

 SpringerWienNewYork

Tort and Insurance Law
Vol. 19

Edited by the
European Centre of Tort
and Insurance Law

together with the

Research Unit for European Tort Law
of the Austrian Academy of Sciences

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Tort and Regulatory Law

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This work is published with the financial support of
the European Commission, the Austrian Ministry of Justice and
the Association of Austrian Cities and Towns (Österreichischer Städtebund).



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Printed in Germany

Springer-Verlag Wien New York is part of
Springer Science + Business Media
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Typesetting: Composition & Design Services, Minsk, Belarus
Printing and binding: Strauss GmbH, 69509 Mörlenbach, Germany

Printed on acid-free and chlorine-free bleached paper
SPIN: 11605225

CIP data applied for

ISSN 1616-8623
ISBN 978-3-211-31133-2 SpringerWienNewYork

Preface

The European Centre of Tort and Insurance Law (ECTIL), Vienna, commenced working on the “Tort and Regulatory Law” project in summer 2004 in co-operation with the Research Unit for European Tort Law of the Austrian Academy of Sciences (ETL), Vienna. This study, which was initiated by Munich Re, analyses the various interactions between tort law and administrative law with an emphasis on safety regulations and provisions aimed at environmental protection. Such an in-depth analysis of problems on the borderline between tort and regulatory law is of high interest for scholars as well as for practitioners.

Alongside the descriptions of the legal situation on tort and regulatory law in twelve countries – Austria, England and Wales, France, Germany, Hungary, Italy, the Netherlands, Norway, Poland, Spain, Switzerland and the United States of America – the study also includes special reports from the perspectives of administrative and regulatory law as well as an insurance perspective and an economic analysis. The results are summarised in a comparative analysis, followed by conclusions.

At this point, we would like to express our gratitude to the European Commission, the Austrian Ministry of Justice and the Association of Austrian Cities and Towns (Österreichischer Städtebund) for the financial support they provided. Moreover, we would like to thank the staff of ECTIL and ETL, especially Mag. Kathrin Karner-Strobach, Mag. Markus Kellner, Mag. Clara Reiner, Fiona Salter-Townshend LL.B, LL.M, Donna Stockenhuber M.A., Thomas Thiede LL.B, LL.M and Vanessa Wilcox LL.B, LL.M for their committed assistance in producing this publication. Last but not least, we owe a large debt of gratitude to o. Univ.-Prof. i.R. Dr. Dr. h.c. Helmut Koziol, the executive director of ECTIL and ETL, whose critical and benevolent advice was of valuable support.

Willem H. van Boom, Meinhard Lukas and Christa Kissling
Rotterdam/Linz/Vienna, September 2007

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Abbreviations

Abs.	Absatz
a.M.	anderer Meinung
art./Art.	article(s)/Artikel
Aufl.	Auflage
bzw.	beziehungsweise
cf.	confer
chap.	chapter(s)
cmt.	comment(ed)
ed.	edition
ed(s).	editor(s)
e.g.	for example
et al.	et alii
etc.	et cetera
f.	and the following page
ff.	and the following pages
fn./Fn.	footnote(s)/Fußnote(n)
Hrsg.	Herausgeber
ibid.	ibidem
id.	idem
i.e.	id est
i.S.d.	im Sinne des
lit.	litera
Ltd/Ltd.	Limited
no.	marginal number(s)/number(s)
par.	paragraph(s)
Rz.	Randziffer(n)
sec.	section(s)
sent.	sentence(s)
subpar.	subparagraph(s)
subs.	subsection(s)
v/v.	versus
vgl.	vergleiche
viz.	videlicet
Z.	Ziffer
z.B.	zum Beispiel

Introduction

*Christa Kissling**

I. The Problem

Every practising tort lawyer has to deal with administrative and regulatory law rules. As far as the definition of regulatory law is concerned, most contributors to this study tend to consider regulatory law as a part of law outside the private law domain, setting rules or standards of conduct in various social situations.¹ Practitioners in the field of tort law are confronted with administrative and regulatory law when dealing with questions of liability based on fault as some provisions are regarded as so-called “protective laws”,² but they are also of more or less importance in the field of strict liability, e.g. with regard to product liability.³ It is thus not only overdue but also of high practical value to systematically analyse the interaction of administrative and regulatory law, on the one hand, and tort law, on the other hand.

This study will focus mainly on safety regulations and provisions aimed at environmental protection. Such rules regulate, e.g., the disposal of dangerous waste and sewage, the safety of operational facilities, the licensing of potentially dangerous products such as drugs and chemicals, the safety of buildings, the protection of forests against fire, vermin and air pollution, and the protection against nuisance (noise, heat, smell, shocks). In many of the above-mentioned areas of law, rules of European law (directives and regulations) apply. As a consequence, one of the issues dealt with by this project will be the European dimension.

In the following introduction, some of the general problems posed will be outlined.

* Dr. iur. (Berne University, Switzerland), research staff member at the European Centre of Tort and Insurance Law (ECTIL), Vienna, Austria.

¹ Concerning definitions see *infra* *W.H. van Boom*, On the Intersection between Tort Law and Regulatory Law – A Comparative Analysis, no. 1–4, especially no. 1.

² See *H. Koziol*, Austria, in: *H. Koziol* (ed.), *Unification of Tort Law: Wrongfulness* (1998) 14.

³ According to art. 7 lit. d of Directive 85/374 EEC of the Council of the European Communities of 25 July 1985 on Product Liability, Official Journal (OJ) L 210, 7.8.1985, 29–33, “The producer shall not be liable as a result of this Directive if he proves [...] (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities [...]”.

II. A Breach of Administrative Law Rules

- 4 In the field of liability based on fault, one has to consider whether a breach of a rule of administrative law per se constitutes wrongfulness. In Austria, e.g., the mere breach of such a rule is not sufficient, but it is required that the wrongdoer violated a duty of care, whereas in Germany the breach of a duty of care is part of the fault requirement. Thus, the seller of dangerous goods acts wrongfully in Germany merely by failing to comply with the relevant regulatory provisions of licensing, whereas in Austria he only does so if he violated an additional duty of care.⁴ Similar differences seem to arise in other legal systems as well.
- 5 If the tortfeasor acted wrongfully, one still has to consider the protective purpose of the rule. The legal systems of some Member States of the European Union, e.g., Austria, Germany, Greece, Italy, the Netherlands, Portugal and Spain as well as the Common Law, require that a rule be established to protect *the injured party from the damage suffered*; exceptions are Belgium, France and Luxembourg.⁵
- 6 The tortfeasor may succeed in proving that he would also have caused the damage if he had acted in compliance with the relevant administrative law rules. One has to consider if this may count as a defence (of “lawful alternative conduct”). According to one part of legal scholarship, the answer to that question also depends on whether the aim of the rule in question is to guarantee a specific procedure which would have included certain guarantees for the injured party. Licensing requirements might be rules of that kind. If, e.g., the manufacturer of a defective drug has failed to obtain a license therefor, he might be held liable even if he proves that the authority to whom he did not apply would have granted the license.
- 7 With regard to legal entities, another question of practical importance is who is liable for a failure to comply with an administrative law rule which binds the legal entity – the legal entity itself and/or the individual within the organisation of the entity?

III. Acting in Compliance with Administrative Law Rules

- 8 One might argue that a tortfeasor who acted in compliance with all the relevant administrative law rules cannot be held liable as he fulfilled the public law standards and requirements (“regulatory compliance defence”). One might equally argue, however, that these rules require only minimum standards. One thereby has to consider the different aims of administrative law, on the one hand, and tort law, on the other hand: The former is based on general safety

⁴ See *infra* U. Magnus/K. Bitterich, Tort and Regulatory Law in Germany, no. 30 f. and M. Lukas, Tort and Regulatory Law in Austria, no. 34, each with further references.

⁵ See the analysis of Ch. v. Bar, Gemeineuropäisches Deliktsrecht, vol. I (1996) no. 30 and 306 and Ch. v. Bar, Gemeineuropäisches Deliktsrecht, vol. II (1999) no. 222.

expectations, whereas the latter judges the concrete circumstances of the individual case.

In this context, it is also of interest to know the consequences when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions. The question is whether liability is excluded if people act in compliance with a wrongful administrative law.

Even more subtle is the situation where an explicit permit, e.g., a permit to emit a certain amount of a certain substance, exists. Is such a permit relevant for a claim in tort ("regulatory permit defence"), or does a tort claim remain totally independent of the administrative permit?

IV. Compensation from Other Sources

So far, only problems of the law of delict have been mentioned. However, the duty to compensate damage for breach of an administrative law rule may also be founded in administrative law itself or in the broader field of the law of obligations. According to the *Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage*,⁶ e.g., polluters have to pay the costs of restoring the environment, even though this scheme does not fit into the tort law regime.

However, even if the tortfeasor acted in compliance with the relevant administrative law rules, he might still be obliged to pay damages for that very reason, as some legal systems provide for an indemnification claim in exchange for the duty to tolerate certain activities which have been permitted under administrative law. Compensation may be provided either by the party who benefitted, by a fund or by the government. It is of great interest whether such compensation schemes have been developed in the countries under examination.

V. Structure of the Book

This publication addresses the questions that have just been raised. It collects reports from nine Member States of the European Union (Austria, England and Wales, France, Germany, Hungary, Italy, the Netherlands, Poland and Spain) as well as from Norway, Switzerland and the United States of America. These twelve country reports were drafted following a questionnaire, containing general questions as well as practical cases. Additionally, four special reports are part of this study: One focuses on the administrative tort in Italian law and especially deals with the liability of public administrations and the diligence of private individuals. Another special report analyses the relationship between regulation and tort law and presents goals and strategies. Two further reports

⁶ OJ L 143, 30.4.2004, 56–75; see thereto *B.A. Koch*, European Union, in: H. Koziol/B.C. Steininger (eds.), *European Tort Law 2002* (2003) 432 ff.

analyse this topic from an insurance and economic perspective. The results of the country and special reports are summarised in a comparative analysis, followed by conclusions.

Questionnaire

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?
2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?
3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?
4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?
5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?
6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?
7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

6. Can a breach of an administrative law rule result in a claim for punitive damages?

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the “regulatory permit defence”?
2. Can the general duty of care go beyond these rules?
3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?
2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?
2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?
3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or

reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

- a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?
- b) Could the injured persons claim damages from the government agency?

Country Reports

TORT AND REGULATORY LAW IN AUSTRIA

*Meinhard Lukas**

I. General

1. *What, in general, is the impact of administrative law rules on the tort law of your country?*

In § 1294, the *Allgemeine bürgerliche Gesetzbuch* (Austrian Civil Code, ABGB) refers to the “source of damage” and contrasts wrongful acts (*widerrechtliche Handlung*) or omissions (*Unterlassungen*) with accidental events (*Zufall*). According to the general clause under § 1295(1) ABGB, wrongful and culpable conduct obligates the tortfeasor to pay damages to the injured party. Thereby a liability for imputable wrongful behaviour is constituted. Conduct is judged legal or lawful with consideration to all the rules of the legal system.¹ Thus not only the provisions of civil law, but also those of criminal and administrative law must be taken into account. Administrative law forms a sub-category of public law which is to be distinguished from private law (§ 1 ABGB). It governs the execution of public functions by the administration in substantial and procedural respects.² Against this background “regulatory law” (*Verhaltensrecht*) can be understood as a part of administrative law setting rules or standards of conduct concerning various social and economic surroundings.³

The Austrian legal system affords valuable objects, such as life, physical integrity or property, the absolute protection of the law.⁴ On this basis alone, everyone is obliged to treat these objects of legal protection with care (general

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¹ See H. Koziol/R. Welser, *Bürgerliches Recht II* (13th ed. 2007) 312; H. Koziol, *Österreichisches Haftpflichtrecht I* (3rd ed. 1997) no. 4/1 ff.; E. Karner, in: H. Koziol/P. Bydlinski/R. Bollenberger (eds.) (KBB/Karner), *Kurzkomentar zum ABGB* (2nd ed. 2007) § 1294 no. 1 ff.; R. Reischauer, in: P. Rummel (ed.) (Rummel/Reischauer), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II* (2nd ed. 1992) § 1294 no. 6 ff.; F. Harter, in: M. Schwimann (ed.) (Schwimann/Harter), *ABGB-Praxiskommentar VI* (3rd ed. 2006) § 1294 no. 6 ff.

² See W. Antonioli/F. Kojas, *Allgemeines Verwaltungsrecht* (3rd ed. 1996) 92 ff.

³ See Antonioli/Koja (fn. 2) 99.

⁴ H. Koziol, *Österreichisches Haftpflichtrecht II* (2nd ed. 1984) 5 ff.; Koziol/Welser (fn. 1) 312.

duty of care).⁵ These specific duties of care must be judged on the basis of an objective benchmark for care, and the legislator distinguishes between the care of a normal average person (§ 1297 ABGB) and that of a specialist (§ 1299 ABGB). Rules of administrative law are extremely important in defining the benchmark in relation to care. They are able to make it clear what conduct the legislator expects towards a specific object of legal protection. If the tortfeasor fails to discharge this conduct, then a breach of the duty of care with respect to the object of legal protection in question may, as a rule, be assumed.

- 3 As regards the law relating to damages, the function of the rules of administrative law is far from merely detailed definitions of the requirements of care with respect to objects of absolute legal protection. They may in fact acquire major significance, in the capacity of what may be termed “protective statutes” (*Schutzgesetz*): sent. 2 of § 1311 ABGB makes liability to pay damages the rule, in the event of a breach of a law that is intended to prevent accidental damage. In this case, this is clearly not a matter of accidental liability independent of fault; rather, sent. 2 of § 1311 ABGB makes it clear that a breach of the law causes the tortfeasor to be liable for damages even if he could not predict the consequences of his act, since simply breaching the law is sufficient to establish fault. The only prerequisite is the fact that the tortfeasor may subjectively be accused of having objectively acted contrary to his duty of care under the protective statute. The point of reference for the examination of fault is thus not the injured object of legal protection, but the actual protective statute in question.⁶ In this context, we speak of reduced fault (*verkürzter Verschuldensbezug*) being associated with the liability rule under § 1311 ABGB, as compared to the general clause under § 1295(1) ABGB. This also highlights the special relevance of both administrative law and criminal law provisions in relation to tort law, inasmuch as they are covered by the circumstances described in § 1311 ABGB.
- 4 Administrative law regulations are also important in relation to liability independent of fault. Product liability is a case in point. For example, the view is taken in relation to the Product Liability Directive (85/374/EEC), that the breach by a product of the standards laid down in the Product Safety Directive at least establishes the assumption of defectiveness within the meaning of art. 6 of the Product Liability Directive. The Product Safety Directive 92/59/EEC was transposed in Austria in the form of the *Produktsicherheitsgesetz 1994* (Product Safety Act)⁷ which came into force on 1 February 1995. The Act

⁵ Rummel/*Reischauer* (fn. 1) § 1294 no. 13; *Oberster Gerichtshof* (Supreme Court, OGH) in: *Juristische Blätter* (JBl) 1953, 547; *Evidenzblatt der Rechtsmittelentscheidungen* (EvBl) in: *Österreichische Juristen-Zeitung* (ÖJZ) 1959/174; *Zeitschrift für Verkehrsrecht* (ZVR) 1959/211; *EvBl* 1968/258; *Entscheidungen des österreichischen Obersten Gerichtshofs in Zivil- (und Justizverwaltungs-)sachen* (SZ) 43/177.

⁶ See *R. Welser*, *Der OGH und der Rechtswidrigkeitszusammenhang*, ÖJZ 1975, 1, 2 ff.; *M. Karollus*, *Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung* (1992) 84 ff., 269 ff.

⁷ *Bundesgesetzblatt* (Austrian Federal Law Gazette, BGBl) 1995/63.

has since been replaced by the *Produktsicherheitsgesetz 2004*,⁸ which has been in force since 1 April 2005. Its provisions must be qualified as protective statutes within the meaning of § 1311 ABGB, making them of general importance as regards tortious liability.⁹ Furthermore, the *Produktsicherheitsgesetz* and the *Produkthaftungsgesetz* (Product Liability Act, PHG) complement one another in the same way as their counterparts under European law on which they are based (the Product Liability Directive and the Product Safety Directive): if a product does not meet the standards laid down in the *Produktsicherheitsgesetz*, then it must fundamentally be assumed to be defective. However, even if a product meets the requirements of the *Produktsicherheitsgesetz*, it may nevertheless be defective within the meaning of § 5 PHG and may trigger liability accordingly.¹⁰

In the final analysis, sources of administrative law are of significance as regards the law relating to damages, inasmuch as specific rules relating to liability are habitually also found in relevant sources of law. However, irrespective of the fact that they are associated by context with administrative law provisions, such rules must be attributed to the law relating to damages, and consequently directly to civil law.

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2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

In Austria, the civil law system fundamentally falls within the remit of the federal legislator. Against this background, we must establish whether administrative provisions adopted by the Austrian Provinces may be considered as protective statutes within the meaning of § 1311 ABGB. This would mean that the Provincial legislator would have some influence on tort law. This aside, case law in Austria has for some time also qualified regulations under Provincial law as protective statutes,¹¹ and no opposing view has been expressed in the literature.¹² The fact that relevant restrictions to personal freedom of action may be derived from these, through the disposition of rules of conduct, does in

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⁸ BGBl I 2005/16.

⁹ See *R. Welser/Ch. Rabl*, *Produkthaftungsgesetz – Kommentar* (2004) Vorbemerkungen no. 9, § 5 no. 59; *W. Posch*, in: M. Schwimann (ed.) (Schwimann/Posch), *ABGB-Praxiskommentar VII* (3rd ed. 2005) PHG Einleitung no. 6.

¹⁰ See recital 36 of the General Product Safety Directive (2001/95/EC): “This Directive should not affect victims’ rights within the meaning of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.” See also *A. Broichmann*, *Das Produktsicherheitsgesetz als Vorgabe für die Produkt- und Produzentenhaftung* (2001) 34 ff.

¹¹ OGH SZ 13/48; SZ 15/94; Zentralblatt für die juristische Praxis (ZBl) 1935/44; SZ 18/3; SZ 34/39; ZVR 1967/97; ZVR 1969/204; ZVR 1984/139; SZ 59/92; *Immobilienzeitung* (ImmZ) 1990, 287; *Versicherungsrundschau* (VR) 1997, 107; *Mietrechtliche Sammlung* (Miet) 45.162; *Baurechtliche Blätter* (bbl) 2004, 155.

¹² *Koziol*, *Haftpflichtrecht II* (fn. 4) 107; Schwimann/Harrer (fn. 1) § 1311 no. 29.

fact point towards the inclusion of Provincial law regulations. Because Federal and Provincial law are not hierarchically related under the Austrian Constitution, this would indicate that the same equal treatment must also be applied within the context of § 1311 ABGB.¹³ As a result, the Provincial administrative law regulations must, within their geographical area of validity, also be considered in relation to tort law. Although this results in geographical differences in the law relating to tort, which may however be justified by the federal structure of the Austrian legal system, Federal law uses § 1311 ABGB to substantiate effects under the law relating to damages, in which it is assisted by rules under Provincial law. Therefore, no specific limits to the interaction between administrative law and tort law arise out of the division of competence between the Federal State and the Provinces.

- 7 The specifications and limits that are of relevance to the application of the provisions of administrative law under constitutional law must of course also be considered where administrative law provisions are required to be qualified as protective statutes and therefore to be called upon for a judgment of liability under tort law. The constitutionally guaranteed subjective rights (*Grundrechte*), in relation to whose breach claims may be made before the Austrian Constitutional Court, are especially noteworthy in this context: if a court of second instance or the Supreme Court is required to apply a rule, in relation to which there are reservations in constitutional law terms, as a protective statute during damages proceedings, then the Court must challenge this rule before the Constitutional Court.¹⁴

3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

- 8 Protective statutes may be all laws in the substantive sense, and consequently may also include regulations (*Verordnungen*).¹⁵ This follows from the fact that rules of conduct that are of equal relevance to those under statutes may be derived from regulations. There are therefore no grounds to treat these legislative acts any differently. In case law, regulations were also subsumed under § 1311 ABGB at an early stage. The Supreme Court substantiated this on the basis of the historical understanding of the term “statute” in § 1311 ABGB, since the legislator in 1811 understood this in quite general terms as any regulations laid down by high authority.¹⁶

¹³ See *Karollus* (fn. 6) 118 f.

¹⁴ See art. 140(1) *Bundes-Verfassungsgesetz* (Austrian Constitution, B-VG); cf. *H. Mayer*, *Bundesverfassungsrecht* (3rd ed. 2002) no. III.1.

¹⁵ *Karollus* (fn. 6) 96 ff.; see also *Koziol*, *Haftpflichtrecht* II (fn. 4) 102; *Rummel/Reischauer* (fn. 1) § 1311 no. 4; *P. Brunner*, *Die Zurechnung der Schadenersatzpflicht bei Verletzung eines „Schutzgesetzes“* gem § 1311 ABGB, *ÖJZ* 1972, 113, 115.

¹⁶ OGH in: *J. Glaser/J. Unger* (eds.), *Neue Folge, Sammlung zivilrechtlicher Entscheidungen des OGH* (GIUNF) 3037; see also *GIUNF* 3517.

Case law also subsumes individual administrative acts (decisions (*Bescheide*)) under § 1311 ABGB,¹⁷ although in this respect, the situation is far more complex than in the case of regulations. The classification of decisions as protective statutes only, presents no problems provided they conform to the law. However, if an individual sovereign act provides for more extensive obligations than those laid down by law, then it cannot be assumed to be a protective statute, since otherwise the injured party would enjoy a right which the legal system does not in fact afford him. Thus, in the light of § 1311 ABGB, a decision is only considered to be relevant if it simply serves to clarify statutory rules of conduct. Therefore, the legality of decisions must be examined under the law regulating damages and any illegal decisions must be negated.¹⁸

The extent to which internal administrative regulations (directions, including what are termed *Verwaltungsverordnungen* (administrative ordinances)) may be qualified as protective statutes is questionable. The *Oberste Gerichtshof* (Supreme Court, OGH) affirmed this on one occasion, when it considered an “order” (*Befehl*) given to soldiers in a decision to be a qualifying point of departure for liability under a protective statute.¹⁹ However, their legal nature as purely internal rules, restricted to the official operation in question, points against the use of such internal administrative regulations as the basis for a judgment of tortious illegality. Internal administrative regulations only commit the corporate representative towards the person responsible for enforcing them, and do not have any effect externally, with the result that they also cannot acquire such external effect under the law of tort.²⁰

Technical standards (in particular the Austrian standards known as *Ö-Normen*) are not as such binding and cannot therefore be classified as protective statutes. The situation would only be different if they were elevated by the legislator to the status of a statute in the substantive sense. Apart from this, *Ö-Normen*, being summaries of due care requirements, may be correct or incorrect. This circumstance alone excludes the possibility that they may be assumed to be protective statutes.²¹

¹⁷ OGH ZBI 1935/44; ZVR 1969/330; ZVR 1979/283; SZ 52/109; ZVR 1983/35; ZVR 1990/85; ImmZ 1990, 287; bbl 2004, 203; see also *Koziol*, Haftpflichtrecht II (fn. 4) 102; *R. Welser*, Haftungsprobleme der Wintersportausübung, in: R. Sprung/B. König (eds.), *Das österreichische Schirecht* (1977) 385, 422 f.; Schwimann/*Harrer* (fn. 1) § 1311 no. 12; *J. Pichler*, Zur Haftung bei Schiunfällen, ZVR 1969, 59, 65 f.

¹⁸ *Karollus* (fn. 6) 103 ff.; see also Rummel/*Reischauer* (fn. 1) § 1311 no. 4; KBB/*Karner* (fn. 1) § 1311 no. 4; see also *E. Wagner*, Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 337 ff.

¹⁹ OGH ZVR 1974/35.

²⁰ *Karollus* (fn. 6) 115 ff.; Rummel/*Reischauer* (fn. 1) § 1311 no. 4.

²¹ Rummel/*Reischauer* (fn. 1) § 1311 no. 5; KBB/*Karner* (fn. 1) § 1311 no. 4; Schwimann/*Harrer* (fn. 1) § 1311 no. 29; OGH JBI 1972, 569; ZVR 1984/17.

4. *What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?*

- 12 There is dispute in Austria on the interplay between private law and public law, in particular as regards the law relating to damages. We must consider in particular how precise rules of conduct which arise out of administrative law regulations relate to the general requirement of the duty of care as laid down in § 1295(1) ABGB. The question of admissibility under public law must rightly be strictly distinguished from that of admissibility under civil law. Whereas public law governs the relationship between the individual and the State, private law governs relationships “between private individuals”, from which we may conclude that something which is permitted under public law may be inadmissible under civil law.²²

This view requires further substantiation: the rights of personality (objects of absolute legal protection) that are decisive during an examination of illegality in relation to tortious liability, give rise to legal relationships under private law since they are part of the core of the civil law system within the meaning of art. 10(1) no. 6 *Bundes-Verfassungsgesetz* (Austrian Constitution, B-VG). In addition to the protection of life, health and property under private law, administrative law regulations frequently provide for the protection of assets and health. If administrative law provisions permit a certain type of conduct which does not meet the due care requirements laid down under private law, such conduct may give rise to liability under civil law, irrespective of how it is judged under administrative law. This applies in particular if the tortfeasor was aware or should have been aware that the administrative law provision contradicts a higher ranking legal act (e.g. a decision (*Bescheid*) that contravenes a statute or regulation).

5. *If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?*

- 13 If conduct not only breaches public order, but also results in prejudice to another individual, such conduct frequently not only has consequences under the *Strafgesetzbuch* (Austrian Criminal Code, StGB) or under *Verwaltungsstrafgesetz* (Administrative Criminal Code, VStG), but may also result in liability

²² F. Kerschner, *Umwelthaftung im Nachbarrecht*, JBl 1993, 216, 220; R. Thienel, *Verfassungsrechtliche Grenzen für das vereinfachte Genehmigungsverfahren nach § 359b GewO*, Zeitschrift für Verwaltung (ZfV) 2001, 718, 731 fn. 63; T. Giefing, *Der Begriff des Kompetenzkonfliktes*, JBl 2003, 221, 232; OGH 4 Ob 173/03f; *Recht der Umwelt* (RdU) 2003, 151; Wagner (fn. 18) 400 ff.; dissenting: H. Mayer, *Kontrolle der Verwaltung durch ordentliche Gerichte?* ÖJZ 1991, 97; M. Hecht/G. Muzak, *Umwelthaftung im Nachbarrecht*, JBl 1994, 159.

under the principles of tort law.²³ Whereas the criminal or enforcement penalties are intended to meet general and special preventive purposes with a view to the protection of public order and security, tort law is intended to provide compensation for losses. The possibility of liability under tort law in addition to punishment by a court (the same applies in the case of administrative authorities), is demonstrated by the fact that the victim of a punishable act may join the judicial criminal or enforcement proceedings in the capacity of a “private party”, in order to assert his claims under private law, i.e. specifically his compensation claims.²⁴

Informally therefore, the ordering of criminal or enforcement penalties under a criminal or administrative enforcement provision does not in any way preclude the possibility of a claim for damages. In fact, rules of conduct under civil law may be derived from the rules of criminal or enforcement law, without the other features of the criminal or enforcement rule in question being directly incorporated into the law of tort.²⁵

6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

Not every administrative provision equally constitutes a protective statute within the meaning of § 1311 ABGB. As already explained, it makes a significant difference whether an administrative law provision simply defines the general duty of care or additionally justifies its classification as a genuine protective statute. The special significance of the liability circumstances described in sent. 2 of § 1311 ABGB consists of the abstract control of risk: only those rules of conduct which establish a point of reference prior to the damage and are therefore distinct from the precise object of legal protection are covered.

An examination of the protective purpose of a provision presupposes a specification of the relevant rule of conduct. The protective purpose must be ascertained, because a simple (albeit culpable) contravention of the rule of conduct does not per se substantiate a damages claim. Instead, an examination must be made into whether the rule of conduct in question is intended to prevent damage, such as that which actually occurred.²⁶ To answer this question, the intent of the actual historical legislator must be examined. Whether there must also be an objectively teleological investigation of the protective purpose, which is derived out of the intent of the historical legislator, is a matter of dispute. Not only the fundamental relationship between the subjectively teleological and the objectively teleological method of interpretation is of decisive relevance

²³ See Karollus (fn. 6) 216 ff.

²⁴ See § 47 and 366 *Strafprozessordnung* (Criminal Procedure Code, StPO).

²⁵ See Karollus (fn. 6) 220 ff.

²⁶ Koziol, *Haftpflichtrecht I* (fn. 1) no. 8/21; Rummel/*Reischauer* (fn. 1) § 1295 no. 8 ff.; KBB/*Karner* (fn. 1) § 1295 no. 9.

for a response to this question, since we are dealing in this case with the specific question of the transformation of a rule of conduct into the sphere of tortious liability.²⁷ This “remote effect” affords the rule of conduct a dimension which is frequently given little consideration by the primary legislator.

- 16 A ruling dating from 1960²⁸ illustrates this problem: the municipal council of a large city issued a regulation requiring dogs to be kept on leads. According to the minutes of the council meeting, the aim was to protect public gardens. The OGH was asked to clarify whether the injury caused to a child as a result of a dog bite was covered by the protective purpose of the precise order. The OGH affirmed this, and at the same time declared the grounds put forward by the municipal council to be insignificant. Koziol agreed with this “objective” approach and also welcomed the fact that the OGH did not focus on the “short-sighted motives” of the drafter of the rule, but on the purpose which a reasonable legislator would have pursued through such a provision.²⁹ According to Reischauer, the protective area covered by a rule of conduct must be judged on the basis of the intent of the actual legislator. Consideration must also be given to the jurisdiction of the legislator in question. In the case referred to above, according to Reischauer, one cannot ignore the fact that the municipality did not even have jurisdiction to issue rules of conduct aimed at protection from dog bites.³⁰

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 17 Under Austrian civil law, although a legal person cannot commit a tort,³¹ it may be held liable for tortious conduct on the part of its agents. Firstly, a legal person must be answerable for its agents under general provisions (§ 1313a, 1315 ABGB),³² whilst secondly it is also liable for the injurious conduct of its representatives (*Repräsentanten*). According to more recent case law, these include not only its executives, but also all persons having an autonomous, managerial or supervisory function.³³
- 18 § 9 VStG must further be observed in connection with rules of conduct that may be derived from administrative law provisions.³⁴ This provision defines

²⁷ See *Karollus* (fn. 6) 354 f.

²⁸ OGH EvBl 1960/127.

²⁹ *Koziol*, *Haftpflichtrecht I* (fn. 1) no. 8/29.

³⁰ *Rummel/Reischauer* (fn. 1) § 1311 no. 10.

³¹ OGH JBl 1978, 543.

³² *B.A. Koch*, in: *Koziol/Bydlinski/Bollenberger* (eds.) (fn. 1) (KBB/*Koch*) § 26 no. 16; see, e.g., OGH SZ 60/49.

³³ *R. Ostheim*, Gedanken zur deliktischen Haftung für Repräsentanten anlässlich der neueren Rechtsprechung des OGH, JBl 1978, 57 ff.; *Koziol*, *Haftpflichtrecht II* (fn. 4) 375 ff.; KBB/*Koch* (fn. 32) § 26 no. 16; SZ 51/80; *ecolex* 2004, 524.

³⁴ See *Karollus* (fn. 6) 246 ff.

the administrative enforcement responsibility as regards legal persons and partnerships under commercial law. § 9(2) VStG makes provision for the executive bodies called upon to represent the company externally to be entitled or even obliged to appoint one or more persons from amongst their number as responsible agents with responsibility for adherence to administrative regulations. This provision is primarily motivated by the law relating to administrative enforcement. Since only restricted punishment of legal persons is possible, and they are not therefore considered capable of bearing tortious liability under administrative enforcement law, in contrast to the situation under judicial criminal law, a natural person must be brought in as the addressee of the enforcement rule. However, this concept cannot be transferred to civil law, where the principle of tortious liability of legal entities is recognised. Thus in civil law terms, § 9 VStG does not alter the identity of the addressees of the obligations in question in the case of legal persons. In other words, despite the appointment of a responsible agent, the corporate institution remains the addressee of the obligation.³⁵

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

As regards the punishability of legal persons and partnerships, there has been a major change in Austria since 1 January 2006, the date on which the *Verbandsverantwortlichkeitsgesetz* (Collective Liability Act, VbVG)³⁶ came into force.³⁷ This Act defines the prerequisites subject to which *Verbände* (“collective groups”, in particular legal persons and partnerships) are liable for criminal or punishable acts and how they are penalised. One criterion for the punishability of a collective group is the fact that the act was committed for its benefit, or that the act caused a breach of obligations incumbent on the collective group. In addition, punishability depends on whether the act in question was undertaken by a decision-maker (*Entscheidungsträger*) or by an employee (*Mitarbeiter*). The collective group is responsible for punishable acts by a decision-maker if the actual decision-maker illegally and culpably committed the act. Decision-makers include Managing Directors, Executive Board members or *Prokuristen* (officers with statutory authority), members of the Supervisory Board or the Board of Directors, and also persons who exercise significant influence on the management of the collective group.

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³⁵ See *Karollus* (fn. 6) 248 ff.; see also *M. Lukas*, in: *M. Lukas/R. Resch* (eds.), *Haftung für Arbeitsunfälle am Bau* (2001) 38 f.

³⁶ BGBl I 2005/151.

³⁷ See *E. Köck*, Zur Regierungsvorlage eines Verbandsverantwortlichkeitsgesetzes, JBl 2005, 477; *R. Soyer*, Neues Unternehmensstrafrecht und Präventionsberatung, Grundzüge des Entwurfs eines Verbandsverantwortlichkeitsgesetzes (VbVG) – neue Herausforderungen für die Anwaltschaft! Anwaltsblatt (AnwBl) 2005, 11; *W. Brandstetter*, Strafbarkeit juristischer Personen ab 1.1.2006! *ecolex* 2006, 6.

- 20 The collective group is not responsible for punishable acts by simple employees merely because they have brought about the statutory circumstances. The collective group must furthermore have enabled the commission of the act or have significantly facilitated it, through the fact that the decision-makers failed to take the due care required or reasonably expected in the circumstances, in particular by having failed to take important technical, organisational or human resources measures in order to prevent such acts.
- 21 The consequences of the VbVG on the tortious liability of collective groups have not been investigated in detail so far.³⁸ It is obvious that a collective group which may be held liable under criminal or enforcement laws for the conduct of its decision-makers or employees, is also liable under civil law if the damage caused by the punishable act is covered by the protective purpose of the breached criminal rule. However, since persons who may be qualified as decision-makers according to the VbVG may well as a rule be considered to be representatives under civil law and are consequently attributable to the collective group, no major changes as regards the tortious liability of collective groups have come about as a result of the VbVG. The same is also likely to apply with respect to the tortious liability of employees, since in this context the VbVG presupposes at least negligent conduct on the part of the decision-makers, in addition to the punishable act of the employee in question. Under this alternative, we must at all events assume there to have been fault under civil law, in relation to the selection or supervision, which justifies tortious liability. This does not constitute liability for agents, but liability for the own fault of the representatives who are directly attributable to the collective group.

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

- 22 A dense network of safety regulations, based on the requirements under European law, has evolved in Austria. This includes the establishment of environmental standards, alongside rules laying down technical standards for the safety of technical facilities, machines, products and services.³⁹ Such standards are found not only in statutes in the formal and substantive sense, but also in what are termed rules of the art, which are postulated by private organisations and institutions. As already explained, such non-statutory standards do not establish protective statutes within the meaning of § 1311 ABGB.⁴⁰ Despite this, they are also of (admittedly indirect) importance in this context, because

³⁸ See H. Koziol, Die außervertragliche Unternehmerhaftung im Diskussionsentwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 18, 19 fn. 10.

³⁹ These standards are important but not in all cases decisive to determine the general standard of care (see supra no. 2) the public may reasonably expect from a person under certain circumstances; see Koziol/Welser (fn. 1) 312; supra no. 4 and infra no. 40 f.

⁴⁰ See supra no. 11

relevant administrative regulations are frequently based on the acknowledged rules of the art. An example is § 5(3) no. 5 *Produktsicherheitsgesetz*, according to which the safety requirements of a product are judged in particular on the basis of the state of knowledge and the art. Such rules demonstrate the de facto importance of non-statutory technical or engineering standards.

However, on the basis of § 1311 ABGB, *statutory* requirements in relation to product safety are of direct importance as regards tortious liability, since they are recognisably deemed to be protective statutes.⁴¹ However, under general tortious liability according to § 1295(1) ABGB, statutory and non-statutory technical standards are equally important as regards definitions of the general duty of care. As an example, the OGH has declared that *Ö-Normen* contain a summary of habitual due care requirements.⁴² Thus a breach of *Ö-Normen* justifies, at least prima facie, the assumption of a breach of due care. However in this context, contrary to the situation in relation to other protective statutes, the assumption of a true reversal of the burden of proof does not appear justified.

Similarly to the statutory requirements in relation to product safety, the statutory environmental protection rules must also be qualified as protective statutes within the meaning of § 1311 ABGB, inasmuch as they are also intended to protect individuals.⁴³ In the view of the OGH, this last prerequisite is not implicitly met in the case of administrative regulations with environmental relevance. In a ruling, the Court declared that provisions of the law relating to the protection of nature are not intended to protect the asset-related interests of individuals, but to protect the interests of the general public.⁴⁴ This excludes the assumption that this is a protective statute. In contrast, the provisions of the *Gewerbeordnung* (Trade, Commerce and Industry Regulation Act, GewO) for operational facilities serve to protect the life, health and property (and other rights in rem) of neighbours. § 1311 ABGB therefore comes into play in the event of a breach of these provisions.⁴⁵ The regulations relating to keeping water sources clean that are laid down in the *Wasserrechtsgesetz* (Water Rights Act, WRG) are qualified as protective statutes,⁴⁶ and furthermore, the WRG itself contains specific provisions relating to damages.

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

The *Produktsicherheitsgesetz* and the PHG supplement one another and together form the law relating to product quality, which is intended to ensure,

⁴¹ See *Welser/Rabl* (fn. 9) § 5 no. 59.

⁴² OGH 30 January 1990, 5 Ob 515/90 ecolex 1990, 543.

⁴³ See *P. Rummel/F. Kerschner*, *Umwelthaftung im Privatrecht* (1991) 6 ff.

⁴⁴ OGH 10 October 2002, 1 Ob 313/01b SZ 2002/128.

⁴⁵ OGH JBl 1993, 532 with cmt. by *F. Kerschner*; 1 Ob 41/94; JBl 1998, 657; JBl 2002, 390 with cmt. by *F. Kerschner*; *Recht der Wirtschaft* (RdW) 2004, 725.

⁴⁶ OGH SZ 57/16; SZ 57/134; JBl 1991, 247; JBl 1991, 580; ZVR 1994/97; SZ 70/159; *Schwimmann/Harrer* (fn.1) § 1311 no. 29.

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for the entire domestic market, firstly that losses caused by defective or unsafe products are prevented, and secondly that claim settlement is guaranteed if prevention fails.⁴⁷ However, the *Produktsicherheitsgesetz* not only provides important (albeit not conclusive) determinants for the appraisal of a product defect within the meaning of § 5 PHG; as explained above, its provisions are acknowledged to be protective statutes.⁴⁸ Consequently, the *Produktsicherheitsgesetz* not only takes account of the public interest in a corresponding safety standard in relation to products. Rather, it pursues the aim of protecting human life and health from exposure to hazardous products (§ 1 *Produktsicherheitsgesetz*). This ruling aims to protect individuals. On this basis, it may be understood as an expression of the general duty of care requirement that may be derived from the general clause of § 1295(1) ABGB. A clear consonance may be observed in this respect. We must not overlook the fact that a balance between the public interest in safe products and the specific interests of the business circles affected underlies relevant administrative law provisions such as the *Produktsicherheitsgesetz*. Apart from these economic interests, which may have differing effects within the legislative process, account must be taken of the fact that relevant safety regulations in relation to products or services are generally only able to take account of typical risks. As a result, they cannot conclusively define due care requirements. This all demonstrates that the provisions relating to tortious damages and the administrative regulations in question at best supplement one another, but may in some circumstances even serve opposing interests.

- 26 This also applies especially to environmental protection regulations, where economic interests, in particular those of industry, play a prominent role. Only in this way can the fact be explained that the decades of effort in Austria to create an environmental liability statute have so far been unsuccessful (however, there is now a real need for action in this respect, due to the Environmental Liability Directive (2004/35/CE)).⁴⁹ Apart from this, it is agreed in Austria that the implementation of modern environmental protection provisions is primarily a public law exercise.⁵⁰ Private law, and consequently tort law, is only afforded a supplementary function. Thus private law is only required to cover the residual risk of officially approved activities and to guarantee the financial settlement of compensation claims which have arisen.⁵¹

⁴⁷ Schwimann/*Posch* (fn. 9) Einleitung PHG no. 7.

⁴⁸ See *supra* no. 4.

⁴⁹ See *M. Hinteregger*, RL-Vorschlag zur Umwelthaftung, *ecolex* 2002, 301; *M. Kisslinger*, Checkliste: Das neue EG-Umwelthaftungsrecht in Kürze, *RdU* 2004, 98; cf. also the government bill concerning a federal statute on environmental liability with regard to the prevention and remedying of environmental damage (*Bundes-Umwelthaftungsgesetz*, B-UHG), Nummer 95 der Beilagen zu den Stenographischen Protokollen des Nationalrates (BlgNR) 23. Gesetzgebungsperiode (GP).

⁵⁰ Schwimann/*Harrer* (fn. 1) Vorbemerkungen § 1293 ff. no. 42.

⁵¹ OGH SZ 57/16; SZ 57/134; JBl 1991, 247; JBl 1991, 580; ZVR 1994/97; SZ 70/159; Schwimann/*Harrer* (fn. 1) § 1311 no. 29.

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

We have already discussed the nature of administrative law safety regulations and environmental protection provisions as protective statutes. Whereas the safety regulations are seen as abstract risk prohibitions that are aimed at protecting individuals, and consequently as protective statutes, this is not implicitly the case as regards administrative regulations with environmental relevance. Legal provisions relating to nature protection in particular serve to protect the general public. Individuals are not covered by their protective purpose. However, according to case law, this is not the case in relation to the provisions in the GewO relating to production facilities and the WRG. The provisions of the *Forstgesetz* (Forestry Act), the *Mineralrohstoffgesetz* (Mineral Resources Act), the *Altlastensanierungsgesetz* (Rehabilitation of Hazardous Sites Act), the *Abfallwirtschaftsgesetz* (Waste Management Act, AWG) and the *Luftreinhaltegesetze* (Clean Air Acts), which all establish a duty of approval, are also intended to protect the individual. Protection of the individual obviously frequently depends on their proximity to the regulated activity, since most of these provisions are only intended to protect neighbours.

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A breach of safety regulations concerning products will frequently result in liability under the PHG irrespective of fault, since § 5(1) PHG declares a product to be defective if it does not afford the safety which one is entitled to expect, with consideration to all the circumstances. As already explained, these expectations are defined in detail in the relevant safety regulations, albeit only by way of minimum standards.⁵²

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Apart from this, a breach of a safety regulation may also result in tortious liability, with the injured party enjoying a certain degree of relaxation of the burden of proof, in view of the applicability of § 1311 ABGB. According to case law, the tortfeasor must prove that he is not culpable if there is found to be a clear breach of the relevant protective statute.⁵³ This reversal of the burden of proof, based on § 1298 ABGB, also covers the burden of proof for objective breaches of the duty of care (clearly only where there is found to be a breach of a protective statute).⁵⁴ As regards the causal link too, case law affords the injured party relaxation of the burden of proof on the basis of § 1311 ABGB. Some rulings also even refer to a reversal of the burden of

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⁵² See supra no. 4.

⁵³ OGH SZ 51/109; ZVR 1998/3; ZVR 2001/17; see also Schwimann/Harrer (fn. 1) § 1298 no. 22; dissenting: R. Reischauer, Der Entlastungsbeweis des Schuldners (1978) 188 f.; Koziol, Haftpflichtrecht I (fn. 1) no. 16/40; KBB/Karner (fn. 1) § 1298 no. 4.

⁵⁴ Reischauer (fn. 53) 116 ff.; Koziol, Haftpflichtrecht I (fn. 1) no. 16/15; Karollus (fn. 6) 177; KBB/Karner (fn. 1) § 1298 no. 2.

proof.⁵⁵ Although this is opposed in the literature,⁵⁶ the injured party is at the same time allowed to present prima facie evidence if the precise loss which the protective statute is designed to prevent has occurred.⁵⁷ These relaxations of the burden of proof also apply in the event of the breach of administrative regulations with environmental relevance if these may be qualified as protective statutes.

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 30 Valid Austrian law contains a mandatory requirement for liability insurance, for the operators of hazardous plants in particular.⁵⁸ § 59 *Kraftfahrzeuggesetz* (Motor Vehicles Act, KFG) contains the most important requirement of a mandatory liability insurance policy in practical terms. It relates to motor vehicles registered in Austria. There are parallel provisions for aircraft, maritime vessels and cable cars. § 10 *Atomhaftungsgesetz* (Nuclear Liability Act, AtomHG) obviously provides for an extensive insurance obligation. The *Gentechnikgesetz* (Genetic Engineering Act, GTG) contains a similar provision in § 79j. An obligation to contract third party liability insurance also exists in relation to the transportation of natural gas through a high pressure remote transmission network (§ 14(1) no. 2 *Gaswirtschaftsgesetz* (Gas Management Act, GWG)) and to the transportation of products in pipelines (§ 13 *Rohrleitungsgesetz* (Pipelines Act, RLG)).
- 31 As regards product safety, § 16 PHG lays down a requirement for adequate cover: manufacturers and importers of products must make provision, in the manner and to the extent habitual in a business conducted in good faith, by contracting insurance or by taking other appropriate steps to ensure that compensation payment obligations existing under the Product Liability Act can be satisfied. § 70 AWG provides for a more general adequate cover provision obligation. Under this provision, notifiable waste disposal may only take place provided the person making the notification has previously deposited a security or has provided evidence of adequate insurance cover.
- 32 Amongst the service professions, the requirement to take out adequate cover also applies to lawyers, notaries, business trustees, patent attorneys, insurance brokers, certification service suppliers, court expert witnesses and interpreters, mediators and also companies who conduct security checks in courts. Con-

⁵⁵ OGH ZVR 1980/266; ZVR 1985/1; ZVR 1985/9; dissenting: OGH ZVR 1988/174.

⁵⁶ See *Koziol*, *Haftpflichtrecht I* (fn. 1) no. 16/37, 39; *KBB/Karner* (fn. 1) § 1311 no. 6.

⁵⁷ *R. Welsch*, *Schutzgesetzverletzung, Verschulden und Beweislast*, ZVR 1976, 1, 6 f.; *Koziol*, *Haftpflichtrecht I* (fn. 1) no. 16/39; *KBB/Karner* (fn. 1) § 1311 no. 6; OGH ZVR 1978/89; *EvBl* 1996/18; *JB1* 2000, 113.

⁵⁸ See *M. Hinteregger*, *Die Pflichthaftpflichtversicherung aus zivilrechtlicher Sicht*, VR 2005, 44.

tracting a third party liability insurance policy also represents an instrument for adequate cover provision.⁵⁹

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

In terms of the law relating to damages, safety regulations and the provisions of environmental law have no special status, in that provided they have a relevant protective purpose, they may be qualified as protective statutes within the meaning of § 1311 ABGB. On this basis, this question and also the following questions may be answered very briefly: the classification of relevant provisions as protective statutes simplifies liability in a number of ways.⁶⁰ The perpetrator is held liable even if he did not injure the object of legal protection, but simply breached the protective statute. Moreover, the burden of proof on the injured party is lightened, and there may even be a reversal of the burden of proof, with respect to questions related to the illegality of the act and the causal link.

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2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

If a protective statute requires or prohibits specific conduct, in order to hold an abstract risk at bay, then different conduct may be regarded as a contravention, but is not necessarily illegal. The simple fact that a product put on the market by the tortfeasor does not comply with the statutory prescribed safety standards may point towards illegality, but does not permit a conclusive judgement to be given in this regard.⁶¹ In order to trigger a duty to pay damages, it is also necessary for the tortfeasor to have acted contrary to the duty of care in an objective sense with respect to the protective statute in question. However, if this criterion is met, liability is excluded if an accusation cannot be made against the tortfeasor with respect to his conduct. A personal accusation in relation to conduct may only be made against individuals who were capable of reasonable decision-making at the time of the act. Culpability therefore depends on the physical and mental state and the age of the tortfeasor.⁶²

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⁵⁹ See Hinteregger, VR 2005, 44.

⁶⁰ See supra no. 29.

⁶¹ See Koziol, Haftpflichtrecht I (fn. 1) no. 4/14; Rummel/Reischauer (fn. 1) § 1311 no. 6; Karollus (fn. 6) 159 ff.; KBB/Karner (fn. 1) § 1311 no. 5.

⁶² See Koziol, Haftpflichtrecht I (fn. 1) no. 5/8 ff.

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

- 35 According to consistent case law, the tortfeasor of a breach of a protective statute is only liable for the loss which the law is seeking to prevent.⁶³ In this context a distinction must be made between the personal and material protective purposes, within the meaning of the precise definition already proposed for German law by Rümelin.⁶⁴ The question of whether the rule of conduct in question was intended to hold at bay the actual nature and precise manner of occurrence of the loss which arose, and whether precisely the injured party was to be protected from such a loss, must therefore be the subject of investigation. When examining the objective of personal protection, we must also look at the question of whether the rule breached was also intended to protect the individual. Consideration must be given to the fact that administrative law regulations in particular are not intended to grant the right to bring personal damages claims, but pursue quite different purposes. This is also the reason why personal protection is denied under nature protection law provisions for example, as already mentioned above.⁶⁵ However, the fact that a rule has been issued in the interests of the general public does not exclude the possibility of damages claims being derived out of it. The only criterion is that it must at least also have the intention of protecting the injured party.⁶⁶ However, protection of an affected party cannot be derived from simple reflex effects of a rule of conduct.

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

- 36 We must consider the question of whether it is the objective of a rule of conduct to make the illegally acting damaging party also liable for those disadvantages which also would have been brought about in the event of lawful conduct. If the rule of conduct prohibits specific conduct in the interests of damage prevention, then there is no longer any basis for liability if the same loss would have been caused if there had been legal conduct.⁶⁷ However, reliance on legal conduct does not bring exemption from liability if the rule of conduct breached is not primarily targeted at loss prevention, but seeks to unconditionally link interference with a third party object of protection to spe-

⁶³ See Rummel/Reischauer (fn. 1) § 1295 no. 7 f., § 1311 no. 10.

⁶⁴ M. Rümelin, Die Verwendung der Causalbegriffe im Straf- und Civilrecht, Archiv für die civilistische Praxis (AcP) 90 (1900) 171, 304 ff.

⁶⁵ See supra no. 24.

⁶⁶ See Rummel/Reischauer (fn. 1) § 1311 no. 10; OGH SZ 28/127.

⁶⁷ OGH ZVR 1956/132; ZVR 1978/314; SZ 51/126; JBl 1992, 316; ZVR 1993/122; ZVR 1999/97; Schwimann/Harrer (fn. 1) § 1301 f. no. 54; KBB/Karner (fn. 1) § 1295 no. 14; dissenting: Karollus (fn. 6) 399 ff.; see also H. Koziol, Rechtmäßiges Alternativverhalten – Auflockerung starrer Lösungsansätze, in: H.-J. Ahrens/Ch. von Bar/G. Fischer/A. Spickhoff/J. Taupitz (eds.), Festschrift für E. Deutsch (1999) 179.

cific procedure.⁶⁸ In such a situation, case law also makes the tortfeasor liable if the occurrence of the loss could not have been avoided even if his conduct had been legal.⁶⁹ In this case, the damages claim acquires an important penalty-inducing and preventive function: the rule intends to prevent losses being caused through specific operations by all means. This is, for example, the case if an accused party in criminal proceedings is detained without adherence to the relevant provisions.⁷⁰

However, in the case of the safety regulations and environmental provisions under consideration here, the tortfeasor cannot as a rule be held liable if the loss would have arisen even if his conduct had been legal. The tortfeasor is, however, required to prove that the increase in risk caused by the breach of law did not occur in the case under consideration. This distribution of the burden of proof is justified for reasons related to penalty and prevention.⁷¹

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5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

As already explained, case law assumes a reversal of the burden of proof in relation to illegality when applying § 1311 ABGB.⁷² If a breach of the protective statute is established, it is assumed that the breach of law is due to conduct by the tortfeasor which is objectively in breach of his duty of care. Consequently, it is a matter for the perpetrator to prove that even a normal person could not have realised the objective prescribed by the protective statute, even if he had applied the requisite due care. Such a reversal of the burden of proof in the case of breaches of protective statutes is largely refuted in the literature.⁷³ Instead, authors plead in favour of the application of prima facie evidence.⁷⁴ Thus, illegal conduct on the part of the perpetrator is merely intimated by the breach of the protective statute. Such prima facie evidence also has effect during an examination of causality. If precisely that loss has occurred which the protective statute was designed to prevent, then the existence of a causal link may prima facie be concluded.⁷⁵

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⁶⁸ See *Koziol*, Haftpflichtrecht I (fn. 1) no. 8/65; *F. Harrer*, Schadenersatz wegen hoheitlicher Freiheitsentziehung, *Zivilrecht aktuell* (Zak) 2005, 9; *Schwimann/Harrer* (fn. 1) § 1301 f. no. 55; *KBB/Karner* (fn. 1) § 1295 no. 14.

⁶⁹ OGH SZ 54/108; SZ 59/141; Österreichische Richterzeitung (RZ) 1996/51.

⁷⁰ OGH SZ 54/108.

⁷¹ See *Koziol*, Haftpflichtrecht I (fn. 1) no. 8/67.

⁷² See *supra* no. 29.

⁷³ See *Reischauer* (fn. 53) 188 f.; *Koziol*, Haftpflichtrecht I (fn. 1) no. 16/40; *KBB/Karner* (fn. 1) § 1298 no. 4.

⁷⁴ See *KBB/Karner* (fn. 1) § 1311 no. 6.

⁷⁵ See *Rummel/Reischauer* (fn. 1) § 1298 no. 4.

6. Can a breach of an administrative law rule result in a claim for punitive damages?

- 39 The imposition of punitive damages is excluded under Austrian law, even in conjunction with product safety regulations and environmental provisions.

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the “regulatory permit defence”?

- 40 Even where administrative law regulations, such as safety regulations, are intended to protect the individual, they do not conclusively define the duties of care aimed at the protection of life, physical integrity or property. Consequently, even if all relevant administrative regulations are adhered to, the tortfeasor may have committed a breach of his duty of care, thereby making himself liable.⁷⁶ In other words, the Austrian legal system does not allow a general “regulatory compliance defence”.
- 41 However, conduct may be justified by the fact that statutory authority to undertake a specific act exists.⁷⁷ An example is the right of the security forces to use weapons. Even an official approval is able to exclude the illegality of conduct if it withdraws from the person at risk the right to defend himself and thereby requires him to suffer the risk or the attack. However, this effect does not apply to every official approval. For example, it is acknowledged in relation to the official approval of installations that the right of defence may only be withdrawn if the approval is given under a procedure during which the interests of neighbours are properly taken into account.⁷⁸ If important circumstances have altered since the official approval, and if the neighbours have no right to apply for subsequent requirements to be prescribed in this respect, then the official approval has no justifying effect as regards tort law.⁷⁹

⁷⁶ See *Koziol*, *Haftpflichtrecht I* (fn. 1) no. 4/99; *P. Oberhammer*, in: M. Schwimann (ed.) (Schwimann/*Oberhammer*), *ABGB-Praxiskommentar II* (3rd ed. 2005) § 364 no. 18; OGH *EvBl* 1968/21; *JB1* 1997, 658.

⁷⁷ See *Koziol*, *Haftpflichtrecht I* (fn. 1) no. 4/99.

⁷⁸ See *K. Spielbüchler*, in: P. Rummel (ed.) (*Rummel/Spielbüchler*), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch I* (3rd ed. 2000) § 364a no. 4; *Koziol*, *Haftpflichtrecht I* (fn. 1) no. 4/99; *B. Eccher*, in: *Koziol/Bydlinski/Bollenberger* (eds.) (fn. 1) (*KBB/Eccher*) § 364a no. 3; OGH *JB1* 1989, 646.

⁷⁹ OGH *JB1* 1996, 446 with cmt. by *P. Jabornegg* = *EvBl* 1996/83 = *ecolex* 1996, 162 with cmt. by *G. Wilhelm* = *RdU* 1996, 39 with cmt. by *F. Kerschner*.

2. Can the general duty of care go beyond these rules?

As the above explanations demonstrate,⁸⁰ the general duty of care to be observed within the context of the law relating to damages may extend beyond the care requirements laid down in administrative law regulations. However, this applies in particular if official approvals have a justification effect.

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3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

Even if the general duty of care under tort law extends further than that laid down in administrative law regulations, adherence to the latter points against the existence of illegal conduct, at least on a prima facie basis.⁸¹ In this context, no reversal of the burden of proof may be assumed. However, it must be noted that no clear opinions have been given on this question in either case law or literature.

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IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

Specific provisions of the law relating to damages appear in a number of administrative statutes, in particular in the environmental field. Irrespective of their actual regulatory context, these are by their nature civil law provisions, which were issued by way of supplements to the individual administrative law provisions.⁸² Specific examples are the provisions laid down in the *Forstgesetz* (§ 53–57), the *GTG* (§ 79a–79j and 101a f.), the *Mineralrohstoffgesetz* (§ 160–169) and the *WRG* (§ 26). The relevant provisions all establish liability irrespective of fault. They close liability loopholes which would arise, particularly in the sphere of environmental liability, on the basis of simple tortious liability. This notwithstanding, the provisions in question are merely isolated rules. Against this background, the impending transposition of the Environmental Liability Directive will signify true progress.⁸³ Apart from this Directive, reference should be made to the liability between neighbouring landowners (*Nachbarhaftung*) which is governed within the framework of property law (§ 364 f. ABGB). A landowner can bar its neighbour from producing immissions inas-

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⁸⁰ See supra no. 41.

⁸¹ Cf. OGH JBI 1983, 324.

⁸² See KBB/*Eccher* (fn. 78) § 364a no. 7.

⁸³ See supra fn. 49.

much as they exceed the customary level in the relevant place and considerably impair the use of the estate (§ 364(2) ABGB).⁸⁴ In the case of such immissions, in addition to actions for damage compensation (depending on fault), the owner of the affected neighbouring property may file an action (independent of fault) for injunctive relief (*Unterlassung*) and removal (*Beseitigung*).⁸⁵ But even beyond the field of *Nachbarhaftung* a (potential) victim of tortious liability can file a claim for an injunction in case of an (imminent) unlawful conduct of the respondent. This claim does not depend on fault.⁸⁶

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?

- 45 As already mentioned,⁸⁷ the official approval of an operating facility may justify encroachment upon the objects of protection of neighbours. In the case in question, immissions may be generated by a mine or other approved facility. Immissions from such facilities must be suffered even if they exceed the normal local level. Since the approval means that discontinuance claims are excluded in the same way as the tortious liability of the operator of the facility, § 364a ABGB makes provision for an independent claim by the neighbours for compensation payments for those losses which they suffer as a result of immissions in excess of the normal local level.⁸⁸ Obviously, illegality and fault are not issues under such a special compensation claim.⁸⁹
- 46 By analogy with § 364a ABGB, a compensation claim irrespective of fault is allowed if the appearance of absence of risk is given, as a result of another approval (not covered by this provision), and the neighbour who has suffered damage has as a result failed to file on time the discontinuance claim that is in effect due to him.⁹⁰

⁸⁴ A special rule (§ 364a ABGB) applies if the immissions are produced by an operating facility with an official approval; see *supra* no. 41 and *infra* no. 45 f.

⁸⁵ See KBB/*Eccher* (fn. 78) § 364 no. 13 f.

⁸⁶ See *Koziol/Welser* (fn. 1) 302.

⁸⁷ See *supra* no. 41.

⁸⁸ See *Rummel/Spielbüchler* (fn. 78) § 364a no. 4 ff.; *Schwimann/Oberhammer* (fn. 76) § 364a no. 9 f.; KBB/*Eccher* (fn. 78) § 364a no. 5 ff.

⁸⁹ *Schwimann/Oberhammer* (fn. 76) § 364a no. 9.

⁹⁰ OGH JBl 1993, 653; JBl 1995, 785; JBl 1997, 521; KBB/*Eccher* (fn. 78) § 364a no. 7; *Schwimann/Oberhammer* (fn. 76) § 364a no. 9.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

A cannot be held liable on the basis of § 1311 ABGB because the authority did not require him to take further action to reduce immissions. However, it is questionable whether the operator may be held liable for a breach of the general duty of care. In the final analysis, the operator may rely on an existing official approval. This notwithstanding, in a comparable case, the Austrian Supreme Court considered the operator to have acted wrongfully.⁹¹ However, at that time, adjacent owners did not yet have the right to apply for additional requirements in relation to the operation on the basis of an altered situation. In view of this legal protection loophole, the Supreme Court found that an affected neighbour could bring discontinuance claims against the operator in a comparable case. However, this case law is likely to be at least partially obsolete, since adjacent owners in such situations now have the right to make such applications (§ 79a(3) GewO).⁹² If the authority wrongly fails to comply with the application by adjacent owners to issue additional requirements, then the discontinuance claim by the adjacent owners is revived due to the altered interests, and with consideration of the new legal situation. In this case, tortious damages claims against the operator of the factory are also possible. The situation may differ if the adjacent owners fail to avail themselves of their right of application.

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The legal position also differs as regards potential public liability. Case law has in fact repeatedly declared there to be public liability where the trade authority has illegally and culpably failed to issue the requisite requirements for the operation in the event of a change in interests.⁹³ However, irrespective of fault on the part of the authority, compensation cannot be claimed if the injured party has culpably failed to assert the legal remedies due to him against the authority (§ 2(2) *Amtshaftungsgesetz* (State Liability Act, AHG)). Therefore, in this case too, the assertion of compensation claims depends on this.

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⁹¹ See supra fn. 79.

⁹² KBB/*Eccher* (fn. 78) § 364a no. 3; Schwimann/*Oberhammer* (fn. 76) § 364a no. 3 ff.

⁹³ See *W. Schragel*, *Kommentar zum Amtshaftungsgesetz* (3rd ed. 2003) no. 145; OGH SZ 63/166.

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

- 49 According to case law, regulations designed to protect employees not only protect the employees themselves, but also those individuals who enter the area of risk on an authorised basis.⁹⁴ However, a one-off visitor to the workshop would not fall within this group of individuals. B cannot therefore be held liable under § 1311 ABGB. It is questionable whether B has breached his general duties of care towards the injured party. In this context, B's duties of care must be given special consideration. The scope of these duties will decisively depend on whether the workshop was freely accessible.⁹⁵ If this is the case, then failure to observe employee protection regulations may equally mean a breach of the duties of care incumbent on B.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

- 50 In view of B's glaring breach of safety regulations, there is no doubt that he is liable to pay damages for the losses that have occurred. Failure to supervise on the part of the authority is not capable of altering B's fault.

b) Could the injured persons claim damages from the government agency?

- 51 The injured party may also assert public liability claims, because the authority has failed to meet its duties to act in order to protect the injured party.⁹⁶ The fault on the part of the authority that is required for there to be public liability⁹⁷ must be affirmed, because the authority had been informed of B's breach of the safety regulations.

⁹⁴ OGH Miet 31.153; SZ 63/38; Rummel/Reischauer (fn. 1) § 1311 no. 13.

⁹⁵ Cf. KBB/Karner (fn. 1) § 1294 no. 6.

⁹⁶ Cf. OGH JBl 1993, 320; Schragel (fn. 93) no. 145.

⁹⁷ See Schragel (fn. 93) no. 142 ff.

DELIKTS- UND VERWALTUNGSRECHT IN ÖSTERREICH

*Meinhard Lukas**

I. Allgemeines

1. Welchen grundsätzlichen Einfluss haben die Bestimmungen des (verwaltungsrechtlichen) Verhaltensrechts auf das deliktische Schadenersatzrecht Ihres Landes?

Das *Allgemeine bürgerliche Gesetzbuch* (ABGB) nennt in § 1294 die „Quellen der Beschädigung“ und stellt dabei widerrechtliche Handlungen oder Unterlassungen zufälligen Ereignissen gegenüber. Rechtswidriges und schuldhaftes Verhalten verpflichtet den Täter nach der Generalklausel des § 1295 Abs. 1 ABGB zum Schadenersatz gegenüber dem Geschädigten. Die Beurteilung eines Verhaltens als rechtmäßig oder rechtswidrig ist unter Berücksichtigung aller Normen der Rechtsordnung vorzunehmen.¹ Es ist also nicht nur auf die Bestimmungen des Zivilrechts, sondern auch auf jene des Straf- und Verwaltungsrechts abzustellen. Das Verwaltungsrecht ist Teil des öffentlichen Rechts, das vom Privatrecht abzugrenzen ist (§ 1 ABGB). Es regelt die Vollziehung öffentlicher Aufgaben durch die Verwaltung in materiellrechtlicher und verfahrensrechtlicher Hinsicht.² Innerhalb des Verwaltungsrechts kann zwischen dem Organisationsrecht und dem hier interessierenden Verhaltensrecht (*regulatory law*) unterschieden werden. Das (verwaltungsrechtliche) Verhaltensrecht umfasst jene Vorschriften, welche die für die Rechtsgenossen verbindlichen Gebote, Verbote und Berechtigungen normieren.³ 1

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¹ Siehe H. Koziol/R. Welser, *Bürgerliches Recht II* (13. Aufl. 2007) 312; H. Koziol, *Österreichisches Haftpflichtrecht I* (3. Aufl. 1997) Rz. 4/1 ff.; E. Karner, in: H. Koziol/P. Bydlinski/R. Bollenberger (Hrsg.) (KBB/Karner), *Kurzkomentar zum ABGB* (2. Aufl. 2007) § 1294 Rz. 1 ff.; R. Reischauer, in: P. Rummel (Hrsg.) (Rummel/Reischauer), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II* (2. Aufl. 1992) § 1294 Rz. 6 ff.; F. Harrer, in: M. Schwimann (Hrsg.) (Schwimann/Harrer), *ABGB-Praxiskommentar VI* (3. Aufl. 2006) § 1294 Rz. 6 ff.

² Siehe W. Antonioli/F. Kojas, *Allgemeines Verwaltungsrecht* (3. Aufl. 1996) 92 ff.

³ Siehe Antonioli/Koja (Fn. 2) 99.

- 2 Die österreichische Rechtsordnung verleiht hochwertigen Rechtsgütern wie dem Leben, der körperlichen Integrität oder dem Eigentum einen absoluten Rechtsschutz.⁴ Allein schon im Hinblick darauf trifft jedermann die Pflicht, sich diesen Rechtsgütern gegenüber sorgfältig zu verhalten (allgemeine Sorgfaltspflicht).⁵ Die konkreten Sorgfaltspflichten sind anhand eines objektiven Sorgfaltsmaßstabes zu beurteilen, wobei hier der Gesetzgeber zwischen der Sorgfalt eines maßgerechten Durchschnittsmenschen (§ 1297 ABGB) und eines Fachmannes (§ 1299 ABGB) differenziert. Bei der Konkretisierung des Sorgfaltsmaßstabes kommt verwaltungsrechtlichen Normen maßgebliche Bedeutung zu. Aus ihnen kann sich ergeben, welches Verhalten der Gesetzgeber gegenüber einem bestimmten Rechtsgut erwartet. Weicht der Täter davon ab, ist in aller Regel eine Sorgfaltsverletzung gegenüber dem betroffenen Rechtsgut anzunehmen.

- 3 Aus schadenersatzrechtlicher Sicht haben nun aber verwaltungsrechtliche Normen keineswegs nur die Funktion, die Sorgfaltsanforderungen gegenüber absolut geschützten Rechtsgütern näher zu umschreiben. Vielmehr kann ihnen als sogenannte *Schutzgesetze* zentrale Bedeutung zukommen: § 1311 Satz 2 ABGB normiert eine Ersatzpflicht für den Fall der Übertretung eines Gesetzes, das eine zufällige Beschädigung verhindern will. Der Sache nach geht es hier freilich nicht um eine verschuldensunabhängige Zufallshaftung; vielmehr will § 1311 Satz 2 ABGB zum Ausdruck bringen, dass eine Gesetzesübertretung auch dann eine Schadenersatzpflicht des Täters nach sich zieht, wenn für ihn die Folgen seiner Tat nicht vorhersehbar waren, zumal bereits die Gesetzesübertretung ein Verschulden zu begründen vermag. Voraussetzung ist lediglich, dass bezogen auf das Schutzgesetz ein objektiv sorgfaltswidriges Verhalten des Täters vorliegt, das diesem auch subjektiv vorwerfbar ist. Bezugspunkt der Verschuldensprüfung ist demnach nicht das verletzte Rechtsgut, sondern das fragliche Schutzgesetz selbst.⁶ In diesem Zusammenhang wird daher auch von einem *verkürzten Verschuldensbezug* der Haftungsnorm des § 1311 ABGB – verglichen mit der Generalklausel des § 1295 Abs. 1 ABGB – gesprochen. Damit zeigt sich zugleich die besondere Relevanz verwaltungsrechtlicher, aber auch strafrechtlicher Bestimmungen im Bereich des deliktischen Schadenersatzrechts, soweit sie vom Tatbestand des § 1311 ABGB erfasst sind.

- 4 Verwaltungsrechtlichen Vorschriften kommt auch innerhalb der verschuldensunabhängigen Haftung zentrale Bedeutung zu. Hier ist vor allem die Produkthaftung zu nennen. So wird zur Produkthaftungs-Richtlinie (85/374/EWG)

⁴ H. Koziol, Österreichisches Haftpflichtrecht II (2. Aufl. 1984) 5 ff.; Koziol/Welser (Fn. 1) 312.

⁵ Rummel/Reischauer (Fn. 1) § 1294 Rz. 13; Oberster Gerichtshof (OGH) in: Juristische Blätter (JBl) 1953, 547; Evidenzblatt der Rechtsmittelentscheidungen (EvBl) in: Österreichische Juristen-Zeitung (ÖJZ) 1959/174; Zeitschrift für Verkehrsrecht (ZVR) 1959/211; EvBl 1968/258; Entscheidungen des österreichischen Obersten Gerichtshofs in Zivil- (und Justizverwaltungs-) sachen (SZ) 43/177.

⁶ Siehe R. Welser, Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 1, 2 ff.; M. Karollus, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 84 ff., 269 ff.

vertreten, dass der Verstoß eines Produktes gegen die in der Produktsicherheits-Richtlinie vorgegebenen Standards zumindest die Vermutung einer Fehlerhaftigkeit i.S.d. Art. 6 Produkthaftungs-Richtlinie begründet. In Österreich wurde die Produktsicherheits-Richtlinie 92/59/EWG durch das am 1. Februar 1995 in Kraft getretene gemeinschaftsrechtskonforme *Produktsicherheitsgesetz* umgesetzt.⁷ Zwischenzeitlich wurde dieses Gesetz durch das seit dem 1. April 2005 in Geltung befindliche *Produktsicherheitsgesetz 2004*⁸ ersetzt. Die hier vorgesehenen Regelungen sind nicht nur als Schutzgesetze i.S.d. § 1311 ABGB zu qualifizieren und damit allesamt für die Verschuldenshaftung von Bedeutung.⁹ Vielmehr ergänzen *Produktsicherheits-* und *Produkthaftungsgesetz* (PHG) einander ebenso wie deren europarechtliche Vorgaben (Produkthaftungs-Richtlinie und Produktsicherheits-Richtlinie): Entspricht ein Produkt nicht den vom *Produktsicherheitsgesetz* (PSG) vorgegebenen Standards, ist grundsätzlich von dessen Fehlerhaftigkeit auszugehen. Selbst wenn aber ein Produkt den Anforderungen des PSG entspricht, kann es dennoch fehlerhaft i.S.d. § 5 PHG sein und eine entsprechende Haftung nach sich ziehen.¹⁰

Verwaltungsrechtlichen Rechtsquellen kommt für das Schadenersatzrecht schließlich auch insofern Bedeutung zu, als sich in einschlägigen Rechtsquellen regelmäßig auch spezifische Haftungsregeln finden. Derartige Regeln sind aber ungeachtet ihres Regelungszusammenhangs mit verwaltungsrechtlichen Bestimmungen dem Schadenersatzrecht und somit direkt dem Zivilrecht zuzuordnen.

2. Gibt es verfassungsrechtliche Grenzen oder Vorgaben für das Zusammenspiel zwischen Verwaltungs- und Deliktsrecht, etwa was das Verhältnis zwischen Bundes- und Landesrecht und dem Schutzzweck einer verwaltungsrechtlichen Bestimmung betrifft?

In Österreich fällt das Zivilrechtswesen grundsätzlich in die Zuständigkeit des Bundesgesetzgebers. Vor diesem Hintergrund stellt sich die Frage, ob verwaltungsrechtliche Bestimmungen der Länder als Schutzgesetze i.S.d. § 1311 ABGB in Betracht kommen. Schließlich hätte damit der Landesgesetzgeber in gewisser Hinsicht Einfluss auf das Schadenersatzrecht. Dessen ungeachtet hat die österreichische Rechtsprechung bereits seit längerer Zeit

⁷ Bundesgesetzblatt (BGBl.) 1995/63.

⁸ BGBl. I 2005/16.

⁹ Siehe R. Welser/Ch. Rabl, Produkthaftungsgesetz – Kommentar (2004) Vorbemerkungen Rz. 9, § 5 Rz. 59; W. Posch, in: M. Schwimann (Hrsg.) (Schwimann/Posch), ABGB-Praxiskommentar VII (3. Aufl. 2005) PHG Einleitung Rz. 6.

¹⁰ Siehe den 36. Erwägungsgrund der Produkt-Sicherheitsrichtlinie (2001/95/EG): „Diese Richtlinie lässt die Rechte von Geschädigten im Sinne der Richtlinie 85/374/EWG des Rates vom 25. Juli 1985 zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedstaaten über die Haftung für fehlerhafte Produkte unberührt.“ Siehe auch A. Broichmann, Das Produktsicherheitsgesetz als Vorgabe für die Produkt- und Produzentenhaftung (2001) 34 ff.

auch landesrechtliche Vorschriften als Schutzgesetze qualifiziert,¹¹ ohne dass dem in der Literatur widersprochen worden wäre.¹² Für die Einbeziehung der landesrechtlichen Vorschriften spricht in der Tat, dass auch ihnen relevante Beschränkungen der individuellen Bewegungsfreiheit durch die Anordnung von Verhaltenspflichten entnommen werden können. Da Bundes- und Landesrecht nach der österreichischen Verfassung in keinem Hierarchieverhältnis stehen, spricht alles dafür, dass diese Gleichbehandlung auch im Rahmen des § 1311 ABGB zu berücksichtigen ist.¹³ Verwaltungsrechtliche Vorschriften der Länder sind daher – innerhalb ihres örtlichen Geltungsbereiches – auch unter schadenersatzrechtlichen Gesichtspunkten zu berücksichtigen. Dies hat zwar eine örtliche Verschiedenheit des Deliktsrechts zur Konsequenz, die sich allerdings mit der föderalistischen Struktur der österreichischen Rechtsordnung rechtfertigen lässt: Das Bundesrecht begründet mittels § 1311 ABGB schadenersatzrechtliche Wirkungen unter Zuhilfenahme landesrechtlicher Normen. Aus der Kompetenzverteilung zwischen Bund und Ländern ergeben sich demnach keine spezifischen Grenzen für ein Zusammenspiel zwischen Verwaltungs- und Schadenersatzrecht.

- 7 Die für die Anwendung verwaltungsrechtlicher Bestimmungen maßgeblichen verfassungsrechtlichen Vorgaben und Grenzen sind selbstverständlich auch dort zu berücksichtigen, wo verwaltungsrechtliche Bestimmungen als Schutzgesetze zu qualifizieren und damit für die Beurteilung einer schadenersatzrechtlichen Haftung heranzuziehen sind. In diesem Zusammenhang sind insbesondere die verfassungsgesetzlich gewährleisteten subjektiven Rechte (*Grundrechte*) zu nennen, deren Verletzung beim Verfassungsgerichtshof geltend gemacht werden kann: Hat ein Gericht zweiter Instanz oder der *Oberste Gerichtshof* (OGH) im Rahmen eines Schadenersatzprozesses eine Norm als Schutzgesetz anzuwenden, gegen die verfassungsrechtliche Bedenken bestehen, so hat das Gericht diese Norm beim Verfassungsgerichtshof anzufechten.¹⁴

3. Welche Arten hoheitlicher Normen (z.B. Verordnungen, Bescheide) können – abgesehen von gesetzlichen Vorschriften – im Falle ihrer Verletzung eine deliktische Schadenersatzpflicht nach sich ziehen?

- 8 Schutzgesetze können alle Gesetze im materiellen Sinn und damit folglich auch *Verordnungen* sein.¹⁵ Dies folgt schon daraus, dass Verordnungen – ebenso

¹¹ OGH SZ 13/48; SZ 15/94; Zentralblatt für die juristische Praxis (ZBl) 1935/44; SZ 18/3; SZ 34/39; ZVR 1967/97; ZVR 1969/204; ZVR 1984/139; SZ 59/92; Immobilienzeitung (ImmZ) 1990, 287; Versicherungsrundschau (VR) 1997, 107; Mietrechtliche Sammlung (Miet) 45.162; Baurechtliche Blätter (bbl) 2004, 155.

¹² Koziol, Haftpflichtrecht II (Fn. 4) 107; Schwimann/Harrer (Fn. 1) § 1311 Rz. 29.

¹³ Siehe Karollus (Fn. 6) 118 f.

¹⁴ Siehe Art. 140 Abs. 1 Bundes-Verfassungsgesetz (B-VG); vgl. H. Mayer, Bundesverfassungsrecht (3. Aufl. 2002) Rz. III.1.

¹⁵ Karollus (Fn. 6) 96 ff.; siehe auch Koziol, Haftpflichtrecht II (Fn. 4) 102; Rummel/Reischauer (Fn. 1) § 1311 Rz. 4; P. Brunner, Die Zurechnung der Schadenersatzpflicht bei Verletzung eines „Schutzgesetzes“ gem § 1311 ABGB, ÖJZ 1972, 113, 115.

wie Gesetzen – relevante Verhaltensgebote zu entnehmen sind. Für eine unterschiedliche Behandlung dieser Rechtsakte besteht daher kein Grund. Auch in der Rechtsprechung sind Verordnungen bereits frühzeitig unter § 1311 ABGB subsumiert worden. Der Oberste Gerichtshof hat dies mit dem historischen Verständnis des Begriffs „Gesetz“ in § 1311 ABGB begründet, zumal der Gesetzgeber des Jahres 1811 darunter ganz allgemein obrigkeitliche Vorschriften verstanden hat.¹⁶

Die Rechtsprechung subsumiert auch individuelle Verwaltungsakte (Bescheide) unter § 1311 ABGB,¹⁷ obwohl sich hier die Lage deutlich komplexer darstellt als bei Verordnungen. Die Einordnung von Bescheiden als Schutzgesetze ist nur insoweit unproblematisch, als sie dem Gesetz entsprechen. Sieht dagegen ein individueller Hoheitsakt weitergehende Pflichten vor als von Gesetzes wegen normiert, scheidet die Annahme eines Schutzgesetzes aus, würde doch andernfalls der Geschädigte in einen Genuss kommen, den die Rechtsordnung ihm gar nicht zubilligt. Ein Bescheid ist daher im Lichte des § 1311 ABGB nach zutreffender Ansicht nur dann beachtlich, wenn er bloß der Konkretisierung gesetzlicher Verhaltenspflichten dient. Aus schadenersatzrechtlicher Sicht sind daher Bescheide auf ihre Rechtmäßigkeit zu überprüfen und rechtswidrige Bescheide zu negieren.¹⁸

Fraglich ist, inwiefern interne Verwaltungsvorschriften (Weisungen einschließlich sogenannter „Verwaltungsverordnungen“ (= generell gefasste Weisung an die Organwalter)) als Schutzgesetze zu qualifizieren sind. Der OGH hat diese Frage einmal bejaht, als er in einer Entscheidung auch einen an Soldaten gerichteten „Befehl“ als tauglichen Anknüpfungspunkt für eine Schutzgesetzhaftung angesehen hat.¹⁹ Gegen die Einbeziehung derartiger interner Verwaltungsvorschriften als Grundlage für ein deliktisches Rechtswidrigkeitsurteil spricht allerdings deren Rechtsnatur als rein interne – auf den Behördenbetrieb beschränkte – Normen. Interne Verwaltungsvorschriften binden den Organwalter nur gegenüber dem Vollziehungsträger, entfalten aber keinerlei Außenwirkung. Dann kann ihnen eine solche Außenwirkung auch nicht in deliktsrechtlicher Hinsicht zukommen.²⁰

Technische Normen (insbesondere die *Ö-Normen*) haben als solche keine Verbindlichkeit und sind demzufolge auch nicht als Schutzgesetze einzuordnen.

¹⁶ OGH in: J. Glaser/J. Unger (Hrsg.), Neue Folge, Sammlung zivilrechtlicher Entscheidungen des OGH (GlUNF) 3037; Siehe auch GlUNF 3517.

¹⁷ OGH ZBl 1935/44; ZVR 1969/330; ZVR 1979/283; SZ 52/109; ZVR 1983/35; ZVR 1990/85; ImmZ 1990, 287; bbl 2004, 203; siehe auch *Koziol*, Haftpflichtrecht II (Fn. 4) 102; *R. Welser*, Haftungsprobleme der Wintersportausübung, in: R. Sprung/B. König (Hrsg.), Das österreichische Schirecht (1977) 385, 422 f.; *Schwimann/Harrer* (Fn. 1) § 1311 Rz. 12; *J. Pichler*, Zur Haftung bei Schiunfällen, ZVR 1969, 59, 65 f.

¹⁸ *Karollus* (Fn. 6) 103 ff.; siehe auch *Rummel/Reischauer* (Fn. 1) § 1311 Rz. 4; *KBB/Karner* (Fn. 1) § 1311 Rz. 4; siehe auch *E. Wagner*, Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 337 ff.

¹⁹ OGH ZVR 1974/35.

²⁰ *Karollus* (Fn. 6) 115 ff.; *Rummel/Reischauer* (Fn. 1) § 1311 Rz. 4.

Anderes gilt nur, wenn sie durch den Gesetzgeber zu einem Gesetz im materiellen Sinn erhoben wurden. Abgesehen davon können Ö-Normen als Zusammenfassung von Sorgfaltsanforderungen richtig oder falsch sein. Allein schon dieser Umstand schließt die Annahme eines Schutzgesetzes aus.²¹

4. Welche privatrechtlichen Folgen hat es, wenn eine verwaltungsrechtliche Norm (gesetzliche Bestimmung, Bescheid etc.) eine (höherrangige) gesetzliche Bestimmung verletzt? Ist eine Haftung von Personen ausgeschlossen, die unter Beachtung einer solchen fehlerhaften, an sie gerichteten Norm einen Schaden verursachen? Spielt es in diesem Zusammenhang eine Rolle, dass der Täter die Fehlerhaftigkeit der von ihm beachteten Bestimmung kannte oder kennen musste?

- 12 Das Zusammenspiel zwischen Privatrecht und öffentlichem Recht ist in Österreich gerade auch in schadenersatzrechtlicher Hinsicht umstritten. Hier stellt sich vor allem die Frage, wie sich konkrete Verhaltensgebote, die sich aus verwaltungsrechtlichen Vorschriften ergeben, zum allgemeinen Sorgfaltsgebot nach § 1295 Abs. 1 ABGB verhalten. Nach richtiger Ansicht ist die Frage der öffentlich-rechtlichen Zulässigkeit von jener der zivilrechtlichen Zulässigkeit strikt zu unterscheiden. Während das öffentliche Recht das Verhältnis zwischen Individuum und Staat regelt, erfasst das Privatrecht das Verhältnis „inter privatos“. Daraus ist der Schluss zu ziehen, dass zivilrechtlich unzulässig sein kann, was öffentlich-rechtlich erlaubt ist.²²

Diese Überlegung bedarf einer näheren Begründung: Die im Rahmen der deliktischen Haftung (bei der Prüfung der Rechtswidrigkeit) maßgeblichen Persönlichkeitsrechte (absolut geschützte Rechtsgüter) begründen privatrechtliche Rechtsverhältnisse, zählen sie doch zum Zentralbereich des Zivilrechtswesens i.S.d. Art. 10 Abs. 1 Z. 6 B-VG. Neben dem privatrechtlichen Schutz des Lebens, der Gesundheit oder des Eigentums sehen auch verwaltungsrechtliche Vorschriften oftmals einen Vermögens- und Gesundheitsschutz vor. Erlauben verwaltungsrechtliche Bestimmungen ein bestimmtes Verhalten, das den Sorgfaltsanforderungen des Privatrechts nicht genügt, kann dieses Verhalten ungeachtet der verwaltungsrechtlichen Beurteilung eine zivilrechtliche Haftung nach sich ziehen. Das ist insbesondere dann der Fall, wenn der Täter wusste oder wissen musste, dass die verwaltungsrechtliche Regelung einem höherrangigen Rechtsakt widerspricht (z.B. gesetz- oder verwaltungswidriger Bescheid).

²¹ Rummel/Reischauer (Fn. 1) § 1311 Rz. 5; KBB/Karner (Fn. 1) § 1311 Rz. 4; Schwimann/Harrer (Fn. 1) § 1311 Rz. 29; OGH JBl 1972, 569; ZVR 1984/17.

²² F. Kerschner, Umwelthaftung im Nachbarrecht, JBl 1993, 216, 220; R. Thienel, Verfassungsrechtliche Grenzen für das vereinfachte Genehmigungsverfahren nach § 359b GewO, Zeitschrift für Verwaltung (ZfV) 2001, 718, 731 Fn. 63; T. Giefing, Der Begriff des Kompetenzkonfliktes, JBl 2003, 221, 232; OGH 4 Ob 173/03f; Recht der Umwelt (RdU) 2003, 151; Wagner (Fn. 18) 400 ff.; vgl. dagegen H. Mayer, Kontrolle der Verwaltung durch ordentliche Gerichte? ÖJZ 1991, 97; M. Hecht/G. Muzak, Umwelthaftung im Nachbarrecht, JBl 1994, 159.

5. Sind Rechtsfolgen, die das Verwaltungsrecht für den Fall der Verletzung seiner Bestimmungen vorsieht (insbesondere Verwaltungsstrafen), auch aus schadenersatzrechtlicher Sicht als abschließend zu betrachten? Wie verhalten sich in diesem Zusammenhang Delikts- und Strafrecht zueinander?

Verletzt ein Verhalten nicht nur die öffentliche Ordnung, sondern zieht es auch die Beeinträchtigung einer anderen Person nach sich, hat dieses Verhalten oftmals nicht nur Konsequenzen auf Grundlage des *Strafgesetzbuches* (StGB) oder des *Verwaltungsstrafrechts* (VStG), sondern kann auch eine Haftung nach den Grundsätzen des deliktischen Schadenersatzrechtes nach sich ziehen.²³ Während die strafrechtlichen Sanktionen general- und spezialpräventive Zwecke zum Schutz der öffentlichen Ordnung und Sicherheit verfolgen, zielt das Schadenersatzrecht auf den Ausgleich von Schäden. Dass eine schadenersatzrechtliche Haftung neben einer Bestrafung durch ein Gericht (Gleiches gilt auch für Verwaltungsbehörden) in Betracht kommt, zeigt sich schon daran, dass sich das Opfer einer strafbaren Handlung dem gerichtlichen Strafverfahren anschließen kann, um seine privatrechtlichen Ansprüche – also insbesondere seine Schadenersatzansprüche – als sogenannter „Privatbeteiligter“ durchzusetzen.²⁴

Ausgehend von diesen Grundsätzen ergibt sich zwanglos, dass die Anordnung von Strafsanktionen in einer strafrechtlichen oder verwaltungsstrafrechtlichen Regelung Schadenersatzansprüche keineswegs ausschließt. Vielmehr lassen sich aus strafrechtlichen Normen zivilrechtliche Verhaltenspflichten ableiten, ohne dass zugleich die sonstigen Merkmale der Strafnorm unmittelbar in das Deliktsrecht übernommen werden.²⁵

6. Unter welchen Voraussetzungen werden verwaltungsrechtliche Bestimmungen als Schutzgesetze betrachtet? Ergibt sich der Schutzzweck aus dem Verwaltungsrecht oder dem Deliktsrecht?

Nicht jede verwaltungsrechtliche Regelung ist zugleich ein Schutzgesetz i.S.d. § 1311 ABGB. Wie bereits ausgeführt, macht es einen wesentlichen Unterschied, ob eine verwaltungsrechtliche Bestimmung lediglich die allgemeine Sorgfaltspflicht konkretisiert oder überdies die Einordnung als echtes Schutzgesetz rechtfertigt. Die besondere Bedeutung des Haftungstatbestandes des § 1311 Satz 2 ABGB besteht in der abstrakten Gefahrensteuerung: Erfasst sind nur solche Verhaltensgebote, die einen der Schädigung vorgelagerten Bezugspunkt aufstellen und damit vom konkreten Rechtsgut abstrahieren.

Die Prüfung des Schutzzwecks einer Bestimmung setzt die Festlegung des relevanten Verhaltensgebotes bereits voraus. Der Schutzzweck ist zu ermitteln, weil die bloße (wenn auch schuldhaft) Übertretung der Verhaltensnorm per se noch keinen Schadenersatzanspruch begründet. Vielmehr ist zu prüfen, ob die

²³ Siehe Karollus (Fn. 6) 216 ff.

²⁴ Siehe § 47 und § 366 Strafprozessordnung (StPO).

²⁵ Siehe Karollus (Fn. 6) 220 ff.

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fragliche Verhaltensnorm gerade Schäden wie den eingetretenen verhindern will.²⁶ Bei Beantwortung dieser Frage ist zunächst einmal auf den Willen des konkreten historischen Normgebers abzustellen. Ob ergänzend auch eine objektiv-teleologische Ermittlung des Schutzzwecks in Betracht kommt, die von den konkreten Intentionen des historischen Gesetzgebers abstrahiert, ist umstritten. Für die Beantwortung dieser Frage ist nicht allein das grundsätzliche Verhältnis der subjektiv-teleologischen zur objektiv-teleologischen Interpretationsmethode maßgeblich, zumal es hier um die besondere Frage der Transformation einer Verhaltensnorm in den Bereich der Deliktshaftung geht.²⁷ Durch diese „Fernwirkung“ erhält die Verhaltensanordnung eine Dimension, über die sich der primäre Normgeber oft kaum Gedanken macht.

- 16 Eine Entscheidung aus dem Jahr 1960²⁸ mag dieses Problem illustrieren: Der Gemeinderat einer größeren Stadt hat im Rahmen einer Verordnung einen Leinenzwang für Hunde vorgesehen. Nach dem Sitzungsprotokoll des Gemeinderats ist dies zum Schutz der öffentlichen Gartenanlagen erfolgt. Vom Höchstgericht war nun zu klären, ob auch der einem Kind durch einen Hundebiss entstandene Schaden vom Schutzzweck der konkreten Anordnung umfasst ist. Der Oberste Gerichtshof hat diese Frage bejaht und dabei zugleich die Motive des Gemeinderates für unbeachtlich erklärt. Diesem „objektiven“ Ansatz stimmt Koziol zu und begrüßt zugleich, dass das Höchstgericht nicht auf die „kurzsichtigen Motive“ der Normverfasser abgestellt habe, sondern auf den Zweck, den ein vernünftiger Gesetzgeber mit einer solchen Vorschrift verfolgt hätte.²⁹ Nach Ansicht Reischauers ist dagegen der Schutzbereich eines Verhaltensgebots nach dem Willen des konkreten Normgebers zu beurteilen. Dabei sei auch dessen Zuständigkeit zu beachten. Im zuvor referierten Fall könne demnach nicht unberücksichtigt bleiben, dass die Gemeinde gar nicht dafür zuständig sei, Verhaltensgebote zum Schutz vor Hundebissen zu erlassen.³⁰

7. Wer ist für die Verletzung einer Verwaltungsvorschrift verantwortlich, wenn sich diese an eine juristische Person richtet? Ist eine natürliche Person auch schadenersatzrechtlich haftbar, wenn sie nach Maßgabe des Verwaltungsrechts für die Einhaltung der fraglichen Bestimmung verantwortlich ist? Wie verhält sich eine solche Haftung der verantwortlichen natürlichen Person zu einer Gehilfenhaftung der juristischen Person?

- 17 Eine juristische Person ist nach österreichischem Zivilrecht zwar nicht deliktischfähig;³¹ ihr kann jedoch das deliktische Verhalten ihrer Hilfspersonen zugerechnet werden. Zum einen hat sie nach allgemeinen Regeln (§ 1313a,

²⁶ Koziol, Haftpflichtrecht I (Fn. 1) Rz. 8/21; Rummel/Reischauer (Fn. 1) § 1295 Rz. 8 ff.; KBB/Karner (Fn. 1) § 1295 Rz. 9.

²⁷ Siehe Karollus (Fn. 6) 354 f.

²⁸ OGH EvBl 1960/127.

²⁹ Koziol, Haftpflichtrecht I (Fn. 1) Rz. 8/29.

³⁰ Rummel/Reischauer (Fn. 1) § 1311 Rz. 10.

³¹ OGH JBl 1978, 543.

1315 ABGB) für Gehilfen einzustehen,³² zum anderen haftet sie aber auch für das schädigende Verhalten ihrer Repräsentanten. Dazu zählen nach neuerer Rechtsprechung nicht nur ihre Organe, sondern auch alle Personen in eigenverantwortlicher, leitender oder überwachender Funktion.³³

Im Zusammenhang mit Verhaltensgeboten, die sich aus verwaltungsrechtlichen Bestimmungen ableiten lassen, ist überdies § 9 VStG zu beachten.³⁴ Diese Bestimmung regelt die verwaltungsstrafrechtliche Verantwortung im Bereich juristischer Personen und Personengesellschaften des Handelsrechts. § 9 Abs. 2 VStG sieht vor, dass die zur Vertretung nach außen berufenen Organe berechtigt oder allenfalls sogar verpflichtet sind, aus ihrem Kreis eine oder mehrere Personen als verantwortliche Beauftragte zu bestellen, denen die Verantwortung für die Einhaltung der Verwaltungsvorschriften obliegt. Diese Bestimmung ist primär verwaltungsstrafrechtlich motiviert. Da die Bestrafung juristischer Personen nur beschränkt in Frage kommt und sie daher im Bereich des Verwaltungsstrafrechts – anders als nunmehr im Bereich des gerichtlichen Strafrechts – nicht als deliktsfähig angesehen werden, soll eine andere Person als Adressat der Strafnorm einbezogen werden. Auf das Zivilrecht lässt sich dieser Gedanke jedoch nicht übertragen, weil hier eine deliktische Haftung juristischer Personen anerkannt wird. § 9 VStG bewirkt also aus zivilrechtlicher Sicht keinen Wechsel im Adressatenkreis der fraglichen Pflichten bei juristischen Personen. Mit anderen Worten: Der Unternehmensträger bleibt folglich trotz Bestellung eines verantwortlichen Beauftragten Adressat der Pflicht.³⁵

18

8. Sind juristische Personen selbst Adressaten einer verwaltungs(straf-)rechtlichen Haftung? Was sind die privatrechtlichen Folgen einer solchen Haftung? Zieht die verwaltungs(straf)rechtliche Haftung der juristischen Person auch eine schadenersatzrechtliche Haftung nach sich? Wie verhält sich die verwaltungs(straf)rechtliche Haftung der juristischen Person zu ihrer Haftung für Gehilfen?

Was die Strafbarkeit juristischer Personen sowie Personenhandelsgesellschaften betrifft, hat sich seit 1. Januar 2006 in Österreich eine maßgebliche Änderung ergeben. An diesem Tag ist das *Verbandsverantwortlichkeitsgesetz* (VbVG)³⁶ in

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³² B.A. Koch, in: Koziol/Bydlinski/Bollenberger (Hrsg.) (Fn. 1) (KBB/Koch) § 26 Rz. 16; siehe z.B. OGH SZ 60/49.

³³ R. Ostheim, Gedanken zur deliktischen Haftung für Repräsentanten anlässlich der neueren Rechtsprechung des OGH, JBl 1978, 57 ff.; Koziol, Haftpflichtrecht II (Fn. 4) 375 ff.; KBB/Koch (Fn. 32) § 26 Rz. 16; SZ 51/80; ecolex 2004, 524.

³⁴ Siehe Karollus (Fn. 6) 246 ff.

³⁵ Siehe Karollus (Fn. 6) 248 ff.; vgl. auch M. Lukas, in: M. Lukas/R. Resch (Hrsg.), Haftung für Arbeitsunfälle am Bau (2001) 38 f.

³⁶ BGBl. I 2005/151.

Kraft getreten.³⁷ Dieses Gesetz regelt, unter welchen Voraussetzungen „Verbände“ (insbesondere juristische Personen sowie Personenhandelsgesellschaften) für Straftaten verantwortlich sind und wie diese sanktioniert werden. Voraussetzung für die Strafbarkeit eines Verbandes ist zunächst einmal, dass die Tat zu seinen Gunsten begangen worden ist oder durch die Tat Pflichten verletzt worden sind, die den Verband treffen. Darüber hinaus hängt die Strafbarkeit davon ab, ob die fragliche Tat von einem Entscheidungsträger oder einem Mitarbeiter begangen wurde. Für Straftaten eines Entscheidungsträgers ist der Verband verantwortlich, wenn der Entscheidungsträger als solcher die Tat rechtswidrig und schuldhaft begangen hat. Zu den Entscheidungsträgern zählen Geschäftsführer, Vorstandsmitglieder oder Prokuristen sowie Mitglieder des Aufsichtsrates oder des Verwaltungsrates, aber auch sonstige Personen, die maßgeblichen Einfluss auf die Geschäftsführung des Verbandes ausüben.

- 20 Für Straftaten von bloßen Mitarbeitern ist der Verband nicht allein deswegen verantwortlich, weil diese den gesetzlichen Tatbestand verwirklicht haben. Der Verband muss überdies die Begehung der Tat dadurch ermöglicht oder wesentlich erleichtert haben, dass Entscheidungsträger die nach den Umständen gebotene oder zumutbare Sorgfalt außer Acht gelassen haben, insbesondere indem sie wesentliche technische, organisatorische oder personelle Maßnahmen zur Verhinderung solcher Taten unterlassen haben.
- 21 Die Folgen des VbVG für die deliktische Haftung von Verbänden sind bislang noch nicht näher untersucht worden.³⁸ Es liegt allerdings nahe, dass einen Verband, der für ein Verhalten seiner Entscheidungsträger bzw. Mitarbeiter strafrechtlich zur Verantwortung gezogen werden kann, auch eine zivilrechtliche Haftung trifft, wenn der durch die Straftat verursachte Schaden vom Schutzzweck der verletzten Strafnorm erfasst ist. Da allerdings Personen, die nach dem VbVG als Entscheidungsträger zu qualifizieren sind, zivilrechtlich wohl in aller Regel als Repräsentanten angesehen werden und schon deswegen dem Verband zuzurechnen sind, haben sich insofern durch das VbVG keine wesentlichen Änderungen für die deliktische Haftung von Verbänden ergeben. Gleiches dürfte auch hinsichtlich der deliktischen Haftung für Mitarbeiter zutreffen, setzt doch das VbVG in diesem Zusammenhang – neben der Straftat des Mitarbeiters – zumindest ein fahrlässiges Verhalten von Entscheidungsträgern voraus. In dieser Variante dürfte aus zivilrechtlicher Sicht aber ohnedies vom Vorliegen eines Auswahl- oder Überwachungsverschuldens auszugehen sein, das eine deliktische Haftung rechtfertigt. Dabei handelt es sich um keine Haftung für Gehilfen, sondern um eine Haftung für ein eigenes Verschulden der dem Verband direkt zurechenbaren Organe.

³⁷ Siehe E. Köck, Zur Regierungsvorlage eines Verbandsverantwortlichkeitsgesetzes, JBl 2005, 477; R. Soyer, Neues Unternehmensstrafrecht und Präventionsberatung. Grundzüge des Entwurfs eines Verbandsverantwortlichkeitsgesetzes (VbVG) – neue Herausforderungen für die Anwaltschaft! Anwaltsblatt (AnwBl) 2005, 11; W. Brandstetter, Strafbarkeit juristischer Personen ab 1.1.2006! ecoloex 2006, 6.

³⁸ Siehe H. Koziol, Die außervertragliche Unternehmerhaftung im Diskussionsentwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 18, 19 Fn. 10.

II. Sicherheitsvorschriften und umweltrechtliche Normen

1. Von welcher Bedeutung sind (a) gesetzliche Sicherheitsvorschriften und (b) umweltrechtliche Regelungen für das deliktische Schadenersatzrecht Ihres Landes?

In Österreich hat sich – ausgehend von den europarechtlichen Vorgaben – ein enges Netz von Sicherheitsvorschriften entwickelt. Hier ist neben der Normierung technischer Standards für die Sicherheit von technischen Einrichtungen, Maschinen, Produkten und Dienstleistungen auch die Anordnung von Umweltstandards zu nennen.³⁹ Derartige Standards finden sich nicht nur in Gesetzen im formellen und materiellen Sinn, sondern auch in sogenannten Regeln der Technik, die von privaten Organisationen und Institutionen postuliert werden. Wie bereits ausgeführt, begründen derartige nicht-gesetzliche Standards keine Schutzgesetze i.S.d. § 1311 ABGB.⁴⁰ Gleichwohl kommt ihnen – freilich nur mittelbar – auch in diesem Zusammenhang Bedeutung zu, weil einschlägige Verwaltungsvorschriften oftmals auf die anerkannten Regeln der Technik abstellen. Beispielhaft erwähnt sei hier § 5 Abs. 3 Z. 5 PSG. Nach dieser Bestimmung beurteilen sich die Sicherheitsanforderungen an ein Produkt insbesondere nach dem Stand des Wissens und dem Stand der Technik. Damit zeigt sich die faktische Bedeutung auch von nicht gesetzlich determinierten Regeln der Technik.

22

Gesetzlichen Vorgaben zur Produktsicherheit kommt dagegen auf Grundlage von § 1311 ABGB unmittelbare Bedeutung für die deliktische Haftung zu, da sie anerkannterweise als Schutzgesetze anzusehen sind.⁴¹ Im Rahmen der allgemeinen deliktischen Haftung nach § 1295 Abs. 1 ABGB sind dagegen gesetzliche und nicht-gesetzliche technische Standards gleichermaßen bedeutsam, um die allgemeine Sorgfaltspflicht zu konkretisieren. So hat der Oberste Gerichtshof ausgesprochen, dass die Ö-Normen eine Zusammenfassung üblicher Sorgfaltsanforderungen enthalten.⁴² Ein Verstoß gegen Ö-Normen rechtfertigt also zumindest prima facie die Annahme einer Sorgfaltspflichtverletzung. Die Annahme einer echten Beweislastumkehr erscheint dagegen in diesem Zusammenhang – anders als bei echten Schutzgesetzen – nicht gerechtfertigt.

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Ebenso wie die gesetzlichen Vorgaben zur Produktsicherheit sind auch die gesetzlichen Regeln zum Schutz der Umwelt als Schutzgesetze i.S.d. § 1311 ABGB zu qualifizieren, soweit sie auch den Einzelnen schützen sollen.⁴³ Gerade die zuletzt genannte Voraussetzung ist nach Ansicht des Obersten Gerichtshofs bei umweltrelevanten Verwaltungsvorschriften nicht ohne weiteres erfüllt. So hat der Oberste Gerichtshof in einer Entscheidung ausgesprochen, dass naturschutz-

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³⁹ Diese Verhaltensstandards sind zwar wesentlich, aber nicht entscheidend, um die allgemeine Sorgfaltspflicht (siehe oben Rz. 2) zu determinieren, welche die Allgemeinheit vom Einzelnen zumutbarerweise erwartet; siehe *Koziol/Welser* (Fn. 1) 312; oben Rz. 4 und unten Rz. 40 f.

⁴⁰ Siehe oben Rz. 11.

⁴¹ Siehe *Welser/Rabl* (Fn. 9) § 5 Rz. 59.

⁴² OGH 30. Januar 1990, 5 Ob 515/90 *ecolex* 1990, 543.

⁴³ Siehe *P. Rummel/F. Kerschner*, Umwelthaftung im Privatrecht (1991) 6 ff.

rechtliche Bestimmungen nicht den Schutz vermögenswerter Interessen Einzelner, sondern nur den Schutz von Interessen der Allgemeinheit bezwecken.⁴⁴ Dies schließt die Annahme eines Schutzgesetzes aus. Demgegenüber dienen die Regelungen in der *Gewerbeordnung* für Betriebsanlagen dem Schutz des Lebens, der Gesundheit und des Eigentums (und sonstiger dinglicher Rechte) der Nachbarn. Im Falle einer Verletzung dieser Bestimmungen greift daher § 1311 ABGB ein.⁴⁵ Auch die Vorschriften zur Reinhaltung von Gewässern im *Wasserrechtsgesetz* (WRG) werden als Schutzgesetze qualifiziert,⁴⁶ wobei das WRG selbst ohnedies spezifische schadenersatzrechtliche Regelungen enthält.

2. Inwieweit verfolgen in Ihrem Land verwaltungsrechtliche und deliktische Regeln auf diesem Gebiet identische oder ähnliche Zwecke?

- 25 Produktsicherheitsgesetz und Produkthaftungsgesetz ergänzen einander und bilden zusammen ein Produktqualitätsrecht, das für den gesamten Binnenmarkt sicherstellen soll, dass einerseits Schäden durch fehlerhafte bzw. unsichere Produkte verhindert werden und andererseits ein Schadensausgleich sichergestellt ist, wenn die Prävention zu kurz greift.⁴⁷ Dem Produktsicherheitsgesetz sind nun aber nicht nur wesentliche (wenngleich nicht abschließende) Determinanten für die Beurteilung eines Produktfehlers i.S.d. § 5 PHG zu entnehmen, sondern seine Bestimmungen sind – wie bereits ausgeführt – anerkanntermaßen auch Schutzgesetze.⁴⁸ Das PSG trägt demnach nicht nur dem öffentlichen Interesse an einem entsprechenden Sicherheitsstandard von Produkten Rechnung. Es verfolgt vielmehr das Ziel, das Leben und die Gesundheit von Menschen vor der Gefährdung durch gefährliche Produkte zu schützen (§ 1 PSG). Diese Anordnung zielt auf den Schutz des Einzelnen. Insofern lässt sie sich als Ausdruck des aus der Generalklausel des § 1295 Abs. 1 ABGB ableitbaren allgemeinen Sorgfaltsgebotes verstehen. Hier ist also durchaus ein Gleichklang zu beobachten. Dabei darf aber nicht übersehen werden, dass einschlägigen verwaltungsrechtlichen Regelungen wie dem PSG notwendigerweise ein Interessenausgleich zwischen dem öffentlichen Interesse an sicheren Produkten und den spezifischen Interessen der betroffenen Wirtschaftskreise zugrunde liegt. Abgesehen von diesen ökonomischen Interessen, die sich im Gesetzgebungsprozess unterschiedlich auswirken können, ist überdies zu berücksichtigen, dass einschlägige Sicherheitsvorschriften bezüglich Produkten oder Dienstleistungen regelmäßig nur typische Gefahren berücksichtigen können. Folglich können sie die Sorgfaltsanforderungen nicht abschließend regeln. All dies zeigt, dass die Bestimmungen des deliktischen Schadenersatzrechts und die fraglichen Verwaltungsvorschriften einander bestenfalls ergänzen, unter Umständen aber sogar gegenläufigen Interessen dienen.

⁴⁴ OGH 10. Oktober 2002, 1 Ob 313/01b SZ 2002/128.

⁴⁵ OGH JBl 1993, 532 mit Anmerkungen (Anm.) F. Kerschner; 1 Ob 41/94; JBl 1998, 657; JBl 2002, 390 mit Anm. F. Kerschner; Recht der Wirtschaft (RdW) 2004, 725.

⁴⁶ OGH SZ 57/16; SZ 57/134; JBl 1991, 247; JBl 1991, 580; ZVR 1994/97; SZ 70/159; Schwimann/Harrer (Fn.1) § 1311 Rz. 29.

⁴⁷ Schwimann/Posch (Fn. 9) Einleitung PHG Rz. 7.

⁴⁸ Siehe oben Rz. 4.

Das gilt in besonderem Maße auch für Vorschriften zum Schutz der Umwelt, spielen doch hier ökonomische Interessen insbesondere der Industrie eine herausragende Rolle. Nur so lässt sich erklären, dass die jahrzehntelangen Bemühungen in Österreich um die Schaffung eines Umwelthaftungsgesetzes bis heute erfolglos geblieben sind (nunmehr ergibt sich allerdings aufgrund der Umwelthaftungs-Richtlinie (2004/35/EG) ein entsprechender Handlungsbedarf).⁴⁹ Abgesehen davon besteht in Österreich Einigkeit, dass die Verwirklichung eines modernen Umweltschutzes vornehmlich eine öffentlich-rechtliche Aufgabe darstellt.⁵⁰ Dem Privatrecht – und damit dem deliktischen Schadenersatzrecht – wird lediglich eine ergänzende Funktion zugebilligt. Demnach beschränkt sich die Aufgabe des Privatrechts auf die Abdeckung des Restrisikos von behördlich genehmigten Tätigkeiten und die Gewährleistung des finanziellen Ausgleichs bei eingetretenen Schäden.⁵¹

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3. Werden einschlägige Regelungen per se als Schutzgesetze qualifiziert? Werden Einzelpersonen vom Schutzzweck dieser Regelungen erfasst? Stellt deren Verletzung in Ihrer Rechtsordnung ein rechtswidriges Verhalten dar? Oder zieht sie eine verschuldensunabhängige Haftung nach sich?

Zum Schutzgesetzcharakter von verwaltungsrechtlichen Sicherheitsvorschriften und Bestimmungen zum Schutz der Umwelt wurde bereits Stellung genommen: Während die Sicherheitsvorschriften als abstrakte Gefährdungsverbote zum Schutz des Einzelnen – und damit als Schutzgesetze – angesehen werden, ist dies bei umweltrelevanten Verwaltungsvorschriften nicht ohne weiteres der Fall. Insbesondere naturschutzrechtliche Regelungen dienen nur dem Schutz der Allgemeinheit. Einzelpersonen sind von ihrem Schutzzweck nicht erfasst. Anderes gilt dagegen nach der Rechtsprechung für die Bestimmungen des *Betriebsanlagenrechts* und des *Wasserrechtsgesetzes*. Einen Schutz des Einzelnen bezwecken dann aber wohl auch die jeweils eine Bewilligungspflicht statuierenden Bestimmungen des *Forstgesetzes*, des *Mineralrohstoffgesetzes*, des *Altlastensanierungsgesetzes*, des *Abfallwirtschaftsgesetzes* sowie des *Luftreinhaltegesetzes* für Kesselanlagen. Der Schutz des Einzelnen hängt hier freilich oftmals von dessen Nähe zur regulierten Aktivität ab, intendieren doch die genannten Bestimmungen meist nur den Schutz der Nachbarschaft.

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Ein Verstoß gegen Sicherheitsvorschriften wird oftmals eine verschuldensunabhängige Haftung nach dem Produkthaftungsgesetz nach sich ziehen, zumal § 5 Abs. 1 PHG ein Produkt für fehlerhaft erklärt, wenn es nicht die Sicherheit

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⁴⁹ Siehe *M. Hinteregger*, RL-Vorschlag zur Umwelthaftung, *ecolex* 2002, 301; *M. Kisslinger*, Checkliste: Das neue EG-Umwelthaftungsrecht in Kürze, *RdU* 2004, 98; vgl. nunmehr auch die Regierungsvorlage betreffend ein Bundesgesetz über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden (Bundes-Umwelthaftungsgesetz, B-UHG), Nummer 95 der Beilagen zu den Stenographischen Protokollen des Nationalrates (BlgNR) 23. Gesetzgebungsperiode (GP).

⁵⁰ Schwimann/*Harrer* (Fn. 1) Vorbemerkungen § 1293 ff. Rz. 42.

⁵¹ OGH SZ 57/16; SZ 57/134; JBl 1991, 247; JBl 1991, 580; ZVR 1994/97; SZ 70/159; Schwimann/*Harrer* (Fn. 1) § 1311 Rz. 29.

bietet, die man unter Berücksichtigung aller Umstände zu erwarten berechtigt ist. Wie bereits ausgeführt, werden diese Erwartungen durch die einschlägigen Sicherheitsvorschriften – freilich nur im Sinne eines Mindeststandards – näher determiniert.⁵²

- 29 Abgesehen davon kann ein Verstoß gegen eine Sicherheitsvorschrift auch eine Verschuldenshaftung nach sich ziehen, wobei hier dem Geschädigten angesichts der Anwendbarkeit des § 1311 ABGB gewisse Beweiserleichterungen zugute kommen: Geht es nach der Rechtsprechung, hat der Täter zu beweisen, dass ihn kein Verschulden trifft, wenn die Verletzung des maßgeblichen Schutzgesetzes feststeht.⁵³ Diese – auf § 1298 ABGB gestützte – Beweislastumkehr erfasst auch die Beweislast für die objektive Sorgfaltswidrigkeit (freilich nur bei feststehender Schutzgesetzverletzung).⁵⁴ Auch was den Kausalzusammenhang betrifft, billigt die Rechtsprechung dem Geschädigten im Rahmen des § 1311 ABGB Beweiserleichterungen zu. In einigen Entscheidungen wird sogar von einer Beweislastumkehr gesprochen.⁵⁵ Dem wird zwar in der Lehre widersprochen,⁵⁶ zugleich aber dem Geschädigten ein prima-facie-Beweis zugebilligt, wenn gerade jener Schaden eingetreten ist, den das Schutzgesetz verhindern sollte.⁵⁷ Diese Beweiserleichterungen greifen auch im Falle der Verletzung umweltrelevanter Verwaltungsvorschriften ein, soweit sie als Schutzgesetze zu qualifizieren sind.

4. *Erörtern Sie gesetzliche Vorgaben im Rahmen von Sicherheitsvorschriften oder umweltrechtlichen Regelungen, die eine Haftpflichtversicherung vorsehen.*

- 30 Im geltenden österreichischen Recht finden sich zwingende Haftpflichtversicherungen vor allem für die Betreiber von gefährlichen Anlagen.⁵⁸ Die praktisch bedeutsamste Anordnung einer Pflichthaftpflichtversicherung enthält § 59 *Kraftfahrgesetz* (KFG). Sie betrifft in Österreich zugelassene Kraftfahrzeuge. Parallele Regelungen finden sich für Luftfahrzeuge, Seeschiffe und Seilbahnen. Eine weitreichende Versicherungspflicht sieht naheliegenderweise auch das *Atomhaftungsgesetz* (AtomHG) (§ 10) vor. Eine ähnliche Regelung enthält das *Gentechnikgesetz* (GTG) (§ 79j). Die Verpflichtung zum Abschluss einer Haftpflichtversicherung besteht auch für den Transport von Erdgas durch

⁵² Siehe oben Rz. 4.

⁵³ OGH SZ 51/109; ZVR 1998/3; ZVR 2001/17; siehe auch Schwimann/Harrer (Fn. 1) § 1298 Rz. 22; vgl. dagegen R. Reischauer, Der Entlastungsbeweis des Schuldners (1978) 188 f.; Koziol, Haftpflichtrecht I (Fn. 1) Rz. 16/40; KBB/Karner (Fn. 1) § 1298 Rz. 4.

⁵⁴ Reischauer (Fn. 53) 116 ff.; Koziol, Haftpflichtrecht I (Fn. 1) Rz. 16/15; Karollus (Fn. 6) 177; KBB/Karner (Fn. 1) § 1298 Rz. 2.

⁵⁵ OGH ZVR 1980/266; ZVR 1985/1; ZVR 1985/9; abweichend OGH ZVR 1988/174.

⁵⁶ Siehe Koziol, Haftpflichtrecht I (Fn. 1) Rz. 16/37, 39; KBB/Karner (Fn. 1) § 1311 Rz. 6.

⁵⁷ R. Welsch, Schutzgesetzverletzung, Verschulden und Beweislast, ZVR 1976, 1, 6 f.; Koziol, Haftpflichtrecht I (Fn. 1) Rz. 16/39; KBB/Karner (Fn. 1) § 1311 Rz. 6; OGH ZVR 1978/89; EvBl 1996/18; JBl 2000, 113.

⁵⁸ Siehe M. Hinteregger, Die Pflichthaftpflichtversicherung aus zivilrechtlicher Sicht, VR 2005, 44.

ein Hochdruckfernleitungsnetz (§ 14 Abs. 1 Z. 2 *Gaswirtschaftsgesetz*) sowie die Beförderung von Gütern in Rohrleitungen (§ 13 *Rohrleitungsgesetz*).

Was die Sicherheit von Produkten betrifft, normiert § 16 PHG eine Deckungsvorsorgeverpflichtung: Hersteller und Importeure von Produkten haben in einer Art und in einem Ausmaß, wie sie im redlichen Geschäftsverkehr üblich sind, durch das Eingehen einer Versicherung oder in anderer geeigneter Weise dafür Vorsorge zu treffen, dass nach dem PHG bestehende Schadenersatzpflichten befriedigt werden können. Eine noch allgemeiner gehaltene Deckungsvorsorgeverpflichtung normiert § 70 *Abfallwirtschaftsgesetz* 2002 (AWG). Nach dieser Bestimmung darf eine anzeigepflichtige Verbringung von Abfällen nur dann erfolgen, wenn die anzeigende Person zuvor Sicherheit geleistet oder eine ausreichende Versicherung nachgewiesen hat.

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Auch im Bereich der Dienstleistungsberufe bestehen Deckungsvorsorgeverpflichtungen für Rechtsanwälte, Notare, Wirtschaftstreuhänder, Patentanwälte, Versicherungsmakler, Zertifizierungsdiensteanbieter, Gerichtssachverständige und -dolmetscher, Mediatoren sowie für Unternehmen, die Sicherheitskontrollen in Gerichten durchführen. Instrument zur Deckungsvorsorge ist der Abschluss einer Haftpflichtversicherung.⁵⁹

32

III. Verschuldenshaftung

A. Verletzung verwaltungsrechtlicher Bestimmungen

1. Welche Rolle spielt im Rahmen der Verschuldenshaftung ein Verstoß gegen Sicherheitsvorschriften oder umweltrechtliche Regelungen?

Sicherheitsvorschriften und umweltrechtliche Regelungen nehmen aus schadenersatzrechtlicher Sicht keine Sonderstellung ein, da sie – einen entsprechenden Schutzzweck vorausgesetzt – als Schutzgesetze i.S.d. § 1311 ABGB zu qualifizieren sind. Ausgehend davon lassen sich die vorliegende Frage und auch die nachfolgenden Fragen in aller Kürze beantworten: Die Einordnung einschlägiger Regelungen als Schutzgesetze bringt verschiedene Haftungserleichterungen.⁶⁰ Auch wenn der Täter nicht die Verletzung des betroffenen Rechtsguts, sondern lediglich die Übertretung des Schutzgesetzes verschuldet hat, kommt eine Haftung in Betracht. Überdies kommt der Geschädigte in den Genuss einer Beweiserleichterung bzw. allenfalls sogar einer Beweislastumkehr, was Fragen der Rechtswidrigkeit und des Kausalzusammenhanges betrifft.

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⁵⁹ Siehe *Hinteregger*, VR 2005, 44.

⁶⁰ Siehe oben Rz. 29.

2. Begründet bereits die bloße Verletzung einer solchen Regelung eine Rechtswidrigkeit oder bestehen dafür zusätzliche Erfordernisse wie etwa die Verletzung einer Sorgfaltspflicht und Verschulden?

- 34 Gebietet oder verbietet ein Schutzgesetz ein bestimmtes Verhalten, um eine abstrakte Gefährdung hintanzuhalten, so ist ein abweichendes Verhalten zwar tatbestandsmäßig, es muss aber nicht rechtswidrig sein. Der bloße Umstand, dass ein vom Täter in Verkehr gebrachtes Produkt den gesetzlich vorgesehenen Sicherheitsstandards nicht entspricht, mag zwar die Rechtswidrigkeit indizieren, erlaubt aber diesbezüglich kein abschließendes Urteil.⁶¹ Für die Auslösung einer Schadenersatzpflicht ist überdies erforderlich, dass der Täter – bezogen auf das fragliche Schutzgesetz – objektiv sorgfaltswidrig gehandelt hat. Selbst unter dieser Voraussetzung ist aber eine Haftung ausgeschlossen, wenn dem Täter sein Verhalten nicht vorgeworfen werden kann. Ein persönlicher Vorwurf wegen des Verhaltens kann nur jenen Personen gemacht werden, die zur Zeit der Tat die Fähigkeit zu einer vernünftigen Willensbildung hatten. Die Verschuldensfähigkeit hängt demgemäß vom physischen und psychischen Zustand sowie dem Alter des Täters ab.⁶²

3. Inwiefern hängt die Haftung infolge der Verletzung einer verwaltungsrechtlichen Vorschrift von deren Schutzzweck ab?

- 35 Nach ständiger Rechtsprechung hat der Täter im Falle einer Schutzgesetzverletzung nur für jene Schäden zu haften, denen das Gesetz vorbeugen will.⁶³ In diesem Zusammenhang ist – im Sinne der bereits von Rümelin für das deutsche Recht vorgeschlagenen Präzisierung – zwischen dem persönlichen und dem sachlichen Schutzzweck zu unterscheiden.⁶⁴ Es ist demnach zu untersuchen, ob die fragliche Verhaltensnorm den eingetretenen Schaden seiner Art und seiner konkreten Entstehungsweise nach hintanzuhalten sollte, und ob gerade auch der Geschädigte davor geschützt sein sollte. Im Rahmen der Prüfung des persönlichen Schutzzwecks ist auch der Frage nachzugehen, ob die übertretene Norm auch den Einzelnen schützen soll. Dabei ist zu bedenken, dass insbesondere verwaltungsrechtliche Vorschriften gerade nicht auf Gewährung individueller Schadenersatzansprüche ausgerichtet sind, sondern ganz andere Zwecke verfolgen. Dies ist auch der Grund, warum etwa naturschutzrechtlichen Bestimmungen – wie bereits erwähnt – ein Individualschutz abgesprochen wird.⁶⁵ Dass eine Norm im Interesse der Allgemeinheit erlassen worden ist, schließt allerdings die Ableitung von Schadenersatzansprüchen nicht aus. Voraussetzung ist lediglich, dass der Schutz des Geschädigten zumindest mit-

⁶¹ Siehe *Koziol*, Haftpflichtrecht I (Fn. 1) Rz. 4/14; *Rummel/Reischauer* (Fn. 1) § 1311 Rz. 6; *Karollus* (Fn. 6) 159 ff.; *KBB/Karner* (Fn. 1) § 1311 Rz. 5.

⁶² Siehe *Koziol*, Haftpflichtrecht I (Fn. 1) Rz. 5/8 ff.

⁶³ Siehe *Rummel/Reischauer* (Fn. 1) § 1295 Rz. 7 f., § 1311 Rz. 10.

⁶⁴ *M. Rümelin*, Die Verwendung der Causalbegriffe im Straf- und Civilrecht, *Archiv für die civilistische Praxis* (AcP) 90 (1900) 171, 304 ff.

⁶⁵ Siehe oben Rz. 24.

bezweckt ist.⁶⁶ Aus bloßen Reflexwirkungen eines Verhaltensgebots lässt sich dagegen der Schutz eines Betroffenen nicht ableiten.

4. Inwiefern steht dem Täter der Einwand offen, dass er den Schaden auch dann verursacht hätte, wenn er im Einklang mit der übertretenen Norm gehandelt hätte?

Es ist eine Frage des Zwecks einer Verhaltensnorm, ob der rechtswidrig handelnde Schädiger auch für jene Nachteile haften soll, die durch rechtmäßiges Verhalten ebenso herbeigeführt worden wären. Wird durch die Rechtsordnung ein bestimmtes Verhalten im Interesse einer Schadensverhütung untersagt, ist einer Haftung die Grundlage entzogen, wenn auch bei rechtmäßigem Verhalten der gleiche Schaden herbeigeführt worden wäre.⁶⁷ Die Berufung auf ein rechtmäßiges Verhalten führt allerdings dann zu keiner Haftungsbefreiung, wenn die übertretene Verhaltensnorm nicht primär die Schadensverhütung im Auge hat, sondern den Eingriff in ein fremdes Rechtsgut unbedingt an ein bestimmtes Verfahren binden will.⁶⁸ In dieser Situation lässt die Rechtsprechung den Täter auch dann haften, wenn auch bei einem rechtmäßigen Verhalten der Schadenseintritt nicht zu vermeiden gewesen wäre.⁶⁹ Hier kommt dem Schadenersatzanspruch eine erhebliche Sanktions- und Präventivfunktion zu: Die Norm will die Herbeiführung von Schäden durch bestimmte Vorgangsweisen auf jeden Fall verhindern. Das ist etwa dann der Fall, wenn ein Beschuldigter in einem Strafverfahren ohne Einhaltung der dafür maßgeblichen Bestimmungen in Haft genommen wird.⁷⁰

36

Bei den hier interessierenden Sicherheitsvorschriften und umweltrelevanten Regelungen ist dagegen in aller Regel eine Haftung des Täters ausgeschlossen, wenn der Schaden auch bei rechtmäßigem Verhalten eingetreten wäre. Es ist allerdings Sache des Täters nachzuweisen, dass sich die durch die Gesetzesverletzung eingetretene Risikoerhöhung im zu prüfenden Fall nicht ausgewirkt hat. Diese Beweislastverteilung lässt sich mit Sanktions- und Präventionserwägungen rechtfertigen.⁷¹

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⁶⁶ Siehe Rummel/Reischauer (Fn. 1) § 1311 Rz. 10; OGH SZ 28/127.

⁶⁷ OGH ZVR 1956/132; ZVR 1978/314; SZ 51/126; JBl 1992, 316; ZVR 1993/122; ZVR 1999/97; Schwimann/Harrer (Fn. 1) § 1301 f. Rz. 54; KBB/Karner (Fn. 1) § 1295 Rz. 14; a.M. Karollus (Fn. 6) 399 ff.; siehe auch H. Koziol, Rechtmäßiges Alternativverhalten – Auflockerung starrer Lösungsansätze, in: H.-J. Ahrens/Ch. von Bar/G. Fischer/A. Spickhoff/J. Taupitz (Hrsg.), Festschrift für Erwin Deutsch (1999) 179.

⁶⁸ Siehe Koziol, Haftpflichtrecht I (Fn. 1) Rz. 8/65; F. Harrer, Schadenersatz wegen hoheitlicher Freiheitsentziehung, Zivilrecht aktuell (Zak) 2005, 9; Schwimann/Harrer (Fn. 1) § 1301 f. Rz. 55; KBB/Karner (Fn. 1) § 1295 Rz. 14.

⁶⁹ OGH SZ 54/108; SZ 59/141; Österreichische Richterzeitung (RZ) 1996/51.

⁷⁰ OGH SZ 54/108.

⁷¹ Siehe Koziol, Haftpflichtrecht I (Fn. 1) Rz. 8/67.

5. Welche Auswirkungen hat die Verletzung einer verwaltungsrechtlichen Vorschrift auf die Beweislastverteilung, insbesondere was die Kausalität, die Rechtswidrigkeit und das Verschulden betrifft?

- 38 Wie bereits ausgeführt, geht die Rechtsprechung bei der Anwendung des § 1311 ABGB von einer Beweislastumkehr auf der Ebene der Rechtswidrigkeit aus.⁷² Steht die Verletzung des Schutzgesetzes fest, wird vermutet, dass die Rechtsverletzung auf einem objektiv sorgfaltswidrigen Verhalten des Täters beruht. Es ist demnach dessen Sache zu beweisen, dass auch ein maßgerechter Durchschnittsmensch bei Aufwendung der gebotenen Sorgfalt das vom Schutzgesetz vorgegebene Ziel nicht hätte erreichen können. In der Literatur wird eine solche Beweislastumkehr bei Schutzgesetzverletzungen weitgehend abgelehnt.⁷³ Vielmehr wird hier für die Anwendung des prima-facie-Beweises plädiert.⁷⁴ Demnach wird ein rechtswidriges Verhalten des Täters durch die Schutzgesetzverletzung lediglich indiziert. Ein solcher prima-facie-Beweis kommt auch bei der Prüfung der Kausalität zum Tragen. Ist gerade jener Schaden eingetreten, den das Schutzgesetz verhindern sollte, kann prima facie auf das Vorliegen eines Kausalzusammenhangs geschlossen werden.⁷⁵

6. Kann die Verletzung verwaltungsrechtlicher Vorschriften einen Zuspruch von „punitive damages“ zur Folge haben?

- 39 Ein Zuspruch sogenannter „punitive damages“ ist im österreichischen Recht auch im Zusammenhang mit Produktsicherheitsvorschriften und umweltrelevanten Regelungen ausgeschlossen.

B. Verwaltungsrechtskonformes Verhalten

1. Kommt die deliktische Haftung eines Täters (Unterlassung oder Schadenersatz) in Betracht, selbst wenn er in Übereinstimmung mit allen einschlägigen verwaltungsrechtlichen Vorschriften gehandelt hat oder lässt Ihre Rechtsordnung den Einwand einer gesetzmäßigen Berechtigung zu?

- 40 Selbst wenn verwaltungsrechtliche Vorschriften – wie etwa Sicherheitsvorschriften – den Schutz des Einzelnen bezwecken, regeln sie nicht abschließend die Sorgfaltspflichten zum Schutz des Lebens, der körperlichen Integrität oder des Eigentums. Selbst bei Einhaltung aller relevanten Verwaltungsvorschriften kann demnach eine Sorgfaltspflichtverletzung des Täters gegeben sein, die eine Haftung nach sich zieht.⁷⁶ Mit anderen Worten: Die österreichische Rechtsord-

⁷² Siehe oben Rz. 29.

⁷³ Siehe Reischauer (Fn. 53) 188 f.; Koziol, Haftpflichtrecht I (Fn. 1) Rz. 16/40; KBB/Karner (Fn. 1) § 1298 Rz. 4.

⁷⁴ Siehe KBB/Karner (Fn. 1) § 1311 Rz. 6.

⁷⁵ Siehe Rummel/Reischauer (Fn. 1) § 1298 Rz. 4.

⁷⁶ Siehe Koziol, Haftpflichtrecht I (Fn. 1) Rz. 4/99; P. Oberhammer, in: M. Schwimann (Hrsg.) (Schwimann/Oberhammer), ABGB-Praxiskommentar II (3. Aufl. 2005) § 364 Rz. 18; OGH EvBl 1968/21; JBl 1997, 658.

nung lässt nicht generell den Einwand zu, dass der Schädiger im Einklang mit den maßgeblichen verwaltungsrechtlichen Vorschriften gehandelt hat.

Ein Verhalten kann allerdings dadurch gerechtfertigt sein, dass eine gesetzliche Ermächtigung zur Vornahme einer bestimmten Handlung gegeben ist.⁷⁷ Beispielhaft erwähnt sei das Recht der Sicherheitsorgane zum Waffengebrauch. Auch eine behördliche Genehmigung kann die Rechtswidrigkeit eines Verhaltens dann ausschließen, wenn sie dem Gefährdeten die Abwehrrechte entzieht und ihn damit zur Duldung der Gefährdung oder des Eingriffs anhält. Diese Wirkung kommt allerdings nicht jeder behördlichen Genehmigung zu. So ist zur behördlichen Genehmigung von Anlagen anerkannt, dass die Abwehrrechte nur dann entzogen werden, wenn die Genehmigung in einem Verfahren erfolgt, in dem die Interessen der Nachbarn entsprechend berücksichtigt werden.⁷⁸ Haben sich seit der behördlichen Genehmigung wesentliche Umstände geändert und haben die Nachbarn diesbezüglich kein Antragsrecht auf Verschreibung nachträglicher Auflagen, kommt der behördlichen Genehmigung aus schadenersatzrechtlicher Sicht keine rechtfertigende Wirkung mehr zu.⁷⁹

41

2. Kann die allgemeine Sorgfaltspflicht über diese Regeln hinausgehen?

Wie die vorstehenden Ausführungen zeigen,⁸⁰ kann die im schadenersatzrechtlichen Kontext zu beachtende allgemeine Sorgfaltspflicht über die in verwaltungsrechtlichen Vorschriften vorgesehenen Sorgfaltsanforderungen hinausgehen. Besonderes gilt allerdings dann, wenn behördlichen Genehmigungen eine Rechtfertigungswirkung zukommt.

42

3. Macht es für die Verteilung der Beweislast betreffend Rechtswidrigkeit und Verschulden einen Unterschied, falls der Täter nachweisen kann, dass er im Einklang mit allen relevanten verwaltungsrechtlichen Vorschriften gehandelt hat?

Selbst wenn die allgemeine Sorgfaltspflicht des Schadenersatzrechts weiter reicht als die Vorgaben in verwaltungsrechtlichen Vorschriften, spricht deren Einhaltung zumindest prima facie gegen das Vorliegen eines rechtswidrigen Verhaltens.⁸¹ Eine Beweislastumkehr wird in diesem Zusammenhang dagegen wohl nicht anzunehmen sein. Es ist allerdings darauf hinzuweisen, dass zu dieser Frage eindeutige Stellungnahmen in Rechtsprechung und Lehre fehlen.

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⁷⁷ Siehe *Koziol*, Haftpflichtrecht I (Fn. 1) Rz. 4/99.

