Hungarian half of the empire. In these districts the frontier was not fixed until some fighting and plebiscites.

4. The Federal Constitution of 1 October 1920 (*Bundesverfassungsgesetz*, ‘B-VG’) defines the Republic of Austria as adherent to a democratic system of government. The state’s institutional organisation is that of a federal union of smaller areas. Thus, Austria is constituted by nine provinces or ‘states’ (*Länder*), viz. *Burgenland*, *Kärnten* (Carinthia), *Niederösterreich* (Lower Austria), *Oberösterreich* (Upper Austria), *Salzburg*, *Steiermark* (Styria), *Tirol* (Tyrol), *Vorarlberg*, and *Wien* (Vienna) which is at the same time a province and the federal capital of Austria.

The most influential draftsman of the Constitution of 1920 was one of the most outstanding specialists of constitutional law in the 20th century: Prof. Hans Kelsen and that explains why the original version is also known under the name ‘Kelsen-Constitution’. In the meantime the Constitution has been amended several times. For the first time major changes were provided as early as 1929, and the most recent substantial modifications have become inevitable as a result of Austria’s accession to the European Union: They are provided by a major Constitutional Amendment of 1995.

The Constitution of 1920/1929<sup>1</sup> is still in effect today. However, it has not been effective throughout the entire eight decades that have since passed. Thus, the democratic 1920/1929 Constitution was repealed in the wake of a three-day civil war between conservatives and social-democrats in February 1934 and replaced by the new constitution of 1 May 1934. This ‘corporate-authoritarian Constitution’ (*ständisch-autoritäre Verfassung*) formed the basis for a short-lived ‘clerico-fascist’ authoritarian regime severely suffering from economic crisis and increasing political and ideological pressure by Nazi-Germany.

1. Cf. BGBl 1930/1.

5. In March 1938 Austria lost its sovereignty and independence and became part of the German ‘Third Empire’ as a result of the German occupation (*Anschluss*) for more than seven years. Finally, on 27 April 1945, the impending end of World War II made the Declaration of Independence by a provisional government under the leadership of the former State Chancellor Karl Renner possible.

On 1 May 1945, the Federal Constitution of 1920/1929 was re-enacted in its wording of 1933. As a former part of the defeated German Empire Austria did not immediately recover full sovereignty, however. The country remained under allied occupation until 1955. The State Treaty of 15 May 1955 re-established Austria’s independence and sovereignty, and after the complete withdrawal of the allied occupation forces, the Austrian parliament adopted the Federal Constitutional Statute on Neutrality of 26 October 1955, thereby declaring Austria a permanently neutral state.

When the communist regimes in Central and Eastern Europe collapsed tearing down the ‘Iron Curtain’ at the Eastern borders of Austria in 1989/1990 bringing an end to the durable East-West-Conflict, the traditional meaning and function of the status of a permanently neutral state became somewhat dubious. After Austria had become a member of the European Union the question, whether Austria should

abandon the status of a permanent neutral State and become a member of the NATO, has been specifically controversial among the political parties and within the Austrian population.

In 2003 a national convention (*Österreich-Konvent*) was constituted which is working on a new Austrian Constitution which shall replace the *Kelsen-Constitution*. One of the primary purposes of this convention is to integrate the numerous provisions with the status of constitutional law that are scattered over various statutes including the European Convention of Human Rights into a single and uniform text. Whether this review will also lead to substantial changes in the institutional framework remains to be seen. In the latter case, a public referendum may be required if it amounts to a 'total revision' of the Constitution.

### III. Political System

6. In its amended version the Federal Constitution forms the basis for all the other statutes. Constitutional provisions are of a higher rank than those of the so-called ordinary legislation (*einfache Gesetzgebung*), since their modification requires the affirmative vote of two thirds of the members of the National Council (*Nationalrat*) and the presence of at least 50 per cent of the 183 representatives.

However, for a so-called 'total revision' of the Federal Constitution the approval of a national referendum is required. Such a referendum became necessary in respect of Austria's intended accession to the European Community. In the referendum of 12 June 1994 66.58 per cent voted in favour of the accession which became effective on 1 January 1995.

European Community law is now the body of legal rules which supersedes even Austrian internal 'rules of constitutional law' to be found not only in the Federal Constitution but also in ordinary statutes, where they are expressly indicated as constitutional provisions. The rules of constitutional law are scattered in numerous statutes and its appearance is rather unintelligible.

7. Guiding principles of the Austrian Federal Constitution are:

- the republican principle,
- the democratic principle,
- the federal principle, and
- the rule of law, or principle of legality.

Together with the strictly observed separation of legislative and executive powers and a clear distinction between judiciary and administration, these principles form the basis of the constitutional order, which can only be modified by a referendum.

According to the democratic principle it is the people who are the sovereign and it is the people's will expressed by elected representatives on which all law depends. The republican principle is laid down in Article 1 B-VG. Thereby the restoration of the monarchy is prohibited. To be allowed to return to Austria, members of the Habsburg 'House of Austria' exiled by a constitutional statute of

3 April 1919 have to waive all imperial claims for an eventually restored Austrian throne by a formal declaration.

The federal principle indicates that the Republic of Austria is constituted by nine states, and that a rather limited part of the legislative and executive powers is conferred to the states.

Pursuant to the principle of legality or ‘rule of law’ the executive powers must be exercised in strict compliance with the law. According to Article 18 B-VG all executive activities must be based on legislative acts, and a hierarchical chain of authorities to give directions exists from the top of the executive, the federal ministers, to the lowest ranks of federal civil servants. This principle governs the entire public administration of Austria on the federal level as well as on the level of the *Länder* and of the communities.

According to Article 20 B-VG, the higher ranking authority has the power to issue directions which the lower ranking addressee has to obey even in a case where such directions violate the law. If a civil servant is faced with a direction appearing to be illegal, he may ask for a direction in writing. The (Federal) Administrative Court (*Verwaltungsgerichtshof*) guarantees the legality of public administration in its entirety.

8. Executive acts may be of a general character or of a particular or individual nature. The typical instrument for general executive or administrative action is the regulation (*Verordnung*). It is addressed to an indeterminate number of individuals. The typical instrument for individual administrative action is the order by decree (*Bescheid*). An order by decree is the decision of an actual case by an administrative authority addressed to an individual person or to a group of individuals.

The procedural steps by which an administrative order by decree is issued and the rules determining whether a remedy against such an order is available are uniformly regulated in a number of administrative statutes. Among them, the most important one is the General Statute on Administrative Procedure (*Allgemeines Verwaltungsverfahrensgesetz*, ‘AVG’).

9. The federal legislative bodies are the National Council, viz. the ‘Lower House’ of Parliament, and the Federal Council (*Bundesrat*), viz. the ‘Upper House’ of Parliament. The members of the National Council are elected for a term of four years on the basis of an electoral statute that is governed by the principles of universal, equal, secret, direct and personal suffrage. Every Austrian citizen who is above the age of eighteen at the date of the election and not convicted for a crime is entitled to exercise the right to vote. With regard to the selection of the members of the National Council the Austrian Constitution adheres to a system of proportional representation.

As a result of the most recent parliamentary elections of 24 November 2002, four political parties are currently represented in the National Council: The Austrian People’s Party (*Österreichische Volkspartei*, ÖVP), a Christian-social, conservative party is the strongest party with 79 MPs, followed by the Social-Democrat Party of Austria (*Sozialdemokratische Partei*, SPÖ) with 69 MPs. The right-wing Freedom Party of Austria (*Freiheitliche Partei Österreichs*, FPÖ) now holds now eighteen

seats, just slightly more than the heterogeneous, leftist Green-Alternative Party (*Grün-Alternative Partei*) with seventeen MPs.

Since the 1987, the SPÖ and ÖVP have governed the country by way of a coalition for more than a dozen of years, and the FPÖ has formed a strong and successful opposition together with the Green-Alternative Party and the so-called 'Liberal Forum' (*Liberales Forum*, LIF). The latter was a 1993 split-off of the Freedom Party which finally dropped out of parliament in the 1999 general elections by missing the threshold requirement of four per cent of the votes. As a result of these elections and after months of futile negotiations between the Social-Democrats and the People's Party leading to a deadlock, a coalition government was formed between the Freedom Party led by the charismatic, sometimes rude and always populist Jörg Haider, and the People's Party the head of which Wolfgang Schüssel became Chancellor. Even though Haider himself abstained from participating in the government, its formation entailed a waive of serious protests and somewhat exaggerated 'sanctions' were imposed on Austria by numerous states, including a declaration of bilateral non-co-operation by the remaining fourteen Member States of the European Union. Regardless of that these 'sanctions' were lifted only a few months later and Haider resigned as leader of the Freedom Party, the coalition government permanently had to face strong interior and external opposition. In September 2002, following an intra-party rebellion against the members of the Freedom Party in the government organized by loyalists of Haider, some of the Freedom Party Ministers resigned and early parliamentary elections were announced. In a landslide victory unprecedented in Austrian history, the ÖVP increased its number of votes by more than fifteen per cent and became the largest party in the National Council for the first time since 1966. The lengthy, separate negotiations between the ÖVP on the one hand and the other three parties on the other hand were dominated by major reform projects in the fields of pension rights, health care and tax reductions. Eventually, only the Freedom Party, which had suffered a dramatic loss of more than seventeen per cent of its votes in the general elections, was prepared to enter into a coalition government with the People's Party. Due to strong resistance against some of the reform projects and constant losses of the Freedom Party in subsequent elections at the provincial level, the stability of this government remains doubtful.

The members of the Federal Council are elected by the nine Parliaments of the provinces (*Landtage*). The number of delegates a province may nominate for the Federal Council depends on the population of the province. By the end of 2003, the number of members of the Federal Council was 62: 23 Social-Democrats, 28 Conservatives from the People's Party, and seven representatives of the Freedom Party, and four of the Green-Alternative Party.

Together, the two parliamentary chambers constitute the Federal Assembly (*Bundesversammlung*). Its most important constitutional functions are the administering of the Federal President's (*Bundespräsident*) oath of office at his inauguration and the potential bringing of an indictment against the head of state.

As the great majority of legislative powers is attributed to the federal legislative bodies, the two Houses of the Federal Parliament are clearly the most important legislative institutions in Austria. It is the National Council that creates new federal laws and modifies existing ones, approves the government and has the ability to

oust the Federal Government in its entirety or individual members thereof by a vote of no confidence.

After the National Council has adopted a bill it must be introduced into the Federal Council. The second chamber of the Austrian Parliament cannot impede the coming into effect of a statute by rejecting the bill. It can only cause a delay. If the National Council insists upon its original draft, the Federal Council has no right to a conclusive veto. That illustrates that the Federal Council that should represent the federal element of the Austrian constitutional system is in fact a rather powerless institution.

10. The Federal President, the Federal Government, and the Federal Ministers are the supreme executive authorities of the federal government.

The Federal President is the head of the state. He is elected by general vote of the Austrian people for a period of six years and may be re-elected one time only. It is he who acts as supreme representative of the Republic of Austria opposite the outside world. The Federal President is entitled to enter into international treaties, notwithstanding the requirement of approval of the National Council in all cases of some importance.

Apart from a limited number of extraordinary powers in a state of crisis, the President's governmental rights are very limited. He is not more than a mere figure-head who has to execute the vast majority of his acts upon the proposition of the Federal Government.

Head of the Federal Government is the Chancellor. In fact it is he who exercises the highest executive powers in the state together with the Vice-chancellor and the Ministers. The political composition of the Federal Government is the result of parliamentary elections, which are held every four years. One of the most important rights of the government is the right to initiate legislation in parliament. The Federal Government exercises the supreme administrative powers insofar as they are not a reserved privilege of the Federal President.

Some of the Federal Ministers are assisted by subordinate Secretaries of State (*Staatssekretäre*). Decisions of the Federal Government must be unanimously made and the Government is dependent on the support and confidence of a majority in the National Council.

The members of the cabinet are legally and politically responsible to the National Council. The Federal Government can object to any draft bill of a state parliament as well as lodge an appeal against any statute of a Land with the Constitutional Court.

11. The government of a state is composed of a governor (*Landeshauptmann*), his deputies, and other state councillors (*Landesräte*). The government is elected by the state parliament. It is legally and politically responsible to and depends on the confidence of the parliament of the state.

The number of representatives in the state parliaments ranges from 36 in the smaller states (*Burgenland, Kärnten, Salzburg, Tirol, Vorarlberg*) to 56 in the bigger states (*Niederösterreich, Oberösterreich, Steiermark*) and 100 in Vienna, which here as in several other instances, enjoys an exceptional position among the Austrian states. The members to the provincial parliaments are elected by separate votes (*Landtagswahlen*).

The function of the governor of a province in administrative matters is a dual one. On the one side, it is he who is the highest executive officer of the province and it is his function to represent the province to the other provinces of Austria. The governor also chairs the provincial government. At the same time, however, he is also an authority of the whole Republic of Austria and responsible for the execution of the so-called indirect federal administration (*mittelbare Bundesverwaltung*). The governor takes his oath from the Federal President.

12. The smallest entities in the Austrian system of administration are the communities. Communities are of various sizes. A number of bigger ‘cities with separate status’ (*Städte mit eigenem Statut*) have particular powers. Local government is executed by the mayor (*Bürgermeister*) and a directing board of the community (*Gemeindevorstand*). Its members and the mayor are responsible to and dependent on the confidence of the local council (*Gemeinderat*) whose members are elected in municipal elections.

#### IV. Economic and Social Values

13. After World War II, Austria’s recovering economy has been based on a developed mixed system of private and state-owned enterprises. In particular mining, heavy-manufacturing industries and energy production were subjected to nationalization measures after World War II. As a result of the accession to the European Union and due to the influence of liberal market ideology, a clear tendency to privatization and limitation of state subsidies to specific economic sectors has emerged cutting back immediate state involvement in the economy.

Nevertheless, Austria is still adhering to the traditional values of a free market system combined with government intervention and far-reaching social-policy measures. The values of a liberal economy find expression in a number of principles. Thus, the right of an individual to ownership of every type of personal and real property, including in principle all means of production, is guaranteed. Freedom of association is granted, and particular emphasis is put on ‘private autonomy’ by the Austrian codification of private law. The principle, that everyone is free to conclude whatever type of contract and to launch a business enterprise, is the basis for freedom of trade and commerce. The carrying out of certain businesses is subject to specific limits set out by the Industrial Code.<sup>1</sup>

In addition to the market-oriented economy, there is particular focus on a developed system of social security and public welfare. Austria is a highly developed example of a ‘welfare state’ which is currently facing serious problems to finance the health care and retirement pension system. Currently, approximately 99 per cent of the citizens are granted a basic protection in the case of accident and illness, and sufficient old age pensions are provided for nearly every inhabitant.

1. Since 1992 the Industrial Code (*Gewerbeordnung*, ‘GewO’) became amended several times and a number of restrictions on the freedom of trade principle were eliminated.

14. The Austrian economic situation mirrors that of a developed industrialized state of Western Europe. As approximately two thirds of Austrian exports are

addressed to other Member States of the European Union, and three fourths of the imports generate therefrom, membership to the European Community (EC) had become of highest priority for the Austrian Government to ascertain economic prosperity in Austria.

After having been a member of the European Economic Area (EEA) Treaty for one year Austria became a Member State of the European Union on 1 January 1995. This evolution entailed a far-reaching approximation of the Austrian legal and economic system to EU-standards. Numerous amendments of federal and state laws have been enacted in the nineties. As a Member State of the European Union Austria takes part in the law making procedure of the Brussels European Institutions. With a GNP per head of approx. 28,000 Euros, Austria is among the rich Member States of the European Union.

## §2. LEGAL SYSTEM

### I. Primacy of Legislation and Codification

15. The Austrian Constitution adheres to the idea, that misuse of political power may be most easily prohibited by separation of powers. Thus, legislation is separated from the executive powers, viz. judiciary and administration. Moreover, legislative power is superior, as judiciary and administration must be executed in strict adherence to the law. The legislative power determines in a binding way, how judiciary and administration have to act. This is the main feature of the ‘rule of law’ principle, or principle of legality (*Legalitätsprinzip*), laid down in Article 18(1) B-VG: ‘The entire administration of the state must be carried out on the basis of the laws’.

Judges and administrative officers must consult the statutory provisions and have to proceed in compliance with the law. They are bound to interpret the statutes according to well-established rules, and must not create ‘legal rules’ of their own.

16. Correct interpretation of statutory provisions by the judge is often crucial for the outcome of a case, especially in the field of private law. It is a remarkable feature of the old codification, that the General Civil Code of Austria includes two exemplary provisions dealing with the interpretation of statutory rules. These provisions are binding upon the courts.

According to §6 ABGB, ‘[n]o other interpretation shall be attributed to a particular provision of the law than that which is apparent from the plain meaning or the language employed and from the clear intention of the legislator’. Thus, the judge has to focus on the literal meaning and the context in which a provision is stated, and he has to inquire into the intentions behind a legal rule. Such intent is documented in the explanations to the drafts of the statutes, and in the stenographic protocols of the discussions in Parliament, that are published as official attachments to the Official Journal.<sup>1</sup>

However, if a case cannot be decided from the language or from the ‘natural sense’ of a provision, the judge has to refer to related legal rules concerning similar situations by way of analogy. Should the case still remain doubtful, then, according to

§7(2) ABGB, ‘it must be decided upon the carefully collected and well-considered circumstances in accordance with the natural principles of justice’. This reference to the rules of ‘Natural Law’ illustrates the influence of the Natural Law School on the Austrian codification of civil law.

With the exception of this obsolete reference, §§6 and 7 ABGB served as a model for rules of interpretation in other codifications, such as the Italian *Codice Civile* of 1942, and Latin American civil codes.

1. Cf. ‘*Stenographische Protokolle Nationalrat*’ and ‘*Beilagen zu den Stenographischen Protokollen*’.

17. §12 ABGB provides that ‘the decisions issued in individual cases and the opinions handed down by the Courts in particular litigations never have the force of law’ and ‘cannot extend to other cases or to other persons’. That means, that decisions of the Supreme Court (*Oberster Gerichtshof*, ‘OGH’) are not binding on the inferior court, but do have a considerable impact on the evolution of the law, in particular of private law. They are of authority but do not constitute a primary source of the law. Usually, without being bound to do so, lower courts tend to orient themselves by the holdings of the OGH in cases deciding similar factual situations. §12 ABGB does not eliminate the practice of the Courts, in particular, the practice of the OGH as a source of law, but elucidates its dependency on ‘positive statutory law’. The primordial functions of the Courts are interpretation of the statutes and filling the gaps therein. Although it is true that the binding law should be arranged in the form of statutes, a ‘subsidiary binding force’ is attributable to precedents.<sup>1</sup>

Codified law ages and since society and their values are normally changing more rapidly than amendments can be enacted, judge-made law exists in Austria in many fields of private law where the interpretation of solutions which the historical legislator had once in mind became insufficient. In addition, judge-made law has to step in, whenever the statutory law provides nothing but a general clause that, in order to be operational, needs to be concretized by the Courts. One of these general clauses is e.g. §1295 ABGB on liability for intentional or negligent causation of damages, and indeed, the Chapter on civil liability<sup>2</sup> as a whole forms the basis of a significant piece of case law within the General Civil Code.

