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The Reform of German Tort Law

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1. Introduction

In 2002 German law of obligations underwent the most farreaching changes since its codification in 1900. First, at the beginning of the year 2002 the widely noticed and disputed “Schuldrechtsreform”¹ entered into force.² It changed greater parts of the general contract law and of the sales and works contract law and modelled them after the structure of the UN Sales Convention (CISG).³ However, only eight months later the next reform⁴ came to light this time modifying the law of tort and damages.⁵ This reform was much less noticed and debated though its practical importance appears to be as significant as the one of the “Schuldrechtsreform”. The following text presents a survey of this most recent reform and summarises its main features.

2. The reasons and main aims of the tort law reform

The general German law of tort and damages had existed almost unaltered over the last hundred years when it was enacted in 1900.⁶ But since long different needs for reform had been articulated and had become widely accepted. The courts tried but could not fully adapt the written law against its clear wording to modern needs as for instance a much more extended compensation for immaterial harm than foreseen by the German Civil Code.⁷ Therefore, already the former (christian-democrat-liberal) government had prepared a respective reform draft but did not finalise it. The succeeding (social-democrat-green party) government, however, recognised an urgent need for reform as well and prepared a new draft which this time passed all parliamentary hurdles.

The present tort law reform had four main goals: (1) to adapt the law to current needs and to improve the protection of victims of torts, in particular in case of personal injuries; (2) to improve the situation of children in case of traffic accidents; (3) to close liability gaps concerning road accidents and injuries through pharmaceuticals; (4) to adapt German tort law to some extent to European standards.⁸

The legislator tried to achieve these aims by rather modest though practical important modifications of the present law.

¹ Gesetz zur Modernisierung des Schuldrechts (Act on the Modernisation of the Law of Obligations) of 26 November 2001, BGBl. (Bundesgesetzblatt – Federal Acts Journal) 2001 I 3138 ss.

² On the 1 January 2002.

³ The United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.

⁴ The Zweite Gesetz zur Änderung schadenersatzrechtlicher Vorschriften (Second Act on the Amendment of Provisions on the Law of Tort and Damages) of 19 June 2002, BGBl. 2002 I 2674ss.

⁵ Entering into force on 1 August 2002.

⁶ The BGB (Bürgerliches Gesetzbuch – Civil Code) entered into force on 1 January 1900.

⁷ See below under III.1.

⁸ See the Reasoning of the Draft (Begründung zum Regierungsentwurf) BT- Drucks. (Bundestagsdrucksache – Parliament Printed Materials) 14/7752, p. 23 s.

However, the reform was not intended to enact all amendments thus far regarded as necessary for a fully satisfactory modernisation of German law of tort and damages.⁹ An example for this reservation is the fact that the legislator let the opportunity pass to enact provisions on the so called “general right of personality” (“allgemeines Persönlichkeitsrecht”). This right has been recognised by German courts since long in extensive interpretation of the relevant Code provision (§ 823 par. 1 BGB).¹⁰ And also immaterial loss has to be compensated when this right has been infringed. Nevertheless the legislator did not include it into the catalogue of protected rights either of the general tort provision of § 823 par. 1 BGB or of the new § 253 par. 2 BGB which now also enumerates those rights the violation of which may entail compensation of immaterial harm. But despite this silence on the general right of personality neither the new § 253 par. 2 BGB nor the entire reform as such is to be taken to intend to abolish the longstanding court practice on the right of personality. Just the contrary intention is expressed in the legislative materials.¹¹ The legislator thought it, however, too difficult to codify this practice within the framework of the current reform.¹²

3. The various amendments

The general aims mentioned above are pursued by a number of single amendments in rather different fields of the law of tort and damages. They are addressed here in the order of their practical importance