⁷⁸ Siehe *K. Spielbüchler*, in: P. Rummel (Hrsg.) (Rummel/*Spielbüchler*), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch I (3. Aufl. 2000) § 364a Rz. 4; *Koziol*, Haftpflichtrecht I (Fn. 1) Rz. 4/99; *B. Eccher*, in: *Koziol/Bydlinski/Bollenberger* (Hrsg.) (Fn. 1) (KBB/*Eccher*) § 364a Rz. 3; OGH JBl 1989, 646.

⁷⁹ OGH JBl 1996, 446 mit Anm. *P. Jabornegg* = EvBl 1996/83 = ecolex 1996, 162 mit Anm. *G. Wilhelm* = RdU 1996, 39 mit Anm. *F. Kerschner*.

⁸⁰ Siehe oben Rz. 41.

⁸¹ Vgl. OGH JBl 1983, 324.

IV. Andere Haftungsgrundlagen

1. Bestehen neben dem Deliktsrecht andere Haftungsgrundlagen, etwa im Verwaltungsrecht selbst oder im Schuldrecht, die eingreifen, wenn Schäden durch die Verletzung von verwaltungsrechtlichen Regelungen entstehen?

- 44 In verschiedenen – insbesondere umweltrechtlichen – Verwaltungsgesetzen finden sich spezifische schadenersatzrechtliche Regelungen. Ungeachtet des konkreten Regelungszusammenhangs handelt es sich hierbei ihrer Natur nach um zivilrechtliche Bestimmungen, die ergänzend zu den jeweiligen verwaltungsrechtlichen Regelungen erlassen wurden.⁸² Hier sind insbesondere die im Forstgesetz (§ 53–57), im Gentechnikgesetz (§ 79a–79j und 101a f.), im Mineralrohstoffgesetz (§ 160–169) und im Wasserrechtsgesetz (§ 26) vorgesehenen Regelungen zu nennen. Die einschlägigen Bestimmungen statuieren jeweils eine verschuldensunabhängige Haftung. Sie schließen damit Haftungslücken, die sich gerade im Bereich der Umwelthaftung auf Grundlage einer bloßen Verschuldenshaftung ergeben würden. Dessen ungeachtet handelt es sich bei den genannten Bestimmungen bloß um punktuelle Regelungen. Vor diesem Hintergrund wird die bevorstehende Umsetzung der Umwelthaftungs-RL einen echten Fortschritt bedeuten.⁸³ Abgesehen von dieser Richtlinie verdient die Nachbarhaftung, die im Rahmen des Sachenrechts geregelt ist (§ 364 f. ABGB), Beachtung. Der Eigentümer eines Grundstückes kann dem Nachbarn die von dessen Grund ausgehenden Einwirkungen durch Abwässer, Rauch, Wärme, Geruch, Geräusch, Erschütterung und ähnliche insoweit untersagen, als sie das nach den örtlichen Verhältnissen gewöhnliche Maß überschreiten und die ortsübliche Benutzung des Grundstückes wesentlich beeinträchtigen (§ 364 Abs. 2 ABGB).⁸⁴ Im Falle solcher Immissionen kann der Eigentümer des betroffenen Nachbargrundstückes neben verschuldensabhängigen Schadenersatzansprüchen verschuldensunabhängige Beseitigungs- und Unterlassungsansprüche geltend machen.⁸⁵ Aber selbst jenseits des Nachbarrechts kann das (potentielle) Opfer einer Rechtsverletzung Unterlassungsansprüche im Falle eines (drohenden) rechtswidrigen Angriffs des Beklagten geltend machen. Dieser Anspruch ist ebenfalls verschuldensunabhängig.⁸⁶

⁸² Siehe KBB/*Eccher* (Fn. 78) § 364a Rz. 7.

⁸³ Siehe oben Fn. 49.

⁸⁴ Eine Sonderregelung (§ 364a ABGB) kommt zur Anwendung, wenn die Immissionen von einem Betrieb mit einer entsprechenden behördlichen Genehmigung herrühren; siehe oben Rz. 41 und unten Rz. 45 f.

⁸⁵ Siehe KBB/*Eccher* (Fn. 78) § 364 Rz. 13 f.

⁸⁶ Siehe *Kozioł/Welser* (Fn. 1) 302.

2. Sieht Ihre Rechtsordnung einen Ersatzanspruch (entweder gegen den Nutznießer oder gegen den Hoheitsträger) vor, wenn eine verwaltungsrechtliche Bestimmung die Beeinträchtigung von Interessen einer anderen Person erlaubt? Was sind die Voraussetzungen für eine solche Eingriffshaftung?

Wie bereits angedeutet,⁸⁷ kann die behördliche Genehmigung einer Betriebsanlage Eingriffe in die Rechtsgüter von Nachbarn rechtfertigen. In der Sache geht es hier um Immissionen, die von einer Bergwerksanlage oder einer sonstigen genehmigten Anlage ausgehen. Immissionen solcher Anlagen sind selbst dann zu dulden, wenn sie das ortsübliche Maß überschreiten. Da angesichts der Genehmigung Unterlassungsansprüche ebenso ausscheiden wie eine Verschuldenshaftung des Betreibers der Anlage, sieht § 364a ABGB einen eigenständigen Anspruch der Nachbarn auf Ersatz jener Schäden vor, die ihnen durch die – das ortsübliche Maß überschreitenden – Immissionen entstehen.⁸⁸ Auf Rechtswidrigkeit und Verschulden kommt es bei diesem besonderen Ausgleichsanspruch naturgemäß nicht an.⁸⁹

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In Analogie zu § 364a ABGB wird ein verschuldensabhängiger Ersatzanspruch gewährt, wenn durch eine sonstige (von dieser Bestimmung nicht erfasste) Genehmigung der Anschein der Gefahrlosigkeit hervorgerufen wird und der geschädigte Nachbar deshalb den ihm an sich zustehenden Unterlassungsanspruch nicht rechtzeitig erhoben hat.⁹⁰

46

V. Einige Fälle

1. 1976 wurde einem chemischen Betrieb, der von dem Unternehmen A geführt wird, eine Bewilligung erteilt, in bestimmtem Umfang Gas zu emittieren. Nach den neuesten technologischen Standards könnten die Emissionen zu vertretbaren Kosten beträchtlich reduziert werden. Dennoch wurden die gesetzlichen Vorgaben seit 1970 nicht angepasst. Kann ein Landwirt, dessen Ernteerträge durch die Emissionen beeinträchtigt wurden, entweder den Hoheitsträger oder den Unternehmensbetreiber auf Schadenersatz in Anspruch nehmen? Ist es maßgeblich, dass der Landwirt im Rahmen eines Verwaltungsverfahrens eine Abänderung bzw. eine Aufhebung der Bewilligung erreichen hätte können?

Eine auf § 1311 ABGB gestützte Haftung von A scheidet schon deswegen aus, weil ihm von der Behörde nicht aufgetragen wurde, weitere Maßnahmen zur Reduktion von Immissionen zu setzen. Fraglich ist dagegen, ob eine Haftung des Betreibers wegen einer Verletzung der allgemeinen Sorgfaltspflicht in Betracht kommt. Schließlich kann sich der Betreiber auf eine bestehende

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⁸⁷ Siehe oben Rz. 41.

⁸⁸ Siehe Rummel/Spielbüchler (Fn. 78) § 364a Rz. 4 ff.; Schwimann/Oberhammer (Fn. 76) § 364a Rz. 9 f.; KBB/Eccher (Fn. 78) § 364a Rz. 5 ff.

⁸⁹ Schwimann/Oberhammer (Fn. 76) § 364a Rz. 9.

⁹⁰ OGH JBl 1993, 653; JBl 1995, 785; JBl 1997, 521; KBB/Eccher (Fn. 78) § 364a Rz. 7; Schwimann/Oberhammer (Fn. 76) § 364a Rz. 9.

behördliche Bewilligung berufen. Dessen ungeachtet hat der OGH bei einem vergleichbaren Fall ein rechtswidriges Verhalten des Betreibers bejaht.⁹¹ Zum damaligen Zeitpunkt bestand allerdings noch kein Recht der Anrainer, bei einer geänderten Sachlage zusätzliche Auflagen für den Betrieb zu beantragen. Angesichts dieser Rechtsschutzlücke hat der OGH in einem vergleichbaren Fall Unterlassungsansprüche eines betroffenen Nachbarn gegen den Betreiber bejaht. Diese Rechtsprechung dürfte allerdings zumindest teilweise überholt sein, da nunmehr den Anrainern in derartigen Situationen ein entsprechendes Antragsrecht zukommt (§ 79a Abs. 3 Gewerbeordnung, GewO).⁹² Soweit allerdings dem Antrag der Anrainer auf Erteilung zusätzlicher Auflagen durch die Behörde zu Unrecht nicht entsprochen wird, lebt der Unterlassungsanspruch der Anrainer aufgrund der geänderten Interessenlage auch unter Berücksichtigung der neuen Rechtslage auf. Insoweit kommen auch deliktische Schadenersatzansprüche gegen den Betreiber der Fabrik in Betracht. Anderes dürfte dagegen gelten, wenn die Anrainer von ihrem Antragsrecht gar nicht Gebrauch machen.

- 48 Auch was eine mögliche Amtshaftung betrifft, stellt sich die Rechtslage ähnlich differenziert dar. Zwar hat die Rechtsprechung bereits wiederholt eine Amtshaftung bejaht, wenn die Gewerbebehörde es rechtswidrig und schuldhaft unterlassen hat, bei einer Änderung der Interessenlage die erforderlichen Auflagen für den Betrieb zu erteilen.⁹³ Ungeachtet eines Verschuldens der Behörde besteht aber der Ersatzanspruch nicht, wenn es der Geschädigte schuldhaft unterlassen hat, ihm gegenüber der Behörde zustehende Rechtsbehelfe geltend zu machen (§ 2 Abs. 2 *Amtshaftungsgesetz*, AHG). Davon hängt daher auch im vorliegenden Fall die Geltendmachung von Ersatzansprüchen ab.

2. Eine spezifische Arbeitnehmerschutzvorschrift verpflichtet Dienstgeber zur Vornahme bestimmter Sicherungsmaßnahmen am Arbeitsplatz. B betreibt einen Einmann-Arbeitsplatz, an dem sich weder Arbeiter noch Besucher aufhalten. Trifft B trotz der hier angenommenen Unanwendbarkeit der Schutzvorschriften eine Haftung, wenn ein einmal zufällig anwesender Besucher durch die fehlenden Sicherungsmaßnahmen verletzt wird?

- 49 Vorschriften zum Schutz von Arbeitnehmern schützen nach der Rechtsprechung nicht nur Dienstnehmer selbst, sondern auch jene Personen, die befugterweise in den Gefahrenbereich gelangen.⁹⁴ Ein einmaliger Besucher in der Werkstatt dürfte aber wohl nicht zu diesem Personenkreis zählen. Eine auf § 1311 ABGB gestützte Haftung von B kommt daher nicht in Betracht. Fraglich ist dagegen, ob B seine allgemeinen Sorgfaltpflichten gegenüber dem Geschädigten verletzt hat. In diesem Zusammenhang ist insbesondere an Verkehrssicherungs-

⁹¹ Siehe oben Fn. 79.

⁹² KBB/*Eccher* (Fn. 78) § 364a Rz. 3; Schwimann/*Oberhammer* (Fn. 76) § 364a Rz. 3 ff.

⁹³ Siehe *W. Schragel*, Kommentar zum Amtshaftungsgesetz (3. Aufl. 2003) Rz. 145; OGH SZ 63/166.

⁹⁴ OGH Miet 31.153; SZ 63/38; Rummel/*Reischauer* (Fn. 1) § 1311 Rz. 13.

pflichten von B zu denken. Die Reichweite dieser Pflichten wird entscheidend davon abhängen, ob die Werkstatt frei zugänglich war.⁹⁵ Trifft dies zu, mag die Nichteinhaltung von Arbeitnehmerschutzvorschriften zugleich auch eine Verletzung der B treffenden Verkehrssicherungspflichten bedeuten.

3. Das Unternehmen B hat seit Jahren unterschiedliche gesetzliche Schutzvorschriften verletzt. Obwohl eine Behörde besteht, die es kraft ihrer Stellung in der Hand hat, das Unternehmen zu bestrafen oder gar zu schließen, hat die Behörde nur selten auf entsprechende Anzeigen reagiert. Sie hat das Unternehmen einmal besucht und hat dabei eine Liste von Auflagen erteilt. B hat die Auflagen nicht erfüllt und auch die Behörde hat die Einhaltung der Auflagen nicht überwacht. Einige Zeit später kam es zu einem schwerwiegenden Unfall in dem Unternehmen, der zu vermeiden gewesen wäre, wenn das Unternehmen die Sicherheitsvorschriften eingehalten hätte.

a) Kann die verletzte Person das Unternehmen auf Schadenersatz in Anspruch nehmen? Kann diesfalls das Unternehmen einwenden, dass es durch die Behörde nicht ausreichend überwacht wurde?

Angesichts der eklatanten Verletzung von Sicherheitsvorschriften durch B besteht an dessen Ersatzpflicht für die eingetretenen Schäden kein Zweifel. Die mangelnde Überwachung durch die Behörde vermag am Verschulden von B nichts zu ändern.

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b) Stehen der verletzten Person Schadenersatzansprüche gegen den Rechtsträger der Behörde zu?

Der Geschädigte kann auch Amtshaftungsansprüche geltend machen, weil die Behörde ihren Handlungspflichten zum Schutz des Geschädigten nicht nachgekommen ist.⁹⁶ Das für eine Amtshaftung erforderliche Verschulden der Behörde⁹⁷ ist schon deswegen zu bejahen, weil sie von der Verletzung der Sicherheitsvorschriften durch B informiert war.

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⁹⁵ Vgl. KBB/Karner (Fn. 1) § 1294 Rz. 6.

⁹⁶ Vgl. OGH JBI 1993, 320; Schragel (Fn. 93) Rz. 145.

⁹⁷ Siehe Schragel (Fn. 93) Rz. 142 ff.

TORT AND REGULATORY LAW IN ENGLAND AND WALES

Karen Morrow*

I. General

1. *What, in general, is the impact of administrative law rules on the tort law of your country?*

This chapter deals primarily with the law as it applies in England and Wales, it is however accompanied by certain observations that hold true for all of the legal systems of the United Kingdom (UK). As an initial comment, it should be pointed out that the term “administrative law” has a very particular (and in comparison to the manner in which it is used in civil law jurisdictions, relatively limited) meaning in UK law. Administrative law, which forms a sub-category of public law more generally, normally encapsulates the law relating to the “composition, structures, powers, duties, rights and liabilities of the various organs of government which are engaged in administering public policies”.¹ In the sense that the term “administrative law” is used in this paper, in UK law, it would more usually be encompassed by the term “regulatory law”. The general position in UK law is that the common law is relegated to a subsidiary role in those situations where State sponsored regulatory regimes have been put into place. This general view was endorsed *obiter dictum* by the House of Lords in the high profile environment torts case of *Cambridge Water Co. Ltd v Eastern Counties Leather* [1994] 2 Appeal Cases (AC) 264: “[...] given that so much well-informed and carefully structured legislation is now [...] in place [...] there is less need for the courts to develop the common law to achieve the same end.”² Indeed it could be said that regulatory law plays the prime role in regulating the environment, supplemented by judicial review controls, with the common law playing very much a secondary, supporting role.³

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¹ A. Bradley/K. Ewing, *Constitutional and Administrative Law* (12th ed. 1997) 697 f.

² Per Lord Goff 305 f.

³ A view critiqued in: K. Stanton/C. Willmore, *Tort and Environmental Pluralism*, in: J. Lowry/R. Edmunds (eds.), *Environmental Protection and the Common Law* (2000) 93 ff. (in subsequent footnotes: Lowry).

Having said this, it does remain true to say that it is (at the very least) a “challenge to capture all the nuances of this important interface between public and private law obligations”.⁴

In the UK, State based regulation operates primarily in the public interest and does not, as a rule, provide redress in the form of compensation for individuals whose private rights are interfered with by activities authorised under such regimes. The roles of regulatory laws and common law in this regard are best viewed as complementary,⁵ with the latter serving to reinforce regulatory regimes by filling the gaps⁶ that exist within them, in particular with regard to enforcement. Certainly, as a minimum function, the common law provides remedies for individuals whose rights are interfered with in an environmental context that are not provided for in mainstream regulatory regimes.⁷ On a more abstract level, the availability of common law remedies serves to open up legal debate with respect to the environment to a wider range of interests (though it is limited to representing the interests of private property), a contentious but arguably socially worthwhile enterprise.

- 2 The law of tort fits into the general context alluded to above. Where regulatory law is concerned, the primary function of tort law is to provide a possible method whereby the individual whose rights are interfered with by the acts (or more unusually omissions) of another who is at fault in the law of negligence, or subject to strict liability, may seek damages. These may potentially be sought from the perpetrator of the wrong, or the public body with regulatory responsibility in the area. Public bodies may be sued either in respect of their operational role (carrying out a broad range of statutory functions) or in a regulatory capacity (authorising activities that cause harm).⁸ Liability in the former situation is highly unusual as in UK tort law, as a general rule, there is no liability for the torts of third parties (except in very limited circumstances, see *Dorset Yacht v Home Office* [1970] AC 1004 and subsequent cases arising from regulatory contexts, see *infra* no. 11). However, the operation of the Human Rights Act (HRA) 1998 (which incorporated the European Convention on

⁴ *M.C. Harris*, Powers Into Duties – A Small Breach in the East Suffolk Wall, *Law Quarterly Review* (L.Q.R.) 113 (1997) 398 ff.

⁵ See, for example, *J. Murphy*, Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation, in: *Lowry* (fn. 3) 51 ff.

⁶ *J. Steele*, Private Law and the Environment: Nuisance in Context, *Legal Studies* (L.S.) 1995, 236 ff.

⁷ See *D. McGillivray/J. Wrightman*, Private Rights, Public Interests and the Environment, in: *T. Hayward/J. O'Neill* (eds.), *Justice, Property and the Environment* (1997) 144 ff.

⁸ It should be noted that this distinction itself is not uncontroversial, nor is it uncontested, however, despite trenchant criticism from a broad range of commentators it remains one that is frequently employed by the courts in this context.

Human Rights (ECHR) into UK law) and its application to public authorities^{9,10} has opened up a new and potentially fertile area of litigation in this regard (see *infra* no. 3).

The potential for HRA based claims to reopen what had previously been regarded as fairly settled areas of the common law is made manifest in the case of *McKenna v British Aluminium Ltd* [2002] Environmental Law Reports (E. L.R.) 30. A number of claimants brought an action in respect of noise, emissions and invasions of privacy generated by a neighbouring factory. The problem lay in the fact that the claimants were children and lacked the requisite proprietary interest in the affected land that had been recently reiterated in the House of Lords' ruling in *Hunter v Canary Wharf* [1997] 2 All England Law Reports (A.E.R.) 426. Thus the claims could not be brought in nuisance but were brought instead under the HRA invoking a "common law tort analogous to nuisance" to protect art. 8.1 rights. British Aluminium applied to have the case struck out but Nueberger J refused to do so on the basis that the law in this area was in a state of development and it was uncertain how the courts would choose to give effect to the HRA in this context.

There is one area of law in particular where the links between tort law and regulatory law are particularly close (to the point where provision overlaps rather than being complementary), namely the law of statutory nuisance. Statutory nuisance is effectively a hybrid of regulatory law and the common law. The relevant provisions are found in Part III of the Environmental Protection Act (EPA) 1990. They offer a more accessible but less extensive and versatile route for pursuing what are essentially public health-based nuisance claims than the common law from which they are derived. This class of nuisance obviously has very significant (if indirect) environmental consequences and dovetails

⁹ Sec. 6 of the Human Rights Act 1998 (HRA) states:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention Right.

(2) Subsection (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection

(3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does include a failure to –

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

¹⁰ The impact of sec. 6 with respect to the courts was made clear in *Douglas v Hello* [2001] 2 All England Law Reports (A.E.R.) 289.

with a variety of regulatory controls. Sec. 79 of the EPA delineates certain states of affairs that are prohibited if they are “prejudicial to health”¹¹ or a nuisance.¹² Case law in this area has tended to the view that the interference complained of under statutory nuisance provisions must be such as to affect personal comfort – this approach is narrower than that adopted in the common law proper and rather restrictive. The reason for this lies in the fact that primary responsibility for the operation of the statutory nuisance regime lies in the hands of local authorities. Local authorities are placed under a dual duty by the EPA to inspect their area for the presence of such nuisances and to respond to complaints made in respect of these by members of the public. If satisfied that such a nuisance exists/is likely to occur/is likely to recur, the authority is obliged to serve an abatement notice stating: the requirements for abating the nuisance; outlining any works required; and the time allowed for action. It is an offence under sec. 80(4) of the EPA to fail to comply with an abatement notice. If such failure occurs, the local authority can take one of a number of courses of action: abate the nuisance itself and recover the costs of doing so under sec. 81(4),¹³ bring summary proceedings in the Magistrates’ Court for non-compliance, or bring proceedings in the High Court. Local authorities do not however enjoy a monopoly over the right to bring proceedings in respect of statutory nuisance. If a local authority refuses to or fails to act, sec. 82(1) of the EPA provides for an action by “persons aggrieved” by a statutory nuisance, allowing the public direct access to the Magistrates’ Court. If a member of the public succeeds in their action for statutory nuisance, the nuisance will be abated or its recurrence prevented (sec. 82(2)), and a fine may also be imposed up to level 5 on the standard scale, though no damages will be paid to the aggrieved individual. Nonetheless, such proceedings do have some advantages for affected individuals in that they do address problems on the ground and they are much less complex and time consuming than proceedings at common law. However, for cases where individuals have suffered substantial interference that would warrant significant compensation, proceedings at common law would provide the best option.

- 5 Regulatory regimes occasionally provide rights of actions to individuals adversely affected by the operation of regulatory systems, though more usually, they will actually preclude proceedings at common law. Such matters are addressed first through statutory interpretation, see *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. The relationship between tort (and in particular negligence) and statutory provisions generally is laid out in Browne-Wilkinson’s judgment in the conjoined House of Lords’ test cases heard under the name: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. These were comprised of two child abuse cases and three education cases. Each in-

¹¹ That is injurious or likely to cause injury, a requirement that dates back to early statutory nuisance provisions under the Public Health Act 1936.

¹² That is a public or private nuisance as defined at common law, *National Coal Board v Neath Borough Council* [1976] 2 A.E.R. 478.

¹³ Sec. 81A provides that where such costs are recoverable from the owner of premises, the local authority can serve notice that they constitute a charge on the said premises.

volved a local authority as defendant and concerned linked claims in respect of breach of statutory duty and common law negligence and these issues were considered in a striking out application. A number of significant rules emerged from this litigation: firstly, whether an action will lie for the tort of breach of statutory duty is a matter of statutory interpretation. Secondly, the fact that public authorities act under statutory authority does not necessarily preclude an action in common law negligence, subject to the normal requirements relating to duty of care¹⁴ and to specific tests applicable in cases involving public bodies. Cane has identified these as: the “compatibility issue” (i.e. a common law duty cannot be imposed if it would be incompatible with the statute in question. This is so similar to the question of statutory interpretation for the tort of breach of statutory duty referred to above that it is unlikely to open further doors for claimants). Next comes the “unreasonableness issue” (does the exercise of the duty or power satisfy the test of *Wednesbury* unreasonableness¹⁵ in administrative law?). Finally there is the “justiciability issue” (is the issue capable of being actionable in tort in general and negligence in particular?).¹⁶ Thirdly, employees of public authorities are unlikely to owe a common law duty of care to claimants on the basis that, if they are employed by a public body to give it professional advice, they are deemed not to have assumed professional duties of care to individuals. (This was found to apply to the child abuse cases and is most likely to be the approach that applies to Environment Agency staff. The approach has however been tempered by the decision in *D v East Berkshire Community Health NHS Trust* [2005] 2 All England Direct Law Reports (Digests) (A.E.R. (D)) 292.) In the alternative, if a duty of care is deemed owed by individual employees (as was found in the education cases), it is subject to the usual test for professional negligence – the *Bolam* test.¹⁷ Fourthly, the question of vicarious liability of public authorities for the torts of their employees depends upon whether a direct duty is owed by the authority – in which case liability would accrue in respect of all actions of employees, whether negligent or not; or it owes no direct duty and will not therefore be vicariously liable either.¹⁸ The claims were ultimately struck out. The position with reference to the civil liability of public authorities following the *X* case can be summarised as follows: “The chance of successful litigation

¹⁴ These are stated in *Caparo Plc v Dickman* [1990] 2 AC 605 as proximity, foreseeability and it being deemed fair, just and reasonable to impose a duty of care. The latter consideration is most influential when applied to claims involving public bodies, see *P. Cane*, *Suing Public Authorities in Tort*, L.Q.R. 112 (1996) 13 ff.

¹⁵ The test for unreasonable behaviour by public authorities in administrative law is contained in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 King’s Bench (K.B.) 223, in which it was decided that *intra vires* actions of public bodies can be challenged on the basis that the action taken was “so unreasonable that no reasonable authority could have taken it”.

¹⁶ *Cane*, L.Q.R. 112 (1996) 13 ff.

¹⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 Weekly Law Reports (W.L.R.) 582 states that in cases of professional negligence a professional will satisfy the requisite standard of care if his conduct is in accord with practice accepted by a competent body of professional opinion in the discipline in question at the time.

¹⁸ *Cane*, L.Q.R. 112 (1996) 19 f.

against them in respect of the exercise of [...] statutory functions [...] is now very small. At the conceptual level, it seems clear that the courts will not entertain negligence actions in respect of the exercise of statutory discretions where the imposition of a common law duty of care would be incompatible with the scheme of the relevant statute or where the judgment of whether the challenged decision or action was unreasonable (and therefore negligent) would require the court to pronounce upon matters which it thinks are beyond its competence or the proper scope of its concerns.”¹⁹

- 6 It could be argued that the House of Lords’ approach in *X* creates something close to a blanket immunity from proceedings in negligence in respect of claims based on the statutory functions of local authorities. Subsequent developments do not however bear this out, see in particular the House of Lords’ decision in *D v East Berkshire Community Health NHS Trust* [2005] 2 A.E.R. (D) 292.²⁰ The child abuse aspects of the *X* case culminated in proceedings under the ECHR as *Z v United Kingdom* [2002] 34 EHRR 3. The main contention by the claimants was that the House of Lords’ decision in *X* had denied them of a right to a fair hearing under art. 6(1), and that all had been denied an effective remedy in breach of art. 13 of the Convention. The majority in the European Court of Human Rights decided that there had been no breach of art. 6 as the claimants had had their day in court and their cases considered in detail.²¹ Nonetheless other breaches were found and art. 13 was deemed to have been infringed in respect of these.
- 7 The key, if somewhat problematic distinction, that applies to the question of the existence and extent of a common law duty underpinning statutory powers, lies in the difference between acts and omissions. Generally speaking, the courts will only impose liability for omissions in exceptional circumstances (see no. 8).
- 8 Insofar as omissions are concerned, historically, the leading line of cases concerned property damage caused by nonfeasance in the context of statutory schemes regulating sanitation. *Glossop v Heston and Isleworth Local Board* [1879] 12 Chancery Division (Ch D) 102 began a trend of disassociating damage sustained as a result of public authorities carrying out statutory functions from traditional common law relief in the law of nuisance, switching the emphasis to the emerging statutory context.²² The case of *Attorney-General v Guardians of the Poor Union of Dorking* [1881–82] Law Reports (L.R.) 20 Ch D 595 determined that there would be no relief for adversely affected property owners in nuisance unless the public authority in question had actively caused the problem. *Hesketh v Birmingham Corporation* [1922] 1 King’s

¹⁹ *Cane*, L.Q.R. 112 (1996) 21 f.

²⁰ See also, *T.P. v UK* [2002] European Human Rights Reports (EHRR) 2.

²¹ This is in direct contrast to the ruling in *Osman v UK* [1998] 29 EHRR 245.

²² This development in the law is discussed in detail in *S. Coyle/K. Morrow*, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (2004) chap. 5, *The Changing Face of Environmental Law* 159 ff.

Bench (K.B.) 260 further clarified the issue, stating that the only route to relief in cases involving nonfeasance in a sanitation context would be under the compensation mechanisms provided for in the relevant statutes. The traditional position at law in respect of an omission to exercise statutory powers was expressed in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74: “Where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power.” per Lord Romer. This position continued to represent the status quo until the expansionist House of Lords’ decision in *Anns v Merton London Borough Council* [1978] AC 728, though the relevant part of that case was reversed in *Murphy v Brentwood District Council* [1991] 1 AC 398.

The leading modern authority on the position of public authorities vis-à-vis nonfeasance in the context of tort is *Stovin v Wise* [1996] AC 175. In this case the local authority, in its capacity as highway authority, had been made aware that an earthen bank by the side of the road was making a junction, for which it was responsible under the Highways Act 1980, unsafe. The bank was located on a third party’s land, the local authority had written to the third party seeking permission to remove the bank, but there had been no response. The claimant was a motorcyclist who was subsequently injured at the junction in a collision with a motorist. The motorist was found liable but claimed indemnity from the local authority for its failure to exercise its statutory duties and powers with respect to the highway, leading to a breach of a common law duty of care. A majority in the House of Lords found the council not liable on the basis that the statutory duties as drafted were not “interventionist” in this context (relating to highway maintenance) and in addition there was no clear provision for compensation contained in the statute. Insofar as the relationship between statutory powers and liability at common law were concerned, *Stovin* determined that if a duty of care was to be found, it would have had to be irrational (in the public law sense) for the authority not to have exercised the power in question and no such irrationality was found on the facts. Lord Hoffmann, whose speech represents the majority view, makes much of the fact that statutory provisions contain broad areas of discretion, which are inappropriate for legal intervention. Financial issues were also a consideration, as Lord Hoffmann states: “It is one thing to provide a service at public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss [...]. To require payment of compensation increases the burden on public funds. Before imposing such an additional burden, the court should be satisfied that this is what Parliament intended.” Hoffmann was clearly concerned to acknowledge the broader contexts in which public bodies operate and to avoid unnecessarily distorting the way in which they set their priorities. To say that this case was controversial is an understatement – the claimant won at first instance and in the Court of Appeal and also persuaded two of the law Lords to his view – so it is perhaps unsurprising that the issue has been tested in subsequent cases.

The House of Lords revisited the issue of the relationship between statutory duty and common law liability in *Goodes v East Sussex County Council* [2000]

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1 Weekly Law Reports (W.L.R.) 1345. This case sought to determine whether local authorities were liable either under the Highways Act 1980 or at common law for failure to grit the highway in bad weather. The House of Lords found that there was no statutory duty to do so as gritting did not fall within the definition of the “maintenance” required by the Act. Other post-Stovin cases have however shown that, while it is difficult to claim against a public authority for breach of a common law duty of care in respect of the exercise of statutory functions, it is not impossible: irrationality can occasionally be found, as in *Kent v Griffiths* [2001] Queen’s Bench (QB) 36 and even policy areas have been found to be justiciable, as in *Barrett v Enfield London Borough Council* [2001] 2 AC 550. The issue of local authority liability for the exercise of statutory powers was revisited in the context of planning law in the Court of Appeal decision in *Lam v Brennan and Borough of Torbay* [1997] Personal Injuries and Quantum Reports (P.I.Q.R.) 488. In this case the local authority had granted permission in its capacity as planning authority for spraying operations which, when carried out, resulted in a nuisance. No liability was found.

- 11 A second group of cases centres on omissions related to regulatory functions where the public authority’s failure to act has allowed others to cause damage to the claimants. These include *Yuen Kun Yeu v Attorney General for Hong Kong* [1988] AC 175 and *Hill v Chief Constable West Yorkshire Police* [1989] AC 53 and *Osman v Ferguson* [1993] 4 A.E.R. 344. The first case concerned regulation of financial services where a company gave false information in its registration for the Hong Kong Stock Exchange. The false material was not discovered and the company was duly listed. The claimants lost money when the company failed and claimed against the regulator for negligence. The case ended up before the Privy Council, which determined that the claimants were not owed a duty of care as the regulator acted in the public interest and not to protect the interests of individual investors. The latter cases concerned policing and crime prevention. In *Hill* the mother of one of the later victims of the serial killer known as the Yorkshire Ripper sued the police for alleged negligence in failing to apprehend him before he killed her daughter. The court refused to find a duty of care was owed to the claimant as it would have extended to the community at large – in addition, the court took the view that there were strong public policy reasons against imposing liability, mainly centred around the dangers of defensive policing. In *Osman* a teacher had a known antipathy towards a pupil, which was reported to the police. The police failed to act and the pupil and his father were attacked by the teacher, resulting in the death of one and injury to the other. Even though, as distinct from the situation in *Hill*, in this case there was a finite class of potential claimants – the pupil and his family – nonetheless no duty of care was found as the police were not deemed to owe a duty of care in negligence to the public. Thus in none of these cases involving failures by public authorities that gave third parties the opportunity to cause harm to others did the claimants succeed in having the courts find the public body in question liable in tort for the damage that they ultimately sustained. This approach fits more generally into the category of cases alluded to above which show a general reluctance in UK tort law to impose liability

in negligence on public bodies for the acts of third parties. A typical example involving broadly environmental issues can be found in *Landcatch Ltd v The International Oil Pollution Fund* [1999] 2 Lloyd's Reports 316. This case followed upon the wake of the Braer oil tanker disaster. One result of the oil spill was the imposition by the Secretary of State for the Environment of an Emergency Exclusion Order prohibiting the sale of fish raised in the affected area. The claimant lost business as a result and brought an action against the Secretary of State – he had no claim in public law as the order was validly made and his claim in tort also failed.

A more recent Court of Appeal decision further illustrates the more activist approach of the courts in cases where local authorities do more than merely omit to act. In *Kane v New Forest District Council* [2002] 1 L.R. 312, a local council, acting in its capacity as a planning authority, was found liable in negligence for personal injuries sustained by the claimant as a result of its failure to ensure that part of a planning agreement had been complied with. The agreement concerned facilitating the construction of a footpath for a new housing development. The claimant was seriously injured when using the footpath after it was opened without the necessary works having been carried out. The claimant's case initially failed but was allowed by the Court of Appeal on the basis that imposing a planning condition to the effect that the footpath could not be opened until it was safe would not have interfered with the planning authority's responsibilities under the Town and Country Planning Act 1990. The case was distinguished from *Stovin* on the basis that the council created the source of the danger rather than simply omitting to remove it. This case has potentially far-reaching consequences for liability of statutory authorities for damage caused as a result of carrying out statutory functions.

The issue of failure to act, in the context of the statutory regulation of sanitation, has come to the fore once again in a rather different guise in the Human Rights Act based case of *Marcic v Thames Water Utilities Ltd* [2002] QB 929. Marcic owned a house and garden that had, since 1992, been subject to repeated flooding from an essentially Victorian system of sewers that had become inadequate to deal with the quantity of sewage and surface waters now draining into them. Marcic eventually had to take measures to prevent his house from being flooded with foul water, but his garden was still subject to regular inundation. Thames Water Utilities (TWU) was under a statutory duty of care to provide and improve a public sewer system and to secure effective drainage, under the Water Industry Act (WIA) 1991 for these sewers. TWU had many flooding and sewerage problems to address, and a limited budget with which to do so, and was therefore unable to tackle all of the problems arising in this regard so it employed a points system in order to set priorities in this context. There was no realistic prospect of Marcic's situation being remedied under this system, as many other equally bad problem areas existed. Marcic had a right of complaint about this state of affairs to the Director-General of Water Services (DGWS) under sec. 18 of the WIA, but instead instituted civil proceedings in negligence, nuisance and under the rule in *Rylands v Fletcher* [1868] L.R. 3

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House of Lords (H.L.) 330 (which were dismissed at first instance); and proceedings for breach of statutory duty (which were also dismissed, under *Stovin v Wise* [1996] AC 923) and alleging a breach of sec. 6(1) of the HRA. The High Court found for Marcic on his HRA claim, specifically in respect of his rights under art. 8 of the ECHR and art. 1 to the First Protocol. One consequence of this was that his eligibility for damages extended only from 2 October 2002, when the HRA came into force. In arriving at its decision, the Court applied the fair balance criteria, as discussed in *Powell & Rayner v UK* [1990] 12 EHRR 355, and used the authority of *Guerra v Italy* [1998] 26 EHRR 357 to impose liability for omissions. The case was appealed by TWU and cross-appealed by Marcic. The Court of Appeal upheld the HRA element of the first instance decision. In addition TWU was found liable in nuisance. As a result, Marcic's entitlement to damages at common law displaced that under the HRA and he was entitled to damages for the full duration of the interference that he had suffered. The Court further took the view that the statutory remedy under sec. 18 of the WIA was unsuitable to meet Marcic's needs and that a claim for breach of statutory duty was barred as a matter of construction. On the question of arriving at a "fair balance" between the rights of the individual and the public interest, the Court specifically raised the issue of compensation in determining what would amount to an appropriate accommodation. In effect, the Court of Appeal's decision allowed the common law and HRA to displace an established and specific statutory regime, going against orthodoxy that had been established since the nineteenth century. On a more practical level, it had potentially crippling financial implications for sewerage undertakers. The matter inevitably ended up before the House of Lords in *Marcic v Thames Water Utilities* [2003] United Kingdom House of Lords (UKHL) 66. The House of Lords upheld TWU's appeal. It took the view that the regulatory regime that existed under the WIA, together with the supervisory jurisdiction of the Courts in the form of judicial review, were adequate to both protect the individual's Convention rights and to provide redress and Marcic had not chosen to avail himself of either of these. In addition, their Lordships deemed the DGWS to be in a better position than themselves to determine the appropriate balance between someone in Marcic's position and TWU's other customers. In so doing, their Lordships followed the approach adopted by the European Court of Human Rights Grand Chamber in *Hatton v United Kingdom* [2003] 37 EHRR 28. In essence, their Lordships returned to the orthodox position that had been largely settled in the nineteenth century, that the common law should not impose obligations (including those of nuisance) on a statutory undertaker that were inconsistent with the statutory regime that Parliament had put in place.

- 14 Having played a prominent part in the judgments in *Marcic*, compensation issues also arose explicitly in the case of *Dennis v Ministry of Defence* [2003] England and Wales High Court (Administrative Court) (EWHC) 793. In this case the claimants owned a sizeable estate near a Royal Air Force (RAF) base and suffered severe nuisance as a result of noise from Harrier jump jets. They claimed damages and a declaration in respect of this. At first instance it was held that the noise did amount to a serious nuisance and one that was aggravat-

ed by persistence and unpredictability. The court also held that the defendants were not engaged in an ordinary use of land, even in a twenty-first century context. The main issue under consideration was whether the interference suffered by the claimants could be deemed justified in the public interest. Buckley J, following *Marcic v Thames Water Utilities* [2002] QB 929, was of the opinion that only reasonably necessary interference would be justified by reference to the public interest. He further determined that a public interest defence would only be allowed to stand in a nuisance context if it would also succeed in a Human Rights Act claim on the same facts. In the instant case he decided that the public interest required that the RAF continue to fly but not that the claimants should carry the cost of the public benefit. Buckley decided that justice demanded that the declaration sought be refused but that damages be awarded to cover the loss of capital value sustained by the claimants and their past and future loss of use and amenity.

Misfeasance by public authorities attracts liability under the rule in *Geddis v Proprietors of Bann Reservoirs* [1878] 3 Appeal Cases (App Cas) 430 which states that there is no liability at common law for damage caused by doing what is authorised by statute, in the absence of negligence.²³ 15

Case law involving potential liability in nuisance has arisen, with rather more success than negligence cases, but still with low victory rates for claimants. A leading authority on this issue is *Manchester Corporation v Farnworth* [1929] 1 K.B. 533. In this case the local authority, acting under a private act of Parliament, operated a power station in order to generate electricity. One result of this activity was the emission of sulphur dioxide, which caused serious physical damage to Farnworth's neighbouring farmland. He brought an action in nuisance that failed at first instance. Among the issues considered by the Court of Appeal was statutory authority. The statute in question here was unusual in that, contrary to normal practice, no provision had been made within it for compensating those adversely affected by its operation. This type of situation would normally create a presumption that the courts would intervene to grant redress. However, this situation, where a public authority was acting in pursuit of what were termed "onerous statutory public duties"²⁴ meant that the court was faced with a difficult decision. The Court was not convinced that the nuisance suffered by Farnworth was an inevitable consequence of the activities authorised by the statute (which would have ensured that no action would lie) and so granted an injunction (suspended for twelve months) forbidding operation of the plant until action had been taken to terminate or mitigate the nuisance. This decision was affirmed by a majority in the House of Lords.²⁵ It should be noted that not only public authorities are insulated from actions in nuisance under statute – private companies acting as statutory undertakers enjoy similar (though more narrowly 16

²³ In this context negligently caused damage will be characterised as damage that is avoidable.

²⁴ Per Scrutton LJ 559 f.

²⁵ *Farnworth v Lord Mayor, Aldermen and Citizens of Manchester* [1930] AC 171.

construed²⁶) freedom from liability in the absence of negligence – see *Mersey Docks and Harbour Trustees v Gibbs* [1866] L.R. 1 HL 93.

- 17 Case law relating to nuisance and liability under the rule in *Rylands v Fletcher* does however need to be read with some caution in relation to environmental cases following the House of Lords' ruling in *Cambridge Water v Eastern Counties Leather* [1994] 1 A.E.R. 53. Following this case, it has now been determined that, in order for liability to accrue at common law, the damage must have been foreseeable at the time that the damage occurred. The case involved the typical but also legally controversial problem of historic pollution. Cambridge Water (CW), a private water company, owned land with a borehole from which it was licensed to extract water to supply to its clients for drinking. Perchloroethylene (PCE), a chemical used in leather production, leaching from the site of Eastern Counties Leather's (ECL) nearby tannery had, unknown to CW, contaminated the aquifer from which the water supply was drawn. This became problematic when the Drinking Water Directive, Dir. 80/778/EEC was introduced. The Directive prohibited the presence of PCE at the levels present in CW's supply in potable water. CW had to discontinue its use of the borehole and find alternative resources. CW brought proceedings against ECL in negligence, nuisance and under the rule in *Rylands v Fletcher*. At first instance CW's claims failed on the basis that the damage sustained was not deemed foreseeable from the escape of relatively small quantities of PCE at the time that the spillages had occurred. CW succeeded in nuisance in the Court of Appeal under the rather obscure authority of *Ballard v Tomlinson* [1885] 29 Ch D 115, which the Court deemed to provide a natural right to abstract uncontaminated groundwater. The House of Lords allowed CW's appeal, deciding the case primarily in nuisance (viewing the rule in *Rylands v Fletcher* simply as an adjunct of nuisance) and refusing to impose liability on ECL for damage that was not reasonably foreseeable²⁷ in the 1970s, when the last spillages of PCE occurred. By placing the issue of foreseeability centre stage in respect of torts pertaining to the environment, the House of Lords has seriously curtailed the potential of this branch of the common law to act as a tool for environmental protection – a task which Lord Goff expressly stated should be left to Parliament, in particular in the context of ever increasing statutory regulation of activities affecting the environment. This approach was arguably based on the view that the House of Lords deemed implicit in the negligence based Privy Council decisions in *Overseas Tankship (UK) v Morts Dock and Engineering Co. Ltd* [1961] AC 388 and *Overseas Tankship (UK) v Miller Steamship Co. Pty Ltd (Wagon Mound No. 2)* [1967] AC 617; that it should not be easier to recover for property damage at common law than to recover for personal injury in the same discipline. In that case, foreseeability was deemed necessary for liability in both nuisance and negligence, though extending this approach to *Rylands v Fletcher*, which was explicitly excluded from the ruling in the *Wagon*

²⁶ See Halsbury's Laws of England, Administrative Law, vol. 4 § 186.

²⁷ G. Cross, Does only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance, L.Q.R. 111 (1995) 445 ff.

Mound,²⁸ was considerably more controversial.²⁹ The idea that legislation can meet all eventualities is of course ultimately a fallacious one and flies in the face of the acknowledged role of the common law in filling the interstices in the statutory system. One view commonly expressed, and put most eloquently by Ghandi, was that the ruling in Cambridge Water signalled “[...] the end of any development of common law principles as a serious weapon with which to combat environmental pollution”.³⁰ An alternative, less radical view is that Cambridge Water appeared to have, at least arguably assimilated the rule in *Rylands v Fletcher* into mainstream nuisance,³¹ thus rendering the latter basis of action redundant. This does not however appear to have been borne out in the subsequent House of Lords’ decision in *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1. This case involved a claim by Transco in respect of operations required to safeguard one of its gas mains which had been undermined as a result of a water pipe leak from a block of flats owned by the defendant local council and supplied with water by it. There had been no negligence on the part of the local authority. In contrast to the Australian case of *Burnie Port Authority v General Jones Pty. Ltd* [1994] 68 Australian Law Journal (A.L.J.) 331 in which the High Court, by a majority, held that, in Australian law, *Rylands v Fletcher* had been assimilated into the law of negligence, the House of Lords in Transco refused to extinguish the rule in UK law. They did however endorse the (not uncontroversial³²) view that, rather than being a truly separate species of liability, the rule in *Rylands v Fletcher* is simply an offshoot of the general law of nuisance. In addition, the Law Lords stressed that, although they wanted to retain the rule in *Rylands v Fletcher*, in future it was to be narrowly applied. Lord Bingham summarised the rule as it now stands: “An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property interest by the escape of that thing, subject to defences of act of God or of a stranger, without the need to prove negligence.”³³ Interestingly, the defendant local authority in the Transco case was actually under a statutory duty to supply water to the block of flats in question and in this regard Lord Scott commented that: “The use of land for carrying on the activity cannot be characterised as unreasonable if it has been authorised by or required by statute. Viewed against the fact of the statutory authority, the use is a natural and ordinary use of the land. [...] The council had no alternative, given its statutory obligations to the occupiers of the flats, but to lay

²⁸ *Overseas Tankship (UK) v Morts Dock and Engineering Co. Ltd* [1961] AC 388 per Viscount Simonds 427 f.

²⁹ See, for example, L. Dolding/R. Mullender, Environmental Law: Notions of Strict Liability, *Journal of Business Law* (J.B.L.) 1995, 93 ff.

³⁰ P.R. Ghandi, Requiem for Rylands v Fletcher, *Conveyancer and Property Lawyer* (Conv.) 1994, Jul/Aug, 309 ff.

³¹ An approach considered in *V. Phillips*, Future Prospects For Pollution Actions Under the UK Common Law, *International Company and Commercial Law Review* (I.C.C.L.R.) 1994, 5(3) 109 ff.

³² D. Nolan, The Distinctiveness of Rylands v Fletcher, *L.Q.R.* 121 (2005) 421 ff.

³³ [2004] 2 AC 1 at page 11.

on a water supply. Strict liability cannot be attached to it for having done so.”³⁴ Taken together with the application of a similar approach to sewerage provision and regulatory functions adopted in the *Marcic* case (discussed supra no. 13) by Lord Nichols: “When flooding occurs the first enforcement step under the statute is that the [...] DGWS [...] as the regulator of the industry, will consider whether or not to make an enforcement order. [...] individual householders may bring proceedings in respect of inadequate drainage only when the undertaker has failed to comply with an enforcement order [...]. The existence of a parallel common law right, whereby individual householders who suffer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme”,³⁵ the continued primacy of statute over the common law appears to be assured.

- 18 This high profile line of authority was not however alone in placing obstacles in the way of claimants attempting to employ torts in “environmental” contexts – a similar reluctance to so employ the common law can also be found in the very different context provided by *Hope v British Nuclear Fuels (BNFL)* [1994] E. L.R. 320. The case involved the application of the strict liability regime imposed by the Atomic Energy Authority Act 1954. Claims were made by two individuals: the first alleged that her infant daughter had developed and died from cancer; the second that she herself had developed cancer, in each case as a result of the exposure of the relevant fathers to radiation while working at BNFL’s Sellafield plant. The cases ultimately turned on causation – both claimants were required to satisfy the court that, on the balance of probabilities, exposure to radiation from the defendants’ plant had caused or materially contributed to their damage.³⁶ The issue fell ultimately to a contest between competing expert evidence and the judge was not convinced by the material adduced on behalf of the claimants. In addition, cases where claimants have attempted to rely on statutory civil liability in order to recover for pure economic loss or psychiatric damage have not met with success. This is demonstrated by the diverse but all equally fruitless claims in *Magnohard Ltd v the United Kingdom Atomic Energy Authority* [2003] Scots Law Times (S.L.T.) 1083, *Blue Circle Industries plc v Ministry of Defence* [1998] 3 A.E.R. 385 and *Merlin v British Nuclear Fuels* [1990] 2 QB 557.
- 19 Causation in the context of liability for environment based claims was also the central issue in *Graham and Graham v ReChem* [1996] E. L.R. 158 (at the time the second longest civil case in English legal history). The claimants owned a farm close to one of ReChem’s hazardous waste incinerators. They alleged that their land had been contaminated and that both their own and their livestock’s health had been adversely affected by emissions of PCBs, dioxins and furans from the incinerator. They brought their case under nuisance and negligence.

³⁴ § 89.

³⁵ § 35.

³⁶ This draws on the classic formulation of the test for causation contained in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

The case ultimately centred on causation.³⁷ The main problem faced by the claimants was that, although the incinerator produced PCBs, furans and dioxins, these substances are ubiquitous in the environment. Once again, the case became a contest between conflicting expert evidence³⁸ and, once again, the claimants failed to convince the court. Interestingly, the courts have recently shown themselves more willing to take a more relaxed approach to causation in cases involving scientific uncertainty in other contexts. This is evident in the House of Lords' decision in *Fairchild v Glenhaven Funeral Services Ltd* [2001] Court of Appeal (Civil Division) (EWCA Civ) 1881. This case involved an action in negligence by the claimant in respect of her husband's death from mesothelioma, a disease that can be caused by exposure to a single fibre of asbestos. The claimant's husband had worked for three different employers, all of whom had dealt with asbestos and all of whom had been negligent in their duties regarding the health and safety of their employees. The court, taking into account the defendants' admitted negligence and the fact that the state of scientific knowledge made it impossible to determine which employer's negligence had caused the damage, deemed it sufficient to attract liability that the defendants had materially increased the risk of damage. This drew on the earlier (much criticised) authority³⁹ of *McGhee v National Coal Board* [1973] 1 W.L.R. 1. While the Lords expressly stated that their ruling in *Fairchild* represented an exception to the general rule that was to be tightly construed, it is likely that this decision will cause the whole vexed issue of causation and scientific uncertainty to be revisited in other contexts, and cases based on environmental harm will inevitably feature in this.

Public nuisance⁴⁰ too has been pressed into service in the context of adverse environmental impacts, as in the case of *Allen v Gulf Oil Refining Ltd* [1981] AC 1014. In this case a private act of parliament⁴¹ had authorised the construction of an oil refinery. A neighbouring property owner subsequently complained of nuisance and brought proceedings claiming that, although the statute in question authorised the construction of the refinery, it did not explicitly authorise its operation and therefore did not preclude liability in nuisance on the part of the refinery's operators. The House of Lords held that the operation of the refinery was implicitly authorised by the statute and that any nuisance that was an inevitable consequence of its operation attracted immunity from proceedings in nuisance. This conclusion was reached despite the fact that Courts usually adopt a restrictive approach towards allowing statutory powers to interfere

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³⁷ See *A. Layard*, Balancing Environmental Consideration, L.Q.R. 113 (1997) 254 ff.

³⁸ See *K. Morrow*, Nuisance and Environmental Protection, in: Lowry (fn. 3) 139 ff.

³⁹ Not least in the House of Lords' decision in *Wilsher v Essex Area Health Authority* [1988] 1 A.E.R. 871.

⁴⁰ Public nuisance adversely affects "a class of Her Majesty's subjects" and is generally a crime in British law, but it can in certain circumstances also found an action for the individual in tort provided that the claimant can show that they have suffered damage "over and above" that of the public at large, see *A-G v P.Y.A. Quarries* [1957] 2 QB 169.

⁴¹ Private acts of Parliament are not initiated by the government, but instead result from a procedure whereby Parliament is petitioned (for example, by a company) to exercise its legislative powers with reference to a particular project or activity.

with the individual's rights at common law.⁴² The House of Lords in *Allen* also confirmed that the burden of showing the inevitability of nuisance arising in the exercise of powers under statute lies with the person exercising those powers. If, however, statutes state that, in the case of a nuisance arising in respect of the exercise of a statutory power, the legal rights of third parties to bring proceedings at common law remain extant, then the normal rules of common law apply – see *Powell v Fall* [1880] 5 Queen's Bench Division (QBD) 597.

- 21 Proceedings in nuisance were also brought in respect of authorised activities in *Hunter v Canary Wharf Ltd* [1997] AC 655 and *Gillingham Borough Council v Medway (Chatham) Dock Co.* [1993] QB 343. These cases involved permitted building operations in an Enterprise Zone⁴³ and the operation of a commercial dock authorised under planning law respectively. The claimants did not succeed in either case. In *Hunter* the claim failed because the claimants lacked the requisite proprietary interest in land to bring an action. The points raised in the *Gillingham* case are in many ways more interesting as it pertains to mainstream planning law. In this case the local council, acting as the planning authority, had granted planning permission authorising a change from a naval dockyard to a much busier commercial dockyard, with adverse environmental impacts on the local populace. The council responding to this state of affairs brought an action in nuisance under sec. 222 of the Local Government Act 1972. It could have tackled the problem by altering the planning permission that it had granted; though to do so compensation would have had to be paid. In any event the nuisance claim failed on the basis that the granting of planning permission had changed the character of the area.

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

- 22 Keeping in mind the un-codified nature of the UK constitution, the main general means (leaving aside internal statute specific mechanisms) by which the actions of a public authority can be challenged in law in the UK is through a Claim for Judicial Review (CJR).⁴⁴ CJR is governed in part by sec. 31 of the Senior Courts Act 1981⁴⁵ and by the new Rule 22 Part 54 of the Civil Procedure Rules (CPR).⁴⁶ While it is possible under rule 54.3(2) for the Courts to make an award of damages under a claim for judicial review, this is only rarely the case. Such claims will only succeed where the claimant can prove that, in addition to an infringement of

⁴² See Halsbury's Laws of England, Administrative Law, vol. 5 § 195, for examples.

⁴³ An area designated for simplified planning controls in order to facilitate expedited development control.

⁴⁴ Formerly known as the application for judicial review.

⁴⁵ Formerly sec. 54 Supreme Court Act 1981, renamed by sec. 4 Constitutional Reform Act 2005.

⁴⁶ As amended by No. 2092 Supreme Court of England and Wales County Courts, England and Wales, The Civil Procedure (Amendment No. 4) Rules 2000.

their public law rights raised in the claim, their rights at private law in contract or tort have also been interfered with. In addition, the Court must be satisfied that, had the claimant proceeded by way of a civil action rather than judicial review, such a claim would have resulted in an award of damages. Thus it can be seen that, while damages for the infringement of certain individual private law rights are available through the CJR process, this is the exception rather than the rule. Other remedies are more readily available in the CJR context. These comprise the public law specific remedies: a quashing order (formerly certiorari), a mandatory order (formerly mandamus) and a prohibitory order (formerly prohibition) and the remedies of injunction and declaration that are also available in private law. In administrative law (and indeed also in private law) the courts may not normally (unless EU law is invoked) employ injunctions against the Crown as a legal entity though a declaration may be awarded in this context. Injunctions are however available against individual departments and ministers (see *M v Home Office* [1994] 1 AC 377). The use of declarations is less contentious in terms of the constitutional position of the judiciary than the alternative course, but generally achieves the same result. Injunctions can also prove problematic in a private law context where broader State interests clash with those of affected individuals – in nuisance cases this has proved a particularly vexed issue as the traditional position at common law was that if a claimant successfully made out their case, they were entitled to an injunction, more or less as a matter of course. More recent case law under the HRA has seen compensation move to the fore in this context (see *supra* no. 14).

Claims in respect of failures by regulatory authorities in their statutory functions may be brought under the Claim for Judicial Review procedure by individuals (legal or natural persons⁴⁷) with a “sufficient interest” in the matter to which the claim relates. In regulatory law, the Courts have tended to be quite generous in according *locus standi*. For example in *R v Her Majesty’s Inspectorate of Pollution (HMIP) and the Minister of Agriculture, Fisheries and Food, ex parte Greenpeace* [1994] 2 Common Market Law Reports (CMLR) 548, Otton J was willing to extend standing to Greenpeace as an NGO with local and national membership and an established reputation for expertise in the area to challenge HMIP’s licensing (by a variation on an existing consent) of the testing of the Thermal Oxide Reprocessing Plant (THORP) at Sellafield. Greenpeace argued that variation was inappropriate and that a new consent was required. The claim however failed on its merits. The requirement imposed under art. 6 of the Ionising Radiation Directive 80/836/Euratom, that nuclear activity resulting in exposure to radiation be justified in advance, was deemed satisfied by the fact that both Parliament and the regulators had given the matter their consideration at the planning stage of the project.

An example of a challenge raised by an individual in a broadly environmental context can be found in *R v Bolton MBC, ex parte Kirkman* [1998]

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⁴⁷ Natural persons will be entitled to a wider range of remedies than NGOs, who are currently likely to find their remedies declared to declaratory relief – see, e.g., *R v Secretary of state for Foreign Affairs, ex parte World Development Movement Ltd* [1995] 1 A.E.R. 611.

Journal of Planning Law (JPL) 787. Although this case was considered controversial on the subject matter concerned, standing was not ultimately deemed problematic. This case involved a judicial review action initiated by a local resident in respect of a grant of planning permission under the Town and Country Planning Act 1990 for a large waste incinerator next to his home. A large part of Kirkman's argument centred on the application of the concept of the Best Practicable Environmental Option (BPEO) as part of the Integrated Pollution Control (IPC) licensing system under Part I of the EPA. Kirkman alleged that both the Local Planning Authority (LPA) and the Judge at first instance had erred in their consideration of the BPEO issue in granting planning permission and refusing leave respectively. Kirkman argued that government policy on sustainable development required planning decisions in waste cases to be made in accordance with the BPEO and that, since no detailed assessment had been made of the costs of alternatives in this case, the LPA had failed in its duty. The Court concluded that, even in the absence of such an assessment, the matter had been appropriately dealt with. It is highly questionable whether this was in fact the case, and reluctance on the part of the Court to intervene could hardly have been more manifest. The Kirkman and Greenpeace cases demonstrate that, while the courts may be generous in allowing access to judicial review in terms of standing, success on challenging the decisions of regulatory authorities is far from likely. This situation prevails in part because of the highly discretionary nature of enforcement that characterises much of UK environmental law. The Environment Agency has developed a prosecution policy⁴⁸ that serves in part to structure and render more transparent its approach to enforcement, but the fact remains that the relevant statutes accord such broad latitude to regulators that effectively challenging their decisions on administrative law grounds, and in particular *ultra vires* is highly problematic.

In addition to the somewhat limited route to damages offered by the CJR, the courts have new (though similarly constrained) powers to award remedies for breaches of the Human Rights Act 1998.⁴⁹ Under sec. 6(1) they may grant such relief or remedy or make such orders against public authorities as they consider "just and appropriate" in respect of acts or proposed acts that are deemed unlawful. Generally under the HRA under sec. 8(3) damages can only be awarded when, having taken into account other remedies granted and the consequences of its decision, the court is satisfied that they are necessary to "afford just satisfaction" to the claimant. There are additional specific limitations applicable to the area of civil liability where, under sec. 8(2), (6), damages can only be awarded under the HRA where they would also be available in civil proceedings. Where a public authority is found liable in damages, under sec. 8(5), it is treated as liable for damage suffered by the claimant under the Civil Liability (Contribution) Act 1978.

⁴⁸ Available at www.environment-agency.gov.uk.

⁴⁹ Halsbury's Laws of England, Administrative Law, vol. 4 § 157.

3. *Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?*

In addition to criminal liability for pollution offences, regulatory laws in the UK occasionally impose a form of statutory civil liability⁵⁰ on polluters for clean-up costs to cover the costs incurred by the Environment Agency in cleaning up pollution incidents for which they are responsible. An example can be found in sec. 161 of the Water Resources Act 1991 (as amended) under which the Environment Agency can recover “reasonable costs” from those who have “caused or knowingly permitted” the pollution in question. Similar provisions can be found in sec. 59 of the Environmental Protection Act 1990 (concerning the removal of unauthorised deposits of waste on land) and sec. 215 of the Town and Country Planning Act 1990 (concerning factors compromising the amenity of land). More problematic have been attempts to impose liability in respect of contaminated land under the Environmental Protection Act 1990 as amended by the Environment Act 1995.

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4. *What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?*

Statutory authority will potentially exclude liability for authorised activities that are carried out under statute, depending on the wording of the piece of legislation in question. As a general rule, an alleged breach of statutory provisions will not, in and of itself, provide a sufficient basis for an action at common law – see *Lonrho Ltd v Shell Petroleum Co. Ltd (No. 2)* [1982] AC 173. In addition, see the discussion of the application of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (supra no. 5) for the current view on what this type of liability requires. In any event, the courts tend to construe statutory powers narrowly, as demonstrated in *Boyce v Paddington Borough Council* [1903] 2 Chancery (Ch.) 556. Compliance with a regulatory permission does not necessarily insulate a licence holder from proceedings at common law, though it may go some way to informing the Court’s analysis of fault in this context, reasoning by analogy from the approach adopted in *Budden & Albery v BPC* [1980] JPL 586 (see infra no. 45).

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⁵⁰ For a general discussion of the types of liability that may be imposed in this context, see, C. Shelbourn, *Historic Pollution – Does the Polluter Pay?* JPL 1994, 703 ff.

- 26 Additional specific rules apply for different public actors. At common law the government has a general immunity from liability in tort.⁵¹ Statute has however largely abrogated⁵² this through the Crown Proceedings Act 1947.⁵³ The definition of the Crown in these circumstances includes the government and its servants or agents. The key relevant provisions are as follows: under sec. 2(1) (a) of the 1947 Act the government is placed under normal civil liability for torts committed by its servants⁵⁴ or agents;⁵⁵ under sec. 2(1)(b) normal employers' liability rules apply; under sec. 2(1)(c) normal liability regimes in respect of ownership and occupation of property apply; and under sec. 2(2) failure to comply with statutory duties, that are either applicable to the Crown specifically or with more general statutory duties that apply to the Crown as well as others, is potentially actionable. In any event, it must be shown that the statutory provisions in question either explicitly or impliedly refer to the Crown.⁵⁶
- 27 Other public bodies may also be liable at common law in negligence, nuisance, trespass and in other torts. Such liability covers failure to act with due care as discussed in the leading authority of *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. Any right of action will be dependant on the claimant falling within a designated class of the public for whose benefit the statute is deemed to exist. As a matter of public policy, no duty is generally deemed to be owed to broad classes such as "the public at large" – see generally, *Hill v Chief Constable of West Yorkshire* [1988] QB 60. This approach is applied in a more narrowly "environmental" context in *Weir v East of Scotland Water Authority* [2001] S.L.T. 1205. In certain circumstances however, public authorities may be made liable by statute for breach of statutory duty or breach of common law duties.⁵⁷ Such bodies may also be liable for torts that they have authorised.⁵⁸
- 28 There is a specific tort in UK law of misfeasance in a public office, though as this requires that a public officer exercise his powers with the intention to injure the claimant or to knowingly act ultra vires in a way that will probably injure the claimant, this is quite rare, see *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)* [2000] 3 A.E.R. 1.

⁵¹ Actions are potentially available against Crown servants acting in a personal (rather than a governmental) capacity provided that the claimant is owed a legal duty, see *M v Home Office* [1994] 1 AC 377.

⁵² There are a number of excluded areas, relating for example to national defence (sec. 11) and judicial issues (sec. 2(5)).

⁵³ See generally Halsbury's Laws of England, Administrative Law, vol. 4 § 182 ff.

⁵⁴ For the meaning of the term "servant" in this context at common law, see the House of Lords' decision in *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584. Under sec. 2(6) Crown liability extends only to officers that it pays directly or indirectly from specifically identified public funds. For the purposes of this report, the most significant Crown servants are government ministers.

⁵⁵ This includes independent contractors sec. 38(2).

⁵⁶ See Halsbury's Laws of England, Statutes, vol. 44(1) (Reissue § 1321).

⁵⁷ See, for example *Blue Circle Industries plc v Ministry of Defence* [1998] 3 A.E.R. 385.

⁵⁸ *Campbell v Paddington Corporation* [1911] K.B. 869.

Finally, there is the possibility of personal civil liability of public officers for breach of the common law and/or breach of statutory duty. Exemplary damages are available in respect of oppressive, arbitrary or unconstitutional conduct⁵⁹ but these do not currently extend to nuisance⁶⁰ and negligence,⁶¹ two of the torts most likely to interact with regulatory law. There are also statutory provisions protecting officials engaged in the protection of public health from personal liability⁶² in specified situations.

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5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

As a general rule, the courts take the view that where statute provides a remedy this takes precedence and should be pursued – see *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (discussed supra no. 13). As criminal law actions are generally brought in the public interest (private prosecutions are possible in this regard, but rare in practice) they do not usually address private grievances. In some circumstances adversely affected individuals may bring proceedings in tort, provided that they can establish that they have no statutory remedy and that they fall within the ambit of the common law (see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, discussed supra no. 5).

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6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

The concept of a “rule with protective purpose” is not commonly used in UK law. However, statutory provisions in regulatory law, notably environmental laws and public health laws, commonly explicitly state that their objectives are geared towards protecting the environment and/or human health and so it may be said that the notion is implicit in much regulatory law. The content of what may be broadly termed “protective purposes” in UK law is therefore statutory rather than common law based.

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⁵⁹ *Rookes v Barnard* [1964] AC 1129.

⁶⁰ *AB v South West Water Services Ltd* [1993] 1 A.E.R. 609.

⁶¹ *Ibid.*

⁶² See, for example, sec. 305 Public Health Act 1936.

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 32 Crown servants are not liable for the acts of their subordinates, unless they directly or impliedly order the acts complained of to be carried out.⁶³ If this is the case, then the conventions of ministerial responsibility apply, shielding the individual civil servant from personal liability by making legal and political responsibility for his actions rest with the Minister, see *Carltona v Commissioner of Works* [1943] 2 A.E.R. 560, otherwise liability will rest with the actual tortfeasor. Other public authorities are vicariously liable for the acts of their own servants and agents in the same way that a private employer would be, thus they will be liable for torts carried out by their personnel acting within the course of their employment. If individuals are not so acting, they will be personally liable for their tortious actions.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

- 33 “Private entities” may, in exceptional circumstances, be subject to administrative law in the UK, as determined in *R. v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] QB 815. The courts will apply administrative law to such entities if they carry out a public function and their role is underpinned by statute. The definition of a public authority contained in sec. 6 of the HRA is broader in its application than that used in judicial review and thus HRA remedies also may be available against private entities in certain circumstances. It is extremely difficult to recover damages for the infringement of private law rights though the CJR (see supra no. 22). In addition, the application of the rules contained in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (see supra no. 5), means that it is possible but highly unlikely that tort liability will result from breach of administrative law. Private entities are subject to civil liability for clean-up costs under a number of statutory regimes. UK environmental laws tend to utilise criminal law, in the form of statutory offences, for example under subs. 23 and 33 of the EPA and sec. 85 of the Water Resources Act 1991 (WRA) in tandem with provisions imposing statutory civil liability for personal injury and property damage under statute, as, for example sec. 209 WIA, sec. 73(6) EPA. In addition, the Environment Agency is empowered to clean up pollution damage and then apply to the courts to recover reasonable expenses so incurred from those responsible for the pollution as, for example, under sec. 27 EPA and sec. 161 of the WRA.

⁶³ Halsbury’s Laws of England, Administrative Law, vol. 4 § 183.

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. *Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?*

As a rule statutory regulations take precedence over the common law of tort in this area, see, for example *R v Exeter City Council, ex parte J.L. Thomas & Co. Ltd* [1991] 1 QB 471. Statutory regimes are preferred for their specificity and because they have been endorsed by Parliament – see *Marcic v Thames Water Utilities Ltd* [2002] QB 929, at supra no. 13.

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2. *In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?*

While there is some overlap between regulatory law and the common law (see discussion of statutory nuisance, at supra no. 4) in terms of cases that arise, the purposes of these two legal regimes are normally quite distinct. Tort law exists to protect private and individual rights and interests; in the context of “environmental” torts these in principle primarily involve property rights (in the case of liability in nuisance and under the rule in *Rylands v Fletcher*) and to a lesser extent personal injury (in negligence). Regulatory law on the other hand exists to protect statutorily defined public interests; in the environmental law context, these usually involve protection of the environment itself and protection of human interests in it and related to it, for example, public health.

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3. *Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?*

To some extent regulations can be regarded as statutes with a protective purpose. Provisions contained in primary legislation (such as the Environmental Protection Act 1990 and the Environment Act 1995) typically explicitly state that their aim (and the aim of statutory instruments made under them) is to protect the environment and human health. However, though this is ultimately a matter for statutory interpretation based on individual statutes, the normal focus of such provision in the context of statutorily mandated activities is the public at large and not the individual, as discussed in *Stovin v Wise* [1996] AC 923, at supra no. 9.

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Breach of pollution control statutes can lead to the defendant incurring strict liability, as for example, in the case of waste in sec. 33 of Part II of the EPA and subs. 85 of the Water Resources Act. It is in the latter area (which draws on provisions originating in the nineteenth century and featuring in the Control of Pollution Act 1974 (COPA) on water pollution, precursor to the current regime) that the courts have had most opportunity to clarify the operation of strict liability in environmental law. These provisions impose statutory strict

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liability for “causing or knowingly permitting” the pollution of controlled waters⁶⁴ and it is in the interpretation of these terms that controversy has arisen,⁶⁵ in particular because they have not been defined in statutes but instead elucidated in case law.

- 38 First, it is necessary to understand the distinction between the terms “cause” and “knowingly permit”. In the leading authority in the area, *Environment Agency (Formerly National Rivers Authority)*⁶⁶ v *Empress Car Co (Abertillery) Ltd* [1998] 1 A.E.R. 481 Lord Hoffmann explained: “[...] under the first limb, what the defendant did must have caused the pollution and under the second limb, his omission must have caused it. The distinction [...] between acts and omissions is [...] due to the fact that Parliament has added the requirement when the cause of the pollution is an omission.”
- 39 There has been a considerable volume of case law over the years concerning the interpretation of the term “cause” in pollution control law. The issue was influentially considered under the COPA regime by the House of Lords in *Alphacell v Woodward* [1972] 2 A.E.R. 475. In the words of Lord Wilberforce: “[...] causing [...] must be given a common sense meaning and I depreciate the introduction of refinements such as *causa*, effective cause or *novus actus*.”⁶⁷ However, he did add that this was subject to the proviso that acts of third parties or of nature could cloud the issue. The question of “causing” pollution came up for consideration under the WRA regime in *Wychavon District Council v National Rivers Authority* [1993] 1 W.L.R. 125, a case involving an identical form of words in sec. 107(1)(c) of the WRA. The National Rivers Authority (NRA) alleged that the Council had caused raw sewage effluent to enter the River Avon through a storm outflow on 11 and 12 March 1990. On 12 March the Council, acting as an agent for Severn Trent Water, cleared a blockage in a sewer pipe and the pollution stopped. At issue was whether the Council had “caused” the pollution by failing to discover the source more promptly. Watkins LJ cited Lord Wilberforce’s view in *Alphacell* and continued: “[...] ‘causing’ [...] must involve some active operation or chain of operations involving as the result the pollution of the stream; ‘knowingly permitting’ [...] involves a failure to prevent the pollution, which failure must be accompanied by knowledge.” In the instant case the pollution was not the result of an operation or positive act by the Council, so they were not deemed to have caused it. The House of Lords endorsed this approach in *National Rivers Authority v Yorkshire Water Services Ltd* [1995] 1 AC 444. However, this approach proved extremely controversial, as it allowed defendants a great deal of latitude in their behaviour, making it comparatively easy for them to escape liability under what was ostensibly a strict liability regime.

⁶⁴ As defined in sec. 104 of the WRA.

⁶⁵ *N. Parpworth*, *Causing Water Pollution and the Acts of Third Parties*, JPL 1998, 752 ff.

⁶⁶ The Environment Agency replaced the National Rivers Authority and Her Majesty’s Inspectorate of Pollution following the Environment Act 1995.

⁶⁷ Per Lord Wilberforce 479.

The House of Lords took the opportunity to clarify what had become an extremely confused area of law and to return to the more demanding intention of the legislation in *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 A.E.R. 481. In this case Empress Cars owned an industrial site with a diesel tank on it. The site drained directly into a river. The tank had been properly equipped with pollution control devices, but Empress had overridden the controls in order to get easier access to the fuel. The outlet pipe had a tap but no lock. There was a record of vandalism on the site. The tank's tap was opened at night by a trespasser and the diesel drained into the yard and subsequently the river. Empress was charged by the Environment Agency (EA) with "causing" pollution. The company was convicted and its appeal eventually ended up in the House of Lords. Empress' argument was that it had not caused the pollution, as it had not done any positive act. Instead the company claimed that the trespasser had caused the pollution. Their Lordships took the view that, by operating its business as it had done, the company's role had been sufficient to be deemed to cause pollution. In addition, their Lordships found that the act of the trespasser did not break the chain of causation in the instant case, as only something "extraordinary" would achieve this. Thus Empress was liable for causing pollution, even though the trespasser had been the immediate means of the pollution occurring. This approach drew on the Court of Appeal decision in Attorney General's Reference (No. 1 of 1994) [1995] E. L.R. 227 determining that more than one party may be responsible for "causing" pollution if separate and different acts were involved.

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The term "knowingly permit" has, on the whole, proved to be less controversial than "cause" but has also been considered in the courts under the COPA regime in *Price v Cromack* [1975] 2 A.E.R. 113. In this case a farmer was charged with "causing" pollution when slurry stored in a lagoon on his land entered a river. The farmer had a contract with an animal products firm that allowed them to discharge into the lagoons on his land. On these facts the farmer was found to have "permitted" the build up of waste in the lagoon but not to have "caused" it. This case did however adopt the more restrictive approach to "causing" pollution, requiring a "positive act" on the part of the defendant that has subsequently been rejected in *Empress*.

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The general rule that statutory authority does not insulate defendants from actions at common law if they act negligently applies to activities relating to water – see *Geddes v Bann Reservoir Proprietors* [1878] 3 App Cas 430. In addition in *Scott-Whitehead v National Court Board* [1985] 53 Property & Compensation Reports (P & CR) 263 it was held that a water authority was under a duty of care to warn riparian owners of the adverse effects that could arise from the operation of a discharge consent. However the shift to public authority based regulation and subsequent case law such as *Murphy v Brentwood District Council* [1991] 1 AC 398, *Stovin v Wise* [1996] AC 175, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 would seem to militate against liability in current law.

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- 43 It is long established authority in UK law that, as a general rule, statutory powers are, unless the instrument in question permits it, not to be exercised in such a way as to interfere with the rights of individuals – see *A-G v Birmingham Borough Council* [1858] 4 Kay & Johnson’s Vice Chancellor’s Reports (K. & J.) 528. In addition, it is settled authority, in respect of water pollution caused by the discharge of sewage, that, if pollution is caused in breach of statutory provisions (specifically sec. 117(5)(6) of the WIA), then the Attorney General may bring proceedings against those responsible. In such proceedings it has long been established case law that it is unnecessary for the AG to prove damage – see *A-G v Cockermouth Local Board* [1874] L.R. 18 Eq 172.

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 44 The waste management licensing system found in Part II of the Environmental Protection Act 1990 introduces a de facto insurance requirement by indirect means through the stipulation in sec. 36 that a licence can only be held by a “fit and proper person”. The definition of this term, found in sec. 74 includes a requirement that the applicant show that they have adequate financial resources in place to deal with potential liabilities in respect of their activities. Given the large sums involved in waste clean-up, this will usually necessitate insurance provision.

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

- 45 As a general rule, there is no blanket exclusion from civil liability at common law for compliance with regulatory law. Thus the “expectation test” is of only limited relevance in UK common law. Avoiding liability will depend on the wording of the applicable statute and the facts of the case. Thus in *Budden & Albery v BPC* [1980] JPL 586 there was no liability in negligence in respect of the sale of leaded petrol when the defendants were complying with the law. On the other hand, the content of administrative guidelines can be taken as an indication of what is foreseeable in negligence, though not as anything more conclusive than this. This was discussed in *Savage v Fairclough* [2000] E. L.R. 183. In this case activities on the defendants’ farm adversely affected the claimants’ water quality. At first instance the trial judge decided that the operation of a pig unit fell short of the standards of agricultural good practice as indicated by the Ministry of Agriculture Fisheries and Food (MAFF), but that otherwise their farming activities did comply with the requirements of good practice. The judge further found that, taking into account both good agricultural practice and the standard of the “hypothetical good farmer”, harm

of the relevant type, i.e. contamination of the neighbouring water supply as a result of farming activities, would not have been reasonably foreseeable. The claimants' appeal failed. In addition, as Shelbourn states, in cases where there is ongoing and foreseeable damage (as distinct from historic pollution, as in *Cambridge Water v Eastern Counties Leather*, discussed at supra no. 17) there may potentially be liability in nuisance/negligence.⁶⁸

2. *Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?*

Mere breach of a statutory rule does not in and of itself constitute wrongfulness, see *Lonrho Ltd v Shell Petroleum Co. Ltd (No. 2)* [1982] AC 173 at supra no. 25. For liability to accrue at common law under statute, the requirements laid out in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (discussed at supra no. 5) must be satisfied. 46

3. *If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?*

A breach of the relevant administrative rule will be relevant to claims to the extent that it is part of the question of breach of statutory duty, see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (discussed at supra no. 5). 47

4. *To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?*

This can go to evidence at common law and also forms an essential element of the defence of statutory authority – see discussion of *Allen v Gulf Oil Refining Ltd* [1981] AC 1014 (at supra no. 20). It is however generally the case that the courts will require statutory powers to be exercised in such a way as to cause minimum interference to others, see *A-G v Birmingham Borough Council* [1858] 4 K. & J. 528. This approach does not however preclude such interference, nor indeed guarantee a remedy at common law should it occur – see *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (discussed at supra no. 13). 48

5. *What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?*

The general burden of proof remains with the claimant, though it is for the defendant seeking to rely on statutory authorisation to show that the interference with the claimant's rights complained of is justified by the relevant statute and this would be more difficult to establish if a relevant regulatory provision has been breached. 49

⁶⁸ *Shelbourn*, JPL 1994, 705 f.

6. *Can a breach of an administrative law rule result in a claim for punitive damages?*

- 50 This issue was examined in the context of environmental law in the UK in the Court of Appeal decision in *AB v South West Water Services Ltd* [1993] QB 507. Following a criminal action in public nuisance in which the defendants were convicted, the instant case in the tort of public nuisance was brought by 180 individuals who claimed that they had suffered illness as a result of consuming water that had been accidentally contaminated at a water treatment plant operated by the defendants. They claimed that the defendants' employees had acted arrogantly and further that they had actively misled the public, thus exacerbating the damage suffered. The Court of Appeal confirmed that the test for the award of exemplary damages remains as stated in *Rookes v Barnard* [1964] AC 1129. This case stated that exemplary damages would be available where: there had been oppressive, arbitrary or unconstitutional conduct by servants of the government; or where the defendant's conduct had been calculated to make a profit that would exceed any payment of compensation made to the claimant. The Court further took the view that exemplary damages are confined to those categories of behaviour falling within the classes identified in *Rookes* and that they will not be extended into other areas.⁶⁹ In this case, as *South West Water Services* was a privatised company, it did not fit into the first class⁷⁰ nor could the claimants show on the facts that it fitted into the second. The Court took the view that exemplary damages had not been applied to public nuisance pre 1964⁷¹ and refused to consider extending them into this area.

B. *Acting in Compliance with Administrative Law Rules*

1. *Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?*

- 51 This issue is one that depends on the circumstances and statutory context. As a general rule, no action will lie in the absence of negligence, as in *Lea Conservancy Board v Hertford Corporation* [1884] 48 Justice of the Peace Reports (JP) 626 for example, where pollution of a watercourse by effluent was deemed not to amount to negligence when the relevant statute required that the best known means of purification be employed prior to the discharge and it had been complied with. However, in the case of *A-G v Hackney Local*

⁶⁹ An approach criticised in *A. Reed*, Exemplary Damages: A Persuasive Argument for Their Retention as a Mechanism of Retributive Justice, *Civil Justice Quarterly* (C.J.Q.) 1996, 130 ff.

⁷⁰ This takes a relatively narrow view of the issue in comparison with that adopted to the definition of the term "emanation of the state" in EU law, which, as determined in *Foster v British Gas* [1991] 2 A.E.R. 705, extended to statutory undertakers.

⁷¹ Exemplary damages had however been awarded in a later public nuisance case: *Guppys (Bridport) v Brookling & James* [1984] 269 Estates Gazette (E.G.) 846, discussed by R.G. Lee, Exemplary Awards and Environmental Law, *J.B.L.* 1993, 287 ff.

Board [1875] L.R. 20 Eq 626, similar pollution was held not to be justified by the statutory regime that was in place.

This issue is also touched upon, if rather obliquely, in *Wildtree Hotels Ltd v Harrow London Borough Council* [2001] 2 AC 1. This case involved a claim for compensation under sec. 10 of the Compulsory Purchase Act (sec. 56) 1965 in respect of temporary interference with access to property as a side effect of a road-widening scheme. The statutory provisions echo aspects of nuisance at common law, in that they allow for damages to be paid if works lawfully carried out under statutory powers cause damage which, had the statute not been in place, would have allowed an action to be brought in nuisance. The court held, following *re Penny and South Eastern Railway Co* [1857] 7 Ellis & Blackburn's Queen's Bench Report (E & B) 660, that there would be no action under statute if there would not have been an action at common law. 52

2. Can the general duty of care go beyond these rules?

It would be difficult, though not necessarily impossible, for this to happen, as the general approach in UK law gives primacy to the statutory provisions, see the discussion of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (discussed supra no. 5) for discussion of the approach adopted by the courts to such issues. 53

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

The allocation of the burden of proof in this situation depends ultimately on statutory construction, as the defendant is effectively claiming statutory authority for his actions – see *Metropolitan Asylum District Managers v Hill* [1881] 6 App Cas 193. As a general rule, the burden of showing that the statute authorises a particular action lies on the defendant who is trying to benefit from it, and in so doing, they must show that the statute has been designed to remove the rights that the claimant would normally enjoy in private law – see *Metropolitan Asylum District Managers v Hill*, supra. 54

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

There are some provisions for statutory civil liability and for statutory liability for clean-up costs, see supra no. 24 for discussion. 55

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?

- 56 Compensation is a vexed issue in this area of law in the UK at present, though it does seem to be emerging as a live issue in particular in light of the HRA, see discussion of *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (at no. 13). and *Dennis v Ministry of Defence* [2003] EWHC 793 (at no. 14).

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 57 Whether an action can be brought by the farmer and against whom will depend on the wording of the statute. In any event the fact that the statute itself is relatively out of date in scientific terms does not affect its applicability as the law of the land. The rule of parliamentary supremacy means that, as far as the UK courts are concerned (absent any EU law dimension), they must apply the statute as it stands, despite its limitations, provided that it is legally complete and capable of application – there is nothing in the fact scenario as it stands to suggest that it is not. The primacy of the statutory regime in a similar context (dealing with a body acting directly under statute rather than under a licence issued pursuant to a statutory regime) is confirmed in *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (see no. 13).

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

- 58 Regardless of the inapplicability of the specific legislation, B could be held liable under the general law of torts to a lawful visitor under the Occupiers’ Liability Act 1957 and, to a lesser degree, to a non-lawful visitor under the Occupiers’ Liability Act 1984 (as amended⁷²).

⁷² By the Countryside and Rights of Way Act 2000.

3. *Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.*

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

Those injured may bring an action at common law against the company, subject to the usual rules of tort. Compliance with statutory requirements is not necessarily conclusive – this will depend on the facts of the case and the wording of the relevant legislation – see *Budden & Albery v BPC* [1980] JPL 586. It is unlikely that the company will be able to successfully plead lack of supervision by the regulatory authority as a defence.

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b) Could the injured persons claim damages from the government agency?

This would begin as a question of statutory interpretation and ultimately fall to be determined under the rules in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. The case is most likely to fail on the basis of the claimants' inability to identify themselves as a specific class for whose benefit the statutory regime exists as in *Weir v East of Scotland Water Authority* [2001] S.L.T. 1205.

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TORT AND REGULATORY LAW IN FRANCE

*Philippe Billet and François Lichère**

Most of the case law and texts mentioned in the present report can be found on the official website www.legifrance.gouv.fr. The quotations from the French Codes come from the official translations also available on the same website.

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

Two types of liability are to be distinguished: civil liability (i.e. protecting third parties such as neighbours, environmental protection associations, local operators, ...) and criminal liability.

In the case of civil liability, the principle is that administrative permits are given *sous réserve du droit des tiers* (without prejudice of third-party rights). This means that if a person acts in compliance with the relevant administrative law rules and causes harm, he is obliged to pay damages to a third party without being exempted from liability because of the existing authorization. However one should take into consideration one exception to this principle according to the so-called *principe de préoccupation individuelle* (principle of individual concern – see *infra* no. 23).

Regarding civil liability in general, two types of liability are concerned: objective liability and subjective liability. The former obliges the victim to establish an objective link between the fact that generates the harm and the damage whereas the latter requires the victim to prove the fault of the liable person. For instance, the objective liability takes place in the case of the non-performance of a contract when there is a duty of results or in the case of an object that has a hidden defect. The behaviour of the liable person has no effect on his liability. There can be an exemption of liability in case of force majeure, third party's action or victim's action. Subjective liability is characterised by

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the need to prove the fault of the liable person. One type of fault consists in the illegality of the behaviour but the illegality is not the only fault. For example, a contractual liability can be induced in the case of the non-respect of a duty of means (*obligation de moyens*). Tort liability is usually based on a fault (§ 1382 of the *Code civil* (French Civil Code, C. Civ.): “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”; § 1383 C. Civ.: “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence”). The evidence of a fault lies on the shoulders of the victim.

- 3 Things are quite different with criminal liability. Although this report is based on tort law, it might not be useless to address briefly the topic of the interplays between criminal law and administrative law rules in the field of environment and security as a plaintiff in France can also claim compensation alongside a criminal prosecution. Such a way to obtain damages is sometimes used by plaintiffs for economic purposes as they save some of the trial costs which are met by the State. If the operating company complies with the administrative permit that he has been granted, it cannot be held liable in criminal law in principle despite a pollution occurrence. For example, § L. 216-6 of the *Code de l'environnement* (Environmental Code, C. Env.)¹ indicates that, if discharging sewage into water is authorised by a public authority, a polluter can be prosecuted only if he has not respected the administrative requirements laid down in the authorization.

However, if a statute law expressly represses a behaviour harming the environment, neither the existence of the administrative permit, nor the respect of the requirements mentioned in this administrative permit can prevent the operating company from being held liable in criminal law, unless otherwise stated in the statute law. In the case of a specific criminal offence aiming at protecting the environment, a person can be held liable in criminal law if he/she does not comply with the administrative permit, regardless if there is no damage to the environment. If environmental damage also occurs, the operating company can be fined for both infringements as far as a specific criminal offence exists (such as water pollution for example). There is no general criminal offence for damage to the environment in French law.

Both civil and criminal law are considered to constitute private law under French law. Public law deals with the special rules concerning the State, such

¹ “The act of disposing of, discharging or letting flow into surface, underground or seawater within the limits of territorial boundaries, directly or indirectly, one or more substances of any kind whose actions or reactions cause, even if only temporarily, harmful effects on health, fauna and flora, with the exception of damage referred to in Articles L. 218-73 and L. 432-2, or significant modifications to the normal regimen of water supply or limitations in the use of bathing waters, is punishable by two years of imprisonment and a fine of € 75,000. When the discharge is authorised by decree, the provisions of this paragraph are applicable only if the prescriptions of the aforementioned decree are not respected. The court may also oblige the convicted person to restore the aquatic environment in accordance with the procedure set out in Article L. 216-9. These same penalties and measures are applicable in the event of discharge or abandonment of waste in large quantities in surface or underground waters or in seawater within the boundaries of territorial limits, on beaches or in coastal areas. These provisions are not applied to discharges from ships at sea.”

as the relationships between the powers within the State (constitutional law), the financial rules of public authorities (called *finances publiques* which include tax law) or the rules regulating the relationships between public authorities and citizens (administrative law). Sometimes however the relationships between public authorities and citizens will be regulated by private law rules when the public authorities act like a private body. Regulatory law has no special statutes but this concept (called *régulation* in French, which does not have the same meaning as the English equivalent which in French corresponds to the term *réglementation*) has emerged quite recently. The basis is that there is a new set of rules and tools to regulate certain questions, based both on soft law and special authorities such as quangos. The French term *régulation* is sometimes also used in a broader sense to describe the new forms of public action in which the State acts less directly than it used to (for instance in the economy) but tries to intervene in order to maintain a certain balance between different interests.²

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

There are no direct constitutional boundaries for the interaction between administrative law and tort law. In particular, as France is a unitary State (although named as a *Etat décentralisé* since a recent reform of the Constitution), no distinction is to be made between State and local authorities in this field.

However, two constitutional implications must be mentioned. The first one is related to the separation between private courts, i.e. ordinary courts (civil or criminal), and administrative courts. The *Conseil constitutionnel* (French Constitutional Council, CC) ruled in 1987 that the existence of administrative courts has constitutional grounds (based on the reasoning that there has been an uninterrupted tradition by statute law so far) so that the Parliament cannot abolish them henceforth.³ Consequently, the law cannot give the jurisdiction of judicial review to civil courts, unless it is in their “natural” field (such as civil status presumably) or for the purpose of a *bonne administration de la justice* by creating a jurisdiction block (as happened in competition law with the Act of 6 July 1987 which gave jurisdiction to the Court of appeal of Paris – a civil court – for the judicial review of decisions of the *Conseil de la concurrence*, a sort of competition commission). As far as liability of a private party before an ordinary court is concerned, the jurisdiction first depends on the interpretation or the validity of an administrative act. The above principle does not mean however that a preliminary ruling by an administrative court

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² See J.-Cl. Thoering, L’usage analytique du concept de régulation, in: J. Commaille/B. Jobert (eds.), *Les métamorphoses de la régulation politique*, Librairie Générale de Droit et de Jurisprudence (LGDJ), collection (series, coll.) “Droit et société” (1998) 35–53.

³ CC, 23 January 1987, in: M. Long/P. Weil/G. Braibant/B. Genevois/P. Delvolvé, *Les Grands arrêts de la jurisprudence administrative* (14th ed. 2003) 668–677.

before the civil court gives its judgment has to be given all the time. Both case law and statute laws have admitted that in some situations a private court can decide without any references to an administrative court. First of all, it is always the case before criminal courts since the Act of 22 July 1992 simplified the previous sophisticated jurisprudence (now § 111-5 *Code pénal* (Penal Code, C.P.)⁴). Secondly, a civil judge has jurisdiction to interpret a regulation but does not have jurisdiction either to interpret an administrative individual act or to declare any administrative act (either a regulation or an individual act) illegal⁵ unless a regulation deals with private property or individual rights. If an administrative body acts (or does not act) in a manner that results in environmental damage or if anybody (either public or private entity) acts in such a manner during public works, it/he can be held liable before the administrative courts and some specific rules therefore apply that are different from those before ordinary courts. Nonetheless, the constitutional jurisdiction does not extend to liability of public authorities. This implies that the current jurisdiction of the administrative courts regarding liability of public authorities could be transferred to civil courts by statute law.

The second implication comes from both the jurisprudence of the *Conseil constitutionnel* and the new *charte constitutionnelle de l'environnement* (constitutional charter of environment). The first had assessed in 1982 that, in principle, any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it.⁶ § 4 of the new *charte constitutionnelle de l'environnement* added to the Constitution by the Constitutional Act of 1 March 2005 goes further: Each person must contribute to compensate for the damage that he/she causes to the environment according to the conditions mentioned in the law. Nowadays, the duty to compensate is not only required in the case of damage to other people but also to any part of the environment including that which is not subject to appropriation. Here is recognised the compensation of the sole ecological damage. By “each person”, one should consider that both individuals and legal entities are subject to this liability, according to the *Conseil constitutionnel* jurisprudence in other areas.⁷ This new constitutional duty is compatible with the European Directive 2004/35/CE of 21 April 2004 on environmental liability which concerns the prevention and compensation of environmental damage without taking into consideration damage to third parties. Such a “duty” is nonetheless subject to limitations. The liable person has only to contribute and not necessarily to entirely compensate the damage. This might mean therefore that a col-

⁴ “Criminal courts have jurisdiction to interpret administrative decisions of a regulatory or individual nature, and to appreciate their legality where the solution to the criminal case they are handling depends upon such examination.”

⁵ Tribunal des conflits (Jurisdictional Court, TC), 16 June 1923, Septfonds, in: *Long/Weil/Braibant/Genevois/Delvolvé* (fn. 3) 247–251.

⁶ CC, 22 October 1982, Loi relative au développement des institutions représentatives du personnel, *Revue Dalloz* (D.) 1983, 189, note *Y. Luchaire*.

⁷ CC, 18 December 1998, décision (decision, déc.) no. 98–404, Loi de financement de la sécurité sociale pour 1999, D. 2000, sommaire (summary, somm.) 63, observations *F. Mélin-Soucramenien*.

lective compensation has to be added in order to compensate for the whole damage, such as indemnification funds as frequently happens now in French law (for victims of natural disasters or terrorism, etc.: see the report from the *Conseil d'Etat* (High Administrative Court, CE)).⁸ This leads to the question of whether the new charter has introduced a general principle of liability without any fault, i.e. an objective liability, for direct or indirect damage to the environment.⁹ Such a solution is not contrary to the European Directive 2004/35/CE of 21 April 2004 on environmental liability since the latter does not require one single system of liability. § 4 of this Directive permits the law to abandon the requirement of a fault in environmental damage. The main reason lies in the fact that it might be difficult to give evidence of a fault in these areas although the causation of the damage is known. As the Constitution has now decided that only the liable person should contribute, it can be seen as a counterpart of this “objective liability” and it implies that the law must not only put a ceiling to the liability but also set a compensation mechanism. Here the main limit of this new constitutional disposition arises: it probably cannot be implemented without statute law. If the parliament does not act in this area, there might be some consequences of this new principle.

3. *Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can, in the case of their violation, result in a tort liability?*

In principle, any kind of administrative act can result in tort liability in the case of their violation as far as damage is attached to this violation. This concerns both public authorities and private persons.

5

The public authorities are concerned thanks to the principle of State liability (and more generally of any public authority) posed in the famous *Blanco* decision by the *Tribunal des conflits*.¹⁰ At the time of the *Blanco* case this meant that this liability was neither general nor absolute. Nowadays, this liability can be seen as general although its intensity varies depending on the judge's requirement of a grave fault, a simple fault or no fault at all from public bodies. The counterpart of this general liability lies in the fact that State liability cannot be decided on grounds of private law (the latter aiming at solving disputes between private parties) but must be governed by public law rules. This implies that State liability has its special rules that must conciliate State rights and private rights.

Private persons can be held liable in tort when failing to implement any regulations or official notifications before the civil courts.

However, for both liabilities some specific administrative acts have to be put aside such as *directives* and *circulaires*. The *directives* (guidelines) are to

⁸ CE, Responsabilité et socialisation du risque, in: Etudes et documents du Conseil d'Etat (2005) 197 ff.

⁹ J. Bizet, La responsabilité environnementale: pour une application européenne raisonnée, Document (document, Doc.) Sénat (27 May 2003) no. 317, 16 ff.

¹⁰ TC, 8 February 1873, in: Long/Weil/Braibant/Genevois/Delvolvé (fn. 3) 1 ff.

provide public authorities with criteria or guidance in the case of discretionary powers. The *circulaires* (administrative circulars) are texts addressed to superiors to recall and comment on the texts and case law in order to implement them. None of them are compulsory, so neither criminal liability nor civil liability would result in the case of their violation. Nonetheless, in the case of the *circulaires*, the violation of these texts when regularly published can sometimes be regarded as a violation of a duty of care.

4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that such person knew or could have known that the administrative law was wrongful?

- 6 Regarding civil liability, the wrongfulness of an administrative act on the ground of which a person acted in compliance with is irrelevant. The illegality of this act does not preclude his/her being held liable. The fact that the person knew that this administrative law was illegal is not taken into consideration either, as a consequence of art. 1382 of the Civil Code: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it”. One should interpret “any act” as including both the knowledge and the ignorance of the unlawfulness of an act.

The civil judge can give an injunction to the operating company to cease the damage. The nature of the injunction varies according to the regulation at stake: In the case of classified facilities for the protection of the environment (*installations classées pour la protection de l’environnement*, § L. 511-1 to L. 517-2 C. Env.), the civil judge cannot order the closure of the facility. Such a decision remains in the hands of the State representative according to the special legislation. The civil judge may nonetheless order measures to cease the disturbance to the neighbourhood as long as it does not lead in practice to the closure of the facility. These measures are to be taken without consideration to the administrative prescriptions as these are always set without prejudice to the rights of third parties.

Outside the scope of the classified facilities for the protection of the environment, the civil judge can give injunctions of any kind, including the closure of the facility. In any case:

- The mere violation of the administrative rules, with no harm to private property or more generally, damage, does not permit to refer the matter to the court in order to ask it to place an injunction on the operating company. There must be a harm of a special interest.
- The judge can take measures to prevent damage without taking into consideration the financial consequences, even if in practice it leads the firm to dismiss workers.
- The injunctions do not exclude the judge from awarding damages to the victims.

As far as criminal liability is concerned, things are different because of the *principe de la légalité des délits et des peines* stemming from the Latin proverb “*nullum crimen sine lege*”. No-one can be sentenced if the text on the ground of which he was prosecuted is no longer lawful. In such a case, the accused person can uphold the illegality of the text that led to prosecution. He cannot be held liable in criminal law even if he knew the behaviour was illegal and did not act in compliance with the illegal act. But a person can be prosecuted if he/she exploits a site without any authorization although the law requires it. For example, a vast number of activities that might cause harm to the environment require a prior authorisation from the *préfet* – local state representative (§ L. 511-1 ff. of the Environmental Code regarding “Classified facilities for the protection of the environment”¹¹). The simple fact of a person acting without any authorisation or with an authorisation that he knows is unlawful characterizes a criminal offence as he deliberately infringed the law.¹²

However one must bear in mind that § 122-4 C.P. states that “A person is not criminally liable who performs an act prescribed or authorised by legislative or regulatory provisions. A person is not criminally liable who performs an action commanded by a lawful authority, unless the action is manifestly unlawful.”

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

As mentioned above, administrative permits are given without any prejudice to the rights of third parties. The fact that an administrative law provides for criminal sanctions does not preclude a compensation claim or a criminal prosecution on other grounds. The violation can effectively lead to other infringements.

7

¹¹ “The provisions of the present Title apply to factories, workshops, depots, work sites and, in general, to all facilities operated or owned by any public or private person or entity, which might present hazards or drawbacks for the convenience of the neighbourhood, or for public health and safety, or for agriculture, or for the protection of nature and the environment, or for the conservation of sites and monuments or elements of the archaeological heritage. The provisions of the present Article are also applicable to quarry operations as defined in Art. 1 and 4 of the Code minier.”

¹² Cour de cassation, Crim. (criminal chamber), 25 May 1994, *M. Louvet*.

For instance, in the case of sewage being discharged into water without any of the required authorizations, this would lead to a criminal offence even though no pollution occurs (§ L. 216-8 C. Env.¹³).

If pollution occurs, the offender can also be prosecuted if the pollution harms health, fauna or flora (§ L. 216-6 C. Env.¹⁴). For instance, if a fishing association is harmed, it can claim compensation during the same criminal procedure.

However, tort law seems to be more complete than criminal law regarding the question of civil damages in the sense that civil liability before a civil court can be sought not only when a behaviour is subject to criminal offence (in such a case a victim would be joining the prosecution as a *partie civile* (plaintiff) asking also for damages) but each time the victim can prove any behaviour which led to harm.

6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

8 The so-called “rules with a protective purpose” are unknown in French law. Nevertheless, the administrative law rules can sometimes be seen as protective rules in the sense that certain activities shall receive prior authorization. The administrative control implied by this system allows the public authority to impose conditions aiming at protecting different interests. For example, in the area of “Classified facilities for the protection of the environment” mentioned earlier, the *Préfet* can demand the respecting of constraints in order to avoid any risk for health or the environment.

9 The protection can be direct as it appears in the field of animal protection: § L. 411-1 C. Env. states:

“I. – When a specific scientific interest or the necessity of conserving biological heritage justifies the conservation of non-domestic animal species or non-cultivated plant life, the following are prohibited:

¹³ “I. – Without due authorisation for an act, an operation, an installation or a structure, the following are punishable by two years of imprisonment and a fine of € 18,000:

1. Committing such an act;
2. Directing or carrying out such an operation;
3. Operating such an installation or structure;
4. Implementing or participating in the implementation of such an installation or structure.

II. – For repeated offences, the fine is increased to € 150,000.

III. – In the event of a conviction, the court may order that the operations and use of the structure or installation be halted. Temporary enforcement of this decision may be ordered.

IV. – The court may also demand the measures described in the previous paragraph and demand that the site be returned to its original condition, within the framework of the procedure set out in Art. L. 216-9.

V. – The court handling proceedings for an infringement of the obligation of declaration may order that the operation be halted, or that the use of the installation or structure be prohibited, in accordance with the procedure described in Article L. 216-9.”

¹⁴ See *supra* fn. 1.

1. The destruction or poaching of eggs or nests; mutilation, destruction, capture or poaching, intentional disturbance, the practice of taxidermy on any of these species or, whether dead or alive, their transport, peddling, use, possession, offer for sale, their sale or their purchase;
 2. The destruction, cutting, mutilation, uprooting, picking or poaching of these plant species, of their flowers or any other form taken by these species during their vegetative cycle, their transport, peddling, use, offer for sale, sale or purchase, the possession of specimens taken from their natural environment;
 3. The destruction, alteration or degradation of the specific environment of these animal or plant species;
 4. The destruction of sites containing fossils that enable the study of the history of the living world, as well as early human activity, and the destruction or poaching of fossils from these sites.
- II. – The possession prohibitions enacted in application of 1. or 2. of I do not apply to specimens held in compliance with the law when the prohibition relating to the species in question came into force.”

§ L. 411-2 C. Env. gives power to the government to act in a manner that can ensure the protection:

“A *Conseil d'Etat* decree defines the conditions under which are set:

1. The comprehensive list of non-domestic animals and non-cultivated plant species thus protected;
2. The length of the permanent or temporary prohibitions laid down in order to enable the recovery of the natural populations in question or their habitats, as well as the protection of animal species during time periods or circumstances under which they are particularly vulnerable;
3. The area of the national territory, including the public coastal areas and the territorial waters, to which they apply;
4. The delivery of permits to capture animals or sample species for scientific purposes;
5. The laws in force with regard to seeking out, hunting down and approaching with a view to taking photographs or recording sound, including wildlife and game photography of any species and the areas where these laws are enforced, as well as to protected species outside of these areas;
6. The rules that must be complied with by establishments authorised to hold and breed specimens of the species listed in 1. or in 2. of I in Article L. 411-1 outside of their natural habitat for the purposes of conserving and breeding these species;
7. The list of protected sites mentioned in 4. of I in Article L. 411-1, the specific protection measures in order to avoid their degradation, and the delivery of special permits to remove fossils for scientific or teaching purposes.”

The protection can also be indirect insofar as the violation of a rule protecting the environment is sanctioned in itself without any harm to the environment. For instance, § L. 514-9 C. Env. leads to sanctions against any activities that

do not have the required prior authorisation they should have even though no harm to the environment is apparent:

I. – The operation of a facility without the authorisation required is punishable by one year's imprisonment and a fine of € 75,000.

II. – In case of conviction, the court may forbid the use of the facility. This prohibition ceases to be effective if an authorisation is issued at a later date in the conditions laid down by the present Title. The provisional execution of the prohibition may be ordered.

III. – The court may also demand the rehabilitation of the premises and set a date limit for performance.

IV. – In the latter case, the court may:

1. Either adjourn the announcement of the sentence and make the injunction to rehabilitate the premises subject to a maximum duration and to payment of a daily penalty determined by the court in case of a delay in performance; the provisions of Article L. 514-10 concerning the adjournment of the announcement of the verdict are applicable in this case;

2. Or order that the work to rehabilitate the premises be carried out automatically at the expense of the condemned party.”

Only the administrative rule is directly protected but health and the environment are indirectly protected as their protection is the purpose of this administrative rule.

The protection is reinforced by the rule mentioned earlier that any authorisation is given without prejudice to the rights of a third party. The courts subsequently ruled that the fact that a law or regulation permits an act does not prevent those who commit this act from the general duty of care enshrined in § 1382 C. Civ. cited above. For example, if a cooperative farm knew that a product was toxic for bees and did not inform neighbours whereas it could not ignore that they had hives, it is liable although it respected the regulations.¹⁵

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 11 As far as private persons are concerned, one should bear in mind the general liability of “Masters and employers, for the damage caused by their servants and employees in the functions for which they have been employed” enshrined in § 1384 subs. 5 C. Civ. which would also apply in the case of administrative law rules. The rationale of this article is to be found in the

¹⁵ Cour de cassation, Civ. 2ème (2nd civil chamber), 14 June 1982, *Coopérative agricole de Limours*.

idea that employees are under masters' orders, the latter bearing in principle their employees' faults. The master can be exempt if he gives evidence that the employee who caused damage acted outside his usual functions, with no authorisation from the master and with a purpose which is irrelevant to his mission.¹⁶

The violation of the administrative law rules has no effect on this liability. The only consequences would be the possibility of administrative sanctions. For example, if a person has special diplomas in order to perform the annual inspection of vehicles and neglects to respect the administrative rules, his permit can be suspended or withdrawn but the garage in which this person is working would not be directly but only indirectly sanctioned due to the fact that its employee would no longer be allowed to perform this task.

Regarding criminal liability, the employee would be held liable in criminal law (if applicable), even though he acted during his work in compliance with his master's order as such a situation is outside the scope of § 122-4 C.P. cited above. The master would also be prosecuted as an accomplice. Regarding the civil liability before the criminal judge, the victim can sue the employee, but the latter would bear the final liability only if he acted outside the scope of his duties, the master bearing liability in the case of the opposite. The concept of acting outside the scope of one's duties is related to the *faute personnelle/faute de service* distinction (personal fault/service fault). The jurisprudence recognises a *faute personnelle* if the employee commits an exceptionally grave fault or acts maliciously for personal motivation.

The master can be held liable in criminal law if he allowed his employee to break the Penal Code although he had the duty to ensure its respect.

The same rules apply if the master is a legal entity as nowadays any legal entity (with the exception of the State) can bear criminal liability under French law for the infringements caused by their regular organs (§ 121-2 C.P.¹⁷). This system does not free the individuals from their criminal liability. The rationale of this system is mainly to find a person (a legal entity) liable in criminal law when no individual can be prosecuted. This can also lead to civil liability before a criminal judge.

However, criminal and civil liability before a criminal judge is now less demanding than civil liability before the civil judge in the field of negligence. The Act of 10 July 2000 known as *Loi Fauchon* introduced a new provision,

¹⁶ Cour de cassation, Plén. (plenary session), 25 February 2005, *Costedoat*.

¹⁷ "Juridical persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in Article 121-4 and 121-7 and in the cases provided for by statute or regulations. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of the natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of Article 121-3."

§ L. 121-3 C.P.¹⁸ This highlights the importance of administrative law rules that can lead to a more frequent criminal liability for negligence than when no administrative law rules apply.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

- 12 Public entities are the only persons subject to “administrative liability” (i.e. liability before administrative courts) in the French sense. As we understand administrative liability for the purpose of this study, i.e. liability of private entities in relation to administrative law rules, a few considerations must be pointed out. The French regime of liability towards public authorities lies on the so-called *principe du pollueur-payeur*. The State representative in the case of classified facilities for the protection of the environment or the Mayor in other cases can engage administrative sanctions against the polluting operating company. They can both ask for the *dépollution* of the polluted site. If the company does not comply, they can force it to pay a sum corresponding to the estimated cost of the *dépollution* which will be reimbursed to it as and when it follow the process of the *dépollution*. If it still does not act, they ask somebody else to do the work and ask the polluter to pay the bill. The Council of State has however issued a limit to this procedure when the pollution arises after the end of the exploitation. The duty for the polluter to restore the site ceases after 30 years following the end of the exploitation if this end was known to the public authority and if the pollution had not been dissimulated.¹⁹

This administrative procedure does not preclude a civil claim from third parties (neighbours, environmental associations). There is no effect between the two procedures. A civil claim can also arise between the owner of the land and the operating company on this land. If the value of the land is below the value of the land before the exploitation although it has been cleaned up, the owner can either engage a contractual action if such a clause was enacted in the contract or engage an extra-contractual claim (*responsabilité délictuelle ou*

¹⁸ “There is no felony or misdemeanour in the absence of an intent to commit it. However, the deliberate endangering of others is a misdemeanour where the law so provides. A misdemeanour also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him. In the case as referred to in the above paragraph, natural persons who have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen, who failed to take steps enabling it to be avoided, are criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware. There is no petty offence in the event of *force majeure*.”

¹⁹ CE, Assemblée (Assembly, Ass.), 8 July 2005, *Société Alusuisse-Lonza-France*.

quasi-délictuelle) if a fault can be proved (§ 1382 C. Civ.) or on the basis of liability of things in one's custody (§ 1384 C. Civ.).

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

There are no real differences between liability linked to safety regulations and the general regime of tort law. The deliberate or negligent violation of safety regulations constitutes a fault that can result in civil liability. But a person can also be held liable when he/she respects all the safety requirements as there is a general duty of care (see *supra* no. 6). For instance, the simple fact that a person respects all the planning rules does not prevent a person from being held liable in the case of *troubles anormaux du voisinage* (abnormal disturbance of neighbours by way of possession). In a way, the safety or environmental rules are quite neutral regarding the question of tort law.

Environmental law however insists on the enforcement of protective rules. The *associations agréées de protection de l'environnement* (approved environmental protection associations – § L. 141-1 C. Env.²⁰) can sue the tortfeasor on behalf of the normal claimant for damage to the environment that they aim to protect (§ L. 141-2 C. Env.²¹). The rationale of this provision is to force a prosecutor to sue an operating company even if he otherwise would not have done so. These associations can also act before administrative courts.²²

The civil judge can also give an injunction to overhaul the damaged site instead of ordering the payment of compensation.

²⁰ "If they have been exercising their activities for at least three years, the properly declared associations that exercise their statutory activities in the field of nature protection, the improvement of the living environment, water protection, air, soils, sites and landscapes, and town planning, or those whose purpose is the control of pollution and nuisances and, in general, those working principally for the protection of the environment, may be awarded approval by the administrative authority. In the *départements* of the Bas-Rhin, the Haut-Rhin and the Moselle, the approval procedure applies to associations registered for at least three years. These associations are known as "approved environmental protection associations". This approval is granted under the conditions stipulated by a *Conseil d'Etat* decree. It may be withdrawn when the association no longer fulfils the conditions required to grant it. The associations exercising their activities in the fields mentioned in the first paragraph above and approved prior to 3 February 1995 are considered as approved in accordance with this Article. The decisions made in accordance with this Article are subject to the procedures governing contentious matters."

²¹ "The environmental protection associations approved under Article L. 141-1 and the associations mentioned in Article L. 433-2 are called upon, within the framework of the laws and regulations in force, to participate in the environmental action of public bodies."

²² "Any association the purpose of which is the protection of nature and the environment may institute proceedings before the administrative tribunals for any grievance relating to this protection. Any environmental protection association approved under Article L. 141-1 is considered as being entitled to act against any administrative decision with a direct relation to its purpose and its statutory activities and generating harmful effects on the environment on all or part of the territory for which it is approved."

Finally the principle of precaution (§ L. 110-1 C. Env.²³) could reinforce the notion of fault. In the near future this could lead the jurisprudence to increasingly set aside causes of exemptions as this principle reduces the scope of unpredictability.

§ L. 221-1 of the Consumer Code (C. Cons.) also sets a general principle of security: "Products and services must, under normal conditions of use or under other circumstances that may reasonably be foreseen by the professional, offer the safety that can legitimately be expected and must not be a danger to public health". Therefore: "The person responsible for marketing the product shall provide the consumer with sufficient information to enable him to evaluate the risks inherent in a product during its normal or reasonably foreseeable useful life and to guard against them, when such risks are not immediately apparent to the consumer without adequate forewarning" (§ L. 221-1-2 C. Cons.). Variable actions are open to the consumer for the application of this principle:

- In the case of an accident caused by or linked to a product, the consumer can seek damages alongside a criminal prosecution for breach of a safety duty (§ 226-1 C.P.). The person who sells the product bears a criminal liability. § 223-1 C.P. penalizes "The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation". The infringement can even be constituted without any damage if it is proved that the violation of the regulation led to a risk of death or grave injury and that the risk was taken intentionally, i.e. not negligently. As far as civil action is concerned, the liability for safety default implies no fault to prove. The mere fact that a product is marketed with a safety risk is enough to involve a civil claim. The victim has only to prove that the fault existed when he/she bought the product.

²³ "I. – Natural areas, resources and habitats, sites and landscapes, air quality, animal and plant species, and the biological diversity and balance to which they contribute are part of the common heritage of the nation.

II. – Their protection, enhancement, restoration, rehabilitation and management are of general interest and contribute to the objective of sustainable development which aims to satisfy the development needs and protect the health of current generations without compromising the ability of future generations to meet their own needs. They draw their inspiration, within the framework of the laws that define their scope, from the following principles:

1. The precautionary principle, according to which the absence of certainty, based on current scientific and technical knowledge, must not delay the adoption of effective and proportionate measures aiming to prevent a risk of serious and irreversible damage to the environment at an economically acceptable cost;
2. The principle of preventive and corrective action, as a priority at source, of damage to the environment, using the best techniques available at an economically acceptable cost;
3. The polluter pays principle, according to which the costs arising from measures to prevent, reduce or combat pollution must be borne by the polluter;
4. The principle of participation, according to which everybody has access to information relating to the environment, including information relating to hazardous substances and activities, and whereby the public is involved in the process regarding the development of projects that have a major impact on the environment or on town and country planning."

- The victim can also seek State liability if the administration failed in taking measures that could have stopped the damage. This is due to the fact that a duty of action lies upon the shoulders of the Ministries: “In the event of grave or immediate danger, the Minister for Consumer Affairs and the other minister(s) concerned may, via a joint order and for a period not exceeding one year, suspend the manufacture, importation, exportation and availability of a product, and its general withdrawal or destruction if there is no other means of eliminating the danger, regardless of whether it is provided free of charge or in return for payment. They are also empowered to order the distribution of warnings or precautions for use, and recall of the product for exchange or modification or full or partial reimbursement.” (§ L. 221-5 C. Cons.).

2. *In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?*

At first view tort law and regulatory law rules do not have identical or similar objectives. The former aims at compensating damage while the latter aim at preventing damage by way of prior declarations, prior authorisations or interdictions. Nonetheless, tort law can also be seen as having a preventive purpose as it is based on a general duty of care.

14

3. *Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?*

All these regulations and provisions are preventive and therefore have implied protective purposes. But the objectives of such rules vary depending on the concerned fields. Sometimes the regulations have only a protective purpose, as is the case with the regime of protected animal and plant species. Most of the time, these regulations have several objectives: the law of classified facilities for the protection of the environment protects against abnormal disturbances to neighbours by way of possession and at the same time ensures the safety of people and protects agriculture, the environment and monuments.

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Consequently individuals are sometimes covered by the protective purpose of these rules although not all the time. A breach of such rules by way of an administrative act or a failure to act constitutes a wrongful act for the public authorities. They might see this act (or a tacit decision of not acting after a claimant provoked a decision) quashed by the administrative court which could give an injunction to act lawfully. Meanwhile, the same decision could

lead the public authority to be held liable if this act results in damage (e.g. an authorisation to dispose of a product classified as dangerous). If such rules are breached by a private person, strict liability would result.

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 16 Three examples of compulsory liability insurance with regard to safety regulation and/or environmental protection are to be mentioned. The first comes from § L. 218-2 C. Env.²⁴ regarding owners of ships registered in France that transport more than 2,000 tonnes of petrol. The insurance must cover the liability's rate fixed by the international Convention of 27 November 1992. These ships cannot access French ports without this insurance but the Convention posed a ceiling to the amount of liability.

A same ceiling is to be found with the second example of compulsory liability insurance concerning the transport of nuclear materials. The Paris Convention of 29 June 1960 introduced in France by the statute law of 30 October 1968 sets an objective liability (i.e. with no fault to prove for the victims) for the operating company of a facility from which the nuclear materials left – if this company is located in a country that signed the treaty. This insurance secures the transport of the nuclear materials until they reach the facility of the final operating company (payee) of a country which signed the Convention or the port of a country which has not signed the Convention. If the nuclear materials leave a country which did not sign the Convention to a company situated in France, the latter would bear the liability of the transport from the port of the exporting country to the French facility. The prescription period is ten years after the nuclear accident occurs (or in the case of a robbery of nuclear materials twenty years after this event). The ceiling of damage is set at € 23 million (€ 230 million for the transit in France of nuclear materials not covered by the Paris Convention).

Hunters are also subject to a compulsory insurance thanks to § L. 423-16 C. Env.²⁵

²⁴ "Subject to the provisions of the international convention mentioned in Article L. 218-1 relating to ships which are the property of the State, the owner of a ship registered in a French port and transporting more than 2,000 tonnes of hydrocarbons in bulk as a cargo may not allow such a ship to trade if it does not possess, under the conditions specified in Article VII of the aforementioned convention, insurance or financial security in sums equivalent to the amount of its liability, for any single incident."

²⁵ "The hunter must have had taken out hunting liability insurance cover with a company authorised to practice in France to cover civil liability for an unlimited sum and without any deduction being opposable to victims or their legal representatives, for bodily harm caused by any hunting activity or culling of pests. This insurance must also cover the hunter's civil liability for damage by hunting dogs, under the same conditions."

Two others provisions must be mentioned as they deal not with compulsory insurance but with compulsory financial guarantees (§ L. 516-1 C. Env.²⁶ and § L. 552-1 C. Env.²⁷).

III. Fault-Based Liability

A. Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

The violation of these rules in itself constitutes a fault capable of leading to tort liability. Although the absence of these rules does not preclude anyone from being held liable, such a violation would ease the establishment of a fault. The same principles apply to administrative liability of public authorities before the administrative courts.

In the case of criminal liability, one should bear in mind that the person who caused the damage would be prosecuted only if a specific offence has been committed.

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

The simple fact of violating a rule constitutes wrongfulness and there is no need to prove a violation of a duty of care or a fault. The violation of a duty of care is required only when no safety regulations or environmental rules exist. In the case of abnormal disturbance to neighbours by way of possession where no fault is demanded, the violation of the rules would ease the proof of the abnormality of the disturbance.

²⁶ “The starting up of the activity, be it after the initial authorisation or after the authorisation of a change in operator, of facilities defined by a *Conseil d’Etat* decree presenting major risks of pollution or accident, of quarries and of waste storage facilities is subordinated to the provision of financial guarantees. These guarantees are destined to cover, depending on the nature of the hazards or the drawbacks of each category of facility, the surveillance of the site and the safety of the facility, any interventions in case of an accident before or after closure and rehabilitation after closure. They do not cover compensation due by the operator to any third parties who might suffer a prejudice due to pollution or an accident caused by the facility. A *Conseil d’Etat* decree determines the nature of the guarantees and the rules according to which its amount is fixed. Without prejudice to the administrative fine procedure provided for in Article L. 541-26, any failure to comply with the obligations in terms of financial guarantees gives rise to the deposit procedure provided for in Article L. 514-1, aside from any criminal proceedings that might be initiated.”

²⁷ “For the structures or facilities presenting risks the possible financial consequences of which are clearly disproportionate to the value of the capital tied up, the authority responsible for granting the authorisation to operate may subject this granting to the provision of financial guarantees. Decrees approved by the *Conseil d’Etat* set the categories of structures concerned, the rules setting the amount of the guarantee – which must be adapted to the foreseeable consequences of the risk – and the methods for its implementation.”

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

- 19 The answer depends on the nature of the damage which is related to the victims. For example in the case of water pollution that results in the death of fish where a regulation aims to protect water fauna, a neighbour will not be able to claim compensation if he does not suffer any damage as the fish are not his property. Only a fish association could claim compensation. The public authorities would also not be able to claim compensation as fish and water are not its property, even though they could prosecute the polluter (§ L. 216-6 C. Env. cited in *supra* fn. 1). A few years ago, a hunter was prosecuted for killing a wolf. He was acquitted because wolves were not on the list of protected animals at the time of the hunt. But if an animal protection association had claimed compensation, they would have obtained damages from the hunter even though quite symbolic. Generally tort liability is independent from the protective purpose of a rule, but they are sometimes linked as a fault would be more easily established in the case of violation of the protective rule.

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

- 20 The strict compliance with the relevant rule does not preclude anybody from being held liable in tort as anyone is subject to a general duty of care. The simple fact of causing damage proves that he/she did not respect the general duty of care.

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

- 21 The breach of an administrative law rule eases the establishment of a fault as such a violation in itself constitutes a fault. But this violation is not sufficient: the victim who still has the burden of proof would have to prove that he/she has suffered damage and that such damage is linked to the violation. The establishment of this evidence represents the most difficult part of the claim for the victim. The pollution of water does not necessarily lead to damage and, if damage occurs, it can be the consequence of several factors, such as the presence of other substances which are not pollutants per se. The victim would have to establish that the conjunction of different products led to the pollution and would have to sue the alleged operators.

6. Can a breach of an administrative law rule result in a claim for punitive damages?

- 22 The notion of punitive damages has no real meaning in French law. The only purpose of tort law is to compensate damage. A sanction would be imposed only in the case of a criminal offence when applicable. Even compensation

claims before the criminal courts have a compensating and not a punitive goal. Additionally, the injunction of a clean-up of a polluted site would not have a punitive goal either.

B. Acting in Compliance with Administrative Law Rules

1. *Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?*

As mentioned before (supra no. 1), in the case of civil liability, the principle is that administrative permits are given *sous réserve du droit des tiers* (without prejudice of third-party rights). If a person acts in compliance with the relevant administrative law rules and causes damage (water pollution following an authorised draining of a barrage that leads to the death of fish, for example), he must compensate the third party without being exempted from liability because of the existing authorisation, even in the case of strict compliance with a licence or a permit. This civil liability is sometimes even to be applied without any fault by virtue of liability for objects in one's custody (the pollutant is seen as an object in French law). There is also liability without fault by virtue of the *troubles anormaux du voisinage* theory (abnormal disturbance to neighbours by way of possession): if an authorised activity pollutes or is noisy and harms neighbours on a permanent basis, they can seek liability of the operating company by proving that a damage affects them physically, or harms their goods or the use of their goods.

However, the liability of a legally authorised operating company acting in compliance with administrative rules is subject to limitation thanks to the so-called *principe de préoccupation individuelle* (principle of individual concern). Enshrined in § L. 112-16 of the *Code de la construction et de l'habitation* (Building and Housing Code, CCH), this principle means that occupants of houses are not entitled to the payment of damages if they applied for their building licence after the emergence of the environmental nuisances. The same rule applies for the buying or the renting of a house near the nuisances subsequent to this emergence. In such a case, the operating company ought to comply with the administrative law rules and not change the conditions of exploitation. If it does not comply with these rules or if the conditions of exploitation change afterwards, it can be held liable in civil law if the third party suffers damage and gives the evidence of a causal link.

2. *Can the general duty of care go beyond these rules?*

Any operating company is subject to a general duty of care thanks to the principle of § 1382 C. Civ. cited above. As already mentioned, the simple fact of acting in compliance with an administrative regulation or authorisation does not exempt anybody from tort liability.

Furthermore, some regulations go further by requiring a special duty of care related to the so-called *principe de précaution* (principle of precaution).

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For example, any person who has obtained an authorisation to grow genetically modified organisms must give information about risks and update it (§ L. 532-4 C. Env.²⁸). This article equals a continuing duty of care: if a person fails to give information although he/she could not ignore the fact that the risks had evolved after the authorisation was given, he/she could be held liable.

The same principle is implied by § 1386-12 subs. 2 C. Civ. by which “a producer may not invoke the exonerating circumstance provided for in Article 1386-11, 4., where damage was caused by an element of the human body or by products thereof. A producer may not invoke the exonerating circumstance provided for in Article 1386-11, 4. and 5., where, faced with a defect which has revealed itself within a period of ten years after the product has been put into circulation, he did not take the appropriate steps to avoid its damaging consequences”. The producer has to keep abreast of any scientific surveys discovering a defect regarding his product or its components since the first authorisation was given and shall inform the clients or control the product or even withdraw it in case of real danger for the consumers. However, this duty is currently limited to defective products.

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

- 25 There are no direct consequences on the allocation of the burden of proof if the tortfeasor acts in compliance with the relevant administrative rules. However, the fault would be less easily established in the case of acting in compliance with them than in the case of their violation.

²⁸ “I. – When the approval covers the first use of genetically modified organisms in a facility, the operator puts an information file at the disposal of the public.

II. – This file, submitted to the town hall of the town where the facility is located, is stamped by the administrative authority. Excluding any information covered by industrial or commercial secrecy or protected by the law, or the disclosure of which could harm the interests of the operator, it contains:

1. General information about the activity of the facility and about the purpose of the research submitted for an approval application;
2. Any useful information about the classification of the genetically modified organisms that may be used at the facility, and about the containment measures, the intervention means in case of an incident, and the technical prescriptions upon which the approval is dependent in accordance with Article L. 532-3;
3. Where applicable, the summary of the decision given by the genetic engineering commission regarding the approval application;
4. The address of the genetic engineering commission, where the public may make any observations.

III. – A synthesis of the observations collected and information about any actions to be taken following these observations feature in the annual report mentioned in Article L. 531-3.

IV. – The provisions of this Article do not apply if the approval only covers the use of non-pathogenic genetically modified organisms presenting no serious risk to public health or the environment.

V. – A *Conseil d'Etat* decree sets the conditions of application of this Article.”

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

A tortfeasor can be held liable before the civil judge but also before the criminal judge when the victim claims compensation alongside the prosecution of a criminal offence that led to civil damage.

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Administrative law in general also provides for remedies before the administrative courts which lead to civil liability in the case of the violation of such a rule by public authorities. The remedies vary in this case depending on the cause of damage and the situation. For example, if the victim of a dysfunction of a waste disposal factory run by a public authority sues the latter on the ground that it infringed the relevant rule, he/she must give evidence of this infringement. But in the same situation, if the victim sues the public authority on the ground of abnormal disturbance to neighbours by way of possession or, if the victim is not a neighbour, on the ground that he/she is a third party to the public work (i.e. it did not use it), he/she would not have to give evidence of a fault in these cases. The public authority would usually be exempt from liability if it proves that it has maintained the public work in a normal way (*entretien normal de l'ouvrage public*) but it would not be able to do so in the case of violation of a rule aiming at protecting the environment or at imposing safety rules. It would be partially or totally exempt from liability only in the case of the victim's fault or of a force majeure event.

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

An administrative law rule can lead to an infringement of interests of another person even though the act is lawful. In this case the jurisprudence allows the victim to claim compensation from public authorities before the administrative courts in two situations.

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Firstly, the victim can be indemnified of damage caused by a statute law if the following conditions are secured. If the statute law provides for indemnification (or limit or forbid it), one should consider the statute law as comprehensive. If it does not, the jurisprudence of the Council of State ruled that the judge must seek the intention of the Parliament. If nothing can be found that would lead to the conclusion that the Parliament had tacitly excluded the liability of the State, the State must bear the burden of damage caused by the law. However the harm must be special (only certain persons are concerned) and abnormal (the injury must be higher than the normal inconvenience of any person living in society) as the State cannot bear all the consequences of a statute law.²⁹ In

²⁹ CE, Ass., 14 January 1938, *Société anonyme des produits laitiers "La Fleurette"*, in: Long/Weil/Braibant/Genevois/Delvolvé (fn. 3) 323–329.

such a situation, no fault from the State is required. The Council of State, e.g., rules that the Act of 10 July 1976 regarding the protection of nature has not excluded the liability of the State when applying this text. Therefore it must bear the liability of damage caused to fish by the proliferation of birds called *Phalacrocorax Carbo sinensis* due to the interdiction of hunting them posed by an administrative rule taken on the ground of the Act of 10 July 1976.³⁰

The same principles apply to damage caused by public authorities when applying international treaties (CE, Ass., 30 March 1966, *Compagnie générale d'énergie radio-électrique*).

Secondly, another case deals with the situation when no statute law applies. The jurisprudence of the Council of State early ruled that even in the case of an lawful act, the relevant public authority must bear the liability of its administrative acts when damage consequently occurs, subject to the conditions that the damage is special and abnormal.³¹ The rationale of this case law is to ensure equality between citizens as the administrative act created a *rupture d'égalité devant les charges publiques* (break-up of equality in face of common burdens). The Council of State extended this case law rule to lawful abstention. As in the case of the presence of a statute law, no fault is to be proved.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 28 First of all, the farmer can claim compensation from the operating company thanks to the principle which establishes that administrative permits are given without prejudice of third-party rights (see above) as it could be seen as a *trouble anormal de voisinage* (abnormal disturbance to neighbours by way of possession) or even on the ground of § 1384 C. Civ. (see above). The fact that the regulations have not been updated is irrelevant. The *Cour de cassation* (final court of appeal of ordinary courts) ruled that, in the field of “classified facilities for the protection of the environment”, an operating company must adapt by itself the functioning of its facilities to the new regulations even though its authorisation has not been updated. The case dealt with the storage of domestic waste that was authorised in 1991 by the *Préfet*. A claimant asked the operating company to stop storing waste other than ultimate waste as prescribed from 1

³⁰ CE, Section (Section, Sect.), 30 July 2003, *Association pour le développement de l'aquaculture en région Centre et autres*.

³¹ CE, 30 November 1923, *Couitéas*, in: Long/Weil/Braibant/Genevois/Delvolyé (fn. 3) 252–259.

January 2002 by the Act of 13 July 1992 (now in § L. 541-24 C. Env.³²). The operating company refused to comply with this new regulation and the *Cour de cassation* forbid it to store waste other than ultimate waste with a daily penalty (Cour de Cassation, Civ. 1ère (1st civil chamber), 25 October 2005, *Société Coved Centre Est*). As far as administrative liability is concerned, i.e. liability of public authorities, no text prescribes the relevant authority to adapt the permit to the new regulation. Nonetheless, a third party (neighbours, association, ...) can ask the public authority to adapt it and if it still does not act in this way after a *délai raisonnable* (reasonable period), it can be held liable for *carence* (failure to act) before the administrative court. A recent case regarding the so-called *scandale de l'amiante* (asbestos scandal) shows an evolution towards a very demanding jurisprudence. The French State has been held liable for the way it managed the risk of inhalation of asbestos dust. Two faults have been recognised. Before 1977, the State is held liable for failing to adopt a regulation aiming at protecting the concerned people, as it could not have been unaware of the "serious risks for the health" for the concerned workers since the 1950s. Having known the risks, it should have run scientific studies to measure the exact risks and introduce the relevant regulations. After the 17 August 1977 Decree, which imposed certain rules regarding the use of asbestos in building construction, the State is held liable for the delay in adapting the regulation to the latest scientific surveys that should have led it to lower the minimum threshold of asbestos exposure and run studies to check whether the relevant regulation were sufficient enough.³³

Since the jurisprudence has evolved, the State can be held liable if anybody can prove that, according to scientific knowledge or at least serious doubts, it has not imposed a safety regulation to the concerned industrial companies.

Regarding the question of the incidence of the inaction of the farmer for the reviewing or withdrawal of the permit, one should first bear in mind that in any case there is no priority of the administrative procedure over the civil procedure and that furthermore the civil judge has no jurisdiction over the appraisal of the illegality of public authorities, except in exceptional circumstances which are not relevant for this study. In order to answer the question, three hypotheses must be distinguished:

- a) If the farmer did not ask the public authority to modify the permit or seek annulment of the permit: if the plant respected the rules and nonetheless harmed the farmer, there would be no public liability (i.e. liability of the government or any other public authorities) unless the plant was installed before the award of the permit and it continued in the same conditions after the permit was delivered. In the latter case, the farmer must prove that the public authority committed a fault in failing to impose stricter prescrip-

³² "Special industrial waste, which appears on a list set by a *Conseil d'Etat* decree owing to its dangerous properties, may not be deposited in storage facilities that receive other categories of waste. From 1st July 2002, the facilities for waste disposal by storage are only authorised to receive ultimate waste."

³³ CE, Ass., 3 March 2004, *Ministre de l'emploi et de la solidarité*.

- tions. The fact that it did not act either by seeking annulment or by asking for the withdrawal of the permit has no effect.
- b) If the farmer asked the public authority to modify the permit but the latter did not, public liability can be sought only if this failure to act is considered as a fault. This would be the case if several conditions are present; it should have acted and did not although the initial prescriptions were insufficient to ensure the protection of the environment or of third parties; it failed to respond to the farmer who asked several times within a long period of time. Anyway this action against the public authority has no effect on the action against the operating company.
 - c) If the farmer asked the public authority to modify the permit and the latter did act but the measures taken were not sufficient enough, there is still no effect on the question of civil liability of the operating company. The farmer can also seek the liability of the public authority if he proves that the insufficiency of the measures led to the damage. He can then obtain damages covering the entire damage as there is no limitation to the part that may have been caused by public authority failure.

