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The development of legal doctrine in Europe

Extracontractual liability for fault

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One of the most intricate problems of comparative historical research concerns the question whether developments in different legal systems are to be understood, described, and explained as the – possibly parallel – developments of independent legal systems, or as part of a common development.[1] On the one hand, modern legal systems are understood as independent bodies of norms that define their borders from within by some ultimate source of validity.[2] Even if it is taken as a matter of course that legal systems may mutually influence each other, from an internal national perspective legal development is necessarily the individual process of an independent legal system: legal change will always be determined by the decisions of participants of a specific legal system.

On the other hand, however, the development of European legal systems was apparently influenced to a large degree by the same ideas, by largely common socioeconomic developments and by a similar cultural perception of the social world. More specifically, during the nineteenth century and the first decades of the twentieth, the rules of liability for fault were clearly determined by natural law ideas about individual responsibility, as they were authoritatively expressed by Pufendorf[3] and later used

[1] The problem is not specific for historical comparative law; it has intensively been discussed in comparative history by authors like Marc Bloch, Otto Hintze or, more recently, Hannes Siegrist, Jack A. Goldstone and Charles Tilly; cf. N. Jansen, 'Comparative Law and Comparative Knowledge', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 305, 332 ff., with further references on the debate.

[2] This would be some 'rule of recognition' providing 'authoritative criteria for identifying primary rules': H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 100; similarly H. Kelsen, *Reine Rechtslehre*, 2nd ed. (Vienna: Deuticke, 1960), 196.

[3] S. Pufendorf, *De iure naturae et gentium libri octo* (cum integris commentariis Io. Nic. Hertii atque Io. Barbeyraci, Frankfurt and Leipzig 1759), *lib.* III, *cap.* I; id., *De officio*

for reconstructing the rules of the 'positive law' by Heineccius,[4] Domat[5] or Pothier.[6] At the end of the nineteenth century a growing dissatisfaction with the fault principle was common among European lawyers and in public discussion;[7] and again in the middle of the twentieth century, dissatisfaction with the tort system as a means of socially distributing the risks of accidents resulted in a common European (or rather Western) discourse about legal reform and insurance systems. Contributions to these debates were read all over Europe;[8] typically they did not specifically relate only to one individual legal system. Even where the debates

hominis et civis iuxta legem naturalem libri duo (Cambridge, 1682), *lib.* I, *cap.* VI; see Jansen, *Haftungsrecht*, 337 ff.

[4] J.G. Heineccius, *Elementa iuris naturae et gentium* (Halle, 1738), *lib.* I, §§95 ff., 211; id., *Elementa iuris civilis secundum ordinem Institutionum* (Giessen, 1784), §§1033 ff., 1080 ff.; cf. Jansen, *Haftungsrecht*, 349 ff. Heineccius was among the main sources of Pothier; it is not unlikely that he has exercised a substantial influence of the latter's exposition of the law of extracontractual liability and thus on the later French law; cf. O. Descamps, *Les origines de la responsabilité pour faute personnelle dans le code civil de 1804* (Paris: LGDJ, 2005), 437.

[5] J. Domat, *Les loix civiles dans leur ordre naturel, le droit public et legum delectus* (Paris, 1777), *part* I, *liv.* II, *tit.* VIII, *sect.* 4.

[6] R.J. Pothier, *Traité des obligations* (*Oeuvres*, vol. 1, Paris, 1824), nn. 116 ff.

[7] See, for Germany, Jansen, *Haftungsrecht*, 376 ff.; id., 215 ff.; for the Scandinavian countries Modéer, 111 ff.; for Italy Graziadei, 119 ff.; for France Halpérin, 85 ff. (politicians); for the Netherlands Hol, 170 ff.; for Spain, though not before the second half of the twentieth century, Martín-Casals and Ruda, 193 ff. (judges) (where references only give the name of an author, they refer to the national reports in this book); for Switzerland C.C. Burckhardt, 'Die Revision des Schweizerischen Obligationenrechtes in Hinsicht auf das Schadensersatzrecht', (1903) *Zeitschrift für Schweizerisches Recht* 469, 503 ff., 567 ff., 578. Thus the German writer V. Mataja, who had developed an early economic and thus functional analysis of extracontractual liability advocating strict liability rules (*Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie* (Leipzig: Altenburg, 1888); see I. Englard, 'Victor Mataja's *Liability for Damages from an Economic Viewpoint:* A Centennial to an Ignored Economic Analysis of Tort', (1990) 10 *Int. R. Law & Ec.* 173 ff.), could become influential in Italy (Graziadei, 138, n. 37) and France (Halpérin, 89), although he was regarded as an outsider in Germany; cf. below n. 155.