1. See F. Bydliński, *Juristische Methodenlehre und Rechtsbegriff* (2d ed, 1990), p. 501 *et seq.*

2. ABGB, Part II, Chapter 30.

## II. Position of the Judiciary

18. According to Article 94 B-VG, the judiciary is strictly separated from public administration and completely independent from other state powers. Judges are independent in their judicial activities and cannot be dismissed or transferred from one court to another against their will. To become a judge in Austria, the graduate of one of the five law schools of the country<sup>1</sup> must pass a particular examination after clerkship that corresponds with the bar exam of an attorney. The judges are career judges, starting their profession usually in their late twenties at a District Court.

Lay-judges play an important role since juries sit in criminal proceedings on severe felonies such as murder or political crimes. Experienced businessmen assist the professional judge in commercial cases as do representatives of the employers and of the working force in labour disputes. In a regular civil law suit no lay-judge takes part in the decision.

1. In Vienna, Graz, Innsbruck, Linz und Salzburg.

19. All courts are federal courts. There is no dual system of federal and state courts in Austria. An important distinction is made, however, between courts of 'ordinary' and 'extra-ordinary' jurisdiction.

'Ordinary courts' are the courts sitting in civil, commercial and criminal cases. The lowest courts in the hierarchy are the District Courts (*Bezirksgerichte*). They are small claims courts located in nearly 200 communities<sup>1</sup> all over the country. At a District Court the judge sits alone. The 16 'State Courts' (*Landesgerichte*)<sup>2</sup> hear more important cases. On this level the decision is rendered either by a single judge or by a panel of three judges. However, it is always a tribunal of three judges that renders the decision on appeal in one of the four 'Superior State Courts of Appeal' (*Oberlandesgerichte*) in Graz, Innsbruck, Linz, and Vienna.

The court on top of the system of the Courts of Ordinary Jurisdiction is the Supreme Court 'OGH' which – like all supreme federal institutions – is situated in Vienna. Its existence is guaranteed by the Federal Constitution (cf. Art. 92(1) B-VG). OGH-Decisions are being rendered by a chamber of five highly qualified supreme judges.

A particular subject matter jurisdiction exists for commercial matters, family matters and labour disputes. Outside Vienna the courts of first instance in commercial matters are either the District Courts, or the State Courts dependent on the value of the case. In Vienna a special Commercial District Court and a Commercial State Court exists. In family matters the District Courts serving as Family Courts have to apply specific rules of procedure. Labour disputes are handed down by specialized Labour and Social Courts (*Arbeits- und Sozialgerichte*). Outside Vienna the Labour and Social Court is identical with the Circuit or State Court having local jurisdiction. In Vienna a separate Labour and Social Court is established.

1. There has been a tendency to reduce the number of District Courts and a continuing process of court concentration in recent years.
2. The name of the former 'Circuit Courts' (*Kreisgerichte*) which have been existing under this name since 1853 has changed to 'State Courts' (*Landesgerichte*) by a statute of 1993, BGBl 1993/41.

20. In Austrian civil procedure there are three instances. Depending on whether the trial court is a District Court or a State Court, an appeal will be handed down either by the State Court or by the Superior State Court of Appeal having local jurisdiction in the case. The decision of the appellate court may be reviewed by the OGH. The admission of an appeal for review has been restricted by a far-reaching amendment of the Civil Procedure Code in 1983 so that only a limited number of notices of appeal for review become accepted for decision by the OGH which is only concerned with questions of law.

In criminal cases, however, there is only a two-tier system of judicial review. In addition to the general courts of the regular hierarchy specific courts exercising jurisdiction in juvenile criminal matters exist.

21. The Courts of ‘extra-ordinary jurisdiction’ are the Administrative Court (*Verwaltungsgerichtshof*, ‘VwGH’) and the Constitutional Court (*Verfassungsgerichtshof*, ‘ VfGH’), both having their seat in Vienna.

The Administrative Court is charged with the task of controlling whether the entire administration of the state complies with the law. Currently the court consists of some 50 professional judges who are appointed by the Federal President on the proposal of the Federal Government. On top of the Court is a president and a vice-president. Appeals to the Administrative Court are open to those persons who have exhausted all the other available remedies of administrative procedural law. The Administrative Court reviews the conformity of the acts of administrative authorities with the relevant law to be applied. Powers and functions of the Administrative Court are determined in Article 130 *et seq.* B-VG.

By an amendment of the Federal Constitution of 1988 Independent Administrative Senates in the Provinces (*Unabhängige Verwaltungssenate in den Ländern*) were installed. Their function is to assist the Administrative Court in the control of the administrative authorities.

The main function of the Constitutional Court is to review the compatibility of the legislation with the constitution. The Court was created to ensure that conflicts concerning questions of constitutional law be decided by an independent judicial body. In particular, it lies with this Court to examine whether a regular statute complies with the constitutional framework, and to scrutinize in a given case if a constitutionally protected fundamental right is violated by a state authority.

The Court consists of a president and a vice-president, twelve regular, and six additional members, who have to be graduates from a law school and, in fact, are usually practitioners or academics of some reputation. The judges are appointed by the Federal President after being nominated by the Federal Government, the National Council, or the Federal Council. To ascertain the strict impartiality of a member of the Constitutional Court it is provided that a judge must neither be, at the same time, a member of the federal government or of a provincial government, nor a member of the Parliament, nor a functionary or employee of a political party.

The extensive judicial power of the Constitutional Court as a state court is determined in a comprehensive and detailed way by Article 137 to 148 B-VG.

22. With the country’s accession to the European Union, Austria has accepted the European Court of Justice as highest authority in cases involving Community Law. Here the European Court of Justice has venue and jurisdiction according to Article 220 *et seq.* EC-Treaty. Decisions of the European Court of Justice may affect Austrian public authorities as well as citizens and business enterprises. It should be noticed that the number of references for preliminary rulings presented to the Court of Justice by Austrian courts in the early time of membership has been amazingly high.<sup>1</sup>

1. During the first four years of EU-membership Austrian Courts have filed more than 60 references for preliminary ruling to the ECJ: nearly three times as many as the Swedish and five times as many as the Finnish Courts.

## Selected Bibliography

### 1. Tort Law in General

- Brüggemeier, *Deliktsrecht* (1986)  
F. Bydlinski, Der Ersatz immateriellen Schadens als sachliches und methodisches Problem, JBl 1965, 173, 237  
F. Bydlinski, *Probleme der Schadensverursachung* (1964)  
Harrer, *Schadenersatzrecht* (1999)  
Harrer, in Schwimann, *Praxiskommentar zum ABGB VII*<sup>2</sup> (1997), §1293 *et seq.*  
Karner/Koziol, *Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform* (2003)  
Karollus, *Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung* (1992)  
Koziol, *Österreichisches Haftpflichtrecht I*<sup>3</sup> (1997), II<sup>2</sup> (1984)  
Raber, Fragmente zum allgemeinen Teil des Haftpflichtrechts, JBl 1977, 24  
Randa, *Die Schadenersatzpflicht*<sup>3</sup> (1913)  
Reischauer, in Rummel, *Kommentar zum ABGB II*<sup>2</sup> (1992), §1293 *et seq.*  
Schilcher, *Theorie der sozialen Schadensverteilung* (1977)  
Schilcher/Kleewein, Österreich in: von Bar, *Deliktsrecht in Europa* (1963)  
Walter, Gleichheitsgrundsatz und Schadenersatzrecht, ZVR 1979, 33  
W. Wilburg, *Die Elemente des Schadensrechts* (1941)  
W. Wilburg, Zur Lehre von der Vorteilsausgleichung, JherJB 82, 51

### 2. Liability for One's Own Acts

- Koziol, Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 209  
Reischauer, *Der Entlastungsbeweis des Schuldners* (§1298 ABGB) (1975)  
Reischauer, Verschulden und Beweislast, ZVR 1978, 97 and 129

### 3. Damage

- Apathy, *Aufwendungen zur Schadensbeseitigung* (1979)  
Chr. Huber, *Fragen der Schadensberechnung*<sup>2</sup> (1995)  
Koziol, Zum Begriff des Vermögensschadens im bürgerlichen Recht, ZfRV 1969, 22

## Selected Bibliography

Koziol, Damages under Austrian Law, in: Magnus, *Unification of Tort Law: Damages* (2001)

### 4. Causation

F. Bydlinski, *Probleme der Schadenverursachung* (1964)

F. Bydlinski, Zum gegenwärtigen Stand der Kausalitätstheorie im Schadensrecht, JBl 1958, 1

v. Caemmerer, *Das Problem des Kausalzusammenhanges im Privatrecht* (1956)

Kleewein, *Hypothetische Kausalität und Schadensberechnung* (1993)

Koziol, Causation under Austrian Law, in: Spier, *Unification of Tort Law: Causation* (2000)

Mayer-Maly, Zivilistische Kausalitätstheorie in Bewegung, JBl 1965, 441

Posch, Multikausale Schäden in modernen Haftungsrechten, in: Fenyves/Weyers, *Multikausale Schäden in modernen Haftungsrechten* (1988)

### 5. Unlawfulness/Fault

Albert A. Ehrenzweig, *Die Schuldhaftung im Schadenersatzrecht* (1936)

H. A. Fischer, *Die Rechtswidrigkeit* (1911)

Koziol, Objektivierung des Fahrlässigkeitsmaßstabes im Schadenersatzrecht? AcP 196, 593

Koziol, Wrongfulness under Austrian Law, in: Koziol, *Unification of Tort Law: Wrongfulness* (1998)

### 6. §1325 ABGB

Danzl, Die (psychische) Gesundheit als geschütztes Rechtsgut des §1325 ABGB, ZVR 1990, 1

Danzl/Gutierrez-Lobos/Müller, *Das Schmerzengeld*, 8th ed. (2003)

### 7. Medical Malpractice

Engljähriger, Ärztlicher Behandlungsvertrag, ÖJZ 1993, 498 *et seq.*

Holzer/Posch/Schick, *Arzt- und Arzneimittelhaftung* (1992)

Kleewein, Zurechnungszusammenhang und Normadäquanz in der Arzthaftung, ÖJZ 1993, 161

Speiser, Einflüsse auf die Rechtsposition des Patienten, ÖJZ 1988, 746 *et seq.*

J. W. Steiner, Die ärztliche Aufklärungspflicht nach österreichischem Recht, JBl 1982, 169

J. W. Steiner, Geschäftsfähigkeit und Heilbehandlung, RdM 1994, 7

Zankl, Eigenmächtige Heilbehandlung und Gefährdung des Kindeswohls, ÖJZ 1989, 299

## Selected Bibliography

### 8. §1299 *et seq.* ABGB

- Avancini/Iro/Koziol, *Österreichisches Bankvertragsrecht I* (1987), II (1993)  
P. Bydlinski, Notariatsakt und Notarhaftung, NZ 1991, 235  
F. Graf, *Anwaltshaftung* (1991)  
Harrer, Die zivilrechtliche Haftung des Sachverständigen, in Aicher/Funk, *Der Sachverständige im Wirtschaftsleben* (1990) 177  
Koziol, Zur Haftung wegen fahrlässiger Anstiftung durch unrichtige Auskünfte, JBl 1988, 409  
Völkl/Völkl, Die Haftung der rechtsberatenden Berufe im Spiegel der Rechtsprechung, ÖJZ 1991, 617  
Welser, *Haftung für Rat, Auskunft und Gutachten* (1983)  
Welser, Zur Haftung der Banken für Bonitätsauskünfte, ÖBA 1982, 117

### 9. §§1318, 1319, 1319a, 1320 ABGB

- Oberhofer, Tierhalterhaftung im ländlichen Bereich, ZVR 1996, 34, 66  
Pirker, Die Wegehalterhaftung im alpinen Gelände, ZVR 1991, 193  
Posch, Marginalien zur Wegehaftung, JBl 1977, 281  
Posch, Die Folgen des §1319a – Zur Rechtsprechung des OGH in Wegehaftungssachen, ZVR 1984, 257  
Terlitzka, Die Bauwerkehaftung (§1319 ABGB) (2000)

### 10. DHG

- Dirschmied, *Dienstnehmerhaftpflichtgesetz* (1992)  
Kerschner, *Dienstnehmerhaftpflichtgesetz* (1992)  
Wachter in Schwimann, *Praxiskommentar zum ABGB VIII<sup>2</sup>* (1997), DHG

### 11. AHG, OrgHG

- Ent, *Die Organhaftpflicht* (1969)  
Rebhahn, *Staatshaftung wegen mangelnder Gefahrenabwehr* (1997)  
Schrage, *Kommentar zum Amtshaftungsgesetz<sup>2</sup>* (1985)  
Spanner, Einige Rechtsfragen der Amtshaftung, JBl 1951, 326  
Vrba/Zechner, *Kommentar zum Amtshaftungsrecht* (1983)

### 12. Liability for Acts of Others

- Dullinger, Mitverschulden von Gehilfen, JBl 1990, 20, 91  
Karollus, Gleichbehandlung von Schädiger und Geschädigtem bei der Zurechnung von Gehilfenverhalten, ÖJZ 1994, 257  
Kletecka, *Mitverschulden durch Gehilfenverhalten* (1991)

### **Selected Bibliography**

Koziol, Die Zurechnung des Gehilfenverhaltens im Rahmen des §1304 ABGB, JBl 1997, 201  
M. Wilburg, Haftung für Gehilfen, ZBl 1930, 650 *et seq*

### **13. Forms of Strict Liability (EKHG, PHG):**

Apathy, *EKHG* (1992)  
Barchetti/Formanek, *Das österreichische Produkthaftungsgesetz* (1988)  
Danzl, *Das Eisenbahn- und Kraftfahrzeug-Haftpflichtgesetz*, 6th ed. (1998)  
Fitz/Purtscheller/Reindl, *Produkthaftung* (1988)  
Gimpel-Hinteregger, *Grundfragen der Umwelthaftung* (1994)  
Posch in Schwimann, *Praxiskommentar zum ABGB VIII<sup>2</sup>* (1997), PHG  
Preslmayer, *Handbuch des Produkthaftungsgesetzes* (1993)  
Schauer in Schwimann, *Praxiskommentar zum ABGB VIII<sup>2</sup>* (1997), EKHG  
Welser, *Produkthaftungsgesetz* (1988)

## Part I. Liability for One's Own Acts

### Chapter 1. General Principles

#### §1. UNLAWFULNESS AND FAULT

57. Under the general rules of the Austrian law of civil liability a person's injurious conduct must be unlawful to entail his liability for the resulting injury. Whether the requisite of unlawfulness is met, has to be evaluated on the basis of the positive acts of legislation and regulations issued by state authorities, imposing on the addressees the duty to behave in the way so ordered. Characteristic examples for statutory provisions demanding a certain conduct to avoid the occurrence of injury are the rules of the Road Traffic Act:<sup>1</sup> that statute provides for detailed rules that have to be observed by all users of public roads.

Whenever the positive law imposes on certain persons detailed rules on the way they have to proceed in a specific activity, the test of unlawfulness presents no major difficulties. In these cases 'unlawfulness' follows directly from the violation of a statute that is designed to protect ('protective law')<sup>2</sup> endangered values and interests of potential victims from injury. §1311 ABGB refers to this type of statutory provision as 'a law in endeavouring to prevent incidental injuries'.

The character of a 'protective law' may not only be attributed to legal orders or prohibitions having general effect in that they are binding for everyone. A decree by a public authority addressed to individuals may in the same way qualify as a 'protective law'. Indeed, provisions bearing the character of a 'protective law' may be found in all fields of the legal system: in several areas of Administrative Law, in Criminal Law as well as in Labour Law. The Road Traffic Act is nothing but a characteristic and, in terms of its impact on judicial practice, the most important example for this category of the law.

1. In German: '*Strassenverkehrsordnung*', StVO.

2. In German: '*Schutzgesetz*'.

58. There are, however, not many other fields of societal conduct as intensively regulated as road traffic, safety of working machines or building construction etc. In many fields of societal activities there are no statutory or administrative rules existing that would expressly prohibit an unreasonably dangerous conduct. In these cases, no 'protective laws' may form the basis for the test of unlawfulness since no statutory or administrative rules aiming at the prevention of incidental harm exist that would indicate unlawfulness of a conduct in case of their violation.

In the absence of a protective law, however, unlawfulness must be identified as well. This identification requires more complex proceeding. As always, the starting point for the analysis has to be, whether the tortious activity is touching upon a legally protected interest. If there is an infringement of a protected interest, then there is a sort of *'prima facie'* evidence that the conduct causing the infringement was unlawful. From the fact that a protected interest is violated, it is presumed that the violation is attributable to a breach of the duty to abstain from intruding into the protected interests of the person having suffered harm. However, since the person intruding into the protected interests may be allowed to do this in the pursuit of legitimate interests of his own, it is often necessary to weigh and balance the involved interests with one another to find a clear picture.

However, a clear majority of Austrian learned writers and the Courts do not adhere to the theory that the violation of an absolutely protected interest, such as life, body or property, would by itself amount to a full and convincing evidence of unlawfulness, unless a ground for justification is shown by the wrongdoer.<sup>1</sup> The view that the unlawfulness test must apply to the injurious activity rather than to its result has become predominant in Austrian tort doctrine.<sup>2</sup> Indeed, it appears to be self-evident that the injurious result itself cannot be the subject of the unlawfulness test, and that rather it should be the wrongdoer's conduct that has to be examined. When this examination proves that there is no violation of a protective law, the question of whether a duty of care has been violated is to be answered by a comprehensive weighing of interests.

1. This is the position of the doctrine of *'Erfolgsunrechtslehre'*.

2. The German word for this theory is *'Handlungsunrechtslehre'*.

59. 'Unlawfulness' can also result from the inability of a person's duty to take measures to ensure that the protected interests of others may not become affected by the inherent injurious consequences of an earlier activity of that person. The artificial concept of *'Verkehrssicherungspflichtverletzung'*,<sup>1</sup> introduced into German legal terminology by German doctrinal writers to become an integral part of contemporary judicial practice in Germany, has been adopted by the Austrian theory and practice of tort law.

In these cases unlawfulness of the wrongdoer's conduct is generated by his failure to avoid hazards the sources of which he himself had created at an earlier time. The Courts have adopted the position that any conduct by which a source of danger of harm to others is created, entails the duty of the acting person to take all necessary efforts that may reasonably be expected in the circumstances to avoid the threatening occurrence of that harm.