2. A specific statute with regard to occupational hazards compels employers to take certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop who is injured as a result?

- 29 In such a situation, the liability of the employers differs if the victim at stake is a visitor or an employee. Regarding the visitor, B can be held liable in two manners according to the cause of the injury. If the injury was caused by things such as machines for example, § 1384 C. Civ. shall apply: “A person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody. (*Act of 7 November 1922*) However, a person who possesses, regardless of the basis thereof, all or part of a building or of movable property in which a fire has originated is not liable towards third parties for damage caused by that fire unless it is proved that the fire must be attributed to his fault or to the fault of persons for whom he is responsible. (*Act of 7 November 1922*) This provision may not apply to the landlord and tenant relationship, which remains governed by Art. 1733 and 1734 of the Civil Code. (*Act no. 70-459 of 4 June 1970*) The father and mother, in so far as they exercise ‘parental authority’ (*Act no. 2002-305 of 4 March 2002*), are jointly and severally liable for the damage caused by their minor children who live with them; masters and employers, for the damage caused by their servants and employees in the functions for which they have been employed; teachers and craftsmen, for the damage caused by their pupils and apprentices during the time when

they are under their supervision. (*Act of 5 April 1937*) The above liability exists, unless the father and mother or the craftsmen prove that they could not have prevented the act which gives rise to that liability. (*Act of 5 April 1937*) As to teachers, the faults, imprudence or negligent conduct invoked against them as having caused the damaging act must be proved by the plaintiff at the trial, in accordance with the general law.” The jurisprudence is very severe when applying this article. The owner will be held liable (e.g. for insufficient protection of a machine or the existence of an oil puddle that caused a fall) unless the victim’s grave fault (*faute caractérisée*) is deemed unpredictable and unavoidable.³⁴ The latter would consist for example in the fact that, having taken all precautions to prevent the entrance to the workshop (lockers, display of signs forbidding the entrance), the victim nonetheless came in by force. Only in this case would the owner be exempt from liability.

Otherwise, § 1382 and 1383 C. Civ. shall apply: “Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.” And “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence”. But this liability is less demanding than the liability of things which are under someone’s custody. If the victim acts on the ground of § 1382 or 1383 C. Civ., greater account would be taken of his/her fault. The owner would be partially exempt from liability when its fault (e.g. no lockers or signs displayed) did not solely contribute to the damage (e.g. oil puddle) and he/she would not be held liable at all if the damage can be seen as the sole fault of the victim (e.g. the victim starts a machine or stands up on furniture and gets injured).

The solution regarding employees differs from the visitors as they are linked to the employer by a contract and because the *Code du travail* (Labour Code, C. Trav.) imposes a duty of safety of workers on the shoulders of the employer. However, the evidence lies upon the employee who must prove that the employer, had he known the risks, did not take the sufficient measures to prevent the accident. It also lies to each worker to take care, according to his education and possibilities, of his own safety and health when working (§ 230-3 C. Trav.). This may result in the fact that under certain circumstances, the worker would be held liable for unreasonable error (*faute inexcusable*).

³⁴ Cour de cassation, Civ. 2ème, 11 January 2001, *Beaudron v. SNCF*.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It visited the company once and issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

- 30 The injured persons can hold the company liable for the damage as far as they prove the existence of damage and establish the causal link between the damage and the behaviour of the company.

The company cannot succeed in relying on the agency failure to act. French law applies the Latin principle by which no-one can allege its own fault (*Nemo auditur propriam turpitudinem allegans* = *Nul ne peut alléguer de sa propre turpitude*). This means that no-one can prevent themselves being held liable by arguing that an agency or any public authority should have intervened.

b) Could the injured persons claim damages from the government agency?

- 31 Concurrently to a claim for damages against the company before a civil court, the injured parties can claim damages against the agency or any public authority in charge of security requirements: the State for the action or the absence of action of a Minister or a *Préfet* (local state representative) – or a city council for the action or the absence of action of the *Maire* (mayor) before administrative courts which have jurisdiction not only for judicial review but also claim damages against public authorities.

The injured party must as usual give evidence of damage, of a fault from the agency and of a causal link between the two. But as far as public control of private activities are concerned, as in the example above, the French administrative case law ruled by the Council of State initially required therefore the existence of *faute lourde* (serious fault or gross negligence) from a public authority. The jurisprudence has evolved and the *faute lourde* is only required in specific situations such as emergency or complicated situations. Apart from that, judges now consider that in normal conditions, the controlling authorities have time to avoid any fault and therefore a simple fault in controlling the companies can lead to fines. For example, the Council of State now requires a simple fault for the control of forests (CE, 25 March 2005, *Commune de Kintzheim*).

TORT AND REGULATORY LAW IN GERMANY

Ulrich Magnus and Klaus Bitterich*

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

As an introduction, a brief overview of § 823 *Bürgerliches Gesetzbuch* (German Civil Code, BGB) as the basic provision of fault-based liability in tort should be given. According to § 823 subs. 1 BGB, a person, “who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom”.¹ Three elements must be present: the injury of one of the rights enumerated in § 823 subs. 1 BGB (objective element of the statutory definition of a tortious act; *objektiver Tatbestand*), wrongfulness (*Rechtswidrigkeit*) and fault (subjective element; *Verschulden*). With regard to actions which are only indirectly linked to the infringement they have caused, in particular by a failure to act, this statutory definition is specified by duties of care to maintain safety and to protect third parties from damage (so-called *Verkehrssicherungspflicht* or simply *Verkehrspflicht*²) which German courts started to develop soon after the BGB came into force.³ Generally speaking, a duty of care within the meaning of § 823 subs. 1 BGB obliges someone who creates a source of danger or

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¹ Translations of the BGB (except for § 906 subs. 1 sent. 2, 3 BGB) are taken from *S. Goren*, *The German Civil Code* (1994). For a translation of the German delict provisions see also *B.S. Markesinis*, *The German Law of Torts* (4th ed. 2002) 14–18.

² See *Markesinis* (fn. 1) 86, and for the terminology *Ch. v. Bar*, *Entwicklungen und Entwicklungstendenzen im Recht der Verkehrs(sicherungs)plichten*, *Juristische Schulung* (Jus) 1988, 169.

³ *Reichsgericht in Zivilsachen* (Supreme Court of the German Reich for Civil Matters, RGZ) 52, 373 is considered to be the starting point of this process. See *K. Larenz/C.-W. Canaris*, *Lehrbuch des Schuldrechts*, vol. II/2 (13th ed. 1994) 400. A list of case-law-created *Verkehrspflichten* (classified alphabetically) can be found in *H. Sprau*, in: O. Palandt (*Palandt/Sprau*), *Bürgerliches Gesetzbuch* (65th ed. 2006) § 823 no. 185 ff.

at least allows such danger to continue within his sphere of influence to take all reasonable measures to protect other individuals against the risks emanating from that source of danger.⁴ The courts determine what is exactly required on the basis of a variety of factors, in particular the reasonable expectations of the public.⁵ Whether the breach of a *Verkehrspflicht* is part of the objective element of § 823 subs. 1 BGB, of wrongfulness, or even fault is subject to controversy.⁶ The predominant opinion seems to be that one has to take the *Verkehrspflicht* into account on the “objective level”.

§ 823 subs. 2 BGB, declares: “The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement is possible even without fault, the duty to make compensation arises only in the event of fault.” Generally, § 823 subs. 2 BGB enables the courts to grant damages where standards of behaviour established in branches of law other than tort law are violated. With regard to the rights already protected by § 823 subs. 1 BGB, the function of this provision is to establish tort liability in case such a right is endangered, but not yet violated, as a result of the breach of a statute intended to protect others (so-called *Schutzgesetz*).⁷ Another important purpose of § 823 subs. 2 BGB is to open tort law for the protection against purely economic loss. If a statute which provides for a standard of conduct aiming at the protection of financial interests of another is recognised as a protective statute, the claimant is entitled to compensation for purely economic loss in case of an intentional or negligent⁸ breach of that statute regardless of whether a right protected by § 823 subs. 1 BGB has been violated.⁹

It should be noted that § 823 BGB provides not only the legal basis for claims for damages but also, in conjunction with § 1004 BGB, for injunctions aiming at a cease-and-desist order or an order for the abatement of a nuisance, e.g., if damage has arisen or is imminent to arise through the pollution of the

⁴ See, e.g., Bundesgerichtshof (Federal High Court for Civil Matters, BGH), *Neue Juristische Wochenschrift* (NJW) 2001, 2019, 2020; NJW 1990, 1236 ff.; *Larenz/Canaris* (fn. 3) 399 f. § 836–838 BGB are statutory expressions of this general principle.

⁵ An example for this approach is the case-law regarding fault-based liability of producers (*Produzentenhaftung*) of cigarettes or sweets. The courts deny a duty to warn about the risks the consumption of these goods usually entails because the average consumer knows about these risks. See, e.g., Oberlandesgericht (Court of Appeal, OLG) Hamm, *Entscheidungen zum Wirtschaftsrecht* (EWiR) 2004, 935, annotation by *M. Adams/C. Merten*; OLG Düsseldorf, *Versicherungsrecht* (VersR) 2003, 912. As a counter-example see *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Federal Supreme Court for Civil Matters, BGHZ) 116, 60 = NJW 1992, 560, concerning the risk of tooth decay caused by sweetened tea for children (Kindertee).

⁶ See *infra* no. 30.

⁷ *G. Wagner*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (MünchKomm/Wagner), vol. V/2 (4th ed. 2004) § 823 no. 319.

⁸ See § 823 subs. 2 sent. 2 BGB.

⁹ MünchKomm/Wagner (fn. 7) § 823 no. 320. The other basic tort liability provision protecting the aggrieved party against purely economic loss is § 826 BGB (liability of a person inflicting damage intentionally and in a manner contrary to the public policy; *vorsätzliche sittenwidrige Schädigung*). From a practical point of view, § 826 BGB is of little relevance as far as the relationship between tort law and administrative law in the field of safety and environmental regulations is concerned.

environment. Such actions under civil law may be brought independently from actions aiming at the enforcement of an individual's rights under administrative law. The requirements that must be present to request legal protection differ under the public and the civil law regime and, generally, they must be determined independently.¹⁰

The impact of administrative law rules¹¹ on German tort law is a topic which is not addressed by express statutory provisions but for a few exceptions.¹² The prevailing view is that the judgment whether a damaging conduct constitutes a tort has to be made autonomously. But the fact that the conduct in question is also governed by administrative law rules has to be taken into account when determining whether the different elements of the relevant liability provisions are present.¹³ Regarding the general duty of care under § 823 subs. 1 BGB, German courts decline to refer to standards of conduct based on administrative law rules or decisions of public authorities as strictly binding,¹⁴ but, on the other hand, they accept such standards as an important indication as to what standard of care is required under tort law. Thus, the relevant administrative law rules provide for a *minimum standard*,¹⁵ but do not prevent a court from asking for a higher degree of care and diligence taking account of the facts of the actual case. The same applies for technical (safety and environ-

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¹⁰ See, e.g., for industrial plants falling within the scope of the Federal Immission Control Act (*Bundesimmissionsschutzgesetz*, BImSchG), *H.D. Jarass*, *Bundesimmissionsschutzgesetz* (6th ed. 2005) § 10 no. 99, 99a.

¹¹ "Administrative law" refers to the part of public law governing the execution of public functions by the administration both in substantial and procedural respects. The term "regulatory law" is used in this report to define the branch of administrative law dealing with the aversion or minimization of dangers for the public or individuals by implementing all kinds of (technical) standards, including procedures to guarantee that the relevant behaviour or products comply with these standards (see also *infra* no. 19).

¹² See, e.g., § 14 BImSchG barring injunction proceedings against the operation of installations for which a permit was issued by the approving authority.

¹³ See, e.g., *E. Steffen*, *Haftung im Wandel*, *Zeitschrift für die gesamte Versicherungswissenschaft* (ZVersWiss) 1993, 13, 24 f.: relative autonomy; *MünchKomm/Wagner* (fn. 7) § 823 no. 321: no "blind" application of administrative law rules; *J. Hager*, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Staudinger/Hager), § 823–825 (13th ed. 1999) § 823 no. E 34; *Larenz/Canaris* (fn. 3) 416; v. *Bar*, *Jus* 1988, 169, 172 f.; *H. Versen*, *Zivilrechtliche Haftung für Umweltschäden* (1994) 155 f.; *J. Kohler*, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Staudinger/Kohler), *Umwelthaftungsrecht* (2002) Einl zum UmweltHR no. 270, 276, 286 ff., 302 ff. and, for an overview on the different positions taken by academics on this topic, no. 286, 301 f.

¹⁴ See, e.g., BGH, *Transportrecht* (TransPR) 2004, 356; BGH, *NJW* 1999, 2815, 2816; BGHZ 139, 79, 83 = *NJW* 1998, 2905, 2906; *NJW* 1997, 582, 583; BGHZ 99, 167, 176 = *NJW* 1987, 1009, 1011; *MünchKomm/Wagner* (fn. 7) § 823 no. 578. The only counter-example seems to be the much criticised decision BGHZ 62, 265, 270: § 27 subs. 1 *Bundesjagdgesetz* (Federal Hunting Law, BJagdG) empowers the competent authority to oblige the proprietor of hunting rights to reduce the number of wild animals. This provision intends to prevent damage caused by game and was considered by the BGH to exclude a duty of care under § 823 subs. 1 BGB going beyond the administrative rule of law. See *Larenz/Canaris* (fn. 3) 416.

¹⁵ *Steffen*, ZVersWiss 1993, 13, 24; *Staudinger/Hager* (fn. 13) § 823 no. E 34; *Staudinger/Kohler* (fn. 13) Einl zum UmweltHR no. 273.

mental) standards which can be found in regulations of executive departments (*Rechtsverordnungen*), in administrative directives (*allgemeine Verwaltungsvorschriften*) such as the Technical Directive on Air Pollution Control (*TA Luft*) and on Noise Abatement (*TA Lärm*) or in other sets of rules developed by private standards institutions like, e.g., the German Engineers Association (*Verein Deutscher Ingenieure*, VDI).¹⁶

The legal concept of § 906 subs. 1 BGB affords authority for this view. § 906 BGB deals with the real estate owner's obligation to tolerate an insubstantial impairment (*unwesentliche Beeinträchtigung*) of the use of his piece of land caused by immissions or other intrusions.¹⁷ In 1994 sent. 2 and 3 were added to § 906 subs. 1 BGB declaring that immissions which do not exceed marginal or approximate values (*Grenz- oder Richtwerte*)¹⁸ under administrative law principally have to be tolerated, but only "as a rule", i.e. as a guideline, not a binding provision for the civil courts.¹⁹ Accordingly, it may be concluded that administrative law rules (and related technical or environmental standards) serve as a guideline for the civil courts and thereby support legal certainty and the efficiency of the judiciary²⁰ as far as they describe the safety precautions necessary in the "normal" cases. But, still, the civil courts have the final say when applying the fault-based liability regime in a way that guarantees a comprehensive and sufficient protection of an individual's rights.

- 3 A "natural" link between tort law and other legal standards of conduct regardless of their origin is § 823 subs. 2 BGB. Many administrative provisions dealing with safety requirements or the protection of the environment are considered to be protective statutes within the meaning of § 823 subs. 2 BGB. Still, case-law shows that most claims for pecuniary damages are decided on the basis of § 823 subs. 1 BGB even if a law applicable under § 823 subs. 2 BGB exists, a fact which can be explained to some extent with the above mentioned

¹⁶ MünchKomm/Wagner (fn. 7) § 823 no. 268 ff., 578; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 276.

¹⁷ § 906 BGB, the most important civil law provision dealing with environmental liability (although part of property law), declares: "(1) The owner of a piece of land is not entitled to prohibit the intrusion of gases, vapors, smells, smoke, soot, heat, noises, shocks and similar interferences emanating from another piece of land to the extent that the interference does not or only immaterially prejudices the use of his piece of land. The prejudice is, as a rule, immaterial if the marginal or approximate values stipulated by statutes or regulations are not exceeded by the intrusions ascertained and evaluated in accordance with these provisions. The same applies for values in administrative directives which are enacted under § 48 of the Bundesimmissionschutzgesetz and describe the state of technology. (2) The same applies insofar as a substantial prejudice is caused by the use of another piece of land in conformity with local custom and it cannot be prevented by measures, the financing of which can be reasonably expected of users of this kind. [...]"

¹⁸ See infra fn. 166 f.

¹⁹ The 1994 amendment confirmed earlier decisions of the BGH regarding § 906 BGB. Cf. BGH, NJW 1995, 132, 133; BGHZ 121, 248, 252 f. = NJW 1993, 1656, 1657; BGHZ 120, 239, 254 ff. = NJW 1993, 925, 929 f.; BGHZ 111, 63, 65 f., 68 = NJW 1990, 2465, 2466; BGHZ 92, 143, 151 ff. = NJW 1985, 47 ff. (the famous Kupolofen-decision); to § 906 BGB as amended in 1994 see, e.g., BGH, NJW 2004, 1317, 1318; NJW 1999, 1029, 1030.

²⁰ See Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 276.

creation of comprehensive duties of care (*Verkehrspflichten*) by the courts. Anyhow, administrative law rules intending to protect others are important in connection with § 823 subs. 2 BGB (and § 1004 subs. 1 sent. 2 BGB) with regard to claims aiming at the prevention or abatement of a nuisance.²¹

To some extent,²² administrative law rules also have an impact on liability regardless of fault²³ which, apart from § 833 sent. 1 BGB establishes strict liability of the holder of certain animals, an issue of special laws such as the *Produkthaftungsgesetz* (Product Liability Code, ProdHaftG), § 84 *Arzneimittelgesetz* (Medical Preparations Act, AMG) or the *Umwelthaftungsgesetz* (Environmental Liability Code, UmweltHG).²⁴ Although in the field of strict liability no breach of a duty of care or fault is required,²⁵ administrative law is of significance when it comes to determining whether the loss suffered by the aggrieved party is an outcome of the operational risk of the facility (*Betriebsrisiko*) the operator is strictly liable for.²⁶ 4

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and or local law (if applicable) and the protective purpose of an administrative law rule?

According to art. 74 subs. 1 no. 1 *Bonner Grundgesetz* (Basic Law, GG), civil law (*bürgerliches Recht*) including tort law is a matter of concurrent federal legislative power (*konkurrierende Gesetzgebung*), i.e. federal legislation intended to be final bars state legislation on the same subject matter. Civil law liability provisions created by a state or a local government body would be unconstitutional²⁷ which is one of the arguments against a binding effect of standards of conduct contained in or based on non-federal administrative law rules when considering the duty of care under § 823 subs. 1 BGB.²⁸ On the other hand, § 823 subs. 2 BGB enables the transformation of such standards into tort law regardless of the responsible legislative body. As long as a state or a local government body intends to serve a public purpose which lies within 5

²¹ See, e.g., BGH, NJW 1997, 55; BGHZ 122, 1 = NJW 1993, 1580; BGH, NJW 1976, 1888: all concerning injunction proceedings against activities violating building law rules.

²² See Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 309 f.

²³ See Lorenz/Canaris (fn. 3) 601 ff.; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 94 ff.; J. Fedtke/U. Magnus, German Report on "Strict Liability", in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002); § 834 sent. 2, 836–838 BGB do not form part of the strict liability regime. They establish liability on the basis of presumed fault.

²⁴ The courts have no competence to invent or to extend strict liability provisions, see BGHZ 55, 229, 234 = NJW 1971, 607, 608.

²⁵ As the strict liability regime often covers only physical loss and generally provides for limits of liability, e.g., regarding the maximum amount of damages, fault-based liability still is of great importance, even if the aggrieved party is entitled under strict liability provisions.

²⁶ See, e.g., § 6 subs. 2 UmweltHG dealing with rules of evidence regarding causation.

²⁷ *Entscheidungen des Bundesverfassungsgerichts* (Supreme Federal Constitutional Court, BVerfGE) 45, 297, 345 = NJW 1977, 2349, 2355.

²⁸ See fn. 192.

its legislative competence, such as accident prevention (*Gefahrenabwehr*), the constitutional requirements regarding the legislative competence for tort law are not violated.²⁹ Therefore, an architect who does not conform to a state's building regulations (*Bauordnungsrecht*) may be rendered liable pursuant to § 823 subs. 2 BGB, irrespective of the fact that these regulations are part of the law of the states.³⁰ The same is true for local statutes providing for an obligation to strew salt (or sand) on icy surfaces.³¹

- 6 A general constitutional boundary is the obligation of the courts to apply tort law provisions in a way that conforms with the constitutional requirements, namely the constitutional rights (*Grundrechte*), according to art. 1 subs. 3 GG.³² The constitutional rights require a certain standard of protection which legislative bodies must not fail to implement, but as a matter of principle an obligation to create a certain rule of law cannot be derived from the constitution.³³ It lies within the competence of the legislator or, where no statutory provisions apply, of the courts to choose the means to provide sufficient protection. Given this broad discretion, academics unanimously confirm the constitutionality of the tort law provisions, in particular with respect to the comprehensive duties of care the courts established under § 823 subs. 1 BGB.³⁴

3. *Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?*

- 7 Regarding the required type of law, a statute intended for the protection of others within the meaning of § 823 subs. 2 BGB must be a norm in the formal sense of art. 2 *Einführungsgesetz zum BGB* (Introductory Law to the German Civil Code, *EGBGB*), i.e. any federal, state or local legislative enactment regardless of its characterization as private, public or criminal law. Therefore, the GG,³⁵ formal enactments of federal or state parliaments (*Gesetze im formellen Sinn*), regulations of executive departments (*Rechtsverordnungen*) or autonomous legislation like local statutes (*Satzungen*) qualify for the application

²⁹ Staudinger/*Hager* (fn. 13) § 823 no. G 12. See for a detailed analysis *A. Spickhoff*, *Gesetzesverstoß und Haftung* (1998) 100 ff., 105.

³⁰ MünchKomm/*Wagner* (fn. 7) § 823 no. 323.

³¹ Staudinger/*Hager* (fn. 13) § 823 no. G 12.

³² For details on the impact of constitutional rights on private law which is a matter of some dispute, see *C.-W. Canaris*, *Grundrechte und Privatrecht* (1999) 24 ff. The constitutionality of the BGH's application of § 906 BGB is challenged as far as the court (by analogy) imposes a duty to tolerate immissions on the owners of movables without granting them an indemnification claim under § 906 subs. 2 sent. 2 BGB (BGHZ 92, 143 = NJW 1985, 47); see MünchKomm/*Wagner* (fn. 7) § 823 no. 626; Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 121.

³³ See, e.g., BVerfGE 96, 56 = NJW 1997, 1769, 1770; *H. Schulze-Fielitz*, *Technik und Umweltrecht*, in: M. Schulte (ed.), *Handbuch des Technikrechts* (2003) 443, 446.

³⁴ See, e.g., *G. Spindler*, in: H.G. Bamberger/H. Roth (eds.) (Bamberger/Roth/*Spindler*), *Kommentar zum Bürgerlichen Gesetzbuch* (2003) Vor § 823 no. 10; *Canaris* (fn. 32) 77.

³⁵ Bundesarbeitsgericht (Federal Labour Court, BAG), NJW 1967, 843; art. 9 subs. 3 GG; Bamberger/Roth/*Spindler* (fn. 34) § 823 no. 169; art. 3 subs. 3 sent. 2 GG.

of § 823 subs. 2 BGB.³⁶ Whether regulations for the prevention of accidents enacted under the accident insurance scheme (*Unfallverhütungsvorschriften*) satisfy the norm-criterion is a matter of dispute.³⁷

Administrative decisions (*Verwaltungsakte*) clearly do not satisfy the norm-criterion of art. 2 EGBGB³⁸ and regularly the same is true for administrative directives (*Allgemeine Verwaltungsvorschriften*) because they only bind the authorities when executing administrative law but do not determine rights or obligations in the external relationship between the administration and the individual³⁹ and for private standards such as, for example, DIN-standards of the German Standards Institute (*Deutsches Institut für Normung*, DIN)⁴⁰ because private standardisation organisations lack legislative power.⁴¹ Accordingly, if a norm refers to such standards, only the norm itself may be regarded as a protective statute under § 823 subs. 2 BGB.⁴²

Statutes which do not directly oblige the individual but contain abstract provisions regarding the expected conduct and are therefore designed to be put into a concrete form by way of an administrative decision (e.g. an order or an operating permission) generate some considerations with respect to the norm-criterion. It is common understanding that this mechanism does not object to a statute empowering the administration being characterized as *Schutzgesetz* within the meaning of § 823 subs. 2 BGB if it intends to protect the individual. The argument is that to exclude all the administrative law rules requiring an executory decision of an authority would not be legitimate as long as the required administrative decision has in fact been issued.⁴³ Thus, e.g., § 5 *Bundesimmissionsschutzgesetz* (Federal Immission Control Act, BImSchG), establishing specific duties of plant operators (so-called *Betreiberpflichten*), must not be applied in conjunction with § 823 subs. 2 BGB until the pollution

³⁶ See, also with regard to customary or judge-made law, *Spickhoff* (fn. 29) 75 ff, 86.

³⁷ See *P. Salje/J. Peter*, *UmweltHG* (2nd ed. 2005) § 18 no. 12; *MünchKomm/Wagner* (fn. 7) § 823 no. 324 takes a different view.

³⁸ *Infra* no. 9. See BGH, NJW 1995, 132, 133; BGHZ 122, 1, 3 = NJW 1993, 1580. As an exception from this rule, § 33 subs. 1 *Gesetz gegen Wettbewerbsbeschränkungen* (Anti-trust Act, GWB) declares that obligations imposed by the anti-trust authority have to be regarded as a protective law within the meaning of § 823 subs. 2 BGB.

³⁹ This is a matter of dispute with respect to administrative directives created on the basis of § 48 BImSchG like the *TA Lärm* und *TA Luft*; cf. *Staudinger/Hager* (fn. 13) § 823 no. G 15; denied, e.g., by *MünchKomm/Wagner* (fn. 7) § 823 no. 326; for the adverse opinion see *P. Salje*, *Anlagenhaftungsrecht*, in: *Schulte* (ed.) (fn. 33) 271, 291; *Staudinger/Kohler* (fn. 13) *Einl zum UmweltHR* no. 68.

⁴⁰ BGHZ 139, 16, 19 = NJW 1998, 2814, 2815.

⁴¹ *Staudinger/Hager* (fn. 13) § 823 no. G 13. Regarding § 823 subs. 1 BGB, private (as well as statutory) standards are considered as important indications (but without a binding effect) as to the standard of care required by tort law; cf. BGH, NJW 2001, 2019, 2020; and see *supra* no. 2.

⁴² *MünchKomm/Wagner* (fn. 7) § 823 no. 326; *Staudinger/Kohler* (fn. 13) *Einl zum UmweltHR* no. 68: dissenting as far as the *TA Luft* and *TA Lärm* or other directives are concerned which are created according to the special procedure provided for in § 48 BImSchG.

⁴³ BGHZ 122, 1, 3 = NJW 1993, 1580: concerning a noise abatement provision in a building permit; *Staudinger/Kohler* (fn. 13) *Einl zum UmweltHR* no. 67.

control authority has instructed the operator to take certain measures (pursuant to § 17, 22 BImSchG). According to the BGH, the civil courts are bound by the administrative decisions as far as the required conduct is concerned even if the decision is contrary to the law.⁴⁴ It is sufficient for the binding effect that the administrative decision is legally valid. The civil courts must not review it in terms of lawfulness. Thus, e.g., if a dance school's building permit imposes an obligation to take certain measures reducing noise, a neighbour will be granted injunctive relief and the dance school's obligation will be enforced pursuant to § 823 subs. 2, 1004 BGB.

4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

- 10 This question arises most likely in case an administrative decision, e.g. an operating permit for an industrial facility, does not meet the requirements of the empowering statute because the measures the permit provides for are not sufficient to protect the rights of other persons, e.g., against obnoxious substances emanating from the facility. According to the provisions regulating the general administrative procedure,⁴⁵ only certain obvious and serious errors result in the invalidity of the administrative decision whereas, in principle, wrongful decisions stay valid until they are repealed by the authority or a court. If an administrative decision suffers from a ground of nullity, a non-conforming conduct of the legally obliged person cannot amount to a tortious act under § 823 subs. 2 BGB because, as mentioned above (supra no. 9), in the event of a statute requiring an administrative decision to create an obligation, the statute cannot be regarded as a *Schutzgesetz* without the decision of the public authority.⁴⁶ And in case an error does not result in nullity, even a wrongful administrative decision is binding⁴⁷ and, accordingly, liability under § 823 subs. 2 BGB must also be denied.

But, as administrative decisions do not overrule the general duty of care under tort law (supra no. 2), the holder of a wrongful permit may be liable under § 823 subs. 1 BGB. In such a case the question of fault needs sound consideration: if a permit has been issued by the approving authority, the obliged person may, in principle, assume that it is valid and in conformity with all legal requirements⁴⁸ and that the prescribed measures will be sufficient to control

⁴⁴ BGHZ 122, 1, 5 = NJW 1993, 1580, 1581. This opinion of the BGH is subject to criticism insofar as statutory powers of intervention with a sufficiently accurate description of the expected conduct are concerned; see Bamberger/Roth/Spindler (fn. 34) § 823 no. 153; MünchKomm/Wagner (fn. 7) § 823 no. 334 f.; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 67.

⁴⁵ § 43 f. *Verwaltungsverfahrensgesetz* (Administrative Procedure Act, VwVfG).

⁴⁶ BGHZ 62, 265, 266 ff. = NJW 1974, 1240; Spickhoff (fn. 29) 84.

⁴⁷ See BGHZ 122, 1, 5 = NJW 1993, 1580, 1581, and supra no. 9.

⁴⁸ BGH, NJW 1980, 2578, 2579.

potentially dangerous effects of the permitted conduct. To establish a claim, the aggrieved party must therefore prove that the damaging party, taking the circumstances into account, did know or could have known that the permit was wrongful and that therefore other or more efficient measures would have been necessary to prevent harm. Due to this allocation of the burden of proof, liability under § 823 subs. 1 BGB will be the exception in this type of case.⁴⁹

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

If an action does not only disturb public peace but has also done harm to another individual, it is an unwritten but undisputed principle that such an action may also result in consequences under the Criminal Code (*Strafgesetzbuch*, StGB) or the Regulatory Offences Act (*Ordnungswidrigkeitengesetz*, OWiG) as in liability under tort law.⁵⁰ While the sanction aims at the preservation of “law and order” in the general public interest, tort law enables the individual to seek compensation for his own benefit. The fact that a breach of an administrative law may be subject to prosecution as a crime (or an offence) does neither formally exclude nor automatically result in tort liability under § 823 BGB.

Whether a (criminal) offence is a tort pursuant to § 823 subs. 1 BGB has to be determined autonomously but regard has to be paid to the fact that a standard of behaviour required by an administrative rule of law has principally the effect of a minimum standard in tort law.⁵¹ The general principles of tort law also apply when determining whether an administrative rule of law providing itself for (criminal) sanctions is applicable under § 823 subs. 2 BGB (see *infra* no. 13 ff.). The threat of a sanction has to be taken into account. As a rule of thumb the protective purpose of an administrative law rule is likely to be denied if a breach only constitutes an offence whereas the threat of a criminal sanction in principle indicates that a protective statute (*Schutzgesetz*) is present.⁵²

⁴⁹ See *B. Balzereit/K. Kassebohm/R. Kettler*, Umwelthaftung und Versicherungsschutz, Betriebsberater (BB) 1996, 117, 119.

⁵⁰ *Ch. v. Bar*, Gemeineuropäisches Deliktsrecht, vol. I (1996) no. 601. This is documented, for instance, by the possibility to link criminal proceedings with a damage claim pursuant to § 403 ff. *Strafprozessordnung* (Criminal Procedure Code, StPO) (so-called “Adhäsionsverfahren”, adhesive procedure).

⁵¹ As to the relationship between standards established by or on the basis of administrative law rules, see *supra* no. 2 and *infra* no. 22 f. and 43 f.

⁵² See *Larenz/Canaris* (fn. 3) 438 ff. According to the so-called “Subsidiaritätsdogma” of the BGH (doctrine of subsidiary; see BGHZ 125, 366, 374 = NJW 1994, 1801, 1804; BGHZ 116, 7, 14 = NJW 1992, 241, 242), the protective purpose of a law should be denied if the aggrieved party is already sufficiently protected without an entitlement to damages in tort; see *Spickhoff* (fn. 29) 129 ff. This doctrine is not applied by the BGH if a rule of law provides for criminal sanctions; cf. *Staudinger/Hager* (fn. 13) § 823 no. G 5 f., G 17.

6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

- 13 § 823 subs. 2 BGB is designed as a link between tort law and other branches of law providing for standards of behaviour (supra no. 3). As the relevant rules of law usually do not expressly determine their status with respect to § 823 subs. 2 BGB, it is an important and demanding task for the courts to decide upon their protective purpose particularly because a too generous approach would mean extending liability contrary to the basic features of tort law implemented in § 823 subs. 1 BGB, namely not to establish liability for the mere endangerment of a right and not to protect the individual’s assets as such but only where the loss is a consequence of the injury of a right protected by § 823 subs. 1 BGB.
- 14 When considering the protective purpose of an administrative law rule, the general principles of construction as adapted by the BGH for the purposes of § 823 subs. 2 BGB apply. Starting point is the wording of the law and, if applicable, the *travaux préparatoires*. If a law does not expressly mention a certain individual right, this has to be taken as an indication against a protective purpose within the meaning of § 823 subs. 2 BGB.⁵³ On the other hand, § 823 subs. 2 BGB does not presuppose that the rule of law’s only purpose is the protection of an individual right.⁵⁴ Even if the law primarily exists for the sake of the general public interest, this does not exclude its protective character per se⁵⁵ as long as the protective effects to the benefit of individuals are not only of an indirect or even casual nature.⁵⁶ As a peculiarity of the construction of a statute with respect to its suitability for the application under § 823 subs. 2 BGB, it must be noted that, to a particularly great extent, attention has to be paid to the legal context of the supposedly protective norm.⁵⁷ In order to avoid frictions with the general system of tort law, a sound determination is necessary whether the breach of a non-tort rule of law should give rise to an entitlement to damages. The decisive test is to ask whether the creation of a claim for compensation appears suitable, adequate and tolerable having in mind the general purposes of tort law and particularly those of § 823 subs. 2 BGB.⁵⁸
- 15 These principles apply irrespective of the origin of the rule of law in question, may it be part of the civil law, criminal law or administrative law. But it certainly has to be taken into account that, in administrative law, a similar problem arises regarding the question of the individual’s right of action before the administrative courts. Applying the so-called *Schutznormtheorie* (protective

⁵³ BGHZ 100, 13, 15 = NJW 1987, 1818, 1819.

⁵⁴ BGHZ 122, 1, 4 = NJW 1993, 1580, 1581.

⁵⁵ BGHZ 116, 7, 13 = NJW 1992, 241, 242.

⁵⁶ BGHZ 100, 13, 18 ff. = NJW 1987, 1818, 1819; BGHZ 89, 383, 400.

⁵⁷ BGHZ 106, 204, 206 ff. = NJW 1989, 974, 975. See *Spickhoff* (fn. 29) 102 ff., 105.

⁵⁸ BGHZ 66, 388, 390 = NJW 1976, 1740, 1741. See, for an illustration of how these principles are applied by the courts, *Markesinis* (fn. 1) 886 ff.

scope of the norm test) administrative courts have settled the question of the protective purpose for many administrative law rules, and civil courts usually do not hesitate to adopt the administrative courts' practice.⁵⁹

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

Administrative liability is generally governed by the Regulatory Offences Act. According to § 30 OWiG, a company will be "personally" fined if one of the members of the managing staff has committed a breach of an administrative law rule binding the company. If a "normal" employee committed a regulatory offence, § 30 OWiG may still be applicable having regard to § 14 OWiG establishing administrative liability for participation in an offence. Where § 30 OWiG is not fulfilled, administrative liability will be imposed on the employee of a legal entity who actually committed the breach. In addition, with regard to activities of members of the managing level, both the StGB and the OWiG provide that specific requirements of the statutory description of an offence which are only fulfilled by the legal entity are to be attributable to the managing staff.⁶⁰ Thus, e.g., a director of a company cannot escape a criminal or regulatory sanction on the ground that an administrative law rule only addresses the company he represents. Furthermore, § 130 OWiG imposes on the owner of a company the obligation to take appropriate supervisory measures to ensure that no legal obligations binding the owner are violated in the course of the operation of his company.

Tort liability resulting from the breach of an administrative law rule, be it subject to a criminal or administrative sanction or not, follows its own rules. Obligations of a legal entity have to be fulfilled by persons acting in a special representative capacity, i.e. as a company's organs (e.g. directors or managers). The representatives are bound to fulfil the company's obligations on the ground of their position as organs and according to their contract of employment with the company. Thus, a failure of a representative to comply with a duty imposed on the company constitutes a violation of his obligations towards the company, and, as regards third parties, may give rise to the company's liability under § 823, 31 BGB.⁶¹ On the other hand, personal liability in tort of individuals acting as representatives for a legal entity may arise in case they breach

⁵⁹ BGHZ 86, 356, 362 = NJW 1983, 1795, 1796; BGHZ 66, 354, 355 f. = Monatsschrift für Deutsches Recht (MDR) 1971, 41. See MünchKomm/Wagner (fn. 7) § 823 no. 342; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 69; Staudinger/Hager (fn. 13) § 823 no. G 22.

⁶⁰ § 14 subs. 1 no. 1 StGB declares: "If a person acts as an executive organ of a legal entity or as a member of an executive organ, a statute describing the criminal offence with specific personal characteristics, circumstances or facts ('besondere persönliche Merkmale'), shall also be applied to the person acting as a representative, if not the representative but the represented person shows such characteristics." See also § 9 OWiG.

⁶¹ § 31 BGB declares: "The association is liable for any damage which the board, a member of the board, or other duly appointed representative may, in carrying out his duty, cause a third party, if the act obliges the making of compensation."

obligations binding not only the legal entity but also their representatives,⁶² or, as a joint offender (see § 840 BGB), in case they failed to intervene in an employee's violation of the law.⁶³ But even where actual participation in an offence is not present because a company's representative did not know about a tortious act committed or a danger created by an employee, the BGH held that a breach of a duty of care may result in personal liability of the representative if he failed to take measures to avoid the infringement of a right for which he had the position of being a guarantor.⁶⁴ In case the representative body of a company consists of more than one person, each member is fully responsible without the possibility to delegate the duty of care to employees of a lower level in the company's hierarchy. As regards the internal delegation of duties of care between the members of the representative body, the BGH accepts such delegation as long as there is no indication that the respective representative carries out his duties insufficiently. Therefore, in any case a duty of supervision (*Überwachungspflicht*) remains.⁶⁵

The principles of personal tort liability of representatives⁶⁶ developed by the BGH are supported by some academics as an applicable case of the "professional" assumption of responsibility which is one of the ways to impute a risk and to justify a duty of care.⁶⁷ But an argument often advanced against the BGH's approach is that it neglects the distinction between liability of the company which is restricted to the company assets and the exceptional direct liability of representatives.⁶⁸ But such doubts should be considerably reduced if the representatives' duties of care are determined properly.⁶⁹ There is in particular no rule that the representatives' duties of care are identical with the company's duties.⁷⁰ Furthermore, an inappropriate risk of personal liability does not arise if the fault requirement is determined properly, and, to some degree, legal certainty for the managing staff may be gained through auditing or certification procedures.⁷¹

⁶² See, e.g., BGHZ 133, 370, 375 = NJW 1997, 130, 131: duty to pay social insurance contributions; MünchKomm/Wagner (fn. 7) § 823 no. 382.

⁶³ See BGHZ 110, 323, 335 = NJW 1990, 2877, 2880; BGHZ 109, 297, 303 f. = NJW 1990, 976, 977; Staudinger/Hager (fn. 13) § 823 no. E 66.

⁶⁴ BGHZ 109, 297, 303 = NJW 1990, 976, 977. See *Ch. v. Bar/J. Rogge*, Limitation and Mitigation in German Tort Law, in: J. Spier (ed.), *The Limits of Liability – Keeping the Floodgates Shut* (1996) 17, 23 f.

⁶⁵ BGHZ 133, 370, 378 = NJW 1997, 130, 132.

⁶⁶ These principles may even cover leading staff on lower levels as well; see MünchKomm/Wagner (fn. 7) § 823 no. 396.

⁶⁷ *Larenz/Canaris* (fn. 3) 422; MünchKomm/Wagner (fn. 7) § 823 no. 399; *B. Grunewald*, Die Haftung von Organmitgliedern nach Deliktsrecht, *Zeitschrift für Handelsrecht* (ZHR) 1993, 157, 451, 455 ff., supports personal liability of organs only with regard to a duty of care owed to the public (e.g. the duty to strew sand on icy surfaces) but not where the injured is a party to a contract the legal entity has entered into.

⁶⁸ See, e.g., *M. Lutter*, Zur persönlichen Haftung des Geschäftsführers aus deliktischen Schäden im Unternehmen, *ZHR* 1993, 157, 464, 473 ff.

⁶⁹ Staudinger/Hager (fn. 13) § 823 no. E 68; MünchKomm/Wagner (fn. 7) § 823 no. 400; *Grunewald*, *ZHR* 1993, 157, 451, 457.

⁷⁰ MünchKomm/Wagner (fn. 7) § 823 no. 377; Staudinger/Hager (fn. 13) § 823 no. E 68; *Grunewald*, *ZHR* 1993, 157, 451, 458 f. Cf., e.g., BGH, NJW 1987, 372, 374: the head of a chemical enterprise's laboratory is not liable in case of an insufficient product instruction.

⁷¹ See Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 78.

Personal liability of representatives is independent from the legal entity's vicarious liability. If the representative's conduct results in the company's liability pursuant to § 31 BGB, the representative remains personally liable according to the general rules of tort.⁷² The aggrieved party may seek damages from both (potential) defendants which is of particular importance in case a juristic person is insolvent or has become extinct⁷³ but also where the claim against the company is statute-barred.⁷⁴

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8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

Administrative liability may also mean that a legal entity is confronted with a claim for reimbursement of costs that a public authority had to expend in order to avert or minimize a danger the legal entity is responsible for. According to the Police Functions Acts (*Polizeigesetze*) of the states within the Federal Republic of Germany, which provide the general legal framework for the aversion of dangers as a state function (*Gefahrenabwehr*), reimbursement of costs may be claimed from the disturber of public order (*Störer*). A "disturber" is defined as someone who directly causes a source of danger through his conduct (*Verhaltensstörer*) or someone who exercises physical control over an object and is therefore responsible for the dangerous condition of the object (*Zustandsstörer*). The Police Functions Acts also provide for the liability of employers for acts of their employees without the possibility of exculpation, the latter being obvious when one bears in mind that fault is never a requirement for the intervention of the state in the field of the aversion of dangers.⁷⁵

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Again, tort liability is not directly influenced by the liability as "disturber". The owner of real property may claim compensation in case of soil contamination pursuant to § 823 subs. 1, subs. 2 BGB or, if applicable, § 906 subs. 2 sent. 2 BGB if the state's intervention, e.g., on the basis of the Federal Soil Conservation Act (*Bundesbodenschutzgesetz*), has not made good the whole damage. As such interventions are carried out in the public interest, they neither exclude nor automatically lead to tort liability of the legal entity.⁷⁶ The general rules apply. Thus, tort liability may arise under § 823 subs. 1 BGB as a consequence of a breach of a duty of care binding the legal entity⁷⁷ or under § 823 subs. 2 BGB if the legal entity is obliged by a protective statute.⁷⁸ Legal entities are

⁷² BGHZ 109, 297, 302 = NJW 1990, 976, 977; NJW 1974, 1371, 1372.

⁷³ See BGHZ 109, 297 = NJW 1990, 967.

⁷⁴ See BGH, NJW 2001, 964.

⁷⁵ See C. Gusy, *Polizeirecht* (4th ed. 2000) no. 276 ff.

⁷⁶ The prerequisites of a tort claim must be determined autonomously, which, as mentioned above (supra no. 2 and infra no. 22 f. and no. 43 f.), does not exclude some interaction between tort law and administrative law.

⁷⁷ BGHZ 109, 297, 303 = NJW 1990, 967, 968; NJW 1973, 1602, 1603; MünchKomm/Wagner (fn. 7) § 823 no. 377.

⁷⁸ BGHZ 133, 370, 375 = NJW 1997, 130, 132.

liable for intra vires torts of their representatives on the basis of § 31 BGB, including faults in choosing, instructing and supervising employees (but with the possibility of exculpation) according to § 831 BGB. But the comparatively restrictive wording of these vicarious liability provisions must not be taken as a final description of the legal entities' liability since it has been significantly extended by the courts by way of introducing a general duty to organise the company in a way that avoids dangers arising from the company's activities (so-called *Organisationspflicht*). Again, the required standard will be indicated by the relevant obligations under administrative law. A "faulty" organisation leads to the company's tort liability pursuant to § 823 subs. 1, 31 BGB without the possibility of exculpation.⁷⁹

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. *Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?*

- 19 As an introductory remark, a short overview on how safety or environmental standards are implemented into administrative law should be given: In the course of the increasing importance of technology and under the influence of European law⁸⁰ a close network of safety regulations has developed. Standards aiming at the safety of technical facilities, machines, products and services as well as environmental standards can be found in statutes, administrative regulations (*Rechtsverordnungen*) and directives (*Allgemeine Verwaltungsvorschriften*).⁸¹ An important non-statutory source of safety and environmental standards are so-called *Regeln der Technik* (engineering standards) created by private organisations and institutions representing interest groups of the economy, industry or crafts and trade. Important national⁸² private standardisation organisations are, e.g., the

⁷⁹ If the necessary organisational measures have been delegated to employees not covered by § 31 BGB this amounts per se to an independent breach of the duty to organise the company properly. See for this and other extensions and modifications of the vicarious liability of legal entities (e.g. BGH, *Neue Juristische Wochenschrift Rechtsprechungsreport* (NJW-RR) 1996, 867, 868; NJW 1980, 2810, 2811; BGHZ 49, 19, 21 = NJW 1968, 391): J. Fedtke/U. Magnus, *Liability for Damage Caused by Others under German Law*, in: J. Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others* (2003) 105, 109 ff.

⁸⁰ The so-called "New Approach" of European safety regulation is described by D. Langner, *Technische Vorschriften und Normen*, in: M. Dausen (ed.), *Handbuch des EU-Wirtschaftsrechts*, C. VI., no. 7 ff.; J. Geiß/W. Doll, *Geräte- und Produktsicherheitsgesetz – GPSG* (2005) 2 ff.

⁸¹ These legally binding standards are created by the administration (so-called "exekutive Standardsetzung") but with institutionalized participation of experts (so-called "Technische Ausschüsse", committees on technical standardisation, see, e.g., § 13 *Geräte- und Produktsicherheitsgesetz* (Equipment and Product Safety Act, GPSG) or § 31 lit. a *BImSchG*). These committees may also independently create technical standards which are later approved by the administration and published in the relevant official gazettes. See M. Kloepfer, *Instrumente des Technikrechts*, in: Schulte (ed.) (fn. 33) 111, 137 f.

⁸² There are about 150 national organisations engaged in the creation of technical standards, see Kloepfer (fn. 81) 138.

German Engineers Association VDI (founded in 1856⁸³), the German Electrical Engineers Association (*Verband Deutscher Elektrotechniker*, VDE), the German Standards Institute and the German Committee on the Foundations of Environmental Protection (*Normenausschuss Grundlagen des Umweltschutzes*, NAGUS). On the European level, the *Centre Européen de Normalisation* (CEN), the *Centre Européen de Normalisation Electrotechnique* (CENELEC) and the European Telecommunication Standardisation Institute (ETSI) should be mentioned.

A basic feature of safety or environmental regulation is that the relevant statutes formulate only abstract safety requirements and refer for the details to administrative regulations or directives and namely private standards, e.g., by means of a general reference to the “accepted engineering standards” (*anerkannte Regeln der Technik*⁸⁴) or similar paraphrases.⁸⁵ § 4 *Geräte- und Produktsicherheitsgesetz* (Equipment and Product Safety Act, GPSG), one of the basic provisions of the law of safety regulation, is a typical example. It uses a blanket clause when providing that only products which do not endanger the safety and health of a user of the product or a third person may be marketed, but refers to the specific requirements the product must meet to specific regulations of the competent executive departments (see § 3 GPSG) or other standards and technical specifications on the non-statutory level. Although not legally binding per se⁸⁶ non-statutory technical or engineering standards therefore exercise a great influence on administrative law.

According to continuous holdings of the BGH,⁸⁷ neither statutory or non-statutory safety regulation nor official licenses or permits determine the duties of care (*Verkehrspflichten*) toward third parties under § 823 subs. 1 BGB in the sense of a binding effect. However, standards implemented by regulatory law rules are an important and, in the absence of unusual circumstances of the case, even a decisive factor for the determination of the standard of care the public may reasonably expect from every member of society. By describing a minimum standard of what standard of care is expected, they provide an important guideline for the civil courts when considering claims in tort involving a technical course of events.⁸⁸ Furthermore, safety regulation may have an impact on the question of fault and the allocation of the burden of proof regarding causation.⁸⁹ Administrative law rules implementing safety standards may also qualify for the application of § 823 subs. 2 BGB. However, even though many law rules dealing with product safety aim at the protection of the indi-

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⁸³ *Kloepfer* (fn. 81) 134 gives a short historic overview.

⁸⁴ See, e.g., § 2 subs. 1 *Haftpflichtgesetz* (Public Liability Act, *HaftpflG*).

⁸⁵ See for the interaction of statutes, regulations and (private) safety standards *P. Marburger*, Die Regeln der Technik im Recht (1979) 53 ff.; *Versen* (fn. 13) 69; *Schulze-Fielitz* (fn. 33) 452. Private standardisation therefore is also a means to relieve the legislative bodies, to keep the safety regulation flexible and to support private initiative; see *Kloepfer* (fn. 81) 135 ff.

⁸⁶ *Kloepfer* (fn. 81) 136.

⁸⁷ See, e.g., BGH, NJW 2001, 2019, 2020; BGHZ 139, 43, 48 = NJW 1998, 2436; BGHZ 92, 143, 151 f. = NJW 1985, 47, 49.

⁸⁸ MünchKomm/Wagner (fn. 7) § 823 no. 272. See supra no. 2 and infra no. 43 f.

⁸⁹ Infra no. 35 f.

vidual, case-law shows that in this respect their significance suffers from the comprehensiveness and completeness of the general duties of care developed by the courts on the basis of § 823 subs. 1 BGB.⁹⁰ On the other hand, there are constellations where a safety provision may gain decisive significance in connection with § 823 subs. 2 BGB, e.g., if it imposes the obligation to take measures going beyond the general duty of care.⁹¹

- 21 The importance of provisions aimed at environmental protection for tort law is clear from the fact that tort law is one of the pillars of civil environmental liability law.⁹² Tort law is comprehensive in terms of the protected rights and, unlike many environmental (strict) liability provisions, does not presuppose that damage is inflicted by a certain type of plant or facility, within a certain spatial relationship between the parties or by way of some environmental “path” like earth, air, water, etc. It is therefore considered to be of great importance in the field of environmental liability.⁹³ Causing environmental damage may amount to a breach of the general duty of care and give rise to a claim for compensation under § 823 subs. 1 BGB.⁹⁴ The standard of care required by tort law is significantly influenced by provisions aiming at environmental protection such as immission control laws like the BImSchG and the respective regulations and directives like the *TA Lärm* and the *TA Luft*. The relevant standards have to be taken into account as a guideline, e.g., when determining whether a source of danger was recognisable and what kind of measures were necessary and appropriate to control it. An example are marginal values (*Grenzwerte*) dealing with a plant’s emissions. As a rule, tort law will not accept high economic expense as an excuse as far as measures necessary to conform to marginal emission values are concerned.

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

- 22 Safety regulations require from producers or providers of services adequate measures of accident prevention and thus, like tort law, contribute to the protection of individual rights. On the other hand, accident prevention is not the only purpose of safety regulations. Their other basic task is to provide a legal framework for the marketing of products both in a national and international (particularly European) perspective, and in this respect regulatory law rules have to find a balance between the interests of the market participants, in par-

⁹⁰ MünchKomm/Wagner (fn. 7) § 823 no. 617; Versen (fn. 13) 70.

⁹¹ This is discussed with regard to the obligation of a manufacturer to recall faulty products according to the GPSG. See MünchKomm/Wagner (fn. 7) § 823 no. 620 to § 7, 9 *Produktsicherheitsgesetz* (Product Safety Act, ProdSG – now replaced by the GPSG).

⁹² As a homogeneous environmental liability law does not exist in German law, reference has to be made to many different fields of law. See Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 49 ff.

⁹³ See, e.g., Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 33 f.

⁹⁴ BGHZ 142, 227, 233 = NJW 1999, 3633, 3634; BGH, NJW 1984, 233, 234; NJW 1976, 46. Liability as a result of the breach of a protective law under § 823 subs. 2 BGB is, again, displaced to a great extent by § 823 subs. 1 BGB; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 65.

ticular the producers, on the one hand, and the consumers on the other hand, but also between those partial interests and the general public interest. As an outcome of a compromise⁹⁵ between (potentially) conflicting purposes,⁹⁶ safety regulations or the authorities applying such regulations might therefore determine a lower safety standard than desirable, e.g., with regard to the interests of an industrial branch struggling with economic problems or because otherwise a new technology could not be used.⁹⁷ Particularly, but not exclusively, regarding private standardisation, it may be doubted whether the standardisation process guarantees a fair balance of interests, especially as far as the public authorities lack the capacity to independently evaluate whether those standards take the general public interest properly into account.⁹⁸ Criticism is also based on the excessive influence of economic interests (large-scale industry in particular) on the standardisation process, an inadequate participation of the public and a lack of transparency.⁹⁹ Furthermore, contrary to the legal situation under tort law, public authorities are bound by the limits of their competence and functions. Statutory or non-statutory safety regulations as well as decisions of licensing or supervising authorities therefore only have an eye on risks arising from circumstances which are generally covered by their competence. And finally, safety regulations cannot provide details for every imaginable risk in any imaginable situation. It would be almost impossible to keep up with the technological and scientific developments and, thus, the risk of a suffocation of technological development would arise if the state tried to provide comprehensive standards.¹⁰⁰

It is clear from these peculiarities of technical standardisation that the objectives of safety regulation and tort law are obviously not identical. To the extent both fields of law share the objective of the protection of the individual, safety regulations and the respective instruments such as licensing requirements, etc. as a means to directly influence the market participants are replenished by the indirect approach of tort law enabling individuals who suffered damage caused by faulty products or services to seek compensation. Tort law may thereby even create a further incentive to comply with the safety expectations of the public. But, given the limitations and deficiencies of safety standards, it must be stressed that tort law independently fulfils the task not only of providing for compensation in case of damage but also of guaranteeing a comprehensive protection of individual rights taking account of the circumstances

⁹⁵ Cf. Bamberger/Roth/Spindler (fn. 34) § 823 no. 252; Salje/Peter (fn. 37) § 8 no. 34. A need for compromises is particularly obvious with regard to safety regulation in the EU internal market where a common denominator has to be found. In fact, the possibilities of a Member State to control the safety of products independently are very limited in the scope of the so-called harmonised standards; see *Kloepfer* (fn. 81) 148.

⁹⁶ See BGHZ 70, 102, 107 = NJW 1978, 419, 420; Steffen, ZVersWiss 1993, 13, 24.

⁹⁷ Some administrative laws expressly declare the importance of a certain policy aspect in so-called "Förderklauseln", like, e.g., § 1 no. 2 GenTG. See *Schulze-Fielitz* (fn. 33) 445.

⁹⁸ *Kloepfer* (fn. 81) 143; *Schulze-Fielitz* (fn. 33) 449; *Jarass* (fn. 10) § 48 BImSchG no. 63.

⁹⁹ See *Kloepfer* (fn. 81) 143 ff.

¹⁰⁰ MünchKommWagner (fn. 7) § 823 no. 270; *Schulze-Fielitz* (fn. 33) 450 f.

of the actual case. Tort law thereby may establish standards of conduct which go beyond the safety regulations in public law.¹⁰¹

- 23 Environmental law is a field where the creation of standards of conduct by administrative law rules is particularly influenced by the general public interest, as the protection of natural resources of humans is a most significant objective in modern society. But environmental law too has to find a compromise between the needs of the economy and the protection of nature and the individual who depends on clean water, air, etc. The purpose of technical standards in the field of environmental law is therefore not only to restrict but also to enable technical innovation.¹⁰² This is true in particular for emission control laws where the protection of the individual depends to a great extent on marginal values (*Grenzwerte*) for all kinds of emissions or immissions. Marginal values do not necessarily represent a maximum of safety and environmental protection but are based on prognosis and evaluation including policy considerations and therefore often accept a residual risk.¹⁰³ Another important objective of environmental standards is to enable the uniform execution of administrative law¹⁰⁴ which explains the need to design such standards in an abstract way taking the average situation into account. Although the authorities executing environmental law may to some extent consider the circumstances of the actual case, their decision is based on the facts given at a certain point in time and there is no guarantee that they are able to enforce additional measures afterwards.¹⁰⁵

The situation is, after all, basically the same as in the field of safety regulations. Environmental and tort law share their objectives to a certain extent. But while in environmental law the protection of individual rights is one policy aspect among others,¹⁰⁶ only tort law is able to provide a comprehensive protection for the individual. The decision who bears the risk that damage may arise as a consequence of a conduct which administrative law declares lawful, e.g., because it wilfully accepts a residual risk or because of a false prognosis, has to be made by tort law.¹⁰⁷ Autonomous tort law thereby contributes to the protection of the environment in case of an actionable damage caused by environmental pollution or, generally spoken, in the course of events involving natural resources like air, water or soil that lead to the infringement of a right or interest protected by § 823 BGB. Again, the threat of civil liability may also constitute an additional incentive to comply with environmental law.¹⁰⁸

¹⁰¹ See, e.g., BGH, NJW 2001, 2019, 2020; NJW 1997, 582, 583; Bamberger/Roth/Spindler (fn. 34) § 823 no. 251 f.; MünchKomm/Wagner (fn. 7) § 823 no. 270; and infra no. 43.

¹⁰² See Schulze-Fielitz (fn. 33) 443; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 292.

¹⁰³ See Entscheidungen des Bundesverwaltungsgerichts (Supreme Federal Administrative Court, BVerwGE) 72, 300, 316 = Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1986, 208, 212; Schulze-Fielitz (fn. 33) 453 f.; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 292.

¹⁰⁴ BVerwGE 114, 342 = NVwZ 2001, 1165 (to the *TA Luft*).

¹⁰⁵ Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 295.

¹⁰⁶ The same is basically true for the decisions of public authorities. See E. Steffen, Verschuldenshaftung und Gefährdungshaftung für Umweltschäden, NJW 1990, 1817, 1818.

¹⁰⁷ See Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 293; Versen (fn. 13) 155.

¹⁰⁸ Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 33, 293.

3. Are these regulations and provisions *per se* regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

Safety regulations and provisions aiming at environmental protection are not *per se* regarded as statutes with a protective purpose within the meaning of § 823 subs. 2 BGB. The general principles apply.¹⁰⁹ As safety regulations intend to protect the consumer or professional user as well as other individuals who come into contact with products or services, many of these regulations are regarded as *Schutzgesetz* under § 823 subs. 2 BGB.¹¹⁰ The same is true for environmental law rules if they intend not only to protect natural resources as such but also individual rights, e.g., health and property of neighbours.¹¹¹ As mentioned above,¹¹² the *Schutznormtheorie* developed by the administrative courts provides an important indication as to whether § 823 subs. 2 BGB applies or not. If administrative law denies the protective purpose, it is unlikely (but not excluded¹¹³) that such a provision is nevertheless, according to the general principles, a *Schutzgesetz*. If according to the *Schutznormtheorie* an administrative law rule exists for the benefit of individuals, such rule generally qualifies for the application under § 823 subs. 2 BGB. It goes without saying that not necessarily all individuals potentially affected by the regulated activity are covered by such a provision. While safety regulations usually aim at the protection of persons (potentially) making contact with a product or machine, environmental law rules often require a physical proximity¹¹⁴ between the regulated activity and the potentially affected individual.

The breach of safety regulations will, to a great extent, result in strict liability under the Product Liability Act as the legal definition of a *Produktfehler* (product defect) according to § 3 ProdHaftG refers to the reasonable expectations of the public regarding the safety of the product. These expectations are, again in terms of a minimum standard, represented by safety regulations. Provisions aiming at the protection of the environment are not covered by a comparable broad strict liability provision. Instead, in the course of the 20th century, strict liability was introduced by special legislative acts each covering a certain type of potentially dangerous facilities or activities,¹¹⁵ the most important being the

¹⁰⁹ Supra no. 13 ff. A list of laws recognized as containing protective norms can be found in Palandt/*Sprau* (fn. 3) § 823 no. 61 ff., and in Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 69 ff. with respect to public environmental law.

¹¹⁰ See, e.g., *Geiß/Doll* (fn. 80) § 4 no. 84, regarding § 4 subs. 1 and 2 GPSG.

¹¹¹ See MünchKomm/*Wagner* (fn. 7) § 823 no. 624 ff.; Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 70 ff.

¹¹² Supra no. 15.

¹¹³ See Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 69.

¹¹⁴ E.g., the protective purpose of the duties of plant operators under the BImSchG covers only the neighbours (in a legal sense, i.e. persons that are potentially affected by the plant's emissions; "Schutz der Nachbarschaft"). See MünchKomm/*Wagner* (fn. 7) § 823 no. 629.

¹¹⁵ Cf. *H. Kötz/G. Wagner*, *Deliktsrecht* (10th ed. 2006) no. 31, 190 ff.

UmweltHG which covers a broad variety of types of plants and facilities enumerated in the appendix to § 1 UmweltHG.

- 26 A failure to comply with safety regulations or provisions aiming at the protection of the environment may also constitute a tortious act pursuant to § 823 subs. 1 BGB in case a duty of care has been violated or pursuant to § 823 subs. 2 BGB, e.g., in conjunction with § 4 GPSG regarding defective products and machines.¹¹⁶ An aggrieved party may rely on strict liability and tort liability provisions as concurring claims.¹¹⁷

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 27 Compulsory insurance is an instrument to strengthen tort liability by reducing the risk of the aggrieved party being confronted with an insolvent tortfeasor. Such instruments are of particular significance in connection with strict liability provisions because an efficient and easy way to claim damages contributes to the acceptance of highly risky activities in society. In German law, compulsory liability insurance is required e.g. by § 1 *Pflichtversicherungsgesetz* (Compulsory Liability Insurance Act, PflVG) for the holder of a motor vehicle,¹¹⁸ by § 2 subs. 1 no. 3, 43 subs. 1 *Luftverkehrsgesetz* (Civil Aviation Act, LuftVG) for aviation enterprises or by the *Güterkraftverkehrsgesetz* (Goods Transport Act) with regard to long-distance goods traffic.¹¹⁹ Otherwise, the concept of so-called *Deckungsvorsorge* (obligation to provide for sufficient cover) dominates. The two latest examples are § 19 UmweltHG and § 36 *Gentechnikgesetz* (Genetic Technology Act, GenTG). According to these provisions, the operator of a facility, who is obliged to provide for sufficient cover with regard to potential claims under the respective enactment, may fulfil this obligation by entering into an adequate liability insurance contract or by the acquisition of a deed of general release (*Freistellungserklärung*) issued by a financial institution. But in practice such choice does not exist because financial institutions do not offer the necessary deeds of general release. Therefore, § 19 UmweltHG provides for a *de facto* compulsory insurance,¹²⁰ but without a legal obligation of insurers to enter into a contract.

¹¹⁶ As to wrongfulness as a prerequisite for tort liability, see *infra* no. 30.

¹¹⁷ § 25 subs. 1 *Atomgesetz* (Atom Energy Act, AtG) in conjunction with art. 6 of the Convention on Third Party Liability in the Field of Nuclear Energy, providing for the channelling of liability, is the only exception in German law. See *Larenz/Canaris* (fn. 3) 630.

¹¹⁸ § 5 subs. 2 PflVG imposes a legal duty on insurers to enter into an insurance contract ("Kontrahierungszwang"). The legal position of the aggrieved party is further improved by § 3 PflVG granting a direct claim against the insurer and by § 12 PflVG establishing a compensation fund.

¹¹⁹ See *E.R. Pröbbs/A. Martin*, *Versicherungsvertragsrecht* (27th ed. 2004) Vorbem. IV.

¹²⁰ *Salje/Peter* (fn. 37) § 19 no. 16.

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

In case of an infringement caused indirectly or by a failure to act, a breach of the duty of care (*Verkehrspflicht*) to protect other individuals from harm potentially inflicted by sources of danger under one's own sphere of influence is a prerequisite of tort liability under § 823 subs. 1 BGB.¹²¹ This general duty of care is more or less a blanket clause which the courts put into concrete form as appropriate in the actual case. Thus, the standard of care expected by tort law is a result of case-law, e.g., dealing with activities of producers, medical practitioners, hotel proprietors, architects, building companies, etc. It goes without saying that the sound determination of the proper standard of care is a difficult task for the courts, having in mind that to a large extent technical processes are involved in the field of safety regulations and environmental law rules. It is therefore an important contribution to legal certainty and the efficiency of court decisions that the civil courts may refer to safety regulations and environmental law rules (including technical standards in administrative regulations or directives created within the power granted by such rules) as minimum standards of care with regard to activities within the scope of such provisions (*supra* no. 2). The same applies for private standards, either in case the relevant administrative law rule incorporates the private standard or otherwise as an expression of the pertinent expert knowledge in the respective professional field.¹²²

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In normal cases, a breach of relevant regulations or standards regularly constitutes a breach of the duty of care under § 823 subs. 1 BGB. It therefore suffices to ask whether, by way of exception, the damaging party nonetheless exercised the required duty of care under § 823 subs. 1 BGB, e.g., by taking safety measures other than those provided for in the relevant standards. However, case-law shows that the courts often have to decide on tort liability where the defendant has complied with all the relevant administrative law rules. Due to the rule that regulatory law serves as a guideline, this indicates that the defendant satisfied the expected standard of care under tort law. Thus, in this type of case, regulatory law enables the courts to concentrate on the question whether the relevant standards cover the necessary safety aspects given the circumstances of the case at hand, and if there are peculiarities in the actual case which demand a higher degree of care than that provided by the relevant standards. Accordingly, the

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¹²¹ *Supra* no. 1.

¹²² *Jarass* (fn. 10) § 48 no. 62 f.; *MünchKomm/Wagner* (fn. 7) § 823 no. 272; *Geiß/Doll* (fn. 80) § 4 no. 83.

problem the claimant is confronted with is to show that the damaging party was subject to a duty of care going beyond the minimum standard.¹²³

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

- 30 The concept of wrongfulness in German tort law encapsulates both liability for the infringement of an individual's right protected by § 823 subs. 1 BGB and liability for breach of a law which intends to protect other individuals according to § 823 subs. 2 BGB. Whereas in the latter case wrongfulness clearly refers to a conduct the legal order disapproves of, in the former the law seems to say that it is wrongful to bring about the infringement as such regardless of how the legal order evaluates the conduct that led to it. With regard to § 823 subs. 1 BGB, the answer to the question raised above therefore has to be given in the light of the differentiation between a result-orientated and a conduct-orientated concept of wrongfulness.

Whether a violation of a duty of care is a prerequisite for wrongfulness within the meaning of § 823 subs. 1 BGB is an old and still not settled¹²⁴ controversy in German tort law. One academic approach regards § 823 subs. 1 BGB as a result-orientated provision meaning that the infringement of a right listed in § 823 subs. 1 BGB indicates per se wrongfulness (doctrine of *Erfolgsunrecht*), whereas others take the view that wrongfulness always presupposes the legal evaluation of the physical act causing the infringement (doctrine of *Handlungsunrecht*). The prevailing opinion today follows the first approach only where harm has been caused intentionally or as a direct consequence of an action. But as far as infringements caused indirectly or as a result of a failure to act are concerned, a tort as defined in § 823 subs. 1 BGB has not been committed wrongfully until the violation of a legal standard of conduct can be shown, the most important applicable case being the *Verkehrspflicht* as a general duty of care.¹²⁵ Whether this duty of care is identical with negligence within the meaning of § 276 subs. 2 BGB¹²⁶ is again subject to controversy.¹²⁷ The civil courts usually differentiate between the duty of care in an objective sense (*äußere Sorgfalt*), asking what standard of care is generally required to avoid

¹²³ See OLG Celle, NJW 2003, 2544, 2545: A claimant who suffered damage while using a product has to substantiate why the producer, who complied with all administrative law rules regarding product safety, would have nevertheless violated his duty of care on the ground of a structural design defect ("Konstruktionsfehler").

¹²⁴ G. Wagner, Grundstrukturen des europäischen Deliktsrechts, in: R. Zimmermann (ed.), Grundstrukturen des europäischen Deliktsrechts (2003) 189, 215; see also U. Magnus, Ein einheitliches Deliktsrecht für Europa? Europäisches Wirtschafts- und Steuerrecht (EWS) 2004, 105, 110; Markesinis (fn. 1) 79 ff.

¹²⁵ Palandt/Sprau (fn. 3) § 823 no. 26; v. Bar, Jus 1988, 169, 173.

¹²⁶ § 276 subs. 2 BGB (the former § 276 subs. 1 sent. 2 BGB) declares: "A person who does not exercise ordinary care acts negligently."

¹²⁷ See G. Wagner, Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechtswidrigkeit (1989) 218.

damage, and the question of negligence (*innere Sorgfalt*)¹²⁸ as part of the fault requirement.¹²⁹ In this concept the violation of a duty of care (*Verkehrspflicht*) in the sense of *äußere Sorgfalt* is part of the objective definition of a tortious act in § 823 subs. 1 BGB and, as such, indicates wrongfulness. Consequently, the tortfeasor has to show a legally recognised justification in order to establish that his act was not wrongful.¹³⁰ Thus, if a breach of a regulatory rule of law representing a minimum standard of conduct and therefore constituting as such a breach of a *Verkehrspflicht*¹³¹ has occurred, the act is, by way of indication, considered wrongful without further requirements.

In the field of § 823 subs. 2 BGB, it is undisputed that the breach of a law intended to protect the rights of other persons (*Schutzgesetz*) indicates wrongfulness.¹³² The breach of an administrative law rule which qualifies for the application as a *Schutzgesetz* under § 823 subs. 2 BGB therefore as such constitutes a wrongful act.¹³³

3. If the tortfeasor has violated an administrative law rule, to what extent does his liability depend on the protective purpose of the rule?

The liability of a tortfeasor generally depends on the protective ambit (*Schutzbereich*) of the relevant duty of care (*Verkehrspflicht*) under § 823 subs. 1 BGB or the protective norm (*Schutzgesetz*) under § 823 subs. 2 BGB. The protective purpose may be restricted in terms of the protected category of people (*persönlicher Schutzbereich*), the protected rights or interests (*sachlicher Schutzbereich*) and the nature of the risk the individual is protected against.¹³⁴ All three limitations may apply for safety and environmental regulations. For instance, many safety regulations intend to protect life, health, body and property but not against purely economic loss.¹³⁵ The third aspect refers to the fact that a rule of law prescribes or prohibits a certain conduct only to prevent dangers or risks of a certain type (*funktionaler* or *modaler Schutzbereich*). For instance, § 263 StGB (*Betrug*, fraud) aims only at the protection of an individual's assets

¹²⁸ For instance, the general duty of care of a producer requires that defective products are not marketed ("äußere Sorgfalt"). The producer acted negligently ("innere Sorgfalt") within the meaning of § 276 subs. 2 BGB, if – asking ex ante – he did not take the measures an average and careful producer would have taken to prevent the sale of the defective product. See *Larenz/Canaris* (fn. 3) 369.

¹²⁹ BGHZ 80, 186, 197, 199 = NJW 1981, 1603, 1605 f.; see *Palandt/Sprau* (fn. 3) § 823 no. 54; v. *Bar*, Jus 1988, 169, 173; other academics doubt the necessity of such differentiation; see, e.g., *H. Heinrichs*, in: O. *Palandt* (*Palandt/Heinrichs*), Bürgerliches Gesetzbuch (63th ed. 2004) § 276 no. 15 (the issue is not mentioned in the following editions).

¹³⁰ For the indication of wrongfulness in case of a breach of a "Verkehrspflicht" see *Larenz/Canaris* (fn. 3) 406; v. *Bar*, Jus 1988, 169, 174; *Wagner* (fn. 127) 80.

¹³¹ See supra no. 2.

¹³² *Palandt/Sprau* (fn. 3) § 823 no. 59.

¹³³ § 906 BGB does not restrict the protection against immissions granted by § 823 subs. 2 BGB in connection with a protective law (BGHZ 122, 1, 6 = NJW 1993, 1580, 1581; *Staudinger/Hager* (fn. 13) § 823 no. G 3).

¹³⁴ *Staudinger/Hager* (fn. 13) § 823 no. G 24 ff.; *MünchKomm/Wagner* (fn. 7) § 823 no. 278 ff.

¹³⁵ *Salje* (fn. 39) 291.

against loss as a result of a pecuniary disposition the victim carries out under the influence of a deception. The nature of the risk or the way in which a damage has been inflicted may also be relevant with regard to the general duties of care under § 823 subs. 1 BGB.¹³⁶ Like protective laws, such duties do not necessarily protect against every imaginable risk. For instance, a producer is liable because of his failure to give the user of his product a proper warning of possible dangers only if the damage occurred as a result of a danger he was obliged to warn about.¹³⁷ But the aggrieved party may not rely on the failure to give such warning if there is an independent reason present why the product has caused the damage.

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

- 33 Whether or not a tortfeasor can escape liability if he would also have caused the damage had he acted in compliance with the law is a question of the proper construction of the liability provision the claimant relies on. As a matter of principle the protective purpose of a liability provision does not cover a damage which would also have been caused had the damaging party not committed a breach of the law (so-called *rechtmäßiges Alternativverhalten*,¹³⁸ 'rightful alternative behaviour').¹³⁹ The burden of proof lies with the tortfeasor. It does not suffice to prove a mere possibility that the damage would also have been caused in case of a lawful conduct.¹⁴⁰

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

- 34 To establish a claim for damages under § 823 subs. 1 BGB, the aggrieved party has to prove that the defendant was bound by a duty of care (*Verkehrspflicht*), an injury of a right protected by § 823 subs. 1 BGB as a result of an intentional or negligent breach of this duty (which indicates wrongfulness¹⁴¹) and, finally, a damage caused by the injury of his right.¹⁴² A claim under § 823 subs. 2 BGB requires the aggrieved party to prove the breach of a law intended to protect his rights or interests (*Schutzgesetz*), of damage caused by such breach and,

¹³⁶ MünchKomm/Wagner (fn. 7) § 823 no. 282.

¹³⁷ BGH, NJW 1987, 372, 374.

¹³⁸ BGH, NJW 2000, 661, 663; BGHZ 120, 281, 285 f. = NJW 1993, 520, 522.

¹³⁹ Staudinger/Hager (fn. 13) § 823 no. E 72. Cf., e.g., BGH, NJW-RR 2005, 1185, dealing with the defendant's defence that carrying out the duty to strew an icy surface would have been "pointless"; BGH, MDR 1961, 762: failure to maintain waterways does not entail liability if the damage would have occurred anyhow for "natural" reasons.

¹⁴⁰ BGH, NJW-RR 1995, 937.

¹⁴¹ Supra no. 30.

¹⁴² For details on liability establishing causation (so-called "haftungsbegründende Kausalität") and liability implementing causation (so-called "haftungsausfüllende Kausalität"), see U. Magnus, Causation in German Tort Law, in: J. Spier (ed.), *Unification of Tort Law: Causation* (2000) 63 ff.

finally, the defendant's fault¹⁴³ (which refers only to the breach of the protective law¹⁴⁴).

With regard to the breach of a duty of care in the sense of *äußere Sorgfalt* as the basic prerequisite of tort liability under § 823 subs. 1 BGB, the courts usually decline to reduce the standard of proof a plaintiff is obliged to fulfil, because here a shift of the burden of proof would mean an illegitimate approximation of fault-based tort liability and strict liability.¹⁴⁵ Thus, a claimant who was injured because he fell into a building pit has to prove that the building company failed to secure the building site properly. Since statutory as well as private safety standards in principle reflect the care that tort law expects to be exercised, it will normally suffice to prove a breach of a relevant standard.¹⁴⁶ Even a shift of the burden of proof is considered in case the damaging party failed to comply with a duty to monitor the effects of its professional activity, e.g., the production process,¹⁴⁷ the emissions of an industrial plant or the noise level during a rock concert,¹⁴⁸ and to record the results (*Überprüfungs- und Befundungspflicht*). This amounts to a breach of an independent (complementary) duty of care and provides legitimation for the shift of the burden of proof with respect to the question whether a duty of care intended to protect the claimant's rights has been violated.¹⁴⁹

With respect to causation, the courts allow prima facie evidence (*Anscheinsbeweis*¹⁵⁰) if the claimant establishes a typical course of events indicating, in connection with general rules of experience, that the breach of the duty of care has caused the damage.¹⁵¹ An applicable case of the prima facie evidence is the breach of a general duty of care (*Verkehrspflicht*) or a law intended to protect other individual's rights (*Schutzgesetz*) under the condition that the damage is of such nature the duty or law rule intends to avoid.¹⁵² For

¹⁴³ See BGH, NJW 1985, 1174, 1775.

¹⁴⁴ Prevailing opinion, see, e.g., Palandt/*Sprau* (fn. 3) § 823 no. 60; MünchKomm/*Wagner* (fn. 7) § 823 no. 350.

¹⁴⁵ BGH, NJW 1985, 1774, 1775.

¹⁴⁶ MünchKomm/*Wagner* (fn. 7) § 823 no. 315.

¹⁴⁷ BGH, NJW 1993, 528, 529.

¹⁴⁸ BGH, NJW 2001, 2019, 2020.

¹⁴⁹ See BGHZ 129, 353, 361 f. = NJW 1995, 2162, 2164 (liability of the producer of goods); *M. Klopfer*, Umweltrecht (3rd ed. 2004) § 6 no. 156; Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 247, 285: the breach of a duty to monitor emissions may also result in a (rebuttable) presumption of causation.

¹⁵⁰ The courts hesitate to shift the burden of proof completely to the effect that causation would be presumed unless the defendant proves the contrary (BGH, NJW 1985, 1774, 1775). An example is BGHZ 114, 273, 276 = NJW 1991, 2021, 2022: causation was presumed because shortly after a failure to comply with DIN-standards regarding the safety of a building site, damage occurred at the site. A reversal of the burden of proof is considered in case the defendant obstructed the obtaining of evidence by BGH, NJW 1983, 2935, 2936.

¹⁵¹ BGH, NJW 1985, 1774, 1775; NJW 1984, 360, 362; Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 244.

¹⁵² BGH, NJW 1994, 945; Palandt/*Sprau* (fn. 3) § 823 no. 54, 80; MünchKomm/*Wagner* (fn. 7) § 823 no. 316, 356; Staudinger/*Hager* (fn. 13) § 823 no. E 72, G 39.

instance, administrative laws requiring a plant operator to observe marginal emission values (*Emissionsgrenzwerte*) intend to avoid causation of damage through air pollution. If the aggrieved party whose health was injured as a result of intoxication with exhaust gases proves that the plant operator has not observed the relevant marginal values, this may be regarded as *prima facie* evidence of causation.¹⁵³ Case-law shows that *prima facie* evidence is also possible in case of a breach of regulations for the prevention of accidents (*Unfallverhütungsvorschriften*¹⁵⁴), accepted engineering standards,¹⁵⁵ DIN-¹⁵⁶ or VDE-standards.^{157,158} But this must only be taken as a rule of thumb. Whether the standard of proof is reduced to the benefit of the aggrieved party or not depends, in the end, on the circumstances of the case.

- 37 Fault as specified in § 276 subs. 1 sent. 1 and subs. 2 BGB is present if the damaging party has acted intentionally or negligently, i.e. without ordinary care. The relevant standard of care does not refer to the individual capacities of the tortfeasor but to the standard the public may reasonably expect (*objektiv-abstrakter Sorgfaltsmaßstab*).¹⁵⁹ A breach of the general duty of care (in the objective sense of *Verkehrspflicht*; see *supra* no. 30) indicates fault *prima facie*.¹⁶⁰ Under the condition that the protective statute describes the prohibited conduct in a sufficiently precise manner, § 823 subs. 2 BGB also allows *prima facie* evidence for fault if the aggrieved party succeeds in proving that the objective elements of that law are fulfilled.¹⁶¹

6. Can a breach of an administrative law rule result in a claim for punitive damages?

- 38 In German law liability for damages has no purpose of punishment in the sense of retaliation,¹⁶² instead, the predominant objective of a (tortious) claim for damages is compensation for the loss suffered as a result of a wrongful act. The BGH expressly declines to award punitive damages on the ground that

¹⁵³ BGH, NJW 1997, 2748; BGHZ 92, 143, 146 f. = NJW 1985, 47, 49. But even if *prima facie* evidence is not established, only reasonable demands must be imposed. If the claimant is not able to state full particulars, e.g., concerning the relationship between obnoxious emissions and a health damage because he lacks expert knowledge and is not aware of the defendant's internal processes, it might suffice that the claimant's pleadings rely to a certain extent on presumptions (BGH, NJW 1997, 2748, 2249).

¹⁵⁴ A breach of such regulation establishes *prima facie* evidence that a work damage was caused by that breach: BGH, NJW 1984, 360, 362; NJW 1978, 2032, 2033.

¹⁵⁵ BGH, VersR 1972, 767.

¹⁵⁶ BGH, NJW 2001, 2019, 2020; BGHZ 114, 273, 276 = NJW 1991, 2021, 2022.

¹⁵⁷ OLG Saarbrücken, NJW 1993, 3077, 3078 (causation was presumed).

¹⁵⁸ As to the application of the *prima facie* evidence in relation to duties of care ("Verkehrspflichten") see, e.g., BGH, NJW 1994, 945, 946.

¹⁵⁹ See Palandt/*Heinrichs* (fn. 129) § 276 no. 15.

¹⁶⁰ Palandt/*Sprau* (fn. 3) § 823 no. 80.

¹⁶¹ BGHZ 116, 104, 114 = NJW 1992, 1039, 1042; BGH, NJW 1985, 1774, 1775; MünchKomm/*Wagner* (fn. 7) § 823 no. 355; *Kötz/Wagner* (fn. 115) no. 247.

¹⁶² See MünchKomm/*Wagner* (fn. 7) Vor § 823 no. 36 ff.

this would be contrary to the basic principles of German law.¹⁶³ But that does not exclude aspects of damage prevention from being taken into account. It is widely accepted that prevention is one of the aspects of legal policy behind civil liability in tort. Though this does not mean that the amount of damages is generally assessed with regard to aspects of prevention,¹⁶⁴ there are some exceptions one might regard as a revival of punitive elements of private law.¹⁶⁵ For instance, the assessment of the amount of damages for pain and suffering may take aspects of prevention and legal redress into account, in particular where an intentional and serious infringement of the right of personality is at issue and the tortfeasor acted to make a profit.¹⁶⁶ One might consider paying regard to such policy considerations where an administrative law rule is violated under similar grave circumstances.¹⁶⁷

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the “regulatory permit defence”?

As an introductory remark, it must be stressed that a “regulatory permit” (i.e. a legalizing effect of administrative law rules or decisions; so-called *Legalisierungswirkung*) is not per se allowed as a defence in German tort law. Instead, the influence of the fact that the action causing the damage complies with all relevant administrative law rules has to be discussed with regard to different constellations.

According to continuous holdings of the BGH,¹⁶⁸ § 906 BGB applies to tortious claims under § 823 BGB to the effect that, as far as an obligation exists under § 906 BGB to tolerate immissions, there is no tort liability and therefore neither damages nor an injunction¹⁶⁹ can be obtained. § 906 subs. 1 BGB declares that the owner of a piece of land has to tolerate immissions or other intrusions which do not or at least not substantially impair the use of his property

¹⁶³ BGHZ 118, 312, 338 f. = NJW 1992, 3096, 3103.

¹⁶⁴ Palandt/Heinrichs (fn. 129) Vorb v § 249 no. 4; cf. P. Marburger, Grundsatzfragen des Haftungsrechts unter dem Einfluss der gesetzlichen Regelungen zur Produzenten- und zur Umwelthaftung, Archiv für civilistische Praxis (AcP) 192 (1992) 1, 30 f.: the aspect of compensation still takes priority in tort law.

¹⁶⁵ See v. Bar (fn. 50) no. 605.

¹⁶⁶ BGHZ 128, 1, 15 ff. = NJW 1995, 861, 864 f.; OLG Hamm, NJW-RR 2004, 919, 922 f.; see also BVerfG, NJW 2000, 2187, 2188. Another example is § 611 subs. 2 and subs. 3 BGB; see Palandt/Heinrichs (fn. 129) Vorb v § 249 no. 4.

¹⁶⁷ Staudinger/Köhler (fn. 13) Einl zum UmweltHR no. 118, points out that the duty to make compensation could be regarded as an instrument to skim off the infringer’s profits in the field of environmental liability.

¹⁶⁸ E.g. BGHZ 90, 255, 258. This also applies if not real estate property is at issue but personal property (movables), see BGHZ 92, 143, 148 = NJW 1985, 47, 49.

¹⁶⁹ In conjunction with § 1004 BGB (applied mutatis mutandis if rights other than real property are concerned): so-called “quasinegatorischer Unterlassungsanspruch”.

(see supra no. 2 with fn. 14). According to § 906 subs. 1 sent. 2 BGB, an immission is, “as a rule” (*in der Regel*), considered insubstantial (*unwesentlich*) if the marginal values¹⁷⁰ or approximate values¹⁷¹ implemented by statutes or regulations are observed. Sent. 3 adds that the same applies for marginal or approximate values provided by administrative directives which are based on § 48 BImSchG (in particular the *TA Luft* and *TA Lärm*) as long as they represent the current state of technology (*Stand der Technik*).¹⁷² However, as the civil courts are not strictly bound by the standards of the relevant immission control laws, there is still room for an autonomous consideration with regard to circumstances of the case.¹⁷³ Despite the fact that the relevant marginal values are observed, an immission may be substantial, for instance, if personal property was damaged.¹⁷⁴ Thereby, § 906 subs. 1 sent. 2 BGB confirms the principle of autonomy¹⁷⁵ of tort law.

Pursuant to § 906 subs. 2 sent. 1 BGB, even substantial intrusions have to be tolerated¹⁷⁶ and thus regarded as lawful for the purposes of § 823 BGB if they are customary in the locality (*ortsüblich*) and not avoidable at reasonable expense. As regards *Ortsüblichkeit*, the significance of zoning maps (*Bauleitpläne*) is a matter of some dispute. The BGH considers instruments of zoning law only as an indication as to what kind of uses are customary in the locality and refers otherwise to the uses which are actually present in the area.¹⁷⁷ Thus, compliance with a building plan (*Bebauungsplan*) alone does not mean per se that a disturbing use is *ortsüblich*. Regarding the reasonableness of expenses, all measures necessary to observe marginal values relating to emissions emanating from a plant have to be taken. If these measures are taken, *prima facie* evidence¹⁷⁸ is allowed that further measures are not reasonable.

- 41 Apart from the problem of damage through intrusions covered by § 906 BGB the “regulatory permit defence” is primarily discussed with respect to administrative decisions allowing a certain activity (*Genehmigungen*), like the op-

¹⁷⁰ “Grenzwert” (defining a maximum of emissions or immissions).

¹⁷¹ “Richtwert” (not a strict maximum; may be exceeded under special circumstances). See *Versen* (fn. 13) 196 f. (to marginal values provided by the *TA Luft*).

¹⁷² See BGH, NJW 2004, 1317, 1318. § 906 subs. 1 sent. 2 BGB does not cover private standards like DIN-, VDI- or VDE-standards. But if such standards are observed, this indicates that an immission is insubstantial. See *P. Bassenge*, in: Palandt (Palandt/Bassenge) (fn. 3) § 906 no. 17; *Salje/Peter* (fn. 37) § 18 no. 28.

¹⁷³ BGH, NJW 2004, 1317, 1318; NJW 1999, 1029, 1030; NJW 1997, 2748, 2749; NJW 1995, 132, 133; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 267.

¹⁷⁴ See BGHZ 92, 143, 149 = NJW 1985, 47, 48; BGH, NJW 1999, 1029, 1030.

¹⁷⁵ Supra no. 2.

¹⁷⁶ In case of substantial immissions the aggrieved must tolerate, he may have grounds for an indemnification claim on the basis of § 906 subs. 2 sent. 2 BGB. See infra no. 47.

¹⁷⁷ BGH, NJW 1983, 751, 752; the same is true for building permissions, see BGHZ 140, 1, 9 = NJW 1999, 356, 358. Cf. Bamberger/Roth/Spindler (fn. 34) § 823 no. 18; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 268; *Kloepfer* (fn. 149) § 6 no. 21. But, as long as the disturber has not obtained a necessary building license, it is presumed that the disturbing use is not customary in the locality, unless it is established that the license will be issued (see BGHZ 140, 1, 9 = NJW 1999, 356, 358).

¹⁷⁸ Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 269.

erating permit (*Betriebs- or Anlagengenehmigung*). A wholesale judgment on this question cannot be made, as the different types of permits under public law significantly differ with respect to the influence of private interests on the procedure and the decision, and also in terms of the permit's legal effect. If private interests of potentially affected individuals are not part of the basis of the authority's decision, it would be hardly understandable to exclude tort liability for the sole reason that a permit has been issued for the activity that caused the damage. The same is true for types of permits obviously not intended to be a comprehensive regulation, like e.g., the building permit (*Baugenehmigung*), for the building regulations laws (*Bauordnungsrecht*) of the states declare that such permit is granted regardless of the rights of other individuals under civil law (*unbeschadet der Rechte Dritter*).¹⁷⁹ Thus, injunctions based on § 823 BGB (in conjunction with § 1004 BGB) against a building project for which a building permit has been obtained are possible.¹⁸⁰ Another example for a permit granted regardless of rights under civil law is the water privilege pursuant to § 7 *Wasserhaushaltsgesetz* (Water Resources Act, WHG).¹⁸¹ It must be stressed that such limited effect as to rights under civil law is typical for most of the types of administrative permits. An express reservation of private rights in the relevant statute empowering the authority to issue the permit is not necessary.

On the other hand, there are types of permits expressly precluding claims under civil law (so-called *Genehmigung mit Präklusionswirkung*).¹⁸² This applies e.g. for permits under the Federal Immission Control Act (§ 14 sent. 2 BImSchG), the particular far-reaching water privilege under § 11 WHG and, according to § 75 subs. 2 sent. 1 *Verwaltungsverfahrensgesetz* (Administrative Procedure Act, VwVfG), for the so-called *Planfeststellungsbeschluss* (official determination and approval of a plan required for certain public works projects like highways, airports, etc.). The precluding effect may cover all claims regarding the subject of the permission (e.g. § 11 WHG¹⁸³) or only some types of them.¹⁸⁴ Thus, within the scope of the precluding effect, tort law accepts a "regulatory permit defence" by virtue of the respective express order in an administrative law.

¹⁷⁹ See, e.g., § 69 subs. 2 sent. 3 Hamburgische Bauordnung (Building Regulations of Hamburg, HBauO).

¹⁸⁰ BGH, NJW 1983, 751; for further discussion see *Kloepfer* (fn. 149) § 6 no. 21.

¹⁸¹ BGH, NJW 1977, 763, 764.

¹⁸² *Staudinger/Kohler* (fn. 13) Einl zum UmweltHR no. 279. The precluding effect is to a certain extent compensated by the competent authorities' obligation to take objections of individuals potentially affected by the project and the related rights into account when making their decision. See *Wagner* (fn. 127) 124 ff. – also to constitutional requirements.

¹⁸³ *Kloepfer* (fn. 149) § 6 no. 19.

¹⁸⁴ Cf. *Bamberger/Roth/Spindler* (fn. 34) § 823 no. 19. For instance, § 14 BImSchG only precludes claims aiming at the forbearance of the permitted facility's operation but allows claims for protective measures and, if such measures are not possible according to the current state of technology or not at a reasonable cost, for damages. The state of technology and the reasonableness is determined autonomously by the civil courts; see *Staudinger/Kohler* (fn. 13) Einl zum UmweltHR no. 282.

- 42 The regulatory permit objection finally influences tort liability under § 823 subs. 2 BGB in connection with environmental criminal law provisions as far as they presuppose that the offender acted without an administrative permit or contrary to obligations imposed by administrative law rules (§ 324–330 StGB).¹⁸⁵ The judgment whether this prerequisite of the criminal law provision is satisfied is made exclusively on the basis of administrative law (so-called *Verwaltungsrechtsakzessorietät*).¹⁸⁶ Thus, the “regulatory permit defence” is incorporated into the protective statute itself and therefore allowed by § 823 subs. 2 BGB.

2. *Can the general duty of care go beyond these rules?*

- 43 According to continuous holdings of the BGH,¹⁸⁷ official permits, licenses, safety inspections, etc. as well as the relevant (safety and environmental) regulations or directives do not bind the civil courts when determining the general duty of care under § 823 subs. 1 BGB (*Verkehrspflicht*). The civil courts apply the general principles of tort law to judge whether a duty of care existed and what was required in the actual case under such duty. The autonomous determination of the duty of care may result in the finding that it was sufficient to obtain the relevant official permits.¹⁸⁸ But case-law shows that the courts often impose a standard of care going beyond the relevant administrative law rules. As mentioned supra no. 22 ff., this is justified *inter alia* on the ground that the authorities or certification bodies issue a license or certificate on a somewhat limited factual basis and often only with regard to certain safety aspects related to their legal competence. Given the fact that even the (European) law of technical harmonisation establishes only a rebuttable presumption that a product conforms with the essential (legislative) safety requirements if it complies with the so-called harmonised standards (*harmonisierter Bereich*), and consequently allows, on the other hand, that these requirements are fulfilled by measures deviating from these standards, one must conclude that licensing provisions generally do not intend a comprehensive and final fixing of safety standards.¹⁸⁹ Concerning (not only,¹⁹⁰ but primarily) private standards, another argument against a binding effect within tort law is that standardisation is not a purely scientific process but also the result of an evaluation. Because such evaluation potentially decides over liability in tort it is the task of civil courts,

¹⁸⁵ See Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 272. As a “Schutzgesetz” (protective law) apply, e.g., § 324, 324 lit. a, 325 StGB concerning the pollution of waters, soil or air; see Salje (fn. 39) 290.

¹⁸⁶ See Wagner (fn. 127) 23 f.

¹⁸⁷ Cf., e.g., BGH, TranspR 2004, 356; BGH, NJW 1999, 2815, 2816; NJW 1998, 2905, 2906; BGHZ 99, 167, 176 = NJW 1987, 1009, 1011.

¹⁸⁸ For instance, a tour organizer is only required to check if an operator of a hotel in Germany has obtained all necessary permits (regarding fire protection, sanitary law, etc.); BGHZ 103, 298, 305 = NJW 1988, 1380, 1382.

¹⁸⁹ See BGH, NJW 1998, 2905, 2906: regarding the license under the Explosive Substances Act (*Gesetz über explosionsgefährliche Stoffe*, SprengG).

¹⁹⁰ As to the general problem of legitimization of the broad influence experts exercise on the standardisation process, see Kloepfer (fn. 81) 143 f.

not of standardisation organisations and institutions.¹⁹¹ Furthermore, a strict accessoriness of tort law would be incompatible with two characteristics of standards,¹⁹² the problem of out-dating and the need to find compromises¹⁹³ when creating standards. Both are particularly obvious regarding marginal values (*Grenzwerte*) which are often influenced by economic interests¹⁹⁴ and therefore accept an inherent residual risk.¹⁹⁵ Against this background, safety and environmental rules of law apparently must not be interpreted as a final fixing of the relevant standard of care with a strictly binding effect for the civil courts, unless there is an express provision saying so.¹⁹⁶

Accordingly, tort law imposes on operators of industrial facilities, producers, etc. independent general duties of care under § 823 subs. 1 BGB, irrespective of the fact whether or not their conduct is also subject to administrative law rules.¹⁹⁷ Tort law does not allow the delegation of one's own responsibility to the public authorities.¹⁹⁸ Technical or environmental standards, permits, certificates, etc. do not exempt the individual from the obligation to take the reasonable measures to control dangers according to the circumstances of the actual situation.¹⁹⁹ Thus, under tort law an obvious source of danger must be controlled even if it is not (yet) or not sufficiently covered by a DIN-standard²⁰⁰ and a producer may not conclude from the fact that his product has been officially licensed that the competent authority would have detected a faulty structural design of the product and therefore is not exempted from independent accident prevention.²⁰¹ The same applies for the duty to instruct the users of a product and warn them about dangers. Statutes and regulations concerning the labelling of a product, warnings or safety advice indicate the required standard of care but do not provide a final description of what is expected from tort law regarding the protection of individual rights.²⁰²

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¹⁹¹ MünchKomm/Wagner (fn. 7) § 823 no. 273.

¹⁹² See Salje/Peter (fn. 37) § 6 no. 34.

¹⁹³ See supra no. 22; with regard to environmental law, see Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 291.

¹⁹⁴ BGHZ 70, 102, 107 = NJW 1978, 419, 420: Marginal values might be insufficient to efficiently protect the rights of sensitive individuals like children. See, for the *TA Luft* 1976, *Versen* (fn. 13) 196 with fn. 538.

¹⁹⁵ See BVerfGE 49, 89, 143 = NJW 1979, 359, 362 f.: it does not violate the constitution if the legislator allows the use of a dangerous technology (nuclear power plants) although a residual risk remains.

¹⁹⁶ For reasons of legislative authority, such a rule could only be established by federal law; see *Spickhoff* (fn. 29) 65.

¹⁹⁷ It goes without saying that tort law may require a producer not to market a product, even if its marketing is not subject to any regulations; BGH, NJW 1979, 2309, 2310: sale of motor vehicle to a minor without driving license.

¹⁹⁸ MünchKomm/Wagner (fn. 7) § 823 no. 578; *G. Wagner*, Das neue Produktsicherheitsgesetz: Öffentlich-rechtliche Produktverantwortung und zivilrechtliche Folgen Teil II, BB 1997, 2541, 2542.

¹⁹⁹ BGH, NJW 2001, 2019, 2020; Bamberger/Roth/Spindler (fn. 34) § 823 no. 20.

²⁰⁰ BGHZ 103, 338, 342 = NJW 1988, 2667, 2668.

²⁰¹ BGHZ 99, 167, 176 = NJW 1987, 1009, 1011; NJW 1987, 372, 373: regarding a license under the Road Traffic Licensing Regulations (§ 19 *Straßenverkehrsulassungsordnung*, StVZO) or the Medical Preparations Act (§ 25 AMG).

²⁰² BGH, NJW 1998, 2905, 2906; NJW 1987, 372, 373.

The required standard under tort law might also go beyond administrative law if the obliged person has got special abilities which he can easily use.²⁰³ Under the circumstances of the case, the court may also find that the duty of care was fulfilled by means other than those provided by administrative law.²⁰⁴

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

- 45 The general allocation of the burden of proof regarding claims in tort is described supra no. 34. If the defendant establishes that he acted in accordance with the relevant administrative law rules, the consequence will be that the standard of proof required from the aggrieved party will not be reduced according to the principles outlined supra no. 34 ff.

As regards damage through immissions or similar intrusions, § 906 BGB provides for a specific allocation of the burden of proof. The defendant who uses his piece of land in a disturbing way must rely on the claimant's obligation to tolerate this pursuant to § 906 subs. 1, subs. 2 sent. 1 BGB. He has to prove that such an obligation is present because the intrusions caused by the use of his land are either insubstantial (*unwesentlich*) or, if substantial, customary in the locality (*ortsüblich*) and not avoidable at reasonable cost. If the disturber succeeds in proving that he has observed the relevant marginal or approximate values stipulated in administrative law rules,²⁰⁵ this indicates insubstantiality.²⁰⁶ It is then up to the claimant to rebut the indication. A similar mechanism applies for fault. If the claimant establishes that the actual case is characterised by circumstances giving rise to a duty of care under § 823 subs. 1 BGB which goes beyond the measures required by administrative law, a wrongful act is present. But as a plant operator may principally rely on the effectiveness of the measures imposed on him by administrative law, his compliance with administrative law indicates that there was no fault.²⁰⁷

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of law of obligations, which impose liability for damage caused by a breach of such a rule?

- 46 Apart from tort liability a breach of an administrative law rule may also constitute a violation of a contract. If the subject of the contract does not

²⁰³ *Spickhoff* (fn. 29) 67; *Staudinger/Hager* (fn. 13) § 823 no. E 70.

²⁰⁴ For a limited period of time a lower safety standard may be acceptable under tort law, e.g., in case a machine breaks down without the possibility of immediate repair, a warning notice might suffice; *MünchKomm/Wagner* (fn. 7) § 823 no. 273.

²⁰⁵ See supra no. 40.

²⁰⁶ See BGH, NJW 2004, 1317, 1318.

²⁰⁷ BGH, NJW 1997, 2748, 2749; BGHZ 92, 143, 151 f. = NJW 1985, 47, 49; *Staudinger/Kohler* (fn. 13) Einl zum UmweltHR no. 275.

conform with administrative law rules, this may be regarded as a failure to perform the obligations under the contract. Examples are the supply of tap water of an inadequate quality,²⁰⁸ the sale of baby food contaminated with radioactivity,²⁰⁹ the sale of toxic wood preservative²¹⁰ or the sale of land contaminated with hazardous waste from the past.^{211,212} If marginal values provided by administrative law rules or other relevant technical standards are exceeded, this principally constitutes a defect of a product, service, leased object, etc. under contract law.²¹³ Even a suspicion that the subject of the contract might not conform with relevant administrative standards may constitute a defect.²¹⁴

Another basis for a duty to compensate as a result of a breach of an administrative rule apart from tort law are the principles of *negotiorum gestio* (so-called *Geschäftsführung ohne Auftrag*), e.g., if public authorities take measures to ward off dangers caused by someone disregarding administrative law rules and claim their expenses back.²¹⁵ But, as a rule, special provisions providing for the reimbursement of the authority's expenses take priority.²¹⁶

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

An important applicable case of an "indemnification" claim is § 906 subs. 2 sent. 2 BGB.²¹⁷ This provision deals with substantial intrusions on the aggrieved party's piece of land which are not customary in the locality.²¹⁸ If such intrusions cannot be avoided by the disturber at reasonable expense (§ 906 subs. 2 sent. 1 BGB), the aggrieved party has to tolerate them, but § 906 subs. 2 sent. 2 BGB grants a claim for an appropriate compensation in money (*an-*

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²⁰⁸ BGHZ 17, 191, 195.

²⁰⁹ Amtsgericht (Magistrates' Court, AG) Kiel, NJW 1987, 2748.

²¹⁰ AG Kassel, Verbraucher und Recht (VuR) 1987, 39, 40.

²¹¹ BGH, NJW 1999, 3777.

²¹² Further examples are given by Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 112.

²¹³ OLG Köln, NJW-RR 1991, 1077, 1078.

²¹⁴ See BGH, NJW 1969, 1171, 1172; Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 112.

²¹⁵ E.g., BGHZ 40, 28, 30 = NJW 1963, 1825, 1826, has found the authorities entitled to do so, but the BGH's opinion is subject to criticism (see Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 115).

²¹⁶ Palandt/Sprau (fn. 3) Einf v § 677 no. 16 f.

²¹⁷ § 906 subs. 2 sent. 2 BGB declares: "If by virtue of this (i.e. according to sent. 1, if substantial prejudice is caused by a use in conformity with local custom and not preventable at a reasonable expense), the owner must tolerate an interference, he may demand from the user of the other piece of land an appropriate settlement in money, if by the interference in conformity with local custom the use of, or income from, his piece of land is prejudiced over and above the expected degree."

²¹⁸ See supra no. 40. The courts extend the scope of § 906 BGB's applicability to personal property (movables) arguing that immissions even a real estate owner has to tolerate must also be tolerated by the owner of movables; BGHZ 92, 143 = NJW 1985, 47 ff. See, for this and other extensions of § 906 subs. 2 sent. 2 BGB Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 85 ff.

gemessener Ausgleich in Geld) if the immissions impair an appropriate use (conforming with local custom) of the aggrieved party's land. Fault is not a prerequisite. The compensation is assessed according to the principles which apply for the compensation in case of compulsory expropriation.²¹⁹ In addition to § 906 BGB as the general rule, some administrative laws provide for an obligation to tolerate impairment – e.g. by certain formally permitted industrial facilities – which goes beyond § 906 BGB. An important example is § 14 BImSchG.²²⁰ This provision excludes claims aiming at the prohibition of the permitted operation of a plant. The aggrieved party may only claim protective measures, or, if such measures are not possible at reasonable expense, compensation.

§ 906 subs. 2 sent. 2 BGB is also applicable (by analogy) in a number of constellations where the courts oblige the owner of a piece of land to tolerate immissions or other intrusions although the conditions under which § 906 subs. 1 and subs. 2 sent. 1 BGB provide for such an obligation are not present. This may be the case where the disturber is a (private²²¹) enterprise supplying services in the direct interest of public welfare,²²² e.g., in the field of power supply,²²³ where the aggrieved party was not able to file injunction proceedings in due time for legal or factual reasons,²²⁴ or in case the aggrieved party's land is affected in a way not covered by § 906 BGB, i.e. not by intrusions enumerated in § 906 subs. 1 BGB.²²⁵

- 48 German law provides for compensation from funds in some constellations, but not in particular for infringements of individual rights legally permitted by administrative law. Instead, such funds deal with different concerns, e.g., the risk that a claim cannot be realised if the tortfeasor's motor vehicle was not insured contrary to the obligations of the holder under § 1 PflVG,²²⁶ or in case a farmer has suffered loss because he was supplied with contaminated residues from waste-treatment plants.²²⁷ In these instances a better protection of the individuals' rights against *wrongful* acts is desired for reasons of legal policy. Fund solutions regarding damage caused as a result of the accumulated effects

²¹⁹ See Palandt/*Bassenge* (fn. 172) § 906 no. 27.

²²⁰ § 14 BImSchG is a private law provision (see BGHZ 102, 350, 352 = NJW 1988, 478). Some administrative laws dealing with similar problems refer to § 14 BImSchG (e.g. § 11 LuftVG; § 7 subs. 6 AtG), others establish an independent compensation provision (e.g. § 8 subs. 3 WHG). See Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 84.

²²¹ As to immissions caused by enterprises vested with sovereign power, see Palandt/*Bassenge* (fn. 172) § 906 no. 37.

²²² BGHZ 144, 200, 205 = NJW 2000, 2901, 2902.

²²³ Palandt/*Bassenge* (fn. 172) § 906 no. 39.

²²⁴ BGHZ 155, 99, 103 = NJW 2003, 2377, 2378; BGHZ 142, 227, 235 = NJW 1999, 3633, 3534; NJW 1999, 1029, 1030. These decisions are subject to criticism; see Staudinger/*Kohler* (fn. 13) Einl zum UmweltHR no. 90.

²²⁵ BGHZ 142, 227, 235 = NJW 1999, 3633, 3635.

²²⁶ See § 13 PflVG.

²²⁷ See § 9 *Düngemittelgesetz* (Fertilizers Act); *Kloepfer* (fn. 149) § 19 no. 246.

of many (lawful) private or professional activities²²⁸ do not exist in German law.²²⁹

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

Liability under § 823 subs. 2 BGB can be left out of consideration because the plant operator was not directed by the competent authority to take additional measures to reduce the emissions. As the duties of plant operators according to the immission control laws like the BImSchG need to be put into concrete form by the authorities, they are not applicable as a *Schutzgesetz* without an administrative decision (see supra no. 9). But the objective elements of § 823 subs. 1 BGB are fulfilled: The plant operator, company A, has injured the farmer's property as a result of exhaust gases emanating from his plant into the air. The plant is a source of danger the operator has to control in a way that prevents damage in the neighbourhood. In this respect the plant operator is not allowed to rely solely on the standards imposed on him by the permit.²³⁰ The failure to take sufficient measures to prevent damage arising from the plant's emissions constitutes a breach of the operator's duty of care (*Verkehrspflicht*). But, according to § 906 subs. 1 sent. 1 BGB, which is also applicable in case of claims for damages in tort, the farmer has to tolerate the immissions if they only insubstantially impair the use of his property. Immissions are considered insubstantial according to § 906 subs. 1 sent. 2 BGB if marginal values provided by statutes or regulations are not exceeded. This is the case (provided that the amount of exhaust gases was determined by the authority in accordance with such marginal values), but the relevant government regulations in this respect do not conform with the recent technological standards. As § 906 subs. 1

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²²⁸ Tort law is not able to provide compensation in such cases. For instance, actions aiming at compensation for damage caused to the forests as a result of the dying forests syndrome failed; BVerfG, NJW 1998, 3264; BGHZ 102, 350 = NJW 1988, 478.

²²⁹ A policy discussion is still taking place. See, e.g., Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 318, 323 f.; D. Medicus, Umweltschutz als Aufgabe des Zivilrechts – aus zivilrechtlicher Sicht, in: Umwelt- und Technikrecht (UTR), vol. 11 (1990) 5, 26 f.; Marburger, AcP 192 (1992) 1, 33 f. As an alternative to a fund, the implementation of state liability on the grounds of equitable principles is supposed ("Billigkeitshaftung"); see Kloepfer (fn. 149) § 6 no. 202.

²³⁰ See supra no. 44; specifically with regard to emissions BGHZ 92, 143 = BGH, NJW 1985, 47, 49; Landgericht (District Court, LG) Münster, NJW-RR 1986, 947, 953.

sent. 2 BGB expressly allows exceptions (“as a rule”), the fact that these regulations are outdated must be taken into account (see also § 906 subs. 1 sent. 3 BGB). Moreover, in the case at hand, the immissions are substantial because they actually caused damage to the farmer’s property.²³¹ A duty to tolerate the immissions does not arise pursuant to § 906 subs. 2 sent 1 BGB because the amount of exhaust gases could be reduced at a reasonable cost. Company A is therefore obliged to pay damages under § 823 subs. 1 BGB if it does not succeed in proving that, in the circumstances of the case, fault is not present.²³²

The farmer’s claim may also be justified pursuant to § 906 subs. 2 sent. 2 BGB regardless of fault as this provision, though it does not grant damages but a fair compensation (*angemessener Ausgleich in Geld*) also covers the loss of earnings.²³³ In case the aggrieved party was not able to obtain an injunction in due time for factual reasons (*faktischer Duldungszwang*) the courts apply § 906 subs. 2 sent. 2 BGB *mutatis mutandis*.²³⁴ Thus, whether the claim is well-founded depends on whether the farmer could have prevented the damage inflicted by the immissions by way of asking for legal protection either in the administrative²³⁵ or the civil courts and whether it would have been reasonable for the farmer in the circumstances of the case to take such measures. If he did not know at all about the immissions or the potential dangers of the immissions, and also if it was not reasonable for him to file an action against the plant operator with regard to the costs risk or to the *ex ante* prospects of success, there is no reason to dismiss the claim.²³⁶ If the damage inflicted by the immissions could have been reduced had the farmer taken reasonable steps to enforce additional measures for the protection of the plant’s neighbours, a reduction of the claim according to § 254 BGB is possible on the ground of contributory negligence.

Finally, the claim may also be justified on the basis of § 14 sent. 2 BImSchG if the chemical plant’s permit is a permit which was issued under the Federal Immission Control Act. As we have seen above, such a permit does not preclude claims for compensation under civil law.²³⁷ In case of a factual obligation to tolerate the damaging immissions this provision is, like § 906 subs. 2 sent. 2 BGB, applied *mutatis mutandis*.²³⁸

²³¹ See BGH, NJW 1999, 1029, 1030.

²³² The breach of a duty of care going beyond compliance with marginal values, as is the case here, indicates fault. See *supra* no. 37 on the one hand, and no. 45 on the other.

²³³ The plant operator may also be liable regardless of fault under the UmweltHG if the plant is a facility enumerated in appendix 1 to § 1 UmweltHG.

²³⁴ BGHZ 155, 99, 103 = NJW 2003, 2377, 2378; BGHZ 142, 227, 235 = NJW 1999, 3633, 3534; BGHZ 90, 255, 262 f. = NJW 1984, 2207, 2208.

²³⁵ For legal protection of the neighbour in the administrative courts see *Jarass* (fn. 10) § 10 no. 99 f., § 17 no. 60 f., § 24 no. 23.

²³⁶ Cf. BGHZ 111, 158, 163; BGHZ 90, 17, 32; BGH, NJW 1984, 1876, 1877; LG Münster, NJW-RR 1986, 947, 951.

²³⁷ Cf. *supra* no. 41 with fn. 184.

²³⁸ Staudinger/Kohler (fn. 13) Einl zum UmweltHR no. 93; LG Münster, NJW-RR 1986, 947, 952.

A claim for damages against the state according to § 839 subs. 1 BGB²³⁹ in conjunction with art. 34 sent. 1 GG²⁴⁰ (so-called *Amtshaftung*, liability of the state for a public servant²⁴¹) presupposes that the public servant wilfully or negligently violated an official duty to a third party (*drittbezogene Amtspflicht*) when granting the permit or by way of his failure to order additional measures to reduce the emissions. The public authority's duty to act in compliance with rules of law intending to protect neighbours against immissions is regarded as a duty to a third party,²⁴² but in the case at hand there was no breach of this duty because the authority acted in accordance with the law.²⁴³ Besides, according to § 839 subs. 1 sent. 2 BGB,²⁴⁴ the state's liability is subsidiary if another tort-feasor (the plant operator, company A) is obliged to make compensation for the damage of the aggrieved party.

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2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

The aggrieved party cannot rely on § 823 subs. 2 BGB because the relevant safety regulations do not apply with respect to a third party but only to employees.²⁴⁵ As regards § 823 subs. 1 BGB, the duty of care and the fault requirement need consideration. As mentioned above (supra no. 2 and 43 ff.), the duty of care under tort law has to be determined independent from administrative law rules. In principle, the public may expect that the owner of a workshop takes reasonable measures to avoid accidents. Even beyond their scope of applicability, the relevant regulations for the prevention of accidents reflect expert knowledge with regard to the risks typically arising in workshops and have

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²³⁹ § 839 subs. 1 sent. 1 BGB declares: "If an official wilfully or negligently commits a breach of official duty incumbent upon him against a third party, he shall compensate the third party for any damage arising therefrom."

²⁴⁰ Art. 34 sent. 1 GG declares: "If any person, in the exercise of a public office entrusted on him, violates his official duty to a third party, liability shall rest principally with the State or public body that employs him." (taken from *Fedtke/Magnus* (fn. 79) 111).

²⁴¹ See *Fedtke/Magnus* (fn. 79) 110 f.

²⁴² See *Salje/Peter* (fn. 37) § 18 no. 16.

²⁴³ State liability cannot be assumed on the basis of inadequate *statutory* safety requirements because the legislative bodies are not bound by duties to third parties; see *Palandt/Sprau* (fn. 3) § 839 no. 49. The same applies for administrative directives because they intend to harmonise the execution of the laws in the general public interest; BGH, NJW 1971, 1699, 1700; see, for a different view, *Marburger* (fn. 85) 556.

²⁴⁴ § 839 subs. 1 sent. 2 BGB declares: "If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation elsewhere."

²⁴⁵ See *MünchKomm/Wagner* (fn. 7) § 823 no. 325: to regulations for the prevention of accidents enacted under the accident insurance scheme. The application of the occupational hazards regime by way of analogy would require an unintended legal gap in these provisions with regard to visitors. Such a gap does not seem to exist taking into account the general "Verkehrspflicht" under § 823 subs. 1 BGB. The visitor indirectly profits from the safety regulations designed with regard to the specific needs of occupational safety to the extent that these regulations describe safety expectations suitable for generalization.

to be taken into account when considering the general duty of care (*Verkehrspflicht*) under § 823 subs. 1 BGB.²⁴⁶ Whether B is liable or not therefore is a problem of the proper determination of the protective purpose of B's duty of care to prevent accidents in his workshop. Someone who breaks into a house or enters a building without authority may not belong to the group of persons the relevant duty of care intends to protect. On the other hand, account has to be taken of whether there was free access to the danger zone or whether the injured person's entry was covered by the general purpose of the facility.²⁴⁷ In relation to a *visitor* as someone entering the shop with the knowledge of B, therefore, § 823 subs. 1 BGB imposes a duty of care aiming at the prevention of accidents in the workshop. As B had not taken the measures required by the occupational hazards regulations, he has violated his duty of care. This amounts to *prima facie* evidence of fault.²⁴⁸ B is liable under § 823 subs. 1 BGB.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

- 52 Regardless of regulations dealing with occupational accidents (which would take priority²⁴⁹), the injured persons are entitled to damages under § 823 subs. 1 BGB. The power of government agencies to supervise the activity of company B does not reduce B's general duty of care. Even if the government agency had not visited B and issued a list of shortcomings, B could not have assumed that his facilities meet the required safety standards. Lack of supervision is generally no excuse in tort law.²⁵⁰

b) Could the injured persons claim damages from the government agency?

- 53 The public servants of the competent government agency acted in exercise of a public office entrusted to them (*in Ausübung eines ihm anvertrauten öffentli-*

²⁴⁶ MünchKomm/Wagner (fn. 7) § 823 no. 274.

²⁴⁷ See Larenz/Canaris (fn. 3) 423 f.

²⁴⁸ See MünchKomm/Wagner (fn. 7) § 823 no. 274.

²⁴⁹ See § 104 Sozialgesetzbuch VII (Social Security Code VII, SGB VII) excluding liability of the employer for personal injury, unless intentionally inflicted.

²⁵⁰ See BGH, NJW 1977, 763, 764.

chen Amtes). A further prerequisite for state liability pursuant to § 839 subs. 1 BGB in conjunction with art. 34 sent. 1 GG is that the agency's public servant violated a duty imposed on him as against a third party (*drittbezogene Amtspflicht*). If public safety rules that intend to prevent accidents on the premises of company B are concerned, a duty to enforce these rules and to supervise the obliged companies exists for the benefit of persons potentially endangered by shortcomings.²⁵¹ This duty was violated since the agency never took care of the shortcomings already ascertained in the course of the visit of B's premises. With regard to circumstances of the case, causation and the fault requirement are also present. But, as mentioned above (see *supra* no. 50), § 839 subs. 1 sent. 2 BGB provides for a subsidiary liability of the state in case of a negligent failure to enforce the necessary safety measures. As company B is obliged to make compensation, the state's liability depends on the evaluation of the competent public servant's failure as gross negligence (*grobe Fahrlässigkeit*) as gross negligence is not covered by § 839 subs. 1 sent. 2 BGB.

²⁵¹ See BGH, NJW 1993, 1784, 1785; NJW 1965, 200; NJW 1963, 1821, 1823; *H.-J. Papier*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch (MünchKommPapier)*, vol. V/2 (4th ed. 2004) § 839 no. 242.

TORT AND REGULATORY LAW IN HUNGARY

*Attila Menyhárd**

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

In Hungarian legal theory, practice and tort law regulation there seems to be a Chinese wall between administrative law regulation and civil law. This wall is built with the autonomous concept of unlawfulness and fault in tort law which are independent from administrative regulation. In Hungarian legal terminology, public law is the law governing the structure and activity of the state and state organizations,¹ while administrative law is the law governing the organizing, decision-making and executive activity of state organs.² There is not a generally accepted concept for regulatory law which is distinguished from public and administrative law.

The basic norm of Hungarian tort law is § 339 subpar. (1) of the Hungarian Civil Code on fault-based liability which renders the tortfeasor liable for damage which he caused unlawfully allowing the tortfeasor exoneration only in case he proves that he acted as was generally expected in the given circumstances. Damage, fault, causation and unlawfulness are the prerequisites of liability, where fault and unlawfulness are two distinct elements. Fault is an objective concept: failure to comply with the general standard of conduct in itself creates fault. The theoretical basis for the concept of unlawfulness is that, in general, causing damage shall be deemed as unlawful unless it is explicitly otherwise provided by the law. If the tortfeasor can prove that in that certain case the causing of harm is explicitly rendered lawful by the law, he shall not be liable.³ In other words,

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¹ T. Lábady, A Magyar magánjog (polgári jog) általános része (The General Part of Hungarian Private (Civil) Law) (2002) 22.

² M. Világhy/Gy. Eörsi, Magyar Polgári Jog I. (Hungarian Civil Law) (1962) 15.

³ Gy. Eörsi, A polgári jogi kártérítési felelősség kézikönyve (A Handbook of Civil Law Liability) (1966) no. 221. The defences are such as the consent of the aggrieved person, the necessity, the authorized exercise of rights, etc.

a conduct which results in damage to others is unlawful and from this follows that causing harm is always unlawful. Unlawfulness shall be presumed and can be established in the absence of infringement of a special statutory regulation as well. According to the theory that prevails today, unlawfulness and fault are two preconditions of liability to be distinguished, and in some cases it can even be hard to set them apart.⁴ The notion of unlawfulness in tort law is a category of private law independent of illegality established by infringement of statutory provisions, either in private or in public regulation.

- 3 According to the autonomous concept of unlawfulness, it follows that, even in the absence of the infringement of a statutory provision, the tortfeasor shall be held liable and – on the other hand – the compliance of the tortfeasor's conduct with a statutory provision or an administrative permission in itself does not prevent the tortfeasor from being held liable.⁵ However, the violation of a statutory provision may play an important role in the qualification of the damage. If the qualification of the damage is important from the point of view of establishing the applicable regime (e.g. whether the liability is strict or fault-based), the violation of a specific regulation would be indicative for the courts.
- 4 The court practice, however, has never been consistent in following the approach that a conduct which results in damage to others is unlawful and from this follows that causing harm is always unlawful. The courts very often try to find a certain legal norm which has been infringed by the tortfeasor in order to establish liability even if this would not be a necessary requirement or they simply argue that the tortfeasor's conduct was not unlawful if they think rejecting the claim just.⁶ The violation of a certain statutory provision may provide – despite the original theoretical background of tort law regulation which would not make it necessary – an important reference point to the courts in establishing unlawfulness and liability. The court practice in Hungary seems to be in a state of change regarding the doctrine of unlawfulness.
- 5 Administrative law regulation may play an important role in considering fault as well. The tortfeasor may exempt himself from liability by proving that he acted according to the required standards of conduct. Compliance with the provisions of administrative law regulation in itself does not mean that the tortfeasor cannot be at fault but regulation may provide important reference points on what the required standards of conduct in that certain case could and should be.

⁴ *Eörsi* (fn. 3) no. 252.

⁵ *B. Lenkovichs, A környezetszennyezés polgári jogi szankciói* (The Civil Law Sanctions of Environmental Damage), in: L. Asztalos/K. Gönczöl (eds.), *Felelősség és szankció a jogban* (Liability and Sanction in the Law) (1980) 317 ff., 324.

⁶ *Bíróági Határozatok* (Supreme Court Reports, BH) 2005 no. 12 (Supreme Court, Legf. Bír. Pfv. III. 22.883/2001.); BH 2005 no. 17. (Pécs High Court of Justice, Pécsi Ítéletábra Pfv. III. 20.356/2004.). The courts in these decisions rejected the claims of the plaintiffs simply referring to the absence of unlawfulness without finding and referring to a norm which would allow causing harm explicitly as would have been required by the general doctrine. Neither of the cases was connected to application of administrative law regulation.

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

There are neither such boundaries nor guidelines. The regulation is required to be in compliance with the provisions of the Constitution and the constitutional principles. The same is true for the Civil Code and civil law regulation including the regulation of tort law.

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3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

The infringement of any type of statutory provisions or administrative law can result in a liability for torts. The violation of administrative law is not a necessary precondition for establishing liability for damages. The actual function of administrative regulation in qualifying the damage and providing reference point to the judges is independent of the position of the legal norm in the hierarchical system of legislation.

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4. What are the consequences (under private law), if any, when an administrative law (i.e. law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

The Hungarian courts are consistent in rejecting claims for damages from improper legislation.⁷ The courts hold that the legislator itself cannot act illegally; the law itself cannot be unlawful even if it has not been introduced according to other higher level statutory provisions. It seems, however that the reasoning of the courts to reject claims against the state for damages arising from improper legislation shall be revisited and a new doctrine of state immunity shall be created. The old state immunity doctrine that underlies this practice is obviously to be abandoned. The Hungarian theory seems to accept the possibility of a new form of liability established by the practice of the European Court of Justice (ECJ) and there is a strong argument that the tort liability of the state for legislation and the state liability for failure to implement the legislation of the European Union (EU) shall be assessed

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⁷ BH 1994 no. 31 (Supreme Court, Legf. Bír. Pf. IV. 20.827/1993. sz.); BH 1994 no. 312 (Supreme Court, Legf. Bír. Pfv. X. 23.120/1993/4. sz.).

together and shall be brought under the same theoretical explanation.⁸ The violation of statutory provisions through making administrative law is primarily a public law problem.

- 9 From this it follows that if someone causes damage by acting in compliance with a wrongful administrative law to which he is subject, he shall be held as exercising the right provided by statutory provision and as such he would not be held as causing damage unlawfully; so liability would not be established. On the other hand, a person who fails to make the necessary steps to commence a public law procedure in order to resolve the collision (e.g. initiating the constitutional supervision by the Constitutional Court) may be held liable for this omission. Public officers or institutions, authorities, etc. shall not be required to supervise existing law and to solve the problems of collision in the legal system.

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

- 10 If an administrative law itself governs the consequences of a breach of its own rules, such rules shall not be regarded as comprehensive relating to tort law and as covering all the consequences the legislator intends to attach to the infringement of that certain norm. The public law consequences of breaching administrative law do not exclude tort claims. Even if such teleological reduction is applied in contract law,⁹ this is not the case regarding tort claims. There are some special provisions concerning liability for harm caused by crime¹⁰ but they do not affect the interaction between tort and criminal law.

6. Under what conditions are administrative law rules regarded as so-called "rules with a protective purpose"? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

- 11 The doctrine of protective purpose of the norm is not – yet – known in Hungarian tort law theory and practice. Courts may take into account the purpose of

⁸ Gy. Fülöp, Az állam kártérítési felelőssége a közösségi jog megsértése esetén (The Liability of the State for Infringement of EU Law), Polgári Jogi Kodifikáció 6 (2003) 18 ff.; L. Kecskés, Európa-jogi tapasztalatok az állam jogszabályalkotással okozott károkért való felelősségének megalapozásához (European Law Experiences in Establishing State Liability for Damage Caused by Legislation), Polgári Jogi Kodifikáció 4 (2003) 3 ff.

⁹ A contract shall be held void as illegal only if there are not any special consequences of the infringement of the law the contract violates. If there is a special consequence (e.g. criminal sanction, penalty, withdrawal of a permission, etc.), the contract could not be held void on the ground of illegality. This does not exclude, however, the possibility of declaring the contract null and void due to its immoral nature. § 200 subpar. (2) Civil Code.

¹⁰ Such as the limitation period may be longer (§ 360 subpar. (4) Civil Code) and the liability cannot be excluded by contract (§ 342 subpar. (1) Civil Code).

the norm as an element of causation arguing that the infringement of the norm was not causally linked with the damage since the norm is supposed to serve a different purpose but this can lead to much more restricted results than the doctrine of protective purpose of the norm could.

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

Legal entities are supposed to bear liability themselves. It is not necessary to prove illegal action of their employee in order to establish their liability. If a legal entity fails to comply with regulations, they are liable as legal entities for their own unlawful conduct. 12

Legal entities as employers shall be liable for the conduct of their employees. If an employee causes damage to a third person in connection with his employment, unless otherwise provided by law, the employer shall bear liability towards the injured person (§ 348 Civil Code) or if the manager of a company causes harm to third persons (§ 30 subpar. (1) of the Act no. IV of 2006 on companies). Liability for damage caused within the jurisdiction of government administration shall be established only if common legal remedies could not have prevented the damage or the aggrieved person resorts to the ordinary legal remedies for the prevention of damage. Unless otherwise provided by legal regulation, these provisions shall also be applied to liability for damage caused within the jurisdiction of a court or public prosecutor (§ 349 Civil Code). 13

The interaction or relationship of the liability of legal entities for their own conduct and their vicarious liability for the conduct of their employees, managers, civil servants, officers, etc. is in certain respects not clear in Hungarian theory and practice. The distinction between vicarious liability and liability for the individual conduct of legal entities exists insofar as the liability of the legal entity cannot be excluded on the ground that none of its employees should be liable; neither is the plaintiff required to prove the wrongful conduct of the legal entity's employee in order to establish the liability of the legal entity. On the other hand, it is not clear where the borderline between vicarious liability and the legal entity's own liability should be drawn. From the perspective of the intersection between tort law and regulatory law, the vicarious liability of the employer also covers those cases where the employee is the subject of public responsibility. If, e.g., the employee violates a public law regulation and thereby causes harm, the employer shall be liable for damages if the employee was acting within the employment relationship. The public or criminal law responsibility of the employee triggers the vicarious liability of the employer in tort provided that the other preconditions of liability are fulfilled. 14

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

- 15 Legal entities are subject to public law liability as well. There are not any direct consequences of such liability under private law but establishing public law liability (including criminal law) would surely establish fault under fault-based liability. If the tortfeasor violates a legal norm, he does not act in line with the required standard of conduct so actually he cannot exempt himself from liability under a fault-based regime (§ 339 Civil Code). From this point of view, the administrative liability would almost surely establish the tort liability of the legal entity if the causal link between the damage and the conduct establishing administrative liability has been established. The interaction of administrative liability of a legal entity with its vicarious liability is the same as of the liability of the legal entity under private law. Administrative and private law liability of the legal person are to be distinguished. The liability of the legal person in an administrative procedure and, according to public law standards, does not cover liability for damage.

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

- 16 The infringement of statutory safety regulations or provisions aimed at environmental protection shall not be a necessary precondition of liability. Since, however, liability for environmental damage is strict according to § 345 Civil Code,¹¹ it is important to qualify the damage and to decide whether it is environmental or not because this determines whether the case falls under a strict or fault-based liability regime. Regulations may provide proper measures for the court to decide whether the damage shall be qualified as environmental or not. On the other hand, since courts – in spite of the original doctrine of unlawfulness which does not make it necessary – usually seek infringement of a certain legal norm in order to establish liability, proving the violation of a certain norm would help to establish unlawfulness. Expectation tests in the manner in which they are used in consumer sales as a test for the performance or breach of contract – according to my opinion – do not play a significant role in establishing liability in tort for failure to comply with statutory regulation. The general approach focuses on expectations as general standards of conduct vis-à-vis the person whose liability is at stake. Expectations (e.g. of consumers) are to be taken into account as the test for the general required standard

¹¹ The tortfeasor may be exonerated only by proving that the cause of the damage was unavoidable and fell outside of the scope of the tortfeasor's activity (§ 345 Civil Code).

of conduct, i.e. that general standard of conduct or duty of care requires the compliance with such expectations.

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

The objectives of tort and regulatory law have not yet been considered together in Hungarian legal theory. Eörsi held the protection against wrongdoing through prevention and the allocation of loss in society as the main functions of tort law.¹² Act no. LIII of 1995 on the general rules of environmental protection in its preamble declares that the main aim of the Act is to protect and to preserve the natural inheritance and natural values. In this respect and on this abstract level the objectives of tort law and those of environmental protection are similar. This problem, however, has not been a subject of discussion or dispute in Hungary so far. The relevance of this similarity does not seem to appear on the level of legal practice.

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3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

Since the protective purpose of the norm does not seem to be relevant in Hungarian tort law practice and theory, the protective purpose of the environmental protection regulation has not been considered from this point of view in theory and practice. In Hungarian legal theory and practice the awarding of damages is not inextricably linked to the infringement of a right or a protected legal interest, except for non-pecuniary damages where the infringement of a personality right is the necessary precondition of liability.

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Act LIII of 1995 defines the damage not only as the actual damage (*damnum emergens*), the lost profit (*lucrum cessans*) and the costs of the repair, but also as the non-pecuniary damage resulting from the reduction of the quality of the environment or the worsening of the living conditions of individuals or group of individuals in the society. This definition of damage rests on the traditional concept of material and immaterial damage to persons (§ 81 subpar. (1) of the Act). Thus the Civil Code and the special regulation provided by the Environmental Protection Act as well cover the protection of individuals. It seems that the legislator did not want any individuals to be excluded from the protective purpose of these norms. The category of environmental damage per se introduced by the Directive 2004/35/CE has not yet been implemented in Hungarian tort law.

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¹² Eörsi (fn. 3) no. 4 ff.

- 20 The infringement of environmental protection legislation shall constitute a wrongful act which triggers strict liability according to § 345 Civil Code.¹³

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 21 There are not any statutory schemes with regard to safety regulation and/or environmental protection that would introduce compulsory liability insurance. Special compulsory liability insurance schemes have been introduced for operating motor vehicles, providing medical services, for accountants and for lawyers. Those who burden the environment with certain activities may be bound to provide a guarantee to cover probable damage or they may be obliged to have liability insurance according to § 101 of the Environmental Protection Act. So far there has not been any compulsory liability insurance scheme implemented in Hungary under this regulation.

III. Fault-Based Liability

A. Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

- 22 The breach of safety regulations and environmental law is not a necessary precondition of liability due to the autonomous concept of unlawfulness in tort law. There are, however, very recent cases where the court has rejected a claim on the ground of absence of unlawfulness even if there is not any special provision which would allow causing harm in that certain case. That means that there seems to be a tendency in court practice toward the erosion of the original concept of unlawfulness.¹⁴ The courts very often try to find a certain legal norm which had been infringed by the tortfeasor in order to establish liability even if this would not be a necessary requirement. This approach of the courts has often been criticised as false and not being in line with the underlying concept of unlawfulness. I think that it has now become clear that this original theoretical concept of unlawfulness should be revised. Unlawfulness as a necessary precondition of liability should be treated as such a complex category as fault or causation. The court practice which already does so is not false but a proof of the untenableness of the original oversimplifying theory. This complex approach, which would keep the concept of unlawfulness as

¹³ § 345 subpar. (1) Civil Code states that a person who carries on an activity involving considerable hazards shall be liable for any damage caused thereby. Being able to prove that the damage occurred due to an unavoidable cause that falls beyond the realm of activities involving considerable hazards shall relieve such person from liability. These provisions shall also apply to persons who cause damage to other persons through activities that endanger the human environment.