3.1. Compensation of immaterial damage

The most essential amendment which the recent reform has brought about concerns the extension of compensation for immaterial harm or non-pecuniary loss as for instance compensation for pains, injured feelings and the like. Under former German law such losses were only recoverable where statute so provided (old § 253 BGB). And statute allowed such compensation only in few cases. The most prominent one was the old § 847 BGB which provided for compensation of pain and suffering (so called “Schmerzensgeld”) in case of tortiously caused bodily harm. However, this provision required fault on the part of the tortfeasor and did not apply to almost all strict liability regimes which in Germany are regulated by specific statutes. Under those strict liability statutes any recovery of immaterial loss was excluded. Therefore if a victim could not prove the tortfeasor’s fault the immaterial loss remained uncompensated even if the tortfeasor was liable under a strict liability statute. Also where liability was based on contract the victim could not claim its non-pecuniary loss except in two specific cases of limited importance.¹³ The reason for this reserved attitude towards compensation of non-pecuniary loss was the opinion of the

⁹ See, e.g., Reasoning of the Draft p. 31 (stating that the legislator refrained from enacting a more fundamental reform for practical reasons in particular that then legal certainty would be impeded).

¹⁰ BGHZ (Decisions of the Federal Court in civil law matters) 13, 334.

¹¹ See the Reasoning of the Draft p. 25.

¹² See the Reasoning of the Draft p. 58.

¹³ The only further statutory provisions were thus far § 611 a (adequate indemnification in case of sexual discrimination in labour relations) and § 651 f BGB (adequate indemnification for loss of holiday enjoyment in case of travel contracts).

legislator of 1900 that such losses are too difficult to assess and may invite misuse if their compensation is allowed too widely.¹⁴

The present reform has fundamentally changed this former state of affairs. The old § 847 BGB has been abolished and replaced by a new provision of general application (new § 253 par. 2 BGB) which now provides that non-pecuniary loss has to be adequately compensated in any case of “injury of body, health, freedom and sexual self-determination” irrespective whether liability is based on tortious fault, on a strict liability statute or on contract. In order to get compensation for such loss it is no longer necessary to plead and prove always a tortious fault. It suffices as well that the normal requirements of strict liability or contractual liability are met. For instance, persons injured by a defective product can now claim a “Schmerzensgeld” (pretium doloris) even if the manufacturer was not at fault or if fault can not be proved. Before the present reform no such claim was possible since Germany had opted for the exclusion of compensation for immaterial harm when implementing the Products Liability Directive¹⁵ though the Directive would have allowed such redress.¹⁶ The same solution as now applies for strict products liability is also valid for all other strict liability statutes.

This improves the legal position of victims of the enumerated injuries significantly and will probably also reduce the frequency of law suits. For, the difficult and in lawsuits often disputed question of fault has – at least with respect to compensation of non-pecuniary loss – now lost its all-decisive importance.¹⁷ It may also end the practice of the German courts to extend liability for negligent conduct ever further by inventing so called “Verkehrssicherungspflichten” (duties of care to protect the public) and to continuously raise the standard of care so that the combination of these elements came rather close to a strict liability.

The new solution also narrows the gap between German tort law and its European counterparts which in general are much more generous in compensating non-pecuniary loss.¹⁸

Almost until the end of the legislative procedure it was, however, disputed whether or not an explicit threshold (“Bagatellschwelle”) should be introduced, namely that only intentional or significant injuries to the protected personal rights should give rise to compensation for immaterial loss. The main argument advanced in favour of the “Bagatellschwelle” was that for minor injuries no recovery of immaterial loss should be granted in order to save money (the funds of insurers) for the compensation of the severe cases.¹⁹ However, finally no such threshold was enacted being thought that such a provision would be unnecessary and that the decision on a threshold should be left to the courts. Already before the present reform the German courts

¹⁴ See Motive (to the BGB) vol. II p. 22; Protocols (to the BGB) vol. I p. 622 s.

¹⁵ Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Official Journal L 210, 07/08/85 p. 29 ss.

¹⁶ See art. 9 of the Products Liability Directive.