The Austrian legislative bodies have significantly limited the field of application of the doctrine of 'liability for the duties to secure public safety' by sorting out a group of cases which otherwise would be in the core of that doctrine: that is *liability for the unsafe condition of public roads and ways*. A specific provision for the liability of custodians<sup>2</sup> of public roads and other public ways was introduced in 1975<sup>3</sup> and became effective on 1 January 1976. The fact that the population and environment of Austria is extraordinarily affected by transit road traffic may explain the policy of such specific legislation which is absent elsewhere. Nevertheless, there is

still a good deal of case law existing where the courts had to resort to the concept of negligent violation of one's duties to secure the public<sup>4</sup> to indemnify harm that was inflicted in generally accessible places that do not qualify as public roads or ways.

1. A not fully unsatisfactory translation could be 'violation of the duty to secure public safety'. Markesinis, *A Comparative Introduction to the German Law of Torts* (3rd edn, 1994), p. 75, is right when he remarks, that '[t]he term *Verkehrssicherungspflicht* is not easy to translate'. His further statement, that the meaning of this term 'could be summarized by saying that whoever by his activity or through his property establishes in everyday life a source of potential danger which is likely to affect the interests and rights of others, is obliged to ensure their protection against the risks thus created by him', is applicable to the corresponding notion of Austrian tort law as well.
2. In German: 'Halter'.
3. §1319a ABGB; on this provision, see *infra* N. 93.
4. Cf. OGH SZ 57/57; JBI 1989, 653; JBI 1991, 647; EvBl 1994/8; SZ 60/190; SZ 60/255; etc.

60. The answer to the question whether a certain legal provision amounts to a 'protective law', must focus on the aspect, whether and to what extent the relevant provision was designed to protect certain persons and categories of persons from an infringement of their protected interests.<sup>1</sup> The general protective goal of the provision<sup>2</sup> has to be identified first. Thereafter, the test in an individual case is, whether this protective goal is met, if under the facts liability would be imposed on the person acting in violation of the protective law. Thus, the crucial point is, whether the injury for which recovery is sought, is of a kind which the violated law has been designed to protect.

This examination aims at the establishment of a logical connection between the goal of the law that was violated by a wrongful activity on the one hand, and the resulting injury on the other. If the occurrence of the injury appears to be beyond the policy goal of the protective law, because that protective law aims at the protection from hazards that are different from those having materialized, then liability may be denied because of the absence of what may be expressed in English as 'connection of unlawfulness'.<sup>3</sup>

The function of the '*doctrine of connection of unlawfulness*', also known as '*doctrine of protective goal of a provision*'<sup>4</sup> or is very important as it allows the judge to sort out certain cases of unlawful conduct entailing injury where unlawfulness appears to have no relevant relation to the injury. This doctrine pays attention to the fact that, notwithstanding its established unlawfulness, a violation of a protective statute that would not meet the goal of that statute, cannot justify the imposition of liability on the wrongdoer.<sup>5</sup>

1. Cf. OGH DRdA 1994, 47, DRdA 1994, 393; JBI 1994, 191; etc.
2. In German: '*Schutzzweck der Norm*'.
3. In German: '*Rechtswidrigkeitszusammenhang*': another German term that is all but not easy to translate.
4. In German: '*Lehre vom Schutzzweck der Norm*', or '*Normzwecklehre*'.
5. Cf. JBI 1987, 720; ZVR 1990/119; ZVR 1990/129; JBI 1993, 788; etc.

61. The *relationship between unlawfulness and fault* may be characterized as being that of closely affiliated, nevertheless dogmatically separated concepts. Under the rules of the General Civil Code on civil liability, these two concepts are

indispensable as combined requisites for the imposition of responsibility on a person having caused damage to another.<sup>1</sup>

Whilst unlawfulness is an objective concept meaning simply that a legal provision has been violated without justification, the concept of fault is a subjective concept. It designates a conduct as being imputable to a person's inability to meet the standard of care that could be expected from him. Attributing fault to a wrongdoer's conduct means, as a rule, that he may be reproached for having committed a wrong. The wrongdoer may, nevertheless, be excused for not having acted unlawfully, when there is a ground of legitimacy in his favour, as e.g. in the cases of necessity or self-defence.

Neither unlawfulness, nor fault is requested in those cases where the law accepts that strict liability be imposed on the operators of a dangerous installation or on persons engaged in a dangerous activity.

1. It may be said that the relationship between unlawfulness and fault is that of being two sides of one coin.

## §2. CONCEPT OF FAULT

62. Under the rules of the General Civil Code liability for tortious injury is generally dependent on whether the person whose activity caused the injury is to blame for fault.<sup>1</sup> With regard to injurious conduct, §1294 ABGB makes a fundamental distinction between 'malice' (intent, wilfulness)<sup>2</sup> and 'negligence'<sup>3</sup> by stating in its third sentence that '[w]ilful injury may result either when the damage has been caused knowingly and purposely, or from oversight, when it is caused by careless ignorance or by lack of the proper attention or diligence'. In addition thereto, §1295(1) ABGB expressly provides that fault is not only in cases of tortious misconduct but also for breaches of contract an indispensable prerequisite for compensation.

Finally, an important distinction has to be made with regard to 'negligence', which may either be a 'simple' or a 'gross' one.<sup>4</sup> It follows from §1324 ABGB, that the classification of negligence as 'gross' has significant impact on the method the amount of compensation is assessed.

'Malice' means that injury is consciously and willfully inflicted upon another person ('knowingly and purposely').<sup>5</sup> The injury must either be positively envisaged and directly intended (*dolus directus*) or, at least, consciously accepted as a possible result of one's own wrongful conduct (*dolus indirectus*).

'Negligence' is an unintentional failure to provide the care which is necessary to avoid injury: simple negligence amounts to an insignificant lack of care, whilst gross negligence indicates a tendency to reckless conduct.

As already mentioned, it is of significant and distinctive importance for the scope of compensation, whether the wrongdoer is to blame for intentional or grossly negligent misconduct on the one hand, or only for simple (or slight) negligence on the other. Lost earnings are compensatory damage only in the case of 'gross negligence' or 'intent'. In addition thereto, the method of how the amount of recoverable damage is to be assessed differs depending on the degree of fault involved.

1. In German: ‘*Verschulden*’.
2. In German: ‘*Vorsatz*’; but Austrian lawyers frequently use the Latin word, ‘*dolus*’.
3. In German: ‘*Fahrlässigkeit*’.
4. In German: the distinction is between ‘*leichte*’ and ‘*grobe Fahrlässigkeit*’.
5. §1294 ABGB uses in its third sentence in the original German text the words: ‘*mit Wissen und Willen*’.

63. The general standard for evaluating fault is a subjective one: the test is whether the wrongful activity may be attributed to the carelessness of the particular individual causing the injury.

The ‘*regular standard of care*’ which is relevant for every mentally sane citizen of the age of fourteen or above is laid down in §1297 ABGB. Under this provision it is presumed, ‘that every person of sound mind is capable of such a degree of care and attention as can be applied by one of normal capacity’. It is further stated that ‘whoever causes an injury to the rights of another as a result of omitting this degree of care or attention is guilty of fault’. Thus, a wrongdoer may escape liability only by demonstrating that he was unable to provide, under the circumstances, the average knowledge, intelligence, and experience which would have enabled him to foresee and avoid the injury.<sup>1</sup> Cases in which such demonstration has been and can be successful are rare.

Whilst §1297 ABGB defines the standard of care that every ‘regular’ or ‘average’ citizen has to comply with, §1299 ABGB requires persons presenting themselves publicly as experts and professionals and whose fields of activity require specific skills or extra-ordinary diligence to observe a significantly higher standard of care.

1. For details, see, Koziol, *Österreichisches Haftpflichtrecht I*, 16/19; cf. F. Bydlinski, *Zur Haftung der Dienstleistungsberufe in Österreich und nach dem EG-Richtlinienvorschlag* JBl 1992, 341.

64. There are only a few provisions in the General Civil Code which do not require fault as a precondition for the imposition of liability. Indeed, ‘liability for dangerous activities’ was of little or no concern at the time when the ABGB was drafted, since the progress of technical evolution had not gone far beyond the operation of water and windmills. The problem of strict liability for injury from dangerous activities became associated with technical innovations and industrialization in the course of the 19th century, when the means of transport and the exploitation of new sources of energy developed. Thus, the relevant rules on liability for dangerous activities are laid down in the same way as in Germany, however, with different contents in specific statutes on liability for dangerous activities: the ‘*Gefährdungshaftungsgesetze*’ (see *infra*, No. 112 *et seq.*).

### §3. DUTY OF CARE

65. Under Austrian tort law, the concept of ‘duty of care’ has never played a similarly dominant role as it obviously does in the systems of tortious liability of the Common Law tradition. There indeed, ‘breach of a duty of care’ is a key concept in any negligence-based cause of action. Nevertheless, it has become a common feature for the Austrian Courts to examine unlawfulness and culpability of

a wrongdoer's conduct by asking, whether he would eventually be to blame for having violated a specific duty of care imposed upon him in the circumstances, such as a *'Verkehrssicherungspflicht'*.<sup>1</sup>

Where no clear legal rule alleviates the burden of proving unlawfulness of an injurious conduct, the test is, whether the wrongdoer has violated his duty to take care of another person's interests by abstaining from any intrusion into protected interests or rights of that other person. Indeed, the growing importance of the concept of 'duty of care' follows primarily from the unlawfulness-test that is rather focusing on the wrongdoer's conduct, than on the resulting wrong.

The adoption of the theory of 'liability for the violation of the duty to secure public safety' by Austrian courts<sup>2</sup> and doctrinal writers<sup>3</sup> may serve as an illustration for the increasing acceptance of 'duties of care' as a generally recognized notion of Austrian law of tortious liability. As already mentioned, nothing but a specific duty of care has been imposed on a person having created a source of danger for others, by that theory.

The importance of the notion 'duty of care' has been further enhanced by the fact that extra-contractual duties to secure public safety have found a counterpart in the 'contractual duties of protection and care' which are eventually employed to expand the area of contract law into the law of torts.<sup>4</sup>

1. *See supra* No. 58.

2. *Cf.* OGH ZVR 1989/47; SZ 60/256; JBI 1990, 113; ZVR 1995/130; ZVR 1998/91.

3. *Cf.* Koziol, *Haftpflichtrecht I*, N. 4/28 *et seq.*

4. *Cf.* the evolution of the somewhat dubious concept of 'contracts implying the protection of a third party', which appears to be an imported notion of German origin.

#### §4. CAPACITY (INFANTS, MINORS)

66. With regard to their responsibility for injury which they have caused, mentally sound minors ('infants')<sup>1</sup> reach capacity age at their fourteenth birthday. That does not mean, however, that they would be totally dispensed from becoming liable for an injury they cause at an earlier age. It is clear, however, that the victim of an injurious act of a minor or an insane person has no claim for compensation<sup>2</sup> if he has committed some fault in respect of the injury himself, e.g. by provoking the minor or the insane person.

The victim of injury that was caused by an insane or infant person may have a claim against the parents and other persons who are under the legal duty to supervise the incompetent tortfeasor. §1309 ABGB establishes the general rule for the compensation of damages, that those persons shall be liable to whom, because of their neglect of surveillance over such persons in their supervision or care, the damage can be attributed.

1. In German: *'Unmündige'*.

2. *See* §1308 ABGB.

67. Under Austrian law minors and insane or mentally incompetent people may become liable themselves for injuries they cause only if certain conditions are

met. The relevant rule is §1310 ABGB, which provides the presumption that such persons are not capable of acting negligently or intentionally. Nevertheless, the law acknowledges the fact, that there may be circumstances suggesting that, at least, a partial compensation would be an equitable solution. That explains why §1310 ABGB provides certain circumstances, under which a court may award either full compensation or a reasonable part thereof by the incompetent tortfeasor, whenever the victim of the injurious conduct of a minor or an insane person is not able to obtain compensation from the person who had the duty to supervise the minor or insane.

The circumstances that, according to §1310 ABGB, are to be taken into consideration by the judge are:

- a) whether the person who has caused the injury, notwithstanding his general mental incapacity, is nevertheless to blame for fault in the particular circumstances;
- b) whether the injured person abstained from defending himself in consideration of the age or insane mind of the person causing the damage; and
- c) whether the value of property owned by the injured person exceeds that of the person causing the injury.

If one of these aspects applies to the facts of the case, an injurious minor or insane person may be held fully or partially liable for damage he has caused to another person.

68. Here we find the same solution as in the provision on liability for damage caused by a person in a state of necessity (§1306a ABGB): Again, the judge is given a wider discretion than is usual in a codified legal system. He is not limited to a purely logic reasoning by way of subsumption. A mere syllogism is not sufficient, since the law cannot provide an abstract answer to the crucial question, what the legal consequences would be, if a ‘factual situation’<sup>1</sup> complies with the ‘elements of a statutory rule’.<sup>2</sup> Instead, the law makes the consequences dependent on a number of additional factors.

In the case of §1310 ABGB, these factors are a) abstaining from defence by the victim, b) finding of ‘quasi-fault’ on the incapable wrongdoer, or c) the fact that the wrongdoer is wealthy and has a considerable amount of property at his disposal. This last factor has proven to be the most important aspect in court practice, because the Austrian Supreme Court has accepted the view that a third party liability insurance coverage in favour of the wrongdoer constitutes ‘property’ of the minor or incompetent person. As contracts for a ‘housekeeping insurance’ that include liability insurance for all children living in an insured household are widespread, numerous decisions have been rendered by the Supreme Court that appear to be altogether dubious.<sup>3</sup>

Indeed, since it is necessary for liability insurance coverage to be effectuated, that the case for liability has been established before, the holdings of the Supreme Court are clearly lacking any logic reasoning. Notwithstanding serious criticism,<sup>4</sup> the Court upheld his position as economically reasonable, thereby implicitly accepting

as an unwritten principle of his consistent practice the sentence, that 'insurance entails responsibility'.

1. In German: '*Sachverhalt*'.
2. In German: '*Tatbestand*'.
3. Cf. OGH ÖJZ 1979, 282; SZ 52/168; JBl 1982, 149; JBl 1982, 375 etc.
4. Cf. criticism by Kerschner, *Freiwillige Haftpflichtversicherung als 'Vermögen'* iS des §1310 ABGB? ÖJZ 1979, 282.

## Part II. Liability for Acts of Others

### Chapter 1. Vicarious Liability

#### §1. EMPLOYER/EMPLOYEE

98. In contrast to the French *Code civil*<sup>1</sup> the General Civil Code of Austria does not specifically provide for the liability of an employer for the injury an employee causes to another person during the course of his employment. Instead, vicarious liability is dealt with in a general way. A ‘master’ may be held liable for the injury that his ‘servant’ causes to another in this function. In many cases the servant may at the same time be the master’s employee, or he may in another way be assigned to an activity on behalf of the master. It is not of essence whether the servant has concluded a contract of employment with the master.

1. *Cf.* Art. 1384 CC.

99. The rules on vicarious liability are laid down in two provisions of the ABGB, viz. §§1313a and 1315. Whilst the latter Article has been existing, albeit in a somewhat different wording, from the enactment of the original version of the General Civil Code in 1811, §1313a was introduced in 1916 to match the apparent systematic superiority of the German BGB of 1900 in this field of civil liability. Thus, the fundamental distinction of contractual and extra-contractual vicarious liability that the German Civil Code is providing in its §§278 and 831 has become a characteristic feature of Austrian law, as well: a feature that meanwhile appears to be rather dubious, however.

Prior to the Third Partial Amendment of 1916 there was only one obsolete provision on vicarious liability in the original text of the ABGB, viz. §1315 ABGB. This Article merely imposed a restrictive form of vicarious liability on a person using an injurious servant in pursuing his agenda irrespective of whether that servant was assigned to perform a contractual duty of his master or not. Indeed, that provision had been already obsolete at the time of its enactment in 1811 and its amendment had become inevitable when §1313a was inserted. Since then the Austrian regime of civil liability provides two divergent standards of vicarious responsibility:

§1313a ABGB. ‘A person who is under an obligation of performance to another is liable to the latter for the fault of his legal representative and of persons whom he has employed for the performance, in the same manner as for his own fault’.

§1315 ABGB. ‘A person who employs an unfit person for the care of his own affairs, or who knowingly uses a dangerous person therefor, is liable for any damage caused by such persons acting in such capacity to third persons’.

100. Whenever a contract exists between the injured person and the person having assigned the performance of a contractual duty to the wrongdoer, damage resulting from a servant’s wrongful act can easily be made the object of a successful lawsuit against the master of the servant causing the damage. This follows from §1313a ABGB. This provision was designed in full compliance with §278 of the German Civil Code and imposes strict vicarious responsibility on a party to a ‘specific relationship under the law of obligations’<sup>1</sup> for the lack of care of a servant whom that party employs in the performance of his obligations. A master delegating his obligation to perform a contract to a servant is held liable for any injury caused by that servant in the performance of that obligation, as if he himself had culpably failed to perform the duty.

The servant must have caused the injury ‘in the course’ of the activities assigned to him, not just ‘on the occasion’ thereof. This distinction may quite often be difficult to be clearly drawn.<sup>2</sup>

1. In German: ‘*schuldrechtliche Sonderbeziehung*’. Usually such specific relationship will be a contract.
2. Cf. OGH SZ 51/55; JBI 1982, 654.

101. If, on the other hand, a contractual relation between the master and the servant’s victim is absent, liability may only be imposed upon the master within very narrow limits. Thus the master will be answerable for damage caused by his servant only, if the victim proves that the employee is ‘incompetent’.<sup>1</sup> A servant is ‘incompetent’ if he proves to be unqualified or unfit for the tasks assigned to him, or if he has been knowingly employed by the master regardless of his dangerous properties. According to an unbroken line of authorities, a servant’s incompetence cannot, as a rule, be derived from a single failure in complying with a servant’s duties, unless this failure is extraordinarily grave and indicates a habitual inclination to carelessness.<sup>2</sup>

1. In German: ‘*untüchtig*’.
2. Cf. OGH SZ 48/110; ZVR 1990/85 etc.

102. Thus, in many cases a victim of a servant’s carelessness will remain without a claim for compensation, since it is, on the one hand, all but easy to trigger the master’s liability if there is no pre-existing contractual or other legal bond between the master and the victim. Whenever the construction of a ‘contractual’ liability is not possible the proof of the servant’s ‘incompetence’ has to be produced by the plaintiff. On the other hand, the injured person’s claim for recovery against the servant may not be honoured by the mere fact that the servant lacks insurance coverage and sufficient personal belongings to compensate the victim.

The fact that no general ‘*respondeat superior*’ rule exists in the Austrian law of extra-contractual liability, has increasingly entailed doctrinal criticism which appears to be justified from a comparative point of view. Most legal systems, including the

English and French ones, provide for a system of strict liability for servants' wrongdoing which is independent of any shortcomings in the servant's properties such as the 'incompetence' required by §1315 ABGB, or of any fault on the side of the master.<sup>1</sup> It is this insufficiency, above all, that may provide the explanation for a number of sophisticated attempts of 'contract shopping' aiming at the application of §1313a to tort cases instead of the all too restrictive §1315 ABGB.