¹⁴ See supra fn. 7.

flexible as fault and causation, would fit the Hungarian flexible system as also the Hungarian tort law is designed¹⁵ and would allow the courts greater discretion in risk allocation and risk spreading. A tendency to interpret unlawfulness in a flexible manner is, however, not clear in the court practice.

The other role of the infringement of such regulations may be found in the context of fault. Although fault is an autonomous concept of both tort law and private law and independent from administrative law, the infringement of statutory regulation can hardly be a behaviour which corresponds to the required standard of conduct. The failure to comply with the requirements provided by the regulation would almost surely establish fault. 23

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

The mere breach of safety regulations and environmental law does establish unlawfulness but does not constitute wrongfulness. Fault must be established as well to constitute wrongfulness. It would be very hard, however, for the tortfeasor to prove that he acted as was generally expected in the given circumstances if he had acted in violation of legal norms. The liability for environmental damage is strict, so fault is not a necessary precondition of liability. 24

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

Since the protective purpose of the rule or similar doctrine cannot be traceable in Hungarian tort law yet, the liability of the tortfeasor does not depend on the protective purpose of the rule. In cases where this purpose is strikingly far from the purpose of the norm, the court may “break” the causal link and reject the claim on the ground of absence of relevant causation. 25

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

The tortfeasor may be allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule if causation is 26

¹⁵ Hungarian tort law as a law in action is a flexible system where the decision of the court is a result of weighing different elements in each of the tort cases as it has been established by Walter Wilburg: *W. Wilburg*, *Entwicklung eines beweglichen Systems im Bürgerlichen Recht* (Rede gehalten bei der Inauguration als Rector magnificus der Karl-Franzens-Universität in Graz am 22. November 1950) (1950) and *id.*, *Zusammenspiel der Kräfte im Aufbau des Schuldrechts*, *Archiv für die civilistische Praxis* (AcP) 163 (1963) 346 ff.

supposed to be established by the omission of the tortfeasor.¹⁶ If the tortfeasor proves that the damage would have occurred even if he had not failed to comply with his omitted duty, causation between the omission and the damage cannot be established.

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

- 27 The burden of proof regarding damage and causation as preconditions of liability rests on the plaintiff. The tortfeasor can exonerate himself by proving the absence of fault, so in this respect the burden of proof rests on him and the unlawfulness of the damage is presumed. In this respect the tortfeasor has to prove the lawfulness of the damage as well. If the administrative law rule allocates the burden of proof concerning tort law differently, the problem is a collision of legal norms, where in general the principle of *lex specialis derogat legi generali* shall be applicable and the allocation of the burden of proof according to the administrative law regulation would prevail.

6. Can a breach of an administrative law rule result in a claim for punitive damages?

- 28 Punitive damages are not accepted either in legal practice or in legal theory in Hungary. The breach of an administrative law rule cannot result in a claim for punitive damages.

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?

- 29 The Chinese wall between administrative law and private law concerning delictual liability means that the lawfulness of the tortfeasor's conduct in public law does not mean that it shall be deemed as lawful in tort law as well. The lawfulness of the tortfeasor's conduct in public law in itself does not permit one to cause damage to others.¹⁷ Thus, the Hungarian legal system does not allow the "regulatory permit defence". Compliance with statutory or individual per-

¹⁶ The omission can also be a relevant cause of the harm if there is a legal duty to act; the tortfeasor breaches this requirement by not acting and, had he acted, that harm would not have occurred. In this case all of these requirements are fulfilled. In case of omission, liability is established by not starting a causal process which would have avoided the harm. If the breach of the duty is not a natural cause of the harm, the person who has breached his duty shall not be liable. BH 2002 no. 227 (Supreme Court, Legf. Bír. Pf. V. 20.676/1998. sz.).

¹⁷ E.g. BH 1999 no. 449 (Supreme Court, Legf. Bír. Pfv. I. 23.084/1998. sz.); BH 2000 no. 244 (Supreme Court, Legf. Bír. Pfv. X. 21.156/1999. sz.).

mission makes the tortfeasor's conduct lawful in public law but does not make it lawful in tort law. The permission itself does not constitute exemption for the tortfeasor from civil law liability. In a very recent case the Supreme Court decided – confirming the well-established practice – that the neighbour of a cell phone transmission tower shall be entitled to claim damages according to the general rule of liability in tort for the depreciation in value of the land and the mobile phone company shall be liable even if the necessary permits were given to build the tower at that certain place.¹⁸ Neither in Hungarian court practice nor in theory can one recognize a distinction between regulatory compliance defence and regulatory permit defence. From the inner logic of the prevailing theoretical “Chinese Wall” approach, such a distinction would be meaningless. The dividing line is between lawfully and unlawfully caused damage. If the regulation itself makes causing harm lawful and exempts – explicitly or implicitly – the tortfeasor from the obligation to provide compensation, causing damage shall be deemed as lawful and the tortfeasor does not have to pay compensation. If the regulation allows the tortfeasor to cause the damage but provides the obligation to pay compensation, causing damage shall be deemed as lawful under the obligation to pay compensation.

2. Can the general duty of care go beyond these rules?

The compliance with statutory or individual permission also does not mean that the tortfeasor's fault could not be established. The required standard of conduct implies acting under statutory or individual permission but is not restricted to that. The required general duty of care may go beyond the preconditions, the existence and the compliance with statutory or individual permission.

30

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

Since the statutory or individual permission does not constitute a defence in itself, the tortfeasor cannot – neither concerning unlawfulness nor fault – reverse the burden of proof allocated to him by proving that he has acted in compliance with the relevant administrative law rules.

31

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

Apart from the Civil Code, the administrative law may provide for liability for damage caused by the public law regulation but, if it does so, it generally

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¹⁸ BH 2006 no. 184 (Legf. Bír. Pfv. III. 20.852/2005. sz.).

refers back to tort law. There are not alternative grounds for liability or other sources of obligation to pay compensation. There is also no specific prohibitory or mandatory injunctive relief in which a claimant as private party may ask for damages on the ground that the respondent's conduct is not in compliance with regulatory law. The Civil Code, however, provides a specific claim for a person who is exposed to suffering harm. According to § 341 of the Civil Code, a person in danger of suffering harm is entitled to claim to have the potential tortfeasor prohibited from engaging in the dangerous conduct or to be obliged by the court to take the necessary steps in order to prevent damage and, if it is necessary, to provide a guarantee thereof. Moreover, according to civil procedure rules, the plaintiff may ask for interim measures in which the court provisionally decides for the plaintiff if avoidance of immediate danger of damage makes it necessary or other statutorily determined preconditions are fulfilled (§ 156 subpar. (1) Hungarian Civil Procedure Act).

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

- 33 There is not a general clause for compensating lawfully caused damage. The legal norm which gives the permission to cause harm to another person shall provide whether an indemnification shall be paid or not. There is an indemnification claim only if it is provided explicitly by the regulation which makes the causing of harm lawful. The question whether in a certain case the victim should have to bear the harm without a compensation (indemnification) claim is a constitutional question. The Constitutional Court has to decide whether a certain legal norm which permits causing harm to persons without indemnification shall be in compliance with the provisions of the Constitution on protection of property or not.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 34 From the autonomous concept of unlawfulness and fault follows that the permit granted in 1976 to emit a certain amount of exhaust gases into the air shall not in itself prevent company A from being liable for damage caused by the emission to the farmer. The necessary consequence of this approach is that even if the farmer had the possibility to ask the government through an admin-

istrative procedure to amend the permit of the chemical plant, the omission to file such a request shall not be of relevance for the tort claim against the plant. If one keeps tort and regulatory law separated and says that the permit does not exempt the tortfeasor from liability (as we do, perhaps even with oversimplification of the problem), the failure of requesting an amendment to the permit shall also not be relevant since this (the modification of the permit) would not prevent the plant from causing damage.

If the case were to fall as environmental damage under the strict liability regime provided by § 345 of the Civil Code, company A, as defendant, may exonerate itself and escape liability only by proving that the damage of the plaintiff is the effect of a cause that had fallen outside the scope of its activity and had been unavoidable. Since this is not the case, company A shall be liable. 35

If the damage shall not be qualified as environmental damage and would not fall under the strict liability regime provided by § 345 of the Civil Code, company A as defendant under the fault-based liability regime may exonerate itself and escape liability by proving that it acted as was generally expected in the given circumstances. This must be considered by the court. If the court finds that in the given circumstances the implementation of the recent technology which could significantly reduce the pollution at a reasonable cost would have been the generally required conduct, company A shall be liable. The fact that they complied with the statutory requirements would not itself mean that they acted in line with the generally required standard of conduct. 36

The court would certainly be very reluctant to accept the liability of the government for failing to implement the proper legislation. The omission of the state – including the government and local municipalities as well – to legislate does not constitute an unlawful conduct in the Hungarian court practice except if it is otherwise provided by supranational legislation or court practice. According to the court practice as it stands today, the claim against the government would be dismissed by the Hungarian court. 37

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

Since the liability of B shall be considered and decided on the ground of tort law regulation under civil law, the normal liability test shall be applied. According to the general rule of liability (§ 339 Civil Code), there are four preconditions of liability and if these preconditions are fulfilled, the tortfeasor must pay damages. These four preconditions are: the damage; the unlawfulness of the damage; the causal link between the conduct of the tortfeasor and the suffered harm and the accountability of the tortfeasor's conduct (fault). If the liability shall be strict because the tortfeasor's activity which is the source 38

of the damage is to be considered as extremely hazardous, the tortfeasor may exempt himself only by proving that the cause of the damage fell outside the scope of his activity and was unavoidable (§ 345 Civil Code).

- 39 Damage and causal link are given in this case. In this case B is not permitted to cause harm by regulation so he cannot argue that he had been entitled to cause the damage to the visitor. The fact that there is a specific statute that compels employers to have certain protective measures in their workshops does not influence the consideration of unlawfulness. In absence of special statutory permission to cause damage, unlawfulness shall be established. The crucial point in this case may be the question of fault and the influence of the statutory requirements on the required standard of conduct in this case.
- 40 If the case were to fall under the fault-based regime of § 339 Civil Code, it must be considered whether the special regulation would indicate that, in cases not falling in the scope of the legislation, it is not necessary to implement such measures because the risk of actual danger is very low and such risk could not be realized from other sources. This being the case, it can be established that B had acted as was generally expected in the given situation and, acting in line with the required standard of conduct, B shall not be liable. If – independently of the statutory regulation – the required standard of conduct in such a case is to ensure that certain protective measures are implemented in such workshops (as it seems to be the case here), B shall be liable.
- 41 If the activity pursued by B in the workshop shall be qualified as extremely hazardous according to § 345 Civil Code, B shall be liable unless he proves that the cause of the damage fell outside the scope of his activity and was unavoidable. This would not be the case here, so B shall be held liable. Neither in the fault-based liability regime nor in the strict liability regime is the result analogous with vicarious liability; the liability of B is a liability for his own conduct.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It visited the company once and issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

- 42 Yes. The company should have been acting as was generally expected in the given situation and it shall be liable for its own conduct. Complying with safe-

ty rules is in itself the required standard of conduct. Company B failed to act as was generally expected in the given situation. The company cannot successfully raise the defence of lack of supervision by the regulatory agency because one cannot exempt oneself from liability by proving that another person did not act according to the required duty of care.

b) Could the injured persons claim damages from the government agency?

It has been established in Hungarian court practice that authorities shall be liable for damage caused by failing to perform their statutory obligation.¹⁹ The government agency should prove the lawfulness of causing damage or that it acted in line with the required standard of conduct in order to exempt itself from liability. Omission of statutory obligation is an accepted ground for liability in Hungarian legal theory and practice.²⁰ In this case it would be held that the required standard of conduct from the government agency was to supervise and control the execution of its decision. Failing to perform this duty, the agency caused damage and, failing to be in line with the required standard of conduct, the agency shall be liable unless it can rely on a statutory provision permitting the causing of damage in that certain situation. The court would presumably hold company B and the government agency as multiple tortfeasors jointly and severally liable vis-à-vis the plaintiff.

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¹⁹ BH 2005 no. 430 (Supreme Court, Legf. Bír. Pfv. VI. 22.288/2004.). The decision establishes the principle that if the public authority fails to control the execution of its decision, it shall be liable for damages toward those persons who suffer damage which would not have occurred if the decision had been executed properly.

²⁰ Supra fn. 16.

TORT AND REGULATORY LAW IN ITALY

*Alberto Monti and Filippo Andrea Chiaves**

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

In an effort to synthesise a complex issue, one may say that the impact of administrative law rules on Italian tort law is at least twofold. 1

First, since art. 2043 of the Italian Civil Code (hereafter: CC) states inter alia 2 that the obligation to pay damages arises only in case of a “wrongful injury” (*danno ingiusto*), it is worth discussing the impact of administrative law on the legal concept of “wrongful injury”.

What constitutes wrongful injury under art. 2043 CC has been subject to much 3 controversy among Italian judges and scholars during the past decades. Originally, an injury was considered “wrongful” only if it arose out of a violation of an absolute right (e.g. the right of ownership, limited rights in property, life, liberty, physical integrity, personality rights, etc.); at a subsequent stage, Italian case law admitted that the violation of a relative right of the injured party (e.g. the right to obtain from a third party a contractual performance) also constituted wrongful injury.¹

After the enactment of Legislative Decree 31 March 1998 no. 80 (concerning, 4 inter alia, ordinary and administrative jurisdictions), the recent evolution of Italian case law significantly expanded the scope of civil liability of the Public Administration and the notion of “wrongful injury” by allowing the

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¹ See M. Bussani/B. Pozzo/A. Venchiarutti, Tort Law, in: J. Lena/U. Mattei (eds.), Introduction to Italian Law (2002) 217 ff.

recovery of damages in tort also for the violation of certain legitimate interests. It should be recalled, in fact, that in the Italian legal system one may distinguish between “subjective rights” (*diritti soggettivi*) and “legitimate interests” (*interessi legittimi*).² In short, under Italian law, private parties do not have a “subjective right” as regards the exercise by the Public Administration of authoritative or discretionary powers. For example, the owner of a piece of land has no “right” to obtain a permit to build a house; an entrepreneur who wishes to start up a business has no “right” to obtain the required license; the customer of an insurance company or another financial institution has no “right” to have the institution properly monitored and supervised by the competent authority in order to avoid the effects of insolvency.³ The distinction between “subjective rights” and “legitimate interests” is a very important one in that it is relevant not only to the question of liability but also to the choice of the forum. In the Italian system, in fact, the jurisdiction is split between the administrative and the ordinary courts. Traditionally, the violation of a legitimate interest did not give sufficient standing to lodge a claim with an ordinary court, which was the only one entrusted with the power to award compensation for damage before the enactment of Legislative Decree 31 March 1998 no. 80.

- 5 As a result, until the ground-breaking decision no. 500 rendered on 22 July 1999 by the Italian Supreme Court of Cassation in Joint Sessions, recovery of damages in tort for the violation of mere “legitimate interests” by the Public Administration was not admissible. As anticipated, the picture has radically changed since then. Nowadays, in fact, the right of a private individual or entity to obtain compensation in tort for the illegitimate exercise of the public function does not depend on the formal qualification of the entitlement of the injured party, be it a subjective right or a legitimate interest, as long as the Public Administration acted wilfully or negligently causing a damage.⁴ In other words, under art. 2043 CC both the violation of a subjective right (absolute or relative) and the violation of a legitimate interest may constitute “wrongful injury”.
- 6 However, a distinction must still be made between a “legitimate interest to claim” (*interesse legittimo pretensivo*) and a “legitimate interest to oppose” (*interesse legittimo oppositivo*), since different criteria apply for the assessment of recoverable damages. The harm to a “legitimate interest to claim” must be evaluated by means of a prognostic judgment aimed at ascertaining the existence of a subjective situation of legitimate expectation of a favourable conclusion of the administrative procedure, other than a mere factual expectation; on the other hand, in order to obtain compensation for the violation of a “legitimate interest to oppose”, it is sufficient to prove in court that an interest

² See *D. Sorace*, Administrative Law, in: Lena/Mattei (eds.) (fn. 1) 125 ff.

³ See *R. Caranta*, Governmental Liability after Francovich, Cambridge Law Journal (Camb. LJ) 52 (1993) 272.

⁴ Court of Cassation, Joint Sessions, 22 July 1999, judgment no. 500; see also Court of Cassation, III Session, 29 March 2004, judgment no. 6199; Court of Cassation, Joint Sessions, 24 September 2004, judgment no. 19200.

to preserve a property right or another economic utility has been harmed by the illegitimate and faulty activity of the Public Administration.⁵

From a procedural viewpoint, as reaffirmed by a very recent decision of the Italian Supreme Court of Cassation in Joint Sessions,⁶ the general rule is that ordinary courts and not administrative courts are competent to hear a case brought by a private individual or entity against the Public Administration to obtain compensation for damage in tort,⁷ since the right to claim compensation for damage arising out of a wrongful injury is considered a subjective right, regardless of the legal nature (“subjective right” or “legitimate interest”) of the entitlement violated by the wilful or negligent conduct of the Public Administration. Notwithstanding the above, pursuant to Legislative Decree 31 March 1998 no. 80,⁸ there are certain cases in which administrative courts have exclusive jurisdiction both for the annulment of the illegitimate administrative act that caused the loss, and for the compensation of the damage arising therefrom.⁹

Finally, it shall be noted that an injury is not wrongful pursuant to art. 2043 CC if the conduct causing such injury is somehow justified by the legal system. It is not wrongful, for instance, if the injury was caused by a person acting in legitimate self-defence,¹⁰ with the consent of the injured party,¹¹ or in a state of necessity.¹² Other justifications, relevant for the purposes of the present analysis, may be found in art. 51 and 53 of the Italian Penal Code (hereafter: PC) respectively concerning the exercise of a right or the compliance with a duty, and the legitimate use of arms.¹³ The “compliance with a duty” defence under art. 51 PC, in particular, includes the compliance with a mandatory rule imposing a public law duty, as well as the compliance with a legitimate order of the Public Authority. In case of an illegitimate order of the Public Authority, the agent is also excused from liability if he/she could not question the legitimacy of the order.

The second way in which administrative law rules impact on Italian tort law concerns the concept of fault. As discussed in more detail *infra* (see *infra* no. 28

⁵ Court of Cassation, III Session, 10 February 2005, judgment no. 2705; see also Court of Cassation, I Session, 10 January 2003, judgment no. 157, *Archivio Civile* (Arch. Civ.) 2003, 1223.

⁶ Court of Cassation, Joint Sessions, 24 March 2005, judgment no. 6332.

⁷ Court of Cassation, Joint Sessions, 24 September 2004, judgment no. 19200; Court of Cassation, Joint Sessions, 2 April 2003, judgment no. 5082.

⁸ See art. 33, 34 and 35 of Legislative Decree 31 March 1998 no. 80 (concerning: public services, public construction works, land and urban planning), as amended by Law 21 July 2000 no. 205. See also: Constitutional Court, 5–6 July 2004, judgment no. 204; Court of Cassation, Joint Sessions, 31 March 2005, ordinance no. 6745.

⁹ Pursuant to Law 21 July 2000 no. 205; moreover, administrative courts can also adjudicate damages whenever they have jurisdiction, not just when they have exclusive jurisdiction.

¹⁰ Art. 2044 CC and art. 52 of the Italian Penal Code (PC).

¹¹ Art. 50 PC.

¹² Art. 2045 CC and 54 PC.

¹³ See Court of Cassation, III Session, 24 February 2000, judgment no. 2091.

and 29), the breach of administrative provisions may per se imply fault on the part of the wrongdoer. Under Italian law, in fact, fault arises as a consequence of negligence, lack of prudence, lack of skill, but also as a consequence of breach of statutes, regulations, orders and guidelines.¹⁴ The breach of administrative rules characterized by a protective purpose, therefore, amounts to fault pursuant to art. 40 PC and 2043 CC if the protective rule was aimed at preventing the type of injury caused by the wrongdoer.

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

- 10 Pursuant to art. 28 of the Italian Constitution, public officials and public employees (i.e. public servants) are directly and personally liable under criminal, civil, and administrative law for acts committed in violation of rights. Civil liability extends to the State and Public Law Entities.¹⁵ Art. 22, first paragraph, of Presidential Decree no. 3 of 10 January 1957 (concerning State non-military employees) establishes that employees who inflict wrongful damage on persons in the course of performing their duties shall be personally liable to compensate the inflicted damage. Art. 23 of the afore-mentioned Decree, in turn, specifies that the damage is wrongful, for the purposes of art. 22, if it arises out of a violation of third parties' rights caused by the employee's wilful or grossly negligent conduct. Case law and scholars interpreting the relevant provisions (art. 18–30) of the above mentioned Presidential Decree no. 3 of 10 January 1957 are unanimous in affirming that public officials and employees can be held personally and directly liable if and only if they acted intentionally or with gross negligence (*dolo o colpa grave*), while the Public Administration is civilly liable vis-à-vis third parties even in case of wrongful damage caused by ordinary negligence (*colpa lieve*).

3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

- 11 As discussed supra no. 9, fault may arise out of the breach of statutes, regulations, orders and guidelines.¹⁶ The breach of administrative rules characterized by a protective purpose, therefore, amounts to fault pursuant to art. 40 PC

¹⁴ See art. 40 PC.

¹⁵ On the limits to the joint and several liability of the State and Public Law Entities for acts committed by public officials and employees, see most recently: *V. Tenore*, Responsabilità solidale della P.A. per danni arrecati a terzi da propri dipendenti: auspicabile il recupero di una nozione rigorosa di occasionalità necessaria con i fini istituzionali, *Lexitalia*, 2, 2005; Court of Cassation, III Session, 9 February 2004, judgment no. 2423; Court of Cassation, III Session, 18 March 2003, judgment no. 3980; Court of Cassation, III Session, 13 November 2002, judgment no. 15930.

¹⁶ See art. 40 PC.

and 2043 CC if the protective rule was aimed at preventing the type of injury caused by the wrongdoer. It is important to note that a negligent conduct may give rise to liability in tort under Italian law only if all the requisites set forth by art. 2043 CC are complied with. In particular, such requisites are: a) wilful or negligent conduct; b) wrongful injury; c) causation; d) capacity.

4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

The “compliance with a duty” defence under art. 51 PC, as mentioned, exonerates from liability the agent who acted in compliance with an illegitimate order of the Public Authority only if such agent could not question the legitimacy of the order or, due to an error of fact, he or she believed that the order was legitimate.

12

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

Under Italian law, tort (civil) liability, administrative liability and criminal liability may overlap to a great extent, since the rules providing for criminal and/or administrative sanctions do not exclude a tort claim. The same factual situation, in other words, may entail consequences at various levels of the Italian legal system, so that, for instance, the same conduct may expose the agent to criminal sanctions, administrative sanctions and/or tort liability for damages. However, it is worth mentioning that very different substantial and procedural rules govern civil liability, criminal liability and administrative liability under Italian law.

13

6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

The protective purpose of an administrative law rule can be determined not only by the law itself, but also by the Court entrusted with the power to establish the fault of the agent who violated such rule.

14

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 15 This depends on the public law rule that has been violated and on the type of sanctions (criminal or administrative) imposed as a result of such violation.¹⁷ While criminal sanctions are directed to individuals within the entity,¹⁸ administrative sanctions may be directed to the entity itself. Tort liability does not follow directly administrative liability, since they are based on different requisites. Civil liability of private law entities is based on art. 2043, 2049 ff. CC. Pursuant to art. 2049 CC, the entity is jointly and severally liable for the tort committed by the employee in the performance of his or her tasks; the entity is also liable if the wrongful conduct was simply facilitated by the tasks assigned to the employee.

- 16 As mentioned, pursuant to art. 28 of the Italian Constitution, under certain conditions public servants are directly and personally liable under criminal, civil, and administrative law for acts committed in violation of rights, but civil liability extends to the State and public law entities.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

- 17 Legal entities may be directly subjected to administrative liability. For instance, pursuant to the provisions of Legislative Decree no. 231 of 8 June 2001, as amended, legal entities may incur administrative sanctions whenever a crime is committed by individuals belonging to one of the following categories: a) persons who represent, manage, or otherwise direct – also if merely de facto – the activity of the company or of one of its autonomous business units (hereafter the “Top Management”); or b) persons who are subject to the direction and supervision of the Top Management. In order for the entity to be held accountable for crimes committed by the above categories of individuals (and therefore be liable to administrative sanctions), it is necessary for such persons to have acted in the interest or to the benefit of the company. It follows that the company will not be liable if the crime was committed in the exclusive interest of its author, or of third parties. The liability of the company to administrative

¹⁷ See, e.g., Title III of Legislative Decree no. 196 of 30 June 2003 (Personal Data Protection Code), which contains both administrative (art. 161–165) and criminal (art. 167–172) sanctions.

¹⁸ For the criteria to identify the criminally liable parties within an organization, see most recently: Court of Cassation, III Penal Session, 9 March 2005, judgment no. 12370.

sanctions does not necessarily require the specific identification of the author of the crime, or his/her conviction. Furthermore, the company may be held liable also with respect to crimes committed outside Italy. The liability of the company is ascertained and declared in the context of a criminal trial, by the same judge that would be competent for the trial of the individual who materially committed the crime. Indeed, as a rule both the company and the author of the offence are defendants in the same criminal trial. Not all criminal offences are capable of triggering the application of administrative sanctions against the company: the Decree specifically identifies a list of offences capable of bringing about this result. The list is exhaustive and therefore the inclusion of other offences could occur only by means of formal amendments to the Decree (never as a consequence of court decisions).

The administrative liability of legal entities does not have a direct impact on their civil liability, either direct or vicarious, which is governed by art. 2043 ff. CC, as discussed above. It is worth noting that pursuant to art. 242 ff. and 304 ff. of the new Environmental Code (Legislative Decree no. 152 of 3 April 2006, as amended), legal entities may be held liable to bear clean-up costs, as well as the cost of preventive and remedial actions in case of environmental damage. They are also exposed to civil liability for the same polluting event and the coordination between different remedies may turn out to be problematic in this field.

18

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

Statutory safety regulations, and provisions aimed at environmental protection are quite important for Italian tort law.

19

In case of violation of the provisions of Legislative Decree no. 626 of 19 September 1994, implementing Directive 89/655/EEC on minimum health and safety requirements in the workplace, for instance, the employer may be held liable for injuries suffered by employees.

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The violation of the environmental safety standards set by the new Environmental Code (Legislative Decree no. 152 of 3 April 2006, as amended), in turn, may give rise to liability for clean-up costs under art. 242 ff., preventive and remedial actions under art. 304 ff. as well as to civil liability under art. 311 ff. of such Code and art. 2043 ff. CC.

21

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

- 22 While in principle regulatory law operates *ex ante* through the setting of detailed rules within a command/control type of mechanism, tort law operates *ex post* through the enforcement by courts of the obligation to compensate for the damage inflicted on third parties. In the long run, however, both regulatory law and tort law aim at the prevention of inefficient conduct as well as at the protection of potential victims.

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

- 23 Yes, statutory safety regulations and provisions aimed at environmental protection are generally regarded as statutes with a protective purpose.
- 24 Individuals may or may not be covered by the protective purpose of these rules depending on their specific aim. The provisions of Legislative Decree no. 626 of 19 September 1994 certainly cover individual workers, while environmental protection rules cover the health of individuals only indirectly, and such individuals often do not have standing to sue in case of violation of environmental protection rules.¹⁹
- 25 The breach of statutory safety regulations and provisions aimed at environmental protection may amount to fault (*colpa*) and may give rise to tort liability, but only if all the requirements of art. 2043 ff. CC are met (supra no. 9 and 11).
- 26 The breach of statutory safety regulations and provisions aimed at environmental protection may, in certain cases, also give rise to strict liability.²⁰

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 27 Under Italian law, a compulsory social insurance system (INAIL) is provided for the compensation of damage suffered by employees who perform certain dangerous jobs as a result of work-related illness or accidents at the workplace. The types of jobs covered are listed by Presidential Decree no. 1124 of 30 June 1965, as amended.²¹ The premium is paid by the employer who,

¹⁹ See Bussani/Pozzo/Venchiariutti (fn. 1) 217 ff.

²⁰ See, e.g., art. 242 ff. and 304 ff. of the new Environmental Code (Legislative Decree no. 152 of 3 April 2006, as amended).

²¹ See also art. 13 of Legislative Decree 23 February 2000 no. 38, extending compulsory insurance coverage to the so-called biological damage (*danno biologico*).

under certain conditions, is exonerated from liability for damage covered by the insurance.²²

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

The breach of administrative provisions (including safety regulations and environmental laws) may per se imply fault on the part of the infringer which constitutes a tort. As said, under the general principles of tort, fault-based liability arises if the perpetrator was at fault (art. 2043 CC), and fault arises as a consequence of negligence, lack of prudence or lack of skill, but also as a consequence of a breach of statutes, regulations, orders and guidelines (art. 40 PC, definition of fault deemed applicable to civil law as well). Thus, any breach of ad hoc administrative provisions (including in the field of safety regulations and environmental law) encompassing preventive measures, i.e. characterized by a protective purpose and specific precautionary aims, may imply fault if the tortious conduct of the wrongdoer constitutes the violation of the specific purpose which was typical of the administrative provision at issue. For instance, an accident caused by a careless driver failing to stop at a red light integrates a faulty conduct as a result of the driver's breach of an administrative provision (i.e. the Road Traffic Act) specifically aimed at ensuring road traffic safety by imposing an obligation on car drivers to stop at red lights. In all such cases, for fault-based liability to occur, there must be (i) a breach of a specific administrative provision imposing a preventive measure and (ii) a failure to meet the specific requirements provided for by the administrative provision at issue.

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In the area of environmental law, art. 311, second paragraph, of the new Environmental Code (Legislative Decree no. 152 of 3 April 2006, as amended) provides that the wrongdoer is liable towards the State for any wilful or negligent act or omission, in breach of statutory rules, regulatory provisions or the general diligence standard, that results in damage, deterioration or destruction to the environment, whether partial or total.

29

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

Please refer to the answers above (supra no. 9, 11, 28 and 29). Fault arises as a consequence of the mere breach of an administrative rule, including in the

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²² Pursuant to art. 10 of Presidential Decree 30 June 1965 no. 1124, the employer is not exonerated from civil liability in case he or she is found criminally liable for the work-related injury or illness.

field of safety regulations and environmental law, if the breached rule is a preventive measure that was specifically enacted for the purpose of prevention and the aim of the rule is disappointed and failed to comply with as a consequence of the breach. Moreover, as said above, the specific administrative rule at issue may impose ad hoc requirements to be met: therefore, fault-based liability will occur upon breach of the provision and failure to meet the specific requirements of the rule provided that all the requirements of art. 2043 ff. CC are met.

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

- 31 Once again, please refer to the answer above (supra no. 28 and 29). In case of breach of administrative provisions, fault depends upon the infringer's conduct constituting the violation of the typical, specific purpose for which the administrative provision at issue was enacted.

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

- 32 Since we are dealing with a fault-based tort liability issue, the relevant principles of civil liability apply regardless of the fact that fault is not the consequence of negligence or carelessness but of the infringement of administrative law provisions (*colpa specifica*). In all such cases, the applicability of the general principles of Italian tort law would imply that the issue of causation is relevant, and thus the agent's liability may be reduced or excluded by any external elements affecting the causal nexus, i.e. other predominant causal factors that may have affected the chain of causation, or contributory negligence by the victim of the tort. The tortfeasor may thus prove that he would also have caused the damage if he had acted in compliance with the relevant rule: this introduces a typical tort law issue of concurrence of external factors in causing the damage. In all such cases, the wrongdoer may avoid liability if full evidence is brought that the damage was the result of other causal elements outside the scope of action of the wrongdoer. Otherwise, if a damage occurred and may be attributed to the wrongdoer's actions or omissions and not to any other causal factors, the wrongdoer will still be held liable for the damage regardless of his ability to prove that he would also have caused the damage if he had acted in compliance with the relevant rule, provided that he or she can be considered at fault pursuant to art. 40 PC.

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

- 33 Under Italian law, the breach of an administrative provision is relevant as far as the fault element of tort is concerned. As said, the fault element is defined by art. 40 PC, deemed applicable to civil torts: under art. 40 PC, fault may derive

from negligence, imprudence or lack of skill on the part of the agent, or from the agent's breach of statutes, regulations, orders and guidelines (thus including administrative law provisions). Under art. 2043 CC, the burden of proving the fault of the wrongdoer lies with the injured party.

6. Can a breach of an administrative law rule result in a claim for punitive damages?

Punitive damages are not contemplated in the Italian legal system, which is governed by the general principle that a victim may only be redressed for the damage that it actually suffered and not a cent more. Hence, no breach of an administrative law rule may ever result in a claim for punitive damages.

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B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?

Under Italian tort law, a tortfeasor can be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, as far as the requirements of tort law are met, namely: wilful conduct or fault of the agent, causation between the conduct of the agent and the damage, the wrongfulness of the damage caused to the victim, and the capacity of the tortfeasor. The Italian legal system does not contemplate a "regulatory compliance defence". In this respect, it should be noted that art. 308 of the new Environmental Code (Legislative Decree no. 152 of 3 April 2006, as amended), implementing Directive 2004/35/EC, states that the operator does not have to bear the costs of preventive and/or remedial actions if he/she can prove that the environmental damage or threat thereof is the consequence of the compliance with a mandatory order or instruction issued by the Public Administration. Moreover, if the operator proves that he/she did not act wilfully or negligently, he/she does not have to bear the costs of preventive and/or remedial measures if the emission or the event was expressly authorized by the Public Authority in compliance with applicable Community law (a sort of "regulatory permit defence"). Please note, however, that since the obligation to bear the cost of preventive and/or remedial actions is not the only consequence of a polluting event under Italian law, the operator could still be held civilly liable pursuant to art. 311 ff. of the new Environmental Code and pursuant to art. 2043 ff. CC.

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2. Can the general duty of care go beyond these rules?

The general duty of care can, indeed, go beyond these rules. However, in fault-based liability issues, the burden of proof generally lies on the plaintiff, except in particular instances where the burden of proof is reversed by operation of the

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law or fault is presumed, although such cases may hardly be qualified as fault-based liability cases and have been judged as instances of strict liability. An example is offered by several specific rules following art. 2043 CC and providing a specific regime for particular instances. For example, the Italian Civil Code regulates several cases of vicarious liability under art. 2047–2049, namely: the tutor's responsibility for acts carried out by the person (usually of minor age or of unsound mind) under his care (art. 2047 CC); liability of parents, teachers and masters for torts caused by pupils under their custody (art. 2048 CC). As to the guardian's burden of proof, under art. 2047 CC, in order to avoid liability, supervisors must prove that they had adopted all possible measures which appeared materially apt to avoid the injury (which includes measures not strictly imposed by statutory or administrative law). Similarly, the Civil Code provides a special regime in connection with dangerous activities: under art. 2050 CC, "Whoever causes damage to others upon performing an activity being dangerous by its nature or by the nature of the means employed to perform it, is liable for damages, unless evidence is brought that all possible measures had been taken to avoid the damage" (our translation). This rule is aimed at regulating activities which are socially useful and thus per se considered lawful, although they are very likely to cause damage to third parties. For the performer of the dangerous activity to avoid liability, the latter must prove having adopted every possible measure to avoid the damage, including measures not strictly imposed by law. Based upon this rule, courts have at times found that the duty of care goes beyond having adhered to applicable laws and (administrative) regulations, and implies adopting any possible precautionary measure to avoid the damage. Recently, the rule was invoked by courts in tobacco litigation disputes: in one instance, cigarette manufacturers were found liable for damage caused to consumers for having failed to inform smokers of the health risks associated to smoking. Although before 1990 there was no administrative law imposing on manufacturers the duty to place warnings on cigarette packets informing consumers of the risks connected to smoking, with a highly debatable decision a court found cigarette manufacturers liable for failing to inform smokers of such risks even though the tobacco industry had complied with all existing laws and regulations governing the sale of tobacco products at the time.²³ A similar area where the law requires proof that all possible measures had been taken to avoid the damage, including measures not imposed by statute and/or administrative provisions, is privacy. The provisions of Legislative Decree no. 196 of 30 June 2003 (Personal Data Protection Code) are aimed at ensuring the protection of confidentiality and privacy of individuals and legal entities, and at regulating personal data treatment and storage in

²³ Court of Appeals of Roma (App. Roma), 7 March 2005, decision no. 1015, *Stalteri*. This decision is now pending before the Supreme Court; several subsequent first degree court decisions have denied this view, followed by scholars, both claiming that there was no duty to inform and that the manufacturing and sale of tobacco products may not be qualified as a dangerous activity: see *P.G. Monateri*, I danni da fumo: classico e gotico nella responsabilità civile, nota critica a App. Roma, 7 March 2005, no. 1015, *Corriere Giuridico* (*Corriere giur.*), no. 5/2005, 673 no. 3; Court of Brescia, 10 August 2005, *Danno e Responsabilità* (*Danno e Resp.*), no. 2005, 1210 ff.

electronic databases. This law provides several specific rules governing data treatment and administrative and criminal sanctions for violations of the rules. Under art. 15 of the Personal Data Protection Code, anybody causing damage to others as a consequence of personal data treatment is liable for redress pursuant to art. 2050 CC (i.e. the clause regulating tortious liability arising out of the exercise of dangerous activities, as mentioned above). Basically, in order to claim any economic loss, the victim must simply prove the existence of damage, while the owner of the data base may avoid liability only by proving having adopted all possible precautions to avoid the damage.

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

Please refer to the answer above (supra no. 36). Generally speaking, in fault-based liability the burden of proof lies on the plaintiff. However, as seen above, there are cases where the law requires the plaintiff only to prove the damage and the defendant may avoid responsibility only by proving having adopted all possible measures to prevent the damage from occurring, including but not limited to full adherence to any applicable statutory and administrative laws and regulations. These instances, however, may hardly be classified as purely fault-based liability cases, as they appear to impose a strict liability regime on the defendant.

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IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

There are other sources of law besides tort law imposing liability for damage caused by a breach of a rule encompassed in the body of law. In the area of environmental pollution, for instance, pursuant to the provisions of the new Environmental Code (Legislative Decree no. 152 of 3 April 2006, as amended), the operator may be held liable for clean-up costs under art. 242 ff., preventive and remedial actions under art. 304 ff. as well as civil damages under art. 311 ff.

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2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

The Italian legal system contemplates several situations where administrative law permits a form of indemnification or compensation following the limitation or infringement of the interests of private citizens. The main instrument is expropriation, which is regulated by the Italian Constitution and by the Civil

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Code. Under art. 42.3 of the Constitution, “private property may be expropriated in cases established by statute for purposes of general interest and save indemnification” (our translation). Under art. 834 CC, “nobody can be wholly or partially deprived of his/her property if not for legally declared reasons of public interest and in consideration of payment of a fair indemnity” (our translation). Expropriation is governed by ad hoc statutory provisions (Presidential Decree no. 327 of 8 June 2001, as amended). Art. 838 CC provides a similar form of indemnification for cultivated land of relevant interest for national production abandoned by the landowner: the land may be expropriated by the State and the landowner is entitled to “fair indemnification”. Another example of indemnification as a consequence of limitation of interests of private citizens is offered by the rules of the Civil Code governing forced, imposed servitudes, easements and rights of way. Under art. 1032 CC, “whenever statutory law entitles a landowner to obtain an easement from another landowner, the easement is established by a court decision. The easement may also be established by the administrative authorities in cases strictly defined by statute. The court decision determines the terms and conditions of the easement and the indemnity due to the landowner (whose proprietary rights are limited by the easement)”. Similar rules are provided for specific easements and servitudes (such as rights of way for aqueducts passing on another landowner’s property: art. 1038 and 1039 CC).

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 40 Pursuant to art. 844 CC, landowners may not prevent neighbours from discharging smoke, heat, exhalations, noise and other emissions as long as they do not go beyond ordinary tolerability, considering the location. Authorities shall apply this rule by balancing proprietary interests with production demands. Priority of a certain customary practice may be taken into consideration. According to this rule, “tolerable” emissions are permitted whilst intolerable emissions may be barred by authorities by means of an injunctive relief, unless production demands require not barring them completely. In all such cases, if reducing emissions results in an excessive burden (i.e. so as to paralyse the discharging company’s business), emissions will not be barred and the neighbouring victim will be entitled to an indemnity calculated on the basis of the value of its land. It shall be noted that the action pursuant to art. 844 CC may be cumulated with the action pursuant to art. 2043 CC.

In the present case the emissions, for the purposes of art. 844 CC, may be considered by a Court to be beyond ordinary tolerability even if they do not exceed the amounts stated in the permit.²⁴ For the purposes of the civil action, it is irrelevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure. 41

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

In this case B may be held strictly liable in tort pursuant to the provision in art. 2051 CC, according to which “every person is responsible for damage caused by things under his custody, unless the latter proves the occurrence of a fortuitous event”. As mentioned, liability for things under one’s custody is not based upon fault, but is a form of strict liability, so that the fact that B did not take certain protective measures in his workshop is irrelevant as long as all the requirements of art. 2051 CC are met. 42

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

Yes, the company can be held liable for the damage. Under Italian law, the company cannot raise the defence of lack of supervision by the regulatory agency. 43

b) Could the injured persons claim damages from the government agency?

Yes, under the circumstances the injured persons can claim damages from the government agency for lack of supervision. In some recent cases, Consob, the Italian security and exchange commission, was held civilly liable against the investors for the negligent exercise of its duties to supervise operators in the 44

²⁴ See Court of Cassation, III Criminal Session, 23 January 2004, judgment no. 9757; Court of Cassation, III Criminal Session, 19 March 2004, judgment no. 16728.

financial market.²⁵ The injured party bears the burden of proving all the constitutive elements of the tort, namely: wrongful damage, causal link and violation of the applicable negligence standard.

²⁵ See Tribunal of Rome, 26 July 2004, *Altavilla et al. v. Consob*, II Foro Italiano (Foro It.) 2005, I, 559; *Danno e Resp.* 2005, 767; Court of Appeals of Milan, 21 October 2003, *Stenghel et al. v. Consob et al.*, *Giurisprudenza Italiana* (Giur. It.) 2004, 800; *Società*, 2004, 52; Court of Cassation, I Session, 3 March 2001, judgment no. 3132, *Gatti et al. v. Consob, Banca Borsa e Titoli di Credito (BBTC)* 2002, II, 10; *Foro It.* 2001, I, 1139. On the jurisdictional aspects of such claim see: Court of Cassation, Joint Sessions, 2 May 2003, ordinance no. 6719.

TORT AND REGULATORY LAW IN THE NETHERLANDS

*Rob J.P. Kottenhagen and Pepita A. Kottenhagen-Edzes**

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

Administrative law regulates the relation between the government and citizens. Public law is both administrative law and penal law. Regulatory law covers general rules. 1

In principle, a breach of administrative law rules constitutes an unlawful act (art. 6:162 par. 2 Burgerlijk Wetboek (Civil Code, BW)). Art. 6:162 BW, par. 2 shows that a breach of an administrative law rule is not unlawful if there is a ground for justification (such as force majeure and self-defence).

Art. 6:162 BW reads as follows: 2

- 1) A person who commits an unlawful act toward another which can be imputed to him must repair the damage which the other person suffers as a consequence thereof.
- 2) Except where there is a ground for justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
- 3) An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.¹

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¹ Translation from *P.P.C. Haanappel/E. Mackaay*, New Netherlands Civil Code, Patrimonial Law (1990) 298.

3 So a successful claim under art. 6:162 BW must meet four requirements:

- unlawfulness
- imputability
- causality
- damage.

A fifth requirement – relativity – is discussed *infra* no. 23.

4 In legal doctrine and case law it is sometimes stated that a breach of administrative law as such does not constitute a tort. According to this opinion, a breach of an administrative law rule constitutes a tort only when there is also a breach of a duty of care. However, according to current law, a violation of a statutory duty is an unlawful act unless there is a ground for justification.² If a person acts in compliance with a statutory duty, his conduct can still be unlawful because of the violation of a right or a breach of a duty of care.

5 As will appear from the answers to the following questions, in Dutch law the violation of administrative law rules is important in particular in the field of unlawfulness and causation.

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

6 No, there are no such constitutional boundaries or guidelines according to Dutch law.

3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

7 Apart from statutory provisions issued by the Dutch formal legislator, liability in tort can also be based on the infringement of other generally binding regulations such as provisions of EC law that have a direct effect, as well as regulations issued by provincial and municipal authorities. Infringement of the conditions attached to a licence (e.g. a licence based on an environmental law) may also constitute an unlawful act.³

² Asser-Hartkamp (2006) 4 III, no. 34, 54 and 55.

³ See Hoge Raad (Dutch Supreme Court, HR) 9 January 1981, *Nederlandse Jurisprudentie* (NJ) 1981, 227 and Asser-Hartkamp (fn. 2) 4 III, no. 34.

4. *What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?*

According to art. 120 of the Constitution, a judge is not allowed to try legislation (and treaties) to the Constitution. So the Government cannot be held liable for legislation in a formal sense. In this context, legislation is understood in a broad sense. The fact that a judge is not allowed to test to the Constitution applies to the process of passing,⁴ preserving and enforcing legislation in a formal sense.⁵

A judge is also not allowed to test legislation in a formal sense to the Charter of the Kingdom of the Netherlands and to general principles of justice like the principle of equality.⁶ The same is true for testing whether legislation is unlawful because it is in conflict with unwritten law (of nations).⁷

An exception to this rule exists when general principles of justice are laid down in provisions of treaties and decrees of organizations of international law which are binding for everybody. According to art. 94 of the Constitution, such a provision will not be enforced.⁸ In such a case it is possible that legislation in a formal sense is also unlawful and that the Government has to pay damages.⁹

For the Government to be held liable for legislation in defiance of European law the rules of this special law have to be applied, e.g., when European regulation is not, too late or wrongly implemented.

General binding regulations which are not legislation in a formal sense can sooner lead to tortious liability of Government agencies which enacted regulations,¹⁰ e.g., Orders in Council and provincial and municipal regulations. These regulations and the way they are passed, preserved and enforced can be tortious because they are in defiance of higher regulations such as legislation in a formal sense. These lower regulations can also be tortious because they are in violation of (unwritten) general principles of justice.

So a judge can decide whether a Government agency reasonably cannot pass a certain regulation when all issues concerning it are weighed against each

⁴ E.g. when a certain party is not consulted, HR 19 November 1999, NJ 2000, 160.

⁵ Kluwer, *Onrechtmatige daad V (losbladig)*, comment 230.

⁶ Kluwer (fn. 5) comment 231 and 232.

⁷ Kluwer (fn. 5) comment 238.

⁸ Kluwer (fn. 5) comment 239 and 240.

⁹ See Asser-Hartkamp (fn. 2) 4 III, no. 290g.

¹⁰ The text on this topic is taken from Asser-Hartkamp (fn. 2) 4 III, no. 290h ff.

other.¹¹ Other general principles of justice are, e.g., the principles of reliance and certainty of the law.

- 14 Unlawfulness of such a regulation may lead to tortious liability of the Government agency in case. Another possibility is that the judge issues a prohibition to enforce the regulation.
- 15 Administrative decisions can also be tortious¹² and they can be set aside by the administrative court, e.g., when such an administrative decision is unauthorized, is not well prepared or motivated or does not conform to legal requirements.¹³ In case such a decision is set aside, an aggrieved person can claim damages. Damages can be claimed in the same procedure at the administrative court (art. 8:73 Algemene wet bestuursrecht (Statute on Administrative Law, AWB)) or in a tort claim at a civil court.
- 16 Of course there must be causality between the unlawful decision and the damage and the tort must be subject to the scope of the rule principle (see supra no. 3 and infra no. 23).
- 17 In some cases one can claim damages when the decision is not set aside by an administrative court (art. 8:73 AWB).

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

- 18 No, such rules are not regarded as comprehensive; tort claims are not excluded.
- 19 If in a criminal procedure it is proven that a certain fact has been committed and a sentence has been passed, this is compelling proof in civil procedure (art. 151 Code of Civil Procedure). Unless prohibited by a specific law, counter proof is still possible (art. 151 par. 2 Code of Civil Procedure). However, the proven facts do not necessarily mean that a tort has been committed. It is required that the proven facts must be sufficient to constitute a tort. If the facts that have been proven in a criminal procedure do not constitute a tort according to civil law, it is still possible in civil litigation to prove that a tort has been committed.
- 20 It is sufficient that the facts in question have been proven in criminal procedure. It is not necessary for the suspect to be punished.

¹¹ HR 16 May 1986, NJ 1987, 251.

¹² Decisions of Government agencies in individual cases, see art. 1:3 Algemene wet bestuursrecht (Statute on Administrative Law, AWB).

¹³ Kluwer (fn. 5) comment 192.

If the criminal sentence does not constitute compelling evidence (e.g. because of the fact that not all the requirements of art. 151 Code of Civil Procedure have been met), the criminal sentence can still have consequences for the argumentation in the civil procedure, for example, the judge might presume specific facts as occurred (*res ipsa loquitur*). 21

6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

There are no specific conditions. The protective purpose of a rule is formulated by the legislator and is laid down in the particular regulation itself. 22

An act or omission in breach of an administrative law rule may constitute an unlawful act. However the conclusion whether or not a breach of an administrative law rule constitutes an unlawful act in a particular case depends on the outcome of the appliance of the scope of the rule principle. This principle is laid down in art. 6:163 BW: 23

“There is no obligation to repair damage when the violated norm does not have as its purpose the protection from damage such as that suffered by the victim.”¹⁴ 24

This article stipulates that even if an unlawful act has been committed as defined in art. 6:162 BW (see *supra* no. 2), the claim can still be disallowed: 25

- a) if the breached standard does not envisage protection of the plaintiff (the victim), or
- b) if the type of damage or the way in which damage arose falls outside the scope of that protection.

Administrative law formulates the purpose of the regulation itself. In a tort case, however, the judge determines whether the purpose of the rule is to protect the victim. This is inherent to the open norm of art. 6:163 BW. This means that the protective purpose of an administrative rule in a tort case is determined by both administrative law and tort law. 26

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

If a legal entity fails to comply with an administrative rule, the legal entity itself is responsible for this failure. Under certain circumstances, individuals 27

¹⁴ Translation from *Haanappel/Mackaay* (fn. 1) 299.

who led the behaviour of others or who gave instructions to another to act in a certain way can be held liable in criminal law; see art. 51 Penal Code.

- 28 If an individual within the organisation has to bear criminal liability, this does not mean that there is also liability in tort; see supra no. 20 and 21.
- 29 If an individual of a legal entity can be held liable in tort, the plaintiff can hold the individual liable and claim in tort according to art. 6:162 BW. However, the employer can also be held liable (vicarious liability) in tort according to art. 6:170 par. 1 BW. Therefore the plaintiff has a choice. If the employee is held liable, he can have recourse to his employer unless he acted intentionally or consciously recklessly; see art. 6:170 par. 3 BW.
- 30 When the employer is held liable, he can have recourse to his employee only if the employee acted intentionally or consciously recklessly.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

- 31 Yes, legal entities can be subject to an administrative liability, e.g., if the legal entity does not meet the conditions of a statute or even a licence, the legal entity can be forced to pay a penalty or even to close the entity.
- 32 If there are consequences under private law depends on whether the entity can be held liable in tort or not.
- 33 As regards vicarious liability, see supra no. 29.

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

- The importance of safety regulations and provisions aiming at environmental protection in tort law
- 34 Safety regulations and provisions aiming at environmental protection are relatively important in Dutch tort law,¹⁵ especially when they concern safety regulations that aim to protect third parties from damage. Regulations for en-

¹⁵ The research in this paper concerns especially liability for damage as a result of death or injury of the victim. Nevertheless this may be also true for other damage such as damage to property. Cf. Asser-Hartkamp (2005) 4 I, no. 434 and 434a.

vironmental protection do not always have this specific goal, e.g., because they exclusively aim at the protection of the environment as such. Unless mentioned otherwise, in this text we will refer to safety regulations in the meaning as defined above. Whether in a certain case such a safety regulation is applicable will be judged by the court.

- Unlawfulness

In case of acting or omitting to act in breach of statutory regulations (safety norms or environmental norms), this can be of importance for the court when deciding on the issue of unlawfulness; see generally supra no. 4. 35

- Causality

In some cases when specific safety norms are violated, according to the Hoge Raad (see infra no. 37), causality in the sense of a *conditio sine qua non* between the unlawful act (the violation of the norm) and damage is assumed.¹⁶ The victim does not have to prove causality (as he normally has to, see art. 150 Code of Civil Procedure). There is a shift of the burden of proof: now the defendant has to prove that damage would also have occurred if he had not violated the safety norm. 36

For these cases, the Hoge Raad has formulated stringent requirements¹⁷ for the qualification of a norm as a safety norm.¹⁸ The first requirement is that there must be a violation of a norm which seeks to prevent a specific danger that would cause damage. The second requirement is that one who pleads the violation of a safety norm has to convince the court that the specific danger the norm aims to protect has been realized. 37

The rule that a *specific* norm must have been violated means that the violation of a general duty of care is not sufficient to shift the burden of proof in regard to causality. This is true, e.g., for the norm laid down in art. 7:453 BW: a medical assistant has to act as a good and competent medical assistant would act. When the assistant acts in violation of this norm, causality between conduct and damage is not presumed and there is no shift of the burden of proof. On the other hand, acting in defiance of a certain medical protocol indeed can shift the burden of proof.¹⁹ This is also true for the violation of the norm that a driver who drank too much alcohol is not allowed to drive a car: if he still does so and he causes an accident, causality is assumed between the violation 38

¹⁶ In this context we talk of the violation of written rules. The special meaning of the violation of safety norms is, according to Dutch law, also applicable to unwritten norms.

¹⁷ In this paper we will refer to recent case law of the Hoge Raad. In former case law it was easier to consider a norm as a safety norm.

¹⁸ *C.H. van Dijk*, Omkeringsregel: HR 19 March 2004, NJ 2004, 307 and HR 9 April 2004, NJ 2004, 308, *Tijdschrift voor vergoeding personenschade* 2004, 2, 63 ff.

¹⁹ HR 19 March 2004, NJ 2004, 307.

of the norm and the accident. The aim of this specific norm is to prevent traffic accidents.²⁰

- 39 The rule that the victim has to make plausible that the specific danger which the norm aims to protect has been realized means that, in case the damage arose due to a cause other than, for example a traffic accident, the victim has to prove the damage was caused by the accident.²¹ This means also that in cases where damage (e.g. an illness) might be the result of the environment as a consequence of the violation of a safety norm or the result of other causes as well, there is no shift of the burden of proof. In such cases it is not possible to make plausible that the impairment of the environment caused the damage.²²
- 40 If a shift of the burden of proof cannot be based on the violation of a safety norm, there may be other arguments to do so.²³ A discussion of this topic however is beyond the scope of this paper.
- 41 The violation of a safety norm can also have consequences for the extent to which damages will be imputed to the tortfeasor. This is because of the fact that, according to Dutch law, the extent of the duty to pay damages is, according to art. 6:98 BW, also defined by the nature of the liability and by the nature of the damage:
- 42 Reparation can only be claimed for damage which is related to the event giving rise to the liability of the debtor in such a fashion that the damage, also taking into account its nature and that of the liability, can be imputed to the debtor as a result of this event.²⁴
- 43 The violation of a safety norm constitutes a specific form of liability in the sense that the violated norm aims to protect third parties from damage. Therefore the violation of a safety norm may lead to the result that the tortfeasor is obliged to compensate damage that he would possibly not have had to compensate in other cases, such as damage that is an unlikely result of an unlawful act.²⁵

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

- 44 Both tort law and regulatory law rules have the same goal: protection of damage. Regulatory law rules are general in character: damage has not yet occurred and there is no direct threat that damage will occur. In tort law one can compensate damage or try to prevent damage by a court injunction or interdiction.

²⁰ HR 8 April 2005, Rechtspraak van de Week (RvdW) 2005, 52.

²¹ HR 9 April 2004, NJ 2004, 308.

²² Asser-Hartkamp (fn. 15) 4 I, no. 436e.

²³ This appears from, e.g., HR 19 March 2004, NJ 2004, 307.

²⁴ Translation from *Haanappel/Mackaay* (fn. 1) 268.

²⁵ See Asser-Hartkamp (fn. 15) 4 I, no. 434.

Nevertheless an individual can make an appeal to regulatory law rules, e.g., when a concern operates without a licence or when a concern operates in defiance of a safety rule. It is therefore possible that someone refers to the conduct of another in defiance of safety rules. In such a case one may ask the government to uphold the rule. In this sense administrative rules are individualised. 45

On the other hand, it is possible to use tort law for general goals, e.g., when a pressure group uses tort law for the protection of the interest they wish to protect; see art. 3:305a BW. 46

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

When safety rules or rules for the protection of the environment are created, it will be clear that these rules are regarded as statutes with a protective purpose. 47

Individuals are covered by the protective purpose of these rules; see supra no. 23. In tort law individuals are protected when they fall within the scope of the rule principle of art. 6:163 BW; see supra no. 23. 48

In general one can say that a breach of such rules constitutes a wrongful act; see supra no. 23. 49

The violation of safety norms and norms for the protection of the environment generally does not bring about a strict liability. Nevertheless strict liability is possible in several situations. However, this form of strict liability is not based on the infringement of safety norms or environmental laws but is linked to certain factual circumstances such as selling a defective product or the realisation of a danger that is inherent to a substance or causing a traffic accident with a car. 50

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

According to Dutch law, there is no duty to insure oneself for damage as a result of the violation of safety norms or environmental norms. However, compulsory insurance for damage incurred by third parties is possible when damage that is caused by certain factual circumstances apart from the violation of safety norms or environmental norms is concerned. A good example is the WAM (Liability of Motor Vehicles Act). This insurance is addressed to the protection of someone who has been harmed by motorized traffic. For a right of payment based on the WAM, the defiance of a safety norm is not a requirement per se.²⁶ 51

²⁶ Kluwer, *Onrechtmatige Daad* III.9, comment 345.

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

52 See supra no. 1 and 34.

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

53 A breach of such a rule constitutes an unlawful act. There are no additional requirements, such as the requirement that the tortfeasor violated a duty of care as well. For liability in tort, it is necessary that the unlawful act can be imputed to the tortfeasor (see supra no. 2). In principle, unlawfulness and imputability are separated from each other. The plaintiff has to claim and if necessary to prove both unlawfulness and imputability. When the unlawful conduct or omission is established, in practice fault is often (but not always) assumed. If this is the case, the defendant has to prove that there was no fault. The judge can impose on the defendant an aggravated duty to motivate in relation to the absence of fault. If the defendant succeeds in doing so, the plaintiff can prove that there still is fault. This manner of reasoning is (amongst others) used in cases of violation of safety norms.²⁷

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

54 See supra no. 22.

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

55 See supra no. 4. In legal doctrine and case law it is often stated that a breach of administrative law as such constitutes a tort. According to this opinion, a breach of an administrative law rule constitutes a tort only when there is also a breach of a duty of care.

56 Acting in defiance of law rules is unlawful as such and, therefore, there is no reason for the tortfeasor to prove that damage would also have occurred if he had acted in compliance with the law rules. Nevertheless, in some cases acting in violation of regulations has been assumed not to be unlawful.²⁸

²⁷ See also Kluwer, *Onrechtmatige Daad I (Jansen)* art. 6:162 par. 3, comment 57 ff., especially comment 59.1.

²⁸ See Asser-Hartkamp (fn. 2) 4 III, no. 34, 54 and 55.

5. *What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?*

See *supra* no. 40 and 53.

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6. *Can a breach of an administrative law rule result in a claim for punitive damages?*

Punitive damages are not known in Dutch law.

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B. Acting in Compliance with Administrative Law Rules

1. *Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the “regulatory permit defence”?*

The “regulatory permit defence” is not known in Dutch law. When someone acts in compliance with the rules of administrative law, in tort law both compensation for damage or for an injunction are still possible, e.g., when there is a breach of a duty of care. The leading case on this topic dates from 1972.²⁹ The facts are as follows. The plaintiff is the owner of a fruit orchard. The defendant was granted a license to dump household refuse in a small lake near the orchard. This activity attracted many birds which destroyed the plaintiff's orchard. According to the Supreme Court, acting within the limits of the provisions of a license as such is no protection to tortious liability. The influence of a license on tortious liability depends on three factors:

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- the nature of the license,
- the interest that is pursued by the license and
- the circumstances of the particular case.

However, there are exceptions to this general rule. When a statutory regulation is focused on certain concrete situations, the defence that one is acting in compliance with this regulation will be accepted more easily.³⁰

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In the Covra case³¹ there was also an exception formulated to the general rule as mentioned above. Covra was issued with a license by the Ministry of Economic Affairs which was based on the Nuclear Energy Act for the Storage of Nuclear Waste. They had to follow and keep within the limits of certain terms. A foundation for the protection of interests of the environment initiated a procedure against the Ministry in an administrative court. In their opinion the license was unlawfully granted.

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²⁹ HR 10 March 1972, NJ 1972, 278 (*Lekkerkerker – Vermeulen*).

³⁰ C.C. van Dam, *Zorgvuldigheidsnorm en aansprakelijkheid* (1989) 97.

³¹ HR 17 January 1997, NJ 1998, 656 (*Covra – Miljoenen zijn tegen*).

According to the administrative court, however, the license was not granted unlawfully.

The foundation then started a tort action, not against the Ministry but against the licensee, Covra and in a civil court. They stated that Covra would act tortiously if they did not adhere to the more stringent terms in the license.

The civil division of the Dutch Supreme Court ruled, however, that the common interests were weighed already when the license was issued. Since the administrative court upheld the license, according to the Supreme Court, it is not possible to make more stringent demands on the license in civil law.

So the conclusion is that when a party acts in compliance with a license that, according to an administrative court, has not been unlawfully granted, the civil court will not judge the license again in a tortious setting in the context of common interests.

What the foundation actually tried to do was to use tort law for a general goal; in this case for the protection of the interest they wish to protect, i.e. the environment. This possibility for a foundation to start an action based on common interests as such is enacted now in the Civil Code in art. 3:305a. According to this article, an association or foundation with full legal capacity is entitled to an action for the purpose of protecting the interests similar in kind which are held by other persons, insofar as it promotes these interests according to its articles of association. Such an action, however, cannot relate to money damages.

Therefore, in Dutch law, in this context a difference is made between common interests and individual interests. The conclusion is that even if an administrative court finds that a license has not been unlawfully granted, for an individual it is still possible to start an action against the licensee in tort. However, a civil court will not judge on the weighing of common interests when this has already been done by an administrative judge. In this situation a claim based on tort will not be honoured.

2. Can the general duty of care go beyond these rules?

62 Yes, see *supra* no. 4.

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

63 Yes, see *supra* no. 53.

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

As far as we know there are no other sources. However, there is a possibility to add a civil claim in a criminal procedure, see art. 51 Code of Criminal Procedure. According to this article, someone who suffers damage as a result of a criminal act can include a claim for damages in the criminal procedure. The damage must have been caused directly by the criminal act. An action is also possible by relatives when the direct victim is deceased. This of course is only possible if the defiance of the administrative rule is also a criminal act as such.

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2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

Art. 49 of the Wet op de ruimtelijke ordening (Town and Country Planning Act) has to be mentioned first – especially as it has recently been modified³² – as being most appropriate to address the question. When damage occurs as a result of a decision concerning a local plan, the mayor and aldermen have to pay damages when it is not reasonable that this damage is for account of the victim. This can lead, e.g., to the depreciation of a house when, according to a new local plan, houses may be built while, according to a former plan, this was not possible. This can lead to a devaluation of the privacy of the already existing houses. There is no right to damages when compensation would be available by some other means.

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Some decisions on local plans are made by the government on request of a third party, e.g., when an exemption from a local plan is allowed for the granting of a building licence which itself violates the local plan. According to art. 49a of the Wet op de ruimtelijke ordening, there is a possibility that the government agrees with the petitioner that damage that will be suffered by third parties will be paid by him, the petitioner.³³ When the petitioner makes a contract with the government, he is considered as an interested party of the decision the mayor and aldermen will make regarding the request for damages.³⁴ This means the plaintiff can try to exercise some influence either on the adjudication of damages or on the amount of damages.

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³² Staatsblad 2005, 305.

³³ This article is included in the Act, after the Hoge Raad decided (HR 2 May 2003, Landelijke Jurisprudentie Nummers (LJN) AF2848). Art. 49a concerns requests to modify local plans or requests for an exemption of certain terms of a local plan.

³⁴ Art. 49a par. 2 Wet op de ruimtelijke ordening.

- 67 This construction is an example of a situation in which the government can infringe someone's rights, while at the same time there is a possibility to pay damages (e.g. the infringement of proprietary rights which leads to pure economic loss).
- 68 In several other regulations it is also possible to claim damages if an administrative rule permits an infringement of interests of another person. However, both the provisions for compensation and for the requirements differ in these regulations. Therefore there is no general answer to the question. Most of these regulations relate to the infringement of the government itself and not to third parties who, in compliance with an administrative rule, infringe the right of someone else.
- 69 A good example is the *Onteigeningswet* (Compulsory Purchase Act): the government has to pay damages when the procurement of land is necessary to reach a public goal.
- 70 In this context several environmental Acts can also be mentioned. According to art. 73 *Wet bodembescherming* (Protection of Land Act), one can claim damages when there is a duty to accept that there will be research undertaken to determine whether the land of which one is the rightful claimant has been polluted. There are no special requirements. According to art. 74 par. 3 *Wet bodembescherming*, one has no right to damages if the damage can be imputed to this person or when this person will be unjustly enriched if he is awarded damages.
- 71 According to art. 60 *Wet op de luchtverontreiniging* (Air Pollution Act), a rightful claimant can claim damages when the government has to make use of real property to determine the pollution of the air.
- 72 A last example is art. 15.20 *Wet milieubeheer* (Environmental Conservation Act), although in this context there is no infringement of someone's rights: when damage occurs as a result of an administrative decision, damages can be claimed, e.g., when there is an administrative decision relating to the application of a certain environmental license or to the terms that are stated in the environmental licence. This is also true when, previously, an environmental licence was not necessary, but according to new regulations it is or in the case of new regulations for the protection of the environment.
- 73 Apart from these rather specific Acts, there is also a more general right to compensation of losses which arise as a result of action taken by the government. In these cases damages have to be paid when someone suffers or will suffer damage and it is not reasonable that the damage will be for his account. When the government does not pay damages, the administrative

decision can be repealed by the administrative court.³⁵ It is also possible to claim damages as a result of action taken by the government in civil court.³⁶

For damage as a result of air pollution, the Fonds luchtverontreiniging (Pollution of the Air Fund) has to be mentioned. According to this Fund, there is a right to compensation of damage which is the result of air pollution and which is caused by unknown originators.³⁷ Because in these cases the originators are unknown, it is possible that damage can occur – despite the existence of a licence – because it was not foreseen.

Finally, we mention art. 6:168 BW:

- 1) The judge may reject an action to obtain an order prohibiting unlawful conduct on the ground that such conduct should be tolerated for reasons of important societal interests. The victim retains his right to reparation of damage according to this title.
- 2) In the case referred to in art. 170, the servant is not liable for this damage.
- 3) The judge may still issue an order prohibiting the conduct where a condemnation to pay damages or to furnish security is not complied with.³⁸

To a certain extent this article is also relevant for answering the question, because, according to Dutch law, conduct in compliance with an administrative license can be unlawful in civil law. Although the judge will not prohibit this conduct, the victim retains his right to reparation of damage. In this context, conduct is unlawful when there is a violation of a right or a breach of a duty of care (see *supra* no. 4).

³⁵ See the leading cases of the Judicial Division of the Council of State 12 January 1982, Administratiefrechtelijke Beslissingen (AB) 1982, 299 (*Paul Krugerbrug*) and 22 November 1983, AB 1984, 154 (*Paul Krugerbrug II*). See on recent case law *K.J. de Graaf/A.T. Marseille*, De werkelijke en wenselijke rechtsmachtverdeling bij aansprakelijkheid voor publiekrechtelijk handelen, *Nederlands Juristenblad* (NJB) 2004, 779–784.

³⁶ HR 18 January 1991, NJ 1992, 638 (*Leffers – De Staat*). More recently, e.g., HR 3 April 1998, AB 1998, 256 (*Meiland – De Staat*) and HR 30 March 2001, RvdW 2001, 71. See on this topic *P.C. Knijp*, Civielrechtelijke aansprakelijkheid van de overheid jegens derden voor toepassing van strafvorderlijke dwangmiddelen, *Nieuwsbrief BW* 2001, 91–93.

³⁷ Art. 15.24 ff. Wet milieubeheer.

³⁸ Translation from *Haanappel/Mackaay* (fn. 1) 301.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

77 The farmer can claim damages from the plant owner in tort.³⁹ Whether or not the government regulations are updated, the farmer has a duty of care to operate within certain limits.

78 In this kind of case in doctrinal writing the government is assumed as a “peripheral tortfeasor”.⁴⁰ There is, as yet, no civil litigation on the question whether the government can be held liable when regulations have not been updated or when there is a lack of regulations. In question I.4 is observed, that the judge is not allowed to try legislation in a formal sense to the Constitution and the Charter of the Kingdom of the Netherlands. This being so, according to Van Boom and Giesen, this must also be true when there is, as a result of omitting to create legislation, no legislation at all. However, when there is absolutely no justification for not creating legislation, it should be possible to hold lower regulation agencies liable.⁴¹

79 We agree on this point of view.

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

80 Of course B can always be held liable in tort in general when the injured party meets all the requirements of art. 6:162 BW (supra no. 2) and 6:163 BW (supra no. 23). When the regulatory provisions as such do not apply, B cannot be held liable in tort for violating a statutory norm.

³⁹ *W.H. van Boom/I. Giesen*, *Civielrechtelijke overheidsaansprakelijk voor het niet voorkomen van gezondheidsschade door rampen*, NJB 2001, 1675–1685.

⁴⁰ *Van Boom/Giesen*, NJB 2001, 1676.

⁴¹ *Van Boom/Giesen*, NJB 2001, 1678 and 1679.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

The injured persons can hold the company liable for damage in tort; art. 6:162 and 6:163 BW; see supra no. 2 and 23. However, it is not possible for the company to raise a defence of lack of supervision by the regulatory agent. 81

b) Could the injured persons claim damages from the government agency?

In only one case of the Hoge Raad⁴² is this issue dealt with although the facts were somewhat different. In 1983 there was a fire safety control in the restaurant, Boeddha. In 1988 there was a fire and visitors were both killed and injured. However, according to the court, there was no duty for the municipality to undertake extra controls between 1983 and 1988 and so there was no liability. 82

In the case law of the lower courts there are a few examples in which injured persons could claim compensation from a government agency.⁴³ In all these cases liability was based on the duty of care principle,⁴⁴ but this is only pos- 83

⁴² HR 22 June 2001, LJN AB2237 (*Restaurant "Boeddha"*).

⁴³ Recently on this topic *C.L.G.F.H. Albers*, *Overheidsaansprakelijkheid voor gebrekkig toezicht en ontoereikende handhaving. De geest uit de fles?* Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2005, 482–496.

⁴⁴ See Court of Appeal Amsterdam 9 August 1990, *Bouwrecht* (BR) 1991, 308 (*Ruurlo*). In this case, a building license was applied for the restoring of a hotel in an old farmhouse. A civil servant noticed that there was a very dangerous situation: one could easily fall out of the window of the attic, because it had not been built in conformity with the provisions of the license. However, he did not report this to the mayor and aldermen. A few months later, a 14-year-old girl fell out of the window and was seriously injured. According to the Court of Amsterdam, now there is tortious liability for lack of inspection and control. See also District Court of Utrecht 26 August 2003, *Jurisprudentie Bestuursrecht* (JB) 2003/304 (*Oudewater*). In this case one started building a house without an adequate building license. Plaintiffs were neighbours and they went to civil servants several times to voice their concerns on this project. There was a risk of subsidence of their house or of other forms of damage. Damage did in fact occur and the municipality was held liable in tort by the Court of Utrecht, because of serious shortcomings. See finally the District Court of Rotterdam 26 May 2004, *Nederlandse Juridische Feitenrechtspraak* (NJF) 2004, 508 (*Caldic Chemie BV – Rotterdam*). There is liability only in case of a very severe shortcoming of regulation at all, intentional or wrong advice and severe shortcomings in controlling. According to the Court of The Hague in 2003, e.g., this was not the case in the fireworks disaster and there was no liability in tort for the government. Also in all other cases in this field, liability in tort is denied.

sible in exceptional circumstances. If the administrative agency does not use its competence to maintain orders, this failure to do so is not unlawful as such. There is liability only in case of a very severe shortcoming, intentional or wrong advice and severe shortcomings in supervising. Normally the competence to maintain is assumed to be as discretionary for the administrative agency.

- 84 In one case the claim was denied.⁴⁵ According to this court decision, toleration and legalisation of dangerous activities in a residential district by the municipality is not unlawful. This case law is different from case law of administrative courts; according to these courts, in principle, there is a duty to maintain orders.⁴⁶
- 85 There is also an important verdict of the European Court of Human Rights which contradicts the opinion of the District Court of The Hague.⁴⁷ According to the European Court, the violation of art. 2 of the European Convention on Human Rights (the right to life) as a result of insufficient control or not maintaining orders may lead to liability of the administrative agency.⁴⁸

⁴⁵ District Court of The Hague 24 December 2003, JB 2004/69 (*Vuurwerkkramp Enschedé*).

⁴⁶ *Albers*, NTBR 2005, 488 ff.

⁴⁷ European Court of Human Rights 18 June 2002, European Human Right Cases (EHRC) 2002, 64.

⁴⁸ See *Albers*, NTBR 2005, 486 and *T. Barkhuysen/M.L. van Emmerik*, *Europese grenzen aan het gedogen van gevaarlijke situaties en aan beperkingen van overheidsaansprakelijkheid bij ongelukken en rampen*, *Overheid en Aansprakelijkheid* (2003), 109–121.

TORT AND REGULATORY LAW IN NORWAY

*Bjarte Askeland**

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

The impact of administrative law rules on tort law in Norway is substantial. Firstly, some of the Acts of administrative law comprise rules of strict liability to ensure that the safety regulations elsewhere in the Act are followed. Such Acts are, for example, Forurensningsloven 13 March 1981 no. 6 (the Norwegian Act on Pollution, *forurl.*) and Tivoliloven 7 June 1991 no. 24 (the Norwegian Act on Funfairs, *tivolil.*). In these areas the statutory provisions regulate the question of torts and compensation. Secondly, the administrative rules will have great importance when deciding whether or not an actor has acted in a faulty manner. The administrative law rules will often describe standard procedures, especially when it comes to safety regulations. This kind of description will often be applied by the judges as a sort of guideline when they are deciding whether the alleged tortfeasor acted in a faulty manner.

By public law I refer to all statutes or provisions that govern the relationship between the citizen and the state or other public authorities. By administrative law I refer to all statutes or provisions that say something about the competence of public authorities towards the citizen and all regulatory law. By regulatory law I refer to all statutes or provisions which state that a citizen has a duty towards the municipalities or that the citizen's activity is restrained or forbidden.

In general the interplay between administrative law rules and tort law could be described as two separate avenues which lead to different sets of sanctions. Whenever the judge follows the tort law avenue he will, however, partly take into consideration the administrative law rules as a premise or something that has to be considered in the overall picture of what has happened. The fact that the defendant has violated an administrative law rule will in general provide a good argument for stating that he has violated his duty of care. But this inference depends on the concrete facts of the case at hand. There is no automatic

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connection between administrative law and tort law. Hence it is more than conceivable that an actor violates an administrative law rule without violating his duty of care. This situation is particularly evident where the administrative law rules are very strict in their wording. One example is Arbeidsmiljøloven 4 February 1977 no. 4 (the Norwegian Act on General Working Conditions, aml.) § 8 subpar. 2 e): “[The employer must provide] that noise and vibrations are reduced to avoid unnecessary strain on the part of the employees.” Such provisions will in practical life not always be interpreted literally, at least as a legal basis for deeming the employer liable. It is therefore conceivable that the provision is violated without leading to liability for the employer.

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

- 3 There are no constitutional boundaries that will affect the interaction between administrative law and tort law.

3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

- 4 Apart from statutory provisions there are, above all, a large number of administrative regulations that are relevant to tort law. The Norwegian legal order has a tradition in delegating the formulation of the more concrete provisions to administrative organs, such as ministries or administrative agencies. If an official or private person violates regulations given through such delegation, the plaintiff will often have a strong case when claiming compensation for torts. The violation will often be a strong indication that the actor has been negligent.

4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

- 5 When an administrative law itself violates a statutory duty, there are no direct consequences. However, as far as any citizen in any way is affected by the violation, he can sue the public entity and in this way make it change its conduct. As far as the citizen has suffered an economic loss, he can sue the public entity for damages. He will have a strong case because there is a tradition of compensating citizens when public entities have acted beyond their legal competence.¹

¹ T. Eckhoff/E. Smith, *Forvaltningsrett* (Public administration law) (7th ed. 2004) 448–449.

If a person acts in compliance with a wrongful administration law, he is not automatically excluded from liability. The general rule that every legal subject must bear the consequences if they do not comply with the (binding) law (“error iuris semper nocet”) will apply also here. The only exemption from this rule is that one’s wrong belief regarding the legality of one’s actions is “excusable”. This will be the case where one cannot be blamed for one’s wrong belief. The fact that a citizen was misled by the administrative law may be a strong argument for saying that his behaviour in breach of a tort law standard was “excusable”. If the error concerning what is binding law is excusable, the error will be considered *not wrongful*. Hence the actor will be exonerated.

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The question of whether or not the actor’s mistaken behaviour is excusable is elaborated in the form of the question of negligence. If he ought to have known that the administrative law violated a statute, the actor will be liable, whereas an excusable ignorance of the mentioned fact will be considered as non-negligent behaviour or as no breach of duty. Consequently, if the actor knows that the administrative law violates a statute, he will be considered to have acted with intent. The question of excusability will then not arise at all and the actor will be liable.

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5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

The existence of criminal sanctions will not bar the plaintiff from suing in tort. This is another example of “the twin avenue approach” (see supra no. 1). A simple example is Vegtrafikkloven (the Norwegian Road Traffic Act, vtrl.), which in § 31 ff. sets criminal sanctions for violations of the rules on traffic conduct. Even though a driver is sentenced according to these rules, he can still face a tort law claim based on the same incident; for instance if he has damaged another car by reckless driving.

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In some areas Acts which comprise both criminal sanctions and tort law rules have been enacted. An example of this is forurl., which in § 78 sets a criminal sanction for polluting in a harmful way. In addition, the provision in forurl. § 55 constitutes a strict liability rule which applies to damage which meets the requirements of “pollution damage” (see forurl. § 53 subs. 2).

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6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

Norwegian law has no tradition of so-called “rules with a protective purpose”. Both the term and the notion are unknown under Norwegian law. But the administrative laws will nevertheless from time to time aim at protecting certain

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interests. These interests are often named and elaborated in the preparatory works of administrative acts.

- 11 The fact that a rule aims at protecting a certain interest can, in principle, be relevant to the question of liability. It is conceivable that the judge, when deciding whether a tortious act has taken place, will put weight on whether the actor has violated an administrative rule with a protective purpose. An example is the rule in Barnehaeloven 5 May 1995 no. 19 (the Norwegian Kindergarten Act) § 3 subpar. 1 second sent.: “Children shall have the possibility of varied activities in a safe environment”. If a child in a kindergarten is injured because of unsafe physical arrangements in the kindergarten, the mentioned rule will reinforce arguments supporting the claim that the owner of the kindergarten has acted in a faulty manner.
- 12 Often the administrative rules will, however, apply automatically, and there will be no need to examine whether a rule has a certain protective purpose or not. This is often the situation where the liability rules are taken into the same act as the rules with a protective purpose. An example would be that a person violates a rule with the purpose of protecting the environment, such as forurl. § 7 (“No-one must have, do or initiate anything that may cause a danger of pollution [...]”). He will then be liable according to the strict liability rule in forurl. § 59.

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?
- 13 Any employee who works in the legal entity can (in principle) be responsible for the legal entity’s failure to comply with the rule, provided that the employee was the individual in a position to assure that rules were followed. If the act or omission of the employee amounts to negligence, he can be held personally liable for any damage that stems from or is causally linked to the violation of the administrative rule.
- 14 The legal entity will in most cases itself be responsible via the rule of vicarious liability. The general rule in Skadeserstatningsloven 13 June 1969 no. 26 (the Norwegian Compensation for Damage Act, skl.) § 2-1 will apply, provided that the employee caused damage within the course of his employment. Since we are now elaborating situations where the employee has caused damage connected to his employer’s violation of administrative rules, this requirement almost automatically will be met. When it comes to fines that are imposed on the employee due to his or her lack of complying with administrative law rules, the employer will *not* be legally responsible.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

Under Norwegian law it is not common to establish special rules of administrative liability. One example is, however, *forurl* § 73 which gives the “*forurensningsmyndigheten*” (the public authorities that control pollution) a legal basis for fining entities that do not comply with provisions set in *forurl*. In addition many regulatory Acts comprise the legal basis for fining legal entities by trial. An example is *forurl* § 78 which is the legal basis for fining entities as a penalty for not complying with the statutory provisions of *forurl*. The fact that an entity is fined by public authorities by the court or administratively does not affect the question of civil liability. This is a point where “the twin avenue approach” mentioned *supra* no. 1 is appropriate. When it comes to ordinary civil liability, a public entity can be sued for damages like any other private subject. The legal subject that answers to the courts will either be the state or the local authority. The subdivisions of the state will often be addressed as for instance “the state by the Department of Defence”. The same tort law rules apply on principle to the public entity, except for a certain rule concerning which standard of conduct the citizen is entitled to expect from public entities, see *infra* no. 16.

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Under Norwegian law a special rule governing the question of state liability and liability for other public entities such as local authorities, county councils or municipalities, has been developed. This special rule applies when public entities engage in an activity regarding “control, supervision, service or assistance”. When performing such activities, the actors that act on behalf of the public entities are subject to a lenient standard of conduct. The public entity will not be liable unless there is shown conduct that to a *substantial degree* departs from the standard prudent behaviour. The content of this rule is, in a nutshell, that the public bodies, in the performance of the said activities, are not liable for ordinary negligence; a more qualified level of negligence is required.² The rationale of this rule is mainly that too rigid liability rules will lower the willingness of public bodies to engage in activities for the benefit of the citizen.

16

One should note that this special rule of liability only applies where dangers to the ordinary citizen are created by something outside the activities of the public entities. Accordingly, when a public entity engages in a “service” to lower the danger created by nature, the special rule of qualified negligence

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² For an extensive presentation and critical elaboration of this rule, see *B. Liisberg, Erstatningsansvaret for offentlig servicevirksomhet* (Liability for public service activity) (2005). See also *P. Lødrup, Erstatningsrett* (Tort Law) (5th ed. 2005) 161–166 and *N. Nygaard, Skade og ansvar* (Damage and Liability) (6th ed. 2007) 239–245.

will apply. One example is the decision in *Retstidende* (“The Times of Law” – periodical reporting Supreme Court cases, Rt.) 1970, 1152: A lighthouse was placed to guide ships trying to pass a narrow neck of sea in the north part of Norway called “Finnsnesrenna”. One of the light bulbs went out and it was not replaced for some time. Partly because of this a ship collided with the shore, and the shipowner subsequently sued the lighthouse system/the state of Norway claiming compensation for damage to the ship. The state was acquitted. The court stated that a requirement for liability was that the defendant’s act could be described as a “substantial departure” from the level of safety that the light system aimed at providing. This requirement was not met in the case, and the wording of the decision suggested that the judge was of the opinion that the crew of the ship should have acted more carefully, and that they should not have relied as greatly as they did on the guidance of the lighthouse.

- 18 The legal basis of the mentioned special rule is formally the general rule on vicarious liability enacted in skl. § 2-1. The public entity will accordingly be vicariously liable for any negligence or faulty behaviour performed by its employees. This will be the case whether or not the faulty behaviour falls within the frame of the special lenient standard of conduct/the requisite of qualified negligence.
- 19 In the preparatory works of this statute it is emphasized that the last part of the paragraph’s first sentence is aimed at public entities and the listed special areas.³ The paragraph reads that the liability depends on whether the actor who acts on behalf of the public entity has complied with demands that “reasonably can be expected” of the public service in question. When applying this standard, one should consider as relevant the level of the budget of the public entity. If this is low, the level of expectation is lowered to a proportionate extent.⁴ The more detailed content of this rule follows from a line of cases that have “mapped” the area that the rule covers.⁵

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

- 20 Statutory safety regulations are quite important for Norwegian tort law. Once it is proved that a defendant has violated such a rule, this violation will be the practical starting point for deciding whether the actor has violated his duty of

³ Odelstingsproposisjon (Norwegian Preparatorial Work for Enactment, Ot.prp) no. 48 (1965–66) Om lov om skadeserstatning i visse forhold (On the Act on Compensation), 34, 56–57, 59–62, 79.

⁴ Innstilling om lov om Det offentlige og andre arbeidsgiveres erstatningsansvar m.m., Innstilling II (Report on liability for public entities and other employers) (1964) 24–25.

⁵ Cf. particularly the decisions referred to in Rt. 1970, 1052; Rt. 1991, 164; Rt. 1992, 453 and Rt. 2000, 253.

care or not. In general an actor who has violated such a rule does not stand a good chance of being acquitted. Very often the safety regulation will function as a sort of concrete formulation of the duty of care for this or the other activity. This will sometimes take the form of formulated expectations. When it comes to product liability, a certain level of safety is expressed in *Produktansvarsløven* 23 December 1988 no. 104 (Product Liability Act, pal.) § 2-1: “[...] the safety that the user or the public in general reasonably can expect.” This safety level must be seen in the light of *Produktkontrolløven*, 11 June 1976 no. 79 (the Act on Product Control, *prodkttrl.*). This is a regulatory statute that secures that every product on the market is controlled. The fact that people are used to relying on the public control of products obviously will affect the expectations of safety. In general, regulatory law will have an impact on the consumers’ expectations. For instance, *Plan og bygningsloven* 14 June 1985 no. 77 (Act on Planning and Building, *planl.*) has many statutory provisions which safeguard that no dangerous buildings are constructed, cf. *inter alia* *planl.* § 80. The fact that the regulatory regime is relatively strict and that building processes are closely followed and controlled by municipal authorities affects and increases the general level of expectations when it comes to buildings.

An example of the interplay between regulatory law and tort law is the case referred to in Rt. 1984, 466. A train collided with four cows that belonged to four different farmers. The cows had been grazing near a gated level crossing when the gate was open. The cows had placed themselves on the railway track, and the train driver had been unable to stop in time. The farmers sued *Norges Statsbaner* (Norwegian Railroads, NSB) and claimed compensation for the loss of the cows. There was a state provision regulating NSB’s use of level crossings. This provision prescribed that the user of the level crossing (the owner of the land on which the crossing was located) had a duty to make sure that the gates were closed. The provision also made it compulsory for NSB to give the user a warning if he did not fulfil his duty to keep the gates shut. The railway personnel also had a duty to report the matter to the district manager. It was evident that the user had not fulfilled his duty, and it was also proved that the railway personnel had never given the user any warning or reported it to the district manager. Because of the fact that the railway personnel had not complied with their duties according to the state provision, the Supreme Court found the personnel to be at fault.

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Provisions aimed at environmental protection are also important, particularly within the field of “*forurensningsskade*” (“pollution damage”) (see *forurl.* § 53 and § 6). This term means any damage caused by “pollution”. Pollution is defined in § 6 as a) adding substance, liquid or gas to air, water or soil, b) vibrations and noise, c) light and other forms of radiation, d) manipulation of the temperature. Those who have caused such damage will be liable even if they have fulfilled their duty of care. Such kind of damage is in other words governed by strict liability, cf. *forurl.* § 55. In practice this rule will suspend the ordinary tort law rules because the plaintiff will easier get compensation by using the statutory rules of liability enacted in the Act on Pollution; *forurl.* § 55 and § 53.

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- 23 One might also add that the protection of the environment is regarded politically as a task of great importance. This is inter alia shown by the fact that a special provision that aims to safeguard the environment was implemented in the Norwegian Constitution in 1992 (Grunnloven 17 May 1814 (Constitution Act, G) § 110 lit. b) One can therefore expect that this political view in certain fields will have consequences for the interpretation of tort law rules, especially the concept of damage and the question of duty of care.

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

- 24 Tort and regulatory rules are to a great extent considered to have identical objectives because both kinds of rules will aim at preventing actors from harming other citizens or the environment.

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

- 25 As mentioned supra no. 10, under Norwegian law the term “rules with a protective purpose” is not used. The regulations and provisions are per se regarded as statutes with a protective purpose in the sense that they aim at the protection of certain interests that normally are specified in the preparatory works of the act in question. Individuals are naturally covered by such protective purposes. A breach of such rules will constitute a wrongful act in the sense that the act violates a part of the Norwegian legal order, cf. infra no. 30. But the consequence of this kind of wrongfulness will depend on the circumstances and the gravity of the violation. Sometimes a violation of a regulation will not have any consequence at all. A breach of regulatory rules will, in general, not lead to strict liability.

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 26 According to Norwegian law, there are not many activities that are considered sufficiently dangerous to make it necessary to enact rules that establish compulsory insurance. It is, however, very common to purchase liability insurance, and this fact reduces the need for compulsory insurance schemes. The most important existing compulsory liability insurance schemes are mentioned below.
- 27 Under Norwegian law the statutory schemes with regard to safety regulation and statutes that prescribe compulsory liability insurance in certain fields are enacted in two separate Acts. For instance, Arbeidsmiljøloven 4 February 1977 no. 4 (the Working Conditions Act, aml.) regulates the safety at work (cf. inter alia aml. § 7, 8). If in spite of this an accident happens, the liability of the

employer will be covered by compulsory liability insurance that is enacted in Yrkesskadeforsikringsloven 16 June 1989 no. 65 (the “Injury at work”, Insurance Act, ysfl.). The statute in § 3 of the Act reads that an employer is obliged to purchase insurance that covers all accidents at work. A similar system is introduced concerning the safety of traffic. On the one hand, Veitrafikkloven 18 June 1965 no. 4 (the Road Traffic Act, vtrl.) sets a number of safety rules and there are also a large number of administrative regulations given by the Ministry of Transport by delegation. On the other hand, Bilansvarsloven 3 February 1961 (the Motorised Vehicle Liability Act, bal.) § 15 prescribes a mandatory liability insurance for every car owner. The Act further describes the limits of the insurance coverage, etc.

Safety regulations concerning activities related to nuclear energy are enacted in Atomenergiloven 12 May 1972 no. 12 (the Norwegian Nuclear Energy Act, atoml.), cf. among other paragraphs: § 15. The statute in § 35 compels the entrepreneur who makes use of nuclear energy to insure himself against liability.

28

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

In the field of fault-based liability the breach of safety regulations will often play a significant role.⁶ The existence of such a rule will often increase the expectations towards the actor; if he does not act in compliance with the rule, it will be easier to infer that he acted negligently.⁷ Additionally, the rules will often clearly state what should have been done. Whenever the defendant has not acted in the manner described by the rule or regulation, he will more readily be deemed to be at fault. An example is a Norwegian case on ski-jumping, Rt. 1987, 1346. A ski-jumper’s club had violated rules on how a hill for ski-jumping was to be arranged. A ski-jumper fell in the upper part of the hill and was badly injured because he fell on a steel construction made for adjusting the tracks when there was much snow. The accident happened partly because there was little snow and the steel construction therefore was neither covered by snow nor secured in accordance with international provisions. National and international safety regulations connected to ski-jumping hills were of great importance in the course of deciding whether the club had acted negligently. The fact that the ski-jumper’s club had not complied with the provisions of how to secure the steel construction amounted to negligence on the part of the ski-jumper’s club.

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⁶ Lødrup (fn. 2) 130–135; Nygaard (fn. 2) 199–204.

⁷ Cf. Nygaard (fn. 2) 202–203.

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

30 This question depends on the definition of wrongfulness. In Norwegian doctrine the concept of wrongfulness means that behaviour violates the legal order, regardless of whether this in itself has any consequences. In this sense a breach of an administrative rule will constitute wrongfulness.⁸ However, this will not be sufficient for claiming compensation.⁹ In addition, the regular requirements of tort liability must be met; such as economic loss, fault and causation.

31 However, if one interprets wrongfulness as meaning tortious, faulty behaviour, the mere breach of such a rule is not enough to constitute wrongfulness. The plaintiff has additionally to prove that the defendant was at fault. The fact that there is a breach of safety regulations will, however, be a strong indication that there is a breach of duty.

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

32 The tortfeasor's liability depends to a certain extent on the protective purpose of the rule. The reason for this is that Supreme Court practice and theoretical commentators have developed a doctrine of "relevance" or "parallelism" concerning the relationship between a regulatory law rule and the rules of tort law. According to this doctrine, it is decisive for the question of liability whether or not the inflicted interest in question in fact was protected by the administrative regulation.¹⁰ One example is the decision referred to in Rt. 1957, 590: A 12-year-old boy had joined his father while the latter was working inside a train tunnel. The boy was hit by a train partly due to the fact that the train driver had not given a signal in accordance with the safety regulations given for the safety of workers. The boy sued the train company. The Supreme Court judges were divided in their opinions (3–2), but the majority of the judges denied compensation. The majority put weight on the fact that the safety regulations were given to protect workers, not other persons illegally located inside the tunnel. The decision is, however, criticised.¹¹

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

33 The tortfeasor is allowed to prove that he would also have caused the damage even if he had acted in compliance with the relevant rule.

⁸ Eckhoff/Smith (fn. 1) 449.

⁹ H.P. Graver, *Alminnelig forvaltningsrett* (General public administration law) (2nd ed. 2002) 508–509.

¹⁰ Nygaard (fn. 2) 204–205.

¹¹ Nygaard (fn. 2) 204.

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

Under Norwegian law there are no distinct rules concerning the relation between breach of administrative law rules and the allocation of the burden of proof. The general approach concerning the burden of proof in Norwegian law is that the judge must decide the case on the basis of all the pieces of evidence presented to him.¹² If one wants to obtain a certain legal position, one therefore must provide the evidence that supports the claim. In tort law the plaintiff must, accordingly, bear the burden of proof but the judge has the competence to reverse the burden of proof whenever he finds that there are good reasons to do so.

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An example is the case referred to supra no. 21. The defendant had argued that a warning or a notice would not have prevented the cows from being hit by the train. Accordingly, the defendant maintained that their fault was not a *conditio sine qua non* for the harm done. The court stated that one could not establish any proof that showed that the accident would have happened even if the railway had given the user a warning and a report to the district manager had been sent. The court added that it was also hard to estimate to which degree the risk of accidents would have been reduced by taking such measures. The court found that the burden of the said uncertainty, however, must be placed on the railway company, the party who had been guilty of blameworthy passivity.

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6. Can a breach of an administrative law rule result in a claim for punitive damages?

A breach of an administration law rule cannot result in a claim for punitive damages. Under Norwegian law, one generally does not allow compensation for punitive damage. There is, however, one rule that provides the plaintiff with a similar remedy cf. the special rule of compensation for non-economic damage in skl. § 3-5. Court practice and legal commentators commonly accept that this kind of compensation can be assessed in a manner which takes into consideration a punitive aspect.¹³ This statute applies, however, only when the breach in question can be regarded as an act of intent or an act of gross negligence.

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¹² Tvistemålsloven 13 August 1915 no. 5 (The Norwegian Litigation Act, tvml.) § 183.

¹³ Lødrup (fn. 2) 378; Nygaard (fn. 2) 169–171.

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the “regulatory permit defence”?

- 37 A tortfeasor can be held liable in tort even if he acted in compliance with all relevant administrative law rules. This is a consequence of the twin avenue approach. It is conceivable that an actor behaves in a faulty manner even though he is acting in compliance with administrative rules. In such a case he may be found liable.
- 38 Hence a “regulatory permit defence” is an unknown concept under Norwegian law. But the regulatory rules will still have some effect on the question of liability. The judge will, when deciding whether the actor has breached his duty of care, put a lot of weight on the fact that the actor after all did comply with administrative law rules. This fact may make it adequate to decide that the actor was “excusably misled” (“unnskyldelig rettsvillfarelse”), cf. *supra* no. 6. He will then be exonerated. Still, on principle, the actor’s compliance with administrative rules will not in itself or automatically exonerate him. The same is true for a clear permission to do something which has a negative impact on a sufferer’s sphere of interests. The permitted legal subject may be held liable in spite of the permission.¹⁴ But the existence of a permission may lead to the inference that the permitted person was “excusably misled”.

2. Can the general duty of care go beyond these rules?

- 39 The general duty of care can, in principle, definitely go beyond these rules. This is a consequence of the twin avenue approach. The avenue of the administration rules may have been constructed for purposes other than avoiding harm. Accordingly, it is conceivable that an administrative rule does not suffice to ensure an activity does not endanger other citizens. The actor himself then has a duty to react in a manner which prevents the risk of harm. Failing to comply with this duty will make him liable.

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

- 40 In principle, the fact that the tortfeasor succeeds in proving that he acted lawfully does not make any difference concerning the allocation of the burden of proof. The general starting point under Norwegian law is that the burden of proof lies on the plaintiff (cf. *supra* no. 34), whereas the judge has the compe-

¹⁴ T. Falkanger, *Tingsrett* (Property law) (5th ed. 2000) 328–329; cf. Rt. 1974, 122.

tence to reverse the burden of proof whenever he finds that this will provide the best solution. One should mention, however, that this competence is quite seldom used in court practice within tort law. If the tortfeasor has complied with the regulations in question, the burden of proof will still lie on the plaintiff. In such a situation the judge certainly will have no motivation for reversing the burden of proof.

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

As for administrative law itself (as already mentioned *supra* no. 22), *forurl.* § 55 imposes strict liability upon an owner or operator of a factory, property or similar objects which cause damage through pollution, whereas *tivolil.* § 7 makes the owner or operator of a funfair liable without fault for any personal injury caused by the funfair activities. Both statutes impose liability for damage caused by breach of administrative rules, such as *tivolil.* § 5 and § 6 and *forurl.* § 7.

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When it comes to the broader field of the law of obligations one might mention the statutes in *Granneloven* 16 June 1961 no. 15 (the Neighbour Act, *grannel.*) § 2 and § 9, which constitutes a legal basis for strict liability. The last mentioned rule must, however, be regarded as a codification of principles which has emerged in court practice. The breach of the rules in *grannel.* § 2 and § 9 in itself constitutes liability. But breach of the mentioned statutes will often at the same time represent a breach of administrative law rules made for securing the well-being and quality of the neighbours' environment. An example of such a rule is *planl.* § 70 no. 2 and § 74 no. 2.

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In the Neighbour Act there is a special legal basis for an injunction, cf. *grannel.* § 7. This provision distinctly reads that the neighbour has the right to see that any breach of the rules on nuisance in § 2 and § 9 is corrected. From time to time there are such special provisions on injunctions within the Acts of private law cf. for instance *Servituttloven* 29 November 1968 (Norwegian Act on Servitudes, *servl.*) § 17. A private party who suffers from another legal subject's non-compliance with regulatory law or private law rules has, however, in general, the right to bring his case to the courts seeking an injunction. The court will, in its decision, state that the omission is illegal. The court decision may then be a legal basis for the private party to bring the administrative force of the police into action, cf. *Tvangsfullbyrdsloven* 26 June 1992 no. 86 (the Norwegian Act on Enforcement, *tvangsl.*) § 4-12. With the court decision in their hands, the officials of "namsmyndigheten" ("the enforcement authority", a special branch of the police authority that deals with enforcing citizens' rights according to private law) can, for instance, close down a factory that does not comply with the rules governing their permission to pollute within certain limits. The system above also comprises situations where a private party does

not comply with a given permission. The courts will, however, not have the opportunity to allow the forbidden activity to continue while at the same time granting compensation to the suffering party. The mentioned general system is binary; either a party is forbidden to, or allowed to, continue with his activity.

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

- 43 Apart from the general tort law rules that are described elsewhere in this report, there are no funds or other instruments of compensation designed for the special situation where an administrative law rule permits an infringement of interests of another person.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 44 Without a doubt, the farmer can claim damages from the operator. The most adequate legal basis would probably be grannel. § 2 and § 9. In the second subparagraph of § 2 there is a special statute designed for the above described factual situation. The subparagraph reads that the defendant who has caused an emission will be liable unless he has done what is "technically and economically possible" to prevent the emission/damage. In court practice and tort law theory this requirement has been interpreted as a demand for proportionality between the cost and the possibly avoided damage.¹⁵ The fact that the reduction could be obtained at a reasonable cost would make it easy to maintain that a reduction would have been economically possible. Hence the farmer will have a strong case.¹⁶
- 45 The farmer could also sue company A on the legal basis of forurl. § 55, § 53 and § 6. The emission would be regarded as pollution ("forurensning") (see § 6)

¹⁵ Cf. Rt. 1969, 757 and *B. Askeland*, *Uturvanderegelen i naboloven § 2* (The rule on unnecessary in Neighbour Act § 2), *Jussens venner* ("Friends of the law" – Norwegian periodical on law, JV) 1996, 326, 355–369.

¹⁶ The case referred to in Rt. 1972, 142 concerned the question of to what extent an iron foundry should have applied modern cleansing methods although they were not known in Scandinavia at the time. The defendant was exonerated, but the reasoning of the Supreme Court suggests that the defendant would have been liable had the technical methods been more widely known at the time.

and the damage to his crop would consequently qualify as “pollution damage” (“forurensningsskade”) see § 53. In such a case the strict liability clause in § 55 accordingly would apply. Theoretically the farmer could also sue the operator on the basis of the general, uncodified rule of liability for negligence.

The question of suing the government is more doubtful. At this point one has to bear in mind the special rule on public liability for “supervising”, “control”, etc. described *supra* no. 8. The government’s omission to ensure that modern technological devices are applied would hardly amount to more than ordinary negligence. It would not be considered to be a substantial deviation from prudent behaviour cf. Rt. 1970, 1152 (cf. *supra* no. 17). Consequently the plaintiff would probably have no case against the government. 46

The fact that the farmer could have applied for review or withdrawal of the permit according to administrative law procedures is actually not relevant for the question of torts. This is a consequence of the twin avenue approach. The sufferer has a tort law right to compensation for infringement regardless of what might have been the outcome of an administrative procedure. Hence the administrative law procedure has no priority over tort law.

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

B can be held liable either on the basis of the uncodified rule of strict liability or on the basis of negligence. When it comes to the question of strict liability, the decision depends on whether the hazard constitutes a “continuous, typical and extraordinary risk”.¹⁷ Under Norwegian law, there are a great number of cases which outline what qualifies for this requirement.¹⁸ It would be fair to say that the judges in fact have a margin of discretion when deciding whether or not to apply the strict liability rule. Because of this discretion, it is hard to tell from the scarce facts whether the courts would find B liable. This question would probably turn on whether it was likely or not that a visitor would come by and endanger himself. 47

If the dangerousness of the hazard and the lack of precautions amount to tortious negligence, B would also be liable. A Norwegian judge would probably not contemplate using the statutory regime applicable to employees by analogy. The mentioned regime is established in connection with the (normally) long-term contractual relationship between an employer and an employee. Within the Norwegian legal method, this constitutes a fundamental and therefore relevant difference to the case of the one-time visitor. This 48

¹⁷ Cf. *B. Askeland*, Norwegian report, in: H. Koziol/B.C. Steininger (eds.), *European Tort Law* 2004 (2005) 451 ff. no. 8.

¹⁸ The cases are listed and elaborated in *Nygaard* (fn. 2) 253–283.

difference would probably bar any possibility of applying the analogy approach.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

- 49 The injured person could definitely hold the company liable for damage. The fact that company B omitted to comply with the demands of the agency would easily and quite likely in itself be regarded as tortious negligence once the risk actually materialised.
- 50 The lack of supervision could have been brought into the case as some sort of mitigating circumstance, but the omissions of the agency would not be decisive when it comes to the question of liability or not. To the extent that there was tortious negligence on the part of the agency, the agency and the company would be regarded as several concurrent tortfeasors.¹⁹

b) Could the injured persons claim damages from the government agency?

- 51 The injured persons could claim damages from the government agency, but there would be little chance of success. Also at this point the special rule mentioned *supra* no. 16–18 will apply and provide difficulties for the plaintiff. As mentioned above, a public entity such as the agency will only be liable provided that their omissions amount to qualified negligence. The fact that the agency did make a list of shortcomings and presented it to the company would probably be sufficient to infer that they acted in accordance with the expectations that a citizen reasonably could have, cf. the rule of liability for public entities.
- 52 A case that illustrates the mentioned doctrine in action is referred to in Rt. 1991, 954: A travel agency omitted to give a guarantee as prescribed by law.²⁰ The

¹⁹ Cf. *W.V.H. Rogers*, Commentary ad Multiple Tortfeasors, in: European Group on Tort Law (ed.), *Principles of European Tort Law, Text and Commentary* (2005) 138 ff., 143.

²⁰ The duty to give such a guarantee was earlier prescribed in the former Norwegian Act on Travel Agencies. The same duty follows now from Pakkereiseloven 25 August 1995 no. 57 chapter 11 (The Norwegian Act on Package Holidays).

agency arranged a number of holidays, but eventually went bankrupt. Many customers had paid for their holidays in advance and were left uncompensated as the bankruptcy estate did not have any money to finance refunds. In the months before the bankruptcy the “Travel Guarantee Fund” (Reisegarantifondet) informed the Norwegian Consumers’ “ombudsman”²¹ about the travel agency’s lack of guarantee. The Consumers’ “ombudsman” did not take action. The customers of the travel agency sued the state, claiming compensation for their loss. They held that the passivity of the Consumers’ “ombudsman” amounted to negligence and that the state should be held liable on the basis of the Norwegian rule of respondeat superior in skl. § 2-1. The court found for the defendant because the element of negligence was not sufficient to fulfil the requirement of the special rule of liability for public entities which requires qualified negligence (cf. *supra* no. 16).

²¹ In Norway one has several public employed persons who supervise the citizens’ rights in certain fields. Their job is to secure that the rights of the citizen are respected by other public entities. There are ombudsmen for children, for patients, for non-discrimination between genders, for civil rights and for consumers.

TORT AND REGULATORY LAW IN POLAND

*Monika Jagielska and Grzegorz Żmij**

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

In Poland, with regard to civil law relationships, the spheres in which civil law (as the part of private law) and administrative law (as the part of public law) provisions are applied traditionally interweave.¹ In the legal doctrine, the border between one law and the other is delineated with the applied method of regulation used as a criterion. Typical for the civil (private) law method (as opposed to the administrative (public) one) is the equality of the parties of the civil law relationship. However, the concept of regulatory law is not known in Polish law. For the purposes of this work, regulatory law can be understood as the law setting some standards of conduct in typical social situations connected with the production of goods, industrial actions, performance of services or other environmental influence. Such concept of regulatory law is rather part of the domain of administrative (public law) than of civil law.²

The question of the impact of administrative law provisions on civil law relations resulting from wrongful acts has not yet received a comprehensive assessment in Polish legal literature. Most often, authors writing about these matters

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¹ See A. Stelmachowski, *Zarys teorii prawa cywilnego* (1998) 29.

² See E. Łętowska, *Prawo cywilne a prawo administracyjne. Razem, ale nie do spółki*. “Dobre” prawo cywilne, “złe” prawo administracyjne? Perwersyjne efekty współlistnienia, in: A. Mączyński/M. Pazdan/A. Szpunar (eds.), *Rozprawy z polskiego i europejskiego prawa prywatnego*, Księga pamiątkowa ofiarowana Profesorowi Józefowi Skąpskiemu (1994) 217 ff.; A. Wolter/J. Ignatowicz/K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej* (2nd ed. 2000) 16, 17. Cf. in the administrative law writing, e.g., J. Filipek, *Metoda administracyjnoprawna*, in: E. Knosala/A. Matan/G. Łaszczycza (eds.), *Prawo administracyjne w okresie transformacji ustrojowej* (1999) 41 ff.

have focused on issues related to the liability of the State for the wrongful execution of public authority.³

- 3 It seems that several factors may contribute to this state of affairs. Firstly, whenever the question of an act which is compliant or non-compliant with the rules of administrative law appears in judicial practice, in most cases, it concerns an action of public authority and the compensatory liability connected to it. Secondly, wherever business activity is at issue, and especially an activity which involves some negative environmental impact, there is a clear tendency to move from fault-based liability to strict liability or even strict liability based on abnormal risk, where the question of compliance or non-compliance with certain provisions of administrative law is of secondary or no importance. This tendency is especially seen in those cases where a human being, his life and health is concerned. In their judgments Polish courts continuously tend to impose liability for personal damage even if an activity is in accordance with permits and law rules. For example, a professional producer should clearly inform customers about dangers arising from the usage of the product. If he fails to do so, he cannot exempt himself from liability on the basis of having a formal attestation from the National Hygienic Office or of having placed warnings on the product in accordance with a Ministry executive order.⁴ Also the fact that the product has been manufactured in conformity to Polish Norm does not constitute an exoneration clause.⁵
- 4 In this respect, special attention must be paid to the provisions regulating the liability for damage caused by a dangerous product. There the issue of the product's compliance with administrative law standards may be significant for the producer's liability. He can free himself from liability if the single reason for the dangerous features of the product was its compliance to law rules (art. 449³ of the Polish Civil Code, p.c.c.). This regulation should be interpreted strictly. It does not mean that a producer can exonerate himself by proving the product conformed to legal rules. Conversely – he can only do so in the case when he was faced with the choice between producing a non-dangerous product which did not comply with legal rules or dangerous products which were produced in accordance to regulations.⁶
- 5 A discussion of acts compliant with the provisions of the administrative law and its importance from the point of view of tort liability may be found in ju-

³ Further on this topic *M. Saffan*, Odpowiedzialność odszkodowawcza władzy publicznej (po 1 września 2004 roku) (2004) 11 ff.

⁴ Decision of Court of Appeal in Białystok, 30 November 2000, I ACa 340/00, Orzecznictwo Sądów Apelacyjnych (OSA) 2001, no. 6, pos. 33.

⁵ Decision of the Supreme Court of Poland (SN), 4 December 1981, IV CR 433/81, Orzecznictwo Sądów Polskich (OSP) 1983, no. 3, pos. 55.

⁶ *E. Łętowska*, Prawo umów konsumenckich (2nd ed. 2002) 122 f.; *B. Gneta*, Odpowiedzialność za szkodę wyrządzoną przez produkt niebezpieczny (tzw. odpowiedzialność za produkt) (2000) 104; *M. Jagielska*, Odpowiedzialność za produkt (1999) 163; *id.*, Podstawy odpowiedzialności za produkt (2004) 79 f.

dicial decisions issued on the basis of the Act of 4 February 1994 – Geological and Mining Law,⁷ the Act of 27 April 2001 – Environmental Protection Law⁸ and the Act of 18 July 2001 – Water Act.⁹

As mentioned before, the question whether a certain act causing damage is compliant with the rules of administrative law or not normally arises when we deal with fault-based liability. The question primarily concerns the problem of wrongfulness of a given conduct.

In the Polish doctrine of law there is a dispute over the meaning of wrongfulness.¹⁰ The essence of wrongfulness lies in the violation of an act with the binding legal order.¹¹ Although there is general consensus as to the latter, there is a difference of opinions regarding issues such as the relation between the notion of wrongfulness and the notion of fault as well as the scope of wrongfulness.

In the Polish civil law doctrine, there has been a traditional dispute over the separateness of wrongfulness as an independent prerequisite of tort liability. This dispute has a historical background and results from a clash of the Austrian and German civil law doctrines as opposed to the French doctrine, at the time when Polish modern civil law regulations were created.¹² Art. 415 p.c.c., which constitutes the fundamental and general basis for tort liability in Polish civil law, provides that whoever, by his own fault, causes injury to another person, shall be liable to repair it. In the text of the article, there is no direct mention of wrongfulness.

According to an established view, referring to the wording of art. 415 p.c.c., fault comprises two elements – objective and subjective. Those elements are objective wrongfulness and subjective reprehensibility.¹³ A different view assumes that wrongfulness is only a prerequisite of fault.¹⁴

⁷ Dziennik Ustaw (Journal of Laws, Dz.U.) 1994, no. 27, pos. 96 as amended.

⁸ Dz.U. 2001, no. 62, pos. 627 as amended.

⁹ Dz.U. 2001, no. 115, pos. 1229 as amended.; cf. decision of SN, 26 September 2001, IV CKN 466/00, LEX no. 56088.

¹⁰ Further *M. Sośniak*, *Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone* (1959) 71 ff.; *W. Czachórski*, in: *Z. Radwański* (ed.), *System prawa cywilnego*, vol. III, part 1, *Prawo zobowiązań – część ogólna* (1981) 530 ff.

¹¹ *Sośniak* (fn. 10) 102 f.; cf., e.g., *Czachórski* (fn. 10) 533; *Z. Banaszczyk*, in: *K. Pietrzykowski* (ed.), *Kodeks cywilny, Komentarz do artykułów 1–449*¹¹ (4th ed. 2005) art. 415 no. 21.

¹² See *Sośniak* (fn. 10) 71 ff.

¹³ Cf., e.g., *R. Longchamps de Berier*, *Polskie Prawo Cywilne, Zobowiązania* (2nd ed. 1939, reprint 1999) 234 f.; *W. Czachórski*, *Zobowiązania. Zarys wykładu* (8th ed. 1994) 202.

¹⁴ See, e.g., *B. Lewaszkiewicz-Petrykowska*, *Problem definicji winy jako podstawy odpowiedzialności z tytułu czynów niedozwolonych*, *Zeszyty Naukowe Uniwersytetu Łódzkiego, Seria I, Nauki Humanistyczno-Społeczne*, no. 14, *Prawo* (1959) 43; *G. Bieniek*, in: *G. Bieniek* (ed.), *Komentarz do Kodeksu Cywilnego, Księga trzecia, Zobowiązania*, vol. I (5th ed. 2003) 221; *Z. Radwański/A. Olejniczak*, *Zobowiązania – część ogólna* (6th ed. 2005) no. 470, *Banaszczyk* (fn. 11) art. 415 no. 14.

- 10 In literature it is emphasized that, since wrongfulness means a violation of the binding legal order, the notion of wrongfulness as the opposite of law is single and its contents are common to all branches of law. The differences concern only the scope and the consequences related to the violation of law.¹⁵ From this standpoint, one can talk about civil wrongfulness (with a difference between contract and tortious wrongfulness), administrative wrongfulness, criminal wrongfulness, etc.¹⁶

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

- 11 The new Constitution of the Republic of Poland dated 2 April 1997¹⁷ introduced a number of new solutions, aiming to strengthen the rule of law. The question of links between administrative law and civil law, which regulates the issue of liability in tort, is contained mainly in art. 77 of the Constitution, in which the issue of responsibility for wrongful acts of public authority bodies is regulated. According to this article, everybody has a right to compensation for damage caused to him by an unlawful act of a public authority body. Initially, the introduction of that provision led to the Constitutional Tribunal declaring a substantial part of the Civil Code regulations concerning State liability for wrongful acts of public authority unconstitutional.¹⁸ The result of the Constitutional Court's decision was the extensive change of the provisions of the Civil Code in that respect.¹⁹
- 12 The entry into force of the new Constitution of Poland, including art. 77 and the above mentioned judgment of the Constitutional Tribunal, stimulated the discussion on the notion of wrongfulness. Two strands of that discussion seem to be important for this analysis.
- 13 The first one deals with the question whether, in the context of art. 77 of the Constitution,²⁰ the notion of civil wrongfulness still contains, as it has been assumed so far, apart from the contradiction of an act with the binding law,

¹⁵ Sośniak (fn. 10) 89.

¹⁶ Cf. Banaszczyk (fn. 11) art. 415 no. 22.

¹⁷ Dz.U. 1997, no. 78, pos. 483.

¹⁸ Decision of the Constitutional Tribunal, 4 December 2001, SK 18/00, Orzecznictwo Trybunału Konstytucyjnego (OTK) 2001, no. 8, pos. 256.

¹⁹ Act of 17 June 2004 on the amendment of the Civil Code and other Acts, Dz.U. 2004, no. 162, pos. 1692.

²⁰ Further on the discussion about the meaning of wrongfulness (unlawfulness) on the ground of art. 77 of the Constitution: K. Pietrzykowski, Bezprawność jako przesłanka odpowiedzialności deliktowej a zasady współżycia społecznego, in: M. Pyziak-Szafinicka (ed.), Odpowiedzialność Cywilna. Księga pamiątkowa Profesora Adama Szpunara (2004) 172 ff. and other cited authors.

also the violation of the principles of social intercourse.²¹ In other words, can an act by a tortfeasor be considered wrongful if it formally does not violate the provisions of law, yet it is contrary to the principles of social intercourse or good customs? The principles of social intercourse are a statutory concept, to which the lawmakers often referred while creating the Civil Code, and which was based on Soviet law. It moved a part of the doctrine to formulate proposals to replace the principles of social intercourse with the notion of good customs. According to the present understanding of the principles of social intercourse, they signify values universally accepted in the culture of Polish society, which at the same time constitute the heritage and the elements of European culture. These principles concern the behaviour of people towards other people, yet lawyers are most interested in those principles of social intercourse which are not at the same time binding rules of law.²² In the legal doctrine, a view has been recently presented that currently, civil wrongfulness, including wrongfulness as a prerequisite of liability, has to be principally understood as a lack of compliance (violation) of a certain behaviour with the provisions of a statute. According to this view, a wider understanding of wrongfulness, as the non-compliance (violation) also with the principles of social intercourse or good customs, is possible only if it arises out of a particular statutory provision.²³

The second of the above mentioned strands deals with the question whether a violation of any provision of law (including administrative law) is decisive for the wrongfulness of a given act, or whether only a violation of the rules of a certain category, defined by an agreed criterion of the interest protected by a given legal norm, may constitute a prerequisite of liability in tort. A view established in literature states that “a tortfeasor’s act is wrongful only if it is directed against the interests of the aggrieved party. A claim for compensation will not be justified if the wrongdoer has violated the legal norms whose purpose is to protect the common good, the interests of the public”.²⁴ This view has been reflected in judicial decisions²⁵ and in the doctrine it has been given the term of so-called “relative wrongfulness” or directness of the act against the wronged party.²⁶ Since this concept has sometimes been used to justify the lack of State liability for dam-

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²¹ See, e.g., *Sośniak* (fn. 10) 107, 109; *Czachórski* (fn. 10) 533; *Radwański/Olejniczak* (fn. 14) no. 472. Cf. decision SN, 31 January 1968, III PRN 66/67, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* (OSP i KA) 12 (1968) pos. 261; from the new decisions cf. SN, 19 February 2003, V CKN 1681/00, LEX no. 12742.

²² *Z. Radwański*, *Prawo cywilne – część ogólna* (7th ed. 2004) Nb. 82. Cf. *D. Szmyt-Biniaś*, *Klauzula zasad współżycia społecznego*, *Gdańskie Studia Prawnicze*, vol. XIV (2005) 867 ff.

²³ *Pietrzykowski* (fn. 20) 178.

²⁴ *A. Szpunar*, *Czyny niedozwolone w kodeksie cywilnym*, *Studia Cywilistyczne* (SC) 1970, vol. XV, 71; cf. *Z. Masłowski*, gloss on the decision of SN, 13 April 1962, OSP i KA 1963, pos. 3; *B. Lewaszkiewicz-Petrykowska*, *Wina jako podstawa odpowiedzialności z tytułu czynów niedozwolonych*, *Studia Prawnicze i Ekonomiczne* (SPE) 1969, vol. II, 91; *A. Koch*, *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym* (1975) 113.

²⁵ Cf., e.g., decision SN, 13 October 1987, IV CR 266/87, with gloss *L. Stecki*, *Nowe Prawo* (NP) 1990, no. 4–6, 225.

²⁶ See *R. Kasprzyk*, *Bezprawność względna*, *Studia Prawnicze* (SP) 1988, no. 3, 149.

age caused by a wrongful act, and in particular for actions of a public authority compliant with such acts, it has been greatly criticised recently.²⁷

3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

- 15 According to art. 87 par. 1 of the Constitution, the following are the sources of universally binding law in Poland: the Constitution, statutes, ratified international agreements and executive orders. Whereas by force of art. 87 par. 2 of the Constitution the legal acts of local legislation are the sources of the universally binding law of the Republic of Poland in the area of jurisdiction of the bodies which issued those acts. Thus the Constitution of the Republic of Poland dated 2 April 1997 introduced, on the one hand, a closed system of the sources of universally binding law and, on the other hand, an open system of the sources of internal administration law.²⁸ The system consists of legal acts of local legislation issued by the “voivode”, territorial self-government bodies as well as local bodies of the government administration supervised by the “voivode” (general government administration) and bodies of government administration supervised directly by central government agencies (sectoral government administration).²⁹
- 16 Poland became a Member State of the European Union (EU) on 1 May 2004. Since then the European law is an integral part of the Polish legal system.
- 17 Without an a priori selection of norms according to the principles of the above mentioned idea of relative wrongfulness, it seems that a violation of any norm of the universally binding law may potentially result in wrongfulness of the conduct violating such a norm, and, in the presence of the remaining prerequisites of liability, may result in tort liability.

4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

- 18 As already mentioned, the coming into force of the Constitution dated 2 April 1997 gave rise to fundamental changes in the law concerning State liability for

²⁷ M. Saffan, Problematyka tzw. bezprawności względnej oraz związku przyczynowego na tle odpowiedzialności za niezgodne z prawem akty normatywne, in: W. Popiołek/L. Ogiełto/M. Szpunar (eds.), *Rozprawy Prawnicze, Księga pamiątkowa Profesora Maksymiliana Pazdana* (2005) 1322 ff.

²⁸ J. Stelmasiak, Węzłowe zagadnienia konstytucyjnych źródeł prawa administracyjnego, in: *Księga Pamiątkowa Profesora Ryszarda Paczuskiego* (2004) 325.

²⁹ Stelmasiak (fn. 28) 326.

wrongful actions of public authorities.³⁰ If a lawmaker, while making the law or an administration body issuing an administrative decision in an individual case, acts in an unlawful way, this may lead to the State or a self-government legal entity having a duty to compensate. However, not every case of wrongfulness will result in such liability. Unlawfulness (disregarding the special case of legislative omission) cannot be determined independently by the court adjudicating in the claim for compensation. It has to be first determined in a procedure indicated by relevant regulations.

The liability in question is regulated by the provisions of the new art. 417¹ p.c.c. Pursuant to par. 1 of art. 417¹ p.c.c., if damage has been caused by issuing a normative act, the claim for redressing the damage can only be filed when the said act has been declared inconsistent with the Constitution, a ratified international agreement or a statute, in the course of appropriate proceedings. Par. 2 of art. 417¹ p.c.c. provides that if the damage has been caused by issuing a legally binding ruling or a final decision, the redress may be requested after their inconsistency with the law has been determined in appropriate proceedings. This also applies to the situation when a legally binding ruling or a final decision have been issued on the basis of a normative act inconsistent with the Constitution, a ratified international agreement or a statute. Pursuant to par. 3 of art. 417¹ p.c.c., if damage has been caused by the failure to issue a ruling or a decision, while the law provides for the obligation to issue them, the redress may be requested after the wrongfulness of such failure has been determined in appropriate proceedings, unless separate regulations provide otherwise. Par. 4 of art. 417¹ p.c.c. provides that if damage has been caused by a failure to issue a normative act, when issuing of such act is an obligation under the law, the wrongfulness of such failure shall be determined by the court examining the claim for redressing the damage.

In case of the so-called normative wrongfulness, i.e. non-compliance of a normative act with the law,³¹ the above mentioned “appropriate proceedings” shall consist in the so-called hierarchical control of normative acts, carried out by the Constitutional Tribunal, as a part of examining the constitutionality of the law, with regard to statutes,³² ratified international agreements and the sub-

³⁰ See *Saffjan* (fn. 3) 41 ff.; *M. Saffjan*, Odpowiedzialność odszkodowawcza z tytułu bezprawia normatywnego, *Ruch Prawniczy Ekonomiczny i Społeczny* 2005, vol. 1, 14 ff.; cf. also the discussion predominating the amendment of the Civil Code: *R. Szczepaniak*, Odpowiedzialność za szkodę wyrządzoną wydaniem aktu normatywnego, *Kwartalnik Prawa Prywatnego* 1999, no. 3, 513 ff.; *M. Saffjan*, Ewolucja odpowiedzialności władzy publicznej – od winy funkcjonariusza do bezprawności normatywnej, *Zeszyty Prawnicze Uniwersytetu Kardynała Stefana Wyszyńskiego* 2003, no. 3, 143; *G. Bieniek*, Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez funkcjonariuszy po wyroku Trybunału Konstytucyjnego z 4 grudnia 2001 r., *Przegląd Sądowy* (PS) 2002, no. 4, 3 ff.; *L. Bosek*, Odpowiedzialność odszkodowawcza państwa za zaniechanie ustawodawcze (Uwagi na tle wyroku Sądu Najwyższego z 24 września 2003 r.), PS 2004, no. 11–12, 3 ff.

³¹ *Saffjan* (fn. 3) 42.

³² Cf. *M. Jaśkowska*, Skutki orzeczeń Trybunału Konstytucyjnego dla procesu stosowania prawa wobec zasady bezpośredniego stosowania konstytucji, in: *Instytucje współczesnego prawa administracyjnego*, Księga jubileuszowa Profesora zw. dra hab. Józefa Filipka (2001) 277 ff.

statute acts, issued by central State agencies (art. 188 of the Constitution) and in the control carried out, on the basis of art. 184 of the Constitution, by the Supreme Administrative Court, examining whether the above mentioned acts of local legislation are consistent with the statute.³³ It is worth mentioning that the notion of a normative act inconsistent with the law within the meaning of art. 417¹ § 1 p.c.c. also covers normative acts inconsistent with community law.³⁴ The “appropriate proceedings” in relation to administrative decisions are governed by the relevant provisions of administrative procedure, and primarily the Act dated 14 June 1960 – Code of Administrative Procedure³⁵ and the Act dated 30 June 2002 – Law on Proceedings before Administrative Courts.³⁶

- 21 Ratio legis of the construction adopted by the legislator in art. 417¹ p.c.c. was the obvious consideration for the principle of the certainty of law (in relation to binding normative acts) and protection of the stability of the legal status created by legally binding (final) rulings and decisions.³⁷ It should be assumed that it is the responsibility of the bodies that make and apply the law to ensure that the normative acts issued by them are consistent with the law. On the other hand, the addressee of a legal norm, other than an agency or a representative of the State or territorial self-government, essentially has the right to have full confidence in the normative acts, the more so, as it is not within his power but within the power of an entity indicated by the law, to repeal such an act in an appropriate procedure. This view may be supported by the ruling of the Court of Appeal in Rzeszów dated 26 March 1998,³⁸ according to which “acting in accordance with delegated legislation cannot be deemed wrongful on the basis of the enabling statute, and a regulation issued on the basis of authority conferred by the statute, defining the principles of public road maintenance in winter time is not an internal regulation of an organisation and an assessment of the road manager’s compliance with the obligation to maintain the road in proper condition in winter time, carried out in order to determine the prerequisites of liability under art. 417 p.c.c., cannot be carried out without taking into consideration the said statute”.
- 22 The issue, however, is not as simple as it may seem. Some legal acts, by force of a special provision, introduce a principle according to which even a lawful act, such that falls within the limits of an appropriate individual statute, does not relieve the tortfeasor from liability.³⁹ An example of that may be art. 325 of the Act dated 27 April 2001 – Law of Environmental Protection, providing that the liability for damage caused by environmental impact is not excluded by the

³³ *Saffjan* (fn. 3) 44.

³⁴ *Saffjan* (fn. 3) 54.

³⁵ Unified text Dz.U. 2000, no. 98, pos. 1071 as amended.

³⁶ Dz.U. 2002, no. 153, pos. 1270 as amended.

³⁷ *Saffjan* (fn. 3) 42.

³⁸ IACa 66/98, OSA 1998, no. 11–12, pos. 48.

³⁹ Cf. on the character of so-called “legal damage”: *A. Klein*, Kilka uwag w kwestii charakteru prawnego odpowiedzialności za szkodę legalną, *Acta Universitatis Wratislaviensis* no. 857, *Prawo CXLIII* (1985) 119 ff.

fact that the activity which caused the damage was carried out on the basis of a decision and remains within the limits thereof. We come across a similar situation in the provisions of the Act dated 18 July 2001 – The Water Act. Therefore it should be assumed that, acting on the basis of a defective administrative decision or a decision issued with a violation of the law, in a way harmful for the environment, does not relieve the tortfeasor of liability. The issue of acting on the basis of or within the limits of a normative act will be insignificant whenever the liability of the wrongdoer is a strict liability.

Just as a side note, another problem should be mentioned. The substantive administrative law has considerably grown in Poland and in other EU Member States, which makes it impossible for an average citizen to know whether a given area of activity has been regulated by one of the thousands of statutes or not. This phenomenon has been accompanied in the administrative law doctrine by admission of the so-called “fiction of the universal knowledge of law in administrative law”.⁴⁰ To put it in a simple way, it is a problem of consequences arising out of the universally accepted rule, which boils down to the Roman proverb *ignorantia iuris nocet*. It seems that the issue should be examined as a part of the problem of fault, and in particular, as a question of due care required in relations of a given type. In case of a business activity, attention should be paid to the wording of art. 355 § 2 p.c.c., according to which the due care of a debtor with respect to his business activity shall be defined considering the professional character of that activity. It seems that the measure of due care, used to assess the actions of a businessman, assumes that he is obliged to know the law governing the area of his activity.

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5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

When an administrative law provides for administrative or criminal liability for a breach of its rules, apart from the civil liability, then provisions governing those particular types of liability should be analysed in order to determine whether, by force of a specific provision, they are not mutually exclusive. Even though no universal principle can be formulated here, one may generally assume that for the same act the wrongdoer may bear civil, criminal and administrative liability. In other words, we may deal with concurrent reasons for liability.⁴¹ For instance, civil liability under the Act dated 27 April 2001, the Law of Environmental Protection, does not exclude other types of legal responsibility, such as those mentioned above.⁴²

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⁴⁰ Z. Duniewska, Fikcja powszechnej znajomości prawa w prawie administracyjnym, in: E. Knosala/A. Matan/G. Łaszczyca (eds.), *Prawo administracyjne w okresie transformacji ustrojowej* (1999) 27 ff.

⁴¹ See A. Lipiński, *Prawne podstawy ochrony środowiska* (3rd ed. 2005) 431.

⁴² J. Machowski, *Ochrona środowiska. Prawo i zrównoważony rozwój* (2003) 128.

- 25 It should also be mentioned that Polish law provides for criminal liability of legal entities as well. This issue is governed by the Act dated 28 October 2002 on the liability of collective entities for acts prohibited under the threat of penalty.⁴³ By force of the specific provision of art. 6, the liability or lack of liability of a collective entity for damage caused, on the basis of the principles set out therein, does not exclude civil or administrative liability for the damage, or individual legal responsibility of the author of the prohibited act.
- 26 In order to illustrate the case of concurrent reasons for responsibility it may be useful to quote an example from the environmental protection literature: “an event causing damage to the environment as a result of a breach of waste disposal requirements in circumstances described in art. 183 of Criminal Code”. We cannot exclude that whoever caused such an event may be held responsible under all the types of liability described above. If:
- he is the waste generator, a sanction fee shall be imposed as set out in art. 293 of the Environmental Protection Law;
 - the wrongdoer is an organisation (e.g. a joint stock company), only that member of its managing body whose action (or inaction) led to the situation described in art. 183 of the Criminal Code shall be held criminally responsible;
 - damage is caused, the injured party shall have the right to claim for redress of the damage;
 - there are prerequisites set out in art. 367 of the Environmental Protection Law, the voivodeship inspector for environmental protection may stop the operation of the installation; and in addition
 - it may be possible to impose sanctions provided for in the regulations governing the responsibility of collective entities.⁴⁴
- 27 Compensatory or preventive obligations follow as a consequence of a judgment in criminal proceedings, as is the case of the so-called punitive measure, imposed for commission of an offence against the environment (art. 39 point 5 in connection with art. 46 § 1 of the Criminal Code).
- 28 It is also worth mentioning that sometimes administrative law makes the court action for compensation for certain types of damage conditional upon exhausting the specified administrative procedure, as provided for in art. 186 of the above mentioned Act dated 18 July 2001 – The Water Act. The party dissatisfied with the compensation set by the appropriate administrative body is then entitled to pursue the claim in court.⁴⁵
- 29 As far as the interweaving of criminal and civil liability is concerned, we should point to the general regulations governing the civil process, which may prove important to the relation between civil and criminal liability. According

⁴³ Dz.U. 2002, no. 197, pos. 1661 as amended.

⁴⁴ *Lipiński* (fn. 41) 431.

⁴⁵ Cf. decision SN, 4 June 2004, III CZP 27/04, *Prokuratura i Prawo* 2005, vol. I, 33.

to art. 11 of the Code of Civil Procedure, the ruling of the final convicting judgment passed in criminal proceedings is binding for the court examining the case in civil proceedings. However, a person who has not been accused may, in civil proceedings, plead all the circumstances excluding or limiting his civil liability. It may be worth recalling the contents of art. 12 of the Code of Civil Procedure, according to which a pecuniary claim arising out of a criminal offence may be lodged in civil proceedings or, in cases defined by the statute, in criminal proceedings.