¹⁷ But with some skepticism with regard to this effect: Katzenmeier, Die Neuregelung des Anspruchs auf Schmerzensgeld, JZ (Juristen-Zeitung) 2002, 1029 (1031).

¹⁸ See thereon Rogers, Comparative Report, in: Rogers (ed.), Damages for Non-Pecuniary Loss in a Comparative Perspective (2001) 250s.

¹⁹ Reasoning of the Draft p. 36.

rejected a “Schmerzensgeld” under the old § 847 BGB in cases of minor injuries where sums of less than 250.- € were adequate. It can be expected that the courts will continue this practice.²⁰

The legislator let also the opportunity pass to introduce the principle that persons can claim damages for bereavement when their near relatives are killed or severely injured. Contrary to most other European legal systems²¹ German law does not recognise that kind of immaterial harm as a recoverable damage thus far. And despite proposals urging for the introduction of damages for bereavement the reform did not alter the preexisting situation.

3.2. Rise of maximum amounts under strict liability statutes

In comparison with many other European legal systems it is a peculiarity of German law that strict liability is almost completely regulated outside the general Code (BGB) in specific statutes, that no analogy to these strict liability statutes is allowed (since they are regarded as exceptions from the general fault principle) and that almost all strict liability statutes provide for maximum amounts (caps or ceilings) which limit the possible compensation under those statutes.²² The reason behind this concept is the idea that the ‘benefit’ of strict liability (as an exception from the fault principle) should not be granted unlimited also in order to enable its insurability.

The reform has not altered this peculiarity as such but has increased and unified the limits which thus far differed widely from statute to statute. The former maximum amount has now been almost doubled and adapted to present prices and living conditions. That means that in case of a single victim the general maximum amounts are now: as lumpsum 600.000.- €; alternatively a yearly rent of 36.000.- €. ²³ If several persons have been injured the strict liability statutes provide ceilings which differ according to the specific dangerousness against which the respective statute is intended to protect. For instance the strict liability of a car keeper towards several persons injured in one accident which his car has caused is limited to 3 Mill. € as lumpsum or 180.000.- € as yearly rent for all injured persons; but double those amounts apply in cases where the car transported hazardous goods;²⁴ and even unlimited liability is now granted to passengers in cases of professional transportation against money.²⁵

²⁰ BGH NJW (Neue Juristische Wochenschrift) 1998, 2741; Palandt(-Thomas), Bürgerliches Gesetzbuch (61th ed. 2002) § 847 no. 4.

²¹ See the comparison by Kadner, Schmerzensgeld für Angehörige – Angemessener Ausgleich immaterieller Beeinträchtigungen oder exzessiver Ersatz mittelbarer Schäden? Entscheidung des schweizerischen Bundesgerichts vom 27. Oktober 1992 und Entscheidung des deutschen Bundesgerichtshofes vom 13. Oktober 1992, ZEuP (Zeitschrift für Europäisches Privatrecht) 1996, 135 ss; id., Angehörigenschmerzensgeld im europäischen Privatrecht – die Schere schließt sich, Entscheidung des österreichischen Obersten Gerichtshofs vom 16. Mai 2001, ZEuP 2002, 834 ss.

²² See thereon in a comparative perspective Koch/Kozioł, Comparative conclusions, in: Koch/Kozioł (ed.), Unification of Tort Law: Strict Liability (2002) 428s.

²³ See, e.g., the new § 117 par. 1 no. 1 BBergG (Bundesberggesetz – Federal Mountain Act), § 12 StVG (Straßenverkehrsgesetz – Road Traffic Act), § 9 HaftPfG (Haftpflichtgesetz – Liability Act), §§ 37 par. 2, 46 par. 1 LuftVG (Luftverkehrsgesetz – Air Traffic Act).

²⁴ See the new § 12 a StVG.

²⁵ § 8a StVG.