[8] In fact, discourse in the second half of the twentieth century was not specifically limited to Europe; it was influenced to a large degree by American writers, such as G. Calabresi, *The Costs of Accidents* (New Haven: Yale University Press, 1970). For an overview, see A. Tunc, 'Traffic Accident Compensation: Law and Proposals', *International Encyclopaedia of Comparative Law*, vol. 11 (Tübingen: Mohr, 1971), ch. 14, nn. 1 ff., 94 ff.; G. Wagner, 'Grundstrukturen des Europäischen Deliktsrechts', in R. Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts* (Baden-Baden: Nomos Verlag, 2003), 189, 324 ff., both with further references. For contributions to the European debate, see P. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 1970), esp. 603 ff.; J. Fleming, J. Hellner and E. v. Hippel, *Haftungsersetzung durch Versicherungsschutz* (Frankfurt: Metzner, 1980); Tunc, 'Traffic Accident Compensation', nn. 187 ff.

within the different legal systems were not directly connected with each other, they must thus be understood as expressions of a common reaction to the common European tradition of natural law ideas within the law of extracontractual liability.[9] Thus, all over Europe, the problem of reconciling the traditional Roman and common law rules of strict liability for disturbances among neighbours with the general maxim of no liability without fault was discussed on the basis of similar arguments and led to solutions of similar types.[10] And the present rules on product liability result from a common Western legal discourse that led to a unifying European directive.[11] True, such an overarching perspective should not presuppose that all European systems of extracontractual liability for fault follow identical patterns of development: there can be one or more *Sonderwege*, and different systems may follow a general pattern of development to a larger or lesser degree. Nevertheless, changes within the individual systems would be seen as part of the larger process of the development of European law, into which the different national legal systems are embedded. Their developments would become individual variations of this larger process of legal change.

It is submitted that both the individual and the overarching perspective on legal development may be similarly illuminating; in a full analysis they should complement each other. Thus it will be helpful first to describe the development of the European law of extracontractual liability in general from an overarching perspective before then proceeding to a comparison of the individual developments of different national legal systems. It will be seen that the second perspective is particularly suitable for describing the development of specific legal doctrines; in this respect, the law of an individual legal system should be understood as an independent, autonomous tradition of normative thought. Of course, doctrinal change may influence the outcomes of cases, but this is not necessarily so. Likewise, doctrinal change may be academia's answer to a prior change of the courts' practice. In contrast, the first perspective will be especially helpful for understanding the general development of the substance of law. Here, the law is seen as an expression of common social or legal values and analysed from a more functional perspective. Thus

[9] See below, 8 ff., 15 ff.

[10] See J. Gordley, 'Disturbances among neighbours: an introduction', in id. (ed.), *The Development of Liability between Neighbours* (Cambridge: Cambridge University Press, 2010), 1 ff.

[11] S. Whittaker, 'Introduction to fault in product liability', in id. (ed.), *The Development of Product Liability* (Cambridge: Cambridge University Press, 2010), 20 ff., 23 ff.

legal change in this respect may be expected to influence the outcomes of cases brought before the courts. To avoid misunderstanding, however, it should be emphasized that the law may be understood as a (partially) autonomous discourse also from such an overarching point of view. The law's autonomy is not necessarily identical with the autonomy of individual (national) legal systems.