1. Cf. the requisite provided by §831 BGB of 'fault in selecting and monitoring the servant' ('Auswahl- und Aufsichtsverschulden').

103. Thus, the Austrian Courts have expanded the sphere of application of §1313a ABGB to the violation of precontractual duties of care by a servant. Indeed, the theory of '*culpa in contrahendo*' was stimulated by the unjustified divergence of the rules on contractual and tortious vicarious liability.<sup>1</sup> Likewise, the Courts have – with doctrinal support<sup>2</sup> – created the somewhat artificial concept of 'contracts implying the protection of a third party'<sup>3</sup> in order to protect third persons who are not parties to a contractual relationship with the master, if a servant has caused damage to them.<sup>4</sup>

1. See Welsch, *Vertretung ohne Vollmacht. Zugleich ein Beitrag zur Lehre von der culpa in contrahendo* (1970); and ÖJZ 1973, 281.
2. See F. Bydlinski, *Vertragliche Sorgfaltspflichten zugunsten Dritter*, JBl 1960, 359.
3. In German: '*Vertrag mit Schutzwirkung zugunsten Dritter*'.
4. Cf. OGH JBl 1985, 293; see however OGH SZ 51/176; JBl 1986, 452; and most recently OGH JBl 1999, 461.

104. Notwithstanding serious attempts to eliminate or amend the obsolete provision of §1315 ABGB from the Code by a law reform committee of experts appointed by the Ministry of Justice as early as in the fifties,<sup>1</sup> no progress towards an adequate theory of extra-contractual vicarious liability has been made so far.

There is no doubt that a timely introduction of a general '*respondeat superior*' rule similar to that existing in the systems of tortious liability of the Romanistic as well as of the Common Law tradition, would have invalidated a number of arguments which suggested the introduction of a regime of strict product liability; at least as long as Austria was not yet a Member State of the European Union and as such not bound to transpose the strict liability regime of the EC-Directive<sup>2</sup> into national law.

1. That committee's reasonable proposals for a comprehensive reform of vicarious liability are forgotten by now.
2. For more details, see *infra* No. 120 *et seq.*

## §2. INDEPENDENT CONTRACTORS

105. A 'servant', for whose injurious activities a 'master' may be held liable under §1313a ABGB may not necessarily be a socially and economically dependent person. Even an independent self-employed 'entrepreneur' may qualify as a servant in the performance of contractual duties, provided that he has accepted to perform a duty of the master emerging from a 'specific legal relationship'<sup>1</sup> in his

place and in accordance with his orders.<sup>2</sup> If that servant causes damage to the other party of the contract in the course of the performance, a claim for compensation based on §1313a ABGB may be addressed to the master, who will be held liable for the wrongdoing of the person whom he has entrusted with the performance of his own duties.

The question, whether a person has acted as a ‘servant’ or as an substituting ‘independent contractor’ is of little relevance in the field of tortious liability. Rather, it is of crucial importance in the field of liability for breach of contract. The parties may agree on the involvement of a third ‘independent contractor’ in the performance of their contract. As a result of such an agreement no vicarious liability pursuant to §1313a ABGB may be imposed on the person who is ‘substituted’ in the performance of (contractual) duties by the independent contractor. Such a person may only become liable if he is to blame for a lack of care in the selection of the substitute.<sup>3</sup>

1. In German: ‘*rechtliche Sonderbeziehung*’. In most cases such a relation will be a contractual one.
2. Cf. OGH JBI 1989, 175.
3. Cf. OGH SZ 40/68.

### §3. LIABILITY OF LEGAL ENTITIES FOR ACTS OF THEIR ORGANS

106. With regard to the liability of organs of a ‘*legal entity*’<sup>1</sup> such as corporations, associations etc. no express provision comparable to §31 of the German BGB is included in the General Civil Code of Austria due to its early date of enactment.<sup>2</sup> Nevertheless, there is no doubt whatsoever, that ‘legal entities’ that are incapable of acting on their own and thus dependent on organs acting on their behalf in accordance with the articles of association, are liable for damage caused by the wrongdoing of their organs in the same way as they are liable, pursuant to §§1313a or 1315 ABGB, for harm caused by their servants within a contractual or an extra-contractual setting.

1. In German: ‘*juristische Person*’.
2. §26 ABGB stating in its second sentence, that ‘[i]n their relations towards others, duly organized corporate bodies generally have the same status as individuals’ may serve as a justification for imposing civil liability on legal entities for the tortious conduct of their organs.

107. With regard to persons to whom certain powers of the legal entities are delegated without formally being ‘organs’ of the legal entity under its articles of association, the rules of tortious vicarious liability have proven to be insufficient. Therefore, the Courts paid heed to the suggestion<sup>1</sup> to make the legal entity responsible whenever ‘such persons with authority’<sup>2</sup> to act on behalf of the legal entity have caused damages to others.

The leading case was that of a journalist, who without being an organ under the articles of the Austrian Press Agency caused significant loss of profits of an chocolate manufacturing factory by wrongfully disseminating a message alleging that the factory was the source of an epidemic by marketing infected cakes, whereas in fact another much smaller enterprise with the same name but different address had

caused the epidemic. The question whether that journalist was competent and fit for his job, was deemed to be irrelevant.<sup>3</sup> Thus, the narrow limits of liability under §1315 ABGB could be widened, and some sort of organisationliability<sup>4</sup> was imposed on a legal entity which failed to control and supervise those employees acting with some power and authority on its behalf.

Notwithstanding some doctrinal criticism, the Supreme Court upheld this position in numerous decisions since then,<sup>5</sup> making a legal entity responsible for the wrongs certain employees entrusted with the power to act on its behalf have caused to other persons, irrespective of whether their liability would be justified under §1315 ABGB.

1. By Ostheim, Weisungsdelegation als Haftungsgrund, JBl 1969, 535; cf. Ostheim, Gedanken zur deliktischen Haftung für Repräsentanten anlässlich der neueren Rechtsprechung des OGH, JBl 1978, 57.
2. In German: '*Machthaber*'.
3. See OGH JBl 1972, 312.
4. In German: '*Organisationshaftung*'. Cf. OGH SZ 49/44.
5. Cf. SZ 48/110; OGH EvBl 1977/88; JBl 1977, 199; SZ 51/80 etc.

## Chapter 2. Liability of Parents, Teachers and Instructors (for Minors and Insane Persons)

108. With regard to injuries and damage caused by minors under the age of fourteen ('infants'),<sup>1</sup> insane persons or mental incompetents the Austrian law of torts includes a clear provision of liability. §1308 ABGB states that no compensation is due, if the victim has him/herself committed some fault in respect of that injury, e.g. by provoking the injurious conduct of the minor or insane person. Apart from this specific rule for a particular situation, the Code establishes as general principle for the compensation of damages caused by incompetent tortfeasors, that those persons shall be held liable to whom the damage can be attributed because of their neglect in the supervision of such persons under their care.

1. Under Austrian legal terminology persons under 14 years of age are '*Unmündige*'.

109. Such duties of surveillance are by statutory provision imposed on the parents with regard to their children under their control, or on teachers in respect of their disciples during school hours, provided that the young people are not yet liable themselves. Whilst it is evident that babies and pre-school children need a higher degree of attention and supervision than older minors, the parental duties of surveillance may not end when a child has passed the fourteenth year of age. Even though no liability stemming from the duties of surveillance may, as a rule, be imposed on parents or teachers, the parents may nevertheless be obliged to take specific care of their child for some time beyond the age of fourteen, if the child lacks the maturity to be expected from a person of his/her age, or is extraordinarily aggressive.

With regard to infant minors under the age of fourteen, the duties of surveillance are transferred to the teachers for the period during which the child is staying at school. These duties may also be conveyed to foster parents, nursemaids etc. by contractual agreement. In these cases, those persons replace the parents as addressees of a claim for compensation under §1309 ABGB for any harm caused by the minors during the time of supervision.

110. There is a rich case law on the question what may be expected from persons who have the duty to supervise a minor or insane. With regard to the children-parent relationship, the Court adheres to the 'reasonable parents-test' by asking what kind of measures would have been applied by reasonable parents in the same situation.<sup>1</sup>

The quality of surveillance that is required from parents of children depends on the circumstances of the case, viz. on aspects such as the age and maturity of the minor or insane person, the severity of the risk of harm, and what may legitimately be expected from the parents. Thus, the Austrian Supreme Court held, that if the parents know of a certain wrongful inclination of their child, e.g. to light matches

in danger of fire, or to put the family car into operation,<sup>2</sup> they have to take higher precautions.

1. *Cf.* OGH SZ 44/8; ZVR 1976/292; ZVR 1982/109; ZVR 1983/206; ZVR 1984/324 etc.
2. *See* OGH EvBl 1964/124.

### Chapter 3. Liability for Things and Animals

111. The ABGB like other codifications of the Civil Law Tradition such as, in particular the French Civil Code,<sup>1</sup> provides specific provisions on the liability of owners of buildings and other constructions, and of keepers of animals. In these provisions the requisite of fault appears to be subject to certain relativism, in so far as no reproach of individual wrongdoing is requested. Instead, the breach of an objective duty of care is the requisite for the imposition of liability. The relevant provision in respect of damage by a building is §1319 ABGB, and, in respect of damage by an animal, §1320 ABGB.

§1319. ‘If a person is injured by the collapse of a building or other construction erected on a lot, or by the breaking away of a portion thereof, or if some other damage has been caused thereby, the possessor of the building or construction is liable therefor, provided that the injury occurred as a result of the defective condition of the structure and he cannot prove that he had applied every means for the prevention of the damage’.

§1320. ‘If a person is injured by an animal, the person is liable therefor who has incited or irritated the animal thereto or who has neglected to keep it well guarded. The possessor of the animal is liable if he does not prove that he took precautions to ensure that the animal was properly guarded and kept’.

1. Arts. 1385, 1386 *Code civil*.

112. Under these provisions, which are firmly rooted in ancient Roman law,<sup>1</sup> it is no excuse for the custodian (‘possessor’, ‘holder’ or ‘keeper’)<sup>2</sup> of a building or construction, or of an animal, if he shows that he was not to blame for personal fault in having been unable to provide either sufficient maintenance or supervision. Even if the keeper’s inability was due to illness or an intervening Act of God, he will be held liable. That gave rise to the discussion of whether the liability under §§1319, 1320 ABGB constitutes a system of responsibility for culpable conduct within which the burden of proof of fault is reversed, or, whether it amounts to a form of ‘attenuated strict liability’.

1. This is in particular true of §1319 ABGB which appears to be a resurrection of the ‘*actio de depositio vel suspenso*’.

2. In German: ‘*Halter*’.

113. With regard to the custodian’s liability for injury caused by an animal, the Austrian Supreme Court has held,<sup>1</sup> that this form of liability is a ‘strict liability of a attenuated character’. The reason for this categorization lies in the fact that the defendant custodian may liberate himself from liability by proving that he had observed the regular care that the keeper of an animal of the kind of the injurious one would have to provide, whilst in the cases of true strict liability, as e.g. in the case of claims brought against owners and/or operators of motor vehicles, only the

defendant's proof of having exercised the utmost degree of care may be an excuse from liability.

The liability of the custodian of an animal presupposes the keeper's ability to dispose of the animal. If he leaves the animal with a veterinarian or an animal hospital, he cannot be held liable for any damage, that is caused by the animal while being in the veterinarian's or hospital's custody.

In other cases the question was left open, whether the liability regime for harmful animals would be a 'strict' one, having the effect that the custodian's negligence in controlling the animal would not be essential, or whether it should be classified as fault-based regime combined with a reversal of the burden of proof of fault. Cases of this kind concern primarily damage caused by cattle and horses to users of public roads<sup>2</sup> and injury to the body, health and property of man by biting dogs.<sup>3</sup>

1. *Cf.* OGH JBI 1982, 150.

2. *Cf.* OGH ZVR 1977/59; EvBl 1980/31; ZVR 1983/163; EvBl 1997/21.

3. *Cf.* OGH JBI 1993, 315; EvBl 1995/57; EvBl 1997/106. In a recent decision the Supreme Court held, that the keeper of a dog that due to negligent custody is hit by a car, is not liable pursuant to §1320 ABGB to a veterinarian taking care of the wounds of the dog for being bitten by the shocked animal: OGH ZVR 1998/137.

**Part II, Ch. 3, Liability for Things and Animals**

## Part III. Forms of Strict Liability

### Chapter 1. Road and Traffic Accidents

114. In the Austrian law of tortious liability, the genuine rules of strict liability are provided by specific ‘laws on the liability for dangerous activities’, viz. laws on the liability of the operators of dangerous premises.<sup>1</sup> There are numerous statutes of this kind in Austrian law, of which the most important one is the Law on the Liability of Operators of Motor Vehicles and Railways.<sup>2</sup>

This statute was enacted in 1959 and has been amended several times since. It is aiming at the establishment of more or less identical rules for the imposition of liability of railway operators and of ‘holders’<sup>3</sup> of motorized road-vehicles for injury occurring in the operation of the vehicles. According to its §1, this specific law applies to claims for compensation of personal injuries and property damages that occur during the operation of railways or motor vehicles. The concept of ‘railway’ includes cable cars and skiing-lifts which exist in huge numbers in alpine Austria. The concept of motor-vehicle does not apply to motorised tractors and machines which cannot exceed a speed of 10 km per hour. The strict liability under the law does not apply to gratuitously transported persons or fare-dodgers, as well as to persons who are employed by the railway company or by the owner of the motor vehicle to operate the vehicles.<sup>4</sup>

1. In German, ‘*Gefährdungshaftungsgesetze*’.

2. In German, ‘*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*’, EKHG, BGBl 1959/48, as most recently amended by BGBl I 1997/140.

3. In German, ‘*Halter*’.

4. Cf. §3 EKHG.

115. The strict liability regime of the Law on the Liability of Operators of Motor Vehicles and Railways is based on the theory that motorized means of transport create dangers to others when being in motion. Therefore the operators or ‘holders’ who need not necessarily be the owners of the vehicles should be held liable if the ‘operational hazard’ of their vehicles<sup>1</sup> materializes. Such liability is imposed irrespective of whether the ‘operators’ or ‘holders’, or the persons they employ to keep the vehicles moving were negligent or otherwise culpable, or whether the accident was due to an unexpected and unforeseeable technical failure of the vehicle.<sup>2</sup>

Unauthorized operation by an external person can serve as an excuse only, if the operator or ‘holder’ is not to blame for any negligence in having enabled that person to put the vehicle into operation.<sup>3</sup> In such a case, the unauthorized operator

of the vehicle will become the addressee for any claim for compensation of damage resulting from the unlawful operation.

1. In German, '*Betriebsgefahr*'.
2. Cf. §5 EKHG.
3. Cf. §6 EKHG. The standards of care applied by the OGH in this context are very high: cf. OGH ZVR 1978/78; ZVR 1995/24; ZVR 1995/94; etc.

116. Contributory negligence of a careless participant in public traffic becoming victim of an injury entails the reduction of compensation in proportion to the weight of such negligence.<sup>1</sup> Austrian Law does not provide specific privileges for certain categories of victims as does e.g. the French '*Loi Badinter*'.<sup>2</sup> The impact of a victim's contributory fault on the amount of compensation has to be assessed in each individual case.

If damage was caused by a plurality of railways or motor vehicles, the victim may bring his claim against every single operator or 'holder' whose vehicle is involved in the accident: they are, within the statutory ceiling amounts, jointly and severally liable for the damage.<sup>3</sup> The final assessment of the damage among the several operators or 'holders' is dependent on the degree of fault that may eventually be attributed to the involved persons, and on whether the damage emerged from an 'extraordinary or prevailing regular hazard of operation'.<sup>4</sup>

1. See the reference in §7 EKHG to §1304 ABGB. Cf. OGH ZVR 1987/22; ZVR 1992/101; ZVR 1994/22; etc.
2. Loi n° 85–677 du 5 juillet 1985, *tendant à l'amélioration de la situation des victimes d'accidents de la circulation*.
3. Cf. §8 EKHG.
4. See §11 ABGB using the German terms, '*au bergewöhnliche Betriebsgefahr oder über-wiegende gewöhnliche Betriebsgefahr*'.

117. The liability of railway companies and operators or 'holders' of motor vehicles is excluded under the Law on the Liability of Operators of Motor Vehicles and Railways, if the accident was caused by an 'unavoidable incident', provided that such unavoidability was not generated by a defect in the vehicle or an operational failure thereof. The law provides for a number of exemplary incidents that would qualify as 'unavoidable'. Thus, the conduct of the victim, or of any person who is not employed in the vehicle's operation, or the interference of an animal, may constitute an 'unavoidable incident'. In such a case, nobody will be charged with liability, if the operator or 'holder' and everybody employed in the vehicle's operation have exercised the utmost care necessary in the circumstances, and provided that the 'regular operational hazard' has not become one of 'extraordinary' quality.<sup>1</sup>

1. Cf. §9 EKHG. The OGH is rather restrictive in excusing the car-owner on this ground, in most cases his liability will become reduced; cf. OGH ZVR 1981/146; ZVR 1981/146; see however, OGH ZVR 1981/76, granting full excuse.

118. The Law on the Liability of Operators of Motor Vehicles and Railways provides detailed rules on recoverable damages in the cases of death and personal injury.<sup>1</sup> The law grants compensation for the expenses of the medical cure, whether

successful or not, for the impairment of the victim's ability of earnings, for the augmentation of the victim's needs. In contrast to the corresponding German law compensation for pain and suffering is provided under the Austrian act. It states, that the regular form of recovery for impairment of earning abilities shall be by way of annuities.<sup>2</sup> Compensation for loss resulting from a victim's death, personal injury, and property damage is limited, however, to certain ceiling-amounts that used to be different for the operation of railways on the one hand, and for that of cable cars and motor vehicles on the other,<sup>3</sup> but have recently been harmonized.

1. Cf. §§12 and 13 EKHG.
2. Cf. §14 EKHG.
3. §§15 and 16 EKHG are rather detailed and consider the possibility of accidents with a plurality of victims. According to §15(1) the regular maximum amount of compensation for a victim of a railway or other traffic accident is now ATS 4,000,000 in capital, and ATS 240,000 in annuities. Compensation of property damages is limited to an amount of ATS 2,000,000.

119. The rules on limitation are in full compliance with those of the General Civil Code: the claim must be brought within three years from the time the victim has learned of the damage and of the identity of the person responsible therefor.<sup>1</sup> If, however, the victim fails to notify the responsible person within three months after having learned of the injury and the person to whom the claim ought to be addressed, he/she loses the right to claim compensation under the Law on the Liability of Operators of Motor Vehicles and Railways.

1. Cf. §17 EKHG.

120. Strict liability of 'holders' of motor vehicles is combined with a mandatory liability insurance coverage. In order to have a motor vehicle registered and to receive a licence plate therefor, its 'holder' must prove that he/she has concluded an insurance contract providing a sufficient coverage with an insurance company.<sup>1</sup> Thus, the victim of a traffic accident that was caused by the driver of a motor vehicle does not have to fear of being unable to enforce his claim for compensation because of the eventual insolvency of the responsible 'holder' or driver of the vehicle causing the accident.