3.3. Extension of liability for pharmaceuticals

A further improvement for bodily injured victims is brought about in cases where the harm is due to detrimental pharmaceuticals. Especially the case of HIV-infected blood products and infusions has prompted the legislator to improve the rights of victims who are injured by detrimental pharmaceuticals. The respective statute (Pharmaceutical Act – Arzneimittelgesetz [AMG]) established – already prior to the reform – a strict liability of the producer of detrimental pharmaceuticals. However, the injured person had to prove the causal link between his or her damage and the used pharmaceutical. This proof was often difficult if not at all impossible.

Now a limited presumption of causation – modelled after the similar §§ 6,7 UmweltHG²⁶ – has been introduced: when in the circumstances of the case at hand the applied pharmaceutical seems apt to have caused the damage then its causal effect is presumed. The presumption does however not apply when in the light of the circumstances of the case another occurrence (other than the detrimental pharmaceutical) seems apt to have caused the damage (§ 84 par. 2 AMG). In practice this rule will probably reduce the standard of proof which otherwise had to be met: namely instead of certainty – as to causation – prevailing probability will suffice.²⁷

A further improvement for victims who have suffered damage through a detrimental pharmaceutical is a new right of information against the producer and against the administrative authority which is competent to admit and supervise pharmaceuticals (§ 84 a AMG). If facts justify the assumption that the pharmaceutical has caused the damage then the victim can require both the producer and the authority to disclose their knowledge on effects, side-effects etc. of the pharmaceutical except in cases where the information must be kept secret either due to statute or in the prevailing interest of the producer or of a third party. Although the new right of information may remind of the American “pretrial discovery” the German legislator has however not intended to offer such a possibility.²⁸ According to the new provision the claim for information can therefore be rejected when the producer (or the authority) can show that the information is not necessary for the victim’s damages claim.

It remains however doubtful whether the mentioned extension of the pharmaceutical producer’s liability is in accordance with EU-law. The pharmaceutical producer’s liability is a specific case of product liability which is governed by the respective European Directive.²⁹ Though the directive in its article 13 contains a certain exception leaving unaffected “a special liability system existing at the moment when this Directive is notified” it is open for debate whether the directive allows also for later modifications and amendments of any such special liability system which – like the German AMG – already existed when the Directive was notified. Doubts appear even more justified as the European Court of Justice has ruled that the Products’ Liability Directive

²⁶ Umwelthaftungsgesetz (Act on Environmental Liability) of 10 December 1990, BGBl. 1990 I 2634 ss.

²⁷ In this sense the Reasoning of the Draft p. 45; also Wagner, Das Zweite Schadensersatzrechtsänderungsgesetz, NJW (Neue Juristische Wochenschrift) 2002, 2049 (2052).

²⁸ See the Reasoning of the Draft p. 48 (“no fishing discovery”).

²⁹ See above n. 15.

constitutes not only a minimum but also a maximum harmonisation from which the EU-Member States are not allowed to depart even in favour of consumers.³⁰

3.4. Improvement of children's position in connection with traffic accidents

A further important amendment concerns the liability – and equally the contributory negligence – of children in case of traffic accidents.

In Germany children below the age of seven lack tortious capacity; they are therefore not liable for any wrong they have committed (§ 828 par. 1 BGB). Likewise their contributory negligence is disregarded when they have been injured. Children between seven and eighteen years are, however, fully liable for any damage they have at least negligently caused if they had sufficient insight to discern their responsibility (former § 828 par. 2 BGB). Under the same condition their contributory negligence is fully taken into account and reduces their claim for damages.