6. Under what conditions are administrative law rules regarded as so-called "rules with a protective purpose"? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

Polish administrative law doctrine does not distinguish any particular group of "rules with a protective purpose". Distinction of such norms is characteristic of the civil law doctrine, and more precisely, of those scholars who support the above mentioned concept of the so-called "relative wrongfulness".⁴⁶ According to the assumptions of this theory, a breach of a legal rule does not result in the wrongfulness of the act in case of all legal rules, but only in case of those rules whose purpose is to protect the interests of the aggrieved party. In the view of the creator of that concept, A. Szpunar, a claim for compensation will not be justified if the wrongdoer violates the legal norms whose purpose is to protect the common good, the interests of the public.⁴⁷ In the opinion of another supporter of this concept, J. Kasprzyk, "from the perspective of the whole norm expressed in art. 415 p.c.c. significant are only such specific provisions and only to such an extent to which their purpose is to protect another person from damage".⁴⁸ Further, the author supports his view with the following example: "It is definitely unlawful within the meaning of administrative rules, to use an unregistered car to drive on a public road. It is not, however, a case of wrongfulness relevant from the point of view of the tort rules of the civil code. It would be difficult to agree with a statement that failure to comply with the registration obligation justifies the driver's civil fault-based liability for a traffic accident. The purpose and the function of the violated rule are different from the purpose and the function of the civil code provisions concerning wrongful acts. The purpose of the former is to protect the public interest. The purpose of the latter is to protect from damage, that is to grant the wronged the right to compensatory or preventive claim".⁴⁹

As mentioned above, this concept has recently been strongly criticised by M. Safjan. Firstly, according to him, the relative character of wrongfulness is a characteristic of contract liability.⁵⁰ Secondly, he finds the concept self-contradictory,

⁴⁶ Main supporters of this concept: A. Szpunar, Z. Masłowski, B. Lewaszkiewicz-Petrykowska, A. Koch and J. Kasprzyk.

⁴⁷ Szpunar (fn. 24) 71.

⁴⁸ Kasprzyk (fn. 26) 165.

⁴⁹ Kasprzyk (fn. 26) 166.

⁵⁰ Safjan (fn. 27) 1325.

as the same act may be qualified as being wrongful or not being wrongful, depending on against whom the action is directed.⁵¹ Thirdly and most importantly, he raises an objection against the concept of relative wrongfulness, saying that it inevitably leads to confusion of liability prerequisites, and in particular, enters the area where another prerequisite, namely causation, is applied, by anticipating findings within the scope of causation and as such is incompatible with the concept of adequate causation, adopted by the legislator.⁵²

- 32 Without resolving the dispute over the correctness of the premises underlying the relative wrongfulness concept, it should be stressed that it has been reflected in judicial decisions.⁵³

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 33 The answer to the question, who is responsible for complying with the rules of the administrative law if we talk about action or inaction of individuals acting on behalf or within the structure of a legal entity, is naturally a complex one. Disregarding the considerations related to the liability of the State and self-government legal entities as well as considerations concerning legal entities' strict liability (frequently applied, for example, in liability for damage caused by enterprises set in motion by the forces of nature under art. 435 p.c.c.), where wrongfulness is essentially of no significance, it may be worthwhile to focus on fault-based liability.
- 34 Discussing the legal entities' liability based on fault, one can distinguish two main groups of cases – liability for one's own actions (art. 416 p.c.c.) and liability for the actions of others (art. 430 p.c.c., art. 429 p.c.c.). According to a theory adopted in Polish law, the so-called "theory of agency" and art. 416 p.c.c. which is based on it, a legal entity is obliged to redress the damage caused by the fault of its agency. Liability under art. 430 p.c.c. and 429 p.c.c. concerns respectively the liability for a subordinate and a person charged with the performance of the relevant action (auxiliaries).
- 35 In literature, the considerable similarities of the liabilities under art. 416 p.c.c. and 430 p.c.c. are often emphasized, as for example they both require the determination of fault of the direct wrongdoer (an individual or individuals acting on behalf of the agency or a subordinate), whereas in case of liability under art. 429 the fault of the direct wrongdoer is not necessary and the legal entity

⁵¹ *Saffjan* (fn. 27) 1326.

⁵² *Saffjan* (fn. 27) 1326, 1328.

⁵³ Cf., e.g., decision SN (fn. 25) and the newer decision SN, 27 April 2001, III CZP 5/01, OSP 2003, pos. 74 with critical gloss by *J. Widło*.

may be exculpated by proving the lack of fault in the selection of personnel or by pleading that the performance of the action was vested in a person, an enterprise or an establishment which professionally perform such actions.⁵⁴

The liability of a given natural person acting within the structure of a legal entity, determined in administrative or criminal proceedings, does not automatically lead to the liability in tort of that person towards the aggrieved party. In the majority of cases, the issue normally concerns the action or inaction of people employed by a given legal entity. Then, by force of a special provision of art. 120 § 1 of the Act dated 26 June 1974 – the Labour Code,⁵⁵ if damage is caused to a third party by an employee in the course of his duties, only the employer shall be liable for redressing such damage. The employee shall be liable to his employer, who redressed the damage caused to a third party, under the principles provided for in the labour law (which in practice means liability limited to the equivalent of three months remuneration to which the employee is entitled, unless the employee committed the fault intentionally).

Therefore, in general, determination in the administrative or criminal proceedings of the liability of a particular individual, acting on behalf of an agency or as a subordinate within an organisational structure and in the course of performing an action of a legal entity, shall lead, first of all, to the liability of the legal entity itself.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

In Poland, legal entities are subject to administrative liability as are natural persons. For instance, a legal entity engaging in a business activity in gross violation of conditions specified in a concession or other conditions of carrying out a business activity subject to concession must take into account that, on the basis of art. 58 par. 2 point 1 of the Act dated 2 July 2004 on Freedom of Economic Activity,⁵⁶ the concession granting agency will withdraw the concession, which shall in no way exclude the tort liability for damage caused as a result of such activity.

It should be recalled at this point that, as mentioned above, administrative law sometimes provides for its own, separate, usually initial “administrative” procedure for compensatory claims.

⁵⁴ Cf. J. Dąbrowa, *Odpowiedzialność deliktowa osoby prawnej za winę własną i cudzą*, SC 1970, vol. XVI, 18 ff.

⁵⁵ Unified text Dz.U. 1998, no. 21, pos. 94 as amended.

⁵⁶ Dz.U. 2004, no. 173, pos. 1807 as amended.

- 40 It should be added that, contrary to the case of the criminal court rulings in case of a final convicting judgment, the findings of an administrative body or an administrative court, related to administrative liability, are essentially not binding for the civil court adjudicating on the liability in tort.

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

- 41 In Poland safety regulations are basically regulated in the Law on General Product Safety of 12 December 2003.⁵⁷ This bill implements provisions of EU Directive 2001/95/EC on General Product Safety⁵⁸ and changes the previously existing bill on the same subject and title from 22 January 2000 based on the former EU Safety Directive.
- 42 As far as environmental protection is concerned, the suitable provisions are contained in the Environmental Protection Law of 27 April 2001,⁵⁹ which implements 37 different EU directives on various aspects of environmental protection.
- 43 In the area of safety there are two complementary sets of rules – one (described above) belongs to administrative rules and provides the frame for producers' and State duties in the field of safety but does not grant an individual a right to claim damages. Such a right arises from the second set of rules – those on product liability, contained in the Civil Code (art. 449¹ f. p.c.c.) based on the Product Liability Directive 85/374/EEC of 25 July 1985.⁶⁰
- 44 As was mentioned above, product safety rules play a complementary role for tort law. The basic prerequisites of tort liability in the area of product liability (strictly connected to safety regulations) are prescribed in the Civil Code where such notions as product or dangerous product are also defined. These definitions are nevertheless rather vague (especially as far as dangerous products are concerned). Therefore the Law on General Product Safety, containing (among others) the definition of safe product or the putting into circulation of safe products, can be considered as a guidance in ascertaining if a product was not safe, etc. One must also remember that the Law on General Product Safety lists producers' obligations in the issue of product safety. So if we are to determine if a producer has broken a safety rule (especially if we want to assume negligence – which is of some importance in the field of safety), the above mentioned legal act is of great importance. But of course rules on product

⁵⁷ Dz.U. 2003, no. 229, pos. 2275.

⁵⁸ Official Journal (OJ) L 11/4, 15.1.2002, 4–17.

⁵⁹ Dz.U. 2001, no. 62, pos. 627 as amended.

⁶⁰ OJ L 210, 7.8.1985, 29–33.

safety belong to the scope of public law and are not predominant in private law rules of liability. As was said above, the issue of the safety of a product is regulated in Polish law in two different sets of rules – one dealing with administrative law (which in this context can be called regulatory law) where it reflects Product Safety Directive solutions and secondly in the Polish Civil Code, in the frame of product liability rules. According to art. 4–6 of the Polish Product Safety Act, a product is safe if it does not create danger (or creates only minimum, acceptable danger) to consumers. When evaluating if a product is safe, one must consider (among others) the normal and foreseeable conditions of its use, the way it works, its features, structure, instructions, possible interactions, information given to a consumer, special categories of consumers (children or the elderly), etc. If there are no special EU rules on product safety, a product brought onto the Polish internal market is deemed safe if it fulfils conditions prescribed in Polish internal law. If such rules do not exist, the safety of a product is evaluated according to different EU voluntary norms, the Polish Norm, recommendations of the European Commission, rules of a good practice, state of knowledge and justified expectations of a consumer towards product safety. So, as may be seen from above, consumer expectations are separated from safety rules and constitute a separate prerequisite of product safety. Even if a product fulfils legal stipulations, nevertheless it may be considered unsafe if it does not meet the consumer expectation test. It must be stressed that, according to Polish safety law, one must take into account high standards of demands as far as human health and life are concerned (art. 4 Product Safety Act). The above mentioned way of thinking has been confirmed on numerous occasions by the Polish Supreme Court, which in many rulings always stated clearly that the conformity with the Polish Norm does not exclude the liability of a seller or producer if a product is not fit for normal usage and purpose.⁶¹ During the series of cases of exploding TV sets in Poland, the Supreme Court held many times that the fact that a product was produced according to the Polish Norm and was allowed to be circulated does not exculpate a producer from liability. The worth of a product and its usefulness (safety) must be considered due to the contract, functions, and destination of a product. Functionality and safety are given higher priority than techno-normative criteria.

The same can be said of environmental rules. The most important rule which describes the relationship between public and private law rules in this field is contained in the Environmental Protection Law (art. 322) and states that liability for environmental damage is prescribed by the rules of the Civil Code unless the Environmental Protection Law states differently. These different rules widen civil liability as they give some public bodies (State and communities) and ecological organisations the right to claim damages against those who cause damage to the environment which is to be understood as a common good (art. 323 sec. 2). They also establish a rule of strict liability for injuries

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⁶¹ Decision SN, Whole Civil Chamber, 30 December 1988 r., III CZP 48/88, OSNCP 1989, no. 3, pos. 30; decision SN 20 May 1997, II CKN 115/97; decision SN 4 December 1981, IV CR 433/81, OSP 1983/3/55; decision SN, 10 July 2002, II CKN 111/01.

caused by enterprises or establishments of aggravated or abnormal risk even if they are not set in motion by natural forces. It is allowed by art. 324 of the Law to claim damages from entrepreneurs on a strict basis although their activity is not put into motion by natural powers (as it is in the Civil Code – art. 435 p.c.c.).⁶²

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

- 46 One can observe a close relationship between the safety regulation and civil code regulation on product liability. These two sets of rules are rather complementary,⁶³ as they aim to achieve more or less common targets but by various means and sometimes on different scales. Both are designed to prevent dangerous products from being put into circulation. Safety rules aim at real prevention and sometimes punishment, while the main target of product liability rules is to cover damage and the function of prevention is of less importance.⁶⁴
- 47 It is not easy to present clearly and unequivocally the relations between civil law rules and environmental rules. The issue is not settled in Polish literature. Without a doubt, environmental law is in many ways bound to civil law, but – as some authors say⁶⁵ – only at its edges. Civil law is mainly targeted at the protection of individual rights, which is not always true in the scope of environmental liability. First of all in the sphere of compensation of environmental damage, a strict application of civil liability rules can be impossible (as it is sometimes difficult to find a person who has directly suffered damage, as the real victim is the environment as a whole) but still there is a need to compensate damage according to art. 328 of the Environmental Protection Law. Therefore we can observe a widening of the notion of environment – it is almost treated “personally” and some persons are granted action popularis aimed to protect it (art. 328 of the Law).⁶⁶
- 48 The compensative function of civil liability is sometimes impossible to realize in the field of environmental protection especially when damages are not possible to recover. Therefore the preventive function of liability in the area of environmental damage is underlined and exposed.⁶⁷ Although traditional civil law lawyers still find it difficult to accept, one may observe the tendency (in environmental law) to create civil liability even when the damage does not yet exist but there is a threat that it will occur. The rules of environmental protec-

⁶² E. Radziszewski, *Prawo ochrony środowiska. Przepisy i komentarz* (2003) 351 ff.

⁶³ In a slightly different way, giving civil law rules only additional meaning, J. Boć (ed.), *Ochrona środowiska* (2004) 394.

⁶⁴ M. Jagielska, *Ogólne bezpieczeństwo produktów*, *Miscellanea Iuridica* 2002, 36 ff.

⁶⁵ Boć (fn. 63) 394.

⁶⁶ Machowski (fn. 42) 124.

⁶⁷ Machowski (fn. 42) 125.

tion law give the persons whose rights are violated (or the public bodies) the negatory claim (art. 81 of the Law) for renunciation.

Comparing traditional rules of civil liability and rules on liability for environmental damage, the main differences can be observed in such issues as: claiming damages even when no individual has directly suffered damage; granting a right to claim damages not only to persons suffering damage, but also to society (represented by suitable bodies) as a whole; admittance of liability even if the rules (on pollution, for example) were not broken; joint and several liability of any person causing damage. The administrative character of environmental rules and the need to protect the public interest justify these differences.

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On the other hand, we cannot forget that nearly all specific sets of rules (such as the Law on Environmental Protection, the Geological and Mining Law, the Law on Protection of Nature, etc.) do not contain their own exclusive rules on liability. In each regulation there is the general rule indicating civil liability as a basic ground, usually with a few changes contained in the particular Act. As was said above, art. 323 of the Environmental Protection Law clearly expresses application of the Civil Code in the sphere of liability only with the few changes contained in that Act. According to art. 91 § 3 of the Geological and Mining Law, an entrepreneur is liable for damage on the basis of the Civil Code regulations on tort liability.

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3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

The breach of safety regulations with a protective purpose does not lead per se (without fulfilling other prerequisites) to liability of any kind. The problem should therefore be posed in a different way: is such a breach of any relevance in case of fault or strict liability? Then we must state that such a breach can be relevant in assuming wrongfulness in case of liability based on fault. There the above mentioned problem of the notion of wrongfulness should be invoked. If we accept the concept of relative wrongfulness, then we must consider if the rules protect individual interests, and – if so – if they were violated. If one does not share the idea of relative wrongfulness, then there is no place for differentiation of interests to be protected. The simple breach of a rule indicates wrongfulness which can (but not always does) lead to liability. In the strict liability case, such a breach is practically of no importance, in the way that it is neither a prerequisite of liability nor an exemption. The only explicit exception can be seen in the sphere of product liability, where the conformity of a product with a rule can be invoked as an exemption if it was a cause of the dangerous character of the product (art. 449³ p.c.c.)

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In the area of environmental protection the situation is slightly different. The general rule contained in art. 322 of the Environmental Protection Law refers

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directly to the Civil Code and its basis of liability such as: art. 415 p.c.c. (on fault-based liability); art. 435 p.c.c. (on an entrepreneur's strict liability) and art. 439 p.c.c. (on preventive actions against future damage). Nevertheless, as mentioned above, these rules are applicable unless the Environmental Protection Law states differently and in this Act one may find two basic grounds for an individual to claim damages. According to art. 323 of the Law, any person whose rights are directly threatened by an illegal impact on the environment can claim from the person responsible for such danger either restitution or prevention (such as constructing suitable facilities) or even the ceasing of such activity. In case of damage caused by a risky enterprise, one may claim damages based on art. 435 p.c.c. In this article an entrepreneur's strict liability is prescribed. But it must be stated clearly that this strict liability is – according to the Civil Code – reserved only for cases where an enterprise is put into motion by natural forces, whereas, due to the Environmental Protection Law, this liability is imposed on any risky business.⁶⁸

- 53 The special character of environmental protection rules can also be underlined by a provision of art. 325 of the Law, according to which, liability for environmental damage cannot be excluded by the fact that the activity causing damage was carried out in accordance with and in the frame of an administrative decision.

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 54 Polish law rules on insurance are mainly contained in the Law on Insurance Activity of 22 May 2003.⁶⁹ There one may find only three kinds of compulsory insurance, none of which deals with the issues of safety or environmental protection. They cover risks connected to driving and agriculture. However, the duty to insure can also arise from other sources of law, not of a general but of a specific character (rules applicable to one particular branch of activity). There are two ways of obtaining protection: simple compulsory insurance or financial guarantee.
- 55 As far as safety is concerned, there are no obligatory insurance schemes or any other kind of compulsory protection. In the field of environmental protection, one may find traces of obligatory schemes some examples of which will now be outlined. It concerns two spheres: pollution of the sea and nuclear damage. The first issue is dealt with in the executive order of the Ministry of Infrastructure of 19 April 2004 on certificates on financial guarantees for civil liability for damage caused by a ship's oil.⁷⁰ According to the regulation, the ship owner is obliged to apply for a special certificate only if he proves that a financial

⁶⁸ A definition of a risky business can be found in art. 248 of the Environmental Protection Law.

⁶⁹ Dz.U. 2003, no. 124, pos. 1151 as amended.

⁷⁰ Dz.U. 2004, no. 114, pos. 1196 as amended.

guarantee has been issued by a bank or that he is insured against liability for damage caused by his ship's oil. The whole regulation in fact implements into Polish law the provisions of the Brussels Convention of 29 November 1969 on liability for damage caused by a ship's oil. In the field of nuclear damage, the core of legislation is contained in the Nuclear Law of 29 November 2000.⁷¹ According to art. 103 of that Law, a person operating a nuclear device is obliged to insure his liability for nuclear damage. Once again it must be stated that these are merely examples of the most important obligatory insurance schemes. Others arise, for example, from Aviation Law.

The role of insurance in the field of environmental damage is not of much importance in Poland. It is generally said that the introduction of insurance systems in this area would be very difficult and would even split its legal construction without giving expected effects.⁷² 56

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

If one were to ask a question about the practical role of fault-based liability in the field of safety regulations and environmental law rules, one could certainly claim that that role is not significant. In Poland nowadays, particularly liability in the broadly understood area of environmental protection is to a great extent a strict liability, and even sometimes based on abnormal, aggravated risk (art. 324 of the Environmental Protection Law). However, where the basis for strict liability, which in practical terms is much more convenient for the aggrieved party to enforce a claim, cannot be applied, it becomes necessary to resort to liability based on fault. As far as the legal basis for liability is concerned, art. 322 of the Environmental Protection Law refers to the Civil Code provisions, including the basis for tort liability under art. 415 p.c.c. with modifications arising out of its own provisions. 57

If a case concerns damage to the environment, the first provision to look at would be art. 325 of the Environmental Protection Law, according to which the liability for damage caused by environmental impact is not excluded by the fact that the activity constituting the cause of such damage has been carried out on the basis of an administrative decision and within the scope thereof. 58

In other cases, concerning fault-based liability, however, the question of wrongfulness may be of fundamental importance. 59

⁷¹ Dz.U. 2000, no. 161, pos. 1689 as amended.

⁷² Boć (fn. 63) 402.

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

- 60 A breach of an administrative law rule constitutes wrongfulness of the act and thus provides a prerequisite for tort liability. However, for a compensatory obligation and especially for liability in tort based on art. 415 p.c.c. (that is based on fault), additional prerequisites are needed, namely: action bearing the attributes of fault, damage and an adequate causal link between the two. If one of those prerequisites is missing, the above mentioned liability does not arise.

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

- 61 The answer to the question to what extent the liability of a tortfeasor violating an administrative rule depends on the protective purpose of the rule cannot be given without adopting or rejecting the concept of relative wrongfulness described above. An argument for accepting the necessity to determine whether the purpose of the administrative rule is to protect the interest of the aggrieved party is contained in a proposition to initially reject the liability for a breach of a norm which has nothing to do with the wronged party and its legally protected interests. On the other hand, however, it may often be difficult to determine whose interest is protected by a given administrative rule. This applies primarily to the law aiming at environmental protection.

- 62 Moreover, if we assume that it is just the legally protected interest that differentiates *ius privatum* from *ius publicum*, to which the administrative law belongs, then, in order to be consistent, we would have to assume each time that the protected interest is the interest of the public, which is not very helpful from the point of view of the relative wrongfulness concept.

- 63 Therefore it seems that any breach of an administrative law rule will potentially lead to a wrongful act by the wrongdoer. On the other hand, one cannot totally forget about the judicial decisions, which, even in the most recent judgments reach for the principles of that concept.

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

- 64 The question to what extent the tortfeasor is allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule has been addressed by judicial decisions. In a judgment dated 14 January 2005 the Supreme Court formulated the following sentence: "The defendant against whom a claim for redressing the damage is filed, cannot plead that if he had acted lawfully the wronged party would have sustained the same dam-

age – while the actual action of the defendant constituted a breach of the norms supposed to prevent the damage”.⁷³

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

The question of the burden of proof is generally regulated in art. 6 p.c.c., which provides that the burden of proof of a fact is allocated to the party which derives legal effects from that fact.⁷⁴ This general rule, together with art. 415 p.c.c., indicates that the burden of proof as to all the prerequisites of the tortfeasor’s liability is allocated to the aggrieved party. It is therefore the obligation of the aggrieved party to prove: the existence and the extent of damage, the existence of a causal link between the wrongdoer’s action and the damage and the action bearing the attributes of wrongfulness and fault.⁷⁵

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Sometimes the task faced by the aggrieved party may not be an easy one. In practice, it may be made easier by factual presumptions as to the fault of the wrongdoer, often applied by courts. The wrongfulness of the act may be the basis for such presumption, which is in many cases sufficient to assume that the wrongdoer shall be held liable.⁷⁶ Unlike fault, wrongfulness itself cannot be the subject of a factual presumption.⁷⁷ The legislator, however, sometimes introduces legal presumptions concerning wrongfulness, as, for example, in the case of infringement of personal rights (art. 24 § 1 p.c.c.).⁷⁸

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6. Can a breach of an administrative law rule result in a claim for punitive damages?

The phenomenon of “punitive damages” is an object of interest for the Polish civil law doctrine,⁷⁹ although it is stressed that the repressive function is alien to the modern civil law.⁸⁰ The civil law in Poland *de lege lata* does not contain legal norms which would provide for punitive damages. It does not seem, either, that the above mentioned punitive measures imposed in criminal proceedings for some offences could be equivalent to “punitive damages” from the legal-comparative point of view.

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⁷³ III CKN 193/04, Biuletyn SN 2005, no. 7, 12.

⁷⁴ See Radwański/Olejniczak (fn. 14) no. 498.

⁷⁵ Cf. Czachórski (fn. 10) 218.

⁷⁶ Radwański/Olejniczak (fn. 14) no. 499.

⁷⁷ Cf. Czachórski (fn. 10) 218; Radwański/Olejniczak (fn. 14) no. 499.

⁷⁸ See Radwański/Olejniczak (fn. 14) no. 499.

⁷⁹ See E. Bagińska, Odszkodowanie karne (punitive damages) w prawie amerykańskim, Państwo i Prawo (PiP) 2001, vol. 9, 79 ff.

⁸⁰ Czachórski (fn. 10) 96.

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the “regulatory permit defence”?

- 68 In case of liability based on fault, if a tortfeasor proves that he has acted in compliance with all relevant legal rules, the prerequisite of wrongfulness will not apply, which will effectively exculpate the tortfeasor. There may, however, be certain exceptions to that rule.
- 69 Firstly – a different ruling may arise out of an explicit legal provision as is in case of the above mentioned art. 325 of the Environmental Protection Law.
- 70 Secondly – it may happen that, in spite of the fact that fault-based liability is excluded, another liability may arise – so-called equity liability. An example of that may be art. 417² p.c.c. according to which, if damage was caused to a party by the lawful performance of public authority, the aggrieved party may claim for its full or partial redress and for pecuniary compensation for the sustained damage if the circumstances, and particularly the wronged party’s inability to work or difficult financial situation, indicate that the principles of equity require that.
- 71 Third – a different outcome may be the result of certain solutions adopted in judicial decisions, referring to the rules of careful conduct.

2. Can the general duty of care go beyond these rules?

- 72 As mentioned before, in Poland, the question of the scope of wrongfulness is a subject of controversy both in the doctrine and in judicial decisions, which first of all applies to the issue of the act being contrary to the principles of social intercourse. There is also a question whether the issue of complying with the rules of careful conduct (e.g. in road traffic) should come within the scope of wrongfulness or fault. The doctrine proposes the exclusion of the principles of correct conduct from the scope of wrongfulness,⁸¹ and placing it within the realm of fault, since otherwise the notion of unintentional fault would be deprived of any real contents.⁸²
- 73 It should be noted that some decisions of Polish courts suggest that sometimes the general rules of careful conduct may reach further than the safety rules provided by administrative law. This applies in particular to judicial decisions

⁸¹ Sośniak (fn. 10) 83; Szpunar (fn. 24) 51; M. Sośniak, *Należyta staranność* (1980) 179. Another point of view: M. Krajewski, *Należyta staranność – problem bezprawności, czy winy*, PiP 1997, vol. 5, 32 ff.

⁸² Szpunar (fn. 24) 51.

related to product liability, which, until the introduction of detailed regulations in that respect (art. 449¹–449¹¹ p.c.c.), was based solely on art. 415 p.c.c.⁸³ and so the judgment dated 4 December 1981 reads as follows: “The fact that the television set was produced in accordance with a Polish Norm, that it has been released for production and for circulation by the decisions of relevant administrative bodies, does not exculpate the manufacturer in a situation when he has been informed about fires caused by self-ignition of the equipment produced by him, which are dangerous to property and even to the health and life of his customers, and if the manufacturer does not undertake any remedial measures in the form of replacing the flammable insulation or at least warning the customers of a potential danger in the product operation instructions. Negligence in this respect constitutes fault, which justifies civil liability for the damage that has been caused”.⁸⁴

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

As mentioned above, in case of liability based on fault (art. 415 p.c.c.), it is the aggrieved party that is obliged to prove the existence of all the prerequisites of liability, and in particular, wrongfulness and fault. Therefore it is up to the aggrieved party to prove that the action or inaction of the wrongdoer violated the relevant legal norms and constituted a breach of the due care principle, which the latter is obliged to comply with.

If the tortfeasor proves that he has acted lawfully, such evidence should essentially lead to excluding his liability in tort, since the prerequisite of wrongfulness is missing. It does not, however, lead to the change of the general evidence rule of art. 6 p.c.c.

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

In the field of liability for product safety, the main role is played by Civil Code rules on product liability, which – according to prevailing views – are strict liability (or at least no-fault liability) rules. There are some doubts as to whether the new regime is a tort one or rather an extra-contractual liability.⁸⁵

⁸³ Cf. decision SN, 12 July 2002, V CKN 1112/00, LEX no. 57216.

⁸⁴ IV CR 433/81, OSP 1983, no. 3, pos. 55 with gloss by Cz. Żulawska.

⁸⁵ E. Łętowska, Ustawa o ochronie niektórych praw konsumentów. Komentarz (2001) 113; Gnella (fn. 6) 281; M. Jagielska, Odpowiedzialność za produkt, Monitor Prawniczy (MoP) 2000, 496; Czachórski (fn. 10) 281; P. Granecki, Odpowiedzialność za produkt niebezpieczny. Charakter i miejsce w systemie odpowiedzialności, Przegląd Legislacyjny 2001, 33.

Those doubts are caused by the way in which the new rules are expressed. They were not introduced in the VI chapter of the III Book of the Civil Code: Torts, but a new chapter VI¹: Product liability was added. Additionally, art. 449⁶ p.c.c. states that, in the sphere of product liability, tort rules should be used “adequately” – so not directly. These two factors made some authors think that we must distinguish between product liability and tort.⁸⁶ According to them, product liability does not belong to the tort liability regime, but constitutes a new kind of liability – extra-contractual liability. If this is so, it would mean that a new, third kind of liability (apart from tort and contract) was introduced in the Polish civil law.

- 77 Other authors stress that the arguments cited above are not enough to claim the establishment of a new type of liability and that the only problem was of a technical rather than legal nature.
- 78 It must be remembered that the rules mentioned above are aimed only at protecting humans and their private goods. Meanwhile in the area of B2B relationships and non-personal damages, the rules of product liability are of no relevance. There of main importance are still traditional rules on civil liability, both contractual and tort ones. Usually such claims are based on the general rules of tort (art. 415 of the Civil Code) or contractual liability (art. 471 of the Code).⁸⁷ In both cases the liability is based on fault, but in contractual liability fault is presumed.
- 79 Nevertheless almost all important product liability judgments pronounced by the Supreme Court were based on tort, which is mainly connected with the fact that only within a tort liability regime can a plaintiff claim moral damages for pain and suffering. Polish courts did not adopt the general rule of presumption of fault in product liability cases, as occurred in some EU countries, but in fact they did not insist on the plaintiff proving the producer’s fault. Before the courts, the plaintiffs merely have to show only a high probability of fault.⁸⁸ They have also adopted the concept of anonymous fault⁸⁹ and sometimes summoned the *res ipsa loquitur* rule.⁹⁰ The attempts to introduce strict liability have been rare and usually failed.⁹¹
- 80 The Polish legal system provides some sort of injunctive relief by which a (potential) victim of tortious liability can file a claim for a prohibitory injunction

⁸⁶ J. Rajski, *Odpowiedzialność za produkt niebezpieczny w świetle nowych przepisów kodeksu cywilnego*, Przegląd Prawa Handlowego (PPH) 2001, 23; *Gneta* (fn. 6) 280.

⁸⁷ Polish law allows a plaintiff to choose among the regimes of liability (art. 443 p.c.c.) – if, of course, all the prerequisites are met.

⁸⁸ *Gneta* (fn. 6) 173 ff.

⁸⁹ A. Szpunar, *Odpowiedzialność Skarbu Państwa za funkcjonariuszy* (1985) 154 ff.

⁹⁰ Decision SN, 6 August 1981, I CR 219/81, OSPiKA 1982, vol. 7–8, pos. 122.

⁹¹ As it was in Coca-Cola case, where the Court of Appeal did not share the lower court ruling that the liability for exploding bottle can be based on risk as it is connected with the functioning of a factory (art. 435 p.c.c.). The decision of Court of Appeal in Katowice on 10 October 1996, I ACr 500/96, *Wokanda* 1998, no. 2, 40.

in the future in the form of a negatory claim. These injunctions are considered to be part of the remedies of substantial law. Such claims can also be filed by private parties. The question of compliance or non-compliance with prescribed norms or given permits can be of some importance in such cases. Negatory claims are allowed on the basis of art. 81 and 323 of the Environmental Protection Law. Such a claim also arises from art. 222 § 2 of the Civil Code in connection to art. 144 p.c.c. (on the so-called Neighbourhood Law). It does not allow claims for damages but a negatory claim on renunciation of infringements and restitution. Generally, one cannot disclose the opportunity of the cumulative (or alternative) application of the above mentioned injunction with other remedies of civil or administrative law.⁹²

Liability for mining and geological damage prescribed by the Geological and Mining Law of 4 February 1994⁹³ provides that any person suffering damage can claim recovery from the person causing it or – if such a person is unknown – an entrepreneur exploiting the mine (art. 96 f. of the Law). Such claim is a strict liability claim. 81

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?

According to art. 417² of the Civil Code, if a personal damage was caused by legal acts of public powers, the person suffering it can claim material and non-material damages if the circumstances of the case (disability to work or hard material situation) show it should be fair according to equity rules. This is the so-called liability for legal damage. The prerequisites of such liability are: exercising (according to law) public powers, personal damage, adequate causation and equity. Such a rule is explained by the fact that exercising public powers cannot put the burdens and risk of a damage onto a person if such a damage cannot be avoided and arises as a consequence of exercising legal powers.⁹⁴ 82

The Polish Code of Administrative Procedure allows a Ministry to change or repeal a final administrative decision if it is not possible to avoid danger to human health or life or important public interests in another way (art. 161 of the Code). Any person suffering damage due to such a change or repeal can claim recovery from an authority which changed or repealed the decision. The recovery is limited to real damage (*damnum emergens*). Such liability is no-fault liability, with only two prerequisites: repeal of the decision and damage. 83

In the field of environmental protection, one may find different sets of rules behind the traditional tort law rules which allow various claims. Below are 84

⁹² See A. Stelmachowski, in: Z. Radwański(ed.)/T. Dybowski (vol. ed.), *System prawa prywatnego*, vol. 3, *Prawo rzeczowe* (2003) 292, 293.

⁹³ Dz.U. 1994, no. 27, pos. 96 as amended.

⁹⁴ Saffan (fn. 3) 80.

only some examples. It must be underlined that such rules can be found in different regulations, in addition to those mentioned above and below (such as the Water Act, the Law on Protection of Nature, etc.). They do not constitute a homogenous system of rules. Rather they have been created to realise particular interests. The common features of them are that damage arises either from legal acts of public bodies, or from the activity of a person which is of social value or from an entity empowered to exercise some activities, even infringing another person's rights. Then – as far as indemnification is concerned – we can observe: the tendency to reduce compensation (usually to *damnum emergens*) and the relativity between indemnity and kinds of rights infringed. We can usually recognize a partial duty of a party to participate in damage and a reduction of final liability of a person benefiting from a damage.⁹⁵

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 85 According to the opinions contained in Polish literature,⁹⁶ legal acts⁹⁷ and Supreme Court judgments,⁹⁸ the legality of pollution (arising from norms of allowed level of pollution) does not exclude civil liability. This damage is still considered illicit even although the legal permission (for example, administrative decision) was given. An entrepreneur is liable for damage caused by the emission of poisonous substances even if their concentration does not exceed the norms. According to the Environmental Protection Law (art. 325), liability for environmental damage is not excluded by the fact that the activity causing damage is carried out on the basis of an administrative decision and within its frames. Therefore the farmer can claim damages from the plant operator. The question whether it is relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure is rather of minor importance and it should have no influence on the level of compensation.

- 86 Liability of the State, based on art. 77 of the Constitution and art. 417 ff. p.c.c. is excluded to all cases that occurred before 1 September 2004. This rule was

⁹⁵ E. Łętowska, Odpowiedzialność odszkodowawcza administracji, in: T. Rabska/J. Łętowski (eds.), System prawa administracyjnego (1978) 469 ff.

⁹⁶ Machowski (fn. 42) 125; Boć (fn. 63) 396.

⁹⁷ Art. 325 of Environmental Protection Law.

⁹⁸ Decisions SN, 7 April 1970, III CZP 17/70, OSP 1971, no. 9, pos. 169 and SN, 24 February 1981, IV 17/81, OSP 1982, no. 45-6, pos. 64.

expressly stated in a law introducing new rules – art. 5 of the Law of 17 June 2004 changing the Polish Civil Code in the issue of State liability.⁹⁹ Therefore the new rules described above will be of no relevance in this case.

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

According to art. 435 p.c.c., an entrepreneur conducting business which is set in motion by natural powers (steam, gas, electricity, etc.) is liable for damage caused to anyone by its motion unless the damage was only the result of force majeure, or it was incurred through the exclusive fault of the person injured or of a third person. In this case no exoneration grounds appear, liability is strict and the entrepreneur would be held liable, irrespective of who is the victim, the employee or the third person. If an activity of an entrepreneur is not connected to the usage of natural powers, then art. 435 is not applicable and the general rules of tort liability shall apply. It is art. 415 p.c.c. which emphasises liability based on fault. In such a situation, of course, the ascertained breach of duty to introduce protective measures constitutes an illicit act. However, to hold an entrepreneur liable on the basis of art. 415, his fault must be proved and there we may consider his conduct, negligence, etc. We can also think of contributory negligence, but still we can presume the imposition of liability in this case.

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3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

The basic grounds to answer these questions would be the same as to the answer for the previous question. A company would be held liable either on grounds of strict or fault-based liability, depending on what kind of activity it conducts. If it is a case of strict liability (art. 435 p.c.c.), then the sole fact of the agency's omission does not constitute an exemption. If this activity does not implicate strict but fault liability (art. 415 p.c.c.), then the entrepreneur's

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⁹⁹ Dz.U. 2004, no. 162, pos. 1692.

lack of activities aimed at remedying the shortcomings would still implicate his liability because of his wrongfulness and negligence. The sole reason of the authorities' omission would not exempt them from liability.

b) Could the injured persons claim damages from the government agency?

- 89 Generally the answer to this question would be in the negative. We can consider liability of a State or a public body only if it was obliged (by law) to act. Then we may consider the application of art. 417 § 3 p.c.c, according to which, it is possible to claim damages caused by the non-enactment of a judgment or decision if its enacting was mandatory. In such a case, liability of the public body can be possible but still we must consider if there is a causal (adequate) link between public body renunciation and damage.

TORT AND REGULATORY LAW IN SPAIN

*Pedro del Olmo**

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

Under Spanish law, harm may be reparable if it is negligently caused. Consequently, it is essential to define the idea of negligence or fault. Very often, legal scholars provide a definition through a gradual approach: (i) first, “fault” is explained as a deviation from the standards of conduct of a reasonable man; (ii) if harm is caused by a professional, his/her fault is based on a breach of *lex artis*; and (iii) finally, if the specific sector where the accident occurs is subject to administrative regulations which are thereby breached, this in itself shall presume that fault exists (if, as explained below, the purpose of the infringed law coincides).

Thus, the existence of a breach of administrative regulations is significant from the point of view of Spanish tort liability. A breach of administrative law shall presume the existence of fault or negligence and, consequently, a potential tort liability. However, please note that compliance with all legal and administrative requirements do not define the standards of diligence. As will be seen throughout this report, Spanish law may attribute negligent behaviour to the defendant, even if the latter has strictly fulfilled all the necessary administrative requirements. This is further explained below.

a) The starting point of Spanish tort liability is established in art. 1902 of the Spanish Civil Code, very similar to art. 1382 of the French Civil Code: “Whoever causes harm to another, by an action or omission, with intent or negligence, shall be obliged to remedy the harm caused”. Consequently, Spanish tort liability is based on what is known as a general clause.

In relation to art. 1902, both the Spanish Courts and legal scholars have usually interpreted that Spanish tort liability not only requires an action, fault,

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harm and a causal link, but also wrongfulness. However, lately there has been a tendency to reject wrongfulness as a tort liability requirement, whilst at the same time highlighting the manner in which this requirement was traditionally interpreted. In fact, this recent and popular trend indicates that wrongfulness is usually based on the conduct, rather than on the harm caused, and is nearly always connected to a breach of the general duty not to cause harm to another (*neminem laedere*), i.e. the requirement of wrongfulness does not add much to a tort system that, in fact, is subsumed in the idea of fault.¹

- 5 The traditional position is that any harm caused to a person (personal injury) or to assets (material damage) is wrongful and should be indemnified, unless it is justified (non-abusive exercise of a right, self-defence ...).² Consequently, the starting point is the existence of a general duty to take care established in very general terms:³ the duty of *alterum non laedere*, as an authentic legal rule. Based on the foregoing, fault is traditionally only understood as a breach of a duty to take care and not to harm another, which is very easily defined.⁴
- 6 Under Spanish law, fault is usually defined as the difference between the actual act and the behaviour that would have been adopted by a reasonable man given the circumstances of the case (i.e. essentially, the standard of diligence). According to L. Díez-Picazo, fault means “a deviation from the standards of conduct”.⁵ As a result, an event will be remediable if the defendant’s conduct did not conform to the behaviour of a reasonable man. Furthermore, if safety regulations in the relevant sector impose additional requirements, any breach

¹ This is well explained in *F. Pantaleón*, Comentario al artículo 1902, in: C. Paz-Ares et al. (eds.), Comentario del Código civil (1993) 1994, who claims that wrongfulness is not a significant requirement in Spanish law. See also *M. Yzquierdo Tolsada*, Sistema de responsabilidad civil contractual y extracontractual (2000) 111; *C. Asua*, La responsabilidad, in: L. Puig Ferriol et al. (eds.), Manual de Derecho civil II (2000) 465; *F. Reglero Campos*, Conceptos generales y elementos de delimitación, in: F. Reglero Campos (ed.), Tratado de responsabilidad civil (2002) 46 ff., 52; *E. Vicente Domingo*, El requisito de la ilicitud y la reparación del daño corporal, Revista de Derecho Privado (RDP) 1990, 812; *E. Roca*, in: R. Valpuesta (ed.), Derecho de obligaciones y contratos (2nd ed. 1995) 494; *E. Roca*, Derecho de daños (4th ed. 2003) 73 and *P. del Olmo*, Responsabilidad por daño puramente económico causado al usuario de informaciones falsas, Anuario de Derecho Civil (ADC) 2001, 302, amongst others. The traditional position is given by *L. Díez-Picazo*, Derecho de daños (1999) 290; *J.L. Lacruz et al.*, Elementos de Derecho civil II (2005) 468; *R. de Ángel*, Tratado de responsabilidad civil (3rd ed. 1993) 258 ff.; *J.L. Concepción*, Derecho de daños (1997) 65 ff.; *J. Santos Briz*, Comentario al artículo 1902 Cc, in: M. Albaladejo (ed.), Comentarios al Código Civil y Compilaciones Forales (1984) 104 ff., amongst others.

² In the same way as French law, Spanish law seems to readily accept the reparable nature of purely economic losses, provided that the general requirements of fault, harm and causation are met.

³ So general and wide that they are often implausible. *F. Pantaleón*, Cómo repensar la responsabilidad civil extracontractual (también la de las Administraciones Públicas), in: J.A. Moreno Martínez (ed.), Perfiles de la responsabilidad civil en el nuevo milenio (2000) 440 and *Del Olmo*, ADC 2001, 311 provide an explanation and suggest certain amendments.

⁴ Clearly explained by *F. Peña López*, La culpabilidad en la responsabilidad civil extracontractual (2002) 443 amongst others.

⁵ *L. Díez-Picazo*, La culpa en la responsabilidad civil extracontractual, ADC 2001-III, 1017.

thereof will also amount to negligence. Some authors have warned that, in fact, it would be necessary for the scope of protection of the infringed rule to coincide with the harm caused, i.e. a breach of the law entails a situation of risk that becomes the immediate cause of the harm.⁶

b) Under Spanish law, if an accident occurs in a sector subject to administrative regulations, and such regulations are breached, the jurist's task is simplified. It is no longer necessary to apply the *alterum non laedere* rule, as the wrongfulness requirement is deemed fulfilled by the fact of breaching the law. Other authors who prefer not to apply that wrongfulness requirement suggest that the defendant's behaviour is in itself negligent, as a result of the breach, but, in any case, their task is still simplified.

This initial interpretation, to the effect that a lawyer's task is simplified as a result of safety regulations applicable to a particular activity, is simple and hardly raises theoretical problems. However, as mentioned above, Spanish law also takes into account a more peculiar principle, according to which the standards of diligence are not defined by the mere fulfilment of the requirements established in applicable administrative law. In effect, according to S. Cavanillas, "this is a two-sided rule: on the one hand, the existence of fault does not require the breach of any specific rule; on the other hand, fulfilment of the requirements established in the particular bylaw is insufficient to exclude the possibility of being considered negligent".⁷

Below we examine some of the consequences derived from this second idea, i.e. that the fulfilment of administrative law does not in itself define the standards of diligence:

- The Courts have developed the principle of "exhausted diligence" (*agotamiento de la diligencia*), whereby the fulfilment of all legal requirements is insufficient to ascertain diligent behaviour: all the duties inherent to "required social diligence" must also be fulfilled.⁸ According to F. Peña, in order to exempt the defendant from liability, the defendant must prove that all the possibilities of avoiding the harm were exhausted. Once the situation is deemed dangerous and consequently potentially harmful, the actual harm caused may prove that not all the necessary precautions were taken.⁹ This idea is upheld by the Supreme Court: "If the guarantees adopted under the law to foresee and avoid any foreseeable and avoidable

⁶ Díez-Picazo (fn. 1) 358; Yzquierdo Tolsada (fn. 1) 277 and Reglero Campos (fn. 1) 188.

⁷ S. Cavanillas Múgica, *La transformación de la responsabilidad civil en la jurisprudencia* (1987) 49.

⁸ This opinion is expressed, amongst many others, by Roca, *Derecho de daños* (fn. 1) 68; Lacruz et al. (fn. 1) 474; Díez-Picazo (fn. 1) 358; L. Díez-Picazo, *Culpa y riesgo en la responsabilidad civil extracontractual*, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid (AFDUAM)* 2000, 158; Cavanillas (fn. 7) 48; Peña (fn. 4) 538; Asua (fn. 1) 479. An example of extensive Spanish case law is provided in Supreme Court Decisions of 15 February 1995 and 8 May 1995.

⁹ Peña (fn. 4) 541.

damage have been unsuccessful, they are consequently insufficient and not comprehensive and, as a result, the diligence is incomplete".¹⁰ The mere fact that harm was caused reveals that the regulatory precautions were insufficient. Some authors have pointed out that, as a result of this line of thought, it is difficult or impossible to establish a legal definition of diligence and the matter is reduced to a mere ethical opinion.¹¹

- This view of the fault requirement, based on such a broad and flexible clause, is repeated over and over again. As a result, the principle of exhausted diligence has been interpreted as one of the paths that the Courts have followed to change the subjective tort system established in the Spanish Civil Code into a strict liability system.¹² Again, it has been pointed out that, with such a flexible and relaxed definition of fault, there would be no need to introduce a strict liability system for cases that are reparable, in any case, under this wide view of negligence.¹³
- The relationship between the principle of exhausted diligence and strict liability is more complex. According to S. Cavanillas, there was a time when the Courts first checked that all the regulatory requirements were met and then allowed the defendant to attempt to prove his diligent behaviour. However, starting in the 1970s, the defendant was only allowed to bring evidence in relation to *force majeure* or to prove that the victim himself was the direct cause of the accident (it was said at the time that the mere occurrence of an accident was proof that the standards of diligence had not been exhausted). As one can easily understand, the principle of exhausted diligence has very different effects in either case.
- Furthermore, it has also been pointed out that the principle of exhausted diligence indicated the Supreme Court's initial contempt of administrative regulations.¹⁴
- Moreover, it is clear that the situation described above is also characterised by a lack of coherence in decision-making, and a consequent level of uncertainty: first, it is unclear when the Court will use its usual objective tricks or techniques and when, on the other hand, it will actually examine the issue of fault; also, the Courts do not make much effort to describe the specific duties of care that must be exhausted because, in fact, there is no need for these efforts and, as stated by J. Conrad, a need is what spurs an invention.¹⁵

¹⁰ This is a very popular quote taken from the Supreme Court Decision of 12 February 1981. According to *Lacruz et al.* (fn. 1) 474, this manner of thinking was born in the 1930s as a result of a series of court decisions in railway accidents, followed by another set of judgments delivered in (traditional) environmental damage cases, and a further group of cases in which the accident was caused by electric conducts.

¹¹ *Díez-Picazo* (fn. 1) 358.

¹² See, for example, *Díez-Picazo*, AFDUAM 2000, 158; *Peña* (fn. 4) 541; *Roca*, in: Valpuesta (ed.) (fn. 1) 492 and *Asua* (fn. 1) 479.

¹³ *Reglero Campos* (fn. 1) 190.

¹⁴ *Cavanillas* (fn. 7) 48.

¹⁵ Regarding this legal uncertainty, see *F. Pantaleón*, *Comentario*, Cuadernos Civitas de Jurisprudencia Civil (CCJC) 1983-III, 847–848; *Díez-Picazo* (fn. 1) 24.

c) To sum up, the standard of negligence under Spanish law is simplified if the defendant breaches any administrative law in such a way as to determine the occurrence of the accident. However, this outcome is not definitive because, regardless of the protective purpose of the infringed law, the Court can decide that the defendant must pay damages to the victim if the diligence is not exhausted.¹⁶

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The significance of a breach of administrative law is also reflected in the positive definition of diligence provided by the Spanish tort system. Although all safety rules (albeit restricted by a protective purpose) must be fulfilled in order for diligent behaviour to exist, further requirements are subsequently established by the judge in each case. As a result, a positive definition of diligence is left in the air and the level of legal uncertainty is increased. As already mentioned, the definition of fault is consequently excluded from the scope of the law and becomes a question of fact in the hands of the Courts.¹⁷

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2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

The issue in Spain exclusively depends on the rules that establish a statutory reservation in certain matters, or that distribute the corresponding powers between the various territorial instances (central, autonomous and local authorities). If these rules are complied with, there are no further laws governing the scope of each specific law enacted, from the point of view of the infringed law's protective purpose (see the next question below).

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3. Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?

a) The violation of any type of administrative law may be significant from the point of view of tort liability. The assumption of the defendant's negligent behaviour, as a result of the breach, does not depend on the rank of the infringed legal provision. As explained below, what is important is for the scope of protection of the infringed law to coincide with the type of damage caused. If a coincidence exists, it is irrelevant if the infringed law is ranked as a statute or a mere regulation.

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¹⁶ A similar situation arises in the case of a manufacturer's liability for defective products, governed by Act 22/1994, of 6 July. As explained by *J. Solé i Feliu*, *El concepto de defecto del producto en la responsabilidad civil del fabricante* (1997) 434, the requirements established in existing product regulations (toys, food, etc.) provide a set of minimum standards. This administrative regulation, if breached, may indicate that a defect does exist. In other words, the breach or fulfilment of these regulations acts as a presumption of whether or not a defect exists, allowing evidence to the contrary in either case.

¹⁷ *Reglero Campos* (fn. 1) 188.

- 14 A good example of this can be found in tort liability for loud noises. When a plaintiff reports the noise that is being caused by a neighbour, very often the corresponding Regulations issued by the local or regional authorities are examined to ascertain whether the noise level is excessive.¹⁸ A breach of any of these administrative provisions will have the same weight as a breach of statutory provisions in a civil tort case.
- 15 b) Perhaps it is worth mentioning that Spanish law does in fact make a statutory reservation in relation to administrative sanctions.¹⁹ The breach of a legal obligation may entail an administrative sanction, established in the law itself. These administrative sanctions may include an obligation to restore the situation to its original state and/or to pay damages for the harm caused. Although this interpretation may be far-fetched, in such a case we would be referring to a breach of obligations that are solely and necessarily imposed by statute.

4. What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?

- 16 a) If a regulation or administrative act is illegal and causes harm to an individual, this would be a case of general liability of the Administration for the inadequate or even adequate operation of public services,²⁰ and the individual would receive damages from the State.
- 17 At present, administrative scholars disagree on the technical construction of this liability. In relation to the adoption of an illegal act, it is argued whether this would be a case of strict liability or, conversely, whether it would be a case of fault liability. It is also argued whether or not the Administration, notwithstanding the illegality of the act, may attempt to prove the reasonability of its conduct in order to exclude its own liability (e.g. by arguing that the rule on which it based its decision is confirmed in the case law). In any case, recent decisions adopted by the Supreme Court tend to use fault-based reasoning and exempt the Administration from liability if it is able to prove that the illegal resolutions were the product of logic and of a well-constructed legal argumentation.²¹

¹⁸ *A. Macías Castillo*, *El daño causado por el ruido y otras inmisiones* (2004) 280 provides a good explanation and refers to some court decisions.

¹⁹ *E. García de Enterría/T.R. Fernández*, *Curso de Derecho administrativo I* (8th ed. 2002) 174 ff. The literal wording of art. 25 of the Spanish Constitution may raise some doubts. However, the Constitutional Court has fully clarified the issue in various decisions.

²⁰ *L. Medina Alcoz*, *La responsabilidad patrimonial por acto administrativo* (2005) 253 explains that illegality is equivalent to inadequate operation of the Administration. See, for example, *J. González Pérez*, *Responsabilidad patrimonial de las Administraciones públicas* (3rd ed. 2004) 333 for the particular case of harmful regulatory acts.

²¹ The matter as it now stands is well explained in *Medina Alcoz* (fn. 20) 253–273. See page 265 for an interpretation of the case law.

b) If an individual acts further to an illegal regulation or administrative act and causes harm to another individual, he/she is initially excluded from liability.²² In the Spanish legal system, and although most tort scholars do not elaborate the issue, the exercise of a right or the fulfilment of a duty shall exempt the party from liability for the harm caused.²³ This conclusion is reached according to applicable provisions in the Spanish Criminal Code, as the Civil Code is silent on the matter.²⁴

The majority opinion amongst criminal law scholars is that due obedience to superiors' orders will also exempt the party from criminal liability if the order is illegal.²⁵ Nevertheless, certain formal requirements (competence of the body and fulfilment of legal formalities) and material requirements (appearance of legality) must still be met. From either point of view, the fact that the party subject to the act was aware that it was illegal may actually be relevant.

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

In principle, the sanctions established in both administrative and criminal law are perfectly compatible with a tort claim for the harm suffered. In order to describe how this operates under Spanish law, we will first examine the relationship between tort liability and criminal law and, next, between tort liability and administrative sanctions. Further comments will be provided on the issue from the point of view of strict civil law.

a) There is a clear starting point in the issue of how tort liability and criminal sanctions interact: anybody who is charged with the commission of an offence will also be liable in tort for any harm caused.²⁶ However, for historic reasons, tort liability derived from a criminal offence is regulated both in the Civil and Criminal Codes, and there are certain differences between their respective pro-

²² According to *J.C. Laguna de Paz*, Responsabilidad de la Administración por daños causados por el sujeto autorizado, *Revista de Administración Pública* (RAP) 2001, 34, the party authorised to carry out an activity that causes harm must himself repair said harm: "As an exception, the Administration may be deemed exclusively liable – and the authorised party excluded from liability – when the authorisation gave the applicant an unreal appearance of legality and the (technical) adequacy of his behaviour, which he was unable to refute by applying the corresponding diligence".

²³ *Pantaleón* (fn. 1) 1995; *Díez-Picazo* (fn. 1) 304; *Roca*, Derecho de daños (fn. 1) 76; *Lacruz et al.* (fn. 1) 469.

²⁴ According to art. 20.7 of the Criminal Code: "The following parties shall be exempt from criminal liability: [...] 7. Whoever acts further to a duty or in the legitimate exercise of a right, task or position".

²⁵ See *S. Mir Puig*, Derecho Penal, Parte General (7th ed. 2004) 492 for an analysis and further references.

²⁶ Art. 109 of the Criminal Code states as follows: "The execution of an event described by law as an offence or misdemeanour entails an obligation to repair any losses and damage, in the terms foreseen by law".

visions. Although everybody accepts that Criminal Courts may examine civil matters, the majority opinion is against the co-existence of two different sets of rules and proposes a reunification under the Civil Code.²⁷ In fact, the Spanish legislator is generally criticised for having maintained a dual regime when it enacted the new Criminal Code in 1995.²⁸

- 22 Thus, the Criminal Courts will also resolve on the tort liability of the offender unless the victim has reserved its civil actions for a later civil lawsuit, or has waived such actions.
- 23 The most significant differences in the tort liability provisions contained in the Criminal Code refer to liability for third party acts. Problems have also arisen from the different statutes of limitation established for tort and criminal actions.²⁹
- 24 b) With respect to administrative sanctions, art. 130.2 of the Common Procedure Act establishes that the wrongdoer must restore the situation to its original state and pay damages for the harm caused,³⁰ apart from the imposition of the corresponding sanction. Furthermore, art. 22 of the Regulations governing the procedure in which to exercise sanctioning powers (Royal Decree 1398/1993, of 4 August) explains that the purpose is to repair the harm suffered by the Administration itself. Although some authors disagree, it seems clear that the Administration itself must claim any such liability through ordinary enforcement proceedings.³¹
- 25 As will be seen below in the section on environmental regulations, some rules also establish that the Administration may determine, and even demand, the damages owed to an individual as a result of an administrative breach in these cases. This is clearly an exception, as this type of *inter privatos* conflict is usually resolved by the ordinary civil courts.³²
- 26 c) In the event of a purely civil tort claim against a wrongdoer who causes harm to an individual by breaching administrative law in which sanctions are established, the matter will be dealt with under Spanish law as described supra no. 1 and 9.

²⁷ See *Díez-Picazo* (fn. 1) 269 ff.

²⁸ See *F. Pantaleón*, *Perseverare diabolicum – Otra vez la responsabilidad civil en el Código penal*, *Jueces para la Democracia* (JpD) 1993-II.

²⁹ *M. Yzquierdo Tolsada*, *La responsabilidad civil en el proceso penal*, in: *Reglero Campos* (ed.) (fn. 1) 445 ff., 471 ff.

³⁰ *E. García de Enterría/T.R. Fernández*, *Curso de Derecho administrativo II* (8th ed. 2004) 200 f.; *J. González Pérez/F. González Navarro*, *Comentarios a la Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (LRJAPPAC) II* (2nd ed. 1999); *J.A. Santamaría et al.*, *Comentario sistemático a la LRJAPPAC* (1993) 387 f.; *F. Uribe/F. Bueno*, *Estudios y comentarios sobre la LRJAPPAC* (1993) 60. For general arguments from an environmental law perspective: *M. Calvo Charro*, *Sanciones medioambientales* (1999) 152.

³¹ For example, *R. Parada*, *Derecho Administrativo I* (12th ed. 2000) 517.

³² *García de Enterría/Fernández* (fn. 30) 200 f.

6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

There is no obvious reply to this question under Spanish law (see our reply to question one above). It would seem that this protective purpose is basically determined according to tort law, as evidenced by the fact that the Courts may decide that negligence exists even if all applicable administrative rules are fulfilled (regardless of their protective purpose).

Unlike the case of criminal law, the issue of objective imputability (known in Germany as “objektive Zurechnung”) has only recently been incorporated into Spanish tort doctrine.³³ The application of this objective liability to civil tort cases by the courts is still questionable and subject to discussion, even if it is ordinarily applied by the Criminal Courts.³⁴ The criteria for objective imputability that legal scholars have introduced in Spain include, amongst others, the purpose of the infringed law and, often, the increase of the risk.

In relation to the protective purpose of the infringed law, the famous Supreme Court Judgment of 22 February 1946 (Repertorio de Jurisprudencia (RJ) 253) is usually used to illustrate this: the case dealt with the death of certain labourers who had been working on a Sunday in a factory close to an area with accumulated explosives. It was held that the breach of the rules against working on a Sunday was insufficient to attribute liability in causal terms, because the purpose of the infringed law was the employees’ rest, not their safety.³⁵

³³ This theory was ignored by Spanish civil scholars even as late as 1990, when F. Pantaleón, *Causalidad e imputación objetiva: criterios de imputación*, in: Centenario del Cc II (1990) 1561 introduced it in Spain (and confirmed the current state of affairs). However, some previous articles did exist, referred to by F. Pantaleón, such as S. Cavanillas, *Comentario*, CCJC 1988, 383 and the references made by F. Pantaleón, *Comentario a la STS de 4 de octubre de 1982*, La Ley 1983-II, 383. The situation in criminal law is very different. F. Pantaleón refers to doctrinal work by E. Gimbernat in 1966. At present, civil scholars regularly use these criteria: see *Lacruz et al.* (fn. 1) 485–486; *Díez-Picazo* (fn. 1) 340 ff.; *Roca*, in: Valpuesta (ed.) (fn. 1) 521; *P. Salvador Coderch*, *Causalidad y responsabilidad*, inDret 2002, passim; *M.L. Arcos Vieira*, *Responsabilidad civil: nexo causal e imputación objetiva en la jurisprudencia* (2005) 17; *F.J. Infante*, *La responsabilidad por daños: nexo de causalidad y causas hipotéticas* (2002) 149 ff.; *J.M. Pena et al.*, *Derecho de responsabilidad civil extracontractual* (2004) 87 ff.; *C. Díaz-Regañón*, *El régimen de la prueba en la responsabilidad civil médica* (1996) 225; *Yzquierdo Tolsada* (fn. 1) 193; *De Ángel* (fn. 1) 787 ff.; *B. Gutiérrez-Solar*, *Culpa y riesgo en la responsabilidad por accidentes de trabajo* (2004) 131. Objective imputability is criticised in an isolated manner by *I. de Cuevillas Matozzi*, *La relación de causalidad en la órbita del Derecho de daños* (2000) 66. However, *Concepción* (fn. 1) 84 ff. still followed traditional principles and refused to assume (or even describe) objective imputability criteria in 1997.

³⁴ *Reglero Campos* (fn. 1) 290 refers to Supreme Court Decision (Second Section) of 5 April 1983 (Repertorio Aranzadi (RA) 2242) as the first criminal case examined by the Supreme Court Decision that applies the objective imputability. The author also refers to certain Supreme Court Decisions in civil matters that follow the theory of adequate causation and state the issue of objective imputability, but says it is impossible to find a basic definition. This opinion was recently confirmed by *Arcos Vieira* (fn. 33) 18 who provides abundant case law.

³⁵ See *Pantaleón* (fn. 1) 1987 and, more recently, *Reglero Campos* (fn. 1) 305.

- 30 There is another good example in Supreme Court Judgment of 17 July 1986 (RJ 4571): a child drowned in a pool that was under construction and the Court highlighted that the purpose of the regulations used to attribute liability to the Town Council who owned the premises were aimed at 1) employee safety on the worksite, and 2) the safety of swimmers in an operating pool open to the public.³⁶
- 31 Spanish tort scholars have not provided further details on the application of objective imputability. Although they have stated that the protective purpose of the law is fundamental, they have not described the theory used to determine the same. Furthermore, the justification of some Supreme Court Judgments which have held the defendant liable is questioned, as it is not clear whether the Supreme Court believed that the purpose of the infringed law coincided with the avoidance of the harm that eventually occurred, or whether the Supreme Court in these cases simply decided to solve the case by using strict liability (i.e. ignoring that the Spanish Civil Code contains a fault-based tort system).
- 32 As a final note, in Spain the purpose of the infringed law enables the jurist to *limit* the tortfeasor's liability, but the defendant's liability does not depend on the breach of any administrative rule (see *supra* no. 9–11). In fact, as mentioned in our reply to question I.1 (see also *infra* no. 122 and 123), if the accident in question is not covered by the protective purpose of the infringed law, a breach of administrative law does not assume that the action was wrongful/negligent for tort liability purposes. However, the fact that one cannot take advantage of the existence of a breach to more easily ascertain the standard of diligence does not mean that one's work ends here. Beyond the protective scope of the infringed law, the breach of a duty of care, derived from general rules, may still be examined under the principle of non-exhaustion of the standards of diligence explained above.

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 33 In the case of a claim for damages in tort, the tortfeasor may only be the legal entity, or the legal entity and the individual through whom the former caused harm. The relationship between the liability of the legal entity and its employees is examined below.

It is probably unnecessary to clarify that under Spanish law the mere breach of administrative law does not entail a tort liability. In principle, this breach of administrative law in itself may entail administrative sanctions, or even criminal sanctions in some open-ended offences. Secondly, there is only liability in tort if the breach of administrative law has also caused harm.

³⁶ Yzquierdo Tolsada (fn. 1) 195.

Our reply shall distinguish between pure liability in tort, tort liability if an offence is committed, and tort liability if administrative law is breached. The first two issues shall be examined here, and the third shall be analysed in the next question below. 34

a) If a legal entity causes harm that involves the breach of an administrative rule, liability follows the general rules described supra no. 9–11. In the case of employers who are in charge of their workers, the tort liability of a legal entity can be based on art. 1902 and 1903.4 of the Civil Code.³⁷ The latter provision establishes the principle of *liability for third party acts*; the first provision regulates the liability of both individuals and legal entities. 35

Both legal scholars and the Courts readily allow art. 1902 of the Civil Code to apply to the harm caused by legal entities, despite the potential problems that may arise from the requirement of negligent behaviour. In order to overcome this obstacle, the theory of *organic representation* is used with arguments to support the idea that the represented party is liable for the acts of its representative, including the idea that whoever benefits from the acts of its managers and staff should be liable for the harmful consequences of said acts. Furthermore, art. 1903.4 of the Civil Code is analogously applied.³⁸ In some cases the theory of disregard of legal entity may be used, in the opposite sense.³⁹ 36

In light of the foregoing, if the harm was intentionally caused by a management body or representative of a legal entity (art. 1902), or by any of its workers (art. 1903.4), the legal entity shall be *directly* liable for the harm caused.⁴⁰ 37

Although the grounds to attribute liability to a legal entity by virtue of art. 1903 are questionable, the Civil Code establishes a form of fault liability. In fact, the last paragraph of art. 1903 provides that a legal entity shall be exempt from liability if it proves that it acted diligently, according to the standards of a reasonable person, in order to avoid the harm.⁴¹ Thus, the legal entity is liable (ex art. 1903) to the victim for its own fault, alongside the worker who directly caused the harm. In this case, both are jointly and severally liable to the victim, as generally interpreted by legal scholars and the Courts. 38

On the other hand, according to art. 1902, a legal entity shall always be personally and directly liable. However, both the legal entity and the individual (whose actions were attributed to the former) shall also be jointly liable. 39

³⁷ E. Gómez Calle, Los sujetos de la responsabilidad civil, La responsabilidad por hecho ajeno, in: Reglero Campos (ed.) (fn. 1) 395 ff., 421. § 4 of art. 1903 provides that “[Liability] shall also be attributed to the owners or managers of an establishment or company, in relation to the damage caused by their workers when providing their services in branches that use hired staff, or as a result of performing their tasks”.

³⁸ Gómez Calle (fn. 37) 421; De Ángel (fn. 1) 313.

³⁹ See De Ángel (fn. 1) 315 ff.

⁴⁰ Roca, Derecho de daños (fn. 1) 80.

⁴¹ Yzquierdo Tolsada (fn. 1) 254 points out that the Courts have rendered this liability strict.

- 40 It is also possible for the legal entity, eventually declared liable for the acts of its worker, to bring a recovery claim against the latter further to art. 1904.
- 41 b) In relation to criminal law, a distinction should be made between hypothetical offences *committed* by the legal entity itself, and cases where a legal entity is declared liable *in tort* as a result of the offence or misdemeanour committed by another party. From the first point of view, and according to traditional continental law, Spanish law applies the principle of *societas delinquere non potest*, i.e. only individuals may be criminally punished (notwithstanding the application of administrative sanctions to legal entities).⁴² This said, if an offence is committed by a legal entity, the corresponding criminal punishment may be complemented with additional measures contemplated in art. 129.1 of the Criminal Code, which affect the legal entity itself, e.g., the suspension of corporate activity or the winding up of the company.⁴³
- 42 In the event of an offence *committed* by a legal entity, what is essential is to determine who is criminally liable.⁴⁴ According to art. 31 of the Criminal Code, whoever acts as the director or representative of a legal entity will be criminally liable, even if all the requirements for the offence are not met, as long as these requirements are met by the principal entity. As confirmed by legal scholars, the identity of the offender is consequently extended in order to avoid non-regulated impunity that would otherwise arise.⁴⁵
- 43 The basic rule regarding third party liability in tort derived from an offence committed by another is established in art. 120 of the Criminal Code. Amongst the parties that will be liable in tort (apart from the parents or guardians of minors) in art. 120 of the Criminal Code, we can find individuals or legal entities who are liable in tort, (a) in relation to offences committed by individuals within the scope of the media, (b) in relation to offences committed in establishments that, because of the employee's fault, breach the corresponding

⁴² See *M. Bajo/S. Bacigalupo*, *Derecho Penal económico* (2001) 119 ff. or *G. Quintero Olivares*, *Manual de Derecho Penal* (2nd ed. 2000) 643 ff.

⁴³ See *Mir Puig* (fn. 25) 202 ff. Art. 129.1 of the Criminal Code provides as follows: "1. In the events contemplated herein, and after hearing the principal or its legal representatives, the Judge or Tribunal may impose the following sanctions, with sufficient grounds:

a) Closure of the company, its premises or establishments, on a provisional or definitive basis. A provisional closure may not exceed five years.

b) Winding up of the company, association or foundation.

c) Suspension of the activities of the company, foundation or association, for a maximum of five years.

d) Inability to carry out any future activities, mercantile transactions or business of the same type as those by virtue of which the offence was committed, encouraged or concealed. This prohibition may be provisional or definitive. If provisional, the term of the prohibition may not exceed five years.

e) The company's control in order to safeguard the rights of employees or of its creditors, for as long as necessary and up to a maximum of five years."

⁴⁴ *Quintero Olivares* (fn. 42) 643 ff.

⁴⁵ See *M. Muñoz Conde/M. García Arán*, *Derecho Penal, Parte general* (5th ed. 2002) 479 f. or *Mir Puig* (fn. 25) 200.

regulations, (c) in relation to offences committed, in any type of industry or business, by managers, directors or employees, and (d) in relation to offences committed by individuals through vehicles that are dangerous for third parties. Liability in this case is strict and vicarious (*subsidiaria*).⁴⁶

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

Unlike criminal law, administrative law regularly applies sanctions to legal entities.⁴⁷ In the Spanish legal system, many administrative sanctions are established in a range of different acts and statutes, which is why it is difficult to state general rules in this subject. Furthermore, these numerous sanctions are also technically and theoretically defective (as confirmed by legal scholars⁴⁸). We shall thus exclusively examine the Common Administrative Procedure Act (Ley 30/92 del Procedimiento Administrativo Común or LPAC) to reach a general conclusion on the matter. 44

a) The basic premise on which administrative sanctions may be imposed on legal entities is clearly established in art. 130.1 LPAC, by virtue of which both individuals and legal entities shall be liable. If a legal entity is subject to administrative law and breaches the same, it shall incur administrative liability and may be duly sanctioned. Although it is obvious that the bodies or representatives of the legal entity will have acted on its behalf, the legal entity will be attributed any acts carried out by said parties. 45

The issue therefore is whether or not administrative liability may also be attributed to individuals who have participated in each specific case. Spanish law provides two solutions: 1) the legal entity is solely liable, as the author of the breach; or 2) liability is accumulated and both the legal entity and its agents are liable.⁴⁹ The first solution is the general rule, although it is subject to many exceptions. 46

The general rule regarding liability in environmental matters for a breach caused in the course of a company's activities is that the principal legal entity shall be exclusively liable, and any managers, directors or technicians shall be exempt from liability.⁵⁰ 47

⁴⁶ See, in tort law doctrine, *Gómez Calle* (fn. 37) 421; *Yzquierdo Tolsada* (fn. 1) 254. See, in criminal law doctrine, *Muñoz Conde/García Arán* (fn. 45) 620 ff. or *Quintero Olivares* (fn. 42) 698 ff.

⁴⁷ See *García de Enterría/Fernández* (fn. 30) 179.

⁴⁸ *A. Nieto*, *Derecho Administrativo sancionador* (4th ed. 2005) 17.

⁴⁹ *Nieto* (fn. 48) 361 ff.

⁵⁰ *C. de Miguel*, *Derecho español del medio ambiente* (2nd ed. 2003) 280. The same comment is made regarding occupational risk law by *J. García Murcia*, *Responsabilidades y sanciones en materia de seguridad y salud en el trabajo* (2nd ed. 2000) 56.

- 48 However, there are certain exceptions: (a) under the Industry Act, both the company owner/manager and the works manager shall be liable, apart from any parties who intervened in the installation and repair of equipment and machinery; (b) art. 93 of the Coasts Act; and (c) Catalan Waste Act 6/1993, which also extends liability to any individual or legal entity who participated in the commission of the breach.
- 49 b) Until now, we have been examining potential administrative sanctions for a breach of administrative law. According to many specific regulations and the LPAC itself, the offender is also obliged to repair the harm caused. As seen above, art. 130.2 LPAC provides that any administrative liability derived from a sanctioning procedure shall be compatible with the offender's obligation to restore the situation to its original state and to pay the corresponding losses and damages. Apart from any administrative sanctions that may apply, a legal entity may also be obliged to repair and/or compensate any harm caused as a result of the breach.
- 50 For completion purposes, there are certain rules related, though not restricted, to this matter:
- First of all, art. 130.3 LPAC provides that all the parties responsible for the breach of a legal obligation, subject to the corresponding sanction, shall be jointly liable.⁵¹ This legal provision is established for cases in which an obligation binds the parties individually, but a breach thereof entails joint liability.⁵² An example of this would be the participation of a developer, constructor and works manager in the same project.
 - Secondly, the second paragraph of art. 130.3 establishes that each sanctioning law shall determine whether the offender and any individuals or legal entities who breached the duty to prevent an administrative infringement on behalf of a third party shall be vicariously or jointly liable. Legal scholars have pointed out that this liability is imposed on the guarantor and that it is a case of fault-based and vicarious liability.⁵³

II. Safety Regulations and Provisions Aiming at Environmental Protection

- 51 Before examining this matter, we refer to the comment made by A. Cabanillas: "The current situation in Spanish law is similar to French law: environmental

⁵¹ This joint liability has been questioned by legal scholars, particularly regarding the applicability of the principle "nulla poena sine culpa" in administrative sanctions, and has been occasionally examined by the Constitutional Court. Some believe that since the definition makes a distinction between commission and liability, there is a clear separation from criminal law and an approximation to liability in tort. See *Nieto* (fn. 48) 393–394.

⁵² *Nieto* (fn. 48) 377. See also *F. García Gómez de Mercado*, *Sancciones administrativas: garantías, derechos y recursos del presunto responsable* (2nd ed. 2004) 90; *F.J. García Gil*, *Suma de las infracciones y sanciones administrativas* (2000) 39 f.; *González Pérez/González Navarro* (fn. 30) 2623.

⁵³ *Nieto* (fn. 48) 378.

damage and the corresponding liability are not specifically contemplated by law”.⁵⁴

Next, we again refer to the basic premise (see *supra* no. 8) that there is no need to breach a specific rule in order to be liable under Spanish law for the damage caused. Furthermore, the standards of diligence are not defined by the party's behaviour pursuant to applicable administrative law. This general principle also applies to Spanish environmental law.

In effect, the starting point is provided by solid case law, upheld by various authors, to the effect that neither an administrative authorisation nor the behaviour of the tortfeasor pursuant to regulatory standards will exclude liability for harm to individuals.⁵⁵ This principle is generally affirmed in all tort liability cases and is reiterated in the specific case of environmental damage.

1. Of what importance are (a) statutory safety regulations and (b) provisions aimed at environmental protection for the tort law of your country?

In order to provide a clear description of how Spanish law operates in cases of tort liability for environmental damage, a distinction must be made between damage to individual assets and rights, and what is referred to as pure environmental damage. In addition, different branches of the law may apply to these cases.

a) There is a difference between environmental damage that is suffered by an individual or private assets (e.g. damage to a private forest), and damage to public assets (e.g. pollution affecting a beach or the air). Certain environmental damage may affect assets that are privately owned or personal health (i.e. “traditional damage”, as per the recent Directive of 2004), or may affect what are known as *res nullius* or public assets.

Under Spanish law a distinction is made among the various outcomes of a harmful act. Thus, damage to the environment under Spanish may entail (a) the obligation to pay damages derived from a harmful act carried out by an individual (or (b) by the Administration), which does not amount to a criminal offence and entails no criminal or administrative sanctions; (c) the legal consequences derived from certain administrative laws in environmental protection

⁵⁴ A. Cabanillas, *La reparación de los daños al medio ambiente* (1996) 142.

⁵⁵ E. Cordero Lobato, *Derecho de daños y medio ambiente*, in: L. Ortega Álvarez (ed.), *Lecciones de Derecho del medio ambiente* (2002) 485 who quotes the case law. According to this author, administrative licences are granted irrespective of any third party rights. Consequently, despite the social purpose of the authorised activity, the licensee is prohibited from causing harm to others. The Administrative Courts believe that a licence is a *iuris tantum* presumption that no harm will be caused, i.e. if harm is caused, the licence will be cancelled. J.F. Alenza, *Manual de Derecho ambiental* (2001) 121; J. Jordano Fraga, *Administración y responsabilidad por daños al medio ambiente: la construcción del régimen jurídico de los daños ambientales*, in: G. Ruiz-Rico Ruiz (ed.), *La protección jurisdiccional del medio ambiente* (2001) 290 and Cabanillas (fn. 54) 80 ff. are in agreement.

matters (administrative sanctions and restoration of the affected surroundings), and (d) the provisions established in the Criminal Code regarding “environmental offences”, as the commission of an offence usually entails liability in tort or an obligation to repair the harm caused.

- 57 b) The way in which both types of damage are regulated under Spanish law, in light of the foregoing, is explained below:
- i. In the case of *traditional damage*, the ordinary tort liability regime established in the Civil Code is readily applied.
 - ii. In the case of traditional damage caused by the Administration, this will be readily compensated according to the general principles of State liability in tort, without further requirements.⁵⁶
 - iii. Neither is there any difficulty in the case of “pure environmental damage” (not affecting individual assets), as the damage is usually subject to one of the many administrative laws enacted to protect various environmental issues (Water Act, Coasts Act, etc.). As will be thoroughly examined below, apart from establishing the corresponding sanctions for a breach of environmental regulations, these laws usually impose an obligation to restore the affected surroundings. Consequently, both a sanction and an obligation to repair the damage will be imposed by the competent Administration.
 - iv. The issue is much more complex regarding the reparability of pure environmental damage through ordinary liability in tort (even if the damage is committed by the State itself). The system quite clearly excludes any such reparability, both by virtue of regulations and the case law. However, legal scholars are divided on the topic (see *infra* no. 70).
 - v. In general, it seems clear that the damage suffered by individuals is irrelevant for the purposes of administrative liability.⁵⁷ If, for example, a company is responsible for spillage into a river, the Administration may impose the corresponding sanctions and demand compensation for the damage caused to the public domain (or to its own assets). However, damages may not be claimed on behalf of a cattle farmer, for example, whose animals drank from the polluted water. Any damage suffered by the individual must be claimed by the individual himself, before the ordinary Civil Courts. There are, however, some exceptions to this general rule (see *infra* no. 72, fn. 94).
- 58 c) As an overall conclusion, the significance of administrative law in environmental matters in relation to liability for environmental damage may be examined in four different scenarios:
- i. In the case of individual liability in tort, pursuant to the Civil Code, environmental laws play an important role (see *supra* no. 2):
 - If the action causing the damage amounts to a breach of administrative law in environmental matters, proof of the wrongdoer’s negligent or

⁵⁶ See *González Pérez* (fn. 20) 327.

⁵⁷ As explained by *De Miguel* (fn. 50) 274.

- wrongful behaviour is facilitated under the general rules already examined (in supra no. 2).
- If the action causing the damage strictly meets the requirements established in environmental regulations, there is still a possibility of liability in tort, pursuant to the principle of “exhausted diligence”, regularly applied by the Supreme Court (see supra no. 9).
- ii. In the case of damage caused by the Administration to private assets, the Administration shall be strictly liable for any damage caused to individuals as a result of public services. The strict nature of the State’s liability (see infra no. 77) is clearly affirmed in art. 139 LPAC: “Individuals shall be entitled to be indemnified by the corresponding Public Administration for any damage caused to their assets and rights, except in the event of *force majeure*, provided that the harm is derived from the adequate or inadequate operation of public services”.
 - iii. Environmental regulations are extremely relevant in the case of administrative liability that may be imposed by the Administration: the Administration may only impose sanctions and demand that the affected environment be restored to the extent that this is permissible under applicable laws.
 - iv. Furthermore, environmental laws are essential from a criminal law perspective, as the “environmental offences” established in the Criminal Code are genuinely open-ended.⁵⁸ Under Spanish law, a criminal sanction also entails liability in tort derived from the offence, which provides a new perspective of environmental law from the point of view of tort liability. Although criminal scholars have not devoted much attention to this matter, a distinction should still be made between pure environmental damage and traditional damage.⁵⁹

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

The Spanish legal system provides a clear response to the main issue (where clear differences are maintained by the legislator, legal scholars and the Courts), but there are grey areas in marginal issues.

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⁵⁸ Art. 325 of the Criminal Code, which is essential for these purposes, provides as follows: “Imprisonment of between 6 months and 4 years, a fine of between 8 and 24 months and a specific prohibition to carry out a profession or trade for 1 to 3 years shall be imposed on a *party who breaches the law, or other general provisions for environmental protection*, directly or indirectly entailing emissions, spillage, radiation, extractions or excavations, burials, noise, vibrations, injections or deposits in the air, soil, sub-soil, land, water, the sea or underground water with an impact on the environment, including cross-border areas, as well as water collection that may seriously hinder an ecosystem. If there is a serious risk to human health, the upper half of this imprisonment shall be imposed” (my emphasis).

⁵⁹ This is explained by *J. Muñoz Lorente*, La responsabilidad civil derivada de los delitos contra el medio ambiente y el alcance y contenido del artículo 339 del Código Penal: una regla de responsabilidad civil *sui generis* de los delitos medioambientales. Diferenciación entre los daños por contaminación y los daños estrictamente ecológicos, *Revista Integral de Gestión Ambiental (RIGA)* 2001, 47 ff.

- 60 a) Positive law is clear on this point: there is a permanent distinction between tort law that protects private interests, and administrative law that protects the common interest.⁶⁰
- 61 b) According to legal scholars, it seems clear that the purpose and objectives of the Administration's conduct differ in certain competencies from the purpose and objectives of tort liability. It is easy to ascertain the general objectives and purposes of administrative actions; the main purpose of tort liability in Spain is to provide damages. Despite some controversy on the matter, tort liability is not usually used as a deterrent, when seen as an institution.⁶¹ However, a minority opinion, based on the work of many economic analysts, is in favour of this deterrence purpose of tort law.⁶²
- 62 As opposed to the compensatory purpose of tort law, the Administration attempts to avoid environmental damage by controlling activities through the corresponding licences or by applying sanctions.⁶³
- 63 Specifically in relation to environmental law, the purpose and objectives of Spanish tort law and of environmental regulations are clear:⁶⁴ environmental assets that are *res nullius* or which belong to the public domain are protected by public law, which essentially defends the common interest; on the other

⁶⁰ This starting point is also established in the draft works currently underway at the Ministry of the Environment to implement Directive 2004/35/EC of 21 April. According to art. 3.2 (Scope of Application), "The present law shall not apply to personal injury, damage to private property or any type of economic loss. Any liability that may arise from the foregoing shall be examined according to the specific regulations that apply".

⁶¹ *Pantaleón* (fn. 3) 441; *Díez-Picazo* (fn. 1) 47; *M. Martín Casals*, *Notas sobre la indemnización del daño moral en las acciones por difamación de la LO 1/1982*, in: *Centenario del CC II* (1990) 1256.

⁶² For example, *F. Gómez Pomar*, *La responsabilidad por daño ecológico: ventajas, costes y alternativas* (1996) 23 and *J.I. Hebrero Álvarez*, *El aseguramiento de la responsabilidad civil por daños al medio ambiente* (2002) 27 in the specific case of environmental damage. This deterrent purpose is generally supported in *P. Salvador/M.T. Castiñeira*, *Prevenir y castigar* (1997) 117 ff.

⁶³ *A. Betancor*, *Instituciones de Derecho ambiental* (2001) 1267.

⁶⁴ *M.J. Reyes López*, *La responsabilidad civil ambiental*, in: *M.J. Reyes López* (ed.), *Derecho ambiental español* (2001) 192 and *J. Jordano Fraga*, in: *ibid.* 133 indicate that this was already present immediately prior to current tort law. According to the first author, "[The Civil Code] was drafted from a strictly individual point of view, whereby the environment is only and indirectly treated as a protected asset insofar as it reflects the damage that an individual may suffer in his goods or assets, or in the event of personal injury".

hand, personal health and assets are basically protected under private law.⁶⁵ It is one thing to regulate the environment and another to provide solutions in the event of conflicting property rights.⁶⁶ This reflects that the environment is a collectively-owned asset, but that it may also be affected by purely private conflicts between two parties.

This general truth is reflected in the idea that environmental law has a predominantly administrative/public law side, and a less important tort/private law side.⁶⁷ The criminal or eminently public side has its own characteristics, as seen in the tort liability derived from an offence examined above. The special nature of the environment as an asset meriting legal protection is also reflected in one of the characteristics of environmental law, namely the difficulty of adjusting techniques that are conceived for asset protection in individual relations to the specific circumstances of commonly-owned assets, which may often not even be tangible, but which nevertheless may be damaged albeit with no economic consequences for individual parties at the time the accident occurs.⁶⁸

Further to this distinction between the purpose of administrative law and the purpose of tort law, it is often stated that the protection of the environment under private law is only indirect.⁶⁹ private law is used to protect the environment to the extent that it may be broken down into individual assets that are affected by the harm. In other words, the environment may only be protected under private law depending on how environmental damage affects individuals or private assets. In this regard, it is probably unnecessary to insist on the fact that the common interest benefits from the individual defence of privately-owned environmental assets that suffer harm.⁷⁰

⁶⁵ See *M.J. Santos Morón*, *Acerca de la tutela civil del medio ambiente: algunas reflexiones críticas*, in: *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo II* (2003) 3017; *Cordero Lobato* (fn. 55) 479; *R. Martín Mateo*, *Manual de Derecho ambiental* (3rd ed. 2003) 58; *L. Gomis Catalá*, *Responsabilidad por daños al medio ambiente* (1998) 64 ff.; *Roca*, in: *Valpuesta* (ed.) (fn. 1) 518; *De Miguel* (fn. 50) 332; *Díez-Picazo* (fn. 1) 124; *C. de Miguel*, *La responsabilidad civil por daños al medio ambiente* (2nd ed. 1997) 88; *A. Carrasco*, *Responsabilidad de la Administración y medio ambiente*, in: *D. Bello* (ed.), *La responsabilidad patrimonial de las Administraciones públicas* (1999) 315; *Alenza* (fn. 55) 120; *Macías Castillo* (fn. 18) 276 ff.; *J. Junceda*, *Derecho ambiental* (2002) 75; *I. Lasagabaster et al.*, *Derecho ambiental*, *Parte general* (2004) 25; *G. Díez-Picazo Giménez*, *La responsabilidad civil derivada de los daños al medio ambiente*, *La Ley* (1996) 1890 ff.; *C. Auger Liñán*, *Problemática de la responsabilidad civil en materia ambiental* (1988). This distinction is also acknowledged by *Betancor* (fn. 63) 1243, though criticised at 1252 ff. See the analysis of *Gómez Pomar* (fn. 62) 17.

⁶⁶ *Cordero Lobato* (fn. 55) 479.

⁶⁷ *Martín Mateo* (fn. 65) 55 and *Cabanillas* (fn. 54) 68; *M.C. Sánchez-Friera*, *La responsabilidad civil del empresario por deterioro del medio ambiente* (1994) 19; *Jordano Fraga* (fn. 55) 287; *M.A. Parra Lucán*, *La protección al medio ambiente: orientaciones de la jurisprudencia civil* (1992) 16.

⁶⁸ *Martín Mateo* (fn. 65) 57.

⁶⁹ *Sánchez-Friera* (fn. 67) 24 amongst many others.

⁷⁰ *Hebrero Álvarez* (fn. 62) 26. A similar opinion is given by *Jordano Fraga* (fn. 55) 287.

- 66 Please note that our general affirmation to the effect that tort liability only protects individual interests and rights is equally applied to the Administration's liability to individuals for the adequate or inadequate operation of public services,⁷¹ e.g., a port authority that spills petrol and damages the hull and tackle of an anchored fishing boat. The possibility of bringing a claim for individual damage is clearly foreseen in art. 139 of LPAC, Law 30/1992 (transcribed in *supra* no. 58).
- 67 In light of the foregoing, it is often affirmed that tort liability is hardly useful for environmental protection purposes.⁷² As will be seen below, certain authors actively resign themselves to this opinion, whilst others suggest that changes be made in the regulation or construction of tort liability in order to fill these gaps.
- 68 c) The case law is clear on the basic distinction between the purposes and objectives of regulatory administrative law and tort law. As an example, we refer to the well-known Judgment of the Supreme Court (First Section) of 12 December 1980 (RA 4747): "[...] the administrative rules that regulate thermal plants do not prevent an examination under private law and by the ordinary courts of any potential harm derived from their exploitation". Furthermore, this same court decision states: "The compliance and observance of administrative law do not exclude the obliged party from any potential civil action brought by the injured or interested parties to defend their infringed subjective rights; whilst administrative law protects the social/public interest, tort law defends individual rights and always demands damages for the harm caused". Supreme Court decision of 16 January 1989 (RA 101) reiterates the foregoing: "The compliance and observance of administrative law do not exclude the obliged party from any potential civil action brought by the injured or interested parties to defend their infringed subjective rights; whilst administrative law protects the social/public interest, tort law defends individual rights and always demands damages for the harm caused".⁷³
- 69 This same view was upheld by the Constitutional Court in its 119/2001 decision, by virtue of which it is clear that a breach of environmental law will only give rise to an individual claim if an individual right or interest is harmed.⁷⁴
- 70 d) Tort scholars have merely recognised that traditional tort law may only be used to indemnify individual rights and interests, and consequently may not

⁷¹ This is well explained by *Carrasco* (fn. 65) 315.

⁷² However, according to *Hebrero Álvarez* (fn. 62) 24, private law is better suited than public law to defend the environment. *Gómez Pomar*'s opinion (fn. 62), *passim*, is similar.

⁷³ In this respect, *Cordero Lobato* (fn. 55) 279 refers to Supreme Court Decisions of 28 June 1979 (RA 2553), 19 June 1980 (RA 2410) and of 27 October 1990 (RA 8053). The sentence quoted in the text was extracted from Supreme Court Judgment of 3 December 1987.

⁷⁴ *Cordero Lobato* (fn. 55) 479 and *M. Gámez Mejías*, *Jurisprudencia constitucional*, La relevancia constitucional de la contaminación acústica: el contenido ambiental de los derechos fundamentales, RIGA 2002, have commented on this Constitutional Court Decision, as well as *L. Parejo*, *El derecho al medio ambiente y la actuación de la administración pública*, in: *Ruiz-Rico Ruiz* (ed.) (fn. 55) 393.

protect collective or fragmented interests. However, beyond this restricted role of tort liability in environmental matters, other scholars actively resorted to a half-way position in the past, which is now nevertheless in decline and has been rejected by relevant scholars.⁷⁵ These theories may be summarized as follows:

- i. Whilst upholding a traditional construction of tort liability, its scope may be extended to protect the environment by affirming that certain environmental damage in fact breaches individual subjective rights. This was the case of the famous “López Ostra” case of 9 December 1994, where the European Court of Human Rights held Spain liable to an individual for the harm caused by a purifier’s emanations and vibrations. The Court held that the harm breached the right to a private home and to individual and family privacy.
- ii. Another promising method used by those authors who wish to extend the traditional role of tort liability, whilst still applying its internal logic, is based on the idea of non-pecuniary loss (pain and suffering or mental distress). In Spain, reference is often made to Supreme Court Judgment (Second Section) of 1 April 1993, the only case until now which has upheld a claim for damages derived from environmental damage without redirecting the issue to the ownership of individual rights.⁷⁶ In the Judgment, an environmental organisation was recognised as the injured party of an offence that entailed the death of an animal belonging to an extinct species, and received damages for the pain and suffering caused. The case has been criticised by legal scholars, on the grounds that there are no clear limits to the possibility of other organisations bringing a claim, alleging that they are also affected by the offence; there is a risk of excessive liability being imposed on the authors of environmental damage; environmental organisations may be encouraged to adopt strategic behaviour; and, finally, it is alleged that there are no fair grounds on which to uphold that an organisation should be paid each time the environment is damaged.⁷⁷
- iii. On the other hand, there are authors in favour of taking one more step and of adjusting the traditional logic of tort liability to cover the protection of collective interests.⁷⁸ Thus, some authors support the civil protection of *pure environmental damage*. Apart from the problems raised by the assessment and repair of the damage caused, this would mean that individuals and certain organisations are entitled to bring a claim. This capacity to act as plaintiff is clearly significant as, in damage of this type, strictly speaking there is no party whose individual assets have suffered harm.

⁷⁵ *R. de Ángel*, *Algunas previsiones sobre el futuro de la responsabilidad civil* (1995) 50 highlights that environmental damage is one of the acid tests of current tort liability.

⁷⁶ *Reyes López* (fn. 64) 188 or *Gómez Pomar* (fn. 62) 50 confirm the isolated nature of this Supreme Court Decision.

⁷⁷ As per *Carrasco* (fn. 65) 316.

⁷⁸ It is significant, for instance, for *Reyes López* (fn. 64) 190 to affirm the existence of traditional liability, but to also state that it should be interpreted according to new environmental issues.

At present, there are no legal grounds on which to extend this capacity to act as plaintiff beyond the individually affected parties. Whilst it is true that art. 45 of the Spanish Constitution may be used to affirm an individual right to the environment,⁷⁹ this article is systematically placed in the Constitution as one of the so-called *Governing principles of social and economic policy* (art. 39 ff. of the Spanish Constitution) and, consequently “may only be claimed before the ordinary courts according to implementing laws” (art. 53.3).⁸⁰ Furthermore, art. 7 of the Judiciary Act is relevant, though not definitive, and the Civil Procedure Act recently enacted in 2000 has not changed this state of affairs. This latter Act acknowledges the possibility of consumer and user organisations acting as plaintiffs, but omits any reference to environmental matters.

In any case, the possibility and adequacy of allowing individuals to act as plaintiffs are controversial. Some authors reject it upfront, whilst others wish to limit it to claims for cessation of a harmful activity and a restoration of the altered surroundings. In other words, they exclude the possibility of an organisation or *ad hoc* group bringing a claim for monetary damages.⁸¹ Legal scholars often refer to “class actions” under US law, though this is hardly justified in the case of a claim for purely environmental damage.⁸² However, the novel theories presented by these authors have not been applied by the Courts.⁸³

⁷⁹ Art. 45 of the Spanish Constitution provides as follows:

“1. Everybody is entitled to enjoy an environment that is suitable for personal development and is obliged to conserve it.

2. The public powers shall ensure that all natural resources are rationally used, in order to protect and improve the quality of life and to defend and restore the environment, assuming an indispensable collective solidarity.

3. Any party who breaches the provisions of the foregoing section shall be subject to criminal or administrative sanctions, as the case may be, pursuant to the law, and shall be obliged to repair the damage caused.”

⁸⁰ However, *Cabanillas* (fn. 54) 190 argues that this is possible *de lege lata*, by virtue of art. 45 of the Spanish Constitution. *Parejo* (fn. 74) 387 f. explains that this common right in fact exists and is acknowledged in art. 45 Constitución Española (CE), but that the right is guaranteed under ordinary law. Consequently, the right to the environment under art. 45 CE would be subjective, or an “individual legal situation” (though incomplete and pending the necessary guarantee), and also objective (for legal information purposes). A stricter view of a subjective right in traditional terms is provided by *Diez-Picazo* (fn. 1) 121.

⁸¹ An extension of the capacity to act as plaintiff is upheld by *Cabanillas* (fn. 54) 237; *Hebrero Álvarez* (fn. 62) 36; *Alenza* (fn. 55) 98; *Reyes López* (fn. 64) 232 ff.; *E. Moreno Trujillo*, *La protección jurídico-privada del medio ambiente y la responsabilidad por su deterioro* (1991) 284 and also by *Gómez Pomar* (fn. 62) 52 (including damages). Those clearly against include *Diez-Picazo* (fn. 1) 127, *Carrasco* (fn. 65) 316 and *Junceda* (fn. 65) 74. *Cordero Lobato* (fn. 55) 497 f. does allow this capacity to act as plaintiff in a claim for cessation of an activity, but not to demand restoration of the environment. The issue is examined in detail in *Gomis Catalá* (fn. 65) 226 ff.; *R. Luquin Bergareche*, *Mecanismos jurídicos civiles de tutela ambiental* (2004) 163–169 provides a mere description. For example, the Supreme Court’s straightforward approach is affirmed in Supreme Court Decisions of 29 July 1993 (RJ 6495) and 8 April 1994 (RJ 2900).

⁸² This is well explained by *Santos Morón* (fn. 65) 3024 in fn. 37. See also *Gomis Catalá* (fn. 65) 222.

⁸³ Already referred to by *Sánchez-Friera* (fn. 67) 27.

In art. 17 of the implementing draft, certain non-profit organisations are entitled to act as interested parties vis-à-vis the Administration within the scope of the draft, i.e. in the case of pure environmental damage. On the other hand, in criminal matters everybody, both individuals and organisations, may pursue an environmental offence.⁸⁴

- iv. Further to this same wish to extend the role of tort liability in environmental matters, many authors have attempted to affirm that a genuine right to the environment exists, as a subjective or even basic right.⁸⁵ If this approach were successful, the ability of environmental organisations to act as plaintiffs would be subsidiary, as anybody suffering a breach of his/her alleged right to the environment could bring an individual action. There has been an attempt to incorporate this right through other already existing rights in relation to health and privacy, or to provide a direct construction of this right. Some have even based this subjective right on the principles of natural law.

Nonetheless, these honest attempts have not been upheld by the law or the Courts and certain disadvantages have been pointed out, even under the principle of *de lege ferenda*. The main objections are ineffectiveness (in the event of a claim that we all have a right to use the environment) and a basic failure to affirm that this alleged subjective right may be examined by the Courts as a genuine claim. This construction is particularly unfortunate in Spain, as legitimate interests do not need to turn into truly subjective rights to enjoy tort law protection.⁸⁶

Without attempting to exhaust all the legislative possibilities in this field (as the Constitution provides wide freedom of decision), what is clear is that all these doctrinal proposals, at least for the moment, are mere experiments that have not prospered. Although the Spanish Constitution may be used to allege a right to the environment, the measures to protect this right are delegated to the legislator. In other words, as things stand now, there is no subjective right to the environment, understood as a legally protected interest that entitles any party to bring a claim before the Courts for liability in tort.

- e) To sum up, in Spain the compensatory purpose of tort liability (including the tort liability of the Administration vis-à-vis citizens) is clearly different from

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⁸⁴ See *Gomis Catalá* (fn. 65) 214.

⁸⁵ *Cabanillas* (fn. 54) 190 ff. is in favour and provides an exhaustive description of all these arguments. See also *J. Jordano Fraga*, La protección del derecho a un medio ambiente adecuado (1995) 413 ff.; *D. Loperena Rota*, Los principios del Derecho ambiental (1998) 40 ff.; *F. Delgado Piqueras*, Régimen jurídico del derecho constitucional al medio ambiente, *Revista Española de Derecho Administrativo* (REDA) 1993, 56; *C. Alonso García*, El régimen jurídico de la contaminación atmosférica y acústica (1995) 92 ff.; *Alenza* (fn. 55) 94 ff.; *Hebrero Álvarez* (fn. 62) 32. A solid and brief criticism of the issue from a constitutional point of view is provided by *Parejo* (fn. 74) 382 ff. A less solid and more neutral approach is given by *Lasagabaster et al.* (fn. 65) 256 ff.

⁸⁶ This is commented by *Díez-Picazo Giménez* (fn. 65) 1419 and *Santos Morón* (fn. 65) 3023. An explanation of this characteristic of Spanish tort law is provided by *Pantaleón* (fn. 1) 1972. A criticism of this idea of a subjective right may also be found in *Díez-Picazo* (fn. 1) 121; *Carrasco* (fn. 65) 312 ff.

the regulatory purpose of administrative law in environmental matters. This is very clear in the case of traditional damage (protected by non-contractual liability) and purely environmental damage (protected by administrative law). Based on these two ideas, some authors have also raised the possibility of the current legal system entitling an individual to bring a claim in the case of purely environmental damage.

- 72 f) Similarly to our examination of tort liability for environmental damage, administrative environmental sanctions should be briefly described. We will not refer to the Administration's liability towards an injured individual (which is covered by non-contractual liability in tort), but to the legal consequences that may ensue from environmental damage, pursuant to the various environmental statutes in force in Spain. These consequences usually consist of administrative sanctions (mostly fines) and various additional measures (closure of the premises, withdrawal of licences, etc.), of which the most significant is the obligation to restore the damaged environment. The fragmented provisions of these sanctions according to each specific law may be summarised as follows:⁸⁷
- i. The various statutes foresee different sanctions for administrative infractions contemplated therein, which follow the principle that no sanction will be imposed in the absence of fault or intent (*nulla poena sine culpa*).⁸⁸ However, some of these rules do contemplate the possibility of imposing a joint sanction on several offenders, or on a legal entity.⁸⁹
 - ii. Some legal provisions contemplate a possible public action to demand compliance with the law.⁹⁰ Other than this and despite some opinions to the contrary, a public action in the matter cannot be generally upheld. Nevertheless, the mere possibility of reporting the infraction is in fact open to all (art. 69.1 of Act 30/1992), although the accuser is not a party to the proceedings and may not appeal the administrative decision if proceedings are not initiated.⁹¹

⁸⁷ De Miguel (fn. 50) 271 ff.; R. de Vicente Domingo, Régimen de las infracciones y sanciones en materia medioambiental, in: Reyes López (ed.) (fn. 64) 117 ff. lists these laws.

⁸⁸ De Vicente Domingo (fn. 87) 104. The requirement of intent or negligence when committing the infraction is clearly established in art. 130 of Act 30/1992 LPAC and in Constitutional Court decisions (Judgments of the Constitutional Court of 26 April 1990 and 4 July 1991).

⁸⁹ De Vicente Domingo (fn. 87) 106 refers to art. 51.2 of Navarre Act 2/1993, of 5 March, which contemplates the joint liability of the members of a hunting team who cause harm to wild animals. See also Valencia Act 11/1994 on natural parks in relation to liability for infractions. For the liability of legal entities see Betancor (fn. 63) 1313.

⁹⁰ See, for example, art. 109.1 of the Coasts Acts. On the topic, Reyes López (fn. 64) 238–239 indicates that the possibility of bringing a public action is exclusive to this Act. However, it is more common in laws enacted by Regions and this raises the issue of compliance with the Spanish Constitution. See Gomis Catalá (fn. 65) 212. Furthermore, Santos Morón (fn. 65) 3024 in fn. 34, states that public actions are more common in regional environmental law.

⁹¹ Cordero Lobato (fn. 55) 498. According to art. 16 of the current draft being examined by the Ministry of the Environment to transpose Directive 35/2004/EC, the Administration may enforce the liabilities established by law *ex officio* or at an interested party's request. Art. 17 explains who these interested parties are and, as a novelty, includes non-profit organisations (if certain requirements are fulfilled).

- iii. The obligation to restore the damaged environment is usually included in the infractions foreseen by law.⁹² When the obligation to restore *in natura* (removal of illegal works, replacement of a water source, etc.) is unfeasible, it becomes an obligation to pay monetary compensation. This obligation attempts to remedy the damage caused to the public domain and to the Administration's assets, at most.⁹³ However, in no event will this obligation replace the damages to which each injured party may be entitled in tort.⁹⁴

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

a) Spanish law provides a clearer answer to the last part of this question. Basically, the starting point in Spain is liability based on fault which, nonetheless, leads to strict liability in practice: in effect, there is strict and joint liability in tort for environmental (traditional) damage.⁹⁵ Liability is not only strict in the case of a breach of environmental administrative regulations; in general, strict liability is applied in environmental cases. However, this is not expressly recognised by law but is unequivocally affirmed by legal doctrine based on an examination of the case law.⁹⁶ The idea that liability is strict in this field contradicts the general rule of fault-based liability established in Spanish law under art. 1902 of the Civil Code.

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⁹² For instance, art. 118 of the Revised Text of the Water Act, art. 37 of the Act on Natural Parks and Wild Plants and Animals, art. 36 of the Waste Act, art. 36 of the Act for Integrated Pollution Prevention and Control.

⁹³ This is explained, for example, by *Betancor* (fn. 63) 1380.

⁹⁴ *Cordero Lobato* (fn. 55) 494 and *De Miguel* (fn. 50) 274 both agree. However, as explained by *De Vicente Domingo* (fn. 87) 119 ff., the Hunting Act, of 4 April 1970 (art. 47.1), the Regulations of the Mountains Act approved by Royal Decree 485/62 of 22 February (art. 459–463) and some recent regional laws, enable the Administration itself to collect the corresponding damages. This is criticized by *Cordero Lobato* (fn. 55) who later examines the issue in “La liquidación de daños entre particulares en el procedimiento administrativo”, in *Dret* 03/04/2003, 6 (there are some interesting conclusions at 9 ff.). In relation to the Waste Act, *Hebrero Álvarez* (fn. 62) 86 suggests that the Administration should evaluate the damage suffered by individuals. On the other hand, *Betancor* (fn. 63) 1250 is in favour of publicising personal injury in certain cases. Along these same lines, and based on the collective scope of environmental damage, *Gomis Catalá* (fn. 65) 202 states that the public powers should be able to act, instead of the victim, in order to file a claim for the environmental damage caused to private assets.

⁹⁵ In effect, legal scholars often highlight that several parties who cause environmental damage shall be jointly and severally liable towards the injured party when the degree of participation in the damage by each cannot be determined. See *De Miguel* (fn. 50) 353; *Santos Morón* (fn. 65) 3020; *Alenza* (fn. 55) 123. The contrary opinion, criticising the foregoing, is given by *Gómez Pomar* (fn. 62) 72–73 and *Hebrero Álvarez* (fn. 62) 33.

⁹⁶ *Cabanillas* (fn. 54) 160 is unequivocal when ascertaining the opinion of legal scholars. This tendency may be verified, for example, in *Santos Morón* (fn. 65) 3021; *Cordero Lobato* (fn. 55) 489; *Alenza* (fn. 55) 120; *De Miguel* (fn. 50) 356; *Reyes López* (fn. 64) 195; *Hebrero Álvarez* (fn. 62) 26; *Gómez Pomar* (fn. 62) 54–56. There is a minority opinion that upholds fault-based liability. See in this respect *J. Santos Briz* (fn. 1). For the most qualified criticism see *Diez-Picazo* (fn. 1) 129 who points out the disadvantages of strict liability.

- 74 In order to justify strict liability in tort for environmental damage, reference is usually made to current law and to some general principles. Thus, art. 1908.2 of the Civil Code states that owners shall be liable “(2) For excessive smoke that is harmful to persons or property”, as a form of strict liability. Furthermore, based on the traditional saying *cuius est commodum eius est incommodum*, anybody conducting a profitable activity should also be liable for any consequential damage. Reference is also made to the risks inherent to polluting industries. As this situation is unclear, legal scholars recommend that a legal affirmation be made to indicate the cases subject to strict liability.⁹⁷
- 75 The issue has also been clarified by the Courts, although usually fault is presumed and the alleged wrongdoer is obliged to prove his/her diligent behaviour. Occasionally, the existence of fault is derived from the mere fact that the damage (particularly when it was foreseeable and avoidable, and is inherent to a hazardous activity) was caused, thereby establishing a *iuris et de iure* presumption. This leads to the conclusion that fault is irrelevant to ascertain liability, although the Supreme Court has not literally confirmed this.⁹⁸
- 76 Authors who examine traditional damage and who analyse judgments issued in cases of this type usually affirm the strict nature of tort liability in Spain for environmental damage.⁹⁹ However, in the case of pure environmental damage, this affirmation slightly varies as restoration of the environment will only be possible by virtue of environmental administrative law.
- 77 b) It is probably also worth describing the liability system applied when damage is attributable to the Administration. Whereas the general rule in tort is fault-based liability (art. 1902), the Administration is generally subject to strict liability. According to positive law (including the provisions established in art. 106.2 of the Spanish Constitution), the Administration is liable for *individual* damage (as expressly indicated in art. 20 of Law 30/1992) caused to its citizens’ rights and assets as a result of the *normal or irregular* provision of public services. Consequently, it is not necessary to prove fault on the part of the corresponding civil servant and the ensuing liability, of a joint nature in the case of several acting Administrations, may only be excluded in the event of *force majeure* or if the damage derives from development risks. This liability may be claimed before the Contentious-Administrative Courts even if, together with the Administration, an individual participated in the damage.¹⁰⁰ It should be pointed out that the Administration’s liability is based on the principles of traditional liability in tort: its aim is to compensate whoever suffers individual harm, whether of a personal or material nature. Consequently, when it is the Administration itself which causes pure environmental damage, compensation faces the same difficulties as pure liability in tort.¹⁰¹

⁹⁷ See, for example, Santos Morón (fn. 65) 3022.

⁹⁸ De Miguel (fn. 50) 356 quotes numerous case law. See also Gomis Catalá (fn. 65) 122.

⁹⁹ This is explained by Santos Morón (fn. 65) 3027–28.

¹⁰⁰ Cordero Lobato (fn. 55) 498–500 provides a succinct and clear overall view.

¹⁰¹ Explained by Santos Morón (fn. 65) 3028.

c) In effect, the breach of these administrative rules constitutes a wrongful act in Spain. Nevertheless, it should be pointed out (see *supra* no. 4), on the one hand, that there are some doubts about the requirement of wrongfulness in the Spanish tort liability system and, on the other hand, that in Spain compliance with the corresponding regulations does not exhaust the standards of diligence.

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d) As examined in *supra* no. 28, the purpose of the infringed rule has been affirmed by private law scholars and upheld by tort experts only recently. Administrative regulations, on the other hand, do not provide this general individual protection.

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4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

a) As expected, Spanish law has examined the use of insurance as a means to repair and allocate the costs derived from accidents, including liability for environmental damage. It has even been suggested that insurance could have a deterrent effect if insurance companies only execute policies with industries that assume control over their own potentially polluting activities. There is, however, certain scepticism regarding insurance in this field and it is proposed that, apart from insurance, additional reparatory systems be established, particularly through compensation funds.¹⁰²

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Criticism in this regard indicates the particular difficulties involved in the application of insurance to environmental damage, particularly in the case of pure environmental damage. Thus, it has been pointed out that chance and uncertainty play a significant role in some cases of environmental damage (particularly gradual damage); that difficulties are faced by the insurance company because of the general tort liability regime (unlimited liability, etc.); that it is difficult to calculate the accident rate in a relatively new field; and that this difficulty is even greater taking into account that many administrative regulations currently attribute liability in tort to whoever causes pollution beyond the scope of traditional damage (in particular, damage in the restoration of the altered surroundings).¹⁰³ The foregoing criticism is also affirmed by the crisis undergone by the US insurance sector in the 1980s, allegedly as a result of increased environmental liability.¹⁰⁴

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¹⁰² *Cabanillas* (fn. 54) 277–294; *De Miguel* (fn. 50) 363; *Hebrero Álvarez* (fn. 62) 48 amongst many others. Please note that, as in other countries, Spain has an insurers' pool to cover this type of damage. It has acted as a group of companies since 1 January 1995, based on an Economic Interest Grouping ("Agrupación de Interés Económico"), defined in Act 12/1991, of 29 April. For more information see *Hebrero Álvarez* (fn. 62) 251 ff.

¹⁰³ *Cabanillas* (fn. 54) 281 ff.; *De Miguel* (fn. 50) 363. This is corroborated by *Luquín Bergareche* (fn. 81) 173. In turn *Gómez Pomar* (fn. 62) 58 ff. exhaustively describes and qualifies them. The difficulties encountered by insurance in this field were already indicated, from the insurers' point of view, in the report presented by ACBE's Financial Sector Working Group in December 1992, referred to by *Cabanillas* (fn. 54) 281 ff.

¹⁰⁴ This is referred to by *Gómez Pomar* (fn. 62) 67.

- 82 b) Certain Spanish laws impose the obligation to take out compulsory tort liability insurance, for a limited amount.¹⁰⁵ The starting point is art. 75 of the Insurance Act, which states that the Administration may demand compulsory insurance in any activities indicated by the Government. As a result, the issue is removed from the scope of the law, which is a novelty in relation to prior legislation on insurance contracts.¹⁰⁶
- 83 Specifically in relation to the environmental sector, there are basically two laws that have imposed compulsory insurance:
- i. Nuclear Energy Act 25/1964, of 29 April (*Ley de Energía Nuclear* or LEN), enacted further to the Paris Convention on Liability in Nuclear Matters executed on 29 July 1960, which establishes strict liability up to the amount foreseen therein, and requires compulsory insurance (art. 45 and 56). This compulsory insurance may be replaced by a bank deposit. In practice, the Spanish Atomic Pool has been established, of which the most relevant characteristic is that the corresponding regulations make a difference between immediate nuclear damage (caused or notified to the wrongdoer within a term of ten years following occurrence of the event) and deferred nuclear damage (which exceeds this time-limit). The first type of damage is covered by compulsory liability insurance, whilst the latter is assumed by the State (art. 56 LEN).¹⁰⁷
 - ii. Waste Act 10/1998, of 21 April, which is applied alongside Royal Decree (Real Decreto, RD) 833/1988. This RD still remains in force although it was enacted pursuant to the Basic Act on Toxic and Hazardous Waste 20/1986, of 14 May, now repealed. Under these regulations the managers of toxic waste are obliged to take out insurance and to make a deposit,¹⁰⁸ whereas waste producers may only be held liable by the Administration under law.¹⁰⁹ It is obvious that a single person may be both a manager and producer, in which case the first of the foregoing systems shall apply. In any case, legal scholars have pointed out the paradox that, in 1988, the regulations required obligatory insurance that nobody in the insurance sector was willing to provide, a problem that was eventually resolved by providing cover for accidental pollution, and that this is far removed from the legal requirement (see J.I. Hebrero¹¹⁰). Please note that the guarantees

¹⁰⁵ See *Hebrero Álvarez* (fn. 62) 78 on this final point. *Cabanillas* (fn. 54) 279 highlights the difficulty inherent to compulsory insurance, as the operation of an industry may ultimately depend on whether an insurer decides to grant the necessary cover. This idea was already suggested by the EC Commission in its "Green Book for the Repair of Environmental Damage".

¹⁰⁶ Pointed out by *Hebrero Álvarez* (fn. 62) 78.

¹⁰⁷ All these comments are taken from *Hebrero Álvarez* (fn. 62) 81 ff.

¹⁰⁸ Art. 22.2 Waste Act and art. 6.2 and 27.1 of RD 833/88. On the issue, see *Hebrero Álvarez* (fn. 62) 88 ff. Hebrero points out that this is the first obligatory insurance foreseen by Spanish environmental law.

¹⁰⁹ *Alenza* (fn. 55) 126 refers to the different treatment between one and the other.

¹¹⁰ *Hebrero Álvarez* (fn. 62) 90. See also, for the first idea, *E. Pavelek Zamora*, *Los seguros de responsabilidad civil y su obligatoriedad de aseguramiento*, Cuadernos de la Fundación Mapfre Estudios (CFME) 1992, 12 (quoted by *Hebrero Álvarez* (fn. 62) 89).

are not capped in these regulations, as this is a matter to be decided by the corresponding administrative bodies (usually the Autonomous Communities, who are now entrusted with the matter¹¹¹).

- iii. Spain is party to the International Convention on Liability for Oil Pollution Damage, signed in Brussels on 29 November 1969 (updated in 1992). According to this Law, the owner of any of the vessels within the scope of the Convention must take out compulsory insurance. For further information, please refer to international law.

At present, a Draft Bill is underway to implement Directive 2004/35/EC of April 2004 that foresees strict liability and compulsory liability insurance in relation to certain types of industry.¹¹² According to J. Junceda's comments on the Draft Bill, in 2002, this strict liability would be capped and insurance would be obligatory for all the environmental activities described therein. Furthermore, there would be joint liability in the case of several parties responsible for the damage based on accompanying reasons, certain organisations would be entitled to demand restoration of the environment, the statutory limit would be extended and liability would apply even when the activity in question complied with current regulations.¹¹³ 84

The current version of the Draft Bill to transpose Directive 2004/35/EC of 21 April establishes the obligation to provide adequate financial security to cover any potential liability for environmental damage. In this regard, there is a need for compulsory insurance, a bank guarantee or a technical reserve, through the creation of an *ad hoc* fund (art. 14). 85

c) For the moment, Spain participates in the Funds created by the EU and in those established pursuant to international law (e.g. Fondo internacional de indemnización de daños debidos a la contaminación por hidrocarburos (International Oil Pollution Compensation Fund, FIDAC, for Oil Pollution Damage)). However, in the Spanish legal system there are no similar funds in domestic regulations.¹¹⁴ Nevertheless, the general opinion amongst legal scholars is that this type of compensation system is very beneficial.¹¹⁵ 86

According to the draft currently held by the Ministry to transpose Directive 2004/35/EC of 21 April, a State Fund shall be created to repair environmental damage in certain cases (non-existence of fault on the part of the liable party who holds the corresponding administrative permit, or if damage is caused by development risks). This Fund shall be endowed with resources from the General State Budget (art. 15). 87

¹¹¹ Hebrero Álvarez (fn. 62) 90.

¹¹² Alenza (fn. 55) 126 provides some explanations of the draft bill existing at the time.

¹¹³ Junceda (fn. 65) 76; Reyes López (fn. 64) 200–201.

¹¹⁴ Alenza (fn. 55) 125. See De Miguel (fn. 65) 272 who examines the Compensation Fund for forest fires created by Act 81/1968.

¹¹⁵ Cabanillas (fn. 54) 304; Jordano Fraga (fn. 55) 278; De Miguel (fn. 50) 370; Hebrero Álvarez (fn. 62) 48; Gómez Pomar (fn. 62) 75–76.

- 88 d) The laws enacted by Autonomous Communities sometimes do establish a general rule that imposes an obligation for compulsory insurance. An example of this is Act 1/1995, of 8 March, on Environmental Protection in Murcia¹¹⁶ which, somewhat incorrectly (as the type of liability imposed is not clarified), foresees an obligation to take out insurance if this is decided by the Administration in the case of activities entailing a risk to individuals, assets or the environment. The insurance must cover the damage contemplated in art. 46 of the Act.

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

- 89 As already said, safety regulations and environmental law play a very significant role in determining fault-based liability in Spanish law. A breach of these laws results in the defendant's conduct being qualified as negligent, provided that the damage caused is covered by the protective purpose of the law. However, as seen above (see *supra* no. 2), even compliance with all these regulations shall not necessarily entail that the standards of diligence have been exhausted.

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

- 90 As explained *supra* no. 4, the requirement of wrongfulness is disputed by Spanish legal scholars. Both the doctrine and the case law that apply the requirement of wrongfulness establish that the breach of an administrative law is *per se* evidence of illegality. Furthermore, if the remaining general requirements are met for liability to exist, nothing further is required. One of these general requirements is the existence of fault which is usually understood as a mere breach of a duty of care. The breach of an administrative law already assumes that fault exists.

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

- 91 In order to ascertain whether a tortfeasor's conduct has involved fault or illegality due to the breach of administrative law, the damage caused must fall within the scope of the protective purpose of the breached law. Although Spanish tort experts do not usually make a clear affirmation of the foregoing, the idea is well seated amongst renowned tort scholars and has been gradually

¹¹⁶ See comments by Peña (fn. 4) 154–155.

gaining ground. Although the Courts do not clearly apply this liability principle, their decisions do follow it on many occasions.

However, as stated *supra* no. 9, the fact that all applicable administrative rules are strictly complied with does not prevent a Court from considering that the tortfeasor has acted negligently. Consequently, the protective purpose of the law is rendered less important to a certain extent if the judge decides that the defendant's conduct has breached the general duty of care of a reasonable person. 92

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

There are two possible replies. First of all, proof that the tortfeasor has acted according to the standards of a reasonable person shall exempt any liability if this is fault-based. On the other hand, compliance with all administrative regulations on the part of the defendant shall not mean that he acted diligently. In other words, evidence that his conduct complied with applicable administrative law shall not necessarily exempt him from liability. 93

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

a) As already explained, the breach of applicable administrative law means that the defendant's conduct shall be deemed negligent (and/or wrongful). This is not really a presumption but a mere qualification. The only way in which a party in breach of an administrative rule may avoid this qualification of negligence would be to argue that the damage caused was beyond the protective purpose of the law. 94

b) Regarding causation and a possible presumption of causation in Spanish law, the starting point is based on the tortfeasor's obligation to duly prove the link of causation, on which there is general consensus. However, the Courts are quite flexible as to when a fact should be deemed as proved. The current position described in common textbooks may be summarised, by J.L. Lacruz, as follows: "In relation to the burden to prove a causal link, and although there is no general rule that reverses this burden of proof (unfeasible in any case), the Courts often recur to the evidence of presumptions against whoever was potentially able to cause the damage or was subject to a duty of care".¹¹⁷ 95

Consequently, there is no rule that establishes a presumption of causation, even in the case of a breach of applicable administrative requirements. Likewise, there is no presumption of causation that may be rebutted by proving that all administrative requirements have been met. 96

¹¹⁷ Lacruz *et al.* (fn. 1) 488. More case law to support this opinion is provided in *Arcos Vieira* (fn. 33) 44 ff.

- 97 The general position amongst legal scholars is contrary to a general presumption of causation, although it may be used whenever it is necessary to re-establish the so-called “balance of arms” in the lawsuit, in case of damage with a particularly obscure chain of causation (e.g. medical malpractice).¹¹⁸
- 98 In this regard, reference is usually made to the Supreme Court Decision of 22 January 1996 (RJ 248), where an illegally employed worker died on a mining exploitation site that did not hold an exploitation licence and did not follow applicable regulations. The Supreme Court eventually held that the owner of the site was liable, reversing the burden of proof as to fault, although some authors have pointed out that it was more a case of a presumed link of causation by virtue of *praesumptiones iuris* (rather than *praesumptiones facti*), as it was unclear how the mortal accident occurred.¹¹⁹
- 99 However, most often the Courts are clear that the link of causation must be proved and, as already explained, they indicate that the necessary evidence may not be undermined by applying the theory of risk, strict liability or by reversing the burden of proof.¹²⁰

6. Can a breach of an administrative law rule result in a claim for punitive damages?

- 100 In Spain, punitive damages are not generally accepted. As already explained, the purpose of tort law in Spain is basically to provide compensation and, consequently, this does not leave room for punitive damages.¹²¹ However, some legal writers recognize that liability in tort may, indirectly, act as a deterrent.¹²²
- 101 This said, it should be pointed out that some authors are beginning to lean in favour of punitive damages, although with qualified and hesitant opinions, in the case of harm caused through intention or gross negligence.¹²³ Further to the foregoing, the possibility of providing compensation that exceeds the harm

¹¹⁸ As explained by *Pantaleón* (fn. 1) 1983. See also *Díez-Picazo* (fn. 1) 238 f.; *Santos Morón* (fn. 65) 3020; *Yzquierdo Tolsada* (fn. 1) 214; *Arcos Vieira* (fn. 33) 46. This opinion is also expressed by the Courts. The latter author gives, as an example, the Supreme Court Decision of 10 June 2004 (RJ 3605) and the Decision of 4 October 2004 (RJ 5981). However, there are also opinions against: *Cabanillas* (fn. 54) 178 who denies the existence of this general presumption of causation in Spanish law, although he is in favour of introducing a presumption similar to the one contemplated in German law, specifically in relation to environmental damage. See *Reglero Campos* (fn. 1) 320–321.

¹¹⁹ *Díez-Picazo* (fn. 1) 238–239, quoting *Díaz-Regañón*, CCJC 1996-III, 715. On the other hand, *Reglero Campos* (fn. 1) 321 believes that the result reached is reasonable.

¹²⁰ *Arcos Vieira* (fn. 33) 35–36 who quotes Supreme Court Decisions of 29 June 2001 (RA 1470), 20 February 2003 (RA 1174), 12 February 2003 (RA 1010), and 22 July 2003 (RA 5851) to support his view.

¹²¹ *Díez-Picazo* (fn. 1) 47; *Pantaleón* (fn. 3) 441.

¹²² *Pantaleón* (fn. 1) 1971–1973; *Asua* (fn. 1) 468. See also *Concepción* (fn. 1) 49.

¹²³ *Reglero Campos* (fn. 1) 77; *Peña* (fn. 4) 203 ff. Regarding punitive damages, one of the most prominent opinions in Spain is given by *Salvador/Castiñeira* (fn. 62) 163 ff. The opinions of P. Salvador can be examined in *P. Salvador Coderch*, Punitive Damages, AFDUAM 2000-IV.

suffered in strict terms is not totally foreign to the system, and there are in fact certain but isolated cases recognised by Spanish law.

An example is the General Social Security Act, which foresees a 30–50% increase in financial contributions if the occupational accident or illness is caused by the absence of regulatory precaution measures at the workplace, if the workplace is abandoned or in bad condition, or if measures for occupational safety have been breached.¹²⁴ This increase is borne by the employer and may not be insured. 102

Along these same lines, there are certain rules which, when determining the reparable harm, apply the principle of undue profits obtained by the tortfeasor (which partly ignores the logic of pure compensation and fully upholds a sanctioning and preventive purpose¹²⁵). An example of the foregoing is violations to one's honour, as per Act 1/82. The same rule may sometimes appear in environmental laws but in such context, the sanctioning purpose is closer as the provisions regulate the indemnification that replaces the inapplicable (or unfeasible) duty to repair imposed on a tortfeasor.¹²⁶ 103

Occasionally, this debate focuses on the role of awards for non-pecuniary losses as a source of additional compensation, beyond the recognition of the harm caused, in strict terms; it also affirms that the causal link has a wider scope in the case of wilful harm, in a similar way to the Swiss Code of Obligations.¹²⁷ 104

In any case, what seems clear is that punitive damages may not be imposed as a general rule, even when administrative laws have been breached (unlike Italian law on environmental damage). Any preventive and compensatory purpose is usually left to administrative sanctions and to Criminal Law. 105

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damages or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?

The answer is clearly yes, as explained *supra* no. 9. 106

¹²⁴ *Salvador Coderch*, AFDUAM 2000, 4. In relation to art. 123 of the Revised Text of the General Social Security Act.

¹²⁵ Explained by *X. Basozabal*, *Enriquecimiento injustificado por intromisión en derecho ajeno* (1998) 95.

¹²⁶ *De Miguel* (fn. 65) 239 quotes art. 100.3 of the Coasts Act and art. 19 of the Basic Act on Toxic and Hazardous Waste.

¹²⁷ *Reglero Campos* (fn. 1) 63.

2. Can the general duty of care go beyond these rules?

107 In cases where an individual is carrying out an activity authorised by a permit issued by the Administration, liability for any consequential damage is, in principle, attributed to said individual. A limit would arise in the case of an order to carry out a certain activity or a regulation making it mandatory to embark on an activity, in which case the individual would be exempt from liability for the damage caused. It would seem that, in such case, the Administration itself¹²⁸ would be liable.

The breach of administrative regulations is also significant from the point of view of a possible injunction to stop an activity that currently or potentially damages the plaintiff. However, it is not easy to describe how this matter stands in Spain. In fact, and probably due to the decisive influence of the *Code Napoléon*, there is no systematic regulation of interferences in ordinary Civil Law and, consequently, the entire matter has become complex and full of doubts and insecurities.¹²⁹ For example, there has even been debate on the grounds for a claim to cease an activity causing damage to a neighbouring property. There were doubts as whether to apply the theory of an abuse of the law (art. 590 and 1908.4 of the Spanish Civil Code), or to use the theory of strict tort liability for damage.¹³⁰ Notwithstanding the foregoing, the practical solutions eventually reached in the case law and legal doctrine are quite similar to those reached in other Continental European systems.¹³¹

Given that there is a wide tendency in Spanish case law to subsume these situations under liability for damage, it may be concluded that the breach of administrative regulations plays a similar role to the one played in ordinary tort liability cases (see above). For those who allege that art. 590 of the Spanish Civil Code provides the grounds on which to obtain a cessation of a potentially

¹²⁸ See for all *J. González Pérez* (fn. 20) 265. Art. 121.2 of the Expropriation Act contained a rule that was similar to the idea described herein. According to this article, "In the case of public services, indemnification shall be paid by the concessionaire unless the damage arises from a clause imposed by the Administration on the concessionaire and which must be inevitably fulfilled by the latter".

¹²⁹ However, the issue is in fact systematically regulated in Catalonia (Act 13/1990, of 9 July, on the regulation of negating actions, interferences, easements and neighbour relations).

¹³⁰ Art. 590 Civil Code: "It is forbidden to construct, close to a neighbouring or dividing wall, wells, sewers, aqueducts, furnaces, forges, chimneys, stables, deposits of corrosive materials, steam-generated artefacts, or factories which in themselves or as a result of their products are dangerous or noxious, without keeping the necessary distances established in regulations and local practice, and without providing the required safeguards, the manner of which shall be subject to the conditions established in these same regulations. In the absence of a regulation, the precautions deemed necessary shall be taken, after an expert opinion is obtained, in order to avoid any damage to neighbouring properties or buildings". In this regard, see the Regulations on Disturbing, Unhealthy, Noxious and Dangerous Activities (approved by Decree dated 30 November 1961). Furthermore, art. 1908.4 contemplates liability "for the substances emanating from sewers or deposits of infectious matter, constructed without the precautions inherent to their location".

¹³¹ This is explained by *F.J. Díaz Brito*, *El límite de la tolerancia en las inmisiones y relaciones de vecindad* (1999) 17.

harmful activity, administrative regulations are also very important (said article makes a reference to current administrative law).

Furthermore, if the defendant is covered by an administrative licence, the case law has traditionally upheld that the Civil Courts are competent to resolve a conflict between participating individuals and that, in this regard, they may order the adoption of measures to avoid continuing damage and, even, to paralyse the activity.¹³² When adopting this measure, the judges take into account the interests of whoever is carrying out the harmful activity and the interests of those harmed by the activity.¹³³ On the other hand, the damaged party may address the contentious courts and participate in the procedure to grant the licence for potentially harmful activities, and may also demand that the Administration take action to ensure that the individual rectifies his behaviour to adjust to the conditions of the licence.

In effect, as explained *supra* no. 9, the Courts may reach the conclusion that the defendant acted negligently, even if his conduct strictly complied with all applicable administrative rules.

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

As explained *supra* no. 2, compliance with administrative laws entails a *prima facie* exclusion of negligence, but that is all. Any such compliance does not assume that the defendant has acted diligently, nor is there a presumption in his favour. 108

Regarding this question, it has been affirmed that in the case of neighbour relations and intrusions, the fulfilment of all administrative laws defines the level of tolerance of each intrusion. 109

¹³² As an example of a court decision that managed to paralyse a harmful activity, legal scholars usually refer to the Decision of the Supreme Court of 30 May 1997 (RJ 4331). The majority opinion in the case law coincides with the majority opinion of legal scholars. In this respect, see *R. Evangelio Llorca*, La acción negatoria de inmisiones en el ámbito de las relaciones de vecindad (2000) 257; *M.R. Díaz Romero*, La protección jurídico-civil de la propiedad frente a las inmisiones (2003) 47; *H. Díez García*, Comentario al artículo 590, in: R. Bercovitz (ed.), Comentarios al Código Civil (2001) 727 and *Díaz Brito* (fn. 131) 66. Against: *J. Egea*, Acción negatoria, inmisiones y defensa de la propiedad (1994) 170 and *R.M. Méndez/A.E. Villata*, Acción negatoria de servidumbres e inmisiones (1998) 28.

¹³³ According to art. 3.5 of Catalanian Act 13/1990 (see *supra* fn. 129), if the activity enjoys administrative authorisations, the affected owner may only request the adoption of reasonable measures to avoid the damage (not a cessation of the activity) and an indemnification for the damage already suffered. This is a novelty in Spanish law, not upheld by the civil law judges of the Supreme Court. To confirm this last idea, see *T. Hualde*, Inmisiones provocadas por establecimientos industriales autorizados, *Revista Jurídica de Navarra* 2005-I, 180.

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

- 110 The only significant principle in Spanish law is the one already indicated in the LPAC, to the effect that an obligation exists to restore the situation to its original state and/or to pay damages for the harm derived from an administrative sanction.

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?

- 111 In the case of a legal administrative act that detrimentally affects individual interests, the issue should be subsumed under expropriation laws or the principle of State liability. In any case, the individual affected by the administrative act shall be indemnified, whether by receiving a fair price in the case of expropriation or (more likely) through compensation.
- 112 Most legal scholars make a clear *de lege lata* distinction in Spain between expropriation and liability which, unlike other countries, is based on the direct or incidental nature of the dispossession.¹³⁴ As a result of this difference, the act resulting in liability is not directly aimed at a dispossession (as in the case of expropriation) but has another purpose, and the damage is incidentally caused. Otherwise, if the conduct is directly aimed at invading another party’s interest, the case would be covered by expropriation laws.
- 113 Thus, the following replies may be provided to the questionnaire:
- The individual’s interest would in fact be indemnified, either through expropriation proceedings or further to the principle of State liability, according to the distinction described above.
 - The requirements to be met in order to receive this compensation would be the general ones established in each case.

¹³⁴ *García de Enterría/Fernández* (fn. 30) 251–377. See *M. Gómez Puente*, *La inactividad de la Administración* (3rd ed. 2002) 842 and *González Pérez* (fn. 20) 387. *Díez-Picazo* (fn. 1) 57 ff. provides some interesting critical comments.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

a) The farmer could in fact bring a claim against the chemical plant. It would be a case of merely applying the aforementioned general rules, summarised as the requirement to prove *exhausted diligence* on the part of the defendant. According to the case law, the defendant must not only prove that it fulfilled all applicable administrative law, but must also prove that it had adopted all reasonable measures to avoid causing damage (which is evidently not the case here).

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In general, and although this issue has not been thoroughly examined by Spanish legal scholars, the fact that the farmer could have applied for review or withdrawal of the permit would not affect the claim. It is probably true that the plaintiff, at the time, would have been able to participate in the procedure to grant the licence, and could also have addressed the administrative authorities to request a modification or cessation of the harmful activity. However, only in exceptional cases may this fact hinder his claim, whether by virtue of the principle forbidding a challenge to one's own acts, or by applying contributory negligence.