Under Austrian Law the traffic accident victim may bring his claim at the same time against the 'holder' or operator of the involved motor vehicle and against the insurance company that has insured the 'holder's' risk of being held responsible resulting from the operation of the vehicles. This possibility of a 'direct claim' or '*action directe*' is provided by European and national law<sup>2</sup> and alleviates the procedural burden of the victim. Without such direct action, the victim would first have to raise an action against the person having caused the accident and to reach a verdict in his favour that brings the defendant's right to attain coverage from the insurance company into existence. This claim for coverage would then have to be attached by the victorious victim.

1. Cf. §59 of the Statute on Motor Traffic ('*Kraftfahrzeuggesetz*', KFG) BGBl 1967/267, as amended by BGBl I 1998/146.
2. Cf. §26 of the Statute on the Insurance of Motor Vehicles ('*Kraftfahrzeug-Haftpflichtversicherungsgesetz*', KHVG) BGBl 1994/651, as amended by BGBl I 1997/71.

*121.* The practical importance of the strict liability regime of the Law on the Liability of Operators of Motor Vehicles and Railways is not as big as might be expected. The majority of road traffic victims find a possibility to have their claim for compensation of their injury based on the general liability rules. With the help of expert witnesses the driver of a motor-vehicle can be charged with some slight negligence in nearly all traffic accident cases.

## Chapter 2. Product Liability

122. As a consequence of the European Council Directive on Product Liability of 25 July 1985,<sup>1</sup> strict liability has become the dominant regime in the field of product liability in Austrian law. As Austria acceded to the European Union not before 1 January 1995, there was no obligation prior to this date to implement EC-product liability law into Austrian national law. Nevertheless, a statute that was not fully in compliance with the model of the 1985 Council Directive was enacted in an act of ‘autonomous approximation’ as early as 1 July 1988.<sup>2</sup> Thus, the Austrian legislative bodies adopted a strict product liability law at an earlier date than many of the traditional EU-Member States.

The Product Liability Act of 1988 failed to completely comply with the Directive, however, and had to be amended upon Austria’s ratification of the European Economic Area Treaty. This amendment became effective on 1 January 1994 together with the EEA-Treaty.<sup>3</sup>

Before 1 July 1988, the general rules on civil liability of the ABGB formed the only basis for a claim for compensation by a victim of a defective product. Since liability under the new statute is limited in several ways<sup>4</sup> the obsolete statutory framework of codified general civil law has not yet lost its practical importance, but remains relevant for those product liability claims that are not covered by the modern statute.<sup>5</sup>

1. O.J.EC 1985 L 210/29.

2. BGBl 1988/99, effective 1 July 1988. English translation by author, published in *Hulsbeck/Campbell* (eds.) *Product Liability: Prevention, Practice and Process in Europe and the United States* (1989), p. 171–175; for the last amendment to comply with EC Directive O.J.EC 1999 L 141/20, see BGBl I 1999/185, effective 1 January 2000.

3. BGBl 1993/95, English translation by author, published in *Comparative Yearbook of Business Law* 1993.

4. Viz., with regard to the type of products which may create liability for their manufacturer when defective, the recoverable types of property damage, and small property damage claims.

5. Therefore, two statutory sets of rules on liability for defective products exist today: a) the antiquated provisions of the ABGB basing contractual and tortious liability on the requirement of fault; b) the specific rules of the product liability statute of 1988 implementing a theory of strict liability.

123. It is self-evident that manufacturers’ liability for damage caused by a defect in a product could not have been addressed as a specific practical problem by the traditional rules on civil liability in the General Civil Code of Austria. If a seller-manufacturer violated an eventually existing direct contractual relation with the buyer-consumer the remedies for breach of contract in general, and of contract of sales, in particular, were applied, and these remedies that have come down from the ancient Roman Law provided sufficient protection of the victim of a defect in the product.

In general, traditional Austrian law provides two types of remedies for the buyer of a defective good causing damage to person or property: the victim may either resort to the remedies of the law of contracts, especially to the remedies for breach

of warranty,<sup>1</sup> or base his claim for compensation on the rules laid down in §§1293 *et seq.* ABGB. Each of these two approaches has significant shortcomings. The warranty remedy does not provide compensation for damage beyond that vested in the defective good and may be resorted to only, if a contract exists between claimant and defendant.<sup>2</sup> On the other side, the victim has to prove under traditional tort rules that either the wrongdoer himself was at fault, or the servant employed by the defendant was unfit for the job. That burden of proof is a heavy one since it is often very difficult or even impossible to show that fault was involved in the manufacture of a defective product. Only if the manufacturer of a defective product has violated a particular ‘protective statute’<sup>3</sup> such as e.g. the food-and-drug law or a statute regulating the safe condition and installation of machinery, the victim has a good chance to get compensation under the general rules of civil liability.<sup>4</sup>

1. According to §§922 *et seq.* ABGB. These rules also refer to damages (*cf.* §932(1) ABGB). In contrast to the specific warranty remedies, a claim for damages based on §§932(1) and 1293 *et seq.* ABGB is available only if the party in breach is to blame for fault.
2. The addressee of a warranty claim is always the immediate seller, that is in a chain of contracts for the distribution of a good manufactured and marketed in large numbers, the retailer. Compensation for consequential damages is available to the buyer of a defective product only if the seller was at fault in selling the product in a defective condition. Therefore, a victim of a defective product who bases his claim for compensation on warranty law cannot win a lawsuit against the manufacturer in most cases simply because no direct contractual relation exists in a regular product liability case between him and the defendant-manufacturer.
3. In German, ‘*Schutzgesetz*’. *Cf.* in general, Karollus, *Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung* (1992). The manufacturer is liable for the violation of such a protective statute under §1311 ABGB, and the burden to prove the absence of fault in his conduct lies on him. This comes close to a system of strict liability, as it is normally very difficult for the wrongdoer to establish that he was not negligent in violating the relevant protective provision.
4. Other remedies provided by the Austrian General Civil Code, such as the remedy for fraud, are only of rather theoretical importance in the context of manufacturers’ liability. According to §870 ABGB, ‘[n]o person has the duty to perform a contract if he was induced thereto through deceit or through illegal and well-founded fear’. Thus, the buyer may resort to a declaration of avoidance, provided that the seller has fraudulently caused the buyer to enter into a contract for a defective product, and provided that the buyer would not have concluded the contract in the absence of the seller’s fraud. However, a claim for avoidance based on fraud does not automatically entail compensation of damages. Such compensation must be claimed separately on the basis of liability rules. §870 ABGB is, thus, without any importance for the manufacturer’s liability for consequential damage.

124. To meet these insufficiencies of the traditional rules of civil liability, comprehensive theories of manufacturers’ liability under traditional Austrian law were designed by doctrinal writers. In particular, the idea that a manufacturer owes contractual protective duties to the person finally acquiring his product<sup>1</sup> made its way to the Courts and gave rise to a number of successful law-suits instituted by victims of defective products prior to the enactment of the Product Liability Act. In 1976 the Austrian Supreme Court adopted this theory in a landmark-decision.<sup>2</sup> By deriving protective duties in favour of the ultimate buyer from the contract between manufacturer and wholesaler, a judge-made way for the easier imposition of liability for damage created by a defective product on its manufacturer was paved. This ‘quasi-contractual approach’ assuming that a manufacturer violates his ‘contractual duty to protect the ultimate buyer’ when marketing a defective good proved to be a successful intermediate solution before strict product liability was introduced.

These judge-made rules reduced the insufficiencies of traditional liability law, nevertheless, some groups of victims of defective products such as ‘innocent bystanders’, or victims of injuries caused by flaws in the production that are not attributable to a culpable conduct of the manufacturer or his employees,<sup>3</sup> remained without any relief. Moreover, little protection was provided for victims of defective imported goods,<sup>4</sup> and of ‘anonymous products’ which could not be traced back to their manufacturers; and finally, it was unclear whether an agreement between manufacturer and wholesaler to exclude liability affected the ultimate buyer’s claim for compensation.

1. Cf. F. Bydlinki in: Klang, *ABGB Kommentar*, 3rd IV/2 180 *et seq.* (1971): he suggested to classify the first contract of sale in the chain of distribution connecting the manufacturer and the ultimate buyer as a ‘contract implying the protection of a third party’ (*Vertrag mit Schutzwirkung zugunsten Dritter*).
2. OGH SZ 49/14 = EvBl 1976/168 = JBl 1977, 146; *see further*: OGH SZ 51/169 = JBl 1979, 483; OGH SZ 52/74 = EvBl 1980/2; OGH SZ 54/13 = EvBl 1981/159; OGH SZ 54/152 = JBl 1983, 253; OGH JBl 1985, 673 = RdW 1985, 210; OGH JBl 1987, 185; OGH JBl 1987, 385; OGH IPRax 1988, 363; OGH JBl 1988, 650, etc.
3. In German, ‘*Ausreisserschaden*’.
4. A product liability claim could not be directed against an importing dealer of a defective product unless the importer acted at the same time as exclusive distributor and/or agent of the foreign manufacturer: cf. OGH EvBl 1981/159 = JBl 1982, 145. The OGH held that importers and other distributors cannot violate duties of care which are imposed on manufacturers. The strange idea that a manufacturer should be classified as ‘servant’ of the retailer for whose fault the retailer should be liable as ‘master’, pursuant to §1313a ABGB, was rejected: cf. OGH JBl 1979, 653 = EvBl 1980/2.

125. These groups of victims are now in a better position because the Product Liability Statute of 1988 procures an additional efficient cause of action for them. The new law does not replace traditional law, since, according to Article 13 EC-Directive, any rights of a victim based on the traditional rules of contractual or tortious liability shall remain unaffected.

Whereas fault is no requisite for liability under the new law, the damage must be ‘adequately caused’ under the Product Liability Statute as well, and such causal relation must be proven by the claimant as no reversal of the burden of proof was accepted by §7 PHG in this regard. This allocation of the burden of proof complies with Article 7 EC-Directive. Today, the relevant criteria for the imposition of liability on the manufacturer of a defective product causing damage to its user or consumer depend on the victim’s choice of the statutory basis for the claim for compensation: if the victim prefers to bring his action on traditional grounds, he can only expect to be successful if there is evidence that the defect in the product causing the damage is attributable to a culpable wrongful activity of the manufacturer or of one of his employees, and it is not essential whether the damage results from a defective design or from a defective manufacture. Thus, the liability of a manufacturer can only be invoked with some certainty, if the manufacturer violated a protective statutory duty *vis-à-vis* the ultimate buyer when he created the defect in his product.

126. Under the new Product Liability Act of 1988, the imposition of liability on a manufacturer depends on whether his product is defective or not. The definition

of 'defectiveness' complies with that used by the EC-Directive which is rather vague in defining what makes a product defective and which makes no structural distinction between defects in the design, manufacture or presentation of the product.

This solution is not entirely satisfactory since it makes no difference between cases that could satisfactorily be decided on a theory of fault-based liability,<sup>1</sup> and cases that have to be based on a theory of strict liability to reach that goal. Thus, no distinction is made in respect of the type of defect involved.<sup>2</sup> This is attributable to the fact that the EC-Directive leaves little freedom to the legislators of the Member States to find solutions that would better fit into their traditional systems of tortious liability. The Directive is based on a uniform notion of 'defectiveness' and provides no distinction between defects in design, manufacture and presentation.

For the purpose of substantiating this key-concept the draftsmen of the EC-Directive resorted to the so-called 'consumer expectation test' by stating that a product qualifies as defective, 'when it does not provide the safety which a person is entitled to expect' in the circumstances. This test has been adopted by §5 PHG without any modification. One of the three circumstances which are expressly mentioned in this provision is 'presentation of the product'. Thus, the concept of 'defectiveness' includes 'marketing defects' such as failures to warn consumers of undisclosed dangers in a product, or omissions to provide sufficient directions for its use, and is not limited to 'design defects' and 'manufacturing defects'.<sup>3</sup>

A product that may create danger to its consumer's health or property that a reasonable person would not expect must be marketed together with warnings and directions for proper use. Indeed, careful producers are aware of this. Under the new law, it is irrelevant whether a standard of care has been observed or not. Insufficient instructions create defectiveness of the product, and that is the only relevant criterion for the imposition of liability.

1. E.g. all violations of the duty to warn, and the majority of design defects and defects in the manufacture of a product.
2. In contrast to numerous futile American proposals for a Federal Product Liability Act that make a distinction between defects in design, production, and instruction and recognize different standards of liability for each type of defect; and in contrast to §2 of the Restatement of Torts, Products Liability 3rd (1998).
3. Failures of the duty to warn would also entail liability for negligence under traditional law, since the manufacturer in these cases could not provide the necessary care that an average and expert producer would have exercised under the circumstances according to §1299 ABGB.

127. The concept of fault has not lost all of its importance under the new law since contributory negligence is an available defence under the new Product Liability Statute. Whilst the objection that the victim made improper use of the product amounts to a defence under traditional liability rules,<sup>1</sup> 'the use to which it could reasonably be expected that the product would be put' is, according to §5 PHG, a circumstance that has to be considered in establishing defectiveness. Thus, a foreseeable misuse does not affect the classification of a product as defective, but, as a case for contributory negligence, it may significantly reduce the damage award.

The relevant 'consumer expectation', according to §5 PHG, is that of a 'reasonable average consumer' of the particular type of products. Whether a misuse or an abnormal use of a product constitutes a 'use to which it could be reasonably expected that the product would be put' is difficult as case law indicates.<sup>2</sup> The

addressee of a claim for compensation of damage by a defective product may resort to this defence, since §1304 ABGB is expressly referred to by §11 PHG.

1. According to §1304 ABGB ‘contributory negligence’ results in a proportional reduction of the damage award.
2. OGH JBI 1993, 524 (comment of author).

128. Particular defences following from the strict character of products liability under the Austrian Product Liability Statute are provided by its §8. According to this Article, a defendant manufacturer may escape liability by showing that the defect is due to a mandatory legal rule or administrative order, with which the product had to comply. Likewise the proof that ‘the characteristics of the product could, in view of the state of scientific knowledge have been discovered as defective at the time at which the addressee of the claim put the product into circulation’ will exonerate the manufacturer according to §8(2) PHG. By accepting this so-called ‘development risk defence’, the Austrian legislative bodies abstained from derogating from Article 7(e) EC-Directive.<sup>1</sup>

1. Such derogation would have been possible by way of the option provided in Art. 15 EC-Directive.

129. The primary addressee of a claim for compensation is the real manufacturer of the product. Eventually the claim may be brought against any ‘as-if-producer’, that is every distributor presenting himself as *if* he were the true manufacturer.<sup>1</sup> If the product has been manufactured outside the European Economic Area, the foreign manufacturer is replaced by the enterprise or individual distributor importing the product into the EEA-Common Market<sup>2</sup> as the primarily responsible legal or natural person under the new Act.

Retailers or wholesalers cannot be held responsible under traditional liability rules for damages resulting from a defective product they sold, since they are, as a rule, not to blame for negligence. In contrast thereto, professional sellers of a defective product may now become liable for the damage resulting therefrom if either the manufacturer, or the importer into the European Economic Area cannot be identified within a reasonable period of time. However, as soon as the retailer informs the victim of the identity of the manufacturer or importer into the EEA, or of the person who supplied him with the product, he will be released from responsibility.<sup>3</sup> Thus, manufacturers, importers into the EEA and retailers of ‘anonymous products’<sup>4</sup> are liable under the Product Liability Act.

1. Austrian law is in full compliance with the EC-Directive in stating that an ‘as-if producer’ or ‘quasi-producer’, viz. the person who presents himself as producer by putting his name or mark on the product, is liable under the statute.
2. Originally, Austria provided a mirror rule to Art. 3(2) EC-Directive imposing liability on any importer of a product manufactured abroad. As a result of the participation of Austria in the European Economic Area Treaty and of the (delayed) ratification of the ‘Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters’ of 16 September 1988, BGBl 1996/448, effective 1 October 1996, only importers into the European Economic Area are now subject to the same strict liability which is imposed on manufacturers.
3. Austrian law complies with EC-law in that it refers to a ‘reasonable time’ requirement for identification of the producer, importer, or immediate supplier. The draftsmen of the PHG

abstained from fixing a period. However, according to their non-binding opinion a period of one to two weeks should be sufficient. As a general rule, this period is too short.

4. Which does not necessarily mean that the product is really 'anonymous' as the 'Coca-Cola-bottle-decision' of the OGH indicates, OGH JBl 1993, 253. In this case it was a sufficient ground for addressing a claim for compensation of the damage caused by an exploding bottle to the trader, that the franchisee having filled the beverage into a defective bottle could not be traced.

130. Liability under the Product Liability Act extends to every kind of personal injury resulting from the defect but is significantly limited with regard to property damage. §14 PHG refers to the relevant provisions of the General Civil Code.<sup>1</sup> Thus, in the case of personal injury, 'the expenses of the cure' of the injured person, his 'lost profits', 'lost future gains' and pain and sufferings,<sup>2</sup> and, if the injured has been deformed, also 'loss of a better progress in life' must be compensated. If death occurs from the injury, all expenses and the money lost by the survivors who had a right to maintenance *vis-à-vis* the deceased are compensatory damages.

Under traditional law, every type of property damage must be compensated by manufacturers of defective products as well as by suppliers of services, provided that they negligently or intentionally caused damage to a person with whom they are in privity of contract with the exception of 'pure economic loss'.

In contrast thereto, the EC-Directive resorted to a restrictive concept of 'property damage' since its Article 9 limits recovery to damage effected to things ordinarily intended for private use or consumption, and privately used or consumed in the actual case. Thus, strict product liability does not extend to damage caused to items of property that are professionally consumed or used. This restriction in the recoverability of damage to movable or immovable property illustrates the particular consumer orientation of the EC-Directive.<sup>3</sup> In addition thereto and to prevent an avalanche of small claims, Article 9 provides a 'lower threshold' of 500 ECU which amounts approximately to ATS 7,900.<sup>4</sup> In full compliance with the EC-Directive no compensation of pure economic loss is available under the Product Liability Statute and no disclaimer is possible in respect of personal injury as well as in respect of those types of property damage which are accepted as recoverable.<sup>5</sup>

Contrary to German law no ceiling amount for the compensation of personal injury has been reserved by Austrian Law.<sup>6</sup> Likewise, no reservation was made with regard to the possibility to include agricultural raw products within the products that could trigger strict liability.<sup>7</sup> As a result of the 1999 amendment of the Directive, a recent statute has extended strict products liability to all kinds of agricultural products by 1 January 2000.<sup>8</sup>

1. Viz. §§1325 to 1327 ABGB. These provisions identify the recoverable damage resulting from personal injury and death.
2. The EC-Directive leaves it with the national legislative traditions whether non-material damage is covered by strict liability.
3. Originally, no corresponding exclusion was included in the Austrian Law of 1988 which allowed compensation for all types of property damage and combined this extension with a waiver with regard to damage effected to professionally used property. That entailed an unreasonable, extensive use of forms to exclude such liability. Since Austrian product liability law had to be amended to comply with EC-law, as a result of the participation in the EEA, that unsound deviation became eliminated as of 1 January 1994.
4. Cf. §2 PHG. Originally the draftsmen of the Austrian Product Liability Statute did not exactly convert the amount of 500 ECU, provided as 'lower threshold' by Art. 9 EC-Directive, into

Austrian currency. Due to the pressure of consumer organisations, they fixed the respective amount arbitrarily at 5,000 ATS. This had to be changed as a result of the participation in the EEA.