The reform has changed this latter position of children in case of accidents with motor vehicles and railways. In cases of that kind children between the age of seven and ten years still remain irresponsible – they are neither liable nor does their contributory negligence count – unless they have acted with intent, for instance have thrown stones from an autobahn bridge on passing cars. The reason for this increase of age is that scientific research has revealed that children under the age of ten are incapable to estimate correctly distances and speeds of motorised vehicles in traffic situations.³¹ The reform here improves in particular the position of young children who are victims of traffic accidents but have, as often is the case, in one way or the other contributed to their own damage. Their claims are no longer reduced because of contributory negligence. This amendment follows similar developments especially in France and Belgium.³²

However, it has to be stressed that the new rule applies only in case of accidents (sudden events) and of accidents with motor vehicles or railways. Although it is not necessary that the accident occurred in *public* road or rail traffic this will certainly be the normal situation where the new provision comes into play. On the other hand the new rule cannot be invoked where the traffic accident is caused by a bicyclist, be it that for instance a nine year old boy causes damage with his bike to somebody else or that the boy being himself contributorily negligent suffers damage caused by a biker. Here the boy will regularly be held either liable or contributorily negligent since a boy of that age is normally expected to know how to behave as a bicyclist or pedestrian.

3.5. Extension of liability of motor vehicle keepers

It is also of considerable practical importance that the reform has significantly extended the boundaries of strict liability of motor vehicle keepers. These are persons who can dispose and

³⁰ Compare ECJ of 25 April 2002 – C-52/00 (Commission ./ . France); ECJ of 25 April 2002 – C-154/00 (Commission ./ . Greece); ECJ of 25 April 2002 – C-183/00 (González Sánchez ./ . Medicina Asturiana SA).

³¹ Reasoning of the Draft p. 36.

³² In France the famous Loi Badinter reduced significantly the influence of children's contributory negligence for traffic accidents – even up to the age of 16 years. Belgium followed the French example.

make use of a car or motorbike (normally but not necessarily they will own the motor vehicle) and who are therefore responsible for the car. Under German law those keepers are liable regardless of fault when the car was involved in an public road accident and has caused damage to another person (§ 7 par. 1 StVG). This strict liability has been extended in several ways.

The increase of the maximum amount up to which the car keeper can be made strictly liable has already been mentioned.³³ A further extension is the alteration of the exemption clause (§ 7 par. 2 StVG) which the keeper can invoke in order to avoid liability. Thus far keepers of a motor vehicle were exempted from liability if they could prove that the accident was an unavoidable event for them. This has now been changed into an exemption only in case of force majeure (“höhere Gewalt”). The standard for exemption from liability even though already very high is thus still further increased.³⁴

Moreover the keeper is now strictly liable towards all passengers in his vehicle in the same way as towards other victims. According to the former solution only fault liability applied towards gratuitously transported passengers.³⁵

A further amendment the reform has introduced is a strict liability for keepers of trailers³⁶ as if these vehicles were themselves motor vehicles. The reason for this amendment is that cases had become frequent where the trailer had caused the accident but belonged to, and was kept by, another person than the keeper of the truck and/or where the keeper of the trailer did not disclose the (strictly liable) keeper of the truck. Under the former law the keeper of the trailer was only liable in case of fault. Since he was not the driver (of the whole truck) and was not obliged to disclose the keeper of the truck the victim remained in these cases often without an enforceable claim.³⁷ The reform has altered this unsatisfactory state of affairs.

3.6. Extended protection of the right of sexual self-determination

Before the reform the German Civil Code contained an outmoded provision protecting – by the remedy of damages – a female person (“Frauensperson”) against non-marital intercourse through force or fraud. This provision has now been changed into a general rule protecting females and males against the violation of their right of sexual self-determination (§ 825 BGB). Now also any immaterial loss can be recovered in those cases.³⁸

³³ See supra III.2.

³⁴ For a more detailed discussion compare Hentschel, Änderungen im Haftungsrecht des Straßenverkehrs durch das Zweite Gesetz zur Änderung schadesersatzrechtlicher Vorschriften vom 19.7.2002, NZV (Neue Zeitschrift für Verkehrsrecht – New Journal for Traffic Law) 2002, 433 ss [434 s.].

³⁵ See the former § 8 a StVG.

³⁶ In § 7 par. 1 StVG.

³⁷ See thereto Reasoning of the Draft p. 68 s.; Hentschel p. 433 s.

³⁸ See the new § 253 par. 2 BGB.