The Judgment of the Supreme Court (First Section) of 23 December 1952 examined a very similar case to the one described. Apart from the significance of its reasoning on the merits of the case, it dealt with a conflict which arose in 1952 and which was subject to a set of regulations enacted in 1925 (which, as in the case described, were out of date). In the case, the plaintiffs were agricultural and livestock farmers who complained that a nearby cement factory covered their animals and crops in dust. The factory claimed that it strictly fulfilled the requirements imposed by the 1925 regulations, but the Supreme Court held that this was insufficient for their conduct to be deemed diligent. In this Decision, it was literally stated that: "This theory (alleged by the defendant) that only an act or omission contrary to law may be deemed illegal for the purposes of establishing fault is totally mistaken". With regard to the defendant's compliance with the regulatory requirements, the Supreme Court also stated that "these general and preventive governmental provisions do not prevent the injured party bringing an action in tort after his rights have been harmed".

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Furthermore, this Supreme Court Decision also suggests that the Administration was probably not responsible for inadequate services, which could have served as grounds for a claim. In this regard, the Supreme Court pointed out

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that the factory had been ordered by the Administration to change its production process and that, after initially following the instructions received, it subsequently continued to use the original process which was more detrimental to the neighbouring properties.

- 117 b) It does not seem likely that a claim from the farmer against the Administration would prosper. As explained by legal scholars and the Courts (thoroughly explained *infra* no. 130), the Administration's liability for omissions rather than for positive actions is not as readily imposed and may not be based only on the existence of competences; the administrative services must also have been inadequately provided. These inadequate services, in cases where liability is imposed for omissions, basically consist of a prior duty to act (i.e. the Administration could not freely decide whether or not to act). In other words, the administrative services were not provided when there was an obligation to do so.¹³⁵
- 118 In relation to administrative liability for omissions, a distinction is made between the omission of specific administrative acts (see *infra* no. 129 ff.) and the omission to enact regulations. However, in Spain and unlike the case of France or Germany, neither the obligation to exercise regulatory powers nor any potential liability in tort derived therefrom has been extensively discussed. All we have in Spain is a cautious statement that liability may arise for the non-enactment of regulations that were mandatory by statute within a certain time-limit. Nonetheless, the Courts are reluctant to admit a claim for liability even in such cases.¹³⁶
- 119 Neither are there many examples in the case law. One of the few examples is provided by Supreme Court Decision of 8 May 1985 (RJ 2339), which acknowledges the possibility of demanding compensation but does not apply it in this specific case as there was no proof of actual damage. In this case, the plaintiffs were airport employees who complained that the Administration had not enacted the corresponding regulations to implement new classification ranks for their work posts, and that this had supposedly negatively affected their wages.
- 120 Another example is Supreme Court Decision of 4 December 1989 (RJ 9009), which refused to accept compensation for the damage allegedly caused by the delayed drawing up of a list of maximum agricultural prices because, it was said, sales had been voluntarily made at lower prices. See also Supreme Court Judgments of 6 November 1984 (RJ 5758) and 26 February 1993 (RJ 1413).
- 121 Consequently, only if we assumed in the case at hand that the Administration had a legal obligation to update the corresponding regulations within a certain time-limit could it be held liable.¹³⁷

¹³⁵ *González Pérez* (fn. 20) 364.

¹³⁶ *González Pérez* (fn. 20) 335. On the matter, see *Gómez Puente* (fn. 134) 852.

¹³⁷ It is arguable whether art. 45 of the Spanish Constitution could fill the gap, based on its systematic location in the Constitution. *Gómez Puente* (fn. 134) 287 refers to the French experience in this regard.

2. *A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?*

In effect, Spanish law does contemplate the possibility of B being held liable in tort by a one-time visitor to his workshop. In order to be held liable, B's fault cannot be based on a breach of occupational risk regulations, as the purpose of the law is not to protect a one-time visitor who happens to be injured but the corresponding workers. Notwithstanding the foregoing, the case is still not totally clear. As already mentioned on various occasions, Spanish law always enables the standards of diligence to go beyond the specific duties imposed by laws and regulations.¹³⁸

Thus, in the specific case described, all the circumstances surrounding the accident would be examined, particularly the issue of whether B's workshop breached the duties of care binding a workshop owner in relation to occasional visitors, and whether the victim himself intervened in the accident. For example, did B warn the victim that there was dangerous machinery? Was B's workshop in a dirty and neglected state which in itself was hazardous? Did the victim have a reason to be in the workshop?¹³⁹ In answering these questions, the Spanish judges will probably take into account the statutory regime that would have applied to employees, if appropriate. Nevertheless, it is not common for Spanish judges to openly resort to an application by analogy of this statutory regime.

Legal scholars have given the example of a workshop to be inaugurated that still lacks the necessary safety measures. If a visitor to the inauguration of the workshop is injured by a fire caused during the act, he could appeal to the right of general protection granted by art. 1902 of the Civil Code. Another example is a passer-by who is injured by a brick accidentally falling from a worksite without the necessary surrounding network.¹⁴⁰

A good example in the case law is Supreme Court Decision of 17 July 1986 (RJ 4571) (already mentioned *supra* no. 30), in which a child illegally entered a municipal pool that was under construction and drowned. The plaintiffs al-

¹³⁸ This idea is also reflected in the work accidents sector, if occupational health and safety regulations are breached. See *Gutiérrez-Solar* (fn. 33) 152; *García Murcia* (fn. 50) 67; *E. Hevia-Campomanes et al.*, *Los accidentes de trabajo y las enfermedades profesionales* (2nd ed. 1993) 285 ff.; *J.A. Martínez Lucas*, *La responsabilidad civil del empresario derivada de accidentes de trabajo y enfermedades profesionales* (1996) 120 and the case law quoted by these authors.

¹³⁹ In this respect, according to *P. Páramo Montero*, *Responsabilidad empresarial* (1995) 122, the employer has a duty to guarantee the safety of any persons present in the workshop, derived from his awareness of the characteristics of the work centre.

¹⁴⁰ The first example is given by *M. Luque Parra*, *La responsabilidad civil del empresario en materia de seguridad y salud laboral* (2002) 56 in fn. 52, the second by *M. González Labrada*, *Seguridad y salud en el trabajo y responsabilidad contractual del empresario* (1996) 467 in fn. 48.

leged that the pool was in an illegal situation as it breached the corresponding regulations on water purity and, furthermore, that occupational risk regulations imposed an obligation to protect the ditches with railings that, in this case, had not been installed. The Supreme Court held against the plaintiffs and indicated that “the victim drowned and his death apparently had nothing to do with the purity or pollution of the water; he was totally foreign to the pool construction works which, furthermore, had been paralysed, meaning that the corresponding occupational health and safety measures did not apply; and, finally, the installation of a two-metre fence is a mere recommendation when the works take place close to a city centre, and the lack thereof, if any, does not entail liability”. The Supreme Court continued by saying that “in the present case [...] the local Corporation had adopted precautionary measures that exceeded what was required by law as the regulations alleged by the plaintiff were aimed at works under construction, in order to benefit and protect the construction workers, and others were issued to ensure the safety of users of the finished, and operating, pools”.

- 126 Consequently, the Supreme Court first of all held that the breached rules were not the cause of the accident suffered by the victim; next, that the precautionary measures adopted by the Town Council (closing off the worksite and providing surveillance) were sufficient to confirm that it had acted diligently in this case, in which the victim himself had essentially contributed to his unfortunate death.

3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured party hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

- 127 With respect to a), it seems clear that the injured party may hold company B liable, according to the general rules explained above (supra no. 2). Of relevance in this case is the strict liability of environmental damage upheld by legal scholars and that, in any case, a breach of administrative laws entails fault.
- 128 Moreover, B may not claim that the Administration has ignored the information of violations in order to exclude its own liability. This is because there is a duty to act in good faith: nobody can allege one's own misconduct (*nemo*

auditor propriam turpitudinem alegans), which in this case is totally clear, not only because company B cannot claim unawareness of applicable regulations, but also because the Administration had already notified it of the shortcomings it had to remedy.

b) Could the injured persons claim damages from the government agency?

The reply to b) is more complex. The starting point is the fact that the Administration's abstract duty to protect the environment is insufficient to justify potential liability for non-exercise of this duty.¹⁴¹ In order to hold the Administration liable for an omission to supervise a third party's activities, there must be an irregular provision of public services.

In effect, the Administration is not subject to strict liability (including, therefore, the case of *adequately* operating services) in such cases, as opposed to the general rule explained *supra* no. 77.¹⁴² The reason for this change of attitude (upheld by legal scholars) was clearly explained by the Courts: "The Administration's liability could be blown out of proportion if it is allowed to arise in any case where the Administration does not effectively comply with the purpose laid down by the law (e.g. crime prosecution, care of the environment, road traffic control, health services, etc.), even if the causal chain is triggered by a known third party".¹⁴³

In Spanish case law, the Courts began to examine the potential liability of the State for omissions in the case of traffic accidents derived from the bad condition of the roads. Later, this liability was gradually extended to other fields.

¹⁴¹ Upheld by the Courts and legal scholars. See *Carrasco* (fn. 65) 317 ff.; *Cordero Lobato* (fn. 55) 500–503. See also *S. Galera Rodrigo*, *La responsabilidad de las Administraciones públicas en la prevención de daños ambientales* (2001) 144 and *Laguna de Paz*, RAP 2001, *passim*. When referring to the tort liability of the State and of the person it has authorised, the latter author explains: "It is not preposterous to state that, in general terms, administrative tort liability may arise in three cases: one, if there is gross negligence in the granting of the activity permit to an individual who does not fulfil the most basic requirements; two, when the damage is derived from characteristics of the activity that were previously established by law or, exceptionally, by the public Administration (accessory clauses); and three, when an irregular exercise of its duties of supervision and control have entailed a harmful outcome which would otherwise not have occurred". On the other hand, some legal scholars have pointed out that the law may occasionally impose an obligation to provide services on the part of the Administration, in which case a mere omission would entail liability. To illustrate this, reference is made to the *Basic Local Government Act* ("Ley de Bases de Régimen Local"), which requires local authorities to provide a rubbish collection service. See, for example, *Alenza* (fn. 55) 100–101.

¹⁴² As explained by *Gómez Puente* (fn. 134) 845 or *M.M. Zorrilla Suárez*, *Reflexiones sobre la responsabilidad patrimonial por actos de supervisión*, in: *Nuevas líneas doctrinales y jurisprudenciales sobre la responsabilidad patrimonial de la administración* (2002) 217. According to the latter, the absence of strict liability in these omission cases, particularly in the case of a duty to supervise a third party's activities, is related to the existence of compensation funds and other means of no-fault liability.

¹⁴³ Supreme Court Decision (Third Section) of 17 March 1993 (RA 2037).

- 132 Legal scholars usually refer to Supreme Court Decision (Third Section) of 17 March 1993 (RA 2037), which is a good example of why the mere omission to supervise a third party's activities does not suffice to hold the Administration liable and why the public services must be inadequately provided instead. In this Judgment, the Supreme Court held the Administration liable for the damage caused to the basement of a home as a result of a flood. The flood had been caused by the fact that a river bed had been gradually obstructed by various construction works carried out over the years. What the Supreme Court highlighted as the grounds for liability was the fact that the Administration was aware that individuals had been invading the river source with illegal constructions for many years and had not taken any measure to prevent this. Consequently, the Administration's inspection services had been irregular. Furthermore, the Supreme Court states that as the direct author of the floods had been a hotel owner who had blocked the galleries, the Administration could bring the corresponding recovery action against him.
- 133 Also of interest is Supreme Court Decision (Fourth Section) of 15 March 1982: the Town Council in this case was not held liable because, although it had not achieved the results imposed by applicable regulations (prohibiting the sale of milk in bulk), it had in fact issued an edict on the matter and had carried out the corresponding inspection and supervision activities.
- 134 The case described in the questionnaire does indicate that the Administration did not act efficiently: first of all, because it did not act diligently in light of the information on B's shortcomings; secondly, the fact that it failed to take any subsequent steps after it had notified B of the shortcomings it had to remedy.¹⁴⁴
- 135 On the other hand, if the accident described had taken place soon after the Administration had sent B the list of shortcomings to be remedied, the Administration would probably not be liable as it could not be claimed that the control services were irregular. In fact, this administrative activity would have remedied the prior irregularity derived from its omission to act upon receipt of the information on B's shortcomings and, furthermore, the short time elapsed between the notification and the accident would mean that the irregularity of

¹⁴⁴ According to *Cordero Lobato* (fn. 55) 502, in the event of liability for non-exercise of a duty to supervise and control third party activities, the public Administration's inaction in light of the information reported by the affected parties has always been sufficient evidence of an inadequate service, whether in the case of liability for environmental damage or in other fields. The Courts are clear on this point. See Supreme Court Decision (Third Section) of 11 October 1975 (RA 4572), as an example of a historical decision, and Supreme Court Decision (Third Section) of 6 February 2001 (RA 653), as an example of more recent case law. For a broad explanation, see *Carrasco* (fn. 65) 322 and *González Pérez* (fn. 20) 365. See also *Laguna de Paz*, RAP 2001, 32 ff. More vague is the comment provided by *Galera Rodrigo* (fn. 141) 138. The Supreme Court in its Judgment of 28 October 1986 (RA 6635) held the public Administration liable for the fact that certain demonstrators, in the absence of police control, had destroyed a set of loudspeakers; the Judgment indicated that the police had been notified that this equipment was present at the scene.

its control could not be claimed, as there was materially insufficient time in which to act.

As pointed out by legal scholars, only if it were proved that the damage would have in any case arisen, even if the Administration had adequately carried out its supervision duties, could its liability be excluded on the grounds that, at the time, the damage had been caused by the third party's intentional or negligent behaviour, which could not be avoided by the Administration's diligent execution of its duty to supervise.¹⁴⁵ 136

There is also the possibility that a civil servant may be covered by the offence foreseen in art. 329 of the Criminal Code, in which case the Administration could also be held liable for this reason.¹⁴⁶ This liability would be justified both on the fact that the civil servant committed an offence, and on the fact that the offence itself was proof that public services had not been adequately provided.¹⁴⁷ 137

If, as already mentioned, the injured party may hold both company B and the Administration liable, it becomes necessary to coordinate these liabilities. Although the issue is not expressly resolved in Spanish law, it seems that both parties would be held jointly and severally liable if it were impossible to determine to what extent each one contributed to the damage caused.¹⁴⁸ 138

¹⁴⁵ Carrasco (fn. 65) 323.

¹⁴⁶ According to art. 329 of the Criminal Code, a civil servant shall be held liable if he/she consciously provided information in favour of licences to polluting industries or who, in the course of the corresponding inspections, had concealed the existence of any breach.

¹⁴⁷ Cordero Lobato (fn. 55) 502 who quotes art. 93 of the Coasts Act.

¹⁴⁸ *Laguna de Paz*, RAP 2001, 55. This joint liability has been very clearly upheld in the case law for years. See, for example, Supreme Court Decision of 23 February 1995 (RA 1280).

TORT AND REGULATORY LAW IN SWITZERLAND

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I. General

1. *What, in general, is the impact of administrative law rules on the tort law of your country?*

As far as Swiss law is concerned, it has to be pointed out first that, on the one hand, civil law and public law are different fields with, e.g., different legislative and judicial powers and different procedures. On the other hand, there are evidently interdependencies between civil law and public law – in general and also with special regard to the relationship between administrative law rules (that are undoubtedly part of the public law¹) and (civil) tort law. Administrative law rules – the rules about administrative activities, administrative organisation and administrative procedures² – impact (civil) tort law in various ways:

a) In Swiss law, all cases of *liability for risk* (Gefährdungshaftung) are regulated in special statutes outside of the Swiss Code of Obligations (Schweizerisches Obligationenrecht, OR, Systematische Sammlung des Bundesrechts (Systematic Digest of Swiss Federal Legislation, SR) 220).³ Notwithstanding

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¹ P. Tschannen/U. Zimmerli, Allgemeines Verwaltungsrecht (2nd ed. 2005) § 1 no. 22.

² A definition of the term “Verwaltungsrecht” is provided in Tschannen/Zimmerli (fn. 1) § 1 no. 20 ff.

³ See the overview in H. Rey, Ausservertragliches Haftpflichtrecht (3rd ed. 2003) no. 1250 ff.: art. 58 ff. Strassenverkehrsgesetz (Road Traffic Act, SVG, SR 741.01), art. 1 ff. Eisenbahnhaftpflichtgesetz (Railway Liability Act, EHG, SR 221.112.742), art. 64 ff. Luftfahrtgesetz (Aviation Act, LFG, SR 748), art. 27 ff. Elektrizitätsgesetz (Electricity Act, EleG, SR 734), art. 3 ff. Kernenergiehaftpflichtgesetz (Nuclear Energy Liability Act, KHG, SR 732.44), art. 33 ff. Rohrleitungsgesetz (Pipeline Act, RLG, SR 746.1), art. 27 Sprengstoffgesetz (Explosives Act, SprstG, SR 941.41), art. 135 Militärgesetz (Military Act, MG, SR 510.10), art. 60 ff. Bevölkerungs- und Zivilschutzgesetz (Civil Defence Act, BZG, SR 520.1), art. 15 Jagdgesetz (Hunting Act, JSG, SR 922.0), art. 59a and 59a bis Umweltschutzgesetz (Environmental Protection Act, USG, SR 814.01). See also the collection of tort law rules in special statutes outside of the OR in A. Keller, Haftpflichtbestimmungen (12th ed. 2004).

the regulation of these cases in special statutes (issued under public law), they qualify as rules of *civil law* liability.⁴

- 3 b) In a series of public statutes (including rules qualified as civil law liability rules), *compensation is limited to personal injury and/or property damage*.⁵ These provisions limit the general definition of “damage” in the Code of Obligations. According to the Swiss Federal Court, damage is based on the involuntary diminution of fortune. The courts conclude a pecuniary damage from the difference between two situations: the victim’s fortune after damage and his (hypothetical) fortune without damage. In general all positions of economic or financial worth count as fortune (so-called *Differenztheorie*).⁶ Additionally, by means of these explicit or implicit limitations in special statutes, the legislator indirectly defines the limit to the protection of the interests of private individuals, thus affecting the spheres of lawfulness and unlawfulness.⁷
- 4 c) Based on the predominant view in Swiss legal doctrine and in court decisions, wrongfulness exists if the damaging conduct infringes a legal requirement or prohibition, written or unwritten, which serves to protect the affected right (the *objective theory of unlawfulness*).⁸ Such requirements and prohibitions can be found throughout the legal system, i.e. in civil law and in the area of interest in the present case, in public law, particularly criminal law.⁹ For example, there have been attempts to derive protective norms from the Environmental Protection Act and from the Water Protection Act (Gewässerschutzgesetz, GSchG, SR 814.20) (for more details see *infra* no. 41 ff.).¹⁰
- 5 Wrongfulness as the infringement of rules appears in two forms: One is the infringement of a legally and absolutely (*erga omnes*) protected right (absolut geschütztes Rechtsgut) of the injured party (life, limb, privacy, property, possession) (*wrongfulness of the result* in case of personal injury and property damage).¹¹ Infringement of an absolutely protected right results *ipso iure* in a wrongful attack in the victim’s protected sphere, unless justification exists for

⁴ See *Rey* (fn. 3) no. 33.

⁵ Art. 1 par. 1 and art. 11 EHG, art. 58 par. 1 SVG, art. 33 par. 1 RLG, art. 27 EleG.

⁶ Entscheidungen des Schweizerischen Bundesgerichts (Decisions of the Swiss Federal Court, BGE) 116 II 444 Erwägung (consideration, E.) 3a/aa.

⁷ *P. Widmer*, Wrongfulness, Function and Relevance under Swiss Law, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998) 115 ff., 117.

⁸ See *R. Brehm*, *Berner Kommentar zum schweizerischen Privatrecht, Obligationenrecht, Allgemeine Bestimmungen, Die Entstehung durch unerlaubte Handlungen (BK-Brehm)*, vol. VI/1/3/1 (3rd ed. 2006) art. 41 OR no. 33d; BGE 123 II 581 E. 4c, each with further references to court decisions and doctrine.

⁹ *BK-Brehm* (fn. 8) art. 41 OR no. 33d and no. 38f ff.; *Rey* (fn. 3) no. 697 and 706 ff.

¹⁰ *H.R. Trüeb*, in: *Vereinigung für Umweltrecht/H. Keller* (eds.), *Kommentar zum Umweltschutzgesetz (USG-Trüeb)*, vol. IV (2nd ed. 2004) art. 59a no. 32, with reference to *Th. Jäggi*, *Neue Haftungsbestimmungen im Umweltschutzgesetz*, *Schweizerische Juristen-Zeitung* (SJZ) 1996, 249 ff., 251 f. and *A. Petitpierre-Sauvain*, *La responsabilité du pollueur: Révision de la LPE et droit souhaitable*, *La Semaine Judiciaire* (SJ) 1996, 17 ff., 19.

¹¹ *BK-Brehm* (fn. 8) art. 41 OR no. 35 ff.; *Rey* (fn. 3) no. 682 ff.

the infringement.¹² In all other cases, in which an absolutely protected right is not infringed, wrongfulness exists if a specific rule of conduct (precept or prohibition) is violated whose purpose is to protect the interests of the injured party against damage of the kind which actually occurred (so-called *protective rule* (Schutznorm), *wrongfulness of the conduct*).¹³ The latter form of wrongfulness is of relevance in case of pure economic loss and the infringement of certain relative rights.¹⁴

d) Public law also contains *administrative and technical rules*, stipulated in laws, ordinances, regulations and internal administrative instructions, which serve to protect, e.g., the general public, traffic participants and employees.¹⁵ These rules specify the due care which must be exercised in specific situations (e.g. in road traffic).¹⁶ They must be distinguished from the “protective rules” mentioned in supra no. 5, which are of relevance in the context of wrongfulness. Administrative regulations do play a role in tort law, but only as a *factor in measuring fault*.¹⁷ The *violation* of these rules can at least be taken as an *indication* of the presence of negligence if the purpose of the rule in question was to prevent damage. However, the specific situation may actually require deviation from such a rule if due care is to be exercised (e.g. crossing the continuous white line on the street in order to avoid a collision in road traffic).¹⁸ By the same token, *compliance* with these rules does not necessarily mean that negligence does not exist, since the circumstances may require an additional measure of due care (for more details with respect to safety and environmental regulations, see infra no. 34 ff.).¹⁹

2. Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?

The Swiss Federal Constitution (Bundesverfassung der Schweizerischen Eidgenossenschaft, BV, SR 101) and the Introductory Titles (Einleitungstitel) to the Swiss Civil Code (Schweizerisches Zivilgesetzbuch, ZGB, SR 210) contain rules as to legislative powers in civil and public law.

¹² Widmer (fn. 7) 117.

¹³ BK-Brehm (fn. 8) art. 41 OR no. 38b ff.; Rey (fn. 3) no. 695 ff.; see also Widmer (fn. 7) 117 f. and 120 f.

¹⁴ See Rey (fn. 3) no. 696, with reference to no. 703 ff. and no. 713 ff.; BK-Brehm (fn. 8) art. 41 OR no. 37e and 38d.

¹⁵ K. Otfinger/E.W. Stark, Schweizerisches Haftpflichtrecht, vol. I (5th ed. 1995) § 5 no. 98.

¹⁶ Otfinger/Stark (fn. 15) § 5 no. 98; Rey (fn. 3) no. 872.

¹⁷ BK-Brehm (fn. 8) art. 41 OR no. 54, with further references.

¹⁸ Rey (fn. 3) no. 872 f.; Otfinger/Stark (fn. 15) § 5 no. 98, each with further references to Swiss doctrine and court decisions; P. Widmer, Fault under Swiss Law, in: P. Widmer (ed.), Unification of Tort Law: Fault (2005) 281 ff., 293 no. 47; BK-Brehm (fn. 8) art. 41 OR no. 185.

¹⁹ Otfinger/Stark (fn. 15) no. 98, with further references to court decisions; Rey (fn. 3) no. 874, with further references to Swiss doctrine and court decisions; Widmer (fn. 18) 293 no. 48.

- 8 Pursuant to art. 122 par. 1 BV, the federal legislator has exclusive legislative powers in *civil law*. These powers are comprehensive, encompassing all of civil (or private) law as far as the definition of “civil law” extends based on Swiss legal doctrine.²⁰ Based on art. 122 par. 1 BV, art. 5 par. 1 ZGB in conjunction with art. 51 Schlusstitel ZGB (Final Heading of the Swiss Civil Code, SchlT ZGB) essentially excludes the cantons from the sphere of legislative powers in civil law, although it does allow the cantons a narrow scope for specific legislation.²¹
- 9 Legislative powers in *public law* are shared by the confederation and the cantons. Based on the general division of powers in art. 3 BV, the cantons are presumed to have legislative powers unless the Constitution expressly stipulates federal legislative powers. Art. 6 par. 1 ZGB states that the legislative powers of the cantons in public law may not be restricted by federal civil law. This merely confirms what can be derived in any case from art. 3 BV.²² The relevance of art. 6 par. 1 ZGB is limited to cases where the confederation as well as the cantons have legislative powers and, therefore, the same subject area is regulated by the public law of the cantons and by federal civil law.²³ In that case, art. 6 par. 1 ZGB indicates that the principle of the derogatory power of federal law established in art. 49 par. 1 BV does not apply and the legislative powers of the cantons in public law is not restricted.²⁴
- 10 Three criteria have been developed in legal practice for effective treatment of the expansive power of the public law of the cantons relative to federal civil law, all of which must be met: 1. The provision of federal civil law must not be conclusive. 2. There must be tenable grounds of public welfare which justify rolling back federal civil law in this specific case in favour of the public law of the canton. 3. The primacy of federal civil law applies as a general barrier to the legislative powers of the cantons; i.e. the public law of the cantons affecting relations regulated by federal civil law must conform to the latter and may not contradict it, in meaning or in aim.²⁵ Unless all three of these requirements are met, the public law of the cantons cannot override federal civil law.²⁶ In this manner, the postulate of the harmonization of civil law and public law is to be realized.²⁷

²⁰ H. Schmid, in: H. Honsell/N.P. Vogt/Th. Geiser (eds.), Basler Kommentar, Zivilgesetzbuch I, Art. 1–456 ZGB (BSK ZGB I-Schmid) (3rd ed. 2006) art. 5 no. 3, with further references.

²¹ BSK ZGB I-Schmid (fn. 20) art. 5 no. 1.

²² See, e.g., A. Marti, in: Kommentar zum Schweizerischen Zivilgesetzbuch, Art. 1–7 ZGB (Zürcher Kommentar) (ZK-Marti), vol. I/1 (1998) art. 6 ZGB no. 24; BSK ZGB I-Schmid (fn. 20) art. 6 no. 1.

²³ BSK ZGB I-Schmid (fn. 20) art. 6 no. 2 f.; ZK-Marti (fn. 22) art. 6 ZGB no. 39.

²⁴ ZK-Marti (fn. 22) art. 6 ZGB no. 45 ff.; BSK ZGB I-Schmid (fn. 20) art. 6 no. 3.

²⁵ BGE 58 I 32.

²⁶ In detail concerning these three requirements ZK-Marti (fn. 22) art. 6 ZGB no. 50 f.; BSK ZGB I-Schmid (fn. 20) art. 6 no. 10 ff., with further references.

²⁷ ZK-Marti (fn. 22) art. 6 ZGB no. 54 f.

3. *Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?*

It is generally recognized that the rules whose violation may establish wrongfulness can be found throughout the legal system, i.e. not only in the (main) civil code, but in any other Act, be it in the field of private, criminal or administrative law. These rules may be part of federal law, the laws of the cantons or the statutes of municipalities, whether written or unwritten.^{28,29} In some cases, courts have even referred to “soft law” (e.g. the rules of conduct or directives of professional or athletic associations, such as the Directives of the Academy of Medical Sciences or the Rules of the International Ski Federation (FIS)).³⁰

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4. *What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?*

An example of this would be an ordinance which defines incorrect safety standards, or the official approval or inspection of a building, technical system, etc. prior to its opening or commissioning in which errors are not found, or are mistakenly not qualified as defects.

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a) As far as the liability of public servants or the state is concerned, state and public servants' liability in *public law* applies in cases relating to *sovereign actions*, as in the two examples cited above. Unless the liability of the confederation in public law is regulated in another statute, its liability is established in accordance with the State Liability Act (Verantwortlichkeitsgesetz, VG, SR 170.32).³¹ This federal statute as well as the great majority of the cantonal statutes provide for primary and mostly exclusive strict³² liability of the public community (confederation, canton or local community).³³ The public community is *exclusively* liable to the injured party for damage wrongfully

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²⁸ BK-Brehm (fn. 8) art. 41 OR no. 42 ff. gives examples for unwritten law (e.g. in the field of personality rights: right to privacy and the right to one's image, etc.).

²⁹ Widmer (fn. 7) 122; BK-Brehm (fn. 8) art. 41 OR no. 33 and 33d; *Oftinger/Stark* (fn. 15) § 4 no. 42 f.; *Rey* (fn. 3) no. 697, with further references; BGE 116 Ia 169, with further references.

³⁰ *Widmer* (fn. 7) 122 f., with further references; *P. Widmer*, *Privatrechtliche Haftung*, in: P. Münch/Th. Geiser (eds.), *Schaden-Haftung-Versicherung*, Handbücher für die Anwaltspraxis, vol. V (1999) no. 2.46.

³¹ Art. 3 par. 2 VG. Concerning the public law nature of State liability see *Rey* (fn. 3) no. 103 and 113.

³² The liability is strict in the sense that it does not require fault of the members of the authority or the public servants. However, normally there must have been some (objective) breach of duty (see *P. Widmer*, *Liability for Damage Caused by Others under Swiss Law*, in: J. Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others* (2003) 259 ff., 265 no. 14).

³³ *Widmer* (fn. 32) 265 no. 14; *Rey* (fn. 3) no. 113 ff.

caused to third parties by its authorities, public servants and employees in the course of their “official activities”.³⁴ “Official activities” include physical acts, real acts (e.g. waste disposal), specific decrees (orders) and the issuance of general legal rules (e.g. ordinances).³⁵ The public community may have recourse against its agents. However, this action of recourse is frequently limited to cases of intentional or grossly negligent behaviour (see, e.g., art. 7 VG). The idea behind this protection is that agents should not be dissuaded from doing their job by the fear of being held liable for eventual damage that may result from their activity.³⁶

- 14 State and public servants’ liability under *civil law*, which is the topic of discussion in this question, only applies under Swiss law if the actions causing the damage were *not of a sovereign nature*,³⁷ or if the application of the relevant private tort law rule does not depend on the question if the confederation or the canton was acting as a sovereign.³⁸ Actions causing the damage are not of a sovereign nature whenever the state acts *on an equal standing* with individual citizens. In that case, the state is subject to civil law like any private individual, including the provisions relating to civil law liability.³⁹ Liability provisions of civil law apply for damage caused in the course of ancillary administrative activities, the management of financial assets (Finanzvermögen) and in connection with “commercial” activities (art. 61 par. 2 OR).⁴⁰ In such cases, public servants and employees would – in principle – also be liable under civil law liability rules. But de facto, this only applies to public servants and employees of the cantons. On the level of the confederation, the federal statute (the State Liability Act) holds that also in such cases the confederation is *exclusively* liable to the injured party for damage wrongfully caused to third parties by its authorities, public servants and employees (art. 11 par. 1 and 2 VG). As in the context of sovereign actions, the confederation may have recourse against its agents if they acted intentionally or grossly negligently (art. 11 par. 3 VG with reference to art. 7 VG).⁴¹
- 15 b) As mentioned in supra no. 6, compliance with *administrative and technical rules in laws and ordinances* does not necessarily mean that negligence does not exist. The circumstances may require an additional measure of due care and, in exceptional cases, may require violation of the rule. Accordingly, it is irrelevant whether the liable party was familiar with the rule or not.⁴² The presence of negligence must be assessed from the perspective of civil law alone.⁴³

³⁴ *Rey* (fn. 3) no. 113.

³⁵ See *Rey* (fn. 3) no. 130.

³⁶ *Widmer* (fn. 32) 265 no. 14.

³⁷ See particularly art. 61 OR and art. 11 par. 1 VG.

³⁸ See, e.g., art. 73 SVG: liability of the confederation and the cantons for traffic accidents.

³⁹ *Rey* (fn. 3) no. 131 f.

⁴⁰ *Rey* (fn. 3) no. 132, with reference.

⁴¹ See in detail *Rey* (fn. 3) no. 131 ff.

⁴² *Oftringer/Stark* (fn. 15) § 5 no. 98, with further references to court decisions; see also *Rey* (fn. 3) no. 874, with further references to Swiss doctrine and court decisions.

⁴³ *Oftringer/Stark* (fn. 15) § 5 no. 99, with further references to court decisions.

In cases involving *simple or mild objective (strict) liability* (*einfache oder milde Kausalhaftung*) and *liability for risk*, some take the view that compliance with *mandatory* statutory provisions or official decrees constitutes *justification*, e.g., if the use of a poisonous flame retardant is prescribed.⁴⁴ However, this view is not unanimous: It is contended that the assumption of a non-statutory justification is alien to the concept of liability for risk, which is not contingent upon wrongfulness at all (which is not true in that form⁴⁵). Furthermore, it is argued that sovereign action would require certain acts or omissions, but of course not the causation of damage to third parties. The liable party would have recourse against the state if the regulations were erroneous.⁴⁶

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Art. 5 par. 1 lit. d Produkthaftpflichtgesetz (Product Liability Act, PrHG, SR 221.112.944) stipulates a cause of justification by specific statute. Under this provision, the manufacturer of a product is not liable if it demonstrates that the error is attributable to the product's compliance with mandatory legal regulations. This provision is based on the concept that it is unreasonable to force the manufacturer to choose between disobeying the rule and incurring liability.⁴⁷ However, only *mandatory regulations* relating to product quality are relevant in this regard, not rules which merely contain minimum product safety requirements and leave it up to the manufacturers whether or not to go beyond these requirements.⁴⁸ A legal requirement is only assumed if a *statutory* provision (law, ordinance) exists. Permits and approvals in public law and private rules (such as the rules of the Swiss Association of Engineers and Architects, SIA) and private regulations do not qualify as legal regulations.⁴⁹

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There is no such case of justification explicitly stated in environmental law. The legislative material indicates that such provisions were dispensed with because the legislator assumed that "justification" could in any case be derived in such cases from general principles of tort law.⁵⁰

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c) In the case of *official approval or inspection* of a building, technical system, etc. prior to opening or commissioning in which an error was not found or was mistakenly not qualified as a defect, the responsible party cannot deny responsibility if damage was caused to a third party by referring to the ap-

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⁴⁴ H. Honsell, *Schweizerisches Haftpflichtrecht* (4th ed. 2005) § 22 no. 41, with reference to Jäggi, SJZ 1996, 253; G. Schmid/U. Fankhauser, *Industrieunfall*, in: Münch/Geiser (eds.) (fn. 30) no. 20.91, with further references.

⁴⁵ See also *infra* no. 49.

⁴⁶ In this sense, e.g., USG-Trüb (fn. 10) art. 59a no. 92.

⁴⁷ W. Fellmann, in: H. Honsell/N.P. Vogt/W. Wiegand (eds.), *Basler Kommentar, Obligationenrecht I*, Art. 1–529 OR (BSK OR I-Fellmann) (4th ed. 2007) art. 5 PrHG no. 12, with further references.

⁴⁸ BSK OR I-Fellmann (fn. 47) art. 5 PrHG no. 13, with further references.

⁴⁹ BSK OR I-Fellmann (fn. 47) art. 5 PrHG no. 14, with further references; see also *Rey* (fn. 3) no. 1214 f.

⁵⁰ See USG-Trüb (fn. 10) art. 59a no. 92, with reference to the Official Bulletin of the Federal Assembly (*Amtliches Bulletin der Bundesversammlung*, *Amtl.Bull.*), volume of the National Assembly (Nationalrat, N) 1995, 2419 (*Baumberger*).

proval or inspection. While the authority's assessment of the situation constitutes important circumstantial evidence as to the foreseeability of the damage, the courts determine the question of negligence without regard to the decision of the administrative agency conducting the inspection. Excessive lenience, failure to exercise due care in the inspection and lack of expertise on the part of the agency do not absolve the liable party of responsibility if its safety measures are inadequate.⁵¹

In the case of BGE 92 IV 86 ff., a drunken man died of carbon monoxide poisoning in a bathroom with propane gas lighting and inadequate ventilation. The plumber argued that the entire building had been accepted and approved by the building authority. However, since it could not have been unknown to him, based on his experience, that such defects are often overlooked in official building inspections, this argument was not sufficient to absolve him of responsibility.

- 20 The unanimous view in Swiss legal doctrine is that official approval of a facility does not constitute justification for the operator in cases of strict liability and liability for risk as well.⁵²

5. If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?

- 21 If an administrative law contains criminal sanctions, it does not follow that tort claims are excluded. This is already indicated by the fact that public statutes containing criminal provisions also include provisions relating to civil law liability, e.g. the Road Traffic Act,⁵³ the Environmental Protection Act,⁵⁴ the Electricity Act,⁵⁵ the Aviation Act,⁵⁶ the Pipeline Act,⁵⁷ the Inland Waterways Act (Binnenschiffahrtsgesetz, BSG, SR 747.201),⁵⁸ the Explosives Act,⁵⁹ the Nuclear Energy Liability Act,⁶⁰ the Radiation Protection Act (Strahlenschutzgesetz, StSG, SR 814.50),⁶¹ the Genetic Engineering Act (Gentechnikgesetz, GTG, SR 814.91),⁶² the Fisheries Act (Bundesgesetz über die Fi-

⁵¹ *Oftinger/Stark* (fn. 15) § 5 no. 101 f.; *Rey* (fn. 3) no. 875 f., each with further references.

⁵² *Schmid/Fankhauser* (fn. 44) no. 20.91, with further references; BGE 91 II 208 E. 3d (art. 58 OR: liability of the owner of a building or other construction).

⁵³ Art. 58 ff. SVG (liability), art. 90 ff. SVG (penal provision).

⁵⁴ Art. 59a ff. USG (liability), art. 60 ff. USG (penal provision).

⁵⁵ Art. 27 ff. EleG (liability clauses), art. 55 ff. EleG (penal provisions).

⁵⁶ Art. 64 ff. LFG (liability to third parties), art. 88 ff. LFG (penal provisions).

⁵⁷ Art. 33 ff. RLG (liability and insurance), art. 44 ff. RLG (penalties and administrative sanctions).

⁵⁸ Art. 31 ff. BSG (insurance), art. 40 ff. BSG (penal provisions).

⁵⁹ Art. 27 SprstG (liability), art. 37 ff. SprstG (penal provisions).

⁶⁰ Art. 3 ff. KHG (liability), art. 31 ff. KHG (penal provisions).

⁶¹ Art. 39 f. StSG (liability), art. 43 ff. StSG (penal provisions).

⁶² Art. 30 ff. GTG (liability), art. 35 GTG (penal provisions).

scherei, BGF, SR 923.0),⁶³ the Hunting Act,⁶⁴ the Collective Investment Act (Kollektivanlagengesetz, KAG, SR 951.31)⁶⁵ and the State Liability Act.⁶⁶ In addition, art. 53 OR regulates the relation to criminal law under the heading “Liability in General”, in which it briefly describes the relation between cognizance by civil courts and the findings of criminal courts. This question would not arise if criminal sanctions excluded tort claims. Art. 53 OR applies not only to the Code of Obligations, but to all of civil law,⁶⁷ including the aforementioned liability rules established by specific statute, which have the character of civil law liability rules.

In cases where public statutes contain criminal provisions in addition to rules of tort law, the criminal sanctions exist alongside the tort claims, each of which is assessed based on its respective requirements. Art. 53 OR expressly states that civil courts are not bound by provisions of criminal law concerning criminal responsibility or by an acquittal in a criminal court when they are judging fault or innocence, and mental capacity or incapacity to make a rational judgment (par. 1). Likewise, the judgment of a criminal court as to guilt and the determination of damage (art. 42 OR) is not binding upon a civil judge (par. 2). In these points, the federal legislator enters the sphere of procedural law, which is otherwise (thus far⁶⁸) reserved for the cantons.⁶⁹ In other matters which are not regulated in art. 53 OR – above all questions of factual findings, problems of wrongfulness and adequate causal link – the independence of the civil courts from the findings of criminal courts is governed by the provisions of the civil procedure code of the respective cantons.⁷⁰ In practice, however, the legal literature stresses that art. 53 OR may place too great an emphasis on the independence of civil law from criminal law, since criminal findings are used as the basis for settling civil claims in the “vast majority of cases”, e.g. in road traffic law.⁷¹

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6. Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?

Neither Swiss administrative law nor tort law defines which rules of public law constitute “protective rules” in terms of tort law. Instead, this determination is made in court decisions and tort law doctrine. Not every rule of public law is necessarily a “protective rule” in terms of tort law. Protective rules contain rules

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⁶³ Art. 15 BGF (liability), art. 16 ff. BGF (penal provisions).

⁶⁴ Art. 15 f. JSG (liability and insurance), art. 17 ff. JSG (penal provisions).

⁶⁵ Art. 145 ff. KAG (responsibility), art. 148 ff. KAG (penal provisions).

⁶⁶ Art. 3 ff. VG (liability for damage), art. 13 ff. VG (criminal liability).

⁶⁷ BK-Brehm (fn. 8) art. 53 OR no. 12, with further references.

⁶⁸ For the current state of the ongoing harmonization of civil procedure law in a federal statute see www.bj.admin.ch (Themen/Staat & Bürger/Gesetzgebung/Zivilprozessrecht).

⁶⁹ A.K. Schnyder, in: Honsell/Vogt/Wiegand (eds.) (fn. 47) (BSK OR I-Schnyder) art. 53 no. 2.

⁷⁰ See, e.g., BSK OR I-Schnyder (fn. 69) art. 53 no. 2 and 4, with further references; BK-Brehm (fn. 8) art. 53 OR no. 22 ff.

⁷¹ Widmer (fn. 30) no. 2.29.

of conduct, requirements or prohibitions, whose purpose is to afford selective protection to property.⁷² If a rule of conduct is violated, wrongfulness exists in the sense that a rule as such was violated. However, for that violation to attain relevance in tort law, it is also necessary for the *damage to fall within the scope of the rule* and for the *rule to be enacted for the protection of the injured party*.⁷³ In Swiss law, these additional requirements, which may be summarized by the terms “relation of unlawfulness” (Rechtswidrigkeitszusammenhang) and “aim of the norm” (Schutzzweck der Norm), are seen in conjunction with the requirements for wrongfulness, not the requirements for causation.⁷⁴ Protective rules are to be distinguished from *administrative regulations*, which function merely as a factor for measuring fault.⁷⁵

7. If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?

- 24 a) A legal entity derives rights and obligations directly from the actions of its *organs*. This responsibility of a legal entity for its organs applies both for contractual and extra-contractual acts (including torts) by its organs (art. 55 par. 2 ZGB: “sonstiges Verhalten” (“other actions”)). The definition of “organs” in art. 55 par. 2 ZGB includes both *de iure* organs and *de facto* organs who effectively perform management functions or who play an effective or decisive role in decision-making for the legal entity.⁷⁶
- 25 If non-compliance with a rule of administrative law is attributable not to the acts and omissions of organs, but to those of an *employee* or *other auxiliary person*, the legal entity could only be held liable for the damage caused to third parties based on art. 55 OR (vicarious liability of the principal), which stipulates that principals are liable in tort for their employees and other auxiliary persons. The liability in question qualifies as simple or mild objective (strict) liability (einfache oder milde Kausalhaftung), which is not contingent upon a fault by the auxiliary person or the principal. There are some who contend that this liability consists of fault-based liability with reversal of the burden of proof. In contrast to the liability of a legal entity for its organs, two causes of exoneration are open to legal entities if the liability of the principal applies: the defence that utmost care was exercised (with respect to selection, instruction, supervision, internal company organization and control) in order to avoid damage of this kind or that the damage would have occurred even if utmost care

⁷² See BK-Brehm (fn. 8) art. 41 OR no. 38e.

⁷³ Otfinger/Stark (fn. 15) § 4 no. 41; Rey (fn. 3) no. 698 ff.

⁷⁴ See in detail V. Roberto, Schadensrecht (1997) 83 ff.; Widmer (fn. 7) 123.

⁷⁵ BK-Brehm (fn. 8) art. 41 OR no. 54 ff.

⁷⁶ C. Huguenin, in: Honsell/Vogt/Geiser (eds.) (fn. 20) (BSK ZGB I-Huguenin) art. 54/55 no. 12 ff., with further references to court decisions and doctrine. Concerning the administrative (criminal) liability of legal entities, see *infra* no. 29.

had been exercised.⁷⁷ The requirements for the liability of the principal are: the presence of damage, the affirmation of wrongfulness, the existence of an adequate causal link between the action of the auxiliary person and the damage, a relationship of subordination between the principal and the auxiliary person and a functional connection between the activity of the agent and the damaging act (the damage must have arisen in the exercise of his functions and not only on the occasion of the exercise of his functions).⁷⁸ It should be added that all cases of *liability for risk* stipulated by specific statute in Switzerland include the responsibility of principals for their auxiliary persons, and thus exclude application of art. 55 OR.⁷⁹ If the principal is liable in accordance with art. 55 OR, the courts have ruled against the additional application of fault-based liability in accordance with art. 41 OR.⁸⁰ An exception would only apply if the principal himself participated in causing damage through a negligent act or omission of his own in addition to the auxiliary person for whom he is liable pursuant to art. 55 OR, or issued instructions which are wrongful in and of themselves.⁸¹

b) and c) If an individual within the organization is liable in criminal or administrative law, it does not follow that the legal entity cannot be held liable in civil law for the actions of its organs if the requirements are met (see also supra no. 21 f.).⁸² 26

In accordance with art. 55 par. 3 ZGB, the *organs* may be personally liable to the injured party as well. According to the wording of this provision, the personal liability of the organs is contingent upon the presence of fault. However, the basis for the injured party's tort claim does not need to be fault-based liability in accordance with art. 41 OR, but may be any other liability rule as well.⁸³ The personal liability of the organ applies in addition (i.e. alternatively) to the liability of the legal entity, and is not excluded by the latter.⁸⁴ The organ and the legal entity are generally liable to the injured party as joint and several debtors in terms of art. 50 par. 1 OR and art. 143 ff. OR.⁸⁵ As a consequence of this, the legal entity may have recourse against its organs.⁸⁶ 27

⁷⁷ See the overview in BSK OR I-Schwyder (fn. 69) art. 55 no. 15 ff., with further references.

⁷⁸ See again the overview in BSK OR I-Schwyder (fn. 69), art. 55 no. 6 ff., with further references.

⁷⁹ BK-Brehm (fn. 8) art. 55 OR no. 103, with references, amongst others to BGE 99 II 202 E. 3 ("L'art. 58 LCR (= SVG), *lex specialis*, exclut l'application de l'art. 55 CO (= OR), *lex generalis*, qui prévoit en faveur de l'employeur une preuve libératoire"); BGE 64 II 161 E. 3 in fine, with reference.

⁸⁰ BGE 115 II 242.

⁸¹ See BK-Brehm (fn. 8) art. 55 OR no. 97, with further references.

⁸² See, e.g., BSK ZGB I-Huguenin (fn. 76) art. 54/55 no. 8.

⁸³ R.H. Weber, *Juristische Personen*, in: Schweizerisches Privatrecht, vol. II/4 (1998) § 10/IV, 196; H.M. Riemer, *Berner Kommentar zum schweizerischen Privatrecht, Das Personenrecht, Die juristischen Personen, Allgemeine Bestimmungen (BK-Riemer)*, vol. I/3/1 (3rd ed. 1993) art. 54/55 ZGB no. 64 f., with further references; BSK ZGB I-Huguenin (fn. 76) art. 54/55 no. 31.

⁸⁴ BK-Riemer (fn. 83) art. 54/55 ZGB no. 63; Weber (fn. 83) § 10/IV, 195 f.

⁸⁵ Widmer (fn. 32) 262 no. 10; BK-Riemer (fn. 83) art. 54/55 ZGB no. 68.

⁸⁶ BK-Riemer (fn. 83) art. 54/55 ZGB no. 68.

- 28 The principal's liability of the legal entity in accordance with art. 55 OR (as may be applied outside of the scope of the rules establishing liability for risk, see *supra* no. 25) and the personal liability of *employees* do not establish real joint and several claims for the third party in terms of art. 50 par. 1 OR, in other words, they establish concurring causes of action in the sense of art. 51 OR. If a contractual relation between the auxiliary person and the principal exists (as in the case of an employee), the internal recourse is generally governed by this contractual relation.⁸⁷

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

- 29 a) In accordance with art. 53 ZGB, a legal entity may have all of the rights and duties which are not dependent on the natural qualities of natural persons, such as sex, age and familial relationship. As far as administrative liability of legal entities is concerned, provisions can be found in supplementary penal statutes (of federal law, of the law of cantons and municipal law) – particularly in the law of administrative and fiscal offences⁸⁸ – which may stipulate that a legal entity may be required to pay a fine, or that a legal entity and a natural person may be required to pay a fine as joint and several debtors.⁸⁹ Since 1 October

⁸⁷ See BK-Brehm (fn. 8) art. 55 OR no. 39, 96 and 109.

⁸⁸ Rey (fn. 3) no. 1688.

⁸⁹ See also BK-Riemer (fn. 83) Systematischer Teil no. 187. Examples: Art. 7 par. 1 Bundesgesetz über das Verwaltungsstrafrecht (Federal Act on Administrative Offences, VStrR, SR 313.0), which applies – pursuant to scope of application stipulated in art. 1 VStrR – only in cases where responsibility for prosecuting administrative offences falls to a federal administrative authority, and not to the cantons: “If a fine of no more than Swiss Francs 5,000 is possible and investigation of the criminally liable persons in accordance with art. 6 would require investigative measures out of proportion to the penalty incurred, prosecution of those persons may be dispensed with and, in lieu thereof, the legal entity, general or limited partnership (Kollektiv- or Kommanditgesellschaft) or one-man business (Einzelfirma) may be required to pay the fine.” Art. 7 VStrR also applies in environmental, water and fishery law, based on art. 62 par. 1 USG, art. 73 GSchG and art. 18 BGF. Additional examples are: Art. 89 par. 1 Bundesgesetz über die Alters- und Hinterlassenenversicherung (Old Age and Surviving Dependents Insurance Act, AHVG, SR 831.10): generally, joint and several liability of the legal entity, the partnership (Personengesellschaft) and the owner of a one-man business for fines and costs, along with the natural person which committed the act or omission. Art. 77 par. 4 Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (Occupational Pension Act, BVG, SR 831.40): “If a fine of no more than Swiss Francs 4,000 is possible and investigation of the criminally liable persons in accordance with par. 1–3 would require investigative measures out of proportion to the penalty incurred, prosecution of those persons may be dispensed with and, in lieu thereof, the legal entity, the general or limited partnership or one-man business may be required to pay the fine” (version of the 1st revision of the BVG entered into force on 1 January 2005). See also art. 181 par. 1 and 2 Bundesgesetz über die direkte Bundessteuer (Act on Federal Direct Taxes, DBG, SR 642.11) and art. 57 par. 1 and 2 Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (Act on Harmonisation of Direct Taxes of the Cantons and Municipalities, StHG, SR 642.14).

2003, the Penal Code (Strafgesetzbuch, StGB, SR 311.0) itself has provided rules in the General Part for the general criminal responsibility of companies (art. 102 StGB, former art. 100quater⁹⁰ StGB). Pursuant to art. 102 par. 4 lit. a StGB, “companies” (“Unternehmen”) include legal entities. This provision was introduced in an effort to intensify the fight against financing terrorism. Art. 102 StGB creates, on the one hand, *subsidiary* criminal responsibility for companies in cases where the act cannot be attributed to any specific natural person due to their defective organization. In that case, the crime or offence is attributed to the legal entity, which may be required to pay a fine of up to CHF (Swiss Francs) 5 million (approx. € 3.1 million) (par. 1). On the other hand, *original* criminal responsibility for companies is stipulated for certain torts,⁹¹ for which the company can be held criminally liable directly and in the form of primary liability, regardless of the criminal responsibility of the actual perpetrator (par. 2).⁹² Before this new provision entered into force in 2003, legal entities generally could not be held liable for the criminal acts of their organs, unless (administrative) criminal sanctions for legal entities were stipulated by special statute (a few examples for such special statutes are mentioned in *supra* fn. 89).⁹³

b) With respect to the consequences of administrative (criminal) liability for civil law, art. 53 OR expressly states that, for certain selected issues, the cognizance of civil courts is not restricted by the findings of criminal courts (details regarding art. 53 OR are described in *supra* no. 22).

Also of relevance for civil law liability is the *statute of limitations rule* in art. 60 par. 2 OR, which states that, in cases where a civil action is derived from a criminal act for which criminal law stipulated a longer limitation period, that period applies for civil law as well. This rule is highly relevant in practice because of the short limitation periods of damage compensation and satisfaction claims (one year from receiving knowledge of the damage and the liable party and ten years from the date of the damaging action). It applies accordingly for similar claims regulated outside the scope of tort law in art. 41 ff. OR.⁹⁴ Some

⁹⁰ The numbering was changed when the new General Part of the Penal Code entered into force on 1 January 2007.

⁹¹ They are: participation in a criminal organization (art. 260ter StGB), financing terrorism (art. 260quinquies StGB), money laundering (art. 305bis StGB), bribing Swiss office holders (active bribery) (art. 322ter StGB), offering, promising or granting advantages to office holders (Vorteilsgewährung) (art. 322quinquies StGB), bribing foreign office holders (active bribery) (art. 322septies par. 1 StGB) and active private bribery as far as it is an offence in the sense of art. 4a par. 1 lit. a Bundesgesetz gegen den unlauteren Wettbewerb (Federal Act Against Unfair Competition, UWG, SR 241).

⁹² Concerning the new general responsibility of legal entities stipulated in the General Part of the StGB, see, e.g., G. Heine, *Praktische Probleme des Unternehmensstrafrechts*, Schweizerische Zeitschrift für Wirtschaftsrecht (SZW) 2005, 17 ff.; M.A. Niggli/N. Schmuki, *Das Unternehmensstrafrecht* (Art. 100quater StGB/Art. 102 revStGB), *Anwalts-Revue* 2005, 347 ff.

⁹³ BK-Riemer (fn. 83) Systematischer Teil no. 187; Rey (fn. 3) no. 1688; BSK ZGB I-Huguenin (fn. 76) art. 53 no. 14 and art. 54/55 no. 8.

⁹⁴ BK-Brehm (fn. 8) art. 60 OR no. 7 ff., in no. 7 enumerating a series of liability norms, amongst others, art. 333 ZGB (liability of the head of family), art. 679 ZGB (liability of the landowner due to transgression of property rights), etc.

public law statutes make explicit reference to the application of tort law rules in art. 41 ff. OR, including art. 60 OR, e.g. the Explosives Act (art. 27 par. 1 SprstG) and the Hunting Act (art. 15 par. 2 JSG).⁹⁵

- 32 c) The tortious liability of legal entities is assessed based on the requirements applicable to the relevant liability rule. Administrative liability does not automatically lead to tortious liability, nor does it automatically exclude the latter.
- 33 d) As indicated by the co-existence of damage compensation rules and criminal provisions in the relevant statutes, the administrative liability of the legal entity exists alongside its obligation to compensate damage in tort law. Each type of liability pursues a different purpose.

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

- 34 a) *Safety and technical regulations* are widely dispersed in Swiss law in statutes and ordinances.⁹⁶ As was briefly indicated in supra no. 6, these regulations constitute circumstantial evidence for the assessment of fault. *Non-compliance* with these regulations *generally* establishes negligence in civil law. The grounds for this concept are that the agency issuing the regulations has reached this assessment of the situation, and that other parties may expect those regulations to be followed. However, circumstances may render deviation from such rules permissible, and even necessary.⁹⁷ By the same token, *compliance* with such rules does not necessarily mean that negligence in civil law does not exist as certain circumstances may require an additional measure of due care.⁹⁸ According to Widmer, however, the view that increased risk requires a greater duty of due care, whose breach automatically constitutes fault, should not be carried too far, contending that only unnecessary risks are prohibited as such and that the general rule is that everything that is not prohibited is allowed.⁹⁹ *In summary*, it can be stated that the general duty to

⁹⁵ See BK-Brehm (fn. 8) art. 60 OR no. 8 (as far as the statute of time limitations in the Environmental Protection Act is concerned, which is mentioned there too, see infra no. 80 and fn. 194).

⁹⁶ Illustrative concerning product safety rules which are only one part of the safety rules E. Holliger-Hagmann, Produktsicherheit, Zuerst Verantwortung definieren und dann erst kontrollieren, Jusletter (www.jusletter.ch) 9.2.2004, no. 8 ff.; *id.*, Produktsicherheit – denk- und dankbarer Gegenstand einer Gesetzgebung, Jusletter 21.2.2005, no. 1 ff. In the year 1998, there were about 30 statutes and 160 ordinances dealing with product safety aspects (see Holliger-Hagmann, Jusletter 21.2.2005, no. 1 and *id.*, Jusletter, 9.2.2004, no. 8). A federal law about product safety in general or about safety rules in general does not exist so far (see Holliger-Hagmann, Jusletter 21.2.2005, no. 1) but is currently subject of political debate.

⁹⁷ See the references in supra fn. 18.

⁹⁸ See the references in supra fn. 19.

⁹⁹ Widmer (fn. 18) 293 no. 48.

exercise due care in civil law must be observed even if that duty goes further than safety regulations.

In some cases, the violation of generally recognized rules of private professional associations may also constitute fault in terms of art. 41 ff. OR,¹⁰⁰ one example being the SIA-norms. The recommendations of professional associations take on great importance in defining the general standard of due care.¹⁰¹ 35

b) *Environmental protection regulations* (limits, etc.) are also of some importance for tort law. To what extent environmental liability law should be dependent on administrative environmental law is a matter of controversy. The advocates of harmonization invoke the unity of the legal system and legal certainty. Those who favour separation allege structural weaknesses in administrative law, contending that administrative law recognizes only certain risks which are known with sufficient certainty in advance and assesses the consequences using a generalized average standard. Harmonization, they argue, would legalize a residual risk. This consideration supports a fundamental separation of liability requirements in civil law from administrative environmental regulations. Standards of administrative law are relevant, but only as one of multiple criteria.¹⁰² 36

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

In contrast to both safety and technical regulations and environmental protection regulations, tort law, as a law of restitution or reparation, applies only after the defensive and preventive provisions of public law have already failed, and damage has occurred.¹⁰³ Therefore, the function of tort law is primarily compensatory; its preventive function is merely secondary, albeit desirable.¹⁰⁴ The situation is different for environmental and technical regulations, whose primary function is preventive.¹⁰⁵ 37

The object of tort law is to protect the assets of individual persons, while, e.g., environmental protection regulations serve the interests of the general public primarily and private interests only secondarily. This differing focus is espe- 38

¹⁰⁰ BK-Brehm (fn. 8) art. 41 OR no. 186, with further references to court decisions; see also A. Keller, *Haftpflicht im Privatrecht*, vol. I (6th ed. 2002) 124, with reference to BGE 126 III 116 E. 2b; see also BGE 131 III 117 E. 2.1 in fine.

¹⁰¹ BK-Brehm (fn. 8) art. 41 OR no. 186, with further references to court decisions and rules of further private organisations.

¹⁰² See P. Loser, *Kausalitätsprobleme bei der Haftung für Umweltschäden* (1994) 23 ff., with further references; D. Petitpierre, *Zivilrechtliche Haftpflicht für Umweltschädigungen nach schweizerischem Recht, unter Berücksichtigung der Bestimmungen von Art. 138 IPRG und Art. 59a USG* (Entwurf) (1993) 16 f., with further references.

¹⁰³ P. Widmer, *Perspektiven einer Umwelthaftung, Möglichkeiten und Grenzen*, in: M. Haller/H. Hauser/R. Zäch (eds.), *Ergänzungen, Ergebnisse der wissenschaftlichen Tagung anlässlich der Einweihung des Ergänzungsbaus der Hochschule St. Gallen* (1990) 591 ff., 591.

¹⁰⁴ Widmer (fn. 103) 591; *id.* (fn. 30) 2.5 f.

¹⁰⁵ Keller (fn. 100) 353.

cially important in connection with pure environmental damage. Generally, only damage to objects which can be individualized and controlled is to be compensated under tort law.¹⁰⁶ If the object cannot be individualized, there is no injured party.

- 39 Another difference is – as mentioned under supra no. 36 – that administrative environmental regulations only recognize certain risks which are known with sufficient certainty in advance and assess the consequences using a “generalized average standard”. Administrative regulations are often issued by the authorities under pressure of economic interests of high-emission industry.¹⁰⁷ Tort law, on the other hand, considers the case of each individual, not merely those of the general public.
- 40 Another contention is that tort law protects the environment only indirectly as a consequence of protecting the rights of individuals; stated another way, the environment comes within the perspective of tort law only reflexively, via the protection of individual rights.¹⁰⁸ This contention must be regarded sceptically, at the very least since tort law does afford primary protection for the environment insofar as it is owned by individual persons. Moreover, there are some rules relating to the imposition of costs even in cases where damage to private interests is not involved. Mention should be made of the right of recourse of the municipalities against polluters for the costs of remedying damage to the environment (see, e.g., art. 59 USG¹⁰⁹).¹¹⁰

3. Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

- 41 a) and b) The term “protective rule” is used in Swiss legal doctrine in connection with wrongfulness as a requirement for liability in the sense of wrongfulness of the conduct (Verhaltensunrecht) as explained in supra no. 5. Protective rules are all rules of conduct which protect the interests of the injured party against damage of the kind which actually occurred. They are to be distinguished from administrative regulations, which function merely as a factor in measuring fault (see supra no. 6).

¹⁰⁶ Schmid/Fankhauser (fn. 44) no. 20.26.

¹⁰⁷ See Loser (fn. 102) 24, with reference to A. Meier-Hayoz, Technische Entwicklung und Fortbildung des privatrechtlichen Immissionsschutzes, in: Die Rechtsordnung im technischen Zeitalter, Festschrift der Rechts- und Staatswissenschaftlichen Fakultät der Universität Zürich zum Zentenarium des Schweizerischen Juristenvereins 1861–1961 (1961) 35 ff., 56.

¹⁰⁸ E.A. Kramer, Das Schweizerische Umwelthaftungsrecht – De lege lata, in: Haller/Hauser/Zäch (eds.) (fn. 103) 565 ff., 565 f.

¹⁰⁹ Art. 59 USG: “The costs of measures taken by the authorities to avert an impact which poses an imminent threat or to ascertain and remedy such impacts, shall be imposed on the polluter.”

¹¹⁰ See particularly A.-S. Dupont, Le dommage écologique, Le rôle de la responsabilité civile en cas d’atteinte au milieu naturel (2005) 7 ff.

There is a dispute in the legal literature as to whether general administrative rules relating to environmental damage constitute protective rules such that violation of those rules would constitute wrongfulness in terms of tort law and would thus obligate the violator, e.g., to compensate pure economic loss, or whether such regulations are only relevant for determining fault.¹¹¹ 42

Those who *oppose* the view that any violation of administrative regulations relating to environmental damage constitutes wrongfulness argue, e.g., that rules which protect the interests of the general public, such as provisions of water and environmental protection law, only qualify as protective rules whose violation constitutes wrongfulness if they also serve to protect individual persons, in particular the person of the injured party. However, provisions of water and environmental protection law serve primarily to protect the public interest in natural conservation and are not meant to protect individual persons from pure economic loss (e.g. loss of profit).¹¹² 43

Those who regard administrative regulations relating to environmental damage as protective rules refer to the Water Protection Act. Art. 3 GSchG prohibits all water pollution.¹¹³ Many authors use this provision as a basis for the argument that all water pollution is wrongful.¹¹⁴ Although it is not explicitly conceded, wrongfulness within the framework of liability for risk can only exist in the form of wrongfulness of the result (Erfolgsunrecht). Since the liability rule in art. 59a USG has replaced the liability rule in art. 69 GSchG, the interpretation with respect to water pollution and other actions affecting water should continue to apply in order to avoid gaps in liability.¹¹⁵ The Environmental Protection Act, on the other hand, contains no general prohibition of such actions. Consequently, wrongfulness is contingent upon violation of a specific rule of the Environmental Protection Act or an implementing regulation (Ausführungsverordnung). Gaps in liability or extraneous liability would arise if liability based on the Environmental Protection Act should be denied.¹¹⁶ 44

An *intermediate view* contends that administrative regulations relating to environmental damage are meant primarily to protect persons and objects; pure economic losses are to be compensated, but only to the extent that they arise as a direct result of an impact on persons and objects, or of a danger posed to persons and objects.¹¹⁷ 45

Finally, it should be noted that, even if the restrictive view is applied, it must be assumed that the courts will generally find other protective rules which establish wrongfulness, e.g., art. 679 ZGB in conjunction with art. 684 ZGB in 46

¹¹¹ See Honsell (fn. 44) § 22 no. 38; Jäggi, SJZ 1996, 251 f., with further references.

¹¹² Schmid/Fankhauser (fn. 44) no. 20.49, with further references to the doctrine.

¹¹³ Art. 3 GSchG: "Everyone is obligated to exercise utmost care under the circumstances in order to avoid detrimental effects on the water."

¹¹⁴ For detailed references see Jäggi, SJZ 1996, 251 fn. 19 and 20.

¹¹⁵ Jäggi, SJZ 1996, 251.

¹¹⁶ See Jäggi, SJZ 1996, 251.

¹¹⁷ In this sense Jäggi, SJZ 1996, 251 f., with reference.

case of excessive immissions, art. 28 ZGB in case of immissions which do not fall within the scope of art. 684 ZGB, or provisions of the Penal Code, such as art. 224 StGB (exposure to explosives and poisonous gases with criminal intent), art. 233 StGB (spreading vermin (Verbreiten von Schädlingen)) and art. 234 StGB (pollution of drinking water).¹¹⁸

- 47 c) Insofar as the rules mentioned above qualify as protective rules, their violation constitutes wrongfulness under Swiss law, in the form of wrongfulness of the conduct (Verhaltensunrecht), even in cases where an absolute right is not infringed, and the damage consists of pure economic loss.
- 48 d) Liability for risk is not automatically triggered by violation of safety regulations or environmental provisions, but must instead be stipulated by law.
- 49 Even in the case of liability for risk, which is often stipulated within the sphere of environmental law, liability depends on wrongfulness according to the general view in Swiss legal doctrine.¹¹⁹ However, there are some who disagree with this view.¹²⁰ Their criticism of the general view is correct when they argue that liability for risk is by definition dependent on wrongfulness of the result (Erfolgsunrecht), and not on wrongfulness of the conduct (Verhaltensunrecht) since actions by natural persons are not required for risk liability.¹²¹ However, some of the critics go even further when they attempt to separate liability for risk from the criterion of wrongfulness altogether. They contend, e.g., that adequate limitation of the damage eligible for compensation can be achieved based on the protective purpose and on the scope of the risk liability norm (“aim of the norm theory” (Normzwecktheorie)).¹²²

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 50 In cases of liability for risk, the position of the injured party is reinforced by the fact that many statutes also provide for *compulsory liability insurance*. This is the case, e.g., in art. 11 KHG, art. 35 RLG, art. 16 JSJ, art. 70 f. LFG, art. 31 BSG and art. 63 SVG. Some of them, e.g. art. 65 par. 1 SVG, also give injured parties the right to sue the insurance company directly.¹²³ The Environmental Protection Act itself does not stipulate a general obligation to obtain insurance in art. 59b USG. It is merely stated that the Bundesrat (Federal Council of Switzerland), for the protection of injured parties, may require the owners of

¹¹⁸ Jäggi, SJZ 1996, 252.

¹¹⁹ Rey (fn. 3) no. 1246, with further references.

¹²⁰ Critical about the requirement of wrongfulness for the liability for risk stipulated in art. 59a USG, e.g., USG-Trüeb (fn. 10) art. 59a no. 33 ff., with reference.

¹²¹ K. Otfinger/E.W. Stark, Schweizerisches Haftpflichtrecht, vol. II/2 (4th ed. 1989) § 24 no. 30; USG-Trüeb (fn. 10) art. 59a no. 28.

¹²² USG-Trüeb (fn. 10) art. 59a no. 34, with further references.

¹²³ See the overview in I. Schwenger, Schweizerisches Obligationenrecht, Allgemeiner Teil (4th ed. 2006) no. 54.01.

certain businesses or facilities and persons subject to approval and reporting obligations due to their handling with pathogenic organisms to secure their liability through insurance or in another form.

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

Within the framework of fault-based liability, *non-compliance* with technical and safety rules and environmental regulations is a strong indication of the presence of fault. This issue was discussed in detail in *supra* no. 6, 15 ff. and 34 ff. Depending on the circumstances of the individual case, however, deviation from administrative regulations may be not only permitted, but required.¹²⁴

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2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

According to the predominant view in Swiss legal doctrine and in court decisions, wrongfulness exists (as briefly described in *supra* no. 4 f.) if the damaging action violates legal requirements or prohibitions, written or unwritten, and thus breaches a legal duty. Wrongfulness consists in an objective violation of the law (*objective theory of wrongfulness*).¹²⁵ Wrongfulness as the violation of a law appears in two forms: the violation of an absolute right (life, limb, privacy, property, possession) (*wrongfulness of the result*), and the violation of a specific protective rule, i.e. a specific rule of conduct meant to protect the interests of the injured party (*wrongfulness of conduct*).¹²⁶ Violation of an absolute right results *ipso iure* in wrongful violation of the injured party's protected sphere, unless justification exists for the violation.¹²⁷ In cases where wrongfulness is contingent upon human conduct (in the case of "wrongfulness of conduct"), it is rather difficult to separate wrongfulness (at times referred to as the objective aspect of fault) from fault (which can be defined as the subjective aspect of wrongfulness).¹²⁸ Wrongfulness, in the sense of wrongfulness of the conduct, is difficult to distinguish from the "objective aspect" of fault. However, wrongfulness and fault must be considered as two separate requirements for fault-based liability so that one and the same question (i.e. that of breach of the objective duty to exercise due care (objective *Sorgfaltspflichtverletzung*)) is examined from two perspectives. Only when wrongfulness is based on wrongfulness of the result, does fault retain its autonomous function.¹²⁹

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¹²⁴ See the references in *supra* fn. 18.

¹²⁵ See, e.g., *Rey* (fn. 3) no. 670 f., with further references; *Widmer* (fn. 7) 119 f.

¹²⁶ *Rey* (fn. 3) no. 672; *Widmer* (fn. 7) 119 ff.

¹²⁷ *Widmer* (fn. 7) 117.

¹²⁸ *Oftinger/Stark* (fn. 15) § 4 no. 50; *Widmer* (fn. 7) 122, each with further references.

¹²⁹ In detail *Widmer* (fn. 18) 286 no. 19.

3. *If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?*

- 53 According to the predominant view in Swiss legal doctrine and in court decisions, the protective purpose of the rule is used to assess wrongfulness (and not the legally relevant causal link).¹³⁰ As has been repeatedly mentioned above, wrongfulness exists if an absolute right is infringed (wrongfulness of the result) or, if such an infringement is not present, if a rule of conduct is violated (wrongfulness of the conduct). However, rules of conduct are only relevant insofar as the violation affects a person or groups of persons protected by the rule and the purpose of the rule is to prevent damage of the kind which actually occurred.¹³¹ The protective purpose of the rule serves to limit liability.

4. *To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?*

- 54 The issue of *lawful alternative conduct* is a matter of controversy in Switzerland with respect to both, acts and omissions.
- 55 In connection with *acts*, one possible solution is seen in the doctrine of the protective purpose of the violated rule: damage which would have been caused in the same manner by lawful conduct is not covered by the protective purpose of the rule since the rule is unsuitable and is not intended to prevent damage of the kind which actually occurred. In other words, violation of the rule is not relevant for the result. On the other hand, there are those who oppose this argument based on preventive considerations.¹³²
- 56 With respect to *omissions*, the argument of “unlawful alternative conduct” is the same as the argument that the omission is not a necessary condition for the damage, i.e. a natural causal link with the damage is lacking. In the context of omissions, the argument of “lawful alternative conduct” is accepted particularly in court decisions.¹³³

5. *What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?*

- 57 In accordance with art. 8 ZGB, unless otherwise stipulated by law, the existence of an alleged circumstance must be demonstrated by whoever seeks to derive

¹³⁰ In detail *Roberto* (fn. 74) 87 f., with further references.

¹³¹ See *BK-Brehm* (fn. 8) art. 41 OR no. 38b; *Rey* (fn. 3) no. 698 ff., each with further references; *Widmer* (fn. 7) 123.

¹³² See *Rey* (fn. 3) no. 648 ff., with further references; see also *Widmer* (fn. 30) no. 2.63 (58 f.), who notes that the vicarious liability of the principal (art. 55 OR) and the liability of the “holder” of an animal (art. 56 OR) provide by law the issue of “lawful alternative conduct” as a cause of exoneration.

¹³³ See *Rey* (fn. 3) no. 647, amongst others with reference to BGE 122 III 232 ff. E. 5a/aa; 117 Ib 207 ff. E. 5c; 115 II 446.

rights from that circumstance. Therefore, the burden of proof for demonstrating the requirements for liability is generally borne by the injured party.

Some of the specific statutes contain rules which alleviate the burden of proof. However, their scope of application is limited to the cases of liability for risk and simple or mild objective (strict) liability stipulated in those statutes, and does not include cases of fault-based liability, which is the topic of the present discussion.¹³⁴ The violation of a rule of administrative law does not reverse the burden of proof unless such a reversal is stipulated by law.¹³⁵ As far as can be seen, this applies under Swiss law also for the demonstration of causation in cases involving the violation of a protective rule. Unlike German law, Swiss law does not contain any detailed dogmatic recommendations for a reversal of the burden of proof for demonstration of the causal link between the violation of the rule and the very damage which the protective statute was meant to prevent.¹³⁶

Alleviations of the burden of proof are found in court decisions for the demonstration of *natural causation*. The burden of proof is not reversed in this case, but it is weakened in that predominant probability (*überwiegende Wahrscheinlichkeit*) (*prima facie evidence*)¹³⁷ and circumstantial evidence (*Indizienbeweis*),¹³⁸ which allow conclusions about the facts to be demonstrated, are deemed sufficient. The legal doctrine agrees with these court decisions.¹³⁹

In some cases, however, the practice of the courts has an impact on the burden of proof. In the sphere of medical liability, e.g., there is a certain tendency to reverse the burden of proof at times by means of the presumption of causa-

¹³⁴ One example is art. 33 GTG. While art. 33 par. 1 GTG provides that, within the scope of application of the Genetic Engineering Act, the causal link must be demonstrated by the person seeking damages, in accordance with the general rules of evidence, art. 33 par. 2 GTG states that, whenever this evidence cannot be furnished with certainty or the person bearing the burden of proof cannot be expected to furnish the evidence, the court may accept *prima facie evidence* (*überwiegende Wahrscheinlichkeit*) instead. Also: art. 38 EleG (amount of damages determined based on the court's free evaluation of the evidence, without being bound by the evidentiary principles of the applicable procedural code).

¹³⁵ Unlike, e.g., the German Environmental Liability Act, the Swiss Environmental Protection Act does not contain the presumption of causation. Thus, the injured party bears the burden of proof for the causal link between a specific facility and the damage, which may be highly problematic, especially in case of damage with multiple causes (*multikausale Schäden*) (see *Schwenger* (fn. 123) no. 54.18; *Honsell* (fn. 44) § 22 no. 43 f.).

¹³⁶ See *Loser* (fn. 102) 190 f., with further references.

¹³⁷ See, e.g., BGE 121 III 363 E. 5, with references to earlier decisions of the Swiss Federal Court: *prima facie evidence* suffices for demonstration of a causal link between failure to secure the ski runway and the damage which occurred.

¹³⁸ Vgl. BGE 109 II 312 E. 5 (apricot case): fluorine immissions from an aluminium factory are "excessive impacts" in terms of art. 684 ZGB if they, in conjunction with other factors, cause damage to apricot trees.

¹³⁹ *Oftinger/Stark* (fn. 15) § 3 no. 34 ff.; *BK-Brehm* (fn. 8) art. 41 OR no. 117 and 119; *P. Widmer/P. Wessner*, Revision und Vereinheitlichung des Haftpflichtrechts, Erläuternder Bericht 243 (no. 2.9.4.3) (www.bj.admin.ch, Themen/Wirtschaft/Gesetzgebung/Haftpflicht), each with further references to court decisions and doctrine; also in detail *Schmid/Fankhauser* (fn. 44) no. 20.85 ff.; *Loser* (fn. 102) 159 ff., each with further references.

tion.¹⁴⁰ However, there is a general reluctance in Swiss legal doctrine to accept a reversal of the burden of proof.¹⁴¹

- 61 If an administrative regulation which was enacted with the object of preventing damage of the kind which actually occurred is violated, a natural causal link between the wrongful act and the damage can generally be affirmed with adequate certainty, provided the course of the event was typical.

6. Can a breach of an administrative law rule result in a claim for punitive damages?

- 62 In the view of Swiss legal doctrine, punitive elements such as punitive damages are inconsistent with the general principles of computing damage and compensation and are generally deemed a violation of the *ordre public*.¹⁴² Punitive damages require an express legal basis in each case,¹⁴³ regardless of whether a rule in civil or administrative law is violated. In the sphere of civil law, e.g., art. 336a OR, which requires the party which abusively terminates an employment relationship to pay an indemnity to the other party, and art. 337c par. 3 OR, under which the court may require the principal to compensate the employee in the event of unjustified dismissal, are considered to have a punitive function in addition to their function of providing reparation.¹⁴⁴

B. Acting in Compliance with Administrative Law Rules

1. Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?

- 63 As stated in *supra* no. 6, 15 ff. and 34 ff., *compliance* with administrative regulations does not necessarily rule out a failure to exercise due care of a nature sufficient to establish liability.¹⁴⁵ The circumstances of the individual case *may* require an additional measure of due care if a breach of the duty to exercise

¹⁴⁰ *Rey* (fn. 3) no. 656 f.; *Honsell* (fn. 44) § 1 no. 94; see also, e.g., BGE 120 II 250 f.

¹⁴¹ See, e.g., the opinion of *Honsell* (fn. 44) § 1 no. 94, in comparison to Germany.

¹⁴² BGE 122 III 467.

¹⁴³ *M. Sidler*, Die Genugtuung und ihre Bemessung, in: Münch/Geiser (eds.) (fn. 30) no. 10.31 fn. 20, with reference to BGE 122 III 467.

¹⁴⁴ *Sidler* (fn. 143) no. 10.31; *W. Portmann*, in: *Honsell/Vogt/Wiegand* (eds.) (fn. 47) (BSK OR I-Portmann) art. 336a no. 1 and art. 337c no. 7; see also BGE 123 III 391 ff., particularly 394 E. 3c.

¹⁴⁵ See the references in *supra* fn. 19. Also explicitly in this restrictive sense *Widmer* (fn. 103) 598; see also *Loser* (fn. 102) 25. Formerly with dissenting opinion *A. Petitpierre-Sauvain*, Le principe pollueur-payeur en relation avec la responsabilité du pollueur, *Zeitschrift für Schweizerisches Recht* (ZSR) 1989 II, 429 ff., 505 f., who, initially, argued for a full exoneration of liability; later more distinguished *id.*, L'incidence des autorisations administratives sur la responsabilité, *Umweltrecht in der Praxis* (URP) 1992, 427 ff., 429 ff., especially 435 (conclusions).

due care would otherwise exist based on the general rules. In the view of some authors, a party which causes damage despite compliance with administrative regulations can only escape fault if, based on the circumstances of the individual case, there was no apparent reason to believe that the security afforded by the administrative regulations was inadequate.¹⁴⁶ In another remark, it is stated that meeting legal requirements does not give anyone a pass to escape liability.¹⁴⁷ However, Widmer stresses that the concept that higher risk automatically requires additional due care should not be carried too far: only unnecessary risks are prohibited as such; otherwise, the governing principle is that everything not expressly prohibited is allowed.¹⁴⁸

As far as the regulatory *permit* defence is concerned,¹⁴⁹ in the context of fault-based liability, the presence of fault is not automatically excluded by the existence of an official approval (or permit) as the specific circumstances of the individual case may require an additional measure of due care.¹⁵⁰

2. Can the general duty of care go beyond these rules?

The statements in *supra* no. 63 demonstrate that the duty to exercise due care may go beyond the rules of administrative law in any individual case. 64

3. Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?

Reference can be made at this point to the statements in Swiss court decisions regarding allocation and alleviation of the burden of proof in *supra* no. 57 ff. The burden of proof is not reversed by compliance with administrative regulation: the injured party must demonstrate wrongfulness and fault. The question in this case, however, is whether the occurrence of damage despite compliance with an administrative regulation whose purpose is to prevent this very damage constitutes *prima facie* evidence that another cause is responsible for the damage. In light of the fact that administrative regulations very often represent minimum requirements, I deem it less clear that this circumstance would constitute *prima facie* evidence that another cause was responsible for the damage than would be the case if the situation were reversed, i.e. if an administrative rule was violated. 65

¹⁴⁶ *Loser* (fn. 102) 25, with further references, amongst others to *I. Schwenzer*, Grundzüge des Umwelthaftungsrechts in der Schweiz, Produkthaftpflicht International (PHI) 1991, 113 ff., 114.

¹⁴⁷ *USG-Trüeb* (fn. 10) art. 59a no. 103.

¹⁴⁸ *Widmer* (fn. 18) 293 no. 48, with further references.

¹⁴⁹ This question will be addressed again in *infra* no. 78 f.

¹⁵⁰ See *Rey* (fn. 3) no. 875 f., with further references to the Swiss court decisions and doctrine.

IV. Compensation from Other Sources

1. Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?

- 66 In the sphere of *administrative law*, e.g., art. 59 USG states that the costs of measures taken by the authorities to avert an impact which constitutes an imminent danger or to ascertain and remedy such impacts, shall be imposed on the polluter.¹⁵¹ Art. 59 USG holds polluters and contaminators (Verursacher) “liable”, e.g., to reimburse the state for *clean-up costs*.¹⁵² Similar provisions can be found in art. 54 GSchG, art. 20 par. 4 GTG and art. 4 KHG. Legal practice has developed the imposition of costs into instruments of environmental law which bear the marks of *administrative liability rules*, even though the wording itself is restrictive, hardly going beyond the principles of general administrative law (allgemeines Polizeirecht).¹⁵³ Legal practice has released the imposition of costs from the bounds of an execution by substitution by the administration (so-called *verwaltungsrechtliche Ersatzvornahme*).¹⁵⁴ In the system of the statutes, this is reflected only in art. 4 KHG, which is classified under the heading “Liability”. The other rules mentioned above are listed under the heading “Execution”, or in the case of the Environmental Protection Act under “Procedures”. Swiss legal doctrine has always contained references to a *dualistic concept of environmental liability law*, founded in both civil and administrative law.¹⁵⁵
- 67 Elsewhere in civil law, reference should be made to the *liability of the land-owner* (Grundeigentümerhaftung) in terms of art. 679 ZGB in conjunction with art. 684 ZGB. This liability may be asserted in a concurring cause of action with the liability for risk regulated by special statute, on the one hand, and the liability of the owner of a building or other construction (Werkeigentümerhaftung) in accordance with art. 58 OR¹⁵⁶ and the vicarious liability of the

¹⁵¹ In detail Schmid/Fankhauser (fn. 44) no. 20.96 ff.

¹⁵² In detail about costs to be reimbursed USG-Trüeb (fn. 10) art. 59 no. 38 ff.

¹⁵³ In this sense USG-Trüeb (fn. 10) art. 59 no. 3, who is explicitly referring to art. 59 USG and art. 54 GSchG, with further references to court decisions; see also Keller (fn. 100) 357, with regard to art. 59 USG.

¹⁵⁴ USG-Trüeb (fn. 10) art. 59 no. 3.

¹⁵⁵ USG-Trüeb (fn. 10) art. 59 no. 3, with reference to S. Fuhrer, Die Haftung für Umweltschäden und deren Versicherung, Basler Juristische Mitteilungen (BJM) 1992, 225 ff., 227 f.

¹⁵⁶ According to art. 58 OR, the owner of a building or other construction shall be liable for the damage which it causes due to its faulty design or construction, or due to inadequate maintenance (so-called *Werkmangel* (defect in the building or construction)). In this context it is, again, irrelevant, whether the damage occurred due to an impairment by environmental pollution (Schmid/Fankhauser (fn. 44) no. 20.77).

principal in accordance with art. 55 OR¹⁵⁷ (both of which constitute simple or mild¹⁵⁸ objective (strict) liability), on the other hand.¹⁵⁹ Before art. 59a USG took effect, art. 679 ZGB took on central importance as a basis for claims for the compensation of damage to individuals as a result of environmental damage. The advantage of art. 679 ZGB over art. 59a USG is that it also allows compensation claims for damage caused directly and not through environmental damage.¹⁶⁰ Art 679 ZGB requires a violation of property rights. The scope of application of art. 679 ZGB is limited to relations between neighbours, although consistent court decisions, as well as unanimous legal doctrine, support the view that even more distant properties qualify as “neighbouring” in terms of art. 679 ZGB.¹⁶¹ Passers-by and persons staying on the affected neighbouring property only temporarily have no right to sue under this statute.¹⁶² In addition to actions for damage compensation, which are considered to be of only subsidiary character, the owner or possessor of the affected neighbouring property may file an action for removal (Beseitigung), injunctive relief (Unterlassung), preventive relief or declaratory judgment.¹⁶³

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?

The first case which comes to mind in Swiss law is *compensation in expropriation law*, which must be paid as a result of formal or substantive expropriation. “Expropriation” is defined as the limitation or deprivation of property rights by sovereign act of the state, for which the owner must be compensated based

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¹⁵⁷ According to art. 55 OR, the principal shall be liable for any kind of damage caused by his employees or other auxiliary persons in the course of their employment or business, regardless of whether the principal or auxiliary person is personally at fault. The principal can only escape responsibility by demonstrating that utmost care was exercised under the circumstances in selecting, instructing and supervising his or her auxiliary persons and, in accordance with court decisions, in efficiently organizing his or her business. Especially due to the latter requirement for demonstrating due care, exculpatory evidence is becoming more and more difficult to furnish (see *Rey* (fn. 3) no. 941). Before the liability rules of the Product Liability Act took effect on 1 January 1994, the Swiss Federal Court had developed art. 55 OR into a kind of a general standard for defective products (*id.* (fn. 3) no. 951 ff., with further references to court decisions).

¹⁵⁸ In the case of simple or mild objective (strict) liability, a qualifying criterion is required, as opposed to liability for risk, although the presence of fault is not required, other than in fault-based liability.

¹⁵⁹ See *Oftinger/Stark* (fn. 15) § 13 no. 20.

¹⁶⁰ See also, e.g., *Schmid/Fankhauser* (fn. 44) no. 20.72.

¹⁶¹ *Schmid/Fankhauser* (fn. 44) no. 20.74, with further references to court decisions and doctrine.

¹⁶² *Schmid/Fankhauser* (fn. 44) no. 20.73.

¹⁶³ *H. Rey*, in: H. Honsell/N.P. Vogt/Th. Geiser (eds.), *Basler Kommentar zum Schweizerischen Privatrecht, Zivilgesetzbuch II*, Art. 457–977 ZGB, Art. 1–61 SchlT ZGB (BSK ZGB II-Rey) (2nd ed. 2003) art. 679 no. 4 ff.

on the value guarantee contained in the guarantee of private property in art. 26 par. 2 BV.¹⁶⁴

- 69 In the case of *formal expropriation*, a right protected by the guarantee of private property is *withdrawn*, in whole or in part, by sovereign act of the state. Objects for expropriation include real property, movable objects, limited rights in rem, rights in personam, duly acquired rights (so-called *wohlerworbene Rechte*) of public law and neighbour's rights.¹⁶⁵ For the institutional, the individual (*Bestandesgarantie*) and the value guarantees inherent in the guarantee of private property to be fulfilled, all of the following *four requirements* must be met: 1. there must be an *adequate legal basis* (a general rule duly enacted in the legislative process);¹⁶⁶ 2. the expropriation must be in the *public interest*; 3. the expropriation must be *necessary* and suitable for the intended purpose; an overriding public interest must be present so that the requirement of *proportionality* is met;¹⁶⁷ 4. the loss of the property right must be *compensated*.¹⁶⁸ The compensation is to be paid by the expropriator, which is – on the federal level – generally the confederation, although the latter may transfer the right of expropriation to third parties.¹⁶⁹
- 70 *Substantive expropriation* differs from formal expropriation in that only the legal or actual power of disposal is withdrawn or limited, but the private property right itself does not change hands.¹⁷⁰ The Swiss Federal Court distinguishes between two variations:¹⁷¹ 1. the basic case, deprivation of an essential power derived from ownership; 2. forcing the owner to make an unreasonable sacrifice, but one which does not reach the intensity required by the basic case (so-called *Sonderopfer* (individual sacrifice)).¹⁷² These cases must be distinguished from *public limitations of ownership which must be tolerated without compensation*. The requirements for compensation are as follows: 1. limitation of an existing use of an object, or a use which will probably become possible in the near future, and 2. the necessary intensity.¹⁷³ The compensation is to be paid by the community which causes the grounds for the presence of substantive expropriation.
- 71 In connection with *fund solutions*, mention should be made of the nuclear damage fund in accordance with art. 15 KHG, which consists of the contribu-

¹⁶⁴ W. Wiegand, in: Honsell/Vogt/Geiser (eds.) (fn. 163) (BSK ZGB II-Wiegand) art. 641 no. 103.

¹⁶⁵ BSK ZGB II-Wiegand (fn. 164) art. 641 no. 107.

¹⁶⁶ BSK ZGB II-Wiegand (fn. 164) art. 641 no. 108; see, e.g., art. 58 par. 1 USG, according to which the confederation and the cantons have the power to expropriate the respective rights as far as necessary for the execution (Vollzug) of the USG.

¹⁶⁷ See art. 36 BV and BSK ZGB II-Wiegand (fn. 164) art. 641 no. 108.

¹⁶⁸ BSK ZGB II-Wiegand (fn. 164) art. 641 no. 109.

¹⁶⁹ Art. 2 Expropriation Act (Enteignungsgesetz, EntG, SR 711).

¹⁷⁰ BSK ZGB II-Wiegand (fn. 164) art. 641 no. 103 and no. 111.

¹⁷¹ BGE 119 Ib 127 ff. E. 2.

¹⁷² BSK ZGB II-Wiegand (fn. 164) art. 641 no. 112 and with regard to the "individual sacrifice" (*Sonderopfer*) also no. 115, with further references.

¹⁷³ BSK ZGB II-Wiegand (fn. 164) art. 641 no. 112 ff.

tions paid to the federal government by the owners of nuclear power plants and the holders of transport permits to cover the federal government's insurance obligation (art. 14 KHG). The federal government uses the fund to cover damage which exceeds the coverage by the plant owners' private insurers or which is excluded from private coverage as well as belated claims. The insurance by the federal government is limited to CHF 1 billion per nuclear power plant or per transport and additionally CHF 100 million for interest and litigation costs (art. 12 and 13 KHG).

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

a) Under *current* law, four provisions would come to the fore as a possible basis for the *liability of the chemical plant owner*: 1. the liability for risk established in art. 59a USG; 2. the simple or mild objective (strict) liability of the landowner for excessive immissions according to art. 679 ZGB in conjunction with art. 684 ZGB; 3. the liability of the owner of a building or other construction according to art. 58 OR (also simple or mild objective (strict) liability) and 4. fault-based liability according to art. 41 ff. OR. If multiple grounds for liability exist in the person of the party liable for compensation, the injured party may, in principle, choose one or the other: the relationship between these provisions is one of alternatives. According to the predominant view, however, liability in accordance with the Code of Obligations and the Civil Code, on the one hand, and liability for risk established by special statute, on the other hand, are not interchangeable: the latter, as *lex specialis*, applies exclusively of the liability established in the Code of Obligations and the Civil Code.¹⁷⁴

With respect to *liability for risk in accordance with art. 59a USG*, it should first be noted that this provision did not take effect until 1 July 1997. Based on the brief description of the case, it is not clear if loss of profit prior to 1 July 1997 is involved. In the absence of a transitional regulation (*Übergangsbestimmung*) in the Environmental Protection Act itself, it must be assumed that the previous law applies for circumstances arising prior to the effective date

¹⁷⁴ M. Keller/S. Gabi-Bolliger, *Haftpflichtrecht*, vol. II (2nd ed. 1988) 159; Rey (fn. 3) no. 45 and no. 1247, with further references; dissenting opinion: e.g., Honsell (fn. 44) § 20 no. 24, who is arguing that the provisions in the Code of Obligations and in the Civil Code on the one hand and the liability for risk provisions on the other hand should be treated as alternatives.

of that Act.¹⁷⁵ Accordingly, compensation for damage occurring prior to 1 July 1997 cannot be sought under art. 59a USG, but only based on the law in effect at that time, i.e. it can be based primarily on art. 679 ZGB in conjunction with art. 684 ZGB (see *infra* no. 75).¹⁷⁶ With respect to damage arising after 1 July 1997, the requirements for liability in art. 59a USG should be described in greater detail:

- 74 Based on the liability for risk in accordance with art. 59a USG, the owner¹⁷⁷ of a business or facility is liable for personal injury, property damage and pecuniary loss *as a result* of environmental damage.¹⁷⁸ In addition to the general requirements for liability, the presence of damage, wrongfulness and causation, the business or facility involved must have the potential to pose a “particular hazard to the environment”. This “particular hazard”, which represents both the basis and limitation of liability, must be such that, even if utmost care is exercised, a residual risk remains since the tendency to cause damage is inevitably inherent to the activity or business.¹⁷⁹ Art. 59a par. 2 USG contains a non-conclusive list of businesses for which the (rebuttable) presumption exists that such businesses pose a particular hazard to the environment. If the business is not listed under art. 59a par. 2 USG, the injured party must demonstrate the circumstances indicative of a particular hazard.¹⁸⁰
- 75 The basis for a claim against the operator for a damage that occurred prior to 1 July 1997 (before art. 59a USG entered into force) was primarily art. 679 ZGB in conjunction with art. 684 ZGB. The *liability of the landowner* in accordance with art. 679 ZGB, requires a transgression of the rights of landowners (*Überschreitung des Grundeigentumsrechts*) in addition to the general requirements (presence of damage, wrongfulness and causation). In *casu*, the presence of “excessive immissions” in terms of art. 684 ZGB is at issue. The criterion of *excessiveness* is assessed by the court. Protective provisions concerning immissions in civil and public law are essentially independent of one another, although there are points of intersection and overlaps between those laws. In certain cases, consideration must also be given to immission provisions of public law, e.g., to measure the degree of impacts which are justified and to be tolerated based on location, condition and local custom.¹⁸¹ Immissions which cause damage (as in the present case) generally qualify as

¹⁷⁵ See *Tschannen/Zimmerli* (fn. 1) § 24 no. 24 ff.: As far as the circumstances of the case were entirely realised under the former law, retroactivity of the new law (so-called *echte Rückwirkung* (real retroactivity)) is not allowed if such a retroactivity is not stipulated in the transitional regulations of the new Act.

¹⁷⁶ As far as the question of limitation of actions is concerned, see *infra* no. 80.

¹⁷⁷ The party in whose interest, on whose account and for whose risk the business is managed or the facility operated at the time of the impact (see *USG-Trüeb* (fn. 10) art. 59a no. 51 ff.).

¹⁷⁸ Consequently, art. 59a USG does not cover pure environmental damage.

¹⁷⁹ *USG-Trüeb* (fn. 10) art. 59a no. 60 f.

¹⁸⁰ *USG-Trüeb* (fn. 10) art. 59a no. 72 f.

¹⁸¹ In detail about the interdependencies between the immissions protection provisions in civil and public law, BGE 126 III 223 ff., particularly 225 ff. E. 3.

“excessive” in terms of art. 684 ZGB and are therefore wrongful.¹⁸² Only in exceptional cases may circumstances exist which justify the causation of damage (e.g. in the case of a landowner performing construction).¹⁸³ Those with the *right to sue* (Aktivlegitimation) according to art. 679 ZGB in conjunction with art. 684 ZGB are owners or possessors of neighbouring properties in the sense of art. 684 par. 1 ZGB. However, based on consistent court decisions and unanimous legal doctrine, “neighbouring properties” include not only properties immediately adjacent to the property in question, but also more distant properties which are affected by the excessive immissions.¹⁸⁴ Based on the text of the statute, only the property owner can *be sued* (Passivlegitimation). In accordance with court decisions and doctrine, however, this liability also extends to holders of a limited property right whose independent actions are responsible for the immissions.¹⁸⁵ The Swiss Federal Court has also ruled that lessees (Mieter) and tenants (Pächter) can be sued under this statute, although this is a matter of controversy in the legal literature.¹⁸⁶

The liability of the owner of a building or other construction in accordance with art. 58 OR requires a defect in the building or construction (Werkmangel: faulty design or construction or inadequate maintenance), in addition to the general requirements for compensation (presence of damage, causation and wrongfulness). Defectiveness is assessed based on 1. the intended purpose of the building or construction, 2. an objective standard, and 3. the reasonability of measures to avert damage (cost-benefit ratio). The owner of a building or other construction cannot escape responsibility by demonstrating due care.¹⁸⁷

In accordance with consistent legal doctrine and court decisions, the owner of a building or other construction cannot escape liability merely by arguing that the facility had been inspected and approved by the authorities.¹⁸⁸ In the view of the Swiss Federal Court, the fact that a facility was inspected and approved by the authorities may indicate, at least to a certain extent but not in all cases, that the facility is not defective in accordance with civil law.¹⁸⁹ Above all, however, it is clear that if the situation were reversed, i.e. in case of non-compliance with regulatory requirements serving to prevent damage, a defect in the building or construction in the sense of civil law may be assumed.¹⁹⁰ The fact that immissions could have been significantly reduced at a reasonable cost in the present case indicates that the measures to prevent the damage were

¹⁸² See *Rey* (fn. 3) no. 1105 f.; BSK ZGB II-*Rey* (fn. 163) art. 684 no. 11, with reference.

¹⁸³ *Rey* (fn. 3) no. 759, with reference to BGE 91 II 107 E. 3 (landowner performing construction).

¹⁸⁴ *Schmid/Fankhauser* (fn. 44) no. 20.74, with further references; BGE 120 II 17 E. 2a.

¹⁸⁵ *Rey* (fn. 3) no. 1117.

¹⁸⁶ *Rey* (fn. 3) no. 1118, with reference to BGE 104 II 19 f. E. 2a; 101 II 249 E. 2.

¹⁸⁷ *Rey* (fn. 3) no. 1058 ff.

¹⁸⁸ BGE 91 II 208 E. 3d, with further references; BK-*Brehm* (fn. 8) art. 58 OR no. 58; *Rey* (fn. 3) no. 1062.

¹⁸⁹ BGE 91 II 208 E. 3d; BK-*Brehm* (fn. 8) art. 58 OR no. 58; *Rey* (fn. 3) no. 1062.

¹⁹⁰ BGE 91 II 208 E. 3d; *Rey* (fn. 3) no. 1062; BK-*Brehm* (fn. 8) art. 58 OR no. 58a.

reasonable. Therefore, in casu, defectiveness as a requirement for the liability of the owner of a building or other construction can be affirmed.

- 78 *In summary:* In the case of all three of the above-mentioned provisions (art. 59a USG, the liability of the landowner in accordance with art. 679 ZGB and art. 684 ZGB and the liability of the owner of a building or other construction in accordance with art. 58 OR) which provide a possible basis for a claim, the unanimous legal view is that the presence of *official approval does not constitute justification* if simple or mild objective (strict) liability or liability for risk applies. An exception would apply if an accident can be ascribed to compliance with a *mandatory* legal rule or official decree.¹⁹¹ However, the brief description of the case gives no indication in this respect.
- 79 Insofar as *fault-based liability in accordance with art. 41 OR* is relevant at all in light of the other possible bases for a claim, the presence of fault on the part of the owner of the chemical company is not automatically excluded by the existence of an official approval, as the specific circumstances of the individual case may require an additional measure of due care.¹⁹² Demonstrating a breach of the duty of due care is associated with the typical difficulties concerning evidence.
- 80 The statute of limitations rule in art. 60 OR (establishing a so-called relative limitation of one year from the time the injured party receives knowledge of the damage and the liable party, and an absolute limitation of ten years from the date of the damaging action) applies not only for fault-based liability in accordance with art. 41 OR, but also for damage compensation claims in accordance with art. 58 OR (liability of the owner of a building or other construction) and art. 679 ZGB in conjunction with art. 684 ZGB (liability of the landowner).¹⁹³ Art. 60 OR also applies to damages claims based on the Environmental Protection Act, except for damages claims due to pathogenic organisms.¹⁹⁴ Claims based on damage attributable to acts committed over ten years ago are time-barred, regardless of when the damage actually occurred.
- 81 b) Pursuant to art. 3 par. 1 VG, the *confederation* is liable for wrongful damage caused to third parties by its public servants in the course of their official activities, regardless of whether the public servants are at fault. Either an act or (as will be examined in the present case) an omission by public servants may constitute wrongfulness.¹⁹⁵ The requirements for wrongfulness and causation are at issue in the present case.

¹⁹¹ For more details see supra no. 20 and 16 ff., with further references.

¹⁹² See supra no. 19, with further references.

¹⁹³ BSK ZGB II-*Rey* (fn. 163) art. 679 no. 29.

¹⁹⁴ See art. 59c par. 1 USG. According to art. 59c par. 2 USG, time limitations for damages claims due to pathogenic organisms are extended to 3 years from the time the injured party gets to know about the damage and the liable person and to 30 years either from the time the damaging incident occurred or was finished (lit. a) or from the time when pathogenic organisms were put into circulation (lit. b).

¹⁹⁵ Concerning the wrongfulness of omissions, see *J. Gross*, Schweizerisches Staatshaftungsrecht, Stand und Entwicklungstendenzen (2nd ed. 2001) 183.

The requirements for wrongfulness in accordance with the State Liability Act have long been subject of controversy. The matter under dispute was whether these requirements should be assessed in the same manner as in civil law (i.e. based on wrongfulness of the result and, if no such result is at stake, wrongfulness of the conduct) or whether state liability requires the presence of a wrongful conduct in each case, so that a mere infringement of rights (wrongfulness of the result) would not necessarily constitute wrongfulness in the sense of the State Liability Act. In BGE 123 II 577 ff., particularly 581 ff. E. 4b ff., the Swiss Federal Court clarified, after a detailed discussion in legal doctrine and court decisions, that wrongfulness is assessed in the same manner as in civil law. Accordingly, insofar as the infringement of absolute rights is involved, wrongfulness exists in accordance with the State Liability Act even in the absence of an administrative offence or breach of an official duty (wrongfulness of the conduct).¹⁹⁶ However, the present case is an exception to this rule, since state liability is to be derived from an omission. In this case, the breach of an official duty must be present, e.g. inadequate performance of the state's duty to supervise hazardous or damaging private activities.¹⁹⁷ Liability for damage caused as a result of omissions requires the breach of a *duty to take action* (*Garantenpflicht*). Such a duty can only be established by law. Consequently, the breach of a duty to take action is contingent upon the violation of a legal provision defining the type and scope of the state's duty to act and prevent damage.¹⁹⁸ In practice, such breaches of this duty are, e.g., the neglect of the state's supervisory duties, the delay of justice and the inaction of public institutions, particularly the courts.¹⁹⁹ In casu, the omission is the failure to adjust emission limits to a degree consistent with current technical capacities. The question is whether and to what extent the government has such a duty. As a principle for limiting environmental pollution through emissions, art. 11 par. 2 USG, which took effect already on 1 January 1985, states that, for prevention reasons, emissions are to be limited to the extent which is technically and operationally possible and economically tolerable. In accordance with art. 12 par. 2 USG, emission limits are defined by ordinances or, if the latter do not specify limits, by decrees based directly on the Environmental Protection Act. In addition, art. 16 USG provides for a duty to renovate facilities which do not satisfy the requirements of the Environmental Protection Act or the environmental provisions of other federal statutes (par. 1). Pursuant to par. 2 of art. 16 USG, the Federal Council of Switzerland issues regulations relating to the facilities, the scope of the measures to be taken, deadlines and procedures. Insofar as the statute explicitly includes the government (in place of the community for which it is acting) as subject to liability, as it is generally the case, state liability for wrongful or untimely (and, as can be added with respect to the present case: outdated) *ordinances* is undisputed.²⁰⁰ However, it must be kept

¹⁹⁶ BGE 123 II 582 E. 4d/bb in fine.

¹⁹⁷ BGE 123 II 583 f. E. 4d/ff.

¹⁹⁸ BGE 123 II 583 E. 4d/ff; *Gross* (fn. 195) 183.

¹⁹⁹ *Gross* (fn. 195) 183, with further references.

²⁰⁰ *Gross* (fn. 195) 219 (causation).

in mind that emission limits contain a highly political component.²⁰¹ In contrast to the issuance of the original regulation, there are generally no time limits for the adaptation of regulations. Therefore, it is always difficult to assess when the government has failed to act in a timely manner and when this qualifies as a wrongful omission resulting in the liability of the state.

- 83 The causation requirement for state omissions depends on whether compliance with the protective rule which was violated would hypothetically have prevented damage (normative responsibility based on the relation of unlawfulness (normative Zurechnung kraft Widerrechtlichkeitszusammenhangs)).²⁰² If an enhancement of the emission limits would have prevented the damage at hand, a causal link between omission and damage could be affirmed.

c) With regard to the above-mentioned provisions it is not relevant whether the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure. It is, in other words, not relevant for the farmer's claim if the government could have been requested to amend the permit.²⁰³

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

- 84 The question is whether the requirements for the *liability of the owner of a building or other construction* in accordance with art. 58 OR are met (see the summary of the requirements for the liability of the owner of a building or other construction in supra no. 76). The decisive issue is whether a defect in the building or construction can be affirmed. As explained above, three criteria must be considered:
- 85 First, the owner of a building or other construction is required to ensure that *typical use* does not pose a risk (duty of care (Verkehrssicherungspflicht)). The owner of the building or other construction is generally liable for normal risks, not for every remote conceivable risk. If the risk involved is one against which the visitor could have protected himself with a minimum of care, a defect in the building or construction does not exist.²⁰⁴
- 86 Defectiveness is also assessed based on an *objective standard*, in light of the circumstances of the individual case. With respect to the latter, e.g., it is of relevance that employees and visitors do not occupy the workshop, but only

²⁰¹ Gross (fn. 195) 280.

²⁰² Gross (fn. 195) 217.

²⁰³ See, e.g., BSK ZGB II-Rey (fn. 163) art. 684 no. 42 (in the context of a claim based on art. 679 ZGB in conjunction with art. 684 ZGB due to excessive immissions).

²⁰⁴ Rey (fn. 3) no. 1058 f., with reference.

the business owner himself (private work space without public traffic).²⁰⁵ In the view of the Swiss Federal Court, compliance with a regulatory provision meant to avert a danger may indicate, at least to a certain extent, that the building or other construction is not defective in civil law.²⁰⁶ In the present case, however, it should be kept in mind that, in the absence of employees, this business is not covered by the protective purpose of the rule, which is to protect employees.

The final criterion for assessing the defectiveness of a building or other construction is whether the protective measures are *reasonable*. Reasonability is measured based on technical feasibility and, particularly, the ratio of costs to benefit. The costs must be reasonable relative to the users' interests in protection (in this case, those of the one-time visitor), and the purpose of the building or construction.²⁰⁷ This criterion is decisive if the statutory regime that would have been applicable to employees should – generally – be applied by analogy with regard to the visitor.

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The vague description of the case seems to indicate that no defect in the building or construction in the sense of art. 58 OR exists, so that the requirements for the liability of the owner of a building or other construction are not met.

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3. Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

Regardless of whether the basis for company B's liability is fault-based liability (art. 41 OR), simple or mild objective (strict) liability or liability for risk, even in case of fault-based liability, the company cannot absolve itself of responsibility by alleging excessive lenience, inadequate due care or insufficient expertise on the part of the agency or its advisors if the safety measures are inadequate.²⁰⁸ The civil courts will decide the issue without being bound by the judgment of the competent administrative agency. However, the agency's

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²⁰⁵ *Rey* (fn. 3) no. 1059 ff., with further references.

²⁰⁶ BGE 91 II 208 E. 3d.

²⁰⁷ *Rey* (fn. 3) no. 1063 f., with further references.

²⁰⁸ *Oftinger/Stark* (fn. 15) § 5 no. 101 f., with further references to court decisions; see also *supra* no. 19 f.

assessment of the situation is of considerable importance as an indication of the foreseeability of the damage.²⁰⁹ In the present case, the agency notified the company of its non-compliance with public safety regulations, so that the company cannot contend that the damage were not foreseeable.

b) Could the injured persons claim damages from the government agency?

- 90 The purpose of official approval and inspection is for the agency to provide notice of and order the remedy of any defects. If the agency fails to perform this obligation adequately and damage occurs as a result, the agency may be liable in accordance with the applicable State Liability Act (either for the confederation or the cantons).²¹⁰ However, the agency is only liable for damage which should have been prevented if notice of the defects had been provided.
- 91 In some cases, the government commissions *non-governmental organizations* to perform such safety inspections. In accordance with art. 19 par. 1 lit. a VG (that is referring to art. 3–6 VG), those organizations are liable for damage caused to third parties in such cases. If the organization is unable to pay the compensation owed, the state is liable to the injured party for the unpaid amount. The ability of the state and the organization to claim recourse against the organ or employee who failed is regulated by the State Liability Act (art. 19 par. 1 lit. a VG that is referring to art. 7 and 9 VG; for further details, see *supra* no. 13).

²⁰⁹ *Oftinger/Stark* (fn. 15) § 5 no. 102.

²¹⁰ *Oftinger/Stark* (fn. 15) § 5 no. 102 fn. 113.

TORT AND REGULATORY LAW IN THE UNITED STATES OF AMERICA

*Marshall S. Shapo**

ESSAY

I. The Problem

The relationship between tort and regulatory law is a fascinating aspect of jurisprudence, combining as it does private law and public law. Across the globe, the forced interaction of these branches of law requires judges to confront the role of expertise in devising systems to achieve safety in technical areas. In the United States, there exists an overlay of issues derived from two phenomena that are specific to American law: a system of common law jurisprudence that has generated judicial decisions in the tens of thousands, and the federal nature of the republic. These features of American law are superimposed upon a long list of statutes that create agencies to deal with problems that have inspired Congress to try to achieve higher levels of citizen protection in areas of risk that are typical of industrial societies. Only illustrative is the catalog of statutes that have been at issue in products liability litigation with respect to the question of whether federal regulation “preempts” decisionmaking by courts. The statutes involved in products cases alone range from legislation that regulates motor vehicle safety¹ to statutory systems regulating the safety of drugs and devices.² These laws also include the Occupational Safety and Health Act,³ the Consumer Product Safety Act⁴ and the Electronic Product Radiation Control Act.⁵

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¹ See National Traffic & Motor Vehicle Safety Act, now codified as 49 United States Code Annotated (U.S.C.A.) § 30101–30170 (1997 & Supp. 2005).

² See Federal Food and Drug and Cosmetic Act, 21 U.S.C.A. § 301–397 (1999 & Supp. 2005).

³ 29 U.S.C.A. § 651–678 (1999).

⁴ 15 U.S.C.A. § 2051–2085 (1998 & Supp. 2005).

⁵ 21 U.S.C.A. § 360hh–360ss (1999).

- 2 Courts faced with tort cases dealing with safety statutes and administrative regulations must try to discern congressional intent and to fill in gaps involving policies that, almost by definition, are controversial. Underlying the heated nature of these disputes is the very fact that Congress passed legislation on the subject. Typically a federal statute involving safety regulation represents a compromise among competing interests – for example the interests of manufacturers in being able to market products with inherent risks; the consumer interest in innovation; and the interests of consumers and others exposed to product and process risks in securing protection from injury caused by hazards about which they may not know.

II. Breach of Rules

1. *The initial application of the statute*

- 3 The initial question with respect to application of a statutory or administrative rule in civil litigation is whether the rule applies at all to the event at issue. An example is a case involving a statute that focuses on the safety of railroad cars, which requires that cars be equipped with “couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles.”⁶ The Supreme Court explained that “[a] coupler consists of a knuckle joined to the end of a drawbar, which itself is fastened to a housing mechanism on the car.”⁷ Drawbars frequently become misaligned, and railroad employees have to realign them by hand so that cars can be coupled together. The plaintiff hurt his back when he went between cars to adjust a misaligned drawbar, but the Court said that his claim for his injury could not succeed, because it could not find that “a misaligned drawbar is, as a matter of law, a malfunctioning drawbar.” Because drawbars became misaligned so often, the court said it was “hesitant to adopt a reading of [the statute] that would suggest that almost every railroad car in service for nearly a century has been in violation of the” legislation.⁸
- 4 Thus, even seemingly simple language in a rule may require interpretation. An interesting comparison appears in a case involving a youth who was injured while skating on in-line skates in a dark area on a highway at night. A Minnesota appellate court in effect concluded that the skates were “a vehicle” that must comply with highway safety rules. It said that if skaters use highways, “they must comply with pertinent statutory provisions,” for example the use of lights or reflectors, “that are in place for their safety and the safety of other travelers.”⁹ With that premise, the court affirmed a judgment for the defendants when the jury had found that the skater was 85 percent causally negligent.

⁶ The provision is part of the Federal Safety Appliance Act, 49 United States Code (U.S.C.) § 20302(a)(1).

⁷ *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400, 401–02 (1996).

⁸ *Id.* 412.

⁹ *Boschee v. Duevel*, 530 N.W. 2d 834, 840 (Minn. Ct. App. 1995).

2. *What the standard is*

Another question at the threshold is what the administrative standard is. An illustrative controversy on this question arose in the well publicized event known as “Three Mile Island,” in which a nuclear plant accident released radiation into the atmosphere. The court confronted the argument that the appropriate standard, with respect to the defendant’s alleged breach of its duty of care, would require radiation releases to be “as low as is reasonably achievable” (ALARA). However, the court concluded instead that specific, highly quantitative regulations on permissible levels of radiation, promulgated by the Nuclear Regulatory Commission, “constitute[d] the federal standard of care.” It pointed out that those regulations “represent[ed] the considered judgment of the relevant regulatory bodies – the Federal Radiation Council, EPA, AEC, and NRC – on the appropriate levels of radiation to which the general public may be exposed.”¹⁰

Beyond these threshold issues, there are several principal ways in which the violation of a statute or administrative regulation may affect a civil suit:

3. *The statute provides the tort standard in terms*

On occasion, the legislature creates a cause of action. An example is the Consumer Product Safety Act, which provides that anyone injured “by reason of any knowing (including willful) violation of a consumer product safety rule,” or other rules or orders issued by the Consumer Product Safety Commission, may sue violators for “damages sustained” and, in the discretion of the court, for attorneys’ fees.¹¹ Legislatures may also modify existing tort rules, as in the case of statutes that impose dollar limits, or “caps,” on the amount of money a plaintiff may recover in a tort action.¹²

4. *Implying causes of action*

In some cases, in which a statute does not speak one way or another about whether it provides a civil cause of action on the subject matter it covers, a court may infer that the legislature intended to permit injured persons to sue on the basis of a statutory violation. A United States Supreme Court decision set out a four part test as the standard for implying private rights of action from statutes. The questions posed by this test included whether the plaintiff was “one of the class for whose special benefit the statute was enacted,” whether there was “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one,” and whether it was “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the

¹⁰ In re TMI 67 F.3d 1103, 1113–1114 (3d Cir. 1995).

¹¹ 15 U.S.C.A. § 2072(a).

¹² See, e.g., Cal. Civil Code § 3333.2 (West 2005) (imposing a limit on “non-economic losses” of \$ 250,000 in suits for “professional negligence” against health care providers).

plaintiff.” A fourth element of the test, linked to the federal nature of American law, was whether “the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law[].”¹³

- 9 Courts have been conservative about allowing claimants to imply private causes of action from statutory violations. An example is a case in which the plaintiffs claimed that indoor “bug bombs” caused an explosion when the claimants set off the products while there was a pilot light burning on a stove. The plaintiffs tried to base their claim on the defendants’ alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, because of the defendants’ failure to report prior incidents of fires related to the use of the product. In rejecting this part of the plaintiffs’ complaint, the court referred to precedents that emphasized that the purpose of “environmental and public and health legislation” is “to benefit the public, rather than any specific individual or class of persons.”¹⁴

5. *Liability per se*

- 10 In some cases, the court will hold that the violation of a statutory rule is dispositive, not only on the question of the violation of the standard of care, but on liability. These liability *per se* rules override defenses based on the conduct of the injured party. Courts typically limit this powerful effect of statutory violations to statutes like those obviously intended to protect a particular, vulnerable class of individuals. Illustrative are cases involving injuries to children employed in violation of child labor laws. Ordinarily the employer in that kind of case would argue that it was not a violation of negligence principles to employ a child whose family needed money, and would argue further that the child was contributorily negligent. However, because the exact goal of the statute is to protect children from working with dangerous machinery, the court would reject these defenses and conclude that the violation of the statute was liability in itself. As the South Dakota Supreme Court explained, the legislature’s purpose was “to protect children from their own negligence.”¹⁵

6. *Negligence per se*

- 11 A somewhat less severe effect of rule violations is “negligence *per se*,” a finding that a violation is negligence “as a matter of law” even if a court would not have found the defendant’s conduct to be negligent under common law standards. In a case involving a violation of the National Traffic and Motor

¹³ *Cort v. Ash*, 422 U.S. 66, 78 (1975). There is some controversy about the continued utility of this test. The majority opinion in *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) says it has “relied on the four factors set out in *Cort v. Ash*,” but Justice Scalia in his concurrence, *id.* 188–89, declares that *Cort* has been “effectively overruled by our later opinions.”

¹⁴ *Rodriguez v. Am. Cyanamid Co.*, 858 F. Supp. 127, 130 (D. Ariz. 1994), referring to *Gammill v. United States*, 727 F.2d 950 (10th Cir. 1984).

¹⁵ *Strain v. Christians*, 483 N.W. 2d 783, 789 (S.D. 1992).

Vehicle Safety Act, a federal appellate court said that when a law enacted to protect a class of people including the plaintiff “creates a minimum standard of care,” then “an unexcused violation, an act done with less than minimum care, would have to be negligence.”¹⁶ In another case, the court held that a violation of a regulation requiring manufacturers of oral contraceptives to provide information for patients – known as patient package inserts – is negligence per se.¹⁷

7. *Presumption of negligence*

A separate legal category that some courts apply to rule violations is that of a “presumption” of negligence. Classically, a presumption is a rule of law that requires one to draw certain conclusions from certain facts. The concept of presumptions overlaps with negligence per se doctrine in the sense that if a defendant fails to rebut a presumption, the court will effectively deem the defendant to have been negligent. The presumption category also overlaps with the category of evidence of negligence, discussed directly below. In the case of a “rebuttable presumption,” the presumption may simply have the effect of being evidence of negligence, which the defendant may refute with evidence to show that it was not negligent. One may contrast with rebuttable presumptions the irrebuttable presumption, under which the court must draw the conclusion that the defendant was negligent. That would have at least the effect of a finding of negligence per se. In some cases it may amount to an imposition of absolute liability, if the court does not allow the defendant to offer evidence that the plaintiff was himself negligent.

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8. *Evidence of negligence*

Many courts will simply regard violations of safety rules as being evidence of negligence. The jury considers that evidence along with any other evidence the plaintiff presents that the defendant fell below the standard of care, and will also weigh evidence presented by the defendant that negates negligence. This is the most flexible standard, allowing the judge and the jury the most leeway for determining the appropriate standard of conduct and how that standard applies to the facts of the case.

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There are significant policy issues involved in the choice of what effect to give in civil litigation to the violation of a safety rule. On the one hand, it may be argued that the violation of a positive standard should be given strong effect because the standard represents the political determination of the entire community on a controversial issue. Enforcement of the stricter standard presum-

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¹⁶ *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1380–81 (5th Cir. 1980).

¹⁷ *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961 (E.D. Wis. 1981), modified to reflect text of regulation at time plaintiff’s cause of action arose, 532 F. Supp. 211 (E.D. Wis. 1981).

ably would achieve more deterrence against conduct deemed socially undesirable, as well as assuring compensation to injured persons in many cases. It also would send a clear, predictable signal to actors about potential liability, and it would provide a clear rule for decisionmakers.

- 15 By contrast, those who prefer an evidence-of-negligence approach would argue that the highly factual nature of individual cases requires a precise determination, based on the specific facts of a case, concerning whether an actor has fallen below the standard of care. Further, collectively determined standards may sacrifice efficiency to normative judgments of legislatures, a result that many economists would find undesirable. Another problem with a per se type of liability is that it deems fault to exist in situations where it may not be appropriate to make a judgment on personal responsibility; many auto accidents may present that kind of situation because of the split second judgment that traffic situations require. Still another argument against per se liability is the obverse of the argument that such rules beneficially assure compensation at tort rates. This is that often tort compensation will be substantially greater than the penalties, like monetary fines, that the legislature has provided for violation of the rule at issue.
- 16 In the final analysis, the question of whether to choose a per se approach or an evidence-of-negligence type rule will depend on the court's judgment about which institution is better suited to make the judgment at issue on the propriety of conduct: on the one hand, the legislature or an administrative agency; on the other, a judge and jury.

9. The purpose of statutory and administrative rules

- 17 The Restatement (Second) of Torts sets out four major factors for dealing with the case in which a plaintiff causally ascribes an injury to the violation of a legislative or administrative rule, but the injury was not the kind of harm for which the rule apparently was fashioned. The Restatement (Second) speaks of whether the rule was designed "to protect a class of persons which includes the one whose interest is invaded"; whether it was designed "to protect the particular interest which is invaded" and "to protect that interest against the kind of harm which has resulted"; and whether the purpose of the rule is "to protect that interest against the particular hazard from which the harm results."¹⁸ The Restatement (Second) specifically says that courts should not adopt the standard of a statute if its "purpose is found to be exclusively ... to protect the interests of the state," or to protect individuals "only as members of the public."¹⁹ A draft of the Restatement (Third) includes a compressed version of the statutory purpose doctrine within a general rule applying negligence per se to statutory violations. It says that "[a]n actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of acci-

¹⁸ Restatement (Second) of Torts § 286 (1965).

¹⁹ Id. § 288.

dent the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."²⁰

It should be noted that the locutions used to describe the statutory purpose issue are various. Some observers will find it useful to view this issue as one of whether the defendant owed the plaintiff a duty with respect to the injuries that occurred; others will speak in terms of whether the statutory violation was the "proximate cause" of the injuries.

A classic decision on the subject is the 19th century English case of *Gorris v. Scott*,²¹ in which the plaintiff shipped cattle on a vessel that did not have livestock pens, and the cattle were washed overboard in a storm. Although presumably the cattle would not have gone into the sea if they had been in pens, the court rejected the plaintiff's claim. It relied on the fact that the statute was designed to prevent the spread of disease among animals. One judge said there could be no liability for negligence when "the damage is of such a nature as was not contemplated by the statute."²²

The United States Supreme Court was more hospitable to plaintiffs who relied on the violation of a Coast Guard navigation rule, which required scows to "carry a white light at each end ... not less than 8 feet above the surface of the water," and "to show an unbroken light all around the horizon." The plaintiff's decedent was a seaman on a scow that had an open flame kerosene lamp that was no more than three feet above a river on which there were oil slicks. The lamp ignited vapors on the oil, causing a fire that killed the decedent. A majority of the Supreme Court reversed a decision for the defendant in which the trial court had said that the purpose of the Coast Guard rule was only to prevent collisions. The majority referred to "liberal" principles developed under a federal statute that expanded negligence recoveries for railroad workers, principles which also governed claims under a federal statute that liberalized claims by seamen. The Court stressed that, under the statute covering railroad workers, it had "repeatedly refused" to limit liability to injuries that the "statute was designed to prevent."²³ The two decisions, taken together, indicate the breadth of the spectrum of judicial interpretation of statutory purpose.

III. Compliance with Rules

1. A general pronouncement: *The T.J. Hooper*

The question of whether compliance with rules should be dispositive in favor of a defendant in a civil action embodies tensions between standards that are a product of political processes and the facts of specific cases. A famous pro-

²⁰ Restatement (Third) of Torts § 14 (Proposed Final Draft No. 1, 6 April 2005).

²¹ L.R. 9 Ex. 125 (1874).

²² Id. at 128 (Kelly, C.B.).

²³ *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958).

nouncement by one of the greatest American judges argued against compliance as a universal defense in a case that involved a defendant's reliance on industry custom rather than compliance with positive law. At issue in this case was the failure of a tug owner to provide working radio receiving sets for his vessel. The defendant argued that he had only complied with the industry standard – that is, that tug owners “had not yet generally adopted receiving sets” on their boats. Judge Learned Hand rejected this argument, saying that:

“[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.”²⁴

- 22 The philosophy articulated by Judge Hand may be applied to compliance with regulations as well as compliance with industry standards. To reject a compliance-based defense may provide salutary incentives to firms to engage in “technology-forcing” research and development beyond that required by legislative or administrative rules. However, defendants may argue that judgments on particular matters that have been fought out in the legislative arena or in regulatory forums should be dispositive on the question of community standards.

2. *Government specifications*

- 23 The more that a government rule approaches a specification, the more likely it is that courts will conclude that compliance is dispositive against liability. In one case, the court held that a Jeep manufacturer's exact compliance with government specifications barred a tort suit when there was a “conscious, intentional determination by the United States Government that the installation of seatbelts would be incompatible with the intended use of the vehicle.”²⁵
- 24 In another case, defendants complied with quantitative limits in a statute that said that bumpers on multi-purpose vehicles could not “exceed[] a height of 28 inches.” The owners of a truck used a “Lift Kit” to raise the front bumper of the vehicle from a height of 19 inches – the height at which the manufacturer's design placed the bumper – to about 24 inches. In giving judgment for the makers of the “Lift Kit,” the court said that without a showing of “special circumstances” that required “extra caution,” compliance with the statutory maximum of 28 inches was enough to defeat a defect claim. The court found it “readily apparent that the ... legislature has considered the issue of vehicle bumper heights” from a standpoint of “mismatched bumpers on colliding vehicles.” It concluded

²⁴ The *T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), cert. denied 287 U.S. 662 (1932).

²⁵ *Sanner v. Ford Motor Co.*, 154 N.J. Super. 407, 410, 381 A.2d 805, 806 (App. Div. 1977), cert. denied, 75 N.J. 616, 384 A.2d 846 (1978).

that apparently the legislature had “contemplate[d] that bumper mismatch between different classes of vehicles” was “an inevitable occurrence and, as such, sanctioned by the legislature as a matter of public policy.”²⁶

3. Compliance under broad-scale regulatory processes

The issue of compliance as a defense is a different one when the defendant argues that its activity or product has complied with a determination made by a government agency under a broad-scale regulatory process. A particularly interesting set of cases involves a Michigan statute that effectively affirms the results of a federal regulatory process in the civil litigation context. This statute says that a drug

“is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States Food and Drug Administration, and the drug and its labeling were in compliance with the United States Food and Drug Administration’s approval at the time the drug left the control of the manufacturer or seller.”

The Michigan Supreme Court decided that this statute was not an “improper delegation of legislative power.”²⁷ A federal court which also held the statute constitutional said that “if the state decides that the federal regulatory scheme furnishes its citizens protection enough against potential injury from the unanticipated effects of a new medication, the state has the prerogative to withdraw the compensatory and remedial safeguards that the tort reparations system might otherwise provide.”²⁸

Confronted with a different technical presentation of the issue, however, the Oregon Supreme Court refused to hold that compliance with federal drug approval processes is dispositive against liability. In a decision that “expressly overruled” a prior case, the Oregon court said that drug warnings “may be found inadequate, [a]lthough all of the government regulations and requirements have been satisfactorily met in the production and marketing of [a drug], and in the changes made in the literature.”²⁹

A Reporters’ study for an American Law Institute project argued that regulatory compliance should be a “complete bar to tort liability” when a defendant could satisfy a number of conditions: (1) promulgation of a regulation by “a specialized administrative agency with the statutory responsibility to moni-

²⁶ *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 742–43, 625 A.2d 1005, 1013–14 (1993).

²⁷ See *Taylor v. SmithKline Beecham Corp.*, 468 Mich. 1, 19, 658 N.W.2d 127, 137 (2003).

²⁸ *Garcia v. Wyeth-Ayerst Labs.*, 265 F. Supp.2d 825, 833 (E.D. Mich. 2003).

²⁹ *McEwen v. Ortho Pharm. Corp.*, 270 Or. 375, 398, 528 P.2d 522, 534 (1974) (quoting *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159, 162 (D. S.D. 1967), affirmed, 408 F.2d 978 (8th Cir. 1969)). See also *Hegna v. E.I. du Pont de Nemours & Co.*, 806 F. Supp. 822, 830 (D. Minn. 1992), which summarizes authorities on the proposition that “FDA certification and regulation of a product, or a party’s compliance with FDA or other governmental regulations, does not automatically relieve a party of either liability or its duty to warn.”

tor risk-creating activities in that domain and to establish and revise regularly specific standards governing enterprise behavior”; (2) the agency has specifically addressed the issue involved in the litigation and “made an explicit judgment about what type of legal controls are appropriate”; (3) the defendant has “complied with all the relevant standards prescribed by the agency”; (4) the defendant has disclosed to the agency “any material in its possession (or of which it had good reason to be aware) concerning either” the hazard at issue or ways to control risk.³⁰

29 There is a Siren attractiveness to the regulatory compliance defense, rooted in the idea that regulatory agencies, because of their expertise and their statutory existence, are the proper institutions to make judgments on policy-laden issues, especially issues with technical components. However, as I have noted, a problem with this institutional argument is the “Problem of the Missing Tsar.” I have observed that although “[o]ne may speak facetiously of ‘assign[ing]’ injury law tasks to one [institutional] ‘system’ or the other” – for example, to tort or to regulation, “that is not the way [the American] system works.”³¹ Although one could fantasize about a “tireless ... administrator” who sits “at a great control board at which he adjusts risks twenty-four hours a day,” that is not reality. “[I]n a politico-legal climate that changes from decade to decade, in a system where there is no Tsar,” “tort has a special utility.” Arguably, tort “provides an island of certainty in our injury law: as an aid to the workings of the market, as a powerful set of symbols for proper behavior, as a gyroscopic mechanism in changing political weather.”³²

30 Specifically, as Robert Rabin has pointed out, there is reason to believe that tort litigation provides public information about “unscrupulous and socially dangerous business practices detrimental to the public health,” and does so “with some regularity.”³³ Professor Rabin has also written of a “compensation gap” that exists because “[r]egulatory agencies are not in the business of compensating for accidental harm.”³⁴

4. *Compliance as evidence*

31 Many American courts favor the rule that compliance with a regulation is admissible on behalf of defendants, but not conclusive.³⁵ One example is a

³⁰ 2 Reporters’ Study: Enterprise Liability for Personal Injury 110 (Am. Law Inst. 1991).

³¹ Marshall S. Shapo, Tort Reform: The Problem of the Missing Tsar, 19 Hofstra L. Rev. 185, 187 (1990).

³² Id. 188.

³³ R.L. Rabin, Keynote Paper: Reassessing Regulatory Compliance, 88 Georgetown Law Journal (Geo. L.J.) 2049, 2068–69 (2000).

³⁴ Id. 2073.

³⁵ A draft of the Restatement (Third) says that “[a]n actor’s compliance with a pertinent statute, while evidence of non-negligence, does not preclude a finding that the actor is negligent” under the general definition of negligence “for failing to adopt precautions in addition to those mandated by the statute.” Restatement (Third) of Torts: Liability for Physical Harm § 16(a) (Proposed Final Draft No. 1, 6 April 2005).

Pennsylvania appellate decision that says it is appropriate to admit evidence of compliance with federal motor vehicle safety standards, “although compliance is ‘only a piece of the evidentiary puzzle’ and does not grant immunity from strict liability.”³⁶ An interesting comparison appears in a case in which a federal appellate court “reject[ed] the argument that FDA approval preempts state product liability claims based on design defect,” but also said that a jury could consider approval by the FDA as evidence that the drug was effective.³⁷

An instructive set of decisions from two levels of Illinois appeals courts fleshes out the idea of compliance as admissible evidence, but not as dispositive on the liability question. The defendant manufacturer in this case sought to admit evidence that it had complied with federal standards for construction of tank cars to carry liquid petroleum gas. The manufacturer offered evidence that it had complied with federal standards in support of a defense based on state of the art. However, the Illinois appellate court concluded that since there was safer technology in existence when the accident at issue occurred, a showing of compliance “would have been irrelevant.”³⁸ The Illinois Supreme Court disagreed to the extent that it thought that the evidence of compliance was relevant to issues of defect and unreasonable dangerousness. But the state supreme court did not think that compliance was dispositive on the liability issue, saying that federal regulation did not preclude “the imposition of tort liability according to State tort law standards more stringent than those contained in the federal regulations.” Thus, the supreme court said “[t]he finder of fact may conclude that a product is in an unreasonably dangerous defective condition notwithstanding its conformity to Federal standards.”³⁹

The complexity of characterization in this area is evident in a federal appeals decision involving the allegedly defective design of a sun visor in an automobile. In this case, the appellate court drew a distinction between design standards and performance. The visor satisfied the applicable federal motor vehicle safety standard, but the trial court concluded that the standard was invalid because it lacked a definition of the amount of energy a visor must absorb. By contrast, the court of appeals viewed the ruling of the district court as in effect treating the standard as a performance standard, whereas the appellate court thought it was only a design standard. The appellate court held that it was error to allow an argument that the manufacturer had failed to comply with the standard because the visor had insufficient energy-absorbing material. The appellate court commented that “[m]any regulations accomplish little because they require little, but this does not impugn their validity.”⁴⁰

³⁶ See *Jackson v. Spagnola*, 349 Pa. Super. 471, 479, 503 A.2d 944, 948 (1986).