5. *See* Art. 9 EC-Directive.
6. *Cf.* §10 of the German Product Liability Act.
7. Subject to Art. 3 EC-Directive such products were originally excluded from the application of strict liability principles, unless a reservation was made to this end. The Directive 1999/34/EC of 10 May 1999 amending the wording of the original Directive was drafted as a reaction to the BSE or 'mad cow-crisis' and put an end to this exclusion.
8. BGBl I 1999/185, published on 19 August 1999.

131. It should be expressly mentioned that in Austria the number of Appellate Court decisions in product liability cases is significantly higher than elsewhere in the European Union,<sup>1</sup> especially in Germany, where most product liability cases are still resolved on the basis of the traditional rules on extra-contractual liability, which the Federal Court has adapted to the exigencies of industrialized mass production of consumer products. It is evident, that the most convincing argument for this divergent evolution may be found in the considerably wider scope of recovery under Austrian product liability law. The Austrian strict product liability law originally provided a lower threshold and included damage to professionally used items of property for a period of more than five years – from 1 July 1988 to 31 December 1994 – and, in contrast to the product liability laws of Germany or Italy, it is still compensating pain and suffering.

1. Approximately 50 decisions of the Supreme Court have been reported so far (relevant date: 1 December 2003).

## Part IV. Defences and Exception Clauses

### Chapter 1. Limitation of Action

153. In respect of actions for compensation brought on grounds of the general rules on civil liability, §1489 ABGB provides two periods of limitation: a relative and an absolute one. Thus, the provision states, first of all, that all actions for damages are time-barred after three years from the moment when the damaged party learned of the damage and the identity of the person who caused it. Whether the damage was caused by breach of contract or without relation to a contract is irrelevant.

In addition thereto, an absolute overall limitation period of thirty years is provided for the case, that the damaged party would neither become aware of the damage within a short period after the damage occurred, nor be able to identify the person who caused the damage.

The victim's right to sue is not subject to the short limitation period of three years, 'if the damage arises from a felony', but the limitation period is extended to thirty years in the situation of fraud. In any case, the victim's right to sue is extinguished upon expiry of a period of three decades starting from the moment when the injury was caused.

154. Limitation periods may be interrupted or suspended. The General Civil Code provides the respective rules in §§1496, 1497. According to these provisions, the limitation period for an action for compensation, as for any other action, would be *suspended*, if a complete breakdown of the administration of justice occurs, as e.g. 'in time of pestilence or war'. Contrary thereto, the express or implied acknowledgement of the other party's rights, the filing of an action in the subject matter, or the launching of serious negotiations for a settlement would have the effect of *interrupting* the running of the limitation period.

155. Specific rules on limitation can be found in the existing diversity of specific statutes providing a regime of strict liability of the 'operators' of dangerous installations for damages caused thereby. Most of these provisions comply with the general dualism of a short period of three years and a long period of thirty years.<sup>1</sup> The Product Liability Act of 1988 includes exceptional rules on limitation and extinction, since it has to comply with the EC-Directive in this regard as well. This Act provides a short period of three years that starts to run at the moment when the victims gets knowledge of the injury and the wrongdoer, and an 'extinction period'

of ten years from the time the defendant manufacturer or distributor put the product into circulation.<sup>2</sup>

1. Cf. e.g. §§17, 18 EKHG; §8 RHPfG.
2. Cf. §13 PHG.

156. In any case it is necessary that a party raises the limitation defence, when available, since the Courts will not take care thereof *ex officio*.<sup>1</sup> The expiration of relevant limitation periods have the effect of making valid claims unenforceable. However, the obligation changes to an '*obligatio naturalis*'. If payment is made by the debtor, it is still the performance of a debt. Therefore, no claim for restitution of an erroneous payment that is made after the expiration of the limitation period, is available for the payer.

1. Cf. §1501 ABGB.

## Chapter 2. Grounds of Justification

### §1. CONSENT

157. Consent by the victim may eliminate the unlawfulness of an injurious conduct, provided that the infringed good is of a category that is at the victim's disposal. This is primarily true with regard to property. Consent may exclude any claim for compensation with regard to the infringement of a person's honour and reputation. Furthermore, a person may rightfully assent to the deprivation of his personal freedom, as long as it does not entail any injuries to a persons' psychic or physical condition.

However, consent cannot, as a rule, eliminate the unlawfulness of any injurious infringement of one's life, body and health. Consent may, nevertheless, justify a medical treatment or any other activity constituting a hazard to the integrity of a person's body or health that is accepted by society, such as certain kinds of competitive sport. Free and informed consent by the patient is a condition for exonerating a physician from liability if risks associated with the medical treatment materialize.<sup>1</sup>

The number of Court decisions on the issues of 'informed consent' and liability for insufficient pre-treatment instructions has steadily risen in recent years.<sup>2</sup>

1. For more details *see supra* Part I, Ch 2, §1. I.
2. *Cf.* OGH KRSIlg 685; KRSIlg 729; SZ 57/207; JBI 1995, 453.

158. Consent of a person, to participate in dangerous sport activities may serve as a legal excuse of an injury resulting therefrom. There are certain types of fights between two individual sportsmen, which inevitably create bodily injury, such as boxing, wrestling, karate etc. In other competing fights of teams, such as American football, rugby or soccer, injury may easily be inflicted. The victim's consent eliminates the right to claim compensation, as long as the generally accepted rules of the sport have been observed by the wrongdoer,<sup>1</sup> and the necessary safety measures have been applied. Natural or legal persons in charge of the organization of such events have to take any precautionary measures to avoid, as far as possible, injuries of the active participants in the sport and of visitors.<sup>2</sup>

1. *Cf.* OGH EvBI 1979/10; JBI 1983, 101; EvBI 1982/118; JBI 1988, 114; JBI 1996, 786.
2. *Cf.* OGH SZ 57/57; ZVR 1988/91.

159. Consent may serve as a legal excuse of an injury in respect of socially accepted infringements of a person's body. Thus, social acceptance of the widespread trend of tattooing the skin and piercing certain parts of the body forms the basis for the justification of such intrusions into a person's integrity by consent. Similarly, the anachronistic duelling of German-nationalist students' fraternities is a bewildering activity traditionally accepted and tolerated (or ignored) by society.<sup>1</sup>

1. The scars in the face of students resulting from duelling with heavy sabres are viewed as indications of personal courage, at least by the members of the fraternity and by a minority of the population. Thus, such violations are deemed to be lawful, since both fighters have consented to their eventual occurrence and measures to immediate medical protective treatment in case of emergency are provided.

## §2. NECESSITY

*160.* The tortfeasor may become excused from liability and his injurious conduct may not be qualified as ‘unlawful’ if the injuries are caused to another person in a state of necessity (or emergency).<sup>1</sup> The relevant §1306a ABGB which was inserted into the General Civil Code in 1916, provides three aspects for a Court to consider when making the decision, whether and to what amount a person having caused damage in an attempt to escape from an immediately threatening state of emergency, may be held liable. These aspects are:

- a) whether or not the injured person had desisted from avoiding the danger to enable the tortfeasor to overcome his state of emergency;
- b) the relation between the severity of damage and the danger; and
- c) the respective values of property owned by the injuring and the injured party.

1. In German: ‘*Notstand*’.

*161.* A person who, in an attempt to overcome imminent hazards to his life, body, health, or property, causes harm to another person’s property, is not to blame for fault. Nevertheless, he may be held answerable for the damage he caused, if the evaluation of the three criteria referred to by §1306a ABGB, so indicates. The judge must examine, whether the victim has abstained from defending himself or his property because he realized the emergency situation of the wrongdoer. The judge has to weigh the quality of the wrongdoer’s necessity and the severity of the damage. Furthermore, he has to consider the wrongdoer’s and the victim’s capacity to bear the loss by comparing the available assets of both persons. This means that the judge has an unusual wide discretionary power in deciding whether there should be liability of the person causing damage in an state of emergency to save a more valuable good.<sup>1</sup>

1. Cf. OGH JBI 1989, 386; ZVR 1998/137.

## §3. SELF-HELP AND SELF-DEFENCE

*162.* Whilst no express provision on self-defence is included in the old-fashioned General Civil Code, it provides a number of articles on ‘self-help’. Most important is the general rule of §19 ABGB, though it has rather limited practical importance. It states that any person has the duty to present a complaint before the proper legal authority, when feeling to be infringed in certain legally protected interests. Consequently, individual responsibility will be imposed on any person disregarding the duty to address the competent legal authority, if that person

employs an arbitrary remedy or exceeds ‘the limits of self-defence in case of peril’. §344 ABGB allowing self-help to preserve possession in the case of imminent danger, expressly refers to §19 ABGB when it states that the right to possession<sup>2</sup> includes the right . . . ‘to drive off force with suitable force’. In order to be justified, self-help must be the only possibility to escape the obvious danger of irreparable harm.

In addition to §§19 and 344 the General Civil Code legitimates self-help in specific situations. Thus, §1101(2) ABGB allows the landlord to retain ‘at his own risk’ chattels of the tenant moving out without paying for a period of no more than three days. According to §1321 ABGB ‘[a] person who finds cattle which belongs to others on his own soil and ground . . . may exercise a right of private restraint over as many heads of cattle as are sufficient to compensate him’ for the damage the person suffered from the cattle. The crucial point of all cases of self-help is, that ‘timely assistance of the authority’ must not be available. Therefore, a person acting in self-help can do so only for a short period of time. The person has to seek assistance of the administrative authority or of the Court as soon as possible.<sup>3</sup>

1. The rule of §3 of the Criminal Code on self-defence applies by way of analogy.
2. Contemporary doctrine understands ‘possession’ as a factual situation. It does not classify possession as a ‘subjective real right’ such as e.g. ‘property’.
3. Cf. OGH JBI 1988, 248; ZVR 1997/102.

163. Since the General Civil Code does not provide a legal definition of self-defence, the Criminal Code of 1975<sup>1</sup> has to be consulted. According to its §3 StGB, protected interests that may be legitimately defended are life, health, bodily integrity, freedom and property. If such a protected good is exposed to an immediate unlawful attack by a person, damage caused to the attacking person in the defence of the protected good will not entail any liability.

The list of protected interests does not include ‘honour’; that means that no lawful self-defence may be exercised against an infringement of one’s honour. However, a person defending against an intrusion into his honour may be excused as acting in a state of necessity,<sup>2</sup> as may a person who is attacked by an animal.

The measures of self-defence shall be reasonable under the circumstances and sufficient to avert injury that may result from the aggression: they shall be proportionate and not excessive. The rule, that ‘law need not give way to injustice’<sup>3</sup> cannot be accepted without considering its limits. Therefore, excessive self-defence will make the defending person responsible for any harm that is caused thereby.

Obviously, civil law-suits on the issue of self-defence are rare, as the scarce case law indicates.<sup>4</sup>

1. In German: ‘*Strafgesetzbuch*’, StGB, BGBl 1974/16 (several amendments).
2. Cf. Koziol, *Haftpflichtrecht I*, N. 4/66.
3. In German: ‘*Recht braucht dem Unrecht nicht zu weichen*’.
4. Cf. OGH EvBl 1972/219; JBI 1990, 104.

#### §4. OTHERS

164. It is generally recognized that a certain form of *negotiorum gestio* constitutes a ground for justification. Thus, it may be derived from §1036 ABGB that

conducting another person's affairs to obviate a threat of imminent danger to the other person's interests may serve as justification for damage that has been caused in the course of this 'agency of necessity', whilst acting without mandate to the mere profit of another does not qualify as a ground for justification as has been clarified recently.<sup>1</sup>

Finally, under Austrian tort rules a statutory authorization as well as a formal decree of a public authority permitting the addressee to behave in a way that entails damages to another may constitute a ground for justification.<sup>2</sup> If the permission by the public authority amounts to a violation of the law, a claim may be brought against the relevant legal entity under the rules of the Austrian Law on the Responsibility of the State, Provinces, Communities and other Corporate and Statutory Bodies.<sup>3</sup>

1. See Meissel, *Geschäftsführung ohne Auftrag* (1993), p. 117 *et seq.*

2. Cf. OGH JBI 1983, 324; JBI 1996, 446.

3. Cf. Federal Act of 18 December 1984, on the Liability of the Federation, Provinces, Districts, Communities and the other Corporate and Statutory Bodies for Damage Caused in the Execution of the Laws ('*Amtshaftungsgesetz*'), BGBl 1949/20, as most recently amended by BGBl 1993/91.

### Chapter 3. Contributory Fault

165. Whenever a victim of another person's injurious activity has, by his own carelessness in his own affairs, contributed to his damage, the scope of recovery he is entitled to claim may be affected. Since fault is always affiliated to unlawfulness under Austrian law, and careless treatment of one's own belongings is, as a rule, not unlawful,<sup>1</sup> contributory fault does not amount to 'fault' in its technical meaning. It is possible that a culpable and unlawful conduct violating another person's interests and belongings may only result in damage only due to the simultaneous carelessness of the victim. Carelessness to one's own interests, however, is not unlawful and culpable *per se*, even if the victim's conduct indicates that he was consciously careless.

According to §1304 ABGB, 'the injured party who is simultaneously at fault . . . must bear the damage proportionately with the person who has caused the injury'. Only 'if the proportion cannot be determined the damage is borne in equal parts'. Thus, careless conduct of the victim that contributes to his damage does not extinguish the claim for compensation as a whole: Austrian tort law adheres to a rule of 'comparative liability'.

1. Cf. OGH SZ 28/197; EvBl 1982/39; SZ 53/61.

166. There is plenty of case law on contributory fault and on the computation of damage to be compensated in the case of a negligent conduct of the victim. Such computation always depends on the circumstances of the actual case. It is the task of the judge to weigh the degree of fault of which the wrongdoer is to blame and the carelessness of the victim against one another. If the wrongdoer has maliciously caused the victim's harm, the latter's carelessness may be found to be too insignificant to justify any reduction of liability.<sup>1</sup>

However, if the victim has consciously acted to his own detriment, whereas the wrongdoer is to blame only for an insignificant negligence in the causation of the damage, it may be justified to impose no liability at all on the wrongdoer.<sup>2</sup> Infants under the age of fourteen and insane persons may contribute to their damage if they comply with the criteria of §1310 ABGB.<sup>3</sup> Their contributory fault will not be evaluated as being as severe as would be the case with the carelessness of competent adults.

If 'force majeure' contributes to a damage, the victim has to accept a reduction of his claim for compensation. Such a situation may occur in the course of a surgery, when unforeseeable complications occur: The result may be a division of responsibility in the relation of 1:1.<sup>4</sup>

Contributory negligence of a victim entails the reduction of compensation provided by the specific statutes imposing strict liability on the operators of dangerous installations. Normally the 'regular operational hazard' makes up to simple carelessness of a victim, whilst 'extraordinary or prevailing regular hazard of operation' may outweigh a low degree of carelessness so significantly as to justify full recovery. A specific statutory solution has been enacted for the failure of drivers or

passengers to buckle up in motorcars, or to wear helmets while riding motor-bikes. Such failure constitutes contributory negligence pursuant to §1304 ABGB. This results only in a reduction of the victim's claim for pain and suffering, whereas his right to recover the cost of medical treatment and loss of earnings remains unaffected.<sup>5</sup>

1. *Cf.* OGH ZVR 1978/236; ZVR 1979/2.
2. *Cf.* OGH JBI 1955, 360; ZVR 1973/133; ZVR 1976/25.
3. *Viz.* quasi-fault, victim's abstention to defend himself, or own property of the wrongdoer: *see* No. 65 *et seq. supra*.
4. *Cf.* OGH JBI 1996, 181.
5. The reduction of liability in these cases amounts to a share of 25 to 33 per cent; *cf.* OGH ZVR 1982/26; ZVR 1987/14; ZVR 1988/103.

167. There is no general provision in the General Civil Code that would expressly impose on the victim of an injury, the duty to mitigate the damage he has suffered. Therefore, §1304 ABGB on contributory negligence has to be employed to provide an adequate sanction, if the victim fails to keep the damage within limits.<sup>1</sup>

1. For more details *see infra* No. 191.

## Chapter 4. Exemption Clauses

168. The possibility to exclude or limit one's liability is a device rather of contractual than of tortious liability. Usually exemption clauses are included in contracts, and are subject to certain limitations under the law of consumer protection. §6(1) of the Consumer Protection Act<sup>1</sup> includes a number of clauses which are null and void if they are included in standard term contracts. Among the list of void terms is a clause prohibiting a businessman to provide a term in a pre-formulated consumer contract that would exclude liability for property damage in the case of his gross negligence or malice.

Under an amendment<sup>2</sup> that was recently enacted to comply with the Community Directive on Unfair Terms in Consumer Contracts,<sup>3</sup> any exclusion or limitation of the liability for personal injury has been declared void.<sup>4</sup> The total prohibition of the exclusion or limitation of liability for personal injury, was clearly inspired by European Consumer Law. It has been introduced for package travel agreements already on 1 May 1994<sup>5</sup> and was generalized by the amendment of 1997.

1. In German: '*Konsumentenschutzgesetz*', KSchG, BGBl 1979/140, as most recently amended by BGBl I 1999/185.
2. BGBl I 1997/6.
3. O.J. EC 1993 L 95/29 of 21.4.1993.
4. Cf. §6(1) N. 9 KSchG.
5. BGBl 1993/247.

169. Under the new law any clause aiming at the exclusion or limitation of liability for personal injury in an enterprise-consumer relationship is declared void. Although the admissibility of clauses excluding or limiting liability appears to be primarily a problem of contractual liability, the effect of a prohibition of the agreement to exclude liability for personal injury affects any attempt to reduce the danger of becoming liable under tort law by way of a public announcement that liability for damages should be excluded.