The following analysis is mainly based on the national reports to this volume that analyse the development of tort law since about 1850 for the individual legal systems of England (David Ibbetson), France (Jean-Louis Halpérin), Germany (Nils Jansen), Italy (Michele Graziadei), the Netherlands (Antoine Hol), Spain (Miquel Martín-Casals and Albert Ruda) and Sweden (Kjell Å Modéer). Although based on a common questionnaire,[12] these reports are not written in the form of a sequence of answers to the different questions. Instead, every member of the group was asked to tell the story of his system's development. Thus, on the one hand, the reports are made comparable in that they address the same questions, whereas, on the other hand, the individual systems' history is presented in the form of coherent reconstructions, written from an internal perspective. Although this approach is probably helpful in making the history of individual legal systems comparable, it is not without problems. Not all questions will make the same sense in every system; indeed, such questions may be understood differently from the perspective of different systems. What is more, every report must be seen, unavoidably, as a participant's interpretation of his system's history. Thus every story bears an irreducibly subjective element of which the reader should be aware. Those reporters who perceive their law as an autonomous system of thought will present a different picture from those who understand it as determined by sociopolitical change. Some have put their emphasis mainly on the writings of academics, because in their legal system doctrine is largely identified with academic writing, whereas others see doctrinal developments equally determined by the courts. And writers who are convinced that judges should take into account better insurance capacity might be more inclined to find such considerations in judgments, implicitly if not explicitly. Accordingly, if there is no 'objective' history independent of the historian's interpretation, the following comparative history must be understood as an interpretation of interpretations.

[12] See the Appendix, below at 43 ff.

I General Principles of Liability For Fault: An Overview

Already in the times of the *usus modernus pandectarum*, a general rule of liability for fault had, in principle, been acknowledged. Grotius had famously formulated a first 'general clause' of liability for fault ('ex tali culpa obligatio naturaliter oritur si damnum datum est, nempe ut id resarciatur'[13]), and even if the exact scope of this formulation is not fully clear,[14] more practically oriented lawyers soon understood the *actio legis Aquiliae* in the sense of such a broad general clause. Thus Samuel Stryk could authoritatively explain the application of this action to be extremely broad (*amplissimus*) since it gave rise to compensation of all damage caused by any fault of another person.[15] Similarly, French authors had constantly expressed the opinion that a person was liable for all damage resulting from fault.[16] As a consequence, the early codifications adopted this standpoint, too.[17] At the beginning of the nineteenth century, an unrestricted general clause of liability for fault was apparently the state of the art of European law; it was introduced everywhere from Scandinavia[18] to Italy.[19]

In contrast to these unifying general clauses, England presents a totally divergent picture. In fact, it took more than a hundred years before Lord Atkin became the first judge to express such a broad approach to liability in *Donoghue* v. *Stevenson*.[20] Until the nineteenth century, English law much more resembled classical Roman law than did its contemporary

[13] H. Grotius, *De iure belli ac pacis libri tres* (Amsterdam, 1642), *lib.* II, *cap.* XVII, §1.

[14] Cf. N. Jansen, 'Duties and Rights in Negligence', (2005) 25 *OJLS* 443, 456 ff.; id., *Haftungsrecht*, 328 ff.

[15] S. Stryk, *Specimen usus moderni pandectarum*, 2nd ed. (Halle, 1708), *lib.* IX, *tit.* II, §1: 'Tituli praesentis usus amplissimus est, cum omnium damnorum reparatio ex hoc petatur, si modo ulla alterius culpa doceri possit'; further references in Jansen, *Haftungsrecht*, 292 ff.

[16] Domat (n. 5), *part* I, *liv.* II, *tit.* VIII, *sect.* 4, §1: 'Toutes les pertes & tous les dommages qui peuvent arriver par le fait de quelque personne … doivent être réparées par celui dont l'imprudence ou autre faute y a donné lieu'; Pothier (n. 6), nn. 116, 121, 123; Guyot, *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale*, vol. XIV (Paris 1785), 240 ff.

[17] See §1295 Austrian ABGB of 1811 and §§1 ff., 10 ff. I 6 Prussian ALR of 1794. Most famous is the formulation in Art. 1382 Code civil ('Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer'); it has always been understood as including purely economic losses. Even today there is no technical category of purely economic losses in French legal thinking.

[18] Modéer, 214 ff. [19] Cf. Graziadei, 127 ff.