³⁷ *Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 537–38 (6th Cir. 1993).

³⁸ *Rucker v. Norfolk & W. Ry.*, 64 Ill. App.3d 770, 781, 381 N.E.2d 715, 724 (1978).

³⁹ *Rucker v. Norfolk & W. Ry.*, 77 Ill.2d 434, 440, 396 N.E.2d 534, 537 (1979).

⁴⁰ *DePaep v. General Motors Corp.*, 141 F.3d 715, 718–19 (7th Cir. 1998).

- 34 The Restatement of Products Liability has generally articulated an evidence-of-defect rule, but speaks of an exception for certain types of cases. The black-letter of the Restatement says that compliance with regulations may “properly [be] considered in determining whether [a] product is defective” but that “such compliance does not preclude as a matter of law a finding of product defect.”⁴¹ A comment observes that this principle “reflects the traditional view that the standards set by most product safety statutes or regulations generally are only minimum standards,” which “leave open the question of whether a higher standard of product safety should be applied.” However, although this is “the general rule, applicable in most cases,” the comment says that “[o]ccasionally ... a court may properly conclude that a particular product safety standard set by statute or regulation adequately serves the objectives of tort law and therefore that the product that complies with the standard is not defective as a matter of law.” That result, the comment says, “may be appropriate when the safety standard or regulation was promulgated recently, thus supplying currency to the standard ...; when the specific standard addresses the very issue of product design or warning ... before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise.”⁴²
- 35 Closely paralleling the question of whether compliance is either dispositive on liability or evidence of fault is the topic of federal preemption – that is, whether a congressional statute occupies a particular product area to the exclusion of common law rules. This question has arisen with reference to more than twenty statutory regimes involving safety issues in many areas – from motor vehicle safety to drug, vaccine and device safety, from herbicides to boat safety and including the transportation of hazardous materials. It would require a separate, lengthy paper to discuss these preemption questions in detail,⁴³ and it should be emphasized that the strength of arguments for a regulatory compliance defense varies among products and activities.⁴⁴ However, I note that it is symbolic of the intensity of argument in this area that preemption issues have reached the Supreme Court on at least three topics – motor vehicle safety,⁴⁵ cigarettes,⁴⁶ and medical devices.⁴⁷ Such cases may prove very close indeed; in the devices case the majority of a closely divided Supreme Court rejected preemption,⁴⁸ but in a

⁴¹ Restatement (Third) of Torts: Products Liability § 4(b) (1998).

⁴² *Id.* § 4, cmt. e.

⁴³ For a comprehensive summary of different kinds of pre-emption, see *V.D. Dinh*, *Reassessing the Law of Pre-emption*, 88 Geo. L.J. 2085 (2000).

⁴⁴ See, e.g., *M.D. Green/W.B. Schultz*, *Tort Law Deference to FDA Regulation of Medical Devices*, 88 Geo. L.J. 2119, 2131–45 (2000) (noting the difference between drugs and devices with respect to the “case for a regulatory compliance defense,” and expressing skepticism about adoption of the defense in both areas, especially the area of devices).

⁴⁵ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

⁴⁶ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

⁴⁷ *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

⁴⁸ See Justice Stevens’ plurality opinion in *Medtronic* (fn. 47) 518 U.S., 484–503. Justice Breyer’s separate concurring opinion, *id.* 503–08, made the difference.

case involving the absence of an air bag in an automobile, a 5–4 majority of the Court found that the plaintiff’s claim was impliedly preempted.⁴⁹

*** ***

A number of important questions surround the regulatory compliance defense, reflecting the high political content of the subject as well as great jurisprudential tension. The issue involves arguments over the relationship between legislatures and courts. In a legal system in which courts have had a primary lawmaking role in the area of personal injury litigation, it poses sharply the question of who governs – indeed, the question of who represents “the people.” Undercurrents include the need to strike a balance between risk aversion and innovation – a complicated subject in which consumers have interests on both sides. 36

There is a strong argument in favor of a model that relies on administrators taking advantage of specialists in areas of advancing technology. Yet there is also a powerful appeal in the model of courts serving as dispute resolvers on concrete issues, with juries as not only finders of fact but also as adjunct resolvers of disputes. 37

A particularly challenging test for the proposition that compliance with regulatory processes should absolve tort defendants arose in 2004. This was the controversy over the marketing of painkilling drugs that had been found, after extended periods of marketing, to increase significantly the risk of cardiovascular disease. A pivotal event in this history was the decision of the drug maker Merck to withdraw its drug Vioxx from the market.⁵⁰ Another salient chapter in the story was a series of votes taken among a panel of advisers to the Food and Drug Administration on the question of whether three painkillers should be marketed. The two votes that were most interesting dealt with Vioxx and Bextra, a Pfizer drug that also had been shown to have serious cardiovascular risks but which its manufacturer had not withdrawn. The panel voted 17 to 15 to allow Vioxx to be sold again and 17 to 13 to allow Bextra to stay on the market, and the closeness of the votes represented the contentiousness of the debate.⁵¹ One panel member said he was “troubled by some inconsistencies 38

⁴⁹ See Justice Breyer’s majority opinion, in which he refers to the Department of Transportation’s preference for “a mix of devices” that “would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with air bags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems.” Justice Breyer said that “a rule of state tort law” that effectively imposed a duty to install air bags would have required makers of cars similar to that of the defendant “to install air bags rather than other passive restraint systems” and “thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.” 529 U.S., 879–881.

⁵⁰ See, e.g., *G. Kolata*, A Widely Used Arthritis Drug is Withdrawn, *N.Y. Times*, 1 October 2004, A1 & C4.

⁵¹ See *G. Harris/A. Berenson*, 10 Voters on Panel Backing Pain Pills Had Industry Ties, *N.Y. Times*, 25 February 2005, A1 & A16.

that I have found in [a] briefing document from Pfizer,” and declared that he “wonder[ed] how much trust can we put in these presentations.”⁵² A striking fact was that of ten advisers who had benefited from consulting with Merck and Pfizer, nine voted to allow the drugs to be marketed.⁵³

- 39 The issue relevant to our topic is not the merits of the scientific question or the wisdom of allowing the drugs to be marketed. It is what share the tort judicial process should have in making decisions on whether injuries ascribed to products should be compensated for by their makers, when those products have passed the tests of a regulatory process. Underlining the point that the existence of such a process does not guarantee a comprehensive risk assessment of products was the fact that, under pressure from these events, the Food and Drug Administration announced that it was creating a board to advise it on the hazards of drugs on the market.⁵⁴
- 40 Many years ago one of the most distinguished American tort scholars explained that “tort law is public law in disguise.”⁵⁵ The issue of regulatory compliance stands at the interface of the private law that resolves specific controversies and the public law that reflects general societal positions on matters like the tradeoff between risk and innovation.

IV. Compensation from Other Sources

- 41 The principal federal legislative provision requiring compensation for environmental harm is the statute called the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which imposes liability on four categories of persons for “a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance” from what is defined as a “facility.” These categories are:

- “1. the owner and operator of a vessel or a facility,
2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

⁵² See *G. Harris*, Medical Panel Poses Pointed Questions to Drug Makers Over Risks of Painkillers, *N.Y. Times*, 17 February 2005, A22.

⁵³ See *Harris/Berenson* (fn. 51).

⁵⁴ See *G. Harris*, F.D.A. to Create Advisory Panel to Warn Patients About Drugs, *N.Y. Times*, 16 February 2005, A1 & A16.

⁵⁵ *L. Green*, Tort Law Public Law in Disguise: I, 38 *Tex. L. Rev.* 1 (1959); II, 38 *Tex. L. Rev.* 257 (1960).

4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person⁵⁶

The statute defines “release” to include a broad range of activities that might put hazardous substances into the environment – any “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).”⁵⁷ The statute does provide for a so-called “third party defense” concerning “an act or omission of a third party other than an employee or agent of the defendant, or ... one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail).” This defense is available if the defendant “establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.”⁵⁸

42

The severity of the burden that CERCLA imposes on landowners is evident in a case in which, as a federal judge characterized it, the defendants “demonstrated by a preponderance of the evidence” that another party stopped dumping a substance before the time that the defendants purchased the property in question. As the court defined the defendants’ duty under the statute, their liability was “predicated on their unwitting ownership of contaminated property, rather than on any disposal of waste which might have occurred on the Property since they purchased it,” which meant that they bore “the burden of showing that a totally unrelated third party is the sole cause of the release of hazardous substances in question.” Since it was “equally likely” that another substance that had been dumped was “contaminated or ... not contaminated,” and since the other party disposed of the substance for some time after the purchase of the property, the defendants failed in their burden of proof.⁵⁹ However, although the court concluded that the defendants could not rely on the “Innocent Purchaser or Third-Party Defenses,”⁶⁰ it wrote a stinging criticism of the statute, saying that “[t]he only blameworthy activity that many property owners facing CERCLA liability have engaged in is the failure to comply with the host of amorphous and undefined due care requirements necessary for establishing CERCLA’s affirmative defenses.”⁶¹

43

⁵⁶ 42 U.S.C. § 9607(a).

⁵⁷ *Id.* § 9601(22).

⁵⁸ *Id.* § 9607(b) (3).

⁵⁹ See *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 233, 241–43 S.D. N.Y. 1994).

⁶⁰ See *id.* 244–45.

⁶¹ *Id.* 241.

- 44 Other courts have made it explicit that even though CERCLA does not specifically provide for strict liability, a strict liability standard governs under the legislation.⁶² Moreover, liability under CERCLA is not only strict, but it is joint and several, meaning that one party can be held entirely liable for harms to which many parties have contributed. A federal appellate court indicated that it was well known that this “may often result in defendants paying for more than their share of ... harm,” but observed that courts had “continued to impose joint and several liability on a regular basis, reasoning that where all the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty.”⁶³ Although defendants held jointly and severally liable can then claim against others for their equitable shares of environmental harm, the burden of avoiding an initial assessment of joint and several liability is “stringent.”⁶⁴
- 45 CERCLA, therefore, provides a rigorous legislative framework of liability for firms that contribute to, or even are associated with, environmental pollution. It should be noted, in this connection, that the backup fund that Congress set up for the purpose of cleaning up polluted sites when owners could not be identified or were bankrupt – the so-called Superfund – fell on bad times. The money for Superfund came from taxes on industries that handled chemicals most often involved in the pollution of land and ground water. However, Congress let the tax that generated the Superfund expire in 1995, and funding provided by Congress on an annual basis since then was insufficient to meet the need to clean up hundreds of sites with the worst pollution. It was estimated in 2004 that one in four Americans lived “within four miles of a Superfund site.”⁶⁵ Thus, CERCLA establishes the liability of solvent private parties, but has been severely criticized – even by federal judges – for its unfairness. And by 2004, the political will to effectuate cleanups seemingly had faded.
- 46 A number of other statutes provide for various kinds of civil as well as criminal penalties for environmental harm and, in the case of at least one law, personal injury. They include:
- The Clean Air Act provides for administratively imposed civil penalties of up to \$ 25,000 per day for violations of “implementation plan[s]” for air quality control.⁶⁶ The criteria that the administrator or the court takes into account include “the violator’s full compliance history and good faith efforts to comply.”⁶⁷ The statute imposes a range of criminal penalties for different kinds of culpability, including acts by those who “knowingly vio-

⁶² See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

⁶³ *O’Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989).

⁶⁴ See id. 183.

⁶⁵ See, e.g., *J.J. Fialka*, Money Shortage Threatens Superfund, Wall St. J., 7 September 2004, originally in 2004 WL-WSJ 56939865, printout from ProQuest data base; Not-So-Superfund, St. Paul Pioneer Press, 12 March 2004, 2004 WLNR 3558528 (“[t]he Superfund (...) went bankrupt last fall”).

⁶⁶ 42 U.S.C.A. § 7413(d).

⁶⁷ 42 U.S.C.A. § 7413(e)(1).

late[]” legal requirements,⁶⁸ and those who “negligently release[]” hazardous pollutants into the ambient air.⁶⁹

- The Clean Water Act provides civil penalties of up to \$ 25,000 per day for violations, with the size of the penalty depending on such factors as “the seriousness of the violation ... any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.”⁷⁰ This legislation imposes criminal penalties for a range of culpabilities, including negligence;⁷¹ for “knowingly violat[ing]” certain sections of the law,⁷² and in particular for “knowingly violat[ing]” parts of the statute with knowledge that the violator is “plac[ing] another person in imminent danger of death or serious bodily injury.”⁷³
- The Toxic Substances Control Act imposes penalties of up to \$ 25,000 for each violation, again listing factors for the administrator to “take into account.” Those factors include “the nature, circumstances, extent, and gravity of the violation” and the violator’s “ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.”⁷⁴ The standard for criminal penalties is knowing or willful violation of the law.⁷⁵
- For the enforcement of drinking water regulations, The Public Health Service Act makes provision for civil penalties of up to \$ 25,000 per day against “[a]ny person who violates, or fails or refuses to comply, with an order.”⁷⁶ It also authorizes the administrator to “bring a civil action ... to require compliance” with “any applicable requirement.”⁷⁷
- Federal pesticide legislation also provides for civil penalties against violators, of up to \$ 5,000 for each offense, or in the case of “private applicator[s]” of chemicals, up to \$ 1,000 per offense.⁷⁸ As with the statutes summarized above, the administrator is to consult a catalog of factors, including “the size of the business” of the violator and the effect of a penalty on the violator’s “ability to continue in business,” as well as the “gravity of the violation.”⁷⁹ Under this statute, the administrator may issue a warning instead of imposing a penalty if he “finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment.”⁸⁰ This is an especially clear reference to culpability as a determinant of penalties if not of liability.

⁶⁸ See 42 U.S.C.A. § 7413(c)(1). See also *id.*, § 7413(c)(3), (5) for other acts or omissions done “knowingly”.

⁶⁹ See 42 U.S.C.A. § 7413(c)(4).

⁷⁰ 33 U.S.C.A. § 1319(d).

⁷¹ See 33 U.S.C.A. § 1319(c)(1).

⁷² See 33 U.S.C.A. § 1319(c)(2).

⁷³ 33 U.S.C.A. § 1319(c)(3).

⁷⁴ 15 U.S.C.A. § 2615(a)(1),(2)(B).

⁷⁵ See 15 U.S.C.A. § 2615(b).

⁷⁶ 42 U.S.C.A. § 300g-3(g)(3)(A).

⁷⁷ 42 U.S.C.A. § 300g-3(g)(1).

⁷⁸ 7 U.S.C.A. § 1361(a)(1)–(2).

⁷⁹ 7 U.S.C.A. § 1361(a)(4).

⁸⁰ *Id.*

- 47 Congress provided a particularly interesting cluster of remedies with respect to violations of consumer product safety rules and standards. One who “knowingly violates” the law may have to pay up to \$ 5,000 for each violation,⁸¹ although the maximum penalties for certain violations do not apply if the violator “did not have either ... actual knowledge” of his violation or notice from the Consumer Product Safety Commission that his actions would violate the law.⁸²
- 48 As noted above, individuals injured by “any knowing (including willful) violation of a consumer product safety rule” or a “rule or order issued by the Commission” may sue the violator for “damages sustained” and, “if the court determines it to be in the interest of justice,” may recover the “costs of suit, including reasonable attorneys’ fees.”⁸³ The statute specifies that these remedies “shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law.”⁸⁴ Moreover, individuals may sue in federal court “to enforce a consumer product safety rule” or a Commission order concerning a “substantial product hazard,” and may seek injunctive relief.⁸⁵ Rounding out the broad remedies of the statute is a provision that “[c]ompliance with consumer product safety rules or other rules or orders” under the statute “shall not relieve any person from liability” to other persons under “common law or under State statutory law.”⁸⁶ Moreover, “[t]he failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law relating to such consumer product.”⁸⁷ The statute also provides for the imposition of criminal penalties on persons who “knowingly and willfully” violate it, with fines of up to \$ 50,000 and/or a year’s imprisonment.⁸⁸

APPENDIX — ANSWERS TO THE QUESTIONNAIRE

I. General

1. What, in general, is the impact of administrative law rules on the tort law of your country?

- 49 It is fairly substantial and increasing because of the increase in the amount of health and safety regulation.

⁸¹ 15 U.S.C.A. § 2069(a)(1).

⁸² 15 U.S.C.A. § 2069(a)(2)(B).

⁸³ 15 U.S.C.A. § 2072(a).

⁸⁴ 15 U.S.C.A. § 2072(c).

⁸⁵ 15 U.S.C.A. § 2073.

⁸⁶ 15 U.S.C.A. § 2074(a).

⁸⁷ 15 U.S.C.A. § 2074(b).

⁸⁸ 15 U.S.C.A. § 2070.

2. *Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?*

There is a considerable body of case law that deals with the “preemptive” effect of federal statutes and regulations in tort litigation. I have identified more than 20 statutes that have been the subject of judicial decisions in the products liability area alone. See Marshall S. Shapo, *The Law of Products Liability* 11.03[6] (4th ed. 2001 & Annual Supplements 2002–07).

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3. *Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?*

Many states would hold the violation of an administrative rule or regulation to be evidence of negligence or of a product defect. However, most of the courts that give violations of statutes more force than that – e.g., by holding a statutory violation to be “negligence per se” – would not give that strong an effect to a violation of a regulation.

51

4. *What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?*

An interesting commentary on this issue appears in a case in which the plaintiff alleged that employees of the federal Bureau of Biologics “knowingly approved the release of a lot” of a vaccine “that did not comply with safety standards.” Given allegations that the Bureau’s policy left “no room for implementing officials to exercise independent policy judgment,” the Supreme Court concluded that the protection afforded to the Government by the “discretionary function” exception of the Federal Tort Claims Act would not apply if the policy of the Bureau of Biologics “did not allow the official who took the challenged action to release a noncomplying lot on the basis of policy considerations.” *Berkovitz v. Berkovitz v. United States*, 486 U.S. 531, 546–47 (1988).

52

At least at the abstract level, it is probable that an official who acts in compliance with a legal rule in whose legality he believes would have a “qualified immunity”. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Cf. *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986) (dividing holdings with respect to initiation of wiretap and continuation of tap for more than a year).

5. *If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?*

- 53 The fact that an administrative law provides penalties for its breach will not necessarily prevent a tort claim, assuming that there is no evidence that the legislature intended the rule to be preemptive of tort actions. Arguably the purposes of the administrative law – including the criminal provisions of safety statutes – are different from those of the tort law: for example, such statutes typically do not provide a compensatory remedy for persons injured by violations of rules. However, I would suppose that in jurisdictions in which violation of an administrative law is evidence of negligence, a defendant might be able to introduce proof of the relatively light sanctions provided by administrative law in order to argue that it was not negligent in the circumstances.

6. *Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?*

- 54 a) If this question refers to rules that specifically protect vulnerable classes of persons against specified types of harm, such rules would have a particularly powerful effect. See Essay section II(5).
 b) If this question refers to the issue of whether the violation of a rule falls within the purpose of the rule: There is a complex body of law on this subject, summarized in Restatement (Second) of Torts § 286, 288, which refer to the question of whether the purpose of a statute was to protect (e.g.) a particular class of person from a particular type of harm. A spirited controversy in this area appears in the conflicting opinions in *Kernan v. American Dredging Co.*, see Essay section II(9).

7. *If an administrative law rule binds a legal entity, who is responsible for a failure to comply with this rule? If an individual within the organisation of the entity has to bear the respective criminal or administrative liability, does this also result in that same person being held liable in tort? How does such a liability interact with the vicarious liability of the legal entity?*

- 55 The liability of officials depends on whether they have absolute immunity or qualified immunity. Illustrating the clash of views on this topic are *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity for President for “acts within the ‘outer perimeter’ of his official responsibility”) and the *Mitchell* and *Halperin* cases cited in marginal 52.

8. Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?

Perhaps the major controversy in this area concerns the definition of the “discretionary function” of governments – for example, under the Federal Tort Claims Act and state tort claims acts. Illustrating the complexity of the federal law on this subject are *Dalehite v. United States*, 346 U.S. 15 (1953) (no liability) and *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (liability). A particularly interesting case, in the dramatic setting of illness attributed to exposure to fallout from atomic bomb tests, is *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987), in which the court found the government immune under the discretionary function exception. It did this despite several “deviations” from the government’s own program to protect downwind inhabitants from fallout. See McKay, C.J., concurring, *id.* at 1425. It is specifically worth noting that the Supreme Court has immunized the federal government from claims under the Federal Tort Claims Act that are based on strict liability. See *Laird v. Nelms*, 406 U.S. 797 (1972).

56

II. Safety Regulations and Provisions Aiming at Environmental Protection

1. Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?

From time to time they would be very important, along the same lines as described in marginal 51 above.

57

2. In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?

The two types of law would diverge for the reasons described in marginal 53 above. One reason would be that administrative rules aimed at environmental protection do not necessary focus on, or even deal with, compensation for injured individuals.

58

3. Are these regulations and provisions *per se* regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?

In probably a majority of jurisdictions, the violation of an administrative rule is, like violation of a statute, evidence of negligence. In jurisdictions where the violation of a statute has a stronger effect, generally the violation of an administrative rule would still be only evidence of negligence. See also sections II(8)–(9) in the Essay.

59

4. If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.

- 60 There is a range of statutory schemes that require liability insurance of those who engage in risky activities. These schemes include outright requirements of liability insurance for people who apply for drivers' licenses and the "financial responsibility" laws that require people who have had vehicle accidents to show that they have insurance. In the environmental area, the CERCLA statute requires firms dealing with hazardous wastes to show proof of financial responsibility, see 42 U.S.C.A. § 9608(a), (b).

III. Fault-Based Liability

A. A Breach of Administrative Law Rules

1. What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?

- 61 See Essay section II, generally.

2. Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?

- 62 In some cases the breach of a rule alone may be deemed to be fault, without an independent showing of fault. See Essay section II, especially sub-sections (5)–(8).

3. If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?

- 63 See Essay section II(9).

4. To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?

- 64 I would suppose that a defendant would be allowed to present this proof. The defendant would argue that because there was no showing of causation in fact, it would not be a tortfeasor.

5. What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?

- 65 This would depend on the jurisdiction. In some jurisdictions, a judgment that violation of a rule is "negligence per se" or creates a "presumption" of negligence will have burden-shifting effects. See also Essay sections II(6)–(7).

6. *Can a breach of an administrative law rule result in a claim for punitive damages?*

Breach of an administrative law rule could lead to punitive damages if the plaintiff is able to show that the defendant's conduct rose to the level of egregiousness or reprehensibility required by the applicable law. The states vary in the terminology they use to set that standard, with some of the more recurrent language being terms like "outrageous conduct" or conduct in "flagrant disregard" of the plaintiff's rights. 66

B. Acting in Compliance with Administrative Law Rules

1. *Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?*

There is a range of answers to this question. See Essay section III. 67

2. *Can the general duty of care go beyond these rules?*

See Essay section III. 68

3. *Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?*

In states where compliance is only evidence of no negligence, it probably would simply be an evidentiary question. 69

IV. Compensation from Other Sources

1. *Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?*

CERCLA allows suits by private individuals, as well as the Government, to recover cleanup costs for pollution. Outside the environmental area, a notable example is the Consumer Product Safety Act, which allows private individuals injured by violations of agency rules to bring private actions. See generally Essay section IV (*supra* no. 48), text accompanying footnotes 83–84, 86. 70

2. Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?

- 71 The most straightforward example of compensation for legally permitted activity is the provision in the Fifth Amendment of the United States Constitution that says "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V.

V. Some Cases

1. In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

- 72 I should think there would be no case against the government. It is hard to see, also, that there could be a case against the plant operator. This is not simply a case of an activity that is generally permitted by law, but one in which, by hypothesis, the government has given a quantitatively defined permission. To be sure, it could be argued that the level of gases is negligent under a risk-utility or cost-benefit analysis, or is a nuisance. As pointed out above, compliance with governmental standards is not necessarily dispositive on the question of fault. However, given the terms of the Problem, it seems likely that the particularity of permission would undermine the plaintiff's suit. It would appear from the Problem that this is not an abnormally dangerous activity that would qualify for strict liability treatment.

2. A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

- 73 Obviously there could be liability if the visitor could show independent grounds on which to base a showing that the workshop owner violated the common law standard of care. It would appear that the visitor could offer the statute as one piece of evidence of negligence, with the workshop owner having the opportunity to offer his own evidence that he was not negligent in the circumstances.

3. *Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.*

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

The injured person could employ the regulations in support of a tort suit, under whatever state law standards applied with respect to the tort consequences of regulatory violations. In all probability, the plaintiff could at least show that violation of the regulations was evidence of negligence. The agency's lack of supervision certainly cannot be taken as approval of a violation of existing regulations. Particularly negating any legal force that the defendant could derive from the lack of supervision are the limited investigative and enforcement resources typically available to such agencies.

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b) Could the injured persons claim damages from the government agency?

The injured person probably could not recover damages from the agency. This kind of decisionmaking likely would be judged to be a "discretionary function", especially given "limited enforcement resources". See *Irving v. United States*, 162 F.3d 154, 168–69 (1st Cir. 1998).

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Special Reports

ADMINISTRATIVE TORT IN ITALIAN LAW: LIABILITY OF PUBLIC ADMINISTRATIONS AND DILIGENCE OF PRIVATE INDIVIDUALS

*Fabrizio Fracchia**

I. Administrative Liability in Italian Law: An Overview

Even in Italy, by wrongly refusing a licence, or by failing to properly exercise their powers, public authorities can cause damage to private individuals. 1

This obvious remark allows us to outline the field that this paper aims to review: the unlawful damage arising from an administrative act which has infringed administrative rules¹ (in other words: the liability of the administrations) 2

Indeed, it is necessary to point out, at first, that the most relevant theoretical problems concern this matter (tort linked to an administrative act), rather than the liability caused by “facts” (operational acts). 3

Nevertheless, even in these cases, until a few years ago, there was no specific complexity in explaining the structure of the law of tort and the administrations’ liability. 4

Taking into account that in Italy liability and torts are traditionally addressed by applying general principles and rules (rather than on a case-by-case basis or on an overall system of torts), the legal framework used is art. 2043 Codice civile (Italian Civil Code, CC).² 5

Usually, consequences with regard to the burden of proof (it is up to the plaintiff to prove tort elements) and the term of prescription (five years) are stressed. 6

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¹ Administrative law determines the organization and the activities of administrative authorities: see *E. Casetta*, *Manuale di diritto amministrativo* (2006) 8 ff.

² Pursuant to this article “any fraudulent, malicious, or negligent act that causes an unlawful injury to another obliges the person who committed the act to pay damages”.

- 7 It is important to add that art. 2043 CC was, in the past, traditionally interpreted as a rule requesting the infringement of a subjective right: therefore, according to this view, only a violation of subjective rights would have entailed “unlawfulness”.
- 8 In addition to the civil system, five specific features of the liability of the administration have to be considered:
 - a) The existence of legitimate interests (*interessi legittimi*) which reflect a special standing of citizens in the legal system. Although the *interesse legittimo* enables people vested with it to claim a legitimate activity of public authorities, it does not ensure any guarantee of maintaining or obtaining the final outcome the individual is aiming at, as such outcome depends on an administrative choice. Individuals are often vested with *interessi legittimi*. Hence, in these cases, citizens could not have obtained any compensation for damage in a civil suit, because the claim was based only on the infringement of rights. In other words, the breach of a legitimate interest was not deemed sufficient to establish a civil liability for damage, and the illegality of an administrative action could not constitute a tort. Moreover, at least for a long period of time, when an individual sued an administration for damage arising from the breach of an *interesse legittimo*, asking an ordinary judge to hold the public body liable, the action was rejected by the same judge. The grounds used to be the lack of jurisdiction, due to the inexistence of a right. Hence, the *interesse legittimo* gave standing to bring action not before ordinary judges, but only before administrative judges, although the latter did not have the power to provide a remedy for damage. Indeed, only the civil judge was able to provide a remedy for damage.
 - b) The psychological requirement: in the past, in case of damage caused by unlawful acts, negligence was not deemed to be necessary on the grounds that an illegal act – in breach of a rule – entailed negligence (*culpa in re ipsa*). That meant a great advantage for the plaintiff, who did not have to prove the psychological element of the wrongdoer.
 - c) The illegality of the act: this is traditionally considered as a condition for establishing a tort, though such point is still disputed today.³
 - d) The relationship between public administrations and their servants. Indeed, the liability of public bodies was deemed as a category of direct responsibility (strict liability), emphasizing the so-called internal link between the organization and its servant (as an organ). Following such argument, the personal conduct of a servant could be attributed to his organization as a result of the organic identity relationship.⁴
 - e) Besides the liability of authorities, the liability of servants (towards both injured third parties and the authority which is compelled to compensate damage caused to the former). Such liability is submitted to specific rules

³ See A. Bartolini, Il risarcimento da attività amministrativa tra inadempimento, responsabilità precontrattuale e danno da contatto, *Urbanistica e appalti* (Urb. app.) 2003, 939 ff.

⁴ See M. Clarich, The Liability of Public Authorities in Italian Law, in: J. Bell/A.W. Bradley (eds.), *Governmental Liability: a Comparative Study* (1991) 231 ff.

laid down in statutes. The most important of these rules – at least for our purposes – is the one requiring not *culpa levis*, but gross negligence in order to fulfil the requirements of a tort. For this reason, individuals who are injured by an administrative activity usually prefer to bring an action against the public bodies instead of suing servants. Furthermore, such choice is due to the fact that public authorities are more solvent than their servants: indeed it is relatively easier to find assets submitted for execution with regard to administrative bodies rather than to servants.

II. Cassazione Decision of 22 July 1999, No. 500

Against this background, an important change of approach took place as a consequence of the Supreme Court decision no. 500/1999. 9

Said Court established that ordinary judges had jurisdiction with reference to tort disputes involving public authorities, and, above all, stated that the infringement of a legitimate interest was able to entail a tort. 10

In fact, the Court held that, alongside infringement of an *interesse legittimo* (that is to say: the illegality of the act), the public activity must have had an affect on a substantial interest placed under the protection of the law. Thus, focusing on the problem in detail, it cannot be said that the Court simply recognized the liability for the breach of a mere *interesse legittimo*. 11

Nevertheless, with regard to this enlargement of the compensation for the area of damage, the Court introduced a type of limited restraint referring to another element of the tort, thereby redrawing the map of public tort. In this respect, it was held that the psychological requirement was necessary to entail a tort and, as a consequence, it could not be identified in the mere illegality of the act. However, it was established that this tort assumption did not have to refer to the negligence of a servant, but directly to the organization.⁵ 12

Moreover, Cassazione (Italian Supreme Court, Cass.) no. 500/1999, highlighted that the ordinary judge had the power to *disapplicare* an illegal act (that is to say: to settle a dispute as if the act had produced no effect), which excluded the fact that a condemnation for liability was subordinate to the prior invalidation of the illegal act. 13

In order to justify the jurisdiction of the ordinary judge (based upon rights, as previously explained), the Court established that a right always existed: it was the right of each individual to be compensated for damage as a consequence of a tort. 14

⁵ See S. Tarullo, La colpa della pubblica amministrazione nel nascente modello di responsabilità risarcitoria per lesione dell'interesse legittimo. Proposte e prospettive, Tribunali amministrativi regionali 2001, II, 193 ff. Precedently, see E. Cannada Bartoli, Introduzione alla responsabilità della pubblica amministrazione, in: E. Cannada Bartoli (ed.), La responsabilità della pubblica amministrazione (1976) 18 ff.

- 15 It is worth noting that the decision at issue showed the continuing significance of the *interesse legittimo*, since the tort was based upon it. This occurred at a time when some authors objected to the fact that the distinction between subjective rights and legitimate interests appeared useless, even holding that *interesse legittimo* had lost any utility in the scientific debate, especially taking into account European law, which does not know such a concept.⁶

III. From Tort Law to Contractual Liability

- 16 Once the liability of a public administration for the infringement of an *interesse legittimo* was recognized, many legal scholars and judges began to look for new approaches. In particular, some gave up the scheme based upon *interesse legittimo* and returned to subjective rights.
- 17 For instance, some legal scholars invoked the contractual liability of public authorities, stressing the fact that a previous binding relationship would have existed between the administration and the injured part. Such relationship would be based upon the administrative proceedings from which subjective rights would have arisen.
- 18 More generally, a large range of tort patterns was brought out.
- 19 Such increase of responsibility frames, at least at the beginning, was due to the *giurisdizione esclusiva* extension. In such respect, it must be clarified that, with reference to specific fields (such as public services), the Law No. 205/2000 established the competence of administrative judges for disputes involving both subjective rights and *interessi legittimi*. The controversies concerning the liability of administrations also fell into the administrative jurisdiction.
- 20 In these cases (called *giurisdizione esclusiva*), the decisions issued by the *Consiglio di Stato* (that is, the second level of our administrative jurisdiction) could

⁶ An important element of the tort does not seem to be particularly considered by the Court: the causal connection between the authority's wrongful conduct and the individual's injury. Indeed, this is a question which has not been properly addressed even by scholars: theoretical problems arise when such element has to be considered taking into account the presence of an illegal act. The link between an enacted act and damage should be recognized only when the latter is the realisation of the risk that the infringed provisions (causing the illegality of the act) aimed to avoid. Consider the following example: an authority does not give a reason for its decision (e.g. the refusal of a license) which is, nevertheless, correct by merit. Given that, even respecting the provision (in Italy: art. 3, Law No. 241/1990) which obliges public authorities to give reason, the decision would not have been different, it is hard to uphold that damage suffered by the applicant is a consequence of the illegality. In other words, the infringed provision was not enacted for the protection of citizens' interests. Thus, damages do not correspond to the risk which the provision wanted to avoid. This view leads to the conclusion that liability is determined only by substantial defects. A wrong decision, indeed, could be considered as the real cause of the damage suffered by the citizen. Once more, a judicial decision condemning public authorities cannot be obtained on the grounds of a mere *interesse legittimo* infringement: it depends on the kind of defect affecting the act.

be appealed before the Supreme Court only on jurisdiction grounds. As a consequence, such Court had no power to invalidate decisions of administrative judges for violations of law. So new legal models – of course, even beyond tort field – could be shaped by this judge without any possibility of control by the Supreme Court.

This situation encouraged several attempts, headed by administrative judges, 21
to define new tort models.

Nevertheless, while courts showed some confusion and misgivings about 22
which tort model to apply, sometimes mixing up various schemes (especially tort and contractual liability⁷), scholars adopted solutions much clearer and defined, paving the way to a standard classification of the respective theories into different frames.

The quoted tendency towards an enlargement of the responsibility schemes 23
seems to be based upon the necessity to face specific needs, rather than the strict respect of the principles expressed by Italian law: protection of the injured party, proper shelter of procedural interests (that is to say: the interests placed within an administrative proceeding and not protected by the quashing of the final act), and so on.

In fact, an increase in the demand for tort models can be revealed: the problem 24
is whether the answer (i.e. the supply of tort models shaped by judges and scholars) is proper and suitable to meet the needs.

IV. Tort Law and Non-Performance of Obligations: The Problem of Fault

At this point a focus on the contractual responsibility applied to the liability of 25
public administrations is worthwhile.

We have already explained that – at least from one point of view – this pattern 26
looks at the past, since it stresses once more the importance of the subjective rights entrusted to injured individuals.

⁷ See Consiglio di Stato (Council of State, C. Stato), sezione (section, sez.) V, 6 August 2001, no. 4239, *Foro italiano* (Foro it.) 2002, III, 1 ff., commented by *V. Molaschi, E. Casetta and F. Fracchia*; Cass. 10 January 2003, no. 157, *Foro it.* 2003, I, 78, commented by *F. Fracchia*.

- 27 According to this approach (also called *responsabilità da contatto sociale qualificato*), which is advocated by many scholars,⁸ some obligations would arise from the mere contact between a public body and an individual as a consequence of the commencement of administrative proceedings.
- 28 This idea is based upon the fact that the sources of obligations may be both agreements and any other act or fact able to create them according to the law.
- 29 Thus, the illegality of an administrative act, caused by the violation of rules, would be equal to a non-performance of an obligation and, at least from the abstract point of view, would determine responsibility.
- 30 Without any doubt, this model has the merit of highlighting the fact that public bodies cannot be regarded as a lay subject with respect to the injured citizen, for the good reason that a contact between the two parties has already been created by the procedure.
- 31 However, the relationship produced by an administrative proceeding (submitted to the Law No. 241/1990) is not a binding link in the contractual meaning, since the recognition of the final interest depends on public choices.⁹
- 32 Furthermore, in accordance with the Italian Civil Code, the object of an obligation must necessarily be a performance, but it is hard to assume that the authority's "performance" corresponds to the interest of an individual-creditor, for the simple reason that the infringed rule does not directly protect private interests.
- 33 This theory leads to the consequence that, in every case of procedural contact between a public administration and an individual, an obligation is – almost magically – generated, without considering some elements, such as the features of the concrete case, the quality of the two parties, the strength of the private party and his behaviour, the difficulty for the authority to find a solution, and so on.

⁸ Among many, see C. Castronovo, *Le frontiere mobili della responsabilità civile*, Rivista di diritto privato (Riv. dir. priv.) 1989, 587 ff.; C. Castronovo, *L'obbligazione senza prestazione ai confini tra contratto e torto*, Le ragioni del diritto, Scritti in onore di L. Mengoni, I (1995) 150 ff.; C. Castronovo, *La nuova responsabilità civile* (2000) 177 ff.; G.D. Comporti, *Torto e contratto nella responsabilità civile delle pubbliche amministrazioni* (2003); L. Ferrara, *Dal giudizio di ottemperanza al processo di esecuzione* (2003); M. Protto, *La responsabilità per lesione di interessi legittimi come responsabilità da contatto amministrativo*, Responsabilità civile e previdenza (Resp. civ. e prev.) 2001, 235 ff.; M. Cavallaro, *Potere amministrativo e responsabilità civile* (2004). See also F. Figorilli, *Il contraddittorio nel procedimento amministrativo (dal processo al procedimento con pluralità di parti)* (1996) and A. Zito, *Il danno da illegittimo esercizio della funzione amministrativa* (2003).

⁹ Indeed, scholars assume that, faced with the obligation, a subjective right exists having as object not a performance related to the final interest, but a fair dealing.

Moreover, following the thesis at issue, every violation of procedural rules would cause a non-performance of an obligation and, as a consequence, would generate the liability of administrations. Therefore, all individuals who are involved in administrative proceedings (insofar as the rules produce some effects for them – for example, the rule which imposes the duty to give reason), in theory, might be deemed as the victims of a tort, independent of the kind of interest and the standing that they have. This fact would imply a relevant enlargement of the liability area, far beyond traditional limits. 34

Instead, it seems that the liability of administrations must be recognized only when the citizen can show that a particular interest, allocated outside the proceeding path and suitable to be singled out regardless of procedural perspective, was affected. The necessity of the existence of an infringement of a substantial interest in addition to illegality comes from the latest statements. According to these, the judge can be asked to hold the administration liable for damages only if the plaintiff demanded – within a very brief term of 60 days – the quashing of the act (such principle is called *pregiudizialità*). This implies that reparation for injury may not be obtained by all individuals, but only by those who are vested with an *interesse legittimo*. 35

In any case, looking at the decisions of the administrative judges, a person could remark that the adoption of the contractual liability pattern merely shifts the problem of the liability boundaries at the moment of the quantification of the damages. In this respect, it must be said that, even when the responsibility has been deemed entailed, in order to condemn a public authority, the judge has to assess the amount of damages. At this stage, he shall consider the perspective and the chances of satisfaction that assist the individual's standing and legitimate expectations. 36

Thus, we can assume that the most notable consequence linked to the *responsabilità da contatto* theory (or, generally speaking, to the liability for non-performance) is not the enlargement of the concrete liability area with regard to affected interests; instead, it must be found with reference to two other elements: the term of prescription and the psychological requirement. 37

Recte: since many decisions of administrative judges have recently introduced the rule of the *pregiudizialità* – in so doing, obliging the plaintiff in a tort case to require the prior quashing of the act – actually, regardless of the liability pattern, individuals have to bring an action within the above mentioned brief term of 60 days. 38

Thus, the real problem (or the original aspect of the opinion here criticized) seems to be the psychological one. 39

Indeed, under art. 1218 CC, the debtor (in this case: the authority) will be liable for damages relating to its failure of performance (illegality, in accordance with *responsabilità da contatto*) if it does not prove that the non-performance 40

was determined by a cause not attributable to it. In other words, the individual is relieved of the onus of proving negligence or intention¹⁰ of the administration, and the administration has to prove what is required by art. 1218 CC.

V. Why Should Fault be Provided?

- 41 In order to focus on the issue of negligence, we start by analysing the role of this tort element.¹¹
- 42 At first, one must give up a moralizing outlook according to which the negligence would reflect an evaluation of blameworthiness relating to the behaviour and the tort would solely have a punishment function. In Italy such an approach is wrong for the simple reason that, as said above, our law establishes the authority's liability as well as the servant's liability, demanding for the latter gross negligence and not mere negligence. Since actions are always performed by individuals, insofar as gross negligence is not involved, the model does not discourage the behaviour of servants which occurred by chance. Hence, the tort moralization function (relating to servants) disappears completely.
- 43 Thus, the liability function has to be discovered by a different reasoning and upon different grounds.
- 44 It was stated above that fault has a remarkable significance in some fields, such as the adoption of disciplinary measures, and now we shall consider negligence from a specific point of view, that is as a rule which allows allocating the onus of diligence between the wrongdoer and the victim, taking into account the features of the individual case.
- 45 The awareness that the authority is held liable for damages only in case of its own negligence implies for the victim a very strong impulse to use diligence in order to avoid the occurrence of damage¹² and, more generally, to be careful with regard to the relationship with the authorities. Indeed, the citizen knows

¹⁰ See *R. Caranta*, From fault to illegality: shifting patterns in governmental liability, in: *A. Gambaro/A.M. Rabello* (eds.), *Towards a New European Jus Commune, Essays on European, Italian and Israeli Law*, in occasion of 50 years of the E.U. and of the State of Israel (1999) 621 ff.

¹¹ More generally, about the function of tort, see *J. Bell/A.W. Bradley*, *Governmental Liability: a Preliminary Assessment*, in: *Bell/Bradley* (eds.) (fn. 4) 11 ff.; about the asocial and social view of responsibility, see *D. Howarth*, *Three Forms of Responsibility: on the Relationship between Tort Law and Welfare State*, *Cambridge Law Journal* (CLJ) 2001, 552 ff. We have to consider that, in the Italian system, the problem is complicated by the fact that the tort pattern might also be invoked in order to claim (as remedy) the authority's original and specific performance (e.g. the issuing of an act): see *D. Vaiano*, *Pretesa di provvedimento e processo amministrativo* (2002); *F. Trimarchi Banfi*, *Tutela specifica e tutela risarcitoria degli interessi legittimi* (2000); contra: *A. Travi*, *La reintegrazione in forma specifica nel processo amministrativo fra azione di adempimento e azione risarcitoria*, *Diritto processuale amministrativo* 2003, 222.

¹² *P.G. Monateri*, *Responsabilità civile*, *Digesto IV*, discipline privatistiche (disc. priv.), sezione civile (sez. civ.), XVII, 1998, 2 ff.

that he will incur the risk of bearing damages if the administration's conduct is diligent and such an event becomes an important self-protection factor.

The opposite pattern of strict liability (which occurs when there is no need to prove the wrongdoer's negligence), on the other hand, is based upon the ground that only one party can protect the other one.¹³ This situation, at least in many cases, cannot be found when individuals are involved in the activity of the authorities.¹⁴ 46

It is quite interesting to highlight the fact that, among legal scholars, no real concern about the private party's diligence is usually found, although many (those who support the *responsabilità da contatto sociale qualificato* theory or invoke the liability for non-performance) claim a perfect equality between individuals and public bodies, which should lead to stress not only rights, but also duties. 47

Of course, somebody might object that for citizens the relationship with the public authority is not a choice, given that, to some extent, they are compelled to participate in the administrative activity. However, taking into account the great amount of various situations that might occur, it seems impossible to fit all these cases within only one pigeonhole, especially without considering that sometimes it is the private individual who appears stronger than the authority. 48

From this point of view, our proposal is to consider each single case in great detail, instead of adopting a general model which always leads to liability as a consequence of mere contact. 49

VI. Liability and Reduction of Inefficiency, Disorganisation and Illegality

As outlined above (supra no. 42), the function of liability is not the moralization of servants, since they are responsible only for grossly negligent conduct. 50

Having said that, we can add that the tort structure, here prompted, emphasizes the importance of liability in order to reduce administrative inefficiency, disorganization and illegality. 51

Authorities shall be liable for damage when the activity is performed without diligence: given that the psychological element must be referred to natural individuals, we can notice that public liability shall arise (automatically) when 52

¹³ More generally, see P. Trimarchi, voce Illecito (diritto privato (dir. priv.)), Enciclopedia del diritto (Enc. Diritto), XX, 1970, 90 ff.

¹⁴ Moreover, the imposition of strict liability seems an important impulse to push out of the market those companies unable to produce by considering and by facing the consequences of their behaviour, while, as regards authorities, we are dealing with bodies, whose existence is necessary according to the law, which pursue public goals regardless of market perspectives.

servants – who in fact carry out the action – commit the fact with negligence (see also *infra* no. 70).

- 53 The paradox which arises from the above described situation is that a diligent conduct may be useful and convenient for the organization, but not for the servant (relating to his tort), since the latter can be held liable only for gross negligence and he is neither punished nor rewarded – from the point of view of civil responsibility – with regard to the fact that his conduct appears negligent or diligent.
- 54 Nevertheless, even for this reason, administrations have an incentive to increase control over their staff. As organizations run the risk of being held liable for the damage caused by their servants' misconduct (without any possibility to be relieved of the obligation to compensate the injured person), they are encouraged to use every means available to them in order to avoid inefficiency, disorganization, illegality and – more generally – the negligence of their servants.
- 55 The mentioned incentive towards efficiency occurs every time the authorities' liability is wider than that of the servants. As the liability of the servants is established when the behaviour is grossly negligent, the consequence at issue – tort – happens, without any distinction, in case of both mere fault liability and strict liability of public bodies. The choice between these two models must be made considering not the “administrations-servants”, but the “administrations-citizens” relationship.
- 56 In such respect, as already said, the negligence rule which is applied to the authority's liability induces both parties (authority and individuals, especially if the latter cannot be described as “innocent victims”: see *infra* no. 58) to use diligence in their relationship, thereby avoiding the assumption – in a quite automatic way – that, in any case, contacts generate obligations.
- 57 Finally, the rules, according to which a servant is held directly liable only for gross negligence, remove the fear of public officers of incurring liability while exercising their public functions.
- 58 It is worth noting that the approach at issue cannot be forced without limit. Indeed, it is hard to assert that, in the real world, a private individual (intended to represent the “ordinary man”) perceives a specific onus of diligence as a consequence of a particular fault rule provided by the law. Hence, the psychological requirement, actually, ends up standing out as a mere element highlighting a blameworthy behaviour. On the contrary, when an administrative proceeding aims at granting a licence to carry out relevant economic activities, typically it involves private individuals who are particularly strong and “equipped”. It is with respect to these potential victims of a tort that the incentives/disincentives pattern of liability may assume a considerable importance.

VII. Liability for the Conduct of Another Person (Vicarious Liability)

In the Italian legal system, there is a rule which seems to reflect the different aspects above outlined.¹⁵ We are referring to art. 2049 CC that provides a “vicarious liability” with regard to employers for the acts (torts) of their workers.

Moreover, since this article emphasizes the servant figure, it sounds closer to the constitutional discipline of administrative liability¹⁶ than the other frames set forth by the other articles of the Italian Civil Code.

Applying the scheme arising from art. 2049 CC to the administrative tort, we might assume that, regardless of the general concept of contact, only if a tort committed by a servant exists (according to the common rule of tort described by art. 2043 CC¹⁷), does an obligation to compensate damage arise and authorities can, without a doubt, be deemed as responsible.

Following from this, we can easily explain why administrations must be held liable for every tort of their servants, as a sort of guarantor. This, however, is not supported by the majority of Italian scholars.¹⁸

In this respect, we highlight that the application of art. 2043 CC creates a problem in ascertaining if the misconduct of a servant may be considered as a conduct of the same authority. For instance, complex difficulties arise when a servant commits the fact intentionally: some decisions state that, in these cases, the link with public bodies (organic identity) is broken and the activity cannot be attributed to the organization. In order to avoid this unfair result, judges rule that conduct may be attributed to authorities if their servants, acting within the scope of their employment (hence, when a “necessary con-

¹⁵ As regards the USA system, see *S. Carroli*, *La responsabilità vicaria della pubblica amministrazione in Italia, Stati uniti e Inghilterra, Responsabilità comunicazione e impresa* (2003) 161 ff.

¹⁶ Art. 28, indeed, provides that: “State officials and employees of other public bodies are directly responsible under criminal, civil and administrative law for acts committed in violation of rights. Civil liability extends to the State and public bodies”. It is clear that such provision emphasizes the figure of servant and, only at a second step, extends his liability to public bodies. Generally, see *Clarich* (fn. 4) 233 ff.

¹⁷ The feature of this pattern is that, in order to entail authority responsibility, a tort does exist, although servants are not liable for it, since, as said above, the law also requires gross negligence of servants.

¹⁸ The thesis outlined in the text was developed by *E. Casetta*, *L'illecito negli enti pubblici* (1953); *E. Casetta*, voce *Responsabilità civile della pubblica amministrazione*, *Enciclopedia giuridica Treccani* 1991, XXVI, 1 ff.; *E. Casetta*, voce *Responsabilità della pubblica amministrazione*, *Digesto discipline pubblicistiche* (Digesto pubbl.) 1997, XIII, 210 ff.; *Casetta* (fn. 1) 601 ff. See also *A. Torrente*, *La responsabilità indiretta della pubblica amministrazione* (appunti), *Rivista di diritto civile* (Riv. dir. civ.) 1958, I, 27 ff.; *R. Alessi*, voce *Responsabilità civile dei funzionari e dei dipendenti pubblici*, *Novissimo digesto* 1968, XV, 662 ff.; *R. Alessi*, *L'illecito e la responsabilità degli enti pubblici* (1972) 46 ff.

nection" between the activity and the task exists), do not aim at any strictly egotistical goal.¹⁹

- 64 The opinion here outlined, instead, gives protection to the individual's reliance merely observing that the servant's action within his competence, under art. 2049 CC, ties the authority. It also covers the most crucial – and worthy of more protection with regard to injured individuals – situations, that is to say the ones in which the servant acts in an intentional way.²⁰
- 65 Furthermore, there is another doubt relating to the use of art. 2043 CC: in order to assume that the servant's tort becomes a tort of the authority, this theory implies that every activity performed by a servant is suitable to be attributed to his organization, regardless of the fact that he is strictly speaking an organ (as such vested with the competence to act and produce direct effects for the authority) or a regular servant. In so doing, however, such thesis is not coherent with the Italian general opinion according to which only organs can lend their will to and act for the entity.
- 66 As a consequence, it appears easier to refer to art. 2049 CC and to say that authorities are vicariously liable for the conduct of other persons,²¹ removing the fiction according to which they are responsible for their own conduct and eliminating the difficulties of perceiving a same fact (tort) as a source of two direct liabilities (relating both to the authority and to the natural person).

VIII. How to Detect Negligence (and to Find the Individual Liability) with Regard to a Procedural Activity Performed in a Complex Organization

- 67 A serious objection which might be directed to the above outlined opinion is that it is often quite difficult to find the person who in practice acted negligently, given that administrative activities are enforced by many servants within a very complex structure. Thus, damage appears to arise from an overall situation under the influence neither of the servant nor of the victim. Furthermore, disorganization lies beyond the control of the injured party and therefore it sounds unfair to impose on such party a specific onus of diligence in order to avoid the damage thereof.
- 68 However, a way to overcome this problem might be found by assuming that the proof of negligence can be given by relative presumptions.

¹⁹ For instance, see Cass., sez. III civile, 12 August 2000, no. 10803, *Foro it.* 2001, I, 3289; Cass. 26 June 1998, no. 6334, *Corriere giuridico* 1998, 1029.

²⁰ With regard to this concern, see *F. Merusi/M. Clarich*, *Rapporti civili*, art. 28, in: G. Branca/A. Pizzorusso (eds.), *Commentario della Costituzione* (1991) 356 ff.; *M. Clarich*, *Sul modello di responsabilità civile dell'art. 28 Cost.* (spunti da un confronto con le esperienze straniere e con la prassi interpretativa), *Giurisprudenza costituzionale* (Giur. cost.) 1987, I, 1870 ff.

²¹ In general, see *L. Corsaro*, *Responsabilità per fatto altrui*, *Digesto civile* (Digesto civ.) 1998, XVII, 383 ff.; *L. Corsaro*, voce *Responsabilità civile*, I. *Diritto civile*, *Enciclopedia giuridica* Treccani 1991, XXVI, 21 ff.

In other words, the individual who obtained a quashing of a decision would have the possibility to avail of such result: the illegality of the act might be deemed as an element from which negligence can be deduced.²² Indeed, the illegality might be regarded as a “serious” and “precise” circumstance, as provided by art. 2729 CC. 69

As a consequence, it would be up to the authority to prove the contrary (the absence of negligence with regard to the servant who in fact acted), thus moving away from the previous trend, according to which the illegality would have automatically entailed the negligence requirement. 70

Of course, somebody might observe that the outcome thereby achieved is not so far from the theory based upon the *responsabilità da contatto*. 71

However, from the theoretical point of view, it is not exactly the same to prove that there is no negligence and to prove that the non-performance of an obligation has been determined by a cause not attributable to the authority (art. 1218 CC). 72

Apart from other remarks (based, for instance, upon the different meaning of the two sentences set forth by art. 2043 and 1218 CC), in the former case the research is focused on the natural person, in the latter on the entity towards whom the obligation exists. 73

More generally, we wish to avoid the problem of referring (more or less directly) to entities’ negligence, which is a psychological requisite.²³ 74

However, it is primarily case law that provides support to the above outlined theory. 75

IX. Case Law and Responsibility Selectors

At this point, it must be observed that judges have introduced some responsibility selectors (to reduce the tort area) and some specific rules (to help injured individuals): it is up to scholars (it is their “responsibility”) to make an effort to put them in a systematic way. 76

The reasoning here implemented aims at achieving this goal. 77

We have already mentioned the decisions which intend to ease the injured citizen’s onus of proving that the conduct of servants can nevertheless be consid- 78

²² See C. Stato, sez. V, 6 August 2001, no. 4239 (fn. 7) 1 ff.; C. Stato, sez. VI, 19 November 2003, no. 7473; sez. VI, 12 March 2004, no. 1261, Urb. app. 2004, 799 ff. Contra the opinion according to which gross illegality is equal to the negligence, see *R. Caranta*, La pubblica amministrazione nell’età della responsabilità, *Foro it.* 1999, I, 3201 ff. More generally, see *M. Comporti*, Le presunzioni di responsabilità, *Riv. dir. civ.* 2001, I, 650 ff.

²³ See *F.G. Scoca*, Per un’amministrazione responsabile, *Giur. cost.* 1999, 4052 ff.

ered as the actions of authorities, although officers acted pursuing their own interests. Judges reach this result enlarging the concept of organ and introducing the idea that a conduct may be attributed to the authority when it was undertaken within the performance of the public competences. We have, instead, suggested using art. 2049 CC: in so doing, perhaps, the needs which judges wanted to address might be better satisfied.

79 As for the rule of the *pregiudizialità*, the respect of which is required by administrative judges,²⁴ it may be considered as a device devoted to:

- ascertain that an illegal act was performed;
- point out, as a consequence, a presumption with respect to the proof of negligence;
- limit the range of plaintiffs (only those vested with *interesse legittimo* have standing to bring action for condemning authorities), thus playing a role of “selector”;
- make, through deeper analysis, a significant connection between the injured individual’s behaviour and the area of authorities’ liability: such individual knows that, if he does not bring the action within a brief term, damages will befall him, albeit he is the victim.

80 With regard to the (linked) requisite of illegality – apart from the fact that, assuming that a legal act can generate unlawfulness, there would exist a breach of the principle according to which the same conduct cannot be considered by the law admitted and nevertheless unlawful – we can observe that:

- it is relevant in order to limit plaintiffs’ range;
- it encourages the authority to implement its controls to avoid invalid actions, since if an act is valid, the public body will not be deemed liable. In other words, illegality becomes a condition for liability, thus preventing the risk that authorities have the pressure of avoiding individual damages, rather than to pursue in a legal way public interests;
- it also encourages individuals to use their diligence to limit damage in case of valid acts;
- it protects the authority from the risk that, in a liability trial, courts substitute their own view of the merit for that of the decision-maker; for instance, if there is no misuse of discretionary power (so-called *eccesso di potere*), the problem of liability cannot arise and the Court cannot exercise control.²⁵

²⁴ With regard to the Court of Cassation, however, see sezioni unite (United Sections, sez. un.), no. 10180/2004, Foro it. 2004, I, 2738 ff., according to which the rule does not exist. See also Cass., sez. un., no. 5078/2005 and ordinanza (ord.), no. 6745/2005.

²⁵ A similar problem is decided in *Dorset Yacht Co. Ltd. v. Home Office* [1970] Appeal Cases (A.C.) 1026.

Finally, we revert to the aspect of negligence,²⁶ required also in other systems, such as in the English one.²⁷ 81

Invoking a presumption, the weaker party is not placed in a disadvantaged condition in proving a requisite which must be related to a specific servant whom the citizen could not be able to identify. 82

In this respect, judicial decisions show that, in order to overcome the presumption of negligence, the authority has to prove the existence of an excusable mistake (in an *ex ante* assessment). 83

Such mistake, for instance, arises either when the applied law is obscure, unclear, ambiguous, or when the situation is extremely complex, never judged before by any Court, or again when there is no established judicial precedent or when there are decisions that, however, do not maintain the same interpretation of a rule given by an authority.²⁸ 84

The most relevant aspect of the trend at issue is that this kind of mistake (that cancels the fault) can be found only with regard to the activity: it is not related to the organization. 85

In other words, even if the problem is not clearly addressed, the organizational defects (we might think of the absence of evidence due to a lack of servants within the entity) do not sound as errors which can exclude fault. 86

Such a result is perfectly consistent with the above mentioned liability function (namely “auto-protection”): the organization structure, indeed, cannot be “influenced” by individuals to avoid damage, hence it would be unfair to put upon them whatever onus of diligence related to this aspect. 87

On the other hand, given that liability is linked to a servant’s activity in a specific situation, it seems easy to observe that the psychological requisite of tort (and the related problem of the excusable mistake) must be examined with regard to the activity, without referring to the organization. Indeed, only the former element “interferes” with the sphere in the servant’s control. 88

²⁶ As regards negligence as selector of liability, see *L. Torchia*, La risarcibilità degli interessi legittimi: dalla foresta pietrificata al bosco di Birnam, *Giornale di diritto amministrativo* (Giornale dir. ammin.) 1999, 848 ff.

²⁷ See *D. Fairgrieve*, The Human Rights Act 1998, Damages and Tort Law, Public Law 2001, 698 ff.; *Carrolli* (fn.15) 151 ff.; as regards the French system, see, instead: *N. Brown/J. Bell*, French Administrative Law (1998) 193 ff.; as to the USA system, see *G. Bognetti*, La responsabilità per tort del funzionario e dello Stato nel diritto nordamericano (1963).

²⁸ See, for instance Cass. 9 February 2004, no. 2424 (although talking of organizational fault); Cons. Stato, sez. IV, 14 June 2001, no. 3269; sez. VI, 4 November 2002, no. 6000; 3 April 2003, no. 1716 and Tribunale Amministrativo Regionale (Regional Administrative Court, TAR) Puglia, Bari, sez. II, 18 July 2002, no. 3399, www.giustizia-amministrativa.it. A survey might be seen in *G. Saporito/M. Pagliarulo*, L’amministrazione paga se c’è colpa, www.giustit.ipzs.it.

- 89 However, in my opinion, some organizational defects could fall in the area of a servant's responsibility, at least to the extent of the problems which might be overcome using the increased powers that Italian law has conferred to them, according to the latest reforms.
- 90 Nevertheless, the most important example of excusable mistake concerns the interpretation of the activity and cannot be perfectly overlapped with the act's illegality.
- 91 Thus, even faced with the illegality of an act, it might be said that the tort cannot exist (and the public liability cannot automatically arise), when servants act within a grey area, which may be encompassed regarding the features of every individual case.²⁹ As a consequence, the judge must see the specific situation and even the behaviour of both parties. From this perspective, the participation increases in importance, since citizens can contribute to clarify the situation, however with the awareness that uncertainty might not lead to the authorities' liability.³⁰
- 92 In conclusion, we might summarize the previous remarks as follows: the breach of procedural rules causes the illegality of an act; the wrong application of law – which may occur at whatever stage of the proceedings – in a confused context, instead, may entail an excusable mistake, unless it is a result of lack of caution:³¹ that is to say, unless it appears as a fault related to the breach of the duty of care.³²
- 93 As a consequence, the excusable mistake generates the absence of both negligence and tort, thus urging citizens to use caution and organizations to increase servants' training.
- 94 In this way, it seems to me that the "supply" of the here outlined tort pattern could meet the demand of justice thereof and could ensure the efficiency and

²⁹ It shows that the fair dealing relating to authorities and the duty to take reasonable care do consist in a proper application of the rules.

³⁰ The outlined opinion does not mean that, in some cases, taking into account the specific features of the situation, a discipline, very close to the one applicable by invoking the "*responsabilità da contatto*", could be individualized. For instance, when the servant's role is really limited, since the legal frame has already established all elements of the conduct, it is hard to find some space for choices relating to the application of rules and, as a consequence, for excusable mistakes. In general, see *R. Caranta*, La responsabilità extracontrattuale della pubblica amministrazione (1993) 203 ff., with regard to the French system. However, that does not occur in an automatic way.

³¹ The approach is not so far from *Dunlop v. Woollahra Municipal Council* [1982] A.C. 171 ff. About the "movement away from invalidity as a precondition for an action in negligence", see *D. Fairgrieve*, Pushing back to the Boundaries of Public Authority Liability: Tort Law Enters the Classroom, Public Law 2002, 298–299.

³² The remark shows that we cannot make a sort of exchange between the illegality and the tort for the same defects. As regards public authority liability in negligence and the UK trend (above all due to the cases of *Berret v. Enfield LBC* [1999] 3 Weekly Law Reports (W.L.R.) 79 and *Phelps v. Hillingdon LBC* [2000] 3 W.L.R. 776) described as shifting away from duty, see *Fairgrieve*, Public Law 2002, 288 ff.

effectiveness of tort law, at the same time thereby balancing the various needs existing in a crucial field such as public liability.

X. The Problem of the Organizational Defects

What about organizational defects from the theoretical point of view? 95

Following the above described theory, fault should always be required, given that an authority is liable for a “tort” of its servants and this tort must be established considering all its requirements, including fault. 96

However, in such case (*rectius*: at least when the problem is out of the servant’s control), there is no fact of servant as such. 97

In order to try to explain and to elaborate case law’s results, the analysis at issue has to reach a quite paradoxical conclusion: starting from the pattern of liability for the conduct of another person, we outline responsibility for a fact which, to be honest, cannot be imputed to a servant, being out of his control. 98

On the other hand, we cannot accept the conclusion according to which the authority is not liable for damage related to organizational defects. 99

Thus, should we recognize that the tort is based on the authority’s fault (that however would always exist), which was the starting point above criticized? 100

It is worth noting that, even by using the most common interpretation of art. 2043 CC (direct liability of the authority for its own conduct, but however with the necessity of fault), apart from other theoretical remarks, we should accept that – under the approach followed by case law – a fault always exists for organizational defects. 101

The theory of the *responsabilità contrattuale* would seem more useful and coherent, since it expels the psychological element from the liability frame and it plainly states that the authority will be responsible if it does not prove that the cause which determined the non-performance of an obligation is not attributable to it. However, difficulties arise, as said above, taking into account that such an obligation (at least strictly speaking) cannot be seen and that this view makes us lose sight of the *interesse legittimo*, although such concept is useful in order to describe the complex relationship between individuals and authority. 102

From a pragmatic point of view, as far as an organizational defect is involved in tort (at least if there is no room for a servant’s decision about it), a common law scholar would probably find an example of strict liability arising from the system. Italian lawyers, instead, have to continue to refer to traditional rules, thus making use of two alternative *fictiones*: the idea that, in case of damage related to organizational defects, there is always a fault either of the structure or of its servants. 103

- 104 Nevertheless, taking into account the significant administrative powers servants are vested with, in the Italian system, we should conclude that very often a fault of “someone” within the organization might be identified: as a consequence, and without any doubt, the public body shall be considered responsible if it does not prove the existence of an excusable mistake.

XI. The Court of Justice and the Onus of Proving Fault

- 105 The problem of fault has been addressed even at the European level. Generally speaking, it is important to note the general principle of EU Member State liability, established by the Court of Justice in *Franco*: “It is a principle of Community law that the Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible”. According to the Court, the liability of States arises when the “breaches of Community law for which they can be held responsible” involves non-implementation of a directive. More generally, the conditions for liability are: a breach of rights conferred by Community law; the fact that the content of those rights can be identified on the basis of the provisions of the directive; the existence of a causal link between the breach of obligations and the damage. In this case, States must make reparation in accordance with the domestic rules.
- 106 Subsequently, the Court of Justice refined the conditions for State liability:³³ “Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer. Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions”. Hence, the European Court focused its attention upon the “serious breach of law” and not mainly on the clarity of the rule breached and the excusable error of law. Then, the European Court dealt with the element of illegality, regarded as a condition under which liability might be found: illegality has been considered as sufficient ground for acting in tort: “where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. In that respect, in this particular case, the United Kingdom was not even in a position to produce any proof of

³³ See European Court of Justice (ECJ) joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Germany – The Queen v. Secretary of State for Transport, ex parte Factortame (Factortame III)* [1996] European Court Reports (ECR) I-1029.

non-compliance with the directive by the slaughterhouse to which the animals for which the export licence was sought were destined”.

More recently,³⁴ but not with regard to Member States’ liability, the Court 107
stated that the Portuguese Republic, by failing to repeal a Decree-Law which makes the award of damages to persons harmed by a breach of Community law relating to public contracts conditional on proof of fault or fraud, failed to fulfil the obligations under Directive 89/665/EEC on public works contracts.

Hence, should we assume that a case of strict liability is developing at the 108
European level? As a matter of fact, from a deeper analysis of the pronouncement (although referring to the specific field of public contracts), it seems that the Court of Justice simply aims at avoiding that the onus of proving the fault of the servant is automatically on the plaintiff, since he might face too many difficulties in demonstrating this element. From this perspective, the Italian pattern of the presumption appears to be compatible with the decisions of the European Court of Justice.

³⁴ See the ECJ C-275/03, *Commission v. Portugal*, Urb. app. 2005, 36 ff.

THE RELATIONSHIP BETWEEN REGULATION AND TORT LAW: GOALS AND STRATEGIES

*Anthony Ogus**

I. Introduction

I have been asked to contribute to the research project on the relationship between tort and regulatory law by providing a paper on the “regulatory aspects from a common law perspective”. The topic is a comfortably broad one and I interpret my task as attempting to answer three principal questions:

- How do the goals of regulatory law differ from those of tort law?
- To the extent that they share goals, what are the advantages and disadvantages of the two legal instruments in achieving those goals?
- How should overlaps and divergences between the two instruments, as regards substantive content, be dealt with?

These questions lead me also to the subtitle of my paper “goals and strategies”.

I am not sure that my discussion of these issues will reflect a particularly “common law perspective”, except in the sense that according to basic common law concepts of freedom of activity and the relationship between private law and public law, regulation is justified only if private law (here the law of tort) fails adequately to solve the problem which is being addressed (see my discussion *infra* no. 28–34).

II. The Goals of Regulation and Tort Law

“Regulation” is an imprecise and ambiguous concept,¹ but it seems clear from statements made by the convenors of this project that they have in mind that area of public law which lays down standards of safety and quality governing the conduct of individuals and firms. The relationship to be examined is between

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¹ B. Mitnick, *The Political Economy of Regulation* (1980) chap. 1; A. Ogus, *Regulation: Legal Form and Economic Theory* (2004) 1–3.

those areas of law, for example health and safety at work, public health and environmental protection, product safety, road safety and some areas of consumer protection, and those areas of tort law which generate private law obligations to comply with equivalent standards in those or analogous sectors.

- 4 The goal of regulatory law in these areas is clear: it is to induce compliance with the standards, thereby generating a level of quality and safety which the policymakers regard as appropriate. The standards may reflect the policy-makers' perception of distributional justice but, for the purposes of this paper, I will assume that they are intended, in an economic sense, to maximise social welfare. In other words, they aim to generate, in relation to given risks, the optimal level of quality and safety, that is the point where the marginal benefit of increasing quality and safety is approximately equal to its marginal cost.²
- 5 From a traditional legal perspective, the principal role of tort law is, in defined circumstances, to provide compensation for those who are harmed by the actions of others; and the basis of liability is generally perceived to be some form of corrective justice.³ There nevertheless is a recognition, and not only by economists, that another function of tort law is to deter harm-creating activity, the threat of having to pay compensation serving thus to induce more careful behaviour.⁴ And it is a short step from that recognition to formulating tort law as an inducement to take optimal care, thus rendering it equivalent to what we have seen above to be the efficiency goal of regulation.
- 6 Of course, there may be an incompatibility between the two principal functions of tort law; what sum is deemed appropriate to compensate the claimant may not be the right sum to induce optimal care. As we shall see, a clear example arises in relation to fatal accidents. Since deceased persons are no longer alive, they cannot be compensated for the loss of life: instead money is paid to third parties who were dependent on the deceased. Because the value of life to the deceased themselves is not reflected in the amount of damages, defendants at least under a regime of strict liability⁵ will have insufficient incentive to take optimal care.
- 7 Subject to these considerations, we may now compare regulation and tort law.⁶ Since, on the definition of regulation which we have adopted, it has no compensatory function, the only appropriate comparison is between the relative capacities of tort and regulation to induce optimal care.

² Ogus (fn. 1) 153–154.

³ E.J. Weinrib, *The Idea of Private Law* (1995).

⁴ E.g. G. Williams, *The Aims of the Law of Tort*, *Current Legal Problems* (1951) 137.

⁵ Under a regime of negligence or fault, a risk-creator who takes care will not be liable. Therefore, provided that the damages payable exceed the cost of taking care, the risk-creator will have an appropriate incentive, even though the damages do not adequately reflect the harm caused: S. Shavell, *Economic Analysis of Accident Law* (1987) chap. 2.

⁶ For other comparisons, see: P. Cane, *Tort Law as Regulation*, *Common Law World Review* (C.L.W.R.) 31 (2002) 305; K.N. Hylton, *When Should We Prefer Tort Law to Environmental Regulation*, *Washburn Law Journal* (Washburn L.J.) 41 (2002) 515.

III. Inducing Optimal Care: Sanctions Regimes

There are two principal methods of inducing optimal care by legal instruments and they cut across the distinction between tort and regulation.⁷ The first method is to incorporate the standard into the law, rendering unlawful any failure to reach that standard, and enforcing it by means of a sanction: if it is cheaper for the risk-creators to meet the standard than to pay the sanction, rationally they will comply with the law. 8

In tort law, this method is used in negligence (or fault) regimes. If the standard of care explicitly or implicitly required by negligence law is equivalent to optimal care, then risk-creators will take optimal care if that is cheaper than paying damages. Note that for the purpose of this calculation, the potential loss to the risk-creator from paying compensation must be discounted to take account of the possibility that the injured party will not make a legal claim (so if the potential damages award is € 50,000 and there is a 50/50 chance that the victim will not sue, the relevant figure is € 25,000). Nevertheless, the potential loss will include not only the damages payable but any other cost (for example, legal expenses) resulting from the legal claim. 9

The equivalent strategy under a regulatory approach is for the standard to be incorporated explicitly or implicitly into the regulations applying to the risk-creator's conduct, and for those standards to be enforced by the threat of an administrative or penal sanction if there is a contravention. Again account has to be taken of costs other than the formal sanctions arising from detection of the contravention by the enforcement agency, as well as a discounting for the probability of no enforcement proceedings being taken. 10

To compare the relative effectiveness of the two regimes in inducing optimal care in accordance with this model, we need to explore some key characteristics. 11

1. Standard setting

In a private law context, the standard must be concretized by the judge, interpreting the general principles laid down in legislation or the common law, for example that risk-creators must take "reasonable care". For that purpose, adequate information must be available to the court concerning the nature of the risk, the amount of damage likely to occur and the cost of preventing or reducing the risk. Of course, we cannot expect full information on all the variables, nor perfect accuracy in interpreting and applying it. Rather, we are looking for some reasonable approximation in the formulation of optimal care. With the institutional limitations of the judicial process even that will be hard to 12

⁷ R. Cooter, Prices and Sanctions, Columbia Law Review (Colum.L.Rev.) 84 (1984) 1523; A. Ogus, Corrective Taxes and Financial Instruments as Regulatory Instruments, Modern Law Review (Mod.L.Rev.) 61 (1998) 767.

achieve, although the difficulty may, to some extent, be alleviated by the fact that with proceedings being normally adversarial, the opposing parties may be motivated to generate sufficient evidence. Also, over time, case-law will accumulate standards for particular types of situation.⁸

- 13 Standard setting in a regulatory context may be assumed to be somewhat easier, given the greater information capacities of government bureaucracies and the degree of expertise available. There are nevertheless risks that the appropriate standard will not be reached either because regulations are too specific and therefore become too quickly outdated, or because there is some “capture” of the rule-making process by the regulated industry.⁹

2. *Monitoring and enforcement*

- 14 The enforcement of tort law is undertaken by the accident victim (or in the case of death, by a dependant) and of course there are significant costs incurred in determining who is responsible, bringing a legal claim against that person or organisation and producing evidence sufficient to establish breach of the appropriate standard and the causal connection between that breach and the harm suffered. Some of these costs may be reduced if the claim is subsidised (by for example a legal aid system) or if there is a class action; so also, in most European jurisdictions, some of the costs are transferred from a successful claimant to the defendant. The heavy cost of litigation in the ordinary courts also means that many claims are settled out of court.
- 15 Officials who are members of the relevant regulatory enforcement agency might not have the same motivations as accident victims to enforce the law, because they do not benefit financially from the process, but in other respects enforcement of regulatory regimes may be expected to be easier and less costly.¹⁰ In the first place, in comparison with private law claimants, enforcement agencies benefit from considerable economies of scale and scope. Secondly, many regulatory agencies have powers to impose sanctions without resort to formal judicial proceedings, although such decisions may be the subject of an appeal to an administrative tribunal. If, however, the criminal justice system has to be invoked in order to impose penal sanctions, then costs increase dramatically, and may be higher than in tort law, because of the heavier burden of proof which must be discharged in criminal prosecutions.

⁸ *W.M. Landes/R.A. Posner*, The Positive Economic Theory of Tort Law, *Georgia Law Review* 15 (1981) 851.

⁹ *C.J. Tuohy*, Regulation and Scientific Complexity: Decision Rules and Processes in the Occupational Health Arena, *Osgoode Hall Law Journal* 20 (1982) 562.

¹⁰ *A. Ogus*, Costs and Cautionary Tales: Economic Insights for the Law (2006) 108–112.

3. *Sanctions and other costs*

For the legal regime to be effective in inducing optimal care, the basic model of deterrence requires that the costs incurred by the risk-creator who contravenes the standard should exceed the profit (financial or non-financial) derived from the wrongful act. In practice, this can be reinterpreted as requiring that the costs incurred exceed the reduction in loss of profits that would have occurred if the risk-creator had complied with the law, taking the requisite amount of care. In other words, the financial burden consequent on a failure to meet the legal standard must exceed the cost of taking that amount of care. As we have already seen, the probabilities of the law not being enforced should be taken into account, as well as the informal costs arising from defending or dealing with the case.

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Unless the expenditure necessary to take optimal care is significantly high, it should not, in general be problematic in either tort law or regulatory law for the deterrence condition to be met. But we should note some important considerations. A risk-creator who does not have the means to pay the sanction will not be deterred by it. For tort law to remain effective in such circumstances it is necessary for some third party, for example an employer or insurance company, to pay the compensation and have some alternative means (for example, reducing salary or dismissal; raising insurance premiums or requiring a deductible) of inducing the risk-creator to take care.¹¹ Regulatory law has the advantage, here, in that it usually has non-financial sanctions, for example imprisonment, available. However, the sanctions and other costs which a regulatory agency can impose on the risk-creator without prosecuting for a criminal offence may be relatively modest; and the cost of preparing a case for criminal prosecution (given the high burden of proof which must be discharged) may be large.

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4. *Responsiveness of risk-creators*

Systems designed for inducing behavioural change depend ultimately on the individuals or firms concerned being sufficiently aware of the relevant regime and the consequences that it will have for them. In this respect, it is possible that regulatory regimes have advantages over tort law, at least with regard to industrial activities where the standards imposed by particular agencies are likely to be familiar.¹² The standards applied by tort law may be known only by those with expertise in the relevant area and, indeed, in the case of individuals, the very existence of tort law and its remedies may be somewhat of a mystery.

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IV. *Inducing Optimal Care: Pricing Regimes*

The second method of inducing optimal care is very different, but it also cuts across the distinction between tort and regulatory law. The idea is to internalise

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¹¹ *Shavell* (fn. 5) chap. 7–8.

¹² *Ogus* (fn. 10) 134–135.

to risk-creators the costs of any damage caused by their activities. This will generate an appropriate incentive to take optimal care, because the risk-creator will be motivated to incur expenditure on care up to the point where the costs of doing so exceed the amount of damage resulting from care at that level, and by definition that is the point of optimal care. Strict liability in tort law, in principle, operates in this way. So do regulatory systems which impose taxes or charges on individuals or firms, according to the amount of harm they cause.¹³ Examples include pollution taxes, congestion charges and employers' payroll taxes calibrated according to the accident record of the firm. However, whereas strict liability in tort can in principle be applied to a wide range of situations,¹⁴ regulatory taxing systems are, for administrative cost reasons, used only for regularly recurring harm-creating activities where the causal connection between the activity and harm can be relatively easily identified and it is administratively feasible to impose a charge on those responsible.¹⁵

- 20 The difference between this and the sanctions method of inducing optimal care is striking and important. Under the sanctions method, it is important that the standard is set at approximately the right level but, provided that a minimum threshold is passed, the amount of the sanction does not matter.¹⁶ Under a pricing approach, the courts and regulatory agencies are not required to formulate the standard, but it is important that the damages or tax fully reflect the costs of the activity. Subject to this, we can use the same three headings to compare the relative effectiveness of the tort and regulatory regimes.

1. *Standard setting*

- 21 It follows from the discussion above that, unlike the sanctions systems, standards of optimal care are not formulated in legal terms and are therefore not the concern of legislators, administrators and enforcers.

2. *Monitoring and enforcement*

- 22 At first glance, pricing systems might seem to be easier and cheaper to enforce than sanctions systems, because compliance with a particular standard need not be monitored or enforced. That is, however, misleading. Because all damage costs arising from standards of care below that which is optimal have to be internalised, many more transactions have to take place.¹⁷ With a public charging regime, the nature of the transaction might be relatively straightforward, particularly if it can be integrated with an existing taxation system, but (see *infra* no. 26) the authorities still have to verify that the correct amount is paid. Strict liability in tort may not be so difficult to establish as breaching standards

¹³ Ogus, *Mod.L.Rev.* 61 (1998) 767.

¹⁴ As for example in France with art. 1384(1) of the Code civil.

¹⁵ A. Ogus, *Nudging and Rectifying: The Use of Fiscal Instruments for Regulatory Purposes*, *Legal Studies (Leg.Stud.)* 19 (1999) 245.

¹⁶ Cooter, *Colum.L.Rev.* 84 (1984) 1523.

¹⁷ Ogus, *Mod.L.Rev.* 61 (1998) 767.

of optimal care, but large numbers of liability claims still have to be processed by the civil justice system.

As regards the relative advantages and disadvantages as between regulation and tort liability, in other respects the position is similar to that for sanctions regimes. In particular, there are obviously considerable scale economies in the use of public enforcement agencies. 23

3. *Sanctions and other costs*

As we have seen, for the appropriate inducement to optimal care to operate, risk-creators must have to meet the full social cost of their activities. As with formulating appropriate standards under a sanctions regime, we cannot expect perfect institutional responses: the question then becomes how effective are strict liability in tort and taxing systems in imposing something like the full social cost on risk-creators. 24

In answering this question first in relation to tort law, we must of course have regard not only to the amount of damages payable but also any incidental and informal costs which accompany tort claims. Even with this qualification, there are evident obstacles to tort law meeting the condition. The first problem is that, unless punitive damages are available,¹⁸ the damages payable reflect only the losses of those who are parties to the legal claim; and there may be others who sustain losses as a result of the risk-creators' activity but do not bring a claim. This may be either because the costs of securing compensation outweigh the amounts likely to be awarded; or because, as in the example given in the introductory section, the relevant individual is dead. Or the tort system may not be apt to confer rights on those sustaining losses: consider the case of certain environmental effects that take place only at some indefinite time in the future. Secondly, the court must be able, on the information available, to make a reasonable estimate of the harm suffered by the claimant, although arguably this is an easier task than formulating standards of care under a sanctions regime. 25

Regulatory agencies determining appropriate levels of taxes certainly have more information available to them than courts and that in principle should facilitate an appropriate assessment of the amount of the charge or tax, particularly where, as with pollution, the costs are widely spread. Nevertheless the very fact that – unlike tort law – assessment is not made on an individual basis can lead to highly speculative calculations. Furthermore, governments operating taxing schemes will not be indifferent to the fact that the schemes raise revenue as well as induce behavioural changes; and the revenue-raising potential of the tax may distort decisions which are necessary for inducing optimal care.¹⁹ 26

¹⁸ They are rarely encountered in strict liability cases unless the infliction of harm was deliberate.

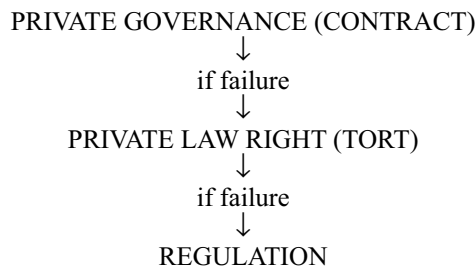
¹⁹ *Ogus*, *Leg.Stud.* 19 (1999) 258.

4. Responsiveness of risk-creators

- 27 Pricing systems have a major advantage over sanction systems insofar as they do not depend on the risk-creators being aware of the standards being applied by the law. Of course, risk-creators must still be able to assess the likely cost which the pricing systems will impose on them, but if (and to the extent that) the systems are designed to internalise to them the full cost of their activities, then it is sufficient if they are aware of the existence of the internalising system and of the likely damage that their activities will cause. In this respect, taxing systems are likely to be more effective than strict liability in tort, because almost all individuals and firms subject to a taxation regime will be aware of its existence, but the same cannot be said of tort law.

V. Rationalising the Use of Tort and Regulatory Law²⁰

- 28 As I indicated in the introduction, if there is a “common law” perspective of the respective roles of tort and regulation, it lies in the preference reflected in the common law for private governance over public governance: subject to the residual interest of the state in public policy, individuals are best left to use legal instruments to meet their own preferences if this can be done at relatively low cost.²¹ That perspective suggests that the legal arrangements to induce optimal care should adhere to the following pattern.



- 29 To explain: the level of care to be taken by the risk-creator towards a potential victim should ideally be the subject of negotiation between the two individuals concerned, so that the preferences of the parties regarding care, and the price to be paid, can be decided by mutual agreement. Contract law is, of course, the legal instrument used for this approach. Often, however, there is little realistic possibility of such a contract taking place, or to put it another way, the costs of transactions between risk-creators and all those likely to be injured would be prohibitively high. The task for the law would then be to prescribe, by means of tort law, the level of care which the parties presumptively would have agreed if they had been able to make the relevant contract. Tort law then operates effectively as a set of default rules which

²⁰ This section draws on Ogus (fn. 10) chap. 3.

²¹ R.A. Posner, *Economic Analysis of Law* (6th ed. 2003) chap. 8.

will apply unless all the parties whose preferences are relevant²² can agree on some alternative standard.

Before considering why and when regulation might be justified, it is important to recognise that an obligation in contract or tort might be imposed by the law, not because it meets the (assumed) preferences of the parties, but because it is considered desirable by reference to some notion of distributional justice or paternalism, with perhaps some sacrifice in efficiency to achieve this purpose.²³ Distributional justice involves some judgement on the fairness (or unfairness) of outcomes; paternalism proceeds from a perception that individuals in a given set of circumstances should not be allowed freedom to make decisions according to their own set of preferences, because there is a fear that such decisions will be made unwisely. Such approaches have the consequence that the relevant standard will be mandatory, rather than a default rule: no freedom is conferred on the parties to modify it by agreement.

Notice, however, that flexibility regarding the remedies for infringement of the private right can facilitate some compromise between the efficiency goal and the justice goal. Suppose that, for justice purposes, the law imposes a level of environmental protection which is inefficiently high: breach of that standard might give rise to liability for damages (thus conferring financial compensation on the right-holder) but refuse to protect that right by an injunction (thus refusing to exercise the police power of the state to endorse the inefficient standard).²⁴

The case for moving from the private law right, in tort, to regulation administered under systems of public law can be made out by reference to the advantages that, in some contexts, we have identified for regulation over tort law.²⁵ So a first important set of justifications is derived from the relatively high cost of enforcing or co-ordinating private rights. It may be difficult for the victim to identify the individual committing the unlawful act, a situation which often arises where the infringement is intentional and the defaulter seeks to avoid detection. Even if this obstacle is overcome, the victim may have insufficient incentive to enforce a claim because the costs of bringing an action will exceed any sums that will be received by way of compensation. This frequently occurs in relation to unlawful activity, such as environmental pollution, the effects of which are thinly spread over a large number of victims. But the problem also arises where, for example in cases involving complex causal or technological

²² This includes third parties affected by the activity.

²³ *D. Kennedy*, Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, *Maryland Law Review* 41 (1982) 563.

²⁴ This paragraph reflects the distinction between "property rules" and "liability rules" made in *G. Calabresi/D. Melamed*, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, *Harvard Law Review* 85 (1972) 1089.

²⁵ See also *S. Shavell*, Liability for Harm versus Regulation of Safety, *Journal of Legal Studies* 13 (1984) 357.

issues, it is very costly for the individual right-holder to obtain the evidence necessary to secure a condemnation. The public enforcement systems can solve these problems, as they enjoy considerable economies of scale; and they are financed independently of outcomes.

- 33 Account must also be taken of the fact that normally private law rights can be enforced only *ex post*, that is after an infringement and damage have occurred; courts are generally reluctant to prevent unlawful activity by the issuing of an order such as a *quia timet* injunction. The principal private law remedy, damages, functions as a deterrent, but that may be inadequate to ensure compliance with obligations if the defaulter has insufficient resources to meet judgments. Public law has a wider range of sanctions available; it also has the power to intervene at an earlier stage of the harm-creating process by, for example, attributing unlawfulness to an activity, rather than the infliction of damage; or by requiring prior authorisation for the activity, as when a licence for that activity is required.²⁶
- 34 Finally we should note that, just as with contract and tort, the regulatory solution might be justified by reference to distributional justice or paternalist considerations.²⁷ Indeed, it is arguable that the aims are more appropriately dealt with in the regulatory sphere. This is not simply because of the general assumption²⁸ that regulation is mandatory and cannot be the subject of consensual waiver or modification. It is also because the democratic processes which presumptively fashion the principal legal forms of regulation are more apt to incorporate distributional justice and paternalism than the judicial process which plays such a major role in the formulation of the principles of private law and for which political neutrality is expected.

VI. Overlaps and Divergences Between Tort and Regulation

- 35 Most harm-creating activities are controlled by both tort and regulation. That has clear advantages if sanctions regimes are used and the standards applied are broadly similar, because the deterrence effect will be enhanced by the combination. The same applies also to pricing regimes, provided that the aggregate of the risk-creator's financial liabilities do not exceed the social cost of the activity in question.
- 36 Sometimes, however, the standards applied under tort law and regulatory sanctions regimes differ. That raises the important policy question as to which

²⁶ *S. Shavell*, The Optimal Structure of Law Enforcement, *Journal of Law and Economics* 36 (1993) 255.

²⁷ *Ogus* (fn. 10) chap. 8.

²⁸ In practice, if not in principle, there is some recognition that in some regulatory areas, the parties whom it is the intention of the regulation to protect may, if fully informed of the circumstances, agree to waive or modify the rules: *T.M. Palay*, Avoiding Regulatory Constraint: Contracting Safeguards and the Role of Informal Agreements, *Journal of Law, Economics, and Organization* 1 (1985) 155; and see *Griffith v Earl of Dudley* [1892] Law Reports (LR) 9 Queen's Bench Division (QBD) 357.

system should prevail. That question has, effectively two dimensions: should private rights be abrogated by regulatory instruments incorporating different standards? And to what extent should regulatory standards be actionable as private rights? The structural analysis contained in section V can assist in answering these questions.

1. *Abrogation of private rights by regulation*

Take, first, a situation in which the private law standard is higher than that required by regulation. For example, a downstream riparian owner bases a claim for water pollution damage caused by an upstream factory owner on infringement of a tort or property right. Should the factory owner be able to plead as a defence that the discharges satisfied the requirements under his regulatory licence?

37

Whether the public standard should prevail over the private standard is, as a matter of law, determined by reference to the intention of the legislature but, since that often is not made explicit, the question of how judges should interpret the legislation raises important policy considerations. In addressing this interpretive issue, as our structural analysis suggests, we should consider the justification for the interventionist measure. If it can be characterised as an effort to prescribe what *all the affected parties* would have agreed to, if not inhibited by transactions costs, then presumptively it should prevail as being the socially efficient solution.

38

However, this is subject to two important qualifications. First, and most obviously the private right might better reflect the preferences of the parties and if there are no externalities (that is, third parties whose preferences are not reflected in the law), the private law should prevail. Secondly, the higher private law standard might reflect distributional justice considerations.²⁹ Here the compromise solution referred to supra no. 31 would seem to be most apt. The riparian owner can claim damages, but not force the factory owner by an injunction to comply with the private law standard.

39

2. *Actionability of regulation in tort law*

Take next the situation where the regulatory standard is higher than that prescribed by the private right. Can the victim use the regulatory contravention as the basis of a private law claim for damages? The diversity of approaches taken in different legal systems to this question is striking.³⁰

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In France, for the purposes of establishing fault-based tort liability, the fault condition is satisfied following proof of the commission of a regulatory of-

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²⁹ It is very unlikely to reflect paternalist concerns if these do not impact on the regulatory standards.

³⁰ J.A. Jolowicz, *International Encyclopedia of Comparative Law*, vol. XI (1972) chap. 13.

fence.³¹ In Germany, civil liability to pay damages arises, in principle, whenever there is a violation of a statutory provision intended for the protection of others.³² In the USA, regulatory contraventions have been accommodated within the general law of negligence.³³ On the “negligence *per se*” principle, the commission of a regulatory offence is automatically treated as negligence, provided that, in the judge’s opinion, the violation was not “excusable”; and that the legislation was intended to lay down a standard appropriate to negligence. On the alternative, “evidence of negligence” principle, the regulatory contravention raises a presumption of negligence, which defendants can rebut if they can prove that they were not in fact negligent. In England, a civil action will lie for breach of statutory duty, whether or not the standard is consistent with negligence, but only if the court finds that it was the intention of the legislature to confer such an action on the victim. Judges are, however, reluctant to find such an intention where it is not made explicit in the legislation.³⁴

- 42 The analytical framework adopted in this paper helps best to explain the American approaches to this problem. That framework suggests that we should focus on whether the public standard was, or was not, intended as an instrument of, or proxy for, private governance, in the sense that it aimed to incorporate the standards which the relevant parties would have agreed upon if transaction costs had allowed them to do so. Public law standards are likely to operate in this way where they are equivalent to, or compatible with, the principles of private law, as they apply to the particular circumstances. Sometimes, for example in relation to environmental or safety standards, private law imposes a general principle that reasonable care be taken; and standards equivalent to that principle are required in the public law. More frequently, scale economies in relation to acquiring the relevant information and/or formulating legal rules lead to regulatory standards being more specific, but still prescribing behavioural requirements that are consistent with the general standard of private law. In such cases it is appropriate that the regulatory standard is actionable in private law.
- 43 In situations where the private and public law standards clearly diverge, the American courts would not be receptive to a private right and we can see the advantages of this approach. The interventionist measure may have been inspired by distributional goals and then the denial of a private right can be rationalised on the basis that the institutions and principles of public law are the appropriate means of determining how the redistributional goals should be pursued. This is exclusively a question of public governance because it makes no sense to envisage what the parties would have agreed in a market context.

³¹ J. Carbonnier, *Droit Civil*, vol. IV (21st ed. 1998) par. 231.

³² Bürgerliches Gesetzbuch (BGB) § 823 (II).

³³ C. Morris, *The Role of Criminal Statutes in Negligence Actions*, *Colum.L.Rev.* 49 (1949) 21.

³⁴ K. Stanton *et al.*, *Statutory Torts* (2003).

Another possibility is that, while the public system serves to proxy for what would have been agreed in private, market arrangements, differences occur because, in either private or public law systems, decision-makers may have insufficient information or may make errors of judgement. Regulatory decision-makers may, for example, have readier access to information or greater technological expertise than private law judges. On this hypothesis, rendering breaches of public law standards actionable in private law would be acceptable; and the French and German approaches might be rationalised on this basis. 44

VII. Conclusions

I draw only a few, brief conclusions from this general, and mainly, theoretical paper. I have compared the capacity of tort and regulation as legal instruments for inducing prescribed standards of care. The principal conclusion is that, for most situations, sanctions regimes are preferable and regulation is likely to achieve the desired outcome at lower cost. This is mainly because there are large scale economies in using specialist rulemakers and specialist law enforcers. There are two additional factors pointing to the same conclusion. First, there is the availability within regulatory regimes of administrative sanctions and cheaper adjudication for smaller contraventions, as well as the possibility of imprisonment and criminal justice condemnation for exceptional and serious breaches. Secondly, regulatory systems are likely to have a higher public profile than tort regimes, thus facilitating the communication of information concerning the standards and sanctions to risk-creators. There are, nevertheless, two countervailing advantages to tort liability which in some cases may prove decisive. The principles of tort law tend to be more general than those used in regulatory law and where this is the case tort is therefore more flexible, and can adapt more easily to individual cases and to technological change. It is also less susceptible to “capture” by the risk-creating industries. Secondly, the active role of victims in tort law and the fact that they receive compensation motivates and facilitates enforcement.³⁵ 45

Where the causal link between a regularly occurring activity and the damage is strong, pricing regimes may be preferable to sanctions regimes. Regulatory pricing regimes are likely to be cheaper than tort pricing schemes (strict liability) but only where they can easily be accommodated within an existing system of taxes or charges. 46

The combination of tort and regulation is likely to enhance the probability of the desired level of safety being induced, assuming that – in the case of sanctions regimes – the standards are equivalent and – in the case of pricing regimes – total liability does not exceed the costs arising from the activity. Where, under sanctions regimes, standards differ, the tort solution should be allowed to prevail, but only where third parties are not affected and the regulatory solution is not used for redistributive or paternalist purposes. 47

³⁵ *Hylton, Washburn L.J.* 41 (2002) 520–521.

REGULATORY LAW AND INSURANCE

*Ina Ebert and Christian Lahnstein**

I. General Aspects

Legal limits, safety regulations and other administrative law provisions tend to have less impact on insurance practice than on tort law: in some respects, state regulation covers issues that are not relevant to the insurance of liability risks, whilst in others the regulatory activity of the insurers themselves goes beyond that of the state.

This is partly due to the fact that, although a claim under a liability policy is generally preceded by the breach of a regulation, it does not necessarily have to be. Another reason is that the applicable legal limits are often so low that loss or damage is unlikely to occur even if they are exceeded by a significant margin. Since an insured event is normally triggered by a loss and not by the mere breach of a regulation,¹ liability insurers base their policy exclusions and conditions on other limits (rules of thumb) which are less strict and often more general and accordingly more simplified than state regulations.

The situation is different with property insurance. In everyday property business, as opposed to spectacular major losses where practical or social reasons dictate a more accommodating approach to settlement, the standards applied by insurers are often stricter than under regulatory law. Under property policies, cover may even be excluded as a result of actions that do not contravene any state regulations. We have only to think of losses excluded on the grounds of gross negligence. German courts have accepted the validity of this argument when, for example, water damage has occurred because the insured left the apartment unattended whilst the washing machine was running,² or when

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¹ Not, however, in discrimination and harassment cases, cf. European Court of Justice (ECJ) C-180/95, *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] European Court Reports (ECR) I-2195 ff., 2196 f.

² Cf., for example, a decision by the Coblenz Court of Appeal (Oberlandesgericht, OLG) 20 April 2001, *Versicherungsrecht (VersR)* 2002, 231 f.

thieves broke into an apartment because the insured had gone out leaving an easily accessible window in the tilt position.³

- 4 The reason why liability and property insurance do not bear the same relationship to state regulation is that they have different objectives. The aim of liability insurance is to indemnify in respect of loss or damage incurred by a third party as a result of the insured's misconduct. It therefore covers losses of all types for which the insured is held liable, unless they are due to wilful acts. The main issue in property insurance, however, is the protection of the insured against an act of God, the act of an (unknown) third party or the insured's own carelessness. If, therefore, the loss has been caused by the insured, there is far more room for negotiation between the parties to the insurance contract than in the case of liability insurance. To avoid moral hazard and keep premiums to a minimum, regular use is made of this negotiating scope to establish reasonably strict criteria for distinguishing insured causation, where there is a minor degree of fault on the part of the insured, from uninsured causation, where the insured's action is tantamount to gross negligence.
- 5 Although state regulations and insurance practice are independent of one another, there are a number of ways in which regulatory law provisions directly affect the existence or scope of insurance cover. In an extreme case, if the regulations governing certain activities are inappropriate and ambiguous, the consequences will be unforeseeable and the risks uninsurable. This is especially true if an unsatisfactory regulation is combined with a particularly strict form of liability. The best illustration of this is the current legal position regarding liability for the unintentional mixing of conventional and genetically modified crops in Germany.
- 6 However, this situation constitutes the exception. As a rule, if the consequences of breaching a regulation are difficult to foresee, insurers deal with the situation by applying exclusions or imposing conditions which insureds have to comply with so as not to risk forfeiting their right to be (fully) indemnified by the insurer.
- 7 Another aspect of state regulation is that it can affect the scope of cover. For example, if an industrial plant is destroyed, there is no point in constructing an exact replica that fails to meet current higher safety standards because the authorities would refuse permission for it to operate. Similarly, regulatory law may stipulate that loss minimisation or clean-up operations must be undertaken following contamination of the soil.
- 8 Finally, state regulation may have repercussions for insurance practice if insurers are forced to regulate intensely in those areas where the state does not or no longer wishes to do so.

³ Such as a decision by the Saarbrücken OLG 4 June 2003, VersR 2004, 1265 f.

II. Specific Issues

1. *Risks that are uninsurable due to regulatory ambiguity*

Directives of the European Union (EU) in particular not infrequently require that for certain activities national legislators apply strict, no-fault liability for third-party loss or even for simple infringements of the law. This in itself would not normally be an insurmountable problem for insurers. However, difficulties can arise when it comes to detailed regulation of the prerequisites of liability or the degree to which the defined liability standards have to be applied. In some cases, they may be so imprecise, ambiguous or otherwise unclear that it is not possible for insurers to assess the risks involved with any reasonable degree of accuracy. This is especially true if a regulation, required to implement an EU directive, concerns actions that are politically controversial in all or a number of the Member States. This may be, for example, because governments seek to discourage a particular action, contrary to EU requirements, by adopting a regulation so strict that its consequences are incalculable. Alternatively, in some cases the deadline for implementing a regulation can only be met through compromise. This tends to produce vague, self-contradictory results that are not consistent with the directive.

Such cases are rare but not unknown, for instance in connection with environmental liability and regulations relating to new risks. One example concerns the liability rules for genetically modified (GM) crops in Germany. Even if there has been no breach of the regulations, the GM crop farmer and other such farmers in the same region are held to be strictly liable, without proof of causation, if accidental mixing results in a fall in market prices for the produce of neighbouring, conventional crop farmers. Not only this, but the limits of such liability are vague in many respects, for example, the permissible threshold for crop mixing (statutory limits only, or any lower limits specified in the contract between the conventional farmer and his customers?). Similar problems are encountered in connection with liability for certain types of ecological damage or discrimination.

2. *Breaches of regulations and exclusions*

Normally, of course, insurance is possible but restrictions are applied in order to avoid various forms of moral hazard. These may be based on statutory requirements or on contractual agreements between the insurer and the insured that deal with matters such as compliance with safety rules or the need to obtain certain authorisations. Non-compliance constitutes a breach of obligations and frees the insurer from its obligation to indemnify. The most common example is the exclusion of cover in the event of loss due to wilful action or, depending on the class of insurance business and national law concerned, gross negligence.⁴

⁴ Cf. E. Deutsch, Die grobe Fahrlässigkeit im künftigen Versicherungsvertragsrecht, VersR 2004, 1485 ff.; Ch. Armbrüster, Künftige Sanktionen der Herbeiführung des Versicherungsfalls und der Verletzung der Rettungsobliegenheit, Zeitschrift für die gesamte Versicherungswissenschaft (ZVersWiss) 2001, 501 ff.; E. Lorenz, Zur Leistungsfreiheit des Versicherers bei einer grob fahrlässigen Obliegenheitsverletzung, VersR 1999, 1006.

- 12 If cover is excluded on the grounds of gross negligence or intent, the main concern is whose fault is at issue? We cannot simply take the rules used to apportion fault under liability law and apply them to insurance practice because the primary concern of policyholders is to insure against the consequences of misconduct – and in particular serious misconduct – on the part of agents or other third parties for whom they are liable. Accordingly, cover is normally excluded only if the loss has been wilfully caused by the policyholder, i.e. usually the management of the insured company.
- 13 Examples of corresponding clauses can be found, for instance, in environmental liability insurance, an area traditionally characterised by wide-ranging restrictions and vague cover limitations:
- Draft of German environmental remediation insurance general terms and conditions, as of 3 August 2006:
 Item 7.1. The following are not covered:
 2.1. Claims against persons who have caused the loss wilfully or through gross negligence.
 Insofar as the causation of the loss occurrence has been established in an enforceable criminal judgment, this shall be deemed proof that the conditions set out in paragraph 1 obtain.
 2.2. Insofar as such claims are made against persons (policyholder or others insured with the policyholder) who have caused the loss through their wilful or grossly negligent omission to comply with environmental protection laws, directives, or administrative orders or ordinances issued to the insured.
 2.3. Insofar as such claims are made against persons (policyholder or others insured with the policyholder) who have caused the damage wilfully or through gross negligence by their failure to follow the guidelines or instructions regarding use, regular checks, inspections or servicing given by the manufacturer or in accordance with the current state of the art, or who wilfully or through gross negligence fail to carry out necessary repairs.
 - ASSURPOL⁵ (Accidental environmental impairment liability insurance):
 Art. 3. Exclusions.
 The following shall be excluded: [...]
 13. Loss or damage arising from
 - a) non-compliance with the legal provisions referred to in the special conditions or any provisions replacing them and any measure laid down by the competent authorities in accordance with such provisions, wherever this non-compliance was known or must have been known to the insured, to the general management or any person substituted in this function if the insured is a legal entity, before the occurrence of the environmental impairment.

⁵ The French liability insurance pool.

- Supplementary general terms and conditions for liability insurance (EHVB 2003):

Section A, item 3: Wilful contravention of regulations:

The insurer shall be discharged from its obligation to indemnify if the loss was caused through gross negligence and [...] the laws, regulations or administrative provisions applicable to the insured business or insured profession or insured risk have been wilfully contravened by the policyholder or by the policyholder's legal representative or directors and officers within the meaning of the Labour Constitution Act [...].

Whilst it is conceivable that losses may be the result of wilful misconduct on the part of the insured company's management, this is usually difficult to prove. This explains why insurance policies may cover the wilful breach of a regulation by an individual involving, for example, discrimination or moral harassment at the workplace. Accordingly, the principle that a wilful act is not insurable is of far less significance than generally assumed. 14

Exclusions based on gross negligence on the part of the insured can give rise to particular complications if the insurer is initially obliged to settle a claim made directly by an injured third party. By and large, this concerns motor third-party liability insurance. The issue is if, and to what extent, the insurer is able to recover its expenses from the insured.⁶ This largely hinges on whether the insured event was caused wilfully, so that the act was not covered by the policy at all, or involved a wilful breach of obligations relating to the prevention or limitation of loss, such as driving while under the influence of alcohol. With the growing tendency in insurance law to move away from the all-or-nothing principle⁷ the result is often a limitation of cover, so that recovery is partial.⁸ 15

⁶ Cf. on this point *Ch. Lahnstein*, Grobe Fahrlässigkeit im Versicherungsrecht europäischer Nachbarländer, in: Arbeitsgemeinschaft (ARGE) Versicherungsrecht (ed.), Die schuldhaftige Herbeiführung des Versicherungsfalles, Deutscher Anwaltverein (DAV) (2000) 89 ff., 96 f.

⁷ Further information: *H. Baumann*, Quotenregelung contra Alles-oder-Nichts-Prinzip im Versicherungsfall, Recht und Schaden (RuS) 2005, 1 ff.; *J. Prölss*, Das versicherungsrechtliche Alles-oder-Nichts-Prinzip in der Reformdiskussion, VersR 2003, 669 ff.; *M. Terbille*, Das Alles-oder-Nichts-Prinzip im Versicherungsrecht, RuS 2001, 1 ff.; *W. Römer*, Alles-oder-Nichts-Prinzip? Neue Zeitschrift für Versicherung und Recht (NVersZ) 2000, 259 ff.; generally also: *E. Schwarz*, Das Alles-oder-Nichts-Prinzip im Versicherungsrecht unter Berücksichtigung des allgemeinen Schadensrechts (1995) passim; *A. Katzwinkel*, Alles-oder-Nichts-Prinzip und soziale Sensibilität von Versicherungen (1993) passim; *R. Raiser*, Rechtsunwürdige Versicherungsnehmer? Zur Funktion versicherungsrechtlicher Verwirkungsklauseln, in: E. Frey/H. Möller (eds.), Ausblick und Rückblick, Festschrift für E.R. Prölss zum 60. Geburtstag (1967) 265 ff.

⁸ Cf., for example, sec. 7 VI Allgemeine Bedingungen für die Kraftfahrtversicherung (General terms and conditions of motor vehicle insurance, AKB); sec. 13 item 3 Allgemeine Feuerversicherungs-Bedingungen (General fire insurance conditions, AFB) 87; sec. 13 item 3 Allgemeine Bedingungen für die Einbruchdiebstahl- und Raubversicherung (General terms and conditions of theft insurance, AERB) 87.

3. *Settlement and the scope of indemnity*

- 16 In liability insurance, apart from any deductibles and indemnity limits, the scope of indemnity is usually left to tort law. However, there are a few special instances where administrative law may result in departures from this principle. To take an earlier example, an industrial plant has been granted authorisation to continue in operation even though it is in breach of the latest and more stringent safety regulations. If, however, the plant is destroyed, there is no point in restoring it to its previous condition because it would not be permitted to (re-)open. In this case, the insurer's duty to meet the additional costs depends not only on what can reasonably be considered restitution in kind but above all on the scope of cover as defined in the terms and conditions of the policy. This is even more true of property insurance, where there is a requirement to specify whether indemnity is on the basis of value as new, actual cash or reinstatement value.⁹
- 17 However, administrative law provisions may also determine the scope of indemnity by laying down loss minimisation or other clean-up obligations that apply to the insured after occurrences such as contamination of the soil by toxic substances. Examples for the clauses mentioned under no. 16 and 17 are:
- Global Advantage factory mutual policy: Demolition and increased cost of construction
 - 1) This Policy covers the reasonable and necessary costs incurred, described in item 3 below, to satisfy the minimum requirements of the enforcement of any law or ordinance regulating the demolition, construction, repair, replacement or use of buildings or structures at an Insured Location, provided:
 - a) such law or ordinance is in force on the date of insured physical loss or damage; and
 - b) its enforcement is a direct result of such insured physical loss or damage.
 - 2) This Additional Coverage does not cover loss due to any law or ordinance with which the Insured was required to comply had the loss not occurred.
 - 3) This Additional Coverage, as respects the property insured in item 1 above, covers:
 - a) the cost to repair or rebuild the physically damaged portion of such property with materials and in a manner to satisfy such law or ordinance; and
 - b) the cost:
 - (i) to demolish the physically undamaged portion of such property insured; and
 - (ii) to rebuild it with materials and in a manner to satisfy such law or ordinance,

⁹ Cf., for example, art. 14 Allgemeine Wohngebäude-Versicherungsbedingungen (General terms and conditions of household buildings insurance, VGB) 88.

to the extent that such costs result when the demolition of the physically damaged insured property is required to satisfy such law or ordinance.

4) This Additional Coverage excludes any costs incurred as a direct or indirect result of enforcement of any laws or ordinances regulating any form of contamination including but not limited to the presence of pollution or hazardous material.

5) The Company's maximum liability for this Additional Coverage at each Insured Location in any occurrence will not exceed the actual cost incurred in demolishing the physically undamaged portion of the property insured in item 1 above plus the lesser of:

- a) the reasonable and necessary actual cost incurred, excluding the cost of land, in rebuilding on another site; or
- b) the cost of rebuilding on the same site.

4. State deregulation and insurers as regulators

The state sometimes chooses not to issue comprehensive regulations governing the handling of certain risks. Detailed state regulation of such matters may be considered politically unacceptable or inopportune, possibly because the state is seeking to promote investment and thus to transfer responsibility for the risks involved to liability insurers. Alternatively, the state may wish to delegate more detailed regulation to the parties concerned. Consequently, to be able to calculate and insure the risks involved, the insurers have to assume a regulatory role. This may be confined to specifying permissible limits and safety provisions dealing with the need for alarm systems and escape routes and their specifications or minimum building standards in regions prone to earthquakes. On the other hand, far wider issues may be involved. For instance, German workers' compensation insurers, which place a strong emphasis on their preventative role, have drafted a considerable body of regulations. As well as legally binding occupational safety provisions devised by their own technical committees, this comprises a compendium of state occupational safety regulations and technical specifications, together with detailed interpretations.

ECONOMIC ANALYSIS OF TORT AND REGULATORY LAW

*Michael Faure**

I. Introduction

This will not be a traditional country report as requested in the questionnaire since this paper deals with the relationship between tort law and regulatory law from a particular angle, being law and economics. As a consequence, the order proposed in the questionnaire cannot be followed within the scope of this report. I will simply try to address the way the law and economics literature has dealt with the choice between liability rules and safety regulation and with the influence of safety regulation on tort law. These issues are crucial for this project and are indeed dealt with in the rich law and economics literature.

To a large extent, we have already dealt with the economic analysis of torts in previous reports. Therefore, this report can be rather brief. In earlier projects, we discussed the economic analysis of fault,¹ of strict liability² and of contributory negligence.³ In these reports, the general goals of tort law from an economic perspective were sketched, so this will not be repeated within the scope of this project. We assume that the reader is aware of the fact that economists view liability rules as instruments to provide incentives to take optimal care to potential parties who can influence the accident risk. This goal can, as we will sketch below, from an economic perspective be reached with different instruments, not only with liability rules. The literature has more particularly extensively dealt with the question under which circumstances it can be more

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¹ See *M. Faure*, Economic Analysis of Fault, in: P. Widmer (ed.), *Unification of Tort Law: Fault* (2005) 311–330.

² *M. Faure*, Economic Analysis, in: B.A. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002) 361–394.

³ *M. Faure*, Economic Analysis of Contributory Negligence, in: U. Magnus/M. Martín-Casals (eds.), *Unification of Tort Law: Contributory Negligence* (2004) 233–256.

appropriate to use regulatory solutions instead of liability rules to provide these incentives for prevention. It is this literature that will be addressed within the scope of this report.

- 3 The questionnaire deals with different notions, such as regulatory law and administrative law. The notion mostly used in the law and economics literature following the seminal article of Shavell is simply safety regulation. With this, we refer to regulatory norms that have *ex ante* been defined by government and that are enforced by public authorities as well.
- 4 The questionnaire paid particular attention to safety regulations and provisions aiming at environmental protection.⁴ We will therefore pay particular attention to this issue of environmental protection and address why, from an economic perspective, it can be understood that, apparently, safety regulation plays a particularly important role in preventing environmental harm.
- 5 This contribution is structured as follows: after this introduction, we will first sketch some basic differences between tort law and regulation from a law and economics perspective (II). Next, the criteria for safety regulation as advanced by Shavell will be discussed (III). Then, it will be discussed how these criteria apply to environmental pollution (IV). Some attention will be given to the empirical literature concerning safety regulation (V) and the question of instruments of deregulation (VI). Then, we will turn to the important question whether liability and regulation exclude each other (VII) and whether violation of regulation should immediately lead to liability (VIII). Also the regulatory compliance defence should be discussed (IX). The summary (X) concludes.
- 6 It should also be stressed that another report deals with regulatory law in particular.⁵ Hence, some issues such as the different goals of tort law and regulation, the standards used and the enforcement processes will not be discussed within the scope of this paper since these are addressed in the contribution dealing with regulatory law.

II. Differences Between Tort Law and Regulation

- 7 Without focusing on the different goals of tort law and regulation,⁶ we can notice that there are important differences in the way in which tort law and regulation work in providing incentives to parties in a potential accident setting to take optimal care.⁷ A first difference considers the setting of the norms. Within tort law, as we have explained in the previous contributions on law and economics for this group, the norm to be followed, i.e. the efficient standard

⁴ See sec. II of the questionnaire.

⁵ It is the report drafted by A. Ogus, *The Relationship Between Regulation and Tort Law: Goals and Strategies*.

⁶ Which is addressed in the contribution on regulatory law by Ogus (fn. 5).

⁷ See equally *P. Cane*, *Tort law as regulation*, *Common Law World Review* (CLWR) 31 (2002) 305–331.

is not ex ante defined in public regulation. It is either the parties themselves or the judge that find out what the optimal way is to prevent the harm. Indeed, under a negligence rule, it is the judge who through case law will define the due care standard required in the legal system. This will guide potential injurers who will comply with the due care standard in order to avoid liability. Under a strict liability rule, it is the potential risk creators that do the weighing of costs and benefits in order to find out what the optimal care level is to prevent the harm. As a consequence of this, it means that parties are not obliged to follow this standard and that the standard is not imposed upon them by the government. Parties can even violate the standard as long as they are willing to pay the corresponding price, being the damages due to the victim in case an accident happens. A consequence is also that since the norms are set by the private parties or by the judge, all the information costs to find out what the optimal standard is lay upon either the parties (under strict liability) or the judge (under negligence)

The situation is completely different under regulation. In that case, a regulatory authority will ex ante fix the standard that has mandatorily to be followed by all potential parties in an accident setting. The flexibility and freedom inherent in the tort system in finding out the optimal standard is hence totally missing in the regulatory approach. It is the government (or related public authorities of course) that will define the standard and which also forces potential risk creators (and sometimes potential victims) to follow the standard. As a consequence of this, in case of regulation, all the information costs are incurred by the government. With this, we have already discovered a second difference between regulation and tort law, being that the standards in regulation are set ex ante, before the accident happens. The standards in regulation also have to be followed irrespective of an accident. Hence, someone who violated, e.g., a traffic light could not argue as a defence that he caused no harm. Tort law on the other hand works essentially ex post, being after an accident. Tort law is triggered by harm. As long as no harm occurs, tort law does not play a role. However, even though tort law is essentially an ex post system, the economic analysis of law of course taught that it will have an ex ante effect on incentives of parties engaging in a potential accident setting.

A third, related difference is that with tort law, the norm setting is not only private, also the enforcement is.⁸ It is in principle private parties (more particularly the victim) that will enforce tort law, precisely because it is triggered by harm. Regulation, on the other hand is enforced through public authorities. The police or other investigators will control whether regulatory norms are complied with and will take notice of violation.

A fourth related difference is of course the differing sanctions. The sanctions in tort law are in principle private sanctions, that is to say the sanctions directly

⁸ See on differences between enforcement regimes *K.N. Hylton*, When should we prefer tort law to environmental regulation? *Washburn Law Journal (WLJ)* 41 (2002) 515–543.

benefit the victim who receives restoration or damages. The sanctions in case of violation of regulatory law are, on the contrary, public sanctions. It is the government (an administrative or criminal court) that will impose the sanction and the benefits of the sanction accrue not to a private party (like a victim) but to the government. This is the case if, for example, a fine is paid.

- 11 As a consequence of this, the fifth and probably most important difference between the two systems is that tort law is of course far more flexible. In that sense, the tort regime is sometimes qualified as a market system: the private parties or the judge fix the norms, enforcement and sanctioning are also private. There is also a lot of flexibility within tort law to adapt to changing circumstances. Regulatory law, on the other hand, is much more interventionist: the norms are set by the government, enforcement and sanctioning is public. There is hence no doubt that the regulatory approach involves a much greater degree of government intervention than tort law. Tort law merely supposes that there is a judge who either sets the due care standard (in case of a negligence rule) and enforces tort claims of victims or merely does the latter (in case of strict liability).
- 12 Although these differences may generally hold, there are of course some grey areas and overlaps. In some legal systems, the government may also use tort law to enforce regulation (and hence there is an overlap between tort law and regulation). In some legal systems, the enforcement of regulatory norms is not always undertaken by government; some legal systems allow private enforcement of regulatory norms as well.⁹ Still, as a general rule, the differences as just described will hold in most cases.
- 13 Given the fact that tort law relies more on the market and is less costly (one only needs a judge, but the judiciary of course does much more than simply enforcing tort law) than regulation (where costs need to be incurred to set the norms, to enforce them and to sanction them), the natural preference of economists, all things being equal, will be with tort law. It is definitely the most flexible and less costly system. Hence, there should be arguments to shift to regulation. Given the natural preference for tort law, one can understand why “criteria for regulation” (and not criteria for tort law) have been developed. Given the fact that regulation requires a much greater degree of government intervention, one can also understand that this debate on market versus regulation has to a large extent been very politicalized. The major advantage of the economic analysis of law and more particularly of the contributions of Shavell is that it has taken this debate out of the journalistic political arena and has provided clear economic criteria for safety regulation. Moreover, as we will show, these criteria are very balanced and do not provide a black or white answer in favour of or against regulation. The reader should also note that this contribution will also show that a long standing misunderstanding, being that all law and economics scholars would be in favour of market solutions and against

⁹ See for an economic analysis of private enforcement *W.M. Landes/R.A. Posner*, The Private Enforcement of Law, *Journal of Legal Studies* (JLS) 1975, 1–46.

regulation, is generally not correct. This contribution shows more particularly that law and economics scholars like Shavell precisely point at the importance of regulation to provide incentives to take optimal preventive measures, more particularly in those cases where the market fails.

III. Criteria for Safety Regulation

Let us now examine under what kind of circumstances liability rules may not suffice to deter environmental harm and a regulatory intervention may be necessary. The choice between regulation and liability rules was thoroughly examined by Steven Shavell in 1984, in a paper in which he advances several criteria that influence the choice between safety regulation and liability rules.¹⁰

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A. Information Asymmetry as a Criterion for Regulatory Intervention

Information deficiencies have often been advanced as a cause of market failure and as the justification for government intervention through regulation.¹¹ Also, for the proper operation of a liability system, information on, for example, the existing legal rules, the accident risk, and efficient measures to prevent accidents, is a precondition for an efficient deterrence. According to Shavell, the parties in an accident setting generally have much better information on the accident risk than that possessed by the regulatory body.¹² The parties themselves have, in principle, the best information on the costs and benefits of the activity that they undertake and of the optimal way to prevent accidents. This “assumption of information” will, however, be reversed if it becomes clear that some risks are not readily appreciated by the parties in an accident setting. This may more particularly be a problem if costs are external. These cannot always be easily assessed by the parties involved. Therefore, for every activity, the question that will have to be asked is whether either the government or the parties involved can acquire the information at the least cost.

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B. Insolvency Risk

If the potential damages can be so high that they will exceed the wealth of the individual injurer, liability rules will not provide optimal incentives. The reason is that the costs of care are directly related to the magnitude of the expected damages. If the expected damages are much greater than the individual wealth of the injurer, the injurer will only consider the accident as having a magnitude equal to his wealth. He will take, therefore, only the care necessary to avoid

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¹⁰ S. Shavell, Liability for Harm versus Regulation of Safety, JLS 1984, 357–374; S. Shavell, A Model of the Optimal Use of Liability and Safety Regulation, Rand Journal of Economics (RJE) 1984, 271–280 and S. Shavell, Strict Liability versus Negligence, JLS 1980, 277–290.

¹¹ See the basic article by G. Stigler, The economics of information, Journal of Political Economics (JPE) 1961, 213 and see A. Schwartz/L. Wilde, Intervening in markets on the basis of imperfect information: a legal and economic analysis, University of Pittsburgh Law Review (UPLR) 1979, 630–682 as well as E. Mackaay, Economics of information and the law (1982).

¹² Shavell, JLS 1984, 359.

an accident equal to his wealth, which can be lower than the care required to avoid the total accident risk.¹³ This is a simple application of the principle that the deterrent effect of tort liability works only if the injurer has assets to pay for the damages he causes. If an injurer is protected against such liability, the problem of under-deterrence arises.¹⁴

- 17 Safety regulation can overcome this problem of under-deterrence caused by insolvency.¹⁵ In that case, the efficient care will be determined ex ante by regulation and will be affected by enforcement instruments which induce the potential injurer to comply with the regulatory standard, irrespective of his wealth.
- 18 Therefore, a problem might still arise if the regulation were also enforced by means of monetary sanctions. Again, if these were to exceed the injurer's wealth, the insolvency problem would remain. Hence, if a safety regulation is introduced because of a potential insolvency problem, the regulation itself should be enforced by non-monetary sanctions.¹⁶

C. The Threat of a Liability Suit

- 19 Some activities can cause considerable damage, but even so a lawsuit to recover these damages may never be brought. If this were the case, there would of course be no deterrent effect of liability rules. Therefore, the absence of a liability suit would again be an argument to enforce the duty of efficient care by means of safety regulations rather than through liability rules.¹⁷ There can be a number of reasons why a lawsuit is not brought, even though considerable damage has been caused.
- 20 Sometimes an injurer can escape liability because the harm is thinly spread among a number of victims. As a consequence, the damage incurred by every individual victim is so small that he has no incentive to bring a suit. In particular, this problem will arise if the damage is not caused to an individual but to common property, such as the surface waters in which each member of the population has a minor interest. In addition, a long time might have elapsed before the damage becomes apparent; in this case much of the necessary evidence may be either lost or not obtained. Another problem is that if the damage only manifests itself years after the activity, the injurer might have gone out of business.

¹³ *Shavell*, JLS 1984, 360.

¹⁴ *S. Shavell*, The judgement proof problem, *International Review of Law and Economics* (IRLE) 6 (1986) 43–58.

¹⁵ If insurance came into the picture, it could overcome the problems of under-deterrence, provided that the moral hazard problem, caused by insurance, can be overcome.

¹⁶ *S. Shavell*, Criminal law and the optimal use of non-monetary sanctions as a deterrent, *Colombia Law Review* (CLR) 1985, 1232–1262.

¹⁷ *Shavell*, JLS 1984, 363.

A related problem is that it is often hard to prove that a causal link exists between an activity and a type of damage.¹⁸ The burden of proof of a causal relationship becomes more difficult with the increasing passage of time since the damaging incident took place. Often a victim will not recognise that the harm had been caused by a tort, but might think that his particular ailment, e.g. cancer, had a “natural cause”, associated with general ill health. For all these reasons, a liability suit might not be brought and hence safety regulation is necessary to ensure that the potential polluter takes efficient care.¹⁹

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D. Administrative Costs

When examining the pros and cons of liability versus regulation, the administrative costs of both systems should also be compared. Liability rules are clearly costly in terms of time for both parties and in court fees. A part of these costs is borne by the whole community, such as the cost of the legal system, fees for the judges, etc. Regulation produces costs for the community, including the costs of making the regulation, setting the standards, passing the statutes, etc. and of subsequent enforcement.²⁰

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In this respect the liability system seems to have an advantage: the administrative costs of the court system are only incurred if an accident has actually happened. The main advantage of the tort system is that a lot of accidents will be prevented by the deterrent effect of being held liable and having to pay damages to the victim. In the case of safety regulation, the costs of passing the regulation and of enforcing it are always there, whether there are accidents or not.

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IV. The Need to Regulate Environmental Pollution

After having discussed these criteria for regulation²¹ we can now discuss the question of how these criteria relate to environmental pollution. If one takes the criteria for safety regulation discussed above and applies them to the potential risk caused by environmental pollution, there is no doubt that liability rules alone are not sufficient.

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If one looks at the first criterion, that of information costs, it must be stressed that an assessment of the risks of a certain activity often requires expert knowledge and judgement. Small organisations might lack the incentive or resources

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¹⁸ See *W. Landes/R. Posner*, Tort law as a regulatory regime for catastrophic personal injuries, *JLS* 1984, 417 and *H. Kunreuther/P. Freeman*, Insurability, Environmental Risks and the Law, in: A. Heyes (ed.), *The Law and Economics of the Environment* (2001) 304–305.

¹⁹ For alternatives to liability suits see: *H. Bocken*, Alternatives to Liability and Liability Insurance for the Compensation of Pollution Damages, *Tijdschrift voor Milieuaansprakelijkheid* (TMA) 1987, 83–87 and TMA 1988, 3–10.

²⁰ *Shavell*, *JLS* 1984, 363–364.

²¹ These are often referred to as “public interest” criteria for regulation to contrast them with “private interest” explanations for regulation, as advanced by public choice scholars.

to invest in research to find out what the optimal care level would be. Also, there would be little incentive to carry out intensive research if the results were automatically available to competitors in the market: this is the well-known “free rider” problem. This problem can partially be countered by legal instruments granting an intellectual property right to the results of the research. However, the problem remains that it may not be possible for small companies to undertake studies on the optimal technology for preventing environmental damage. Therefore, it is often more efficient to allow the government itself to do the research on the optimal technology (e.g. in a governmental environmental research institute). The results of this research can then be passed on to the parties in the market through the regulation. Hence, the setting of environmental standards in regulation can be seen as a means of passing on information on the minimal environmental technology required. Obviously, it is more efficient for the government to acquire information on the optimal emission standard than it would be for an individual firm, for instance, to find out what additional reduction in pollution would produce an optimal reduction of the expected damage from the emission. There are undeniable “economy-of-scale” advantages in regulation.

- 26 Also, the insolvency argument points in the direction of regulation. Pollution can be caused by individuals or firms with assets which are generally lower than the damage they can cause by the pollution. In this respect it should not be forgotten that even a small firm could cause harm to a large number of individuals or to entire ecosystems. The amount of damage caused by this emission can of course largely exceed the assets of an individual company. Moreover, most firms have been incorporated as a legal entity and therefore benefit from limited liability. Hence, the individual shareholders are not liable to the extent of their personal assets, but a creditor of the firm can only lay claim to part of all of the total assets purchased in the firm by the shareholders.
- 27 Also the chance of a liability suit being brought for damage caused by wrongful pollution is naturally very low. The damage is often spread over a large number of people, who will have difficulties in organising themselves to bring a lawsuit. In addition, the damage could only become apparent some years after the emission took place. This will bring proof of causation and latency problems, which will only make it difficult for a lawsuit to be brought against the polluter.
- 28 For these reasons it is clear that some form of government regulation of environmental pollution is necessary. To reformulate: this shows that liability rules alone cannot suffice to prevent environmental harm, but there might be other, publicly imposed, instruments other than the command and control type regulation which can be used to reach this goal. Taxes are obviously such an alternative. But also these are publicly imposed and can hence be considered as “regulation”. Another question, which will be discussed below (VII), is whether this necessarily implies that environmental law should solely depend upon regulation or whether liability can still fulfil a supplementary role.

V. Safety Regulation in Practice

When Shavell's criteria for safety regulation are applied to the environmental risk, one can easily note that a strong argument can be made that the efficient care to be taken to avoid environmental damage should also be fixed ex ante by regulation.

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In many cases this regulation consists of licences or permits in which an administrative authority fixes an emission standard which must be followed by the potential polluter. These licences play a crucial role in environmental policy in most countries. An improvement of environmental quality will mostly be achieved by imposing more stringent emission standards in administrative licences. Hence, the general requirement that emissions are controlled through licences and that the quality and quantity of the emissions are regulated by the conditions in this licence, is a cornerstone of environmental law. Since these licences are administrative acts, in most legal systems environmental law is considered to be a part of administrative law. Criminal law usually only comes into the picture to sanction a violation of administrative regulations or emission standards in the licences.

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Although environmental pollution is in the first place controlled through these administrative licences, in individual cases there can still be damage to the environment. Then again, liability under tort law comes into play and the question is raised of the influence of regulation on the liability system and vice versa.²² The complementary relationship between tort law and regulation will be discussed below.

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Although it is difficult to examine whether the environmental regulation is generally also effective in reducing environmental harm, some studies have attempted to examine the effectiveness of safety regulation in controlling environmental harm. These studies do not address the specific quality of every environmental law, but examine whether regulation has generally been more important in reducing environmental harm than liability rules. Dewees demonstrated that in North America the quality of the environment has improved substantially as a result of regulatory efforts, not so much in response to legal action in tort.²³

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²² Complementarities between tort law and regulation have been addressed by *S. Rose-Ackerman*, Environmental Liability Law, in: T.H. Tietenberg (ed.), *Innovation in Environmental Policy, Economic and Legal Aspects of Recent Developments in Environmental Enforcement and Liability* (1992) 223–243; *S. Rose-Ackerman*, Rethinking the Progressive Agenda, *The Reform of the American Regulatory State* (1992) 118–131 and *S. Rose-Ackerman*, Regulation and the Law of Torts, *American Economic Review/Papers & Proceedings (AERPP)* 1991, 54–58.

²³ *D. Dewees*, The Comparative Efficacy of Tort Law and Regulation for Environmental Protection, Geneva papers on risk and insurance (GPRI) 1992, 446–467 and *D. Dewees*, Tort Law and the Deterrence of Environmental Pollution, in: Tietenberg (ed.) (fn. 22) 139–164.

- 33 This empirical evidence of the success of regulation, compared to tort law, has been stressed in the recent book of Dewees/Duff/Trebilcock.²⁴ They hold that the large regulatory effort to improve the environment has met with considerable success when measured by the reduction of emissions, but that it is more difficult to argue that the environmental regulations of the 1970s in the US equally had a considerable influence on the ambient environmental quality. Moreover, they also stress that while environmental regulation is a determining factor in pollutant emissions and ambient concentrations, other non-regulatory factors such as economic growth and even the weather also influence environmental quality.²⁵

VI. Instruments of Deregulation?

- 34 From the economic analysis presented above, we could establish that regulation is mostly presented as a necessary instrument to deal with weaknesses of tort law. Given the fact that regulation and tort law are actually presented as complementary instruments to reach similar goals, one can also notice that one way of achieving deregulation is precisely the improvement of the functioning of tort law. Several examples of that could be presented.
- 35 First, sometimes it is argued that a weakness of tort is its limited ability to compensate victims, more particularly when the probability of detection of the accident is less than zero. Economics hold that, in case of a lower detection rate, the sanction should be higher than just equal to the damage suffered by the victim. However, traditional tort law does not allow the victim to be awarded an amount higher than compensatory damages. Hence, the low probability of detection and the need for more than compensatory damages was often advanced as an argument in favour of regulation (and in favour of the criminal law). However, if one realizes that the main problem with tort law is that the compensation awarded is limited to the amount of the harm done to the victim, one way of providing a counter weight for the low probability of detection is to increase the amount of compensation payable by the injurer under tort law. That is precisely the economic rationale behind the concept of punitive damages.²⁶
- 36 A second example refers to the argument that civil law will often not be useful as a deterrent against environmental pollution since the damage may be widespread, the whole community may be victimized or the damage may be caused to collective goods that are not owned by one individual. In those cases, no individual victim will bring a suit in tort. Often, this is advanced as an argument in favour of regulation since tort law may lack its deterrent effect. However,

²⁴ D. Dewees/D. Duff/M. Trebilcock, *Exploring the Domain of Accident Law, Taking the Facts Seriously* (1996).

²⁵ Dewees/Duff/Trebilcock (fn. 24) 307–323.

²⁶ For an economic analysis see R.D. Cooter, *Economic Analysis of Punitive Damages*, *Southern California Law Review* (SCLR) 1982, 97–101 and W. Landes/R. Posner, *An Economic Theory of Intentional Torts*, *IRLE* 1 (1981) 127–154.

one could equally improve the functioning of the civil law by allowing the state, public authorities or a non-governmental organisation to act on behalf of the environment in order, for example, to claim for an injunction to stop environmental pollution from occurring.

A third example relates to the insolvency risk which we mentioned above as an argument in favour of regulation. One way of dealing with this insolvency problem is to impose a duty on potential injurers to seek financial coverage, e.g., through insurance. Traditionally, economists have argued that the potential insolvency of an injurer is a strong argument in favour of compulsory insurance.²⁷ Here, one thus finds a third example of a regulatory intervention that could improve the functioning of tort law without necessarily immediately running to regulation. Hence, also these facilitative strategies, that aim at improving the functioning of tort law, have to be considered.