170. The crucial question is, to what extent a wrongdoer may exclude liability in a purely tortious relationship by public announcement that such a specific activity will be 'at one's own risk'.<sup>1</sup> Indeed, contrary to exemption clauses in a contract, there is no definite addressee, but such exemption is directed to 'whom it may concern'. The Supreme Court held that an 'exemption announcement' of this kind may have no effect whatsoever in respect of unforeseeable and unusual hazards, the occurrence of which the addressee could not have expected in the circumstances of the case.<sup>2</sup>

1. In German: '*auf eigene Gefahr*'.
2. Cf. OGH JBl 1980, 590.

**Part IV, Ch. 4, Exemption Clauses**

## Part V. Causation

171. Any claim for compensation must be based on an injurious conduct of its addressee. According to the first sentence of §1294 ABGB, such conduct may either be an ‘act’ or an ‘omission’<sup>1</sup> and it must be controlled by the acting or omitting person’s will. Purely accidental harm may only entail a person’s liability if a dangerous activity constitutes the factual framework for the occurrence of the accidental harm, or if a person has ‘occasioned the accident by his fault’.<sup>2</sup>

In its second sentence §1294 ABGB makes a distinction between injury that is wilfully caused and injury that is not wilfully caused.<sup>3</sup> An injurious activity a person sets in a moment when he/she lacks consciousness (while sleeping or eventually anaesthetized) cannot amount to a conduct that may qualify as ‘causal’ for the damage resulting therefrom. Neither may a movement by pure reflex amount to a ‘conduct’ that may entail the imposition of liability on the person causing injury thereby.

1. See the first sentence of §1294 ABGB: ‘Damage arises either from an illegal act or an illegal omission of another or from an accident’.
2. Cf. Second sentence of §1311 ABGB.
3. In German: the distinction is between ‘*willkürlich*’ and ‘*unwillkürlich*’.

172. ‘Causation’ may be attributed to a ‘human act’, viz. an activity of a human being that, if hypothetically eliminated in thought, would result into the non-occurrence of the alleged injurious consequences of that act. Therefore, a conduct, in order to meet the condition of causal connection, must be a ‘*conditio sine qua non*’ for the harm it allegedly produces. The test is, whether the injury would have occurred irrespective of the injurious activity of the person whose responsibility is at stake.<sup>1</sup> If this would be the case, the causal relationship between the activity in question and the injury would have to be denied.

With regard to the causation test that applies to ‘human omissions’ the perspective has to be reversed. Now the crucial question is, whether the harm would have occurred in the same quality and quantity as it actually did, if it is hypothetically assumed, that the person who ought to have set activities, would not have failed therein.

1. The test which is applied pursuant to the so-called *Äquivalenztheorie* is sometimes translated into English as ‘but-for test’.

173. This ‘naturalistic concept of causation’ had to be subjected to a test, allowing to weed out causalities that could not be of relevance for the imposition

of liability. The Austrian law of civil liability employs the concept of ‘adequate causation’<sup>1</sup> which is significantly different from the concept of ‘proximate causation’ as adopted by the systems of tortious liability of the Common Law tradition. ‘Adequate causation’ has a clearly wider meaning.

The notion of adequate causation may include situations in which the injurious result of wrongful activities were not totally unforeseeable for the wrongdoer. Thus, only such damage falls short of adequate causation which results from an intervening factor that is beyond any human foresight and amounts to an absurd consequence of the activity from which it emerges.<sup>2</sup> As a result of this wide criteria, there are only rare cases where the function of the ‘adequacy rationale’ results into the intended limitation of liability.<sup>3</sup>

1. In German: ‘*adäquate Verursachung*’.
2. Cf. OGH ZVR 1982/189; JBI 1992, 255; ZVR 1995/73.
3. See OGH ZVR 1986/37.

174. The burden of proof of causation lies with the victim. As a rule, it is not sufficient to prove nothing more than the mere probability of causation. Evidence must be convincing and the Court must clearly ascertain that there is a causal connection between the alleged tortious activity and the injurious result. However, pursuant to the *conditio sine qua non*-principle, unambiguous evidence of causation is not always available. This is in particular true in respect of factual situations where the possibility exists that an injury could have been caused in more than one way. It is the problem of ‘multiple causation’ occurring in many ‘mass tort cases’ that pre-sents significant difficulties.

Among these cases of ‘multiple causation’, there are three categories of factual patterns where the ‘but-for test’, if applied in full compliance with the ‘rules of logic reasoning’, fails to produce an acceptable result. These groups of cases have to be distinguished, as:

- ‘alternative causality’,
- ‘cumulative causality’, and
- ‘hypothetical (‘overtaking’) causality’.<sup>1</sup>

1. For a comprehensive explanation of the problems involved in multiple causation, see F. Bydliński, *Probleme der Schadensverursachung* (1964); for an explanation of recent evolutions in that field, see Koziol, *Haftpflichtrecht I*, N. 3/1 *et seq.*

175. *Alternative causality*. When two or more persons act in a tortious way, but the injury suffered by the victim can be caused by only one of the two acting persons, without evidence by whom the injury was caused, both acting persons shall be jointly and severally liable as potential wrongdoers.

The famous ‘classical case’ is everywhere that of a hunting accident: someone gets hurt when struck by a bullet, but it is unclear who has actually fired that bullet.<sup>1</sup>

The imposition of joint and several liability<sup>2</sup> on both potential wrongdoers means that the ‘but-for causation formula’ is abandoned. Actual causation becomes replaced in these cases by merely ‘possible causation’. It is acknowledged by the Austrian

Supreme Court that ‘possible causation’<sup>3</sup> is sufficient to impose joint and several liability on the persons of whom an unidentified and unidentifiable individual has actually caused the harm.<sup>4</sup> The mere ‘suspicion of liability’<sup>5</sup> is sufficient to justify liability of all possible wrongdoers.

The legal basis for this solution is §1302 ABGB, providing in its second sentence that ‘if the damage has been caused intentionally, or if the participation of each wrongdoer cannot be determined, all are jointly and severally liable’. Joint and several liability means, that the (potential) wrongdoer ‘who has satisfied the damage may demand restitution from the others’.<sup>6</sup>

1. This factual pattern serves everywhere as explanation for ‘alternative liability’: cf. the famous Californian decision in *Summers v. Tice* 199 P.2d 1 (Cal. 1948).
2. In German: ‘*solidarische Haftung*’.
3. In German: ‘*mögliche Kausalität*’.
4. Cf. OGH SZ 54/63; JBl 1990, 524; see however the dubious decision of the Supreme Court denying joint and several liability in the case of an accident: JBl 1986, 787.
5. In German: ‘*Kausalitätsverdacht*’; that suspicion of causality may be found to be not sufficient in the circumstances of a case: see OGH EvBl 1982/188.
6. Cf. the last sentence of §1302 ABGB.

176. *Cumulative causation*. Whenever two or more persons acting independently of one another, coincidentally cause harm to another person in a way that each of the two or more wrongdoers would have caused the loss of the victim in its entirety, one is faced with a question of ‘cumulative causation’.

The classical hypothetical case is that of two chemical plants which at the same time and independently of another release toxic liquids into a river. As a result all the fishes in that water are killed. It is evident, that the amount of toxic substances released by each one of the two factories was sufficient to entail the mortal consequences for the fishes.

Such a situation entails ‘joint and several liability’ of all acting wrongdoers, albeit none of them has, in fact, set a *conditio sine qua non* for the harm.<sup>1</sup> A specific provision on pollution of public water refers to joint and several liability as a last resort. If the shares of each of several polluters causing harm by cumulative causation may be identified, their liability is limited to their respective shares.<sup>2</sup>

1. Cf. OGH EvBl 1959/244.
2. Cf. OGH SZ 53/82. The relevant provision is §26 of the Clean Water Act (‘Wasserrechtsgesetz’) BGBl 1959/215, as amended by BGBl 1990/252.

177. *Hypothetical causation*. If two persons acting independently to the harm of another in a way that one causes damage one single moment earlier than the other would have, the facts amount to a specific case of hypothetical causation, by which one wrongdoer somehow ‘overtakes’ the other.<sup>1</sup>

The classical hypothetical case is that somebody carelessly throwing a stone into the window witnesses a tennisball or football crashing the window with higher speed just before the stone would have caused the identical damage. In cases of this type, the Supreme Court imposes liability on both wrongdoers, holding that the short difference in time would not justify to have the first wrongdoer compensate the entire damage, whilst the second would remain free from any liability.<sup>2</sup>

A specific solution is necessary for a situation where a wrongdoer pays a rent to a victim he had bodily injured, when this victim becomes ill and this illness would have caused the same impairment for which the wrongdoer is paying compensation. The Court holds that the original tortfeasor's duty to pay a rent ends with the hypothetical occurrence of the same injury.<sup>3</sup>

1. Cf. the German word for this type of causation is '*überholende Kausalität*'.
2. Cf. OGH SZ 57/51; JBI 1993, 663.
3. Cf. OGH ZVR 1977/239.

178. Intricate and difficult problems occur when culpable and accidental causation of an injury coincide. Doctrine and Courts are in favour of a 50:50 split of liability. The rationale for this position is that, on the one hand, accidental loss, according to §1311 ABGB, has to be borne by the victim, whilst, on the other hand, the wrongdoer is accountable for his culpable conduct. §1304 ABGB applies by way of analogy with the effect that the victim has to accept that a part of his damage remains uncompensated.<sup>1</sup>

1. Cf. OGH JBI 1990, 524; JBI 1996, 181; *see also* OGH JBI 1986, 576.

179. *Minimum Causation.*<sup>1</sup> It may happen, that a huge damage is caused by a great number of wrongdoers. Thus, in a worker's illegal strike each of the wrongdoers participates in the causation of the entire damage in a very insignificant way. Similarly, a great number of small polluters may by synergy contribute to a large damage. In these cases the crucial question is, if each of them should, nevertheless, be held jointly and severally liable, as in the case of cumulative causation, or if their respective liability should be limited to that small part of the entire damage, that each of them has caused. The view that liability should be limited to the portion of causation is predominant.<sup>2</sup>

1. In German: '*minimale Kausalität*'.
2. *See* F. Bydliński, *Probleme der Schadensverursachung*, p. 54 *et seq.*

180. *Psychic(al) Causation.*<sup>1</sup> The characteristic feature of this type of causation is, that someone causes damage merely by inducing another to inflict damage upon a third person. The injurious conduct of the actual tortfeasor is a reaction to the inducement. In order to entail liability, a person's injurious behaviour must be found to be unlawful. Whether pure inducement may meet of unlawfulness is a matter for clarification. Such clarification can be achieved only by a comprehensive evaluation of the interests involved.<sup>2</sup> Thus, the difficulty with 'psychical causation' can be seen primarily in the unlawfulness-test.<sup>3</sup>

1. In German: '*psychische Kausalität*'.
2. *See* OGH JBI 1997, 531; ZVR 1998/121.
3. Cf. Koziol, *Haftpflichtrecht I*, 4/52 *et seq.*

## Part VI. Remedies

### Chapter 1. General Principles

181. The regular remedy of a victim under Austrian tort law is recovery of the loss he has suffered. Since it is the aim of tortious liability to put the victim into the position he would be in without the injurious act, no ‘punitive damages’ are available under Austrian law. Pursuant to §1323 ABGB, the regular remedy should be ‘a return to the former state’<sup>1</sup> or compensation ‘*in natura*’,<sup>2</sup> provided that this form of curing the harm ‘is practicable’. Only if such a reconstruction of the situation as it was before the damage occurred is ‘not possible’<sup>3</sup> in the circumstances the ‘estimated price’<sup>4</sup> of the damaged item has to be refunded instead.

The first sentence of §1293 ABGB provides a definition of ‘damage’. According to this provision, damage is ‘every detriment which has been caused to any person in regard to his property,<sup>5</sup> his rights or his person’. This broad definition is indeed too indeterminate to be instrumental and has to be concretized. Usually the theory employed by the Courts<sup>6</sup> to bring about this task is the doctrine that focuses on an ‘assessment of the difference’<sup>7</sup> in values. That means that the value of a damaged item as it actually is, must be compared with the hypothetical value that item would have, if the damage had not occurred. The result of the comparative computation of the actual value of the victim’s property and the hypothetical value that the victim’s belongings would have without the infringement, is the amount of the compensation.

1. In German: ‘*Zurückversetzung in den vorigen Stand*’.

2. In Latin-German: ‘*Naturalrestitution*’.

3. ‘Not possible’ is the inaccurate translation of the German word ‘*untunlich*’ by Winiwarter/Baeck. Indeed, the expressions ‘not feasible’ or ‘not practicable’ appear to be better suited to express the legislative intention.

4. In German: ‘*Schätzungswert*’.

5. Again the German term indicating that ‘property’ is a protected interest, is not ‘*Eigentum*’ but ‘*Vermögen*’.

6. OGH EvBl 1981/59; ÖBA 1996, 549, 553.

7. In German: ‘*Differenztheorie*’.

182. The second sentence of §1293 ABGB makes a distinction with regard to the concept of damage which is more important under the rules of civil liability in Austria than elsewhere: According to this provision ‘[t]he loss of profits which a person expects according to the usual course of his affairs is to be distinguished’ from the (‘actual’ or ‘positive’) damage as defined earlier in §1293 ABGB.

The second sentence of §1323 ABGB elaborates this distinction, whereas §1324 ABGB makes the scope of recovery dependent on the degree of fault. If the wrongdoer is to blame for malice or gross negligence, 'full compensation', viz. compensation of the actual damage and of the loss of profits is due. In contrast thereto, lost profits are not recoverable in a case where the wrongdoer is to blame for simple negligence only. This approach to a 'graduated compensation' is known as the principle of 'proportionality of fault and liability':<sup>1</sup> This principle is a characteristic feature of the Austrian law of civil liability.

1. In German: '*Proportionalität von Schuld und Haftung*'.

## Chapter 2. Kinds of Damage

### §1. INDIVIDUAL AND COLLECTIVE DAMAGE

183. Unlike its French counterpart the Austrian codification abstains from making a distinction between individual and collective damage in its rules of tortious liability. It consequently adheres to a concept of ‘individualistic compensation’. As a result of this approach, the compensation of losses generated by ‘mass torts’ to a plurality of victims presents considerable problems of allocating the actual damages of the victims. These problems are not limited to a particular procedural character.

Together with the increasing importance of consumer protection, the possibilities of claims that are brought by certain interest group, such as associations of consumers or workers have become more frequent.<sup>1</sup> This type of action may be compared with the US-American ‘class action’ in respect of some of its functions, albeit significant divergences exist.

Indeed, in the field of tortious liability the ‘interest group action’<sup>2</sup> has not been introduced by statutory provision, so far. The only possibility of a consumer interest group to support a victim in civil proceedings involving a claim for compensation is the assignment of the claim by the victim to a consumer organization, that will run the case on its own financial risks. The Austrian ‘Association for Information of Consumers’<sup>3</sup> has proceeded in this way in the context of product liability lawsuits.<sup>4</sup> Nevertheless, it is true that this kind of action has not (yet) achieved a similarly great practical importance for lawsuits in mass tort cases as has the class action in the Courts of the United States. Thus, the actual situation in Austria cannot be compared with the spectacular cases before American Courts against the manufacturers of certain defectively designed or unnecessarily hazardous products.<sup>5</sup> The reasons for this striking divergence may primarily, but not solely, be found in the peculiarities of American civil procedure law, such as contradictory proceedings, jury trial, contingency fees etc.

1. Such form of action is provided by §28 *et seq.* KSchG; however only actions for injunction, not for compensation, may be brought under these articles.
2. In German: ‘Verbandsklage’.
3. In German: ‘Verein für Konsumenteninformation’.
4. Cf. OGH SZ 70/65.
5. Cf. the recent litigation against cigarette and handgun manufacturers in the United States.

### §2. DIRECT AND INDIRECT DAMAGE

184. According to §1293 ABGB, ‘damage’<sup>1</sup> is ‘any detriment which has been caused to any person in regard to his property, his rights or his person’.<sup>2</sup> This broad definition of ‘damage’ needs to be concretized and, at the same time, to be limited. One method to reach this goal is the distinction of ‘direct’ and ‘indirect damage’.<sup>3</sup> Indeed, the Austrian Supreme Court resorts to this possibility of limiting the scope of recoverable damage, by excluding compensation of ‘indirect damage’ unless

such compensation is expressly provided, as e.g. under §1327 ABGB in the case of culpable causation of another person's death: in these cases the surviving close relatives 'for whose maintenance the deceased had to provide', are entitled to recovery albeit their damage is 'indirect' by its character. With this reasoning, as an express provision like §1327 ABGB is absent, the Court has been denying until recently compensation for bodily harm or pain and suffering caused by the death of a close relative.

Indeed, the distinction between 'direct' and 'indirect damage', that the Supreme Court has been using on several occasions, is somewhat dubious. Notwithstanding the doctrinal rejection of the notion of 'indirect damage'<sup>4</sup> the Court resorts to it whenever the 'connection of unlawfulness' is weak as e.g. in the so-called 'cable cases'.<sup>5</sup> The characteristic feature of this group of cases is that the 'direct damage' caused to the cable of a public utility is significantly lower than the damage a customer of that utility suffers as a result of the interruption of the energy supply. Even though compensation of the customer's property damage appears to be reasonable and justified, no compensation is awarded by the Supreme Court in these cases. Quite outspoken, the Court believes that any other solution would open the floodgates to an excessive and virtually unlimited regime of compensation.

The formula which has usually been employed by the Court in these cases is as simple as obscure: 'Any harm occurring outside the main direction of the injurious strike as a result of accidental circumstances against which no protection is intended by the law, amounts to indirect harm and is not recoverable'. In more recent decisions it has become evident that the rationale of these decisions is based on a test of which interests are protected by a specific 'protective provision'.

1. In German: 'Schaden'.
2. In German: 'jeder Nachteil, welcher jemanden an Vermögen, Rechten oder seiner Person zugefügt worden ist'.
3. In German: 'mittelbarer – unmittelbarer Schaden'.
4. Doctrinal writers prefer the German word 'Drittschaden' that may be translated by 'damage to a third person'.
5. Leading Cases: OGH JBI 1973, 579 and 581; see also JBI 1976, 210; OGH SZ 49/96; ZVR 1979/93; cf. Koziol, *Haftpflichtrecht I*, N. 8/40, 41.

185. Thus, the distinction between 'direct' and 'indirect damage' should rather be one between injuries, that lie within the 'connection of unlawfulness' and those which do not.<sup>1</sup> Obviously the Austrian Supreme Courts resorted to a simple language when qualifying a damage which is outside the 'protective goal of an infringed provision'<sup>2</sup> as 'indirect', but manages somehow to comply with that doctrinal position without resorting thereto in many cases.<sup>3</sup>

1. Cf. Koziol, *Haftpflichtrecht I*, No. 8/17 *et seq.*
2. In German: 'Schutzzweck der verletzten Norm'.
3. Cf. OGH JBI 1979, 655; JBI 1984, 262; SZ 61/43; SZ 66/77 etc.