[20] [1932] AC 562, 580 ff.

civilian systems. It was based on a wide range of different torts, among them, most importantly, trespass to the person and to land for injuries to persons and things, and an action on the case for damage done. As in Roman law,[21] the choice between these actions was often less determined by questions of substantive law than by considerations of a purely procedural nature.[22] None the less, beyond this disparate picture natural law thinking was already lurking; and it had begun to influence the development of the rules of substantive law, namely the rise of the action on the case. There was a feeling in England, too, that a man should be liable for all consequences of his faults.[23]

Until the eighteenth century, European legal systems had not restricted liability to fault in the narrow sense of genuinely reproachable behaviour; within the framework of 'liability for fault', there was ample room for somewhat stricter forms of liability.[24] All over Europe, not only in Germany and France, but also in Scotland[25] and Spain,[26] the standard of liability was the Aquilian *culpa levissima*:[27] *fautes … si légeres qu'elles puissent être*,[28] or 'slightest fault'.[29] This standard referred to some 'negligence without fault', where only people that are 'more diligent than

[21] D. Nörr, 'Zur Interdependenz von Prozeßrecht und materiellem Recht am Beispiel der Lex Aquilia', (1987) 6 *Rechtshistorisches Journal* 99 ff.; A. Bürge, *Römisches Privatrecht* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1999), 21 ff.; further references in Jansen, *Haftungsrecht*, 249 ff.

[22] See for all D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999), 155–63.

[23] Ibbetson, 46 ff.

[24] For the development in the French *coutûmes* and in some early German law books replacing older concepts by the idea of – presumed! – fault see B. Winiger, *La responsabilité Aquilienne en droit commun. Damnum culpa datum* (Geneva: Helbing & Lichtenhahn, 2002), 123 ff., 128 ff., 140 ff.

[25] H.L. MacQueen and W.D.H. Sellar, 'Negligence', in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2, *Obligations* (Oxford: Oxford University Press, 2000), 517, 524 ff.

[26] I. Jordán de Asso y del Rio and M. de Manuel y Rodriguez, *Instituciones del Derecho civil de Castilla*, 5th ed. (Madrid, 1792), 242 ff. (*tit.* XIX, *cap.* III, §1).

[27] J. Brunnemann, *Commentarius in Pandectas* (Cologne, 1752), *ad* D.9.2.44, nn. 1 ff.; Heineccius, *Elementa iuris civilis*, §1081; G.A. Struve, *Syntagma jurisprudentiae secundum ordinem Pandectarum concinnatum* (cum additionibus Petri Mülleri, Frankfurt and Leipzig, 1738), D.9.2, *exerc.* XIV, §§19 ff.; J. Voet, *Commentarius ad Pandectas* (Halle, 1778), *lib.* IX, *tit.* II, §13; L.J.F. Höpfner, *Theoretisch–practischer Commentar über die Heineccischen Institutionen*, 4th ed. (Frankfurt, 1793), §§1046, 1060; C.F. Glück, *Ausführliche Erläuterung der Pandekten nach Hellfeld* (Erlangen, 1797 ff.), §705 (vol. 10 at 385); for details see S. Stryk, (*Disputatio) De damno rebus alienis licite illato*, in id., *Dissertationum juridicarum Francofurtensium*, vol. 5 (Frankfurt, 1744), 122 ff., *cap.* I, n. 62; *cap.* VIII, nn. 3 ff.; id., *Specimen usus moderni pandectarum* (Halle, 1723), *lib.* IX, *tit.*, II, §14.

[28] Domat (n. 5), *part* I, *liv.* II, *tit.* VIII, *sect.* 4, §1.

[29] 'Smallest fault or neglect' and 'slightest fault'; cf. above n. 25.

diligent'[30] could have prevented the harm. Of course, such utmost care was not obligatory or regarded as reasonable behaviour; this becomes clear from the examples given by the authorities. Thus Domat expressed the opinion that fire could never escape but for someone's fault,[31] and in Germany it was taught that dropping a teacup because one was frightened by a shot would count as *culpa levissima*.[32] Correspondingly, Heineccius explained that only 'arch-skinflints with a thousand eyes'[33] could be sufficiently careful, those 'who cannot sleep quietly before they have fingered at all bolts and locks at the houses ensuring that everything is closed'.[34] Of course, such ridiculous behaviour was not obligatory, and the Spanish natural lawyer Molina, who was generally regarded as an authority in this point,[35] explained the *ratio* of this liability very clearly as 'quasi-contractual'.[36] Sometimes it was not forbidden to pursue a dangerous activity, but it was forbidden to do so without implicitly agreeing to compensate the victims in case of an accident.[37]