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VII. Liability and Regulation: Exclusivity?

We just stressed that, according to Shavell's criteria, there is a strong argument to control the environmental risk through ex ante regulation (or taxes). However, in individual cases there can still be damage to the environment. Then again, liability under tort comes into the picture and the question has been addressed in the literature how regulation influences the liability system and vice versa. The complementary relationship between tort law and regulation has been examined in detail by Rose-Ackerman,²⁸ Faure/Ruegg,²⁹ Kolstad/Ulen/Johnson³⁰ and recently by Arcuri³¹ and Burrows.³² Rose-Ackerman also compared US and European experiences in using regulation versus tort law in environmental policy.³³ The first point which is often stressed is that the fact that there are many arguments in favour of ex ante regulation of the environment does not mean that the tort system should not be used any longer for its deterring and compensating functions. One reason for still relying on the tort system is that

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²⁷ See *M. Faure*, The view from law and economics, in: G. Wagner (ed.), *Tort law and liability insurance* (2005) 239–273.

²⁸ *S. Rose-Ackerman*, Law versus Private Law in Environmental Regulation: European Union Proposals in the Light of United States Experience, *Review of European Community and International Environmental Law (RECIEL)* 4 (1995) 312–332; *Rose-Ackerman*, in: Tietenberg (ed.) (fn. 22) 223–243 and *S. Rose-Ackerman*, Public Law versus Private Law in Environmental Regulation: European Union Proposals in the Light of United States and German Experiences, in: E. Eide/R. Van den Bergh (eds.), *Law and Economics of the Environment* (1996) 13–39.

²⁹ *M. Faure/M. Ruegg*, Standard Setting through General Principles of Environmental Law, in: *M. Faure/J. Vervaele/A. Weale* (eds.), *Environmental Standards in the European Union in an Interdisciplinary Framework* (1994) 39–60.

³⁰ *Ch.D. Kolstad/Th.S. Ulen/G.V. Johnson*, Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Compliments? *American Economic Review (AER)* 80 (1990) 888–901.

³¹ *A. Arcuri*, Controlling environmental risk in Europe: the complementary role of an EC environmental liability regime, *TMA* 2001, 39–40.

³² *P. Burrows*, Combining regulation and liability for the control of external costs, *IRLE* 19 (1999) 227–242.

³³ *Rose-Ackerman*, *RECIEL* 4 (1995) 312–332 and *S. Rose-Ackerman*, Controlling Environmental Policy: the Limits of Public Law in Germany and the United States (1995).

the effectiveness of (environmental) regulation is dependent upon enforcement, which may be weak. In addition, the influence of lobby groups on regulation, to which public choice theory has rightly pointed, can to some extent be overcome by combining safety regulation and liability rules. Moreover, safety regulation, e.g. emission standards in licences, can become outdated fast and often lacks flexibility, which equally merits a combination with tort rules.

- 39 Hence, from the above it follows that, although there is a strong case for safety regulation to control the environmental risk, tort rules will still play an important role as well.³⁴ This obviously raises the question whether compliance with regulation will affect the liability issue. We will address this point in the next sections.³⁵

VIII. Violation of Regulation and Liability

- 40 The first question to be answered in that respect is whether a violation of a regulatory standard should automatically be considered as a fault under tort law and thus lead to liability of the licensee.³⁶
- 41 Assuming that the licence sets the regulatory standard at the efficient care level, a violation of the regulatory standard should indeed lead to liability to give the licensee an incentive to spend on care. However, Shavell argues that the costs of following the regulatory standard are not the same for all injurers. Following the standard might be inefficient for some injurers. The injurers for whom following the regulatory standard would only be possible at high costs should not be held to follow this standard since it would create inefficiencies.³⁷ The question is whether this means that these injurers should not be held liable if they violate the regulatory standard.
- 42 This problem can be compared with the bonus pater familias standard used in tort law. Although a detailed individualisation of standards of efficient care would be the optimal solution in a first best world, this is often impossible given the costs of an individualised standard setting. Therefore, the legal system sets the required level of care at an average level, the so-called bonus pater familias standard. The same can be said for regulation. If various groups can be identified at low costs, a separate standard for a certain group is efficient as long as the gains from selecting a further group outweigh the further administrative costs. In most cases, however, the regulator will not have the possibility

³⁴ For a recent different analysis, leading to the same result that liability and regulation should be combined see *P.W. Schmitz*, On the joint use of liability and safety regulation, IRLE 20 (2000) 371–382.

³⁵ This issue is equally addressed in the last section of the contribution of *Ogus* (fn. 5) to this volume.

³⁶ This is precisely the question which is also addressed in sec. III A of the questionnaire.

³⁷ See *Shavell*, JLS 1984, 365–366 and *M. Faure/R. Van den Bergh*, Negligence, Strict Liability and Regulation of Safety under Belgian Law: An Introductory Economic Analysis, GPRI 1987, 109–110.

of identifying atypical parties that might be able to avoid a loss at lower costs, for instance because they pose lower risks than normal. Therefore, a single regulatory standard will be used.³⁸

Although one could, therefore, argue that a failure to satisfy the regulatory requirement should not necessarily result in a finding of negligence, so as to avoid some parties who pose lower risks taking wasteful precautions,³⁹ most legal systems generally consider a breach of a regulatory duty a fault.⁴⁰ One of the reasons for introducing safety regulation to prevent environmental damage is, as was mentioned above, that the regulator will usually possess better information to evaluate the efficient standard of care than the parties involved. Hence, the regulation passes on information to the parties on the efficient standard of care. The regulation also gives information to the judge who has to evaluate the behaviour of the injurer *ex post* in a liability case. The judge might lack the information necessary to find out whether in a particular case an injurer should not be held to follow the regulatory standard, for example because he posed a lower risk than usual. Therefore, particularly in environmental cases, a judge will accept a finding of negligence as soon as a regulatory standard has been breached.⁴¹ Thus, the statutory standards can be applied to define negligence.⁴² Hence, one could argue that in this respect tort law can also be used to enforce regulations.⁴³

43

IX. Compliance with Regulation and Liability

Above we explained that to a large extent the prevention of environmental harm is also achieved as a result of regulation.⁴⁴ A lot of attention is paid in the literature to the relationship between regulation and liability. In this respect, for instance, the question arises whether following a regulatory standard excludes an individual from incurring liability.

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In environmental law this is particularly important, since the conditions under which an emission of pollutants is allowed are mostly laid down in a permit. Obviously these permits and their effects on liability can take various forms.

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³⁸ Cf. for the *bonus pater familias* standard, *R. Posner*, *Economic Analysis of Law* (6th ed. 2003) 171 and *S. Shavell*, *Economic Analysis of Accident Law* (1987) 74.

³⁹ *Shavell*, JLS 1984, 365–366.

⁴⁰ Most legal systems indeed consider regulatory violation as negligence *per se*. See for instance *K.S. Abraham*, *The relation between civil liability and environmental regulation: an analytical overview*, WLJ 41 (2002) 379–398.

⁴¹ *Faure* and *Van den Bergh* have also argued that an advantage of this system is that it gives victims incentives to prove that the regulatory standard has been breached. This makes the victim an enforcer of safety regulation. He can claim compensation under the negligence rule as soon as a causal relationship between the violation of the regulatory standard and his damage is established (*Faure/Van den Bergh*, GPRI 1987, 110–111).

⁴² *Rose-Ackerman*, *Rethinking the Progressive Agenda* (fn. 22) 127.

⁴³ For details see *P. Kane*, *Using tort law to enforce environmental regulations?* WLJ 41 (2002) 427–467.

⁴⁴ See chap. V.

In some cases permits and regulations are fairly general, but in other cases they specify emission limits. It is especially in the latter case, that is when specifically allowed releases in a permit have been respected, that the industry often argues that as long as they follow the conditions of that licence, no finding of negligence in tort law is possible. This is often referred to as the “justificative effect of a licence” or the “regulatory compliance defence”. Therefore this issue merits discussion at this point.⁴⁵

- 46 The regulatory compliance defence is, however, rejected in legal systems, like Belgium and the Netherlands,⁴⁶ but also in the US.⁴⁷ One can find a clear economic rationale for this rule. If compliance with a regulatory standard or licence were to automatically result in a release from liability, the potential injurer would have no incentive to invest more in care than the regulation asks from him, even if additional care could still reduce the expected accident costs.⁴⁸ A first reason to hold an injurer liable (if the other conditions for liability are met), although he has followed the regulatory standard, is that indeed this standard is often merely a minimum. The complete “compliance defence” prevents any incentive to take precautions in excess of the regulated standard.⁴⁹ Exposure to liability will give the potential injurer incentives to take all efficient precautions, even if this requires more than just following the licence. This, by the way, holds both under negligence and strict liability. Since the regulatory standard cannot always take into account all efficient precautionary measures an injurer can take, testing the measures taken by the injurer even though the regulatory standard was followed will provide additional incentives. Allowing a regulatory compliance defence would also largely remove the beneficial incentive effects of strict liability. As we argued above, strict liability has the advantage that it provides the injurer with incentives to take all efficient measures to reduce the risk (prevention and activity level), even if regulatory conditions were followed. This outcome has been shown formally by Kolstad/Ulen/Johnson⁵⁰ and more recently by Burrows.⁵¹ They argue that the complete compliance defence prevents any precaution in excess of the regulated standard. If there is serious under-enforcement of standards, the role of liability as an incentive to take precautions remains important.
- 47 A second reason is that exposure to liability might be a good remedy for the unavoidable capturing and public choice effects that play a role when permits

⁴⁵ This issue is also raised in sec. III B of the questionnaire.

⁴⁶ For a comparative analysis of the question whether following a permit excludes criminal liability see: *M. Faure/J.C. Oudijk*, Die strafgerichtliche Überprüfung von Verwaltungsakten im Umweltrecht, Ein rechtsvergleichender Überblick der Systeme in Deutschland, den Niederlanden und Belgien, *Juristenzeitung (JZ)* 1994, 86–91.

⁴⁷ See *Abraham*, *WLJ* 41 (2002) 395.

⁴⁸ *Shavell*, *JLS* 1984, 365; *Faure/Van den Bergh*, *GPRI* 1987, 110.

⁴⁹ So *Burrows*, *IRLE* 19 (1999) 242. Recently Schwartz added to the debate by discussing whether compliance with federal safety statutes should have a justificative effect in state tort cases. See *A. Schwartz*, Statutory Interpretation, Capture, and Tort Law: The regulatory compliance defence, *American Law and Economics Review (ALER)* 2000, 1–57.

⁵⁰ *Kolstad/Ulen/Johnson*, *AER* 80 (1990) 888–901.

⁵¹ *Burrows*, *IRLE* 19 (1999) 227–244.

are granted. If a permit always released an individual from incurring liability, all a plant operator would have to do is get a good permit with easy conditions from a friendly civil servant. That would then exclude any lawsuit for damages from a potential victim. Obviously the capturing and public choice effects should be addressed also via direct tools. In this respect one can think about the liability, even under criminal law, of the licensor.⁵² Liability of the licensor (and appropriate sanctions within administrative law) can provide incentives to civil servants to act efficiently when granting licences.⁵³ This however, still requires tort law to take into account the fact that regulatory standards are not always set efficiently. If the optimal level of care is higher than the regulatory standard, liability will efficiently provide additional incentives.

Finally, tort law can also be seen as a “stop gap” for situations not dealt with by the statute.⁵⁴ This makes clear that the exposure to liability notwithstanding the permit is an important guarantee that the plant operator will take efficient care.

Therefore, simply following the conditions of a license or – more generally – regulatory standards should not have a justificative effect in tort. The opposite may only be true if it were clear that the administrative agency took into account all potential harm of all interested third parties when setting permit conditions. Indeed, theoretically, regulators and licensors are supposed to set standards in regulations and permits in a way that reflects political choices about the level of risks that maximises welfare. Hence, ideally, when setting objective pollution standards, regulators are supposed to weigh costs and benefits of different norms and choose the standard that delivers the highest social net benefit. In such case a judge in a civil liability suit should not be “second guessing” efficient agency decisions. It is, however, rare that agencies will be able to take ex ante all these interests and possible damage into account when setting permit conditions. Hence, as a general rule, following licenses or regulatory standards should not free from liability; the opposite would be the exception. This is the case both under a negligence as well as under a strict liability rule. Indeed, holding an injurer liable – notwithstanding his compliance with regulatory standards – will play an important role under a strict liability rule, since this will lead the injurer to take efficient care and adopt an efficient activity level, i.e. to take all efficient measures to reduce the potential accident costs, although this might require doing more (as far as precaution is concerned) than the regulation requires. Under a negligence rule this case law

⁵² *M. Faure/I. Koopmans/J. Oudijk*, Imposing criminal liability on Government Officials under environmental law: a legal and economic analysis, *Loyola of Los Angeles International Comparative Law Journal (ILR)* 1996, 529–569.

⁵³ Note, however, that industry argues against such a liability of the licensor, claiming that this may entail the risk that licensors would be too reluctant in allowing emissions if this could give rise to their liability: G.J. Niezen/M.J.G.C. Raaijmaker/A.J.S.M. Tervoort (eds.), *Aansprakelijkheid voor milieuschade in de Europese Unie, Ongebonden Recht Bedrijven* (2000) 171.

⁵⁴ *Rose-Ackerman*, Rethinking the Progressive Agenda (fn. 22) 123 and *Arcuri*, *TMA* 2001, 43–44.

is also significant if the efficient care standard (which is assumed to be equal to the due care standard required by the legal system) is higher than the regulatory standard. The basic reason remains that efficient preventive measures can be taken above what is often prescribed in the norm. Requiring a potential polluter to take these efficient preventive measures thus increases social welfare.

50 Within the context of environmental liability, the justificative effect of licenses is strongly supported by (of course) industry and by some authors. It is more particularly held that in environmental law, the damage will to a large extent depend upon prior zoning and planning decisions and will depend upon the framework of regulations and permits. One could imagine the situation where a government authority has balanced all the interests involved appropriately and has, on the basis of available information, taken an efficient decision, after having heard all parties involved, concerning the amount of environmental damage which would be allowed. In that case one could imagine that it would not be efficient that, for example, one of the parties who has been involved in the licensing process (and has hence been heard previously) would afterwards be allowed a liability suit for environmental damage to biodiversity although the damage consists precisely of the harm which had been foreseen as a result of the licence.⁵⁵ It is particularly in these situations that Rose-Ackerman argues that a judge in a civil liability suit should not be second guessing efficient agency decisions⁵⁶ and that Bergkamp argues that the polluter should not “pay double”, once because he has to follow regulatory conditions and once because he has to compensate the victim.⁵⁷ He therefore argued that a future EC environmental liability regime should contain a regulatory compliance defence.⁵⁸ Although one should, once more, in principle not accept a justificative effect of prior regulatory decisions, there may be exceptional situations where the regulatory decision can be such that all the interests involved have been weighed appropriately and that an efficient standard resulted from this balancing process. In that case it seems logical that when this efficient standard has been followed by the regulated, liability in tort is excluded. This seems, however, more to be an exceptional situation than the general rule.

51 Hence, it is relatively easy to solve Case V 1 from an economic perspective: when company A can significantly reduce the amount of emissions at reasonable costs, an economist would hold that it would be efficient to hold the tortfeasor to this higher standard of care. A breach should hence lead to negligence. The mere fact that the company possessed an outdated license which allowed for the emissions should, from an economic perspective, not constitute a justification. Hence, applying the very simple economic model, one would hold that the local farmer who suffers damage to his crop as a result of the

⁵⁵ Cf. Niezen/Raaijmaker/Tervoort (fn. 53) 170–171.

⁵⁶ Rose-Ackerman, *Rethinking the Progressive Agenda* (fn. 22) 123.

⁵⁷ L. Bergkamp, *De vervuiler betaalt dubbel* (1999).

⁵⁸ L. Bergkamp, *The Commission's White Paper on Environmental Liability: A weak case for an EC strict liability Regime*, *European Environmental Law Review* (EELR) 2000, 5.

emissions should be allowed to claim damages at least from the plant operator who can be considered to have acted wrongfully in the sense that the efficient care standard was not followed.

X. Summary

We have tried to show in this overview of the economic literature concerning the relationship between tort law and regulation that law and economics provides very balanced criteria to determine under what kind of circumstances regulation may provide better incentives for optimal care than liability rules. Thus a balanced view was presented showing that regulation does not only have (as it is sometimes pictured) disadvantages for industry. One advantage is that regulation may also provide information on the level of care, thus guiding industry on the minimum which they would have to achieve.

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Also it became clear that, from an economic perspective, regulation is needed because of the failures of tort law. The reverse is therefore also true: to the extent that it is possible to improve the working of tort law, regulation may be less needed. Thus one could imagine that the insolvency problem could partially be cured by imposing a duty to seek financial coverage on risk creators. Then at least one argument in favour of regulation loses its force. The widespread nature of the damage could also maybe still lead to a liability suit if one were to allow either the government or non-governmental organizations to use tort law against polluters even though no individualized damage can be proven. These are just some examples to show that, by improving the working of tort law, the need to use regulation can be reduced. Moreover, since regulation is often enforced with criminal sanctions, a method that improves the working of tort law is therefore also a method of decriminalization.

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We also showed that the economic literature indicates that even though there are important arguments, e.g., to regulate environmental pollution, this is no reason to rely solely on regulation. For many reasons (too specific, too static and lacking flexibility) regulation may have to be supported by tort law. This is also what we can see in practice. Even though empirical research showed that the environmental quality in the US has largely increased as a result of regulatory efforts and less so as a result of tort law, this does not mean that tort law could not have an important function. It can more particularly play an important complementary role in those areas where regulation fails. This may particularly be the case for a reason we did not discuss in detail within the context of this paper, being that regulation may always be subject to private interest capture. Shavell's criteria assume that the government will set regulation in the public interest. Scholars belonging to the public choice school taught that this may often not be the case. Private interest may have as a result that, e.g., environmental standards in licenses are inefficiently lenient. For that reason, the possibility of holding a polluter liable notwithstanding the fact that he complied with regulations can be quite important. Thus tort law becomes an important remedy for lobbying efforts by private interest as well.

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Comparative Analysis and Conclusions

ON THE INTERSECTION BETWEEN TORT LAW AND REGULATORY LAW – A COMPARATIVE ANALYSIS

*Willem H. van Boom**

I. Introduction

It has been said that “regulatory law” is a vague and imprecise term encompassing various instruments of control and constraint.¹ It has also been loosely defined as “any system of rules intended to govern the behaviour of its subjects”.² In this definition, administrative law and criminal law can both be part of an overarching regulatory framework.³ Moreover, strictly speaking even private law can be part of a regulatory framework if it is used by the relevant legislative body as a means of meeting regulatory policy aims. In a more concrete and strict sense, regulatory law is said to be “a distinctive set of techniques used by states to control the operations of markets”.⁴ In this more narrow sense, regulation is traditionally associated with public law – administrative and/or criminal – and is considered to be the domain of government agencies vested with public law powers.⁵ As a result, it seems that most lawyers tend to consider regulatory law to be a body of law outside the private law domain and setting rules or standards of conduct in various social situations ranging from occupational health regulation to environmental standards and competition law. Most contributions to this book work from this assumption.⁶

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¹ *P. Cane*, Using Tort Law to Enforce Environmental Regulations? *Washburn Law Journal* (Washburn L.J.) 2002, 450 f. See also *A. Ogus*, Regulation: Legal Form and Economic Theory (1994) 1, stating that the term regulation has acquired a “bewildering variety of meanings”. Cf. *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, no. 3.

² *H. Collins*, Regulating Contracts (1999) 7.

³ Although the questionnaire we sent out refers to “administrative law”, admittedly regulatory law is the better concept here. Cf. *K. Morrow*, England and Wales, no. 1. Administrative law is the body of law that is used for enforcement purposes of regulatory law, as is criminal law.

⁴ *Collins* (fn. 2) 7.

⁵ *P. Cane*, Tort Law as Regulation, *Common Law World Review* 2002, 305.

⁶ See, e.g., *M. Jagielska/G. Żmij*, Poland, no. 1; *B. Askeland*, Norway, no. 1 and *U. Magnus/K. Bitterich*, Germany, no. 2 fn. 11. For a mixed definition, cf. *P. Billet/F. Lichère*, France, no. 3.

- 2 However, in a more abstract way and returning to the aforementioned definitions, tort law can be understood to have a certain regulatory nature as well. For instance, the breach of a statutory provision obliging employers to provide personal safety equipment to their employees may result in both criminal prosecution or the administrative fining of the employer and in tortious liability vis-à-vis an injured employee. In such a situation, tort law can be considered to be one of the enforcement instruments of the substantive rule. To give one example – regulation on European product quality is primarily enforced by means of public law but is also supposed to be “backed up” by private enforcement efforts such as competitors’ claims for damages and injunctive relief.⁷ Thus, a private law right to compensation can serve as a deliberate policy instrument of strengthening public regulatory policy goals.⁸
- 3 Moreover, in the broadest definition of “regulatory law” tort law itself can be considered to be an autonomous system of regulation. This is especially true if we define regulation as rules controlling human activity⁹ and if we accept that tort law sets standards for behaviour, monitors the behaviour and enforces the standards against those not complying.¹⁰ Admittedly, this is a somewhat instrumental vision on tort law which is not universally shared.
- 4 In this chapter, the words “regulatory standards” or “regulatory law rules” refer to public law rules – be it either clear-cut and concrete or vague and conceptual, be it in the form of statutory rules, government regulations or public authority orders, guidelines, et cetera. I have not tried to work out a detailed distinction between rules and standards; for the purposes of this comparative analysis the distinction is not essential and the terms are used interchangeably.¹¹
- 5 In this chapter, a comparative analysis is undertaken of the legal systems presented in this volume. On the basis of a questionnaire, we asked the contributors to this volume to present an overview of their legal systems and the intricacies of interplay between tort law and regulatory law. The pictures that

⁷ European Court of Justice (ECJ) 17 September 2002, C-253/00, *Antonio Muñoz y Cia SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd* [2002] European Court Reports (ECR) I-7289; cf. *G. Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? Archiv für die civilistische Praxis (AcP) 206 (2006) 414 f.

⁸ See also ECJ 20 September 2001, C-453/99, *Courage Ltd v Bernhard Crehan* [2001] ECR I-6297. On that case, see, e.g., *A.P. Komninos*, New prospects for private enforcement of EC competition law: *Courage v Crehan* and the Community right to damages, Common Market Law Review (CML Rev.) 2002, 460 ff.; *A. Jones/D. Beard*, Co-contractors, Damages and Article 81: The ECJ finally speaks, European Competition Law Review (E.C.L.R.) 2002, 246 ff.; *O. Odudu/J. Edelman*, Compensatory damages for breach of Article 81, European Law Review (E.L.Rev.) 2002, 327 ff.; *G. Monti*, Anticompetitive agreements: the innocent party’s right to damages, E.L.Rev. 2002, 282 ff.; *Wagner*, AcP 206 (2006) 402 ff.

⁹ See, e.g., the references in fn. 1.

¹⁰ For this definition of regulation, see *Cane*, Common Law World Review 2002, 309.

¹¹ Seminal with regard to the dichotomy rules/standards, see *L. Kaplow*, Rules versus Standards: An economic analysis, Duke Law Journal 1992, 557–629.

emerged from the contributions were disparate and turned out to be difficult to reconcile. As a result, this comparative analysis is at best an impressionistic picture of the European strands in legal development.

The structure of this chapter is as follows. First, I will present a number of general remarks on the interplay between regulatory law and tort law (section II) in order to sketch the elements relevant for the comparative analysis. Section III (“Liability under Administrative Law as a Form of Interplay”) analyses both liability of public authorities and liability *vis-à-vis* public authorities for acts and omissions contravening regulatory law rules and standards.

Then, section IV (“Breach of Regulatory Law as a Wrongful Act”) considers the dovetailing of tort law and regulatory law in the specific legal requirements for tortious liability, whereas section V (“Who is Granted Protection under Tort Law in the Case of a Breach of Regulatory Law?”) deals with the scope of protection of the relevant regulatory law rule. Who is protected by the rule and hence, who can claim in tort when the rule is not complied with? Section VI (“Specific Consequences of Breach of Regulatory Law in Tort”) analyses technical issues of tort law (e.g. burden of proof and causation) in the case of non-compliance with regulatory law rules.

Furthermore, section VII (“Regulatory Compliance and Regulatory Permit as a Defence against Liability”) focuses on a specific issue of interplay between tort law and regulatory law, namely the relevance of compliance with regulatory law standards and explicitly issued regulatory permits for the wrongfulness of the damaging behaviour. Here the issue is whether a claim under tort law is pre-empted (i.e., blocked or barred) by the relevant public authority’s “permission to infringe”.

Both section VIII (“Safeguarding Compensation”) and section IX (“Compensation in Cases of Lawful (Regulatory) Interference”) deal with extensions of and alternatives to tort law as a damage compensating mechanism.

Finally, in section X (“Cases”) we consider three complex cases and evaluate the stance of the various legal systems to the problems of concurrence of regulatory law and tort law that the cases pose.

Input for this chapter was received from the country and special reports contained in this volume. These reports will be cited in the following way (name of the author(s), country or heading of the special report, marginal number): *M. Lukas*, Austria, *K. Morrow*, England and Wales, *P. Billet/F. Lichère*, France, *U. Magnus/K. Bitterich*, Germany, *A. Menyhárd*, Hungary, *A. Monti/F.A. Chiaves*, Italy, *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, *B. Askeland*, Norway, *M. Jagielska/G. Żmij*, Poland, *P. del Olmo*, Spain, *C. Kissling*, Switzerland, *M.S. Shapo*, USA, *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of

Private Individuals, *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, *I. Ebert/C. Lahnstein*, Regulatory Law and Insurance, *M. Faure*, Economic Analysis of Tort and Regulatory Law. We asked the contributors to work with a questionnaire (set out at the beginning of this book). For the benefit of the sequence of the issues dealt with in this chapter, the questionnaire is not strictly followed from one question to the next but instead is referred to when applicable. The relevant issues are considered in a thematic order and the relevant questions from the questionnaire are referred to in the footnotes.

II. General Remarks on the Interplay Between Regulatory Law and Tort Law

1. *Co-existence or hierarchy?*

- 12 Tort law is an independent body of law coexisting next to administrative law and criminal law.¹² It may be assumed, as Jagielska and Żmij state, that for the same act the wrongdoer may bear civil, criminal and administrative responsibility.¹³ In particular, criminal law seems quite separate from tort law: a criminal sanction does not exclude a claim for compensation in tort.¹⁴ Having said this, there is indubitably also interplay between the different fields of law. Some legal systems have a principled hierarchy between private law and regulatory law, envisaging the former as the fallback option – the gap filler – if the latter is non-existent or non-comprehensive.¹⁵ However, most legal systems do not consider regulatory law to have priority over or consider it to be superior to private law. In practice, however, the issue of concurrent competence of administrative and criminal courts, on the one hand, and civil courts, on the other, will inevitably necessitate some sort of demarcation between the areas of judicial competence.
- 13 From this demarcation usually follows that civil courts follow some sort of “parallel track” in tort law cases and that they tend to evaluate behaviour according to the autonomous concepts of “wrongfulness”, “fault”, “causation”, et cetera. This does not mean, however, that civil courts ignore decisions rendered by specialized administrative courts that have dealt with the same case. For instance, in some jurisdictions “wrongfulness” of an administrative act can only be established by an administrative court before any civil proceedings on

¹² Cf. the answers we received to Question I/5 (“If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?”).

¹³ *M. Jagielska/G. Żmij*, Poland, no. 24. Cf. *C. Kissling*, Switzerland, no. 21.

¹⁴ *A. Menyhárd*, Hungary, no. 10; *A. Monti/F.A. Chiaves*, Italy, no. 13; *P. Billet/F. Lichère*, France, no. 7; *B. Askeland*, Norway, no. 8; *U. Magnus/K. Bitterich*, Germany, no. 11; *P. del Olmo*, Spain, no. 20; *C. Kissling*, Switzerland, no. 22.

¹⁵ *K. Morrow*, England and Wales, no. 1.

liability of the public authority for upholding the act in the first place can be commenced.

From the foregoing, one could conclude that tort law and regulatory law are separate circuits of law. Indeed, the answers to the questionnaire bear witness of the watershed between tort law and regulatory law.¹⁶ At closer look, however, there definitely is serious interplay between the two fields of the law. In this respect, the field of safety regulation and environmental protection offers a good example. Take for instance the precautionary principle, which stems from environmental policy and has found its way into environmental protection legislation.¹⁷ There currently is a doctrinal debate on the extent of the applicability of the precautionary principle in environmental torts. If ultimately the precautionary principle has the power to reform or amend the concepts of “wrongfulness” and “duty of care” then regulatory law can be said to have prompted tort law to evolve. A mirror-image development in which tort law prompts the evolution of regulatory law rules is feasible as well. This may have been the case in some jurisdictions with employers’ responsibility for certain occupational diseases.

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Another example is offered by the European Directive 2001/95/EC on general product safety.¹⁸ Art. 5, for instance, states that “producers shall provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks.” If under a national tort law system, there was no previous case law under tort liability to the same effect, then the regulatory framework of the Directive provides the national courts with a tool for formulating a duty of care with respect to product information duties. Thus, the regulatory standard of art. 5 of the Directive can in fact be enforced by use of tort law.¹⁹ This does not necessarily work the other way around. If for instance product liability is based on the “reasonable consumer expectation test”,²⁰ then consumers may expect that manufacturers comply with the safety level provided by administrative rules on product quality and safety.²¹ However, they may also – depending on the case – have reasonable expectations *exceeding* those sustained by the statutory regula-

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¹⁶ See, e.g., the answers to Question I/1 (“What, in general, is the impact of administrative law rules on the tort law of your country?”) and Question II/1 (“Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?”).

¹⁷ Cf. *P. Billet/F. Lichère*, France, no. 13.

¹⁸ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, Official Journal (OJ) L 011, 15 January 2002, 4–17. Cf. *M. Jagielska/G. Żmij*, Poland, no. 44; *P. Billet/F. Lichère*, France, no. 14; *M. Lukas*, Austria, no. 4.

¹⁹ Cf. *M. Lukas*, Austria, no. 25.

²⁰ Art. 6 (1) EC Directive 85/374/EEC reads: “A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account [...]”.

²¹ *B. Askeland*, Norway, no. 20.

tory standards.²² Hence, in some respects regulatory law can be said to offer a *minimum standard of protection* under tort law. We will return to this matter in section VII.

2. *Convergence of objectives of tort and regulatory law?*

- 16 The previous section brings us to the question whether tort law and regulatory law in the field of safety and environment indeed have identical or somehow converging objectives.²³ As already mentioned, at a policy level tort law can be considered to be an autonomous system of regulation: it sets standards for behaviour, monitors the behaviour *ex post* and enforces the standards against those not complying and thus causing damage. Some of the contributors to this book indeed argue that tort law and regulatory law have similar ulterior goals, notably the prevention of harm to private or public interests.²⁴ At a more closer look, however, some find that there does not seem to be a firm basis in legal theory in the various legal systems on full convergence of tort law and regulatory law objectives. Moreover, courts do not seem to allude *expressis verbis* to any particular goal and legal practice does not seem to reflect on this either.²⁵
- 17 Some of the contributions to this volume emphasize the divergence of the objectives of tort law and regulatory law.²⁶ The central idea here is that tort law aims at protecting private and individual rights and interests, whereas regulatory law aims at protecting predefined public interests and does not concern itself with individual damage.²⁷ As a result, some types of damage (e.g. environmental damage) can only be the object of tort law insofar as the damage concerns individual property rights.²⁸ Finally, an in-between position is held by those who feel that the goals of regulatory law and tort law are similar on an abstract level, but the instruments and the scale of enforcement differs:²⁹ where regulatory law aims at “direct prevention” and criminal punishment in the case of non-compliance, tort law aims at prevention by means of *ex post* compensation.³⁰

²² Cf. *M. Jagielska/G. Żmij*, Poland, no. 44.

²³ See Question II/2 (“In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?”).

²⁴ See the table and its references at *infra* no. 20.

²⁵ Cf. *A. Menyhárd*, Hungary, no. 17.

²⁶ *P. Billet/F. Lichère*, France, no. 13; *K. Morrow*, England and Wales, no. 35.

²⁷ Cf. *P. del Olmo*, Spain, no. 57.

²⁸ *K. Morrow*, England and Wales, no. 35.

²⁹ Cf. *M. Jagielska/G. Żmij*, Poland, no. 46.

³⁰ Seminal *S. Shavell*, Liability for Harm Versus Regulation of Safety, *Journal of Legal Studies* (JLS) 1984, 357 ff. On the “post facto” features of tort law in this respect, see, e.g., *S. Shavell*, Foundations of Economic Analysis of Law (2004) 585 f.; *S. Shavell*, The optimal structure of law enforcement, *Journal of Law and Economics* (JLE) 1993, 255 ff. Cf. *C.D. Kolstad/T.S. Ulen/G.V. Johnson*, Ex post liability for harm vs. ex ante safety regulation: substitutes or complements? *American Economic Review* 1990, 888–901; *Ogus*, Regulation: Legal Form and Economic Theory (fn. 1) 261. Cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 7 ff. Cf. *W.H. van Boom*, Efficacious Enforcement in Contract and Tort (2006) 18 ff.

At this point, we can introduce injunctive relief as a yardstick for testing convergence of goals of tort law and regulatory law. Indeed, judicial activism with regard to injunctive relief in tort cases has some bearing on the balance between regulatory law and tort law. Take the example of an industrial operator emitting noxious exhaust gases. Usually regulatory law will set standards which can be enforced by issuing administrative stopping orders and shutting down operations. If a civil court has similar powers to grant prohibitory and mandatory injunctions reinforced by recurring penalty payments, then we can compare the use of both administrative and civil tools. Converging use of these tools may then be indicative of convergence of the goals of tort and regulatory law. Moreover, if a civil court refrains from using the aforementioned powers in the case of an operator who complies with all regulatory standards, then that could be an indication for the priority of the regulatory framework over private law and its remedies. If the industrial operator emitting noxious exhaust gases is found to comply with all relevant regulations but the operation of the plant is nevertheless stopped or suspended by means of a civil injunction, then one could argue that apparently tort law standards have primacy over public regulatory law standards.

18

Letting tort law play second fiddle can be the rational thing to do. A tort law system that “merely” compensates but does not stop or deter may indeed be the better position for tort law when the level of protection offered by tort law is inefficiently high. In this structure, the activity itself and its consequences should be endured, but any negative consequences will have to be compensated.³¹ If indeed tort law is merely used in such a situation to compensate the negative side-effects of the activity (i.e. internalizing externalities) rather than to forbid or curtail the activity as such, then there is strong indication that the goals of regulatory law and tort law *diverge*. Then, the former aims at prohibiting and allowing certain activities (under certain conditions) whereas the latter aims at compensating (certain) victims. As a result, whether the goals and instruments of tort and regulatory law indeed converge or diverge depends on the powers of the judiciary to provide injunctive relief in tort cases and on the extent to which these powers are applied in practice.

19

From a policy point of view, regulatory regimes covering safety and environmental protection seem to be preferred over tort liability.³² At the end of the day, preference for either system seems to boil down to a policy choice. In short, the following table shows the possible differences in objectives and instruments of regulatory law and tort law.

20

³¹ Cf. A. Ogus, *The Relationship Between Regulation and Tort Law: Goals and Strategies*, no. 31.

³² K. Morrow, *England and Wales*, no. 34. For a nuanced law and economics approach, see M. Faure, *Economic Analysis of Tort and Regulatory Law*, no. 13.

Regulatory Law	Tort Law
Objectives	
<ul style="list-style-type: none"> • Protection of the general interest³³ • Prevention of undesirable conduct³⁴ 	<ul style="list-style-type: none"> • Protection of individual rights against infringement³⁵ • Compensation of victims of negligence, allocation of loss³⁶ • Prevention of wrongdoing,³⁷ i.e. by the behavioural response to the threat of being held liable (deterrence)³⁸ • Ancillary instrument of enforcement of regulatory objectives
Instruments to Reach These Objectives	
<ul style="list-style-type: none"> • Ex ante³⁹ • No damage required⁴⁰ • Clear and concrete rules • Command/control structure⁴¹ • Criminal charge⁴² • Obligation to restore to original state⁴³ 	<ul style="list-style-type: none"> • Ex post: financial compensation • Securing compensation (e.g. by compulsory insurance)⁴⁴ • Ex ante: injunctive relief in the form of cease-and-desist orders⁴⁵

3. Constitutional restrictions

- 21 We asked the contributors to elaborate on the constitutional restrictions to the interaction between statutory regulation and tort law, e.g., concerning the re-

³³ *K. Morrow*, England and Wales, no. 34 f.; *P. del Olmo*, Spain, no. 57; *U. Magnus/K. Bitterich*, Germany, no. 11 (with regard to criminal law).

³⁴ Cf. *P. Billet/F. Lichère*, France, no. 15; *B. Askeland*, Norway, no. 24.

³⁵ *U. Magnus/K. Bitterich*, Germany, no. 22; *K. Morrow*, England and Wales, no. 35; *M. Jagielska/G. Żmij*, Poland, no. 47.

³⁶ *A. Menyhárd*, Hungary, no. 17.

³⁷ *P. Billet/F. Lichère*, France, no. 13; *A. Menyhárd*, Hungary, no. 17; *B. Askeland*, Norway, no. 24. Cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 2.

³⁸ Cf. *M. Jagielska/G. Żmij*, Poland, no. 48.

³⁹ *A. Monti/F.A. Chiaves*, Italy, no. 22; cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 8.

⁴⁰ Cf. *P. Billet/F. Lichère*, France, no. 7.

⁴¹ *A. Monti/F.A. Chiaves*, Italy, no. 22.

⁴² *M. Jagielska/G. Żmij*, Poland, no. 46.

⁴³ Cf. *P. del Olmo*, Spain, no. 15.

⁴⁴ See infra no. 51 ff.

⁴⁵ *U. Magnus/K. Bitterich*, Germany, no. 1; *M. Jagielska/G. Żmij*, Poland, no. 80; *B. Askeland*, Norway, no. 42; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 46 and *P. Billet/F. Lichère*, France, no. 6 and 13; *M. Jagielska/G. Żmij*, Poland, no. 48; *M. Lukas*, Austria, no. 44.

lationship between federal law and state law.⁴⁶ With regard to these constitutional restrictions, much depends on the constitutional setting of the specific jurisdiction. The constitutional setting of each individual country by and large decides which are binding rules of law and which are not. According to most legal systems, non-compliance with any kind of regulatory law can be a source of tortious liability,⁴⁷ ranging from a statutory framework to delegated rules, standards issued by regulatory agencies, et cetera.⁴⁸ If the legal document at hand fails the constitutional requirements for constituting a “binding law” (e.g. in the case of guidelines set by regulatory agencies without statutory basis), there is still the possibility that the document acquires specific status – for instance, a *good custom* or some other source of uncodified duty of care.⁴⁹

III. Liability Under Administrative Law as a Form of Interplay

1. Two types of “administrative liability”

The interplay between tort law and regulatory law may also present itself in another respect, notably in the area of “administrative liability”. We put a number of questions to the contributors concerning this type of liability.⁵⁰ However, the term “administrative liability” means different things to different lawyers. In the legal systems that consider “administrative liability” to be the liability of the administration and that adhere to a strict separation of jurisdiction between civil courts and administrative courts, administrative liability is the liability of public authorities.⁵¹ In some other jurisdictions, the term “administrative liability” is used for reference to liability under administrative law *vis-à-vis* public entities. We will deal with both understandings of “administrative liability”.

22

⁴⁶ See Question I/2 (“Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?”). Cf. also Question I/3 (“Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?”) and Question I/4 (“What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?”).

⁴⁷ *P. Billet/F. Lichère*, France, no. 5; *A. Monti/F.A. Chiaves*, Italy, no. 11; *C. Kissling*, Switzerland, no. 11.

⁴⁸ Cf. *B. Askeland*, Norway, no. 4; *U. Magnus/K. Bitterich*, Germany, no. 7 ff. and 13 ff.; *M. Lukas*, Austria, no. 6 f.

⁴⁹ Cf. *P. Billet/F. Lichère*, France, no. 5.

⁵⁰ See Question I/8 (“Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?”).

⁵¹ Cf. *P. Billet/F. Lichère*, France, no. 12.

2. Liability of public authorities

- 23 Liability of public authorities is not the focus of this volume, but a specific aspect of interplay should be introduced here: the relationship between administrative review of public authorities' acts and decisions, on the one hand, and public authority liability, on the other. Obviously, the interplay of these two legal regimes very much depends on the domestic constitutional and administrative legal framework. In England and Wales for instance, this is a field of the law very much in motion, in part as a result of the enactment of the 1998 Human Rights Act. In the case of *Marcic v Thames Water Utilities Ltd* [2002] Queen's Bench (QB) 929, Thames Water Utilities (TWU) was in charge of an outdated sewerage system and in the face of financial constraints it had to prioritize certain operations. Marcic's regularly swamped back garden was not one of them. TWU faced a considerable financial burden after the Court of Appeal decided that Marcic was allowed to shortcut administrative procedures and sue directly in tort (numerous other owners would undoubtedly follow). Contrastingly, the House of Lords ruled that the regulatory framework of the Water Industry Act 1991 sufficed as a remedy (it provided for administrative procedures and judicial review of the priority setting process), pre-empting liability under common law rules.⁵²
- 24 The contributions to this volume show that public authority liability for wrongful legislation and for violating existing statutory (regulatory) law standards is a complex issue in most legal systems. Because the topic is too complex to deal with extensively here, a few general remarks suffice. Some legal systems seem to be in a transitory phase towards acknowledging state liability for wrongful legislation.⁵³ Others are moving away from a restrictive approach of immunities to a more citizen-friendly liability regime.⁵⁴ Some are struggling with the technical construction of liability for wrongful legislative acts.⁵⁵ Usually, some principle of "proximity" between the public authority and the claimant is used to limit the circle of potential deserving claims.⁵⁶ Sometimes, establishing the fault of the authority is a difficult hurdle to overcome.⁵⁷ The general trend seems to be one of reticence: claims against public authorities are not easily granted.⁵⁸

⁵² *K. Morrow*, England and Wales, no. 13.

⁵³ *A. Menyhárd*, Hungary, no. 8.

⁵⁴ Cf. *K. Morrow*, England and Wales, no. 25 ff.

⁵⁵ *P. del Olmo*, Spain, no. 17.

⁵⁶ See, e.g., *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, no. 35.

⁵⁷ Cf. *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, no. 45.

⁵⁸ For more literature on this topic, see *W.H. van Boom/A. Pinna*, Liability for Failure to Regulate Health and Safety Risks; Second-Guessing Policy Choice or Showing Judicial Restraint? in: H. Koziol/B.C. Steininger (eds.), *European Tort Law 2005* (2006) 1 ff.

3. Liability vis-à-vis public authorities

“Administrative liability” in the sense of liability under administrative law *vis-à-vis* public entities is a legal construction for financial recourse on specific groups deemed responsible for the financial burden of a specific activity for the benefit of society as a whole. In this respect, liability seems to serve similar purposes as specific taxation does. Liability law is used to this end in a number of jurisdictions.⁵⁹ If the conditions under which such recourse action is allowed are not laid down in the general part of tort law but rather in specific legislation, one could call this genuine “administrative liability”. A notable example of this, which we will deal with *infra* (no. 57), is the administrative recoupment action granted to public authorities for environmental clean-up costs.

25

Generally speaking, in a number of legal systems both natural and legal persons can be subject to such obligations to compensate damage under administrative law.⁶⁰ However, that mere fact does not decide tortious liability, so specific rules on vicarious liability – or any other construction of imputation of acts to a legal entity – are not pre-empted by the administrative law obligations.⁶¹ This may imply that an executive officer of a business entity can be held personally liable for not intervening in the business process and thus allowing the business entity to breach regulatory standards.⁶² Additionally, it seems that conduct of *employees* that constitutes breach of regulatory standards is to be imputed to the employer.⁶³

26

IV. Breach of Regulatory Law as a Wrongful Act

Is the mere breach of regulatory law a tortious act? The answer to this question largely depends on the domestic structure of tort law. In short, there seems to be a number of possible approaches:

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- Non-compliance with the regulatory standard as such constitutes an imputable wrongful act;⁶⁴ thus, the non-compliant behaviour by the respondent gives the claimant a solid basis for his claim in tort: by not complying with the regulatory standards, a tort is committed.⁶⁵
- Non-compliance is an unlawful act and fault is *presumed* but the respondent can rebut this presumption.
- Non-compliance is unlawful, but *fault* still has to be proved.⁶⁶

⁵⁹ See, e.g., *C. Kissling*, Switzerland, no. 29 and 66; *A. Monti/F.A. Chiaves*, Italy, no. 18.

⁶⁰ See, e.g., *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 31; *A. Monti/F.A. Chiaves*, Italy, no. 17; *M. Jagielska/G. Żmij*, Poland, no. 38.

⁶¹ Cf. *A. Monti/F.A. Chiaves*, Italy, no. 18; *P. del Olmo*, Spain, no. 33.

⁶² Cf. *U. Magnus/K. Bitterich*, Germany, no. 18.

⁶³ Cf. *P. del Olmo*, Spain, no. 36; *M. Jagielska/G. Żmij*, Poland, no. 34 ff.; *C. Kissling*, Switzerland, no. 24 ff.

⁶⁴ *A. Menyhárd*, Hungary, no. 23; *P. del Olmo*, Spain, no. 94.

⁶⁵ Cf. *A. Monti/F.A. Chiaves*, Italy, no. 28 ff.

⁶⁶ *M. Jagielska/G. Żmij*, Poland, no. 60.

- 28 Admittedly, the breach of regulatory law standards is not considered a prerequisite for tortious liability.⁶⁷ Imputable wrongdoing is an autonomous concept independent of statutory breach.⁶⁸ But the interplay between tort and regulatory law does sometimes lead to priority of the latter over the former. Thus, if regulatory standards have been violated, this usually amounts to an act contravening the law and the violation as such constitutes a wrongful act.⁶⁹ In this respect, the regulatory standards act as minimum standards of care.⁷⁰ This may have practical relevance for fault-based liability: such regulatory standards may raise expectations of potential victims and can thus be a useful tool for construing liability in cases where these expectations are not met.⁷¹ As a result, non-compliance with regulatory standards may reinforce the claimant's case in the sense that it gives him a benchmark for evaluating the respondent's behaviour.⁷²
- 29 On a more concrete level, one can ask whether the mere breach of a rule of regulatory law *per definitionem* constitutes *wrongfulness*.⁷³ This depends, as Askeland rightly observes, on the definition of "wrongfulness" under the legal system at hand. For the purpose of tortious liability, some legal systems adhere to a subdivision into "wrongfulness" and "fault" (or "imputability"), while others work with an overarching concept of "fault" that encompasses both the evaluation of the act itself and the motives and reproach concerning the actor.⁷⁴ Having said that, it seems that the practical differences between the legal systems do not depend on these definitional differences.
- 30 A considerable number of legal systems seem to take as a starting point that violating a regulatory law standard suffices for establishing wrongfulness but cannot be sufficient for establishing liability as a whole.⁷⁵ Conversely, some legal systems do not automatically consider an unlawful act to be a tortious act.⁷⁶ Indeed, most legal systems will require more than just wrongfulness in order for tortious liability to arise. Fault of the wrongdoer is often assumed or a shift of the burden of proof with regard to imputability of the wrongful act
- ⁶⁷ *A. Menyhárd*, Hungary, no. 22; *P. Billet/F. Lichère*, France, no. 17; *P. del Olmo*, Spain, no. 89; *C. Kissling*, Switzerland, no. 6, 15 and 34.
- ⁶⁸ Although technically speaking, the tort of breach of a statutory duty under the law of England and Wales would be the exception to this rule, of course there are other torts that can possibly be invoked (such as the tort of negligence) in which the breach of the statutory duty itself may be relevant but not decisive. Cf. *K. Morrow*, England and Wales, no. 46.
- ⁶⁹ *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 53; *P. Billet/F. Lichère*, France, no. 18; *P. del Olmo*, Spain, no. 90.
- ⁷⁰ *U. Magnus/K. Bitterich*, Germany, no. 20 and 28.
- ⁷¹ *B. Askeland*, Norway, no. 29; *C. Kissling*, Switzerland, no. 34.
- ⁷² *B. Askeland*, Norway, no. 29; *A. Menyhárd*, Hungary, no. 16.
- ⁷³ See Question III/A/1 ("What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?") and Question III/A/2 ("Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?").
- ⁷⁴ On these different approaches, see, e.g., *C. van Dam*, European Tort Law (2006) no. 801 ff.
- ⁷⁵ Cf. *A. Menyhárd*, Hungary, no. 24.
- ⁷⁶ Cf. *B. Askeland*, Norway, no. 25.

is allowed.⁷⁷ Other legal systems, however, are more reticent in automatically linking breach of regulatory law with any element of tortious liability.⁷⁸ German law seems to hold an intermediate position as it more or less tends to link non-compliance with regulatory standards and liability on the basis of § 823 subs. 1 Bürgerliches Gesetzbuch (German Civil Code, BGB) in cases where the standard constitutes a *Verkehrspflicht* (a duty of care not to infringe upon a subjective right of the claimant).⁷⁹ Moreover, breach of a statutory duty as such constitutes wrongfulness.⁸⁰

V. Who is Granted Protection Under Tort Law in the Case of a Breach of Regulatory Law?

We asked the contributors to report on the so-called “scope of protection” of regulatory law under tort law.⁸¹ When the tortfeasor has violated a rule of regulatory law, to what extent does his liability depend on the protective purpose of this rule? Or, to put it differently: can all those suffering damage as a consequence of the breach of a regulatory law rule claim damages from the person in breach? The answer must surely be negative. Tort law usually sets boundaries to the number of claimants and the extent of their claims. This is aptly illustrated by the Spanish case of employees who were working in a factory on a Sunday and were injured as a result of an explosion nearby. Their claim for compensation against their employer – for breaching the regulatory law forbidding factory work on Sundays – was denied for lack of “protective purpose”: the statute aimed at safeguarding rest and recuperation but not at preventing safety hazards such as explosions.⁸² 31

What are the instruments used in tort law for assessing the scope of protection? 32
Unsurprisingly, these instruments for “containment” differ from one legal system to another. In some jurisdictions these questions are considered as issues of “protective purpose” or the “scope of protection” of the regulatory law rule.⁸³

⁷⁷ R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes, The Netherlands, no. 53; P. Billet/F. Lichère, France, no. 18; B. Askeland, Norway, no. 31.

⁷⁸ See, e.g., M. Jagielska/G. Żmij, Poland, no. 51.

⁷⁹ U. Magnus/K. Bitterich, Germany, no. 30. Note that *Verkehrspflicht* as such is an autonomous concept in tort law. In practice, however, a breach of a regulatory standard may well amount to the breach of a *Verkehrspflicht*.

⁸⁰ U. Magnus/K. Bitterich, Germany, no. 31.

⁸¹ See Question I/6 (“Under what conditions are administrative law rules regarded as so-called “rules with a protective purpose”? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?”), Question II/3 (“Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?”) and Question III/A/3 (“If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?”).

⁸² P. del Olmo, Spain, no. 29.

⁸³ A. Monti/F.A. Chaves, Italy, no. 28; R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes, The Netherlands, no. 23 ff.; B. Askeland, Norway, no. 32; K. Morrow, England and Wales, no. 46 f.; P. del Olmo, Spain, no. 91; M. Lukas, Austria, no. 15.

These concepts usually address two related issues. First, whether the injured party is part of the class of *persons* that the rule purports to protect, according to the legislative intentions. Second, whether the legislator devised the rule at hand in order to protect against the type of damage as was suffered. Obviously, the systems may diverge on the wording and extent of the concept of “protective purpose”. In Norwegian law, for instance, the concept of *relevance* or *parallelity* is used to the same end as the concept of *Schutzgesetz* is used under German law, the doctrine of “relative wrongfulness” under Polish law, and the concept of *relativiteit* is used in the Netherlands.⁸⁴ In England and Wales, the related concept of *statutory interpretation* is decisive in ascertaining whether a statute purports to allow a claim in tort for breach of the statute at hand.⁸⁵

- 33 Other legal systems operate more covertly by using other concepts to express a similar “containment policy”. Under French tort law, for instance, “protective purpose” of the regulatory standard is non-existent.⁸⁶ The requirement is, however, directly relevant under French law when evaluating the *nature of the damage suffered*: if the claimant has suffered damage of a different kind than the damage that the legislator tried to prevent with the enactment of the regulatory standard, he would not be able to claim compensation.⁸⁷ Sometimes, the concept of “protective purpose” is cloaked in the *causation requirement*. The causation requirement is then used to confine the extent of liability to the interests protected by the piece of legislation.⁸⁸
- 34 Determining the actual scope of protection of a regulatory law rule may be extremely difficult, as Jagielska and Żmij note.⁸⁹ Interpreting statutes that are ambiguous in this respect offer less guidance for court decisions than would be desirable.⁹⁰ This is even more so the case when the interests protected by the public law standards seem to refer to “public goods” such as clean environment and healthy competition climate. In some jurisdictions a lack of legislative clarity may lead to the presumed denial of protective purpose.⁹¹ Hence, the court may then have to shift from regulatory law to general principles of fault-based liability and ignore the regulatory framework altogether.
- 35 Alternatively, within the field of “public goods” sometimes a subdivision is made of public goods with specific persons or groups of persons on the receiving end, on the one hand, and public goods with no specific recipients, on the

⁸⁴ *B. Askeland*, Norway, no. 32; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 23 ff.; *U. Magnus/K. Bitterich*, Germany, no. 32; *C. Kissling*, Switzerland, no. 41 ff.; *M. Lukas*, Austria, no. 3 and 35; *M. Jagielska/G. Żmij*, Poland, no. 14. See also the Swiss concept of *Rechtswidrigkeitszusammenhang* as explained by *C. Kissling*, Switzerland, no. 23.

⁸⁵ *X (Minors) v Bedfordshire County Council* [1995] 2 Appeal Cases (AC) 633; cf. *K. Morrow*, England and Wales, no. 5.

⁸⁶ *P. Billet/F. Lichère*, France, no. 8.

⁸⁷ *P. Billet/F. Lichère*, France, no. 19.

⁸⁸ *A. Menyhárd*, Hungary, no. 11 and no. 25.

⁸⁹ *M. Jagielska/G. Żmij*, Poland, no. 61 f.

⁹⁰ Cf. *M.S. Shapo*, USA, no. 3 ff.

⁹¹ *U. Magnus/K. Bitterich*, Germany, no. 14. Cf. *M. Lukas*, Austria, no. 24 and 27.

other hand. Sometimes, courts consider regulation aiming at environmental protection in general to be part of the second category, denying individual claims for compensation based on breach of such regulation.⁹² An illustration of the use of such a subdivision is offered by a Dutch case concerning a negligently executed safety inspection of a Rhine barge by a public authority. The authority was admittedly negligent and as a result a third party suffered property damage when the negligently inspected barge sank and damaged the claimant's property. The *Hoge Raad der Nederlanden* decided against state liability nonetheless. The regulatory law rules obliging the public authority to perform inspections according to a specific standard were held to aim at transport safety in general and not at protecting specific particular (property) interests.⁹³ Hence, the state was not held liable for the damage that the barge caused to the other vessel as a consequence of its unsafe condition.⁹⁴ Similar tools for restricting the protective ambit of regulatory law are used in other legal systems as well.⁹⁵

VI. Specific Consequences of Breach of Regulatory Law in Tort

1. Burden of proof

What are the consequences of a breach of regulatory law rule on the allocation of the burden of proof, e.g., concerning causation, wrongfulness and fault?⁹⁶ Most legal systems do not attach specific consequences to breach of regulatory standards,⁹⁷ although citing a statutory rule that has been breached may help the claimant in substantiating his claim. Moreover, in specific circumstances the court may be more willing to reverse the burden of proof with regard to liability and causation if the non-compliance was of a serious nature.⁹⁸ This is illustrated by the Spanish Supreme Court Decision of 22 January 1996

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⁹² Cf. *A. Monti/F.A. Chiaves*, Italy, no. 24; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 34; *M. Jagielska/G. Żmij*, Poland, no. 47.

⁹³ *Hoge Raad* 7 May 2004, case C02/310HR, *Nederlandse Jurisprudentie* 2006, no. 281 (duwbak Linda). The *Hoge Raad* also argued that admitting liability in this case would allow protection to an unlimited group of third party interests for potentially unforeseeable damage.

⁹⁴ Hence, effectively the marine limitation of liability of the ship-owner was upheld. Note that if the negligent inspection had led to personal injury, the decision might have been different (the Court's reasoning is unclear on whether the decision would also apply to personal injury). On the differentiation between personal injury, property damage and pure economic loss, cf. *R. Rebhahn*, *Staatshaftung wegen mangelnder Gefahrenabwehr* (1997) 482.

⁹⁵ Cf. *M.S. Shapo*, USA, no. 9 and 19, referring to Restatement (Second) of Torts § 288 (1965). See also *K. Morrow*, England and Wales, no. 36, referring to *Stovin v Wise* [1996] AC 923. Cf. the concepts of general and specific reliance (on enforcement by the public authorities) used in, e.g., *Pyrenees Shire Council v Day*; *Eskimo Amber Pty Ltd v Pyrenees Shire Council* [1998] High Court of Australia (HCA) 3.

⁹⁶ See Question III/A/4 ("To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?") and Question III/A/5 ("What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?").

⁹⁷ *A. Menyhard*, Hungary, no. 27; *B. Askeland*, Norway, no. 34; *K. Morrow*, England and Wales, no. 49. Cf. *M.S. Shapo*, USA, no. 65. Contrast Austrian law, see *M. Lukas*, Austria, no. 29.

⁹⁸ Cf. *M. Jagielska/G. Żmij*, Poland, no. 66.

(Repertorio de Jurisprudencia (RJ) 248), where an illegally employed worker died on a mining exploitation site that did not hold an exploitation licence and did not follow applicable regulations. The Supreme Court held that the owner of the site was liable, reversing the burden of proof regarding fault. Since the full facts of the fatal accident had remained unclear, this also seems to have been a case of a presumption of causation.⁹⁹

- 37 With regard to causation, the following is relevant. The proof of causation remains the most difficult in case of breach of a number of regulatory standards.¹⁰⁰ For instance, in the case of regulatory standards aiming at preventing the accumulation of individual trifle damage – small emissions adding to the total of environmental damage – the individual cases of non-compliance with the law do not cause the entire damage to the environment, and assessing the extent of the (small) contribution of the wrongful act to the total of the detriment is either impossible or unfeasible. So, the more general the interests that the regulatory law aims to protect – the environment, fair competition et cetera – the more difficult it will be to pinpoint the exact damage caused by one wrongful act.
- 38 Some legal systems allow the reversal of the burden of proof with regard to causation in cases of non-compliance with a regulatory standard that purports to protect against the damage that was in fact suffered by the claimant. As a rule of thumb, the onus of disproving causation can then be shifted to the respondent (*prima facie* evidence).¹⁰¹ In some jurisdictions the breach of statutory rules is proof of *fault*. For instance, in Italian law the breach of administrative provisions per se may imply “fault” on part of the tortfeasor.¹⁰² Thus, under Italian law, a breach of administrative rules characterized by a protective purpose amounts to fault in the sense of art. 2043 Codice civile (Italian Civil Code, CC).
- 39 The reverse situation may be relevant as well: does acting in compliance with regulatory law have an effect on the burden of proof concerning tortious liability?¹⁰³ If the respondent proves that he complied with all relevant regulatory standards, does this change the distribution of the burden of proof regarding liability? Naturally, if the default position is such that the claimant must prove the imputable wrongful behaviour and causation, then there clearly is no need for shifting the burden of proof: it already lies with the claimant.¹⁰⁴

⁹⁹ *P. del Olmo*, Spain, no. 98.

¹⁰⁰ *P. Billet/F. Lichère*, France, no. 21.

¹⁰¹ Cf. *U. Magnus/K. Bitterich*, Germany, no. 36; *M. Lukas*, Austria, no. 29; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 36 ff.

¹⁰² *A. Monti/F.A. Chiaves*, Italy, no. 9.

¹⁰³ See also Question III/B/3 (“Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?”).

¹⁰⁴ Cf. *M. Jagielska/G. Zmij*, Poland, no. 75.

However, as the defence of compliance is raised by the respondent, he will typically have to prove the underlying facts.¹⁰⁵

2. Elements of causation

To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?¹⁰⁶ In most jurisdictions this defence is allowed.¹⁰⁷ Delivering the necessary proof is more difficult. For instance, a respondent accused of not having complied with a local regulation ordering the bestrewing of icy surfaces, may argue – and prove if necessary – that the accident would also have happened if he had in fact complied. Under German law this is referred to as the defence of the “rightful alternative behaviour”.¹⁰⁸ The cases in which such a defence succeeds seem scarce. In a recent Polish case, the Polish Supreme Court even stated that, “The defendant against whom a claim for redressing the damage is filed, cannot plead that if he had acted lawfully the wronged party would have sustained the same damage – while the actual action of the defendant constituted a breach of the norms supposed to prevent the damage”.¹⁰⁹

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In some cases, however, the defence may be more successful. Consider for instance a case in which a plant operator does not have the required permits and thus acts contrary to strict legal requirements but in substance he does comply with the material rules that he would be obliged to comply with if he had been granted the permit. In such a case, there is an unlawful act but the unlawfulness does not seem to be the cause of the damage. Admittedly, this does not preclude liability on a basis *other* than the breach of regulatory law. The damaging act itself may still be wrongful on alternative grounds.¹¹⁰

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3. Compensation not punishment

Breach of regulatory law is treated under tort law like other grounds for liability. As a result, the compensatory function of liability seems to be in the foreground.¹¹¹ The general position on the European continent is that punitive

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¹⁰⁵ Cf. *K. Morrow*, England and Wales, no. 54.

¹⁰⁶ See Question III/A/4 (“To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?”).

¹⁰⁷ *A. Menyhárd*, Hungary, no. 26; *A. Monti/F.A. Chiaves*, Italy, no. 32; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 55; *B. Askeland*, Norway, no. 33; *U. Magnus/K. Bitterich*, Germany, no. 33; *M.S. Shapo*, USA, no. 64. Note that such a defence does not preclude liability on another basis (viz., negligence instead of breach of statutory duty). See also *M. Lukas*, Austria, no. 36, for a distinction between what would be considered “property rules” and “liability rules” in law and economics (cf. *M. Faure*, *Economic Analysis of Tort and Regulatory Law*, no. 7).

¹⁰⁸ *U. Magnus/K. Bitterich*, Germany, no. 33. Cf. *C. Kissling*, Switzerland, no. 55.

¹⁰⁹ *M. Jagielska/G. Żmij*, Poland, no. 64.

¹¹⁰ *P. Billet/F. Lichère*, France, no. 20.

¹¹¹ See Question III/A/6 (“Can a breach of an administrative law rule result in a claim for punitive damages?”).

damages are not allowed, neither under principles of private law nor under regulatory law.¹¹² Admittedly, in the process of assessing non-pecuniary loss there may be consideration of a punitive element.¹¹³ Contrastingly, the common law action for *exemplary damages* is punitive by nature.¹¹⁴ Although this action is only allowed in a restricted number of cases, it could be relevant in cases where the respondent's conduct had been calculated to make a profit that would exceed any payment of compensation made to the claimant.¹¹⁵ So, exemplary damages may be awarded in case of deliberate breach of regulatory standards with the aim of making a profit exceeding the possible detriment of others.

VII. Regulatory Compliance and Regulatory Permit as a Defence Against Liability

- 43 Acting in compliance with regulatory law may be a relevant factor in deciding liability. In general, the relevance of compliance seems to depend on the nature, aim, and ambit of the regulatory rule at hand. Hence, the relevance of acting in compliance with statutory provisions depends on the nature of these provisions. If these rules set minimum quality standards, then there does not seem to be a relevant obstacle for liability. If, however, the rules aim at complete harmonization and do not leave any room for autonomous decision-making, then compliance may in fact pre-empt liability altogether.
- 44 An example of such a complete bar can be found in art. 7 (d) Product Liability Directive: "The producer shall not be liable as a result of this Directive if he proves: [...] that the defect is due to compliance of the product with mandatory regulations issued by the public authorities".¹¹⁶ A similar example is offered by art. 8 (3) of the Environmental Liability Directive: "An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage: [...] (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities."¹¹⁷

¹¹² *A. Monti/F.A. Chiaves*, Italy, no. 34; *A. Menyhárd*, Hungary, no. 28; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 58; *P. Billet/F. Lichère*, France, no. 22; *P. del Olmo*, Spain, no. 100 ff.; *M. Jagielska/G. Żmij*, Poland, no. 67; *C. Kissling*, Switzerland, no. 62; *M. Lukas*, Austria, no. 39. For an economic rationale of punitive damages, see cf. *M. Faure*, *Economic Analysis of Tort and Regulatory Law*, no. 35.

¹¹³ Cf. *B. Askeland*, Norway, no. 36; *U. Magnus/K. Bitterich*, Germany, no. 38.

¹¹⁴ See also *M.S. Shapo*, USA, no. 66.

¹¹⁵ *K. Morrow*, England and Wales, no. 50.

¹¹⁶ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7 August 1985, 29–33. Cf. *C. Kissling*, Switzerland, no. 17.

¹¹⁷ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30 April 2004, 56–75.

Central to these exceptions is the idea of *regulatory compliance defence*. This, however, is by no means an absolute defence against liability; much will depend on the level of compulsion that the regulation employs. Generally speaking, it seems logical that the more leeway regulation leaves for, e.g., the choice of the instruments for achieving the prescribed regulatory outcome, the more likely it seems that tortious liability is not pre-empted. The *regulatory permit defence* deals with a more specific issue: the relevant authority has used its power under law to allow specific harm doing, e.g., river pollution. Allowing the tortfeasor to invoke the regulatory permit defence bars victims' claims for compensation.

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We asked the contributors to give an account of how the respective legal systems deal with the regulatory compliance defence and the regulatory permit defence.¹¹⁸ Some legal systems flatly reject the idea of such defences; others are hesitant to allow them.¹¹⁹ Moreover, it is commonly held that a general duty of care can surpass the precautions demanded by public law regulation.¹²⁰ As noted by Ebert and Lahnstein, this is reflected in the general practice of liability insurance inclusions.¹²¹

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So, in European legal systems there is a firmly rooted rule that duties of care under tort law can surpass the level of care set by regulatory law. However, exceptions are feasible. Much will depend on the specific regulatory law standards that are applicable. Perhaps the legislative intent is indeed to justify the damaging nature of the challenged acts without any compensation. For instance, if the regulatory framework itself explicitly pre-empts civil law liability, then obviously there is in fact a defence to the described effect.¹²² If there is no explicit pre-emption, statutory interpretation would have to be applied to assess whether the legislative body did in fact consider a claim in tort to be possible in case of compliance.¹²³ If the regulatory standards already balanced the interests of the claimant and respondent, then that could be a ground for

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¹¹⁸ Question III/B/1 ("Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?") and Question III/B/2 ("Can the general duty of care go beyond these rules?").

¹¹⁹ *P. del Olmo*, Spain, no. 11, 53 and 106; *B. Askeland*, Norway, no. 37; *P. Billet/F. Lichère*, France, no. 10 in fine and 23; *A. Monti/F.A. Chiaves*, Italy, no. 35; *A. Menyhárd*, Hungary, no. 29; *M. Lukas*, Austria, no. 12 and 40.

¹²⁰ Cf. *M. Jagielska/G. Żmij*, Poland, no. 72 (although there is some doctrinal controversy on the exact dogmatic form this duty should have; see also the interesting dogmatic discussion in Poland on the concept of "wrongfulness" as described by *M. Jagielska/G. Żmij*, Poland, no. 13–14); *P. del Olmo*, Spain, no. 107; *U. Magnus/K. Bitterich*, Germany, no. 43; *B. Askeland*, Norway, no. 39; *P. Billet/F. Lichère*, France, no. 24; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 62. For an economic rationale, see *M. Faure*, *Economic Analysis of Tort and Regulatory Law*, no. 38 ff.

¹²¹ *I. Ebert/C. Lahnstein*, *Regulatory Law and Insurance*, no. 2.

¹²² Cf. *U. Magnus/K. Bitterich*, Germany, no. 41 (*Genehmigung mit Präklusionswirkung*).

¹²³ *K. Morrow*, England and Wales, no. 51 ff.; *A. Ogus*, *The Relationship Between Regulation and Tort Law: Goals and Strategies*, no. 38. See also *supra* no. 31 ff.

dismissing later claims in the civil court.¹²⁴ Thus, as Menyhárd rightly observes, it boils down to the question whether “the regulation itself makes causing harm lawful and exempts – explicitly or implicitly – the tortfeasor from the obligation to provide compensation”.¹²⁵

- 48 A notable example of a case in which the duty of care exceeds the regulatory standard is given by the March 2005 decision by Rome Court of Appeal. In this case cigarette manufacturers were found liable for the failure to inform smokers of the risks of smoking. Although before 1990 there was no regulatory rule law imposing on manufacturers the duty to place warnings on cigarette packets informing consumers of the risks connected to smoking, the court found cigarette manufacturers liable for failure to inform smokers of such risks even though the tobacco industry had complied with all existing regulations governing the sale of tobacco products at the time.¹²⁶
- 49 Other legal systems start from a different point but arrive at roughly the same conclusion by holding that a regulatory permit is in principle a valid defence which can be countered by alleging that a more stringent duty of care is applicable. The Polish case on self-igniting television sets illustrates this point: the manufacturer was held to a stringent duty of care vis-à-vis his customers, rendering the fact that the products complied with relevant regulatory standards irrelevant.¹²⁷ Interesting in this respect is also the German system of neighbour liability law (§ 906 BGB) which seems to have a mixed system in the sense that emissions which do not exceed marginal or approximate values (*Grenz- oder Richtwerte*) under administrative law principally have to be tolerated, but only “as a rule”, i.e. as a guideline, not a binding provision for the civil courts. So, in effect, the courts should take the administrative permit *into account* when ascertaining tortious liability but they should not take the permit as a complete defence against liability.¹²⁸
- 50 Finally, we asked what the consequences are of compliance with *wrongful* regulation.¹²⁹ Can tortfeasors be excused for complying with wrongful rules? Assuming that a court – be it a civil court or an administrative court – is allowed to assess the wrongfulness of the piece of legislation at hand,¹³⁰ then the matter turns to whether “mistake of law” and “acting on authority” are indeed valid defences. In criminal law, sometimes the “compliance with a legal duty” de-

¹²⁴ Cf. *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 61.

¹²⁵ *A. Menyhárd*, Hungary, no. 32.

¹²⁶ *A. Monti/F.A. Chiaves*, Italy, no. 36. Cf. *van Boom/Pinna* (fn. 58) no. 21 ff. on the French tobacco “saga”.

¹²⁷ *M. Jagielska/G. Żmij*, Poland, no. 73.

¹²⁸ *U. Magnus/K. Bitterich*, Germany, no. 2 and 49. Cf. *M. Lukas*, Austria, no. 44.

¹²⁹ Question 1/4 (“What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?”).

¹³⁰ On that problem, see, e.g., *A. Menyhárd*, Hungary, no. 9.

fence can be raised.¹³¹ With this defence, there usually is some sort of foreseeability test.¹³² Then, the relevant question is whether the respondent knew or could have known that the piece of regulatory legislation was wrongful or not. It seems that a similar test may decide tortious liability of the respondent.¹³³

VIII. Safeguarding Compensation

1. *Compulsory insurance and funds in the case of a breach of regulatory law*

As we have seen throughout this volume, breach of regulatory law may be sanctioned by a claim for damages in tort. How do tortfeasors pay for such claims? Usually, voluntary third party insurance is the funding mechanism used for compensation. However, there may be local circumstances impeding the proper functioning of this loss spreading mechanism. In that case and for whatever reason legislative policy may then aim at alternatives for safeguarding compensation by, e.g., rendering third party insurance compulsory (as reported by the contributors).¹³⁴ The alternative paths chosen seem to depend on the features of the domestic insurance market. 51

In the area of safety regulation and environmental protection, some countries use compulsory insurance schemes quite often, while others hardly make use of these schemes at all. For instance, German law tends to combine strict liability with compulsory insurance (viz., concerning motor vehicle liability, civil aviation, transport of goods).¹³⁵ Another example is offered by the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. These Conventions have established a regulatory framework for limited liability, compulsory insurance, and an international compensation fund for excess damage caused by oil transporting sea vessels.¹³⁶ Similar international arrangements exist regarding nuclear energy.¹³⁷ 52

Additionally, *de facto* compulsory liability insurance can be the result of a regulatory law rule compelling an operator of a specific activity to avail him- 53

¹³¹ A. Monti/F.A. Chiaves, Italy, no. 12; P. Billet/F. Lichère, France, no. 6.

¹³² A. Monti/F.A. Chiaves, Italy, no. 12; B. Askeland, Norway, no. 7.

¹³³ Cf. P. del Olmo, Spain, no. 18.

¹³⁴ Question II/4 ("If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.").

¹³⁵ U. Magnus/K. Bitterich, Germany, no. 27. Naturally, the compulsory liability insurance of motor vehicle owners applies in all EU countries, but this is not part of liability for breach of regulatory law. See also M. Lukas, Austria, no. 30 ff.

¹³⁶ Cf. P. Billet/F. Lichère, France, no. 16; M. Jagielska/G. Żmij, Poland, no. 55.

¹³⁷ See the (amended) Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 and the (amended) Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960.

self of sufficient financial cover against liability risks. This is a widely used instrument with regard to licensees under environmental regulation.¹³⁸

- 54 An even more radical alternative to compulsory third party insurance is the complete replacement of liability law by a comprehensive compensation scheme. In particular, personal injury suffered by employees in the course of their occupation is usually covered by a social security scheme.¹³⁹ This shift towards alternative compensation schemes is outside the scope of this volume.¹⁴⁰

2. *Alternative sources of compensation*

- 55 What alternative sources of compensation are there in connection with regulatory law? First, contract law may be a source of obligation to compensate the injured party for non-compliance with regulatory law.¹⁴¹ Second, there may be an alternative procedure for obtaining compensation. Notably in the case of a criminal offence, some legal systems allow the compensation of damage as an ancillary claim for compensation by the injured party in a criminal prosecution.¹⁴² Third, in some legal systems altruistic intermeddling (*negotiorum gestio*) may be a source of compensation for the state when it decides to intervene after the infringement of regulatory law. Under this heading, the “intermeddling state” can sometimes claim reimbursement from the wrongdoer of the cost incurred “on behalf of” the wrongdoer.¹⁴³ Roughly speaking, this amounts to liability vis-à-vis the public authority as mentioned in section III. Fourth, in some jurisdictions specific rules on neighbour law, as far as these are codified outside the common framework of tort law, can also be a source of obligations to compensate damage caused by non-compliance with regulatory standards.¹⁴⁴ Fifth, there may be specific legislation regarding liability “outside” the common framework of tort law. A number of jurisdictions have specific statutes outside the common framework of tort law providing for a legal ground for compensation.¹⁴⁵ For instance, a 1997 Italian decree renders the wrongdoer liable for redress of soil contamination;¹⁴⁶ specific Norwegian statutes on environmental liability and liability of fun fair operators can cause liability in cases of non-compliance with public law safety

¹³⁸ *K. Morrow*, England and Wales, no. 44; *U. Magnus/K. Bitterich*, Germany, no. 27; *A. Menyhard*, Hungary, no. 21; *P. Billet/F. Lichère*, France, no. 16; *C. Kissling*, Switzerland, no. 50.

¹³⁹ *A. Monti/F.A. Chiaves*, Italy, no. 27; *B. Askeland*, Norway, no. 27.

¹⁴⁰ See, e.g., *W.H. van Boom/M. Faure* (eds.), *Shifts in Compensation between Private and Public Systems* (2007).

¹⁴¹ *U. Magnus/K. Bitterich*, Germany, no. 40.

¹⁴² *P. Billet/F. Lichère*, France, no. 26; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 64.

¹⁴³ *U. Magnus/K. Bitterich*, Germany, no. 46; *C. Kissling*, Switzerland, no. 66.

¹⁴⁴ *B. Askeland*, Norway, no. 42; *U. Magnus/K. Bitterich*, Germany, no. 47; *M. Jagielska/G. Żmij*, Poland, no. 80; *C. Kissling*, Switzerland, no. 67.

¹⁴⁵ Cf. *M. Jagielska/G. Żmij*, Poland, no. 76 (product liability outside tort law).

¹⁴⁶ *A. Monti/F.A. Chiaves*, Italy, no. 38.

standards;¹⁴⁷ specific legislation in England and Wales concerns liability of polluters for clean-up costs;¹⁴⁸ specific legislation in the USA provides relief for injured consumers in the case of a violation of a consumer product safety rule".¹⁴⁹ Sometimes, the relevant administrative statute refers back to the general principles of tortious liability.¹⁵⁰

Apart from all these specific sources of compensation, Spanish administrative law seems to present a unique feature of a general framework for liability in the case of non-compliance with regulatory standards. Under Spanish administrative law, there is the possibility to base liability for breach of regulatory standards on the administrative legislation itself. According to art. 130 *Ley 30/92 del Procedimiento Administrativo Común*, the offender is obliged to restore the situation to its original state and to pay the corresponding losses and damages. So, apart from any administrative sanctions that may apply, a wrongdoer may also be obliged to repair and/or compensate any harm caused as a result of the breach.¹⁵¹

When comparing the various legal systems, a common denominator seems to present itself in the form of the recoupment action by public authorities for environmental clean-up costs. A number of legislators have chosen to implement a specific piece of legislation outside tort law to facilitate the claiming of clean-up costs by public authorities or agencies.¹⁵² Surely, this is no coincidence. Possible reasons for governments designing a separate administrative framework for recoupment of soil clean-up costs seem to be the following. First, in some jurisdictions a claim in tort law presupposes a proprietary interest in the contaminated soil. If the public authority does not own the land, a tort claim is barred. Second, tort law may have inherent traits such as prescription periods, causation requirement, standard of proof, proof of negligence, et cetera that may not suit the pursuit of public policy.

To conclude, the alternative routes to compensation are manifold and the justifications diverge. The justification may be to facilitate recoupment actions for public authorities or to replace tort law by an alternative source of swift and efficient compensation, but may also lie in the classical division of the law of obligations, e.g., altruistic intermeddling as a source of compensation in absence of negligent behaviour.

IX. Compensation in Cases of Lawful (Regulatory) Interference

We asked the contributors to this volume to report on regimes providing for compensation (either from the party who benefited, a fund, or government) in

¹⁴⁷ *B. Askeland*, Norway, no. 41.

¹⁴⁸ *K. Morrow*, England and Wales, no. 24; *C. Kissling*, Switzerland, no. 66.

¹⁴⁹ *M.S. Shapo*, USA, no. 48.

¹⁵⁰ *Cf. A. Menyhárd*, Hungary, no. 32.

¹⁵¹ *P. del Olmo*, Spain, no. 44 ff.

¹⁵² See also *M.S. Shapo*, USA, no. 41 ff. on the USA Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

the case of the *lawful* infringement of interests of another person under regulatory law.¹⁵³ It seems that there is no broadly applicable principle to this topic except for public indemnification for expropriation, either in the strict sense or in a more broad sense (forced easements, et cetera). This naturally constitutes a firm ground for indemnification.¹⁵⁴ Indeed, compensation of the expropriated person is usually constitutionally safeguarded.¹⁵⁵

- 60 Obviously, outside the strict ambit of expropriation, interference in accordance with regulatory standards may also cause damage. Some jurisdictions then allow for liability for lawful interference.¹⁵⁶ In line with this ground for liability, lawful interference with someone's property justified by the public interest – e.g., nuisance caused by an airport – may be in accordance with regulatory standards but may nevertheless result in a duty to compensate the injured party.¹⁵⁷ A related but somewhat different construction is sometimes followed in Dutch law. Art. 6:168 Civil Code provides that, in case of tortious liability (e.g. industrial nuisance), the civil court may reject an action for obtaining a prohibitory injunction on the ground that the tortious conduct should be tolerated in the common overriding interest of society, however without prejudice to the right to compensation of the damage ensued.¹⁵⁸ Hence, although in principle tortious activities can be stopped by filing for injunctive relief, here an exception is allowed leaving the victim with “mere” compensation from the tortfeasor. Other jurisdictions seem to file this problem under the heading of the law of civil procedure, e.g., by rendering injunctive relief a discretionary matter for the court rather than a substantive right to cessation of the activity.
- 61 Finally, there is the matter of liability for “excessive lawful burdening” as a result of *lawful* regulatory acts or justified “regulatory inactivity”. The legal systems vary in this respect. For instance, French law presents a very elaborate picture. Under French law, first the statute itself must be evaluated. If it offers some form of compensation, this is deemed exhaustive. If not, then the legislative intentions must be reconstructed; if nothing implies that the legislature has excluded financial responsibility of the state, then the concept of administrative liability for the excessive burdens of public policy (*égalité devant les charges publiques*) can come into play.¹⁵⁹ Active state intervention can thus

¹⁵³ See the answers to Question IV/2 (“Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an “indemnification” claim?”) and Question IV/1 (“Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?”).

¹⁵⁴ Cf. *P. del Olmo*, Spain, no. 111 f.; *C. Kissling*, Switzerland, no. 68 ff.; *A. Menyhárd*, Hungary, no. 33.

¹⁵⁵ *A. Monti/F.A. Chiaves*, Italy, no. 39; *M.S. Shapo*, USA, no. 71; *C. Kissling*, Switzerland, no. 68.

¹⁵⁶ In Poland for instance, lawful performance of public authority may give rise to “equity liability”. Cf. *M. Jagielska/G. Żmij*, Poland, no. 70.

¹⁵⁷ *K. Morrow*, England and Wales, no. 14.

¹⁵⁸ *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 75.

¹⁵⁹ *P. Billet/F. Lichère*, France, no. 28.

result in financial compensation of the extraordinarily burdened citizen, provided the damage is special and abnormal. Moreover, under Polish law, both “personal injury” caused by the exercise of public powers and the retraction of an administrative decision with the aim of avoiding a specific danger to life or health or to the benefit of overriding public interests give rise to a claim for (limited) compensation.¹⁶⁰

X. Some Cases

Finally, in this section we consider a number of concrete cases. In the questionnaire we sent out to the contributors, we asked them to tackle these cases in order to test the more general questions we put to them.

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1. Case I (Question V/1)

In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

The focal point of this case is that the plant operator did not breach any statutory duties. In fact, his chemical process was in full conformity with the public regulation standards, so there is no basis for tortious liability for breach of a statutory duty.¹⁶¹ However, in this case the public regulation standards were obviously not in conformity with the scientific “state of the art”. As a result, according to all legal systems, this may constitute a wrongful emission (viz., a wrongful act of nuisance).

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In some legal systems, specific rules on neighbour nuisance apply. In these countries, the principles of neighbour law demand that the burden of emissions does not exceed a certain threshold. If it does, the excessive burden constitutes “trouble anormal de voisinage”.¹⁶² A balancing of the costs and benefits of the precaution may be needed to assess whether there is in fact an excessive burden.¹⁶³ If there is, this may either result in the pursuit of a prohibitory injunction.

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¹⁶⁰ *M. Jagielska/G. Żmij*, Poland, no. 82–83.

¹⁶¹ Cf. *U. Magnus/K. Bitterich*, Germany, no. 49.

¹⁶² *P. Billet/F. Lichère*, France, no. 28; cf. *A. Monti/F.A. Chiaves*, Italy, no. 40. Cf. Granelloven 16 June 1961 no. 15 (the Norwegian Neighbour Act, grannel.) § 2 and § 9 as mentioned by *B. Askeland*, Norway, no. 42 and 44.

¹⁶³ *B. Askeland*, Norway, no. 44; *U. Magnus/K. Bitterich*, Germany, no. 49. Cf. *M.S. Shapo*, USA, no. 72.

tion or a claim for compensation of damage.¹⁶⁴ Some jurisdictions even adhere to *strict liability of the emitting plant operator*.¹⁶⁵

- 65 The question is whether an admittedly outdated permit can be a defence against liability? The relevance of the permit seems negligible, especially in those legal systems that do not find regulatory permits relevant at all for deciding tortious liability. Naturally, the fact that the statute is out of date in scientific terms does not render it inapplicable. So, in effect the statutory requirements must be applied even after this considerable lapse of time.¹⁶⁶ However, the standards laid down by statute are not decisive: the emission may be found intolerable even if the amounts permitted by the public regulation were not exceeded. As a result, the chemical plant operator cannot invoke the full defence of a public permit.¹⁶⁷
- 66 Is it relevant that the affected farmer could have applied for a review or withdrawal of the permit according to an administrative review procedure? In a number of legal systems, the fact that the farmer claims compensation for damage that he could perhaps have prevented himself by applying for review of the permit seems not to stand in the way of allowing the claim in tort.¹⁶⁸ It may perhaps amount to contributory negligence.¹⁶⁹ Other jurisdictions are more strict: if the farmer knew or should have known about the emissions, and could have prevented the damage by applying for review, the farmer is indeed contributorily negligent.¹⁷⁰
- 67 With regard to claims against the public authorities, the situation may be more complex. Here, some legal systems adhere to a strict order between (administrative and/or judicial) review of public law permits and tort law. *Marcic v Thames Water Utilities Ltd* confirms the primacy of the statutory regime.¹⁷¹ But even if we isolate this technical obstacle to compensation and focus on the substantive issue of liability for not updating regulation, the chances of winning such a case seem very slim indeed. State liability for not updating regulation is exceptional.¹⁷² In principle, it seems that in most countries the state – being the legal entity to which the legislative bodies of the state belong – cannot be held liable in tort for not updating the statutory standards to

¹⁶⁴ *A. Monti/F.A. Chiaves*, Italy, no. 41.

¹⁶⁵ *B. Askeland*, Norway, no. 45 and 22; *A. Menyhárd*, Hungary, no. 35; *C. Kissling*, Switzerland, no. 72 ff.

¹⁶⁶ *K. Morrow*, England and Wales, no. 58.

¹⁶⁷ *P. Billet/F. Lichère*, France, no. 28. Cf. *P. del Olmo*, Spain, no. 114 ff.; *M. Jagielska/G. Żmij*, Poland, no. 85; *A. Menyhárd*, Hungary, no. 34; *M. Lukas*, Austria, no. 47.

¹⁶⁸ *M. Jagielska/G. Żmij*, Poland, no. 85; *B. Askeland*, Norway, no. 46; *C. Kissling*, Switzerland, no. 83 at lit. c); *P. Billet/F. Lichère*, France, no. 28.

¹⁶⁹ *P. del Olmo*, Spain, no. 114.

¹⁷⁰ *U. Magnus/K. Bitterich*, Germany, no. 49. A complete bar of the farmer's claim seems appropriate according to Austrian law; see *M. Lukas*, Austria, no. 48.

¹⁷¹ *Marcic v Thames Water Utilities Ltd* [2002] QB 929. Cf. *K. Morrow*, England and Wales, no. 57.

¹⁷² Note that under Polish law there is the immunity for acts and omissions dating before 1 September 2004. See *M. Jagielska/G. Żmij*, Poland, no. 86.

the level of scientific knowledge available.¹⁷³ There may be an exception to this principle if the inaction of the government is lacking all justification¹⁷⁴ or constitutes a qualified degree of negligence.¹⁷⁵ Possibly, there could be a claim in tort if there is a statutory duty for a public authority to update the rules.¹⁷⁶ Moreover, there may be constitutional grounds for allowing such claims if the inaction of the state runs counter to the constitutional duty to safeguard life or maintain a habitable environment.¹⁷⁷

Note that the French approach to liability of the state may be more forthcoming to claimants. In France, administrative liability has been tightened by the *scandale de l'amiante*. Indeed, the asbestos scandal prompted debate on state liability for not enacting safety regulations against the dangers of asbestos. The 2004 Conseil d'Etat decisions¹⁷⁸ held that the state is under the obligation to adopt regulation in the face of scientific knowledge of the serious health risks concerning asbestos. Moreover, not adapting existing regulation to new insights can also amount to administrative liability under French law.¹⁷⁹

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2. Case II (Question V/2)

A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

This case purports to address the issue of extending the protective ambit of the public law regulation under tort law. Occupational health and safety standards aim to protect employees. Can the protectionary ambit of such statutory rules be extended to cover others than employees as well? Could it be argued that B is liable according to the specific public law duties that he would have to comply with if he had employed others in his company, although these rules would not directly apply in this case?

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The answers in the contributions to this volume present a mixed picture. Some of the reports state that there are no specific extensions of statutory duties under

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¹⁷³ *P. del Olmo*, Spain, no. 116 ff.; *A. Menyhárd*, Hungary, no. 37.

¹⁷⁴ *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 78.

¹⁷⁵ *Cf. B. Askeland*, Norway, no. 16 and 46.

¹⁷⁶ *Cf. P. del Olmo*, Spain, no. 118 ff.

¹⁷⁷ *Van Boom/Pinna* (fn. 58) no. 1 ff.

¹⁷⁸ Conseil d'Etat (High Administrative Court, CE), 3 March 2004, *Min. de l'emploi et de la solidarité v Xueref, Thomas, Botella, Bourdignon*, *Juris-classeur périodique. La Semaine juridique (JCP)* 2004.II.10098, with note *G. Trébulle*; *Droit Administratif* 2004, no. 87, with note *G. Delaloy*; *Responsabilité civile et assurances (Resp. civ. ass.)* 2004, no. 234, with note *G. Guettier*.

¹⁷⁹ *P. Billet/F. Lichère*, France, no. 28.

public regulation.¹⁸⁰ Otherwise, the normal rules of tortious liability apply.¹⁸¹ A Norwegian case illustrates this point. In this case, a 12-year-old boy had joined his father while the latter was working inside a train tunnel. The boy was hit by a train partly due to the fact that the train driver had not given a signal in accordance with the safety regulations given for the safety of the workers. The boy claimed compensation from the railway operator. The Norwegian Supreme Court was divided in its opinion, but the majority denied compensation. The majority put weight on the fact that the safety regulations were given to protect the workers, not other persons illegally located inside the tunnel. The decision is reportedly criticized for not extending the protectionary ambit of the regulatory standard to cover third parties such as the child as well.¹⁸²

- 71 In some legal systems, the relevant occupational regulatory standards are thought to reflect expert knowledge of health hazards in the workshop. This may be taken into account when evaluating the general duty to take due regard of the interests of passers-by. As a result, the wrongfulness of B's behaviour may in part be decided by the regulatory standards although these do not directly apply.¹⁸³ Then, the public law standard would be "one piece of evidence of negligence".¹⁸⁴
- 72 Note that in some countries this case does not seem to pose a specific problem of wrongfulness at all: if the accident was caused by a tangible object (viz., an unsafe machine), some form of strict liability applies independent of regulatory law.¹⁸⁵

3. Case III (Question V/3)

Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

¹⁸⁰ *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 80.

¹⁸¹ *Cf. K. Morrow*, England and Wales, no. 58; *P. del Olmo*, Spain, no. 123.

¹⁸² *B. Askeland*, Norway, no. 32.

¹⁸³ In this vein, *U. Magnus/K. Bitterich*, Germany, no. 51. *Cf. P. del Olmo*, Spain, no. 122; *C. Kissling*, Switzerland, no. 87.

¹⁸⁴ *M.S. Shapo*, USA, no. 73; *cf. M. Lukas*, Austria, no. 49.

¹⁸⁵ *A. Monti/F.A. Chiaves*, Italy, no. 42; *M. Jagielska/G. Žmij*, Poland, no. 87; *P. Billet/F. Lichère*, France, no. 29 (also noting that vicarious liability of the employer for personnel may exist). *Cf. the Norwegian report*, stating that strict liability for "continuous, typical and extraordinary risk" may even apply (*B. Askeland*, Norway, no. 47).

a) *Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?*

b) *Could the injured persons claim damages from the government agency?*

The company can be held liable, assuming that there is a sufficient causal link between the violations and the damage incurred.¹⁸⁶ Lack of supervision is not considered to be a valid defence vis-à-vis the injured person.¹⁸⁷ As the French and Spanish reporters rightly observe, the basis for denying this defence is the Roman maxim *nemo auditur propriam turpitudinem allegans*.¹⁸⁸ As a result, the victim could claim compensation in full from the liable company.¹⁸⁹

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In some countries, the lack of supervision by the responsible public authority is considered to be a valid ground for tortious liability of that public authority.¹⁹⁰ References are made to court cases of liability of the financial market authority for not diligently supervising,¹⁹¹ and a case of “faute” concerning control of forests.¹⁹²

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Other jurisdictions are more reticent in allowing claims for compensation against government agencies. Clearly, courts and legislatures showing restraint with regard to liability of the administration for negligent supervision are exercising their powers to leave the administration sufficient space to prioritise policy objectives.¹⁹³ The legal method by which these legal systems reach the objective of semi-immunity of the administration usually is some form of high threshold for liability.¹⁹⁴

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Sometimes, a threshold of qualified negligent omission has to be passed before a claim succeeds.¹⁹⁵ Under Spanish law, for example, the mere omission to supervise a third party's activities does not suffice to hold the public authority liable: the claimant must instead argue the inadequacy of the public services, which the courts would not automatically assume in the case at hand.¹⁹⁶

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¹⁸⁶ Cf. *P. Billet/F. Lichère*, France, no. 30.

¹⁸⁷ *A. Monti/F.A. Chiaves*, Italy, no. 43; *K. Morrow*, England and Wales, no. 59; *U. Magnus/K. Bitterich*, Germany, no. 52; *M. Jagielska/G. Żmij*, Poland, no. 88; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 81; *A. Menyhárd*, Hungary, no. 42; *C. Kissling*, Switzerland, no. 19 and 89; *M. Lukas*, Austria, no. 50.

¹⁸⁸ *P. Billet/F. Lichère*, France, no. 30; *P. del Olmo*, Spain, no. 128.

¹⁸⁹ *B. Askeland*, Norway, no. 50.

¹⁹⁰ *A. Menyhárd*, Hungary, no. 43; *A. Monti/F.A. Chiaves*, Italy, no. 44; *P. Billet/F. Lichère*, France, no. 31; *M. Lukas*, Austria, no. 51.

¹⁹¹ *A. Monti/F.A. Chiaves*, Italy, no. 44.

¹⁹² *P. Billet/F. Lichère*, France, no. 31.

¹⁹³ Cf. *P. del Olmo*, Spain, no. 130.

¹⁹⁴ Polish law seems to allow claims against the agency only in cases where there was a positive statutory duty to act. See *M. Jagielska/G. Żmij*, Poland, no. 89.

¹⁹⁵ *B. Askeland*, Norway, no. 51.

¹⁹⁶ *P. del Olmo*, Spain, no. 129 ff.

- 77 With respect to the threshold mentioned, the fact that the public authority presented the company with a list of shortcomings can work either way: either as a ground for finding the public authority liable for not using control instruments to guarantee compliance or as mere evidence of their simple negligence. The example given by the Norwegian report shows the difficulty of evaluating the evidence of knowledge of the public authority: the Consumer's Ombudsman had knowledge of illicit conduct by a travel agency and did not act upon this information. Such negligence in itself does not constitute the qualified negligence necessary under Norwegian law for liability of the public entity.¹⁹⁷
- 78 In other jurisdictions, the claim for compensation against the public authority might fail for lack of a protective purpose of the statute at hand. The position under the law of England and Wales is that the claimant would have to show that he or she was part of a specific class for whose benefit the statutory regime was brought into being.¹⁹⁸ A seemingly comparable test is used with the German concept of *drittbezogene Amtspflicht*.¹⁹⁹ Obviously, this requirement gives the courts some leeway in autonomously ascertaining the protective purpose of the statute, because in most cases the phrasing of the statute itself and the relevant parliamentary proceedings tend to be vague if not silent on the class of protected persons. Under the concept of *drittbezogene Amtspflicht* the victim could in fact be considered to be part of the class of protected "third parties".²⁰⁰

¹⁹⁷ *B. Askeland*, Norway, no. 52.

¹⁹⁸ *K. Morrow*, England and Wales, no. 60.

¹⁹⁹ *U. Magnus/K. Bitterich*, Germany, no. 53.

²⁰⁰ *U. Magnus/K. Bitterich*, Germany, no. 53. Note that the subsidiary nature of German state liability would be a further obstacle to claiming compensation, unless gross negligence of the civil servant was involved.

THE FUNCTION OF REGULATORY LAW IN THE CONTEXT OF TORT LAW – CONCLUSIONS

*Meinhard Lukas**

I. Preliminary Remarks**

1. Terminology

As shown above all by the contribution on the Law of England and Wales,¹ the term “administrative law” is not founded in any uniform understanding from a comparative law perspective.² As far as the conduct of natural persons and/or legal entities is regulated within the framework of public law, it is more apposite to speak of regulatory law. However, van Boom has shown that this term also leaves considerable room for interpretation.³ For the purposes of this project then, the term regulatory law has basically been taken to circumscribe that area of law outside of private law which is directed at specific behaviour control. Naturally, it may not be overlooked that private law also in general and tort law in particular, have a certain regulatory nature: apart from the fact that the threat of compensation claims – just as the threat of criminal penalties – naturally have a deterrent function, tort law often provides for pre-emptive solutions in the form of injunctions. In such a situation, not only the organ which is responsible for the execution of the relevant provision of regulatory law but also the party who is at risk have the means to respond to the (threatening) unlawful conduct of a third party even before any damage is sustained. Here

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**The reports contained in this volume will be cited in the following way: *M. Lukas*, Austria, *K. Morrow*, England and Wales, *P. Billet/F. Lichère*, France, *U. Magnus/K. Bitterich*, Germany, *A. Menyhárd*, Hungary, *A. Monti/F.A. Chiaves*, Italy, *R.J.P. Kottentzen/P.A. Kottentzen-Edzes*, The Netherlands, *B. Askeland*, Norway, *M. Jagielska/G. Żmij*, Poland, *P. del Olmo*, Spain, *C. Kissling*, Switzerland, *M.S. Shapo*, USA, *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, *I. Ebert/C. Lahnstein*, Regulatory Law and Insurance, *M. Faure*, Economic Analysis of Tort and Regulatory Law, *W.H. van Boom*, Comparative Analysis.

¹ *K. Morrow*, England and Wales, no. 1.

² See *W.H. van Boom*, Comparative Analysis, no. 1.

³ *W.H. van Boom*, Comparative Analysis, no. 1.

regulatory law and tort law both operate in a regulatory fashion. Thus, the difference shows itself less in the functions of the two legal areas but much more in the way they are enforced.⁴ In the one area it is up to the holder of sovereign power to use its special position to take regulatory action, in the other the person endangered must protect himself, with the instruments of private law – so in particular by taking action in the civil courts.

2. Central question

- 2 Even the definition of the term “regulatory law” indicates that tort law and regulatory law complement each other.⁵ Thereby it must be considered that the regulatory law legislator usually has specific situations in mind that for instance necessitate specific regulation in the public interest because of their dangerous nature or potential for conflict.⁶ Regulatory law does not focus on the situation of a single individual but on numbers of people possibly affected. Thus, it is obvious, even just on the basis of this background, that regulatory law cannot take all constellations which tend to give rise to damage into consideration. Tort law, on the other hand, takes account of such complexity of life’s realities mostly by prescribing a general duty of care. Such a duty is apparently not found in regulatory law (as part of public law) at least under the legal systems investigated here. This points at the same time to the central subject of this investigation: at the core is the question of what influence the pertinent provisions of regulatory law have in the event of (extra-contractual) damage. What role does it play for the attribution of damage when such provisions have been breached or for instance if damage has been incurred even though the relevant provisions of regulatory law had been observed by the tortfeasor?

3. Distinction between procedural and substantive law aspects

- 3 The answers in the country reports to Questions I/5⁷ clearly demonstrate that tort law and regulatory law are not in any fundamentally hierarchical relation to each other.⁸ Even when regulatory law provides for concrete legal consequences – for example criminal sanctions – for the infringement of its own provisions, these consequences are not comprehensive.⁹ In other words: the penalty does not exempt the offender from the duty to compensate (and vice versa). Insofar both legal areas have a discrete position, which is to an extent – in particular in federalist legal systems – also constitutionally secured: insofar as different legis-

⁴ Cf. *P. Cane*, Tort Law as Regulation, *Common Law World Review* 2002, 305; *W.H. van Boom*, *Comparative Analysis*, no. 1; see *infra* no. 11.

⁵ Cf. *M. Jagielska/G. Zmij*, Poland, no. 24; cf. *C. Kissling*, Switzerland, no. 21.

⁶ Cf. *P. del Olmo*, Spain, no. 57; *M. Lukas*, Austria, no. 12; see *infra* no. 6.

⁷ “If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?”

⁸ *W.H. van Boom*, *Comparative Analysis*, no. 12.

⁹ Cf. *A. Menyhárd*, Hungary, no. 10; *A. Monti/F.A. Chiaves*, Italy, no. 13; *P. Billet/F. Lichère*, France, no. 7; *B. Askeland*, Norway, no. 8; *U. Magnus/K. Bitterich*, Germany, no. 11; *P. del Olmo*, Spain, no. 20; *C. Kissling*, Switzerland, no. 22; *M. Lukas*, Austria, no. 13.

lative organs are responsible for tort law and for regulatory law, such a division of competences in itself generally precludes a hierarchical relationship.

The mere co-existence of tort law as part of private law and of regulatory law as part of public law stands out in particular when it comes to the execution of these two legal areas.¹⁰ Mostly, the civil courts competent for compensation claims are not bound at all by the specialised administrative court's judgment on the same facts. This – as already shown by van Boom – has firstly to do with the fact that claims to compensation based in tort law are dependent on the fulfilment of (with respect to regulatory law) autonomous attribution criteria (wrongfulness, fault, causation, etc.).¹¹ Moreover, it is also decisive that the victim often has no comprehensive party standing in the execution of the pertinent provisions of regulatory law against the tortfeasor. Thus, if the civil court deciding on the complaint were bound by a decision of the administrative court, there would be a conflict with the right to fair trial guaranteed by art. 6 of the European Convention on Human Rights (ECHR).¹² This consideration shows at the same time firstly, that a distinction must be made between the influence of substantive regulatory law on substantive tort law and, on the other hand, the connection between the decisions of an administrative court and the competent civil court. Thus, it is thoroughly conceivable that even if tort law specifically links a tortfeasor's duty to compensate for the damage caused by a breach of a regulatory law provision to such breach, the civil court is not bound by the decision of the competent administrative court even in the question of whether the provision of regulatory law at issue was breached.¹³ This is the case – as just mentioned – when for instance the victim was not accorded sufficient standing as a party in the procedure before the administrative court. While the claim to compensation depends on the breach of a provision of regulatory law in such constellation, the civil court is nonetheless not bound by the decision of the administrative court in the matter.

Within the context of this project, however, the focus was not on the procedural aspects but on the interaction between substantive regulatory law and substantive tort law. Insofar, observations on how civil courts confronted with tort claims deal with decisions of administrative courts on the same facts have only limited significance. Rather, it is decisive what significance is accorded to the pertinent administrative law in the evaluation of compensation claims, even

¹⁰ Cf. *W.H. van Boom*, *Comparative Analysis*, no. 13.

¹¹ *W.H. van Boom*, *Comparative Analysis*, no. 13.

¹² Art. 6(1) ECHR: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

¹³ Cf. *B. Forgó-Feldner*, *Die Bindung des Zivilrichters an strafgerichtliche Verurteilungen*, *Österreichische Juristenzeitung* (ÖJZ) 2005, 866.

when the civil courts must decide the question of the breach of such provisions autonomously.

II. Functional Differences Between Regulatory Law and Tort Law

1. *Public law versus private law*

- 6 A major difference between tort and regulatory law arises naturally from their belonging each to different regulatory levels.¹⁴ It is the task of tort law as part of private law to regulate extra-contractual compensation for damage between private parties.¹⁵ Compensation for damage between the state and private parties is normally only covered to the extent that the state acts as a subject of private law. State liability, on the other hand, usually follows special rules.¹⁶ Notwithstanding this, the application area of tort law is extremely wide. However strange a damage event may be, within the personal application area of tort law a decision must be possible under its rules as to who must bear the damage, independent of whether public interests are affected. Tortfeasor and victim are in a relationship of equality with each other as subjects of private law. This shows especially in the procedure to enforce claims for compensation before the civil court,¹⁷ in which there is equality of arms between complainant and respondent.
- 7 Regulatory law – in accordance with its legal nature as part of public law – only prescribes standards of conduct insofar as public interests are affected. This is above all the case where especial risk potential exists. Suchlike specific risk potentials can be taken into account in the prescription of concrete standards of conduct. Insofar as public interests are at stake, it is also both justified and necessary to specify the standards of conduct adequately using special expertise.¹⁸ Of course at the same time it must be admitted that – in comparison with a general duty of care which can be derived from tort law – this type of established standards of conduct have considerable disadvantages: firstly, it may often be impossible to respond quickly enough to the latest findings on specific danger situations because of the complex legislative procedure which must involve the circles affected. This involves a risk that standards of conduct which in some cases are indeed far behind current standards of knowledge be perpetuated by regulatory law. Furthermore, only typical danger or conflict situations can be covered by regulatory law. Thus, no comprehensive catalogue of conduct standards can be derived from regulatory law.

¹⁴ Cf. *A. Menyhárd*, Hungary, no. 1; *C. Kissling*, Switzerland, no. 1; *M. Lukas*, Austria, no. 1; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 1; *K. Morrow*, England and Wales, no. 34 f.; *P. del Olmo*, Spain, no. 57.

¹⁵ Cf. *A. Menyhárd*, Hungary, no. 17.

¹⁶ See. *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, no. 8; *W.H. van Boom*, Comparative Analysis, no. 23 f.

¹⁷ See *M. Lukas*, Austria, no. 1.

¹⁸ *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, no. 13.

2. Extent to which standards of conduct are determined

Within the framework of tort law it is decided (inter alia) on the basis of the specific standards of conduct decisive in the context whether the victim must bear the loss incurred as a result of the event of damage or whether the damage can be attributed to its causer. The conduct of the offender is thus, insofar as compensation is on the table, judged ex-post.¹⁹ Moreover, in the face of its comprehensive application field, tort law usually only supplies a very general standard by which to judge such. Because of the special function of tort law, it only specifies standards of conduct – if at all – for specific situations. Apart from this, a general duty of care is usually the lynchpin of tort law. Thus, it is in this context – not only in common law jurisdictions – (ultimately) mostly the task of the judge to define the authoritative standard.²⁰ This necessarily means differences in evaluation – depending on the respective competent court. Therefore, it is the task of the highest courts to ensure that a uniform as possible evaluation yardstick is used within one and the same legal system.

The regulatory law rules examined in this project prescribe specific standards of conduct. In the ideal case, they are the result of the consideration of various interests by which the protection of legal interests is optimised in a certain field while also taking expenses into account. It is the task of regulatory law to exert a deterrent effect by the prescription of standards of conduct to stop the damage from occurring in the first place. In order to support this preventive function, penalties are often foreseen for when the addressees of the norm breach the relevant provisions.²¹ Also in this regard, it is necessary correspondingly to specify the standards of conduct prescribed as otherwise the punishment of the offender would be difficult because of the lack in determination of the breached norm. The result can be very clear standards of conduct, as shown by the traffic law largely uniform in Europe. Whoever overruns a stop sign, ignores a red traffic light or exceeds the speed limit is clearly in breach of duty. There are no difficulties of evaluation such as are associated with the tort law general duty of care. At the same time, such a breach of duty also signals a high degree of endangerment of other road users. (We will be returning to this point.) Of course, precisely traffic law shows that even in this field of regulatory law the simple ground rules are not sufficient, even while they constitute a central component. Besides compliance with speed limits, the drivers of motor vehicles have as a rule the duty even on the basis of traffic law to adapt their speed independently thereof to the given conditions (street, traffic and visibility conditions, etc.). Thus, besides a very specific standard of conduct (speed

¹⁹ A. Monti/F.A. Chiaves, Italy, no. 22; M. Faure, *Economic Analysis of Tort and Regulatory Law*, no. 8; W.H. van Boom, *Efficacious Enforcement in Contract and Tort* (2006) 18 ff.; W.H. van Boom, *Comparative Analysis*, no. 16; S. Shavell, *Liability for Harm Versus Regulation of Safety*, *Journal of Legal Studies* (JLS) 1984, 357 ff.; S. Shavell, *Foundations of Economic Analysis of Law* (2004) 585 f.; A. Ogus, *Regulation: Legal Form and Economic Theory* (1994) 261.

²⁰ W.H. van Boom, *Comparative Analysis*, no. 13.

²¹ Cf. M. Jagielska/G. Żmij, Poland, no. 46.

limit), there is a general standard to take account of other specific dangers, which are not considered by the speed limit. Such a standard of conduct is hardly different from the general civil law duty of care in terms of the (slight) extent to which it is defined.

3. Preventive effect

- 10 As already highlighted several times, the rules of regulatory law have a preventive effect.²² Independent of the threat of damage, the breach of these rules in itself triggers legal consequences. The provisions of regulatory law are executed for instance by issuing stopping orders and/or imposing penalties. Tort law cannot fulfil this function if its only purpose is the compensation of damage. The recognition of tort claims operates only *ex-post*. The situation is completely different if it is also possible to derive injunctions to pre-empt the threat of damage from tort law. In this case, the differences between tort and regulatory law as far as preventive effect is concerned only show in the type of legal enforcement.²³

4. Legal enforcement

- 11 In the area of regulatory law, it is the job of the competent authority and/or the competent administrative court to monitor the observance of its stipulations and accordingly to penalise conduct which is in breach. Admittedly, the victim normally has the option of reporting a (threatened) breach of duty. However, as a rule, the responsible government agency must take action independently thereof. In the context of tort law, on the other hand, the (potential) victim is itself responsible for the enforcement of its rights. This difference to regulatory law also shows up particularly in an economic analysis:²⁴ a civil process involves considerable expense for the parties. Even if the national law on civil procedures foresees that costs are borne by the defeated party, there is at least a risk of legal costs. Regulatory law does not normally involve comparable risks (at least not to the same extent). Moreover, procedures before administrative courts are often simpler, faster and thus on the whole more effective than those which come before the civil courts. On the other hand, the parties in an administrative procedure have no comparable right of participation in the process, especially as they are not *dominus litis*.

²² See *W.H. van Boom*, Comparative Analysis, no. 13.

²³ See *W.H. van Boom*, Comparative Analysis, no. 19; cf. *U. Magnus/K. Bitterich*, Germany, no. 1; *M. Jagielska/G. Żmij*, Poland, no. 48 and 80; *B. Askeland*, Norway, no. 42; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 46; *P. Billet/F. Lichère*, France, no. 6 and 13; *M. Lukas*, Austria, no. 44.

²⁴ *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 14 ff.

III. Regulatory Law Grounds for Liability

1. Regulatory standards as minimum standards in tort law

The breach of regulatory law provisions does not per se supply grounds for a tort law duty of the offender to pay compensation.²⁵ It must be possible at least to assume a corresponding connection between the complainant's injury and the breach of regulatory law. In the face of the unlawfulness requirement of tort law, however, the fact that a regulatory law provision was breached has decisive significance. According to the tort law of numerous legal systems, a breach of the conduct standards of regulatory law simultaneously means a breach of the tort law general duty of care.²⁶ Naturally, the inverse conclusion, i.e. that the mere compliance with regulatory law standards satisfies the duty of care requirements of tort law, may by no means be drawn. Rather, regulatory law contributes towards concretising the general duty of care. This can be illustrated by a traffic law provision: the rule road users are subject to forbidding them from exceeding the speed limit in a particular area takes account of typical dangers (e.g. heavy traffic). This rule can, therefore, not be without influence on the duty which can be derived from tort law to take a certain amount of care with respect to certain legal interests of other persons. At the same time, however, it contains no comprehensive statement on the choice of the correct speed on the basis of the concrete conditions. This shows that, from the perspective of tort law, regulatory law provisions often lay down only a minimum standard.²⁷

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2. Causality requirement

If the breach of a regulatory law provision has been established, this often fulfils more than just the attribution requirement. In various legal systems this fact can also found an assumption of causality.²⁸ Such a reversal of the burden of proof may depend on the gravity of the infringement as well as the intensity of the danger created by the infringement.²⁹ It can also be decisive with respect to proof of causality that such damage has occurred which the breached regulatory provision is intended to hinder. As the protective purpose of such is dependant on the will of the regulatory law legislator, the connection also shows the regulating function regulatory law has in relation to tort law.

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²⁵ See *A. Menyhárd*, Hungary, no. 24; *W.H. van Boom*, Comparative Analysis, no. 30.

²⁶ See *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 53; *P. Billet/F. Lichère*, France, no. 18; *P. del Olmo*, Spain, no. 90; *U. Magnus/K. Bitterich*, Germany, no. 20 and 28; *B. Askeland*, Norway, no. 29; *C. Kissling*, Switzerland, no. 34.

²⁷ Cf. *U. Magnus/K. Bitterich*, Germany, no. 20 and 28; *W.H. van Boom*, Comparative Analysis, no. 28; see also *I. Ebert/C. Lahnstein*, Regulatory Law and Insurance, no. 2.

²⁸ See *U. Magnus/K. Bitterich*, Germany, no. 36; *M. Lukas*, Austria, no. 29; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 36 ff.; cf. *W.H. van Boom*, Comparative Analysis, no. 36 ff.

²⁹ Cf. *M. Jagielska/G. Żmij*, Poland, no. 66.

- 14 This phenomenon can also be observed in another context: in special cases the problem may arise that in the case of a breach of regulatory law provisions, tort law liability can only come into question if one departs from a strict understanding of the causality requirement. This point addresses cases of so-called minimal causality, which were also discussed by van Boom in his comparative report:³⁰ only in the case that a number of people breach a regulatory law provision (e.g. for the protection of the environment) does the damage arise. The conduct of each individual offender (e.g. low-level emissions) in itself, on the other hand, is either not causal for the damage or only to a negligible degree. The tort law of the legal systems investigated seems as yet hardly to provide satisfactory answers for such cases. Thus, it could be considered whether the protective purpose of the breached regulatory provision could not justify departing from a strict causality requirement in individual cases. If a regulatory rule is targeted at hindering the damaging combined effect of individual offenders, then this might also have to be considered in the question of attribution of damage.
- 15 A further aspect is also deserving of consideration in this context: in most legal systems the defence that the damage would also have occurred if the offender had complied with the provision at issue is open to the offender who has breached an administrative rule and caused damage with his conduct.³¹ If one at first disregards the burden of proof on the side of the offender, this means that liability to pay damages depends on the causality of the concrete infringement of law. In other words: the breach of law must have had an effect on the damage.

3. *Protective purpose of regulatory law*

- 16 The interface between administrative law and tort law is especially obvious when the question of the protective purpose of a rule of conduct under administrative law is raised.³² First of all, this purpose derives from the regulatory intent of the legislators of the administrative law rule at issue.³³ Eventually, however, it is a question of tort law how this regulatory intent is taken into account in evaluating damage claims. On the one hand, tort law may be more extensive to the extent that this is required, in particular due to its compensating function. On the other hand, a more conservative evaluation of the protective purpose would also come into consideration if otherwise contradictions within

³⁰ *W.H. van Boom*, Comparative Analysis, no. 37.

³¹ See *A. Menyh rd*, Hungary, no. 26; *A. Monti/F.A. Chiaves*, Italy, no. 32; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 55; *B. Askeland*, Norway, no. 33; *U. Magnus/K. Bitterich*, Germany, no. 33; *M. Lukas*, Austria, no. 36, cf. *M.S. Shapo*, USA, no. 64; *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 7.

³² See *W.H. van Boom*, Comparative Analysis, no. 31 ff.; cf. *B. Askeland*, Norway, no. 32; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 23 ff.; *U. Magnus/K. Bitterich*, Germany, no. 32; *C. Kissling*, Switzerland, no. 41 ff.; *M. Jagielska/G.  mij*, Poland, no. 14; *M. Lukas*, Austria, no. 3 and 35.

³³ See *W.H. van Boom*, Comparative Analysis, no. 34 f.

the system of tort law would ensue. This results in a restriction of the influence of administrative law on tort law. Particularly regarding safety regulations, administrative law also plays an important role as far as tort law is concerned. This, for example, becomes clear in the field of product liability. In this regard, European legislation has specifically regulated the interaction between administrative and tort law. The Europe-wide product safety standards, together with a uniform product liability regime, provide for product safety. Naturally, this may not be neglected in the examination of product liability claims. To establish whether or not a product is defective, it must be determined, among other things, whether the product complies with product safety regulations. However, even European legislation has refrained from establishing a mandatory connection. Even if the provisions of product safety law are complied with, the product may still be defective from the viewpoint of product liability law. It also seems necessary, from a European viewpoint, to evaluate safety standards more flexibly in terms of tort law than in terms of administrative law. However, this fact cannot diminish the significance of tort law for safety regulations, since a violation of these regulations may also result in liability based on fault.

4. *Fault requirement*

Where tort law distinguishes between wrongfulness and fault, the question arises to what extent the breach of regulatory law provisions also influence the fulfilment of the fault requirement.³⁴ Insofar the country reports reveal a thoroughly heterogeneous picture. Some of the country reports seem to indicate that the legal systems investigated therein irrefutably assume fault in the case of infringement of regulatory law provisions.³⁵ This begs the question of whether the infringement of a provision of regulatory law really justifies the attribution of damage without further ado if the offender is proven not to be to blame for the infringement. However, such concepts would seem in any case to be the exception in Europe. Largely, the existence of fault must be verified even if a breach of regulatory law has been established. Of course, diverse states do assume fault on the part of the offender in this case. He carries the burden of proof, therefore, that the infringement of the regulatory provision was not culpable.³⁶ If the question of fault cannot be clarified, the offender who breached regulatory law bears the risk.

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5. *Idea of compensation*

Insofar as a duty to compensate under tort law is based on the breach of provisions of regulatory law, the objective of tort law is not punishment for unlawful behaviour but the reparation of the damage caused by such. The majority of European legal systems do not award punitive damages to the victim even if

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³⁴ See *W.H. van Boom*, Comparative Analysis, no. 30 and 36 ff.

³⁵ Cf. *M. Jagielska/G. Żmij*, Poland, no. 51; *A. Monti/F.A. Chiaves*, Italy, no. 9.

³⁶ *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 53; *P. Billet/F. Lichère*, France, no. 18; *B. Askeland*, Norway, no. 31.

liability is founded on a breach of provisions of regulatory law.³⁷ Any punishment of the offender must ensue under regulatory law itself. Furthermore, it is reserved to those organs which execute regulatory law. It is well known that the case is different in common law systems.³⁸ The predominantly negative position of European legal systems towards punitive damages is of course increasingly relaxed by compensation claims also being recognised for non-pecuniary loss. Insofar as suchlike claims for compensation are also made particularly dependent on the degree of fault, they are based in a certain respect on a punitive element.³⁹

6. *Interim result*

- 19 From the viewpoint of an economic analysis, administrative law and tort law are interrelated. The more accurately administrative law describes rules of conduct, the more generally can the standard of conduct in tort law be formulated.⁴⁰ Even if administrative law provides for an efficient and balanced regulation of a certain field, tort law has an important supplementing function. This applies not only to violations of the law. Due to its more flexible approach, tort law is also able to deal with atypical cases, which by their very nature are not or not entirely covered by a precise rule of administrative law. As a consequence, it seems appropriate, even if only for economic reasons, that administrative law rules do not definitively regulate the relevant standard of conduct. This approach also takes into account the fact that detailed administrative law rules are frequently adapted to changed circumstances, often after only a certain delay. In this regard, tort law is clearly more flexible.
- 20 Legislation regulates the interaction between rules of administrative law and rules of tort law only in part. Often, there is no appropriate concept for regulation. Both fields of law then exist next to each other, more or less without any connections. The reason for this is that administrative law rules on the one hand and tort law rules on the other hand aim at different legal relationships. When legislators regulate the relationship between the state and its citizens, regulation of the relationships among the citizens themselves is often neglected. In such a case it is the task of tort law to supplement the rule of administrative law accordingly.

³⁷ See *A. Monti/F.A. Chiaves*, Italy, no. 34; *A. Menyhárd*, Hungary, no. 28; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 58; *P. Billet/F. Lichère*, France, no. 22; *P. del Olmo*, Spain, no. 100 ff.; *M. Jagielska/G. Żmij*, Poland, no. 67; *C. Kissling*, Switzerland, no. 62; *M. Lukas*, Austria, no. 39.

³⁸ See *M.S. Shapo*, USA, no. 66; *K. Morrow*, England and Wales, no. 50; cf. also *M. Faure*, *Economic Analysis of Tort and Regulatory Law*, no. 35.

³⁹ Cf. *B. Askeland*, Norway, no. 36; *U. Magnus/K. Bitterich*, Germany, no. 38; *W.H. van Boom*, *Comparative Analysis*, no. 42.

⁴⁰ See *supra* no. 12.

The country reports submitted confirm what the Principles of European Tort Law (PETL)⁴¹ formulate as a general principle in art. 4:102(3).⁴² Statutory rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct. As a rule, however, they do not have the function of definitively determining the general duty of care since they only describe typical danger situations. However, the general duty of care must also be complied with in situations which are not covered by standards under administrative law. Given this, it is all the more consistent that compliance with the relevant rules of administrative law does not necessarily exclude unlawful conduct.

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As long as tort law is restricted to taking into account administrative rules of conduct in the context of the general duty of care, it does not do justice to the meaning of these rules. If rules of administrative law not only serve the protection of public interests but are also intended to protect individuals, it seems appropriate to also take this special protective purpose into account in the context of tort law.⁴³ The violation of such a rule should, in itself, be sufficient to constitute the basis for attributing the damage covered by the protective purpose of the rule to the tortfeasor. This approach to liability can easily be integrated into the fault-based liability system, since the examination of whether or not fault occurred also comes into consideration with respect to the specific protective law.⁴⁴ In this connection, simplified rules of evidence also seem justified. For example, it is in accordance with the Principles of European Tort Law (art. 4:201)⁴⁵ to reverse the burden of proof if the tortfeasor has committed a sufficiently dangerous act. This type of specific endangerment is often to be expected in cases of violations of the administrative law rules in question.

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On the basis of the above, administrative law in general, and safety regulations and administrative rules concerning the environment in particular have a considerable influence on tort law. It may depend on the existence of such rules whether or not a tortfeasor can be made liable for fault. Therefore, in the interest of legal certainty, it seems indeed reasonable, and all the more so from the viewpoint of tort law, that the general duty of care be specified by specific rules of conduct. This, however, also gives legislators devising administrative law rules considerable responsibility in the field of tort law. It depends primarily on legislators whether a certain regulation serves only public interests or also the protection of individuals. This then decides whether or not the regulation comes into consideration as the basis for damage claims.

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⁴¹ See European Group on Tort Law (ed.), *Principles of European Tort Law, Text and Commentary* (2005).

⁴² Art. 4:102(3) PETL: "Rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct."

⁴³ See *supra* no. 16.

⁴⁴ See *supra* no. 17.

⁴⁵ Art. 4:201(1) PETL: "The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity."

IV. How Regulatory Law May Exclude Liability

1. *Regulatory compliance defence*

- 24 Someone who has caused damage but was acting thereby in compliance with the provisions of regulatory law will try to use this as a defence against liability. This defence is also known as the regulatory compliance defence. As van Boom has already aptly explained, the justification of such a defence depends on the regulatory purpose of the provisions of regulatory law affected.⁴⁶ Insofar as regulatory law only sets minimum standards, it follows automatically that the tort law general duty of care is not overridden by regulatory law.⁴⁷ However, the more detailed the regulatory law provisions determine the required conduct in a certain situation, the less room naturally is left for an autonomous evaluation of such conduct according to the general standards of tort law. Regardless thereof, an analysis of the tort law of various European legal systems shows that the duty of care laid down by such can go beyond the standards of conduct foreseen by regulatory law.
- 25 Ultimately, however, the legislator of regulatory law has the power by structuring provisions correspondingly to intervene in tort law in a far-reaching manner. This is the case for instance when the propensity of a particular course of conduct to cause damage is explicitly taken into account in its regulation. Naturally, the regulatory compliance defence gains in significance in this case. This is also the case when the regulatory law provision observed by the offender is based directly on a comprehensive balance of interests between offender and victim.⁴⁸ In this situation, the applier of tort law may be prohibited from impinging on the balance of interest intended by the regulatory law legislator by awarding damages. One thinks for instance of cases where the regulatory law provisions observed by the offender ask significant efforts of him to protect the subsequent complainant. If in spite of these efforts the occurrence of the damage was unavoidable, this may speak against the offender's liability. On the whole, this shows that the legal values which are the foundation for regulatory law can influence the legal values – directed at compensation for damage – of tort law.
- 26 Of course this observation begs the question of to what extent such an influence of regulatory law on tort law meets constitutional law boundaries.⁴⁹ This question is particularly controversial when a different legislator is responsible for the regulatory law provisions at issue than for tort law. The answer to this question depends – as shown by the country reports – decisively on the constitutional setting of the specific jurisdiction. In spite of different competences at

⁴⁶ *W.H. van Boom*, Comparative Analysis, no. 43 ff.

⁴⁷ See *M. Jagielska/G. Żmij*, Poland, no. 72; *P. del Olmo*, Spain, no. 107; *U. Magnus/K. Bitterich*, Germany, no. 43; *B. Askeland*, Norway, no. 39; *P. Billet/F. Lichère*, France, no. 24; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 62; cf. also *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 38 ff.

⁴⁸ See *W.H. van Boom*, Comparative Analysis, no. 43.

⁴⁹ Cf. *W.H. van Boom*, Comparative Analysis, no. 21.

the level of legislation it is nonetheless obviously largely accepted, also with regard to constitutional aspects, that regulatory law can influence the results of tort law. Of course this may well be connected with the fact that a corresponding responsiveness to regulatory law is already laid out in tort law.

2. Regulatory permit defence

Constellations in which infringement of another person's legal interests are explicitly allowed by the law or an administrative authorisation based thereon must be distinguished from the regulatory compliance defence. This excludes (certain) tort claims withal. The Principles of European Tort Law also take account of this phenomenon as shown in art. 7:101(1).⁵⁰ Suchlike regulations are the basis for the so-called regulatory permit defence⁵¹ against compensation claims. Such a defence can arise directly from regulatory law. In this case the regulatory law legislator excludes claims to compensation under tort law. It is also conceivable, however, that private law claims be excluded through tort law if conduct was authorised by the competent authority or the competent administrative court. Then, the regulatory permission's liability excluding effect is ultimately based on tort law and thus does not raise any (possibly constitutionally relevant) competency questions between the legislator for regulatory law and such for tort law.

As the analysis of Case 1⁵² shows in particular, the European legal systems are rightly extremely sceptical of a regulatory permit defence in the context of tort law:⁵³ although company A's emissions remained under the statutory threshold this alone is not sufficient to exclude liability for damages under tort law. The fact that the technical means to reduce emissions have considerably improved since the permit was issued must be taken into account under tort law aspects in spite of the – from a regulatory law perspective – valid permit. In the majority of legal systems investigated, company A's liability is also not excluded by the fact that the affected farmer would have been able under the rules of regulatory law to ward off his injury by impugning the permit dating from the year 1976 on the basis of the altered technical possibilities.⁵⁴

⁵⁰ Art. 7:101(1) PETL: "Liability can be excluded if and to the extent that the actor acted legitimately [...] by virtue of lawful authority, such as a licence."

⁵¹ See *W.H. van Boom*, Comparative Analysis, no. 45.

⁵² "In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?"

⁵³ Cf. *U. Magnus/K. Bitterich*, Germany, no. 49; *P. Billet/F. Lichère*, France, no. 28; *P. del Olmo*, Spain, no. 114 ff.; *M. Jagielska/G. Żmij*, Poland, no. 85; *A. Menyhárd*, Hungary, no. 34; *M. Lukas*, Austria, no. 47; see also *W.H. van Boom*, Comparative Analysis, no. 63 ff.

⁵⁴ *M. Jagielska/G. Żmij*, Poland, no. 85; *B. Askeland*, Norway, no. 46; *C. Kissling*, Switzerland, no. 83 at lit. c); *P. Billet/F. Lichère*, France, no. 28.

This circumstance is to be taken into account – if at all – only as contributory fault of the farmer.⁵⁵

3. *Interim result*

- 29 Whereas tort law, as a rule, reacts to existing administrative law rules, administrative law in some cases interferes with general tort law by enumerating specific circumstances under which certain activities are allowed. It is in particular in connection with industrial properties that infringements on neighbours' legal interests are often permitted by an administrative act. Under certain circumstances this may exclude neighbours' claims to forbearance and fault-based damage claims, since the conduct of the plant's operator is justified by the administrative act. Such an infringement, similar to expropriation, would seem justified only if the neighbours concerned were parties to the administrative proceedings and, moreover, a compensation claim independent of fault is provided for. At the same time, this demonstrates the particularly pronounced interaction between administrative law and tort law that can occur in this situation.

V. Particularities of Safety Regulations and Environment-Related Regulations

1. *Safety regulations*

- 30 Particularly regarding safety regulations, administrative law also plays an important role as far as tort law is concerned. This, for example, becomes clear in the field of product liability.⁵⁶ In this regard, European legislation has specifically regulated the interaction between administrative and tort law. The Europe-wide product safety standards, together with a uniform product liability regime, provide for product safety. Naturally, this may not be neglected in the examination of product liability claims. To establish whether or not a product is defective, it must be determined, among other things, whether the product complies with product safety regulations. However, even European legislation has refrained from establishing a mandatory connection. Even if the provisions of product safety law are complied with, the product may still be defective from the viewpoint of product liability law. It also seems necessary, from a European viewpoint, to evaluate safety standards more flexibly in terms of tort law than in terms of administrative law. However, this fact cannot diminish the significance of tort law for safety regulations, since a violation of these regulations may also result in liability based on fault.

⁵⁵ See also *W.H. van Boom*, Comparative Analysis, no. 66.

⁵⁶ Cf. *M. Lukas*, Austria, no. 22 ff.; see also *W.H. van Boom*, Comparative Analysis, no. 15.

2. Environment-related regulations

Environment-related regulations require a more differentiated evaluation.⁵⁷ In many cases they are supplemented by specific liability regulations. Apart from this fact, however, regulations of environmental law in particular suggest the question of whether they really aim at the protection of individuals, since public interests take an outstanding position, particularly in the field of environmental law.⁵⁸ The protection of individuals could become so secondary that damage claims are no longer an option. Environment-related regulations often have only a limited influence on tort law for other reasons as well. Even if the victim succeeds in evidencing the violation of a law, it is often hard for the victim to prove the causality of the violation for the damage sustained. Therefore, the application of strict liability is of particular significance with respect to environment-related damages.

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VI. Concluding Remarks

This project has shown how manifold the influence of regulatory law is on tort law: the care standard of tort law can be concretised by provisions of regulatory law. A breach of regulatory law also constitutes in this case unlawful conduct according to the yardsticks of tort law. Apart from this, a breach of the provisions of tort law can also affect further attribution elements of tort law. This applies for instance to the issue of proof of causality or evidence of fault. In relation to both criteria for liability, a breach of regulatory law can shift the burden of proof to the offender. Because ultimately the regulatory law legislator determines the protective purpose of the provisions it enacts, it also influences which kinds of damage are compensable under tort law. It may also be the purpose of regulatory law provisions to permit infringement of other people's legal interests under certain very specific conditions. If this is the case, provisions of regulatory law may exclude (an otherwise existing) duty to make good the damage under tort law.

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Notwithstanding this far-reaching influence of regulatory law on tort law, such influence is subject to boundaries – sometimes also under constitutional law: the duties of care laid out by regulatory law often create only a minimum standard from the perspective of tort law. Accordingly, in spite of the observance of all relevant administrative rules, the offender's conduct can constitute a breach of duty of care under tort law. A regulatory compliance defence, therefore, does not reliably exclude claims for damages. And even where a regulatory permit defence can be derived from the provisions of regulatory law, the offender may still be liable under the principles of tort law, for instance because

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⁵⁷ See *I. Ebert/C. Lahnstein*, Regulatory Law and Insurance, no. 10, concerning aspects pursuant to insurance law.

⁵⁸ Cf. *A. Monti/F.A. Chiaves*, Italy, no. 24; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 34; *M. Jagielska/G. Żmij*, Poland, no. 47; *M. Lukas*, Austria, no. 24; see also *W.H. van Boom*, Comparative Analysis, no. 35; *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, no. 7.

the administrative permission must be regarded as out-dated under consideration of the tort law general duty of care on the basis of new know-how or technical progress.

- 34 Altogether then this comparative law investigation confirms what is already at least implied in the Principles of European Tort Law (art. 4:102(3)):⁵⁹ while the required standard of conduct authoritative for tort law is influenced by statutory provisions (especially also regulatory law) it is not comprehensively regulated. At the same time, liability which would otherwise exist can be excluded by or on the basis of regulatory law (“by virtue of lawful authority, such as a licence”). However, whether this is really the case in concreto is determined by the tort law itself (art. 7:101(2) PETL): “Whether liability is excluded depends upon the weight of these justifications on the one hand and the conditions of liability on the other.” Nothing more needs to be said thereon.

⁵⁹ See *supra* fn. 42.

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The letters refer to the reports; the numbers refer to the marginal notes. A stands for Austria (English and German version), AO for the report of Anthony Ogus, C for the Conclusions, CA for the Comparative Analysis, CH for Switzerland, D for Germany, E for Spain, EL for the report of Ina Ebert and Christian Lahnstein, EW for England and Wales; F for France, FF for the report of Fabrizio Fracchia, H for Hungary, I for Italy, MF for the report of Michael Faure, N for Norway, NL for The Netherlands, PL for Poland, USA for the United States of America.

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Publications

Principles of European Tort Law

Volume 1: *The Limits of Liability: Keeping the Floodgates Shut.*
Edited by Jaap Spier.
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