### §3. PECUNIARY AND NON-PECUNIARY LOSSES

186. §1293 ABGB addresses 'damage to one's property' by using the expression 'Vermögensschaden'. And with regard to that category of 'damage' §1323

ABGB provides that the damaged item of property ‘must be returned to the former state (*status quo*) or, if this is not possible, the estimated price thereof must be paid’. Thus, it is made clear, that under Austrian law of tortious liability compensation *in natura* has priority. Albeit this kind of compensation has lost much of the importance it may have had in a pre-industrial society, for which the rules of the ABGB were designed, it still has some significance for the assessment of damages. Nevertheless, recovery by way of paying a certain amount of money has become the rule. That means that, dependent on the degree of fault, the pecuniary loss of the victim has to be assessed either objectively or subjectively, and either with or without the inclusion of lost profits.<sup>1</sup>

Immaterial damage is not generally compensated under Austrian tort law. Nevertheless, there are some types of ‘non-pecuniary damage’ which are compensable. Among these types are the so-called ‘affection interest’, the ‘deprivation of the possibility to use’ a damaged or destroyed item of property, the ‘loss of comfort and recreation’, and finally ‘frustrated expenditures’.<sup>2</sup> For the compensation of some of these losses there are express provisions, such as the second half-sentence of §1331 ABGB concerning the recovery of the ‘affection interest’.

1. See §§1323, 1324 ABGB.

2. The corresponding German expressions are: ‘Affektionsinteresse’, ‘Gebrauchsentzug’, ‘Freizeit- und Urlaubsentgang’, and ‘frustrierte Aufwendungen’.

187. Unfortunately it does not clearly follow from the English translation of §1331 ABGB by Winiwarter/Baeck that recovery in the case of a qualified malice<sup>1</sup> extends to ‘affection interest’:

§1331 ABGB. ‘If a persons property is injured intentionally or by gross negligence of another, he is entitled to demand any lost profits and, if the damage has been caused by an act forbidden by criminal law or by an act of wantonness and malice, the particular value of the property damaged’.

What appears at the end of this rather unsatisfactory translation of the Code’s old-fashioned German into English as ‘particular value of the property damaged’ is ‘*Wert der besonderen Vorliebe*’ in the original wording. This expression may be translated more correctly by ‘value of a particular affection’.

This part of §1331 ABGB states that under the rules of Austrian civil liability, a tortfeasor who has caused the harm in a specifically contemptuous intention may be charged with some sort of ‘punitive damage’.<sup>2</sup> If the victim of such grave injurious conduct can show that he had strong feelings for the damaged item of property, he may claim to be compensated for the loss beyond its objective value and even beyond the subjective value the damaged or destroyed item may have had in the belongings of the victim before the injury.<sup>3</sup>

If someone is deprived from using a thing that belongs to him such as an automobile, because it has been damaged or destroyed, the ‘loss of the ability to use’ the damaged thing amounts to a non-pecuniary damage and such loss may not be compensated in addition to the regular value of that thing.<sup>4</sup> If however the victim decides to rent a substitute for the period of deprivation of the use of the damaged

thing, he has a claim for compensation of his costs. This somewhat illogical result has given rise to doctrinal criticism.

1. A Latin expression that is used to characterize the extremely vile conduct of the tortfeasor requested by the second half of §1331 ABGB to entail ‘liability for affection interest’ is ‘*dolus coloratus*’.
2. Cf. OGH ZVR 1988/104. The connotation of ‘*punitive damage*’ should not be understood in its US-American meaning.
3. That subjective value is recoverable whenever the wrongdoer is to blame for gross negligence or malice.
4. Cf. OGH ZVR 1970/36.

188. For a long time, the situation with regard to loss of leisure and recreation has been quite similar. Whereas the German Federal Court had already held in an early decision<sup>1</sup> that the deterioration of the ‘delight of vacation’<sup>2</sup> amounts to a ‘material damage’ and thereby, it accepted the commercialization of ‘pleasant feelings’, did Austrian doctrine and the Supreme Court recognize the immaterial character of such encroachments.<sup>3</sup> Even though an increasing number of scholars argued that in case of malice or gross negligence, immaterial losses should be compensated, the courts consistently held otherwise.<sup>4</sup> For individually arranged vacations, this still is the law. For package travel, however, a decision of the European Court of Justice brought a substantial change. There, the court held in case of a non-performance or mal-performance on part of his contracting partner, a consumer is entitled, at least in principle, by Article 5 of the Package Travel Directive<sup>5</sup> to immaterial damages for his lost delight.<sup>6</sup>

1. BGH NJW 1956, 1234.
2. In German: ‘*Urlaubsgenuss*’.
3. Cf. OGH SZ 62/77.
4. For a more detailed analysis, see Koziol, *Haftpflichtrecht I*, N. 2/116 *et seq.*
5. Directive 90/314/EC ABIEG Nr. L 158, S. 59.
6. EuGH 12.3.2002, C-168-00 (Leitner gegen TUI Deutschland) ZVR 2002/56.

189. To honour this decision, the Austrian legislator introduced §31e(3) KSchG.<sup>1</sup> According to this provision, a consumer who buys a travel package may claim compensation for his immaterial losses if two requirements are met. First, the non-performance or mal-performance has to be with regard to a ‘substantial part’<sup>2</sup> of the contractual obligation. Second, fault is required on part of the seller of the travel package or the person he employs to fulfil his contractual obligations. This is not to be understood to require malice or gross negligence – any fault may give rise to liability under §31e(3) KSchG. However, together with other factors such as the nature or duration of the mal-performance and the price of the travel package, the degree of the seller’s fault is decisive when calculating the amount awarded.

1. BGBl I 2003/91.
2. In German: ‘*Erhebliche Beeinträchtigung*’.

190. It is questionable whether the different treatment of travel packages and individually arranged vacations with regard to immaterial damages satisfies the constitutional requirement of equal treatment as laid down in Article 7 of the Federal

Constitution. When passing §31e(3) KSchG, the Austrian legislator argued that such a discrimination is lawful because when buying travel packages, the consumer puts himself and his vacation in the custody of his contracting partner and usually, he also makes a prepayment. Thus, this reduced factual and financial freedom may justify an unequal treatment.

191. Finally, the problem of ‘frustrated expenditures’ has caused difficulties in so far as it is not clear, whether the ‘general expenses’<sup>1</sup> that are caused by the ownership of a thing that due to a culpable act of a wrongdoer cannot be used, are of a pecuniary, or of a non-pecuniary character. The majority opinion conceives ‘general expenses’ as immaterial damage and allows compensation within narrow limits in order to keep the floodgates locked:<sup>2</sup> therefore, only those frustrated expenses which are typically connected with the utilization of the damaged item, are recoverable. In the most practical case of a damaged car, the Supreme Court awards compensation of the regular costs of motor-vehicle taxes, insurance, garage etc. under the title of ‘general expenses’.<sup>3</sup>

1. In German: ‘Generalunkosten’.
2. See e.g. Koziol, *Haftpflichtrecht I*, N. 2/123.
3. Cf. OGH SZ 42/33; ZVR 1965/114; ZVR 1978/264.

192. A specific case of non-pecuniary damage is the deprivation of personal freedom. The General Civil Code includes a provision that until recently has been understood only as a basis for the compensation of ‘material damage’:

§1329 ABGB. ‘A person who deprives another of his liberty by forcible abduction, private imprisonment, or wilful illegal arrest must restore the injured person to his former liberty and render him full satisfaction. If the injuring party cannot restore the liberty of the injured party he must give compensation to his survivors in the same manner as in the case of homicide.’

In reaction to stringent doctrinal criticism<sup>1</sup> of the rejection of compensation of immaterial damage in the context of deprivation of freedom, on the one hand, and to Article 5(5) of the European Convention on Human Rights<sup>2</sup> on the other, the Supreme Court has finally adopted the position that deprivation of freedom may result in compensation of non-pecuniary loss caused thereby, if the wrongdoer is to blame for having caused the deprivation of freedom intentionally.<sup>3</sup>

1. See especially F. Bydliniski, *Der Ersatz ideellen Schadens als sachliches und methodisches Problem*, JBl 1965, 242; see also Strasser, *Der immaterielle Schaden im österreichischen Recht* (1964).
2. This provision aims at violation of the right to freedom by public authorities and is not directly applicable to infringements of freedom by a private person.
3. Cf. OGH EvBl 1979/100; JBl 1990, 794; this position raised harsh criticism, since gross negligence is deemed to be sufficient to justify the compensation of the damage stemming from the deprivation of freedom; cf. Koziol, *Haftpflichtrecht I*, N. 11/18.

193. In line with the rather casuistic approach of the ABGB to the compensation of non-pecuniary damages, §1328a ABGB provides for damages for immaterial

losses suffered from an unlawful invasion of privacy.<sup>1</sup> This provision has been recently adopted in anticipation of a comprehensive reform in the field of immaterial damages. It deviates from the traditional doctrinal view that under the law of tort, the degree of fault constitutes the primary requirement for awarding non-pecuniary damages. Instead, under §1328a ABGB the decisive factor for awarding immaterial damages is that an invasion of privacy itself meets a certain threshold – that is, it has to amount to a considerable infringement of a person’s private sphere. Thus, §1328a ABGB does not grant non-pecuniary damages for any invasion of privacy, but only for qualified invasions. The precise degree of fault, however, is only of importance for the assessment damages.

1. In detail, *see supra* No. 92.

#### §4. PURE ECONOMIC LOSS

194. Notwithstanding the comprehensive scope of ‘Chapter 30’ of the Second Part of the General Civil Code of Austria covering ‘contractual’ as well as ‘extra-contractual (tortious) liability’, a fundamental difference between claims based on tort and those based on contract exists with regard to recoverability of pure economic loss. Because of the specific relationship between partners of a contract and since no danger of boundless damages may occur in a situation of breach of contract, pure economic loss is fully recoverable in contract law. Under the rules of tortious liability, however, economic interests are only protected if a statutory rule so provides.

This is the case, first of all, whenever, according to §1295(2) ABGB, a person ‘intentionally injures another in a manner in violation of public morals’. Under this rule, the tortfeasor shall be liable not only for damage to real and personal property, for injury to the person, and for the violation of other absolutely protected rights. The compensation extends to purely economic losses resulting from such a qualified tortious conduct. Secondly, an expert giving wrongfully bad advice to another person who in reliance on the advice acts to the person’s own disadvantage may be held liable pursuant to §1300 ABGB for pure economic loss, whenever his advice was made ‘for a consideration’.<sup>1</sup> Finally, recoverability of ‘pure economic loss’ may result from a violation of a protective statute according to §1311 ABGB, when the aim of such a statute is to safeguard certain persons against pure economic loss.

1. On the meaning of ‘for a consideration’, *see* OGH JBI 1985, 38.

195. Compensation of pure economic loss is provided by the rules of the ABGB on tortious liability only for exceptional circumstances, whilst a victim may get compensation for infringement of his ‘purely financial interests’ under contract rules. That, together with the insufficient vicarious liability regime in tort, explains why in the absence of a ‘*non-cumul* rule’, the range of contractual liability has been expanded significantly by courts and legal scholars.<sup>1</sup> Indeed such duties which are created by way of innovative interpretation may include the duty to take specific care of the partner’s financial interests. Altogether one may summarize that, with

regard to the compensation of pure economic loss, the Austrian position resembles the practice of the German Courts.<sup>2</sup>

1. By putting particular emphasis on concepts such as ‘*culpa in contrahendo*’ or ‘contractual duties to protect a third party’.
2. Cf. OGH SZ 51/169; SZ 61/64.

#### §5. ACTUAL AND FUTURE DAMAGE (LOST PROFITS)

196. Austrian tort law makes a fundamental distinction between ‘actual’ or ‘positive damage’ and ‘loss of profits’.<sup>1</sup> This is expressly provided by §1323 ABGB, stating in its second sentence, that ‘[c]ompensation for only the actual damage suffered is called indemnity;<sup>2</sup> compensation which includes lost profits and the elimination of all effects of the injury is called full satisfaction’.<sup>3</sup>

The reason for the high importance of the distinction of actual or positive damage and loss of profits can be found in the Austrian system of liability that assesses the amount of compensation in proportion to the wrongdoer’s fault:

§1324 ABGB. ‘In case of damage caused by malice or by gross negligence, the person injured is entitled to demand full satisfaction, and in other cases only indemnity. Where the general expression “damages”<sup>4</sup> occurs in the law, it is to be interpreted pursuant hereto’.

Loss of profits, thus, becomes compensated only if the wrongdoer is to blame for either malice or gross negligence, whilst simple negligence gives rise to the compensation of ‘positive damage’ only.

1. In German: ‘*wirklicher Schaden*’ and ‘*entgangener Gewinn*’. That dualistic conception complies with the ‘*Roman Common Law*’ of the 17th and 18th centuries, that made a distinction between ‘*damnum emergens*’ and ‘*lucrum cessans*’.
2. In German: ‘*Schadloshaltung*’.
3. In German: ‘*volle Genugtuung*’.
4. In the original text of the provision the German word used is simply ‘*Ersatz*’.

197. The distinction between ‘positive damage’ and ‘lost profits’ may be difficult to be drawn in an actual case.<sup>1</sup> Nevertheless, it is futile to deny its great practical importance.<sup>2</sup> The rationale for the distinction may be found in an altogether reasonable consideration: a tortfeasor who is to blame for grave misconduct shall face a higher responsibility by being held liable for a higher amount of compensation. Even though the Courts are aiming at a wide interpretation of the concept of ‘actual damage’ thereby shifting the borderline further towards ‘full satisfaction’ in cases of simply negligent causation of harm, the distinction still has its importance: it is an important feature of Austrian tort Law.

Indeed, the Supreme Court has frequently found that, if it appears to be somehow certain that a chance of profit would have materialized in the absence of the injurious conduct, the loss of profits should amount to a ‘positive damage’ that is recoverable irrespective of the degree of the wrongdoer’s fault.<sup>3</sup> For a loss, to be qualified as ‘positive damage’, it is sufficient that a position that is by contractual agreement

‘legally ascertained’<sup>4</sup> has been infringed.<sup>5</sup> Likewise, the loss of expectable profits that an enterprise has to suffer as a result of a tortious conduct causing the breakdown of the production is to be qualified as ‘positive damage’.<sup>6</sup>

1. Cf. OGH SZ 29/43.
2. See however, Harrer, *Schadenersatzrecht* (1999), p. 77: he draws the conclusion from a recent decision of the Supreme Court in the field of contractual damage, OGH ZVR 1998/81, that the distinction between actual damage and lost profits has lost its significance.
3. Cf. OGH EvBl 1972/191; EvBl 1978/190; SZ 53/148; EvBl 1983/72.
4. In German: ‘*kraft Vertrages rechtlich gesicherte Position*’.
5. Cf. OGH JBl 1992, 392.
6. Cf. OGH SZ 29/43; ZVR 1980/15.

## §6. OTHER COSTS

*198. Costs of Assessing Damage and Liability.* The assessment of the damage causes certain costs, for which the victim may claim compensation. The problems that may occur in this context have not attracted much interest until a recent comprehensive study<sup>1</sup> has dealt with these aspects of tortious liability for the first time in a detailed way. Its author, Professor Christian Huber, suggests to distinguish a number of concomitant costs that play a role in the process of fixing the amount of the compensation. Depending on whether the victim takes it on himself to adjust the damage, or whether he leaves this task to the wrongdoer, these costs are significantly different. They may not only be caused by the assessment of the damage, but by the analysis of the possible methods to cure the loss, as well as by supervising the professional employed to restore the damaged property, or by controlling and testing the repaired item.

It follows from §1323 ABGB that, in the first line, the tortfeasor is bound to re-establish the victim’s state of integrity: the injured person has to be reinstated by the wrongdoer into the position, he was in before the injury. If, however, the victim decides to cure the detriment himself, he is not bound to bear the accompanying costs, that are caused by the process of assessing the damage to be compensated. There is no doubt that these costs are part of the compensation which the wrongdoer has to pay.

If the victim has to select professionals for the repair, he must not accept excessively expensive services, but is bound to keep the costs within reasonable limits. This principle applies to costs of assessing damages as well as to the costs of repair. Some times lump-sum payments may be awarded, if requested by the victim for his activities in the assessment and if found to be reasonable by the Court.

1. Chr. Huber, *Fragen der Schadensberechnung* (1993), p. 618 *et seq.*

*199. Costs in Obtaining Judicial or Extra-Judicial Payment.* Under Austrian civil procedure law,<sup>1</sup> the successful party in a lawsuit does not have to contribute to the costs of the proceedings and will get a refund of its expenses for the legal counsel, provided that they do not exceed the schedule of the ‘Code of Lawyers’ Fees’.<sup>2</sup> According to §41 ZPO the party that has lost the lawsuit in its entirety has to pay all the costs of the proceedings and the costs of the winning party’s legal

counsel as well. Whenever a claim has not been honoured by the Court in its entirety, the Court has the task, pursuant to §43 ZPO, either to distribute the costs proportionally, or to offset the costs of each party by a formal ‘ruling on the costs’.<sup>3</sup>

Irrespective of the result of the proceedings, a party having unnecessarily launched a lawsuit, notwithstanding the opponent’s readiness to pay, has to bear the costs of the proceedings, if the defendant recognizes the claim in the first stage of the trial.<sup>4</sup> Likewise a party having caused the other party additional costs, has to pay these additional expenses of the opponent.<sup>5</sup>

1. See §40 *et seq.* of the Austrian Civil Procedure Code (*‘Zivilprozessordnung’*, ZPO).

2. In German: *‘Rechtsanwaltstarifgesetz’*, BGBl 1969/189.

3. In German: *‘Prozesskostenentscheidung’*.

4. According to §45 ZPO.

5. See §48 ZPO.

#### §7. MITIGATION OF DAMAGES

200. As mentioned earlier<sup>1</sup> in the context of contributory fault the relevant provision of §1304 ABGB refers not only to careless or even intentional activities of the victim. It also applies by way of expansive interpretation to the victim’s failure to minimize the consequences of the harmful conduct of the wrongdoer. It is generally accepted, that the victim has the duty to mitigate the damage he suffered.<sup>2</sup> If he fails to comply with this duty, he may not expect to be fully compensated.

Thus, a person who suffered bodily injury is obliged to look for adequate medical treatment,<sup>3</sup> and to undergo surgery,<sup>4</sup> if this is necessary to avoid future disability. If property damage has been caused, the victim has to look for immediate and reasonably priced repair,<sup>5</sup> he has to use his own disposable capital for intermediate financing<sup>6</sup> and, if he is bound to borrow money for interest, he has to ask the wrongdoer for advance payment first.<sup>7</sup> A person, whose car has been damaged, is under a duty to keep the cost of renting a car within reasonable limits.<sup>8</sup> Finally, the victim who as a result of personal injury cannot continue to work in his old profession has to accept a feasible alternative employment.<sup>9</sup>

1. *Supra* No. 165.

2. In German: *‘Schadensminderungspflicht’*.

3. *Cf.* OGH JBI 1958, 550.

4. *Cf.* OGH SZ 47/69.

5. *Cf.* OGH ZVR 1984/281.

6. *Cf.* OGH ZVR 1985/131.

7. *Cf.* OGH 1983/36.

8. *Cf.* OGH ZVR 1979/304; ZVR 1991/92.

9. *Cf.* OGH ZVR 1974/161; SZ 49/19.

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