3.7. Exclusion of compensation for fictitious damage

A further amendment which might prove to be of much greater importance than it appears at first sight concerns the mode of calculating property damage. Under the prior law when the tortfeasor had damaged property in a reparable way the victim could claim the necessary cost of repair including 16% value added tax (VAT) which a professional repairer is regularly entitled to charge. It was a well established court practice that the total amount of repair costs plus 16 % VAT could even be claimed when the victim left the property unrepaired although then no VAT was incurred.³⁹ The victim then had a fictitious damage, in fact a 'gain' of 16%.

The reform has now expressly abolished this practice. VAT can now only be claimed when the victim had in fact incurred it (§ 249 par. 2 BGB). It remains open for discussion whether or not this solution can be applied by analogy to other similar situations where also fictitious losses are compensated.⁴⁰

3.8. Liability of court experts for wrong opinions

As an aspect of minor importance the reform has also extended the liability of experts who are appointed by court for delivering an expert opinion necessary for the decision of the court. In Germany court experts are under no contractual but only under tortious liability to the parties of the law suit when delivering their opinion because it is the court which appoints the expert. Thus far this liability was rather limited. If the wrong opinion resulted in the loss of the law suit under the prior law the losing party could in most cases not claim damages for the pure economic loss connected with the lost suit since here as a rule liability required intent on the part of the expert.⁴¹ But only very rarely intent was present or proveable. It was, however, felt necessary to raise the standard of liability for those experts.⁴²

The reform has now introduced a new provision which establishes liability already when the expert acts with gross negligence and the party could not have avoided the loss by procedural remedies (§ 839 a BGB).

4. Entrance into force of the new law

The reform of the German law of tort and damages entered into force on August 1, 2002. It applies to all cases where the damaging event occurred after 31 July 2002. However, the new maximum amounts for damage caused by pharmaceuticals apply only from 1 January 2003 on so that pharmaceutical producers can adapt their insurance coverage to the increased amounts. But

³⁹ BGHZ 61, 56; BGH NJW 1989, 3009.

⁴⁰ See thereon Wagner NJW 2002, 2049 ss. [2057 ss.].

⁴¹ BGHZ 62, 54 ss.; but corrected for cases where the wrong expert opinion led to violation of personal freedom (imprisonment) by BVerfGE (Entscheidungen des Bundesverfassungsgerichts – Decisions of the Federal Constitutional Court) 49, 304 ss.

⁴² Extensively thereon Wagner NJW 2002, 2049 ss. [2061 ss.].

on the other hand the mentioned right of information concerning detrimental pharmaceuticals can be invoked already in cases where the damage had occurred before August 1, 2002.

5. Concluding remarks

The recent reform of the German law of tort and damages has no fundamental but a limited nature. It does neither change the structure nor the basic concepts of the existing law perhaps with the one exception that compensation for immaterial harm is not restricted to tortious fault liability any more. Nonetheless the reform has brought about a remarkable number of reasonable and efficient improvements concerning the law of tort and damages, in particular for victims who have been bodily injured by tortious conduct. Their protection has been considerably extended – in general as far as compensation for immaterial loss and higher liability limits under strict liability statutes are concerned and especially in the field of motor traffic accidents and of detrimental pharmaceuticals. With all probability these amendments will also in practice achieve a better protection of tort victims.

As a necessary corollary also the liability of tortfeasors has been extended but only in a modest way with convincing underlying policy considerations. The reformed tort and damages law has thereby become more attractive to resort to instead of other means of compensation of bodily damage, namely instead of those provided by social security systems which mainly serve the same aim as tort law systems but provide only basic protection of victims. Especially the general compensability of immaterial losses gives a strong incentive to resort to tort law instead of social security law where such losses are not recompensed.

An overall estimation of the reform should judge it as a useful improvement of the current German law of tort and damages. By its amendments the present reform also brings German tort law more than one step closer to its European neighbour laws. But it should not be overlooked as well that a number of desiderata for reform remains unsettled and are left for further amendment and later reform.