England, again, at first sight presents a divergent picture, because here the concepts of *culpa levissima* or 'slightest fault' had no real place within the law of torts.[38] Most of the old English torts, like trespass, did not presuppose an allegation of the defendant's fault, though, and were thus 'formally' strict. English lawyers could therefore describe their ideas of a far-reaching (though never absolute) responsibility within an objective language of 'causation'.[39] Hence, in substance, there was apparently

[30] Zimmermann, *Obligations*, 192.
[31] Domat (n. 5), *part* I, *liv.* II, *tit.* VIII, *sect.* 4, §6.
[32] N.H. Gundling, *Discourse über die sämtlichen Pandecten* (Frankfurt and Leipzig, 1748), *lib.* IX, *tit.* II, §2.
[33] J.G. Heineccius, *Recitationes in Elementa juris civilis secundum ordinem Institutionum* (Leeuwarden and Franeker, 1773), §§786 ff.: 'Eucliones, quibus mille occuli sunt'.
[34] J.G. Heineccius, *Academische Reden über desselben Elementa iuris civilis secundum ordinem Institutionum* (Frankfurt and Leipzig, 1748), §§786 ff.: 'welche nicht eher ruhen können, bis sie alle Riegel und Schlösser an den Häusern betastet, und gesehen haben, ob alles zugeschlossen ist'.
[35] As such he is cited by e.g. Struve, *Syntagma jurisprudentiae*, D. 9. 2, *exerc.* XIV, §20; or Brunnemann (n. 27), *ad* D. 9. 2. 44, nn. 1 and 5.
[36] L. Molina, *De iustita et iure* (Mainz, 1659), *tract.* II, *disp.* 698, n. 3: liability 'ratione pacti, seu quasi pacti'.
[37] Molina (n. 36), *tract.* II, *disp.* 698, nn. 3 ff.; cf. also R.P.L. Lessius, *De iustitia et iure* (Venice, 1734), *lib.* II, *cap.*, VII, *dub.* VI.
[38] However, during the middle of the nineteenth century, the Roman trichotomy of *culpa levis*, *culpa lata*, and *culpa levissima* appeared in some decisions, but this was soon abolished again: D.J. Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries', in E.J.H. Schrage (ed.), *Negligence* (Berlin: Duncker & Humblot, 2001), 229, 230 ff.
[39] Ibbetson (n. 22), 58 ff.

no difference from the continental rules imposing liability for *culpa levissima*.

I.A The shadows of natural law

In sharp contrast to this picture, victims of accidents were in no comfortable position during the nineteenth century. The generosity of the eighteenth century was apparently forgotten, and claims for damages were awarded only if rather narrow requirements were fulfilled. In Germany, the broad approach of the *usus modernus* was rejected by highly influential academic writers. Now, the defendant had to show, again, that his claim fell under one of the many specific Roman delictual actions.[40] Thus German law came – in this respect – rather close to the English approach. It is not clear, though, whether this really led to a substantial restriction of liability. The earlier inclusion of purely economic losses into the general clause of liability had partly been due to the fact that delictual and contractual claims for damage were not clearly distinguished, and although the concept of unlawfulness was initially related to the idea of infringing an absolute individual right,[41] nineteenth-century discussions of the concept of such a right were apparently without any relevance for delictual liability.[42] None the less, when the Reichsgericht refused to award a delictual claim for negligently inflicted purely economic losses,[43] this was regarded as a limitation of a more generous practice of other German courts;[44] interestingly, it corresponded to parallel developments in England.[45] At the end of the nineteenth century, this restrictive conception of the scope of protection was codified in terms of unlawfulness presupposing the violation of an absolute subjective right or an explicit legislative prohibition.[46] When this approach was soon transplanted into

[40] See Jansen, 100 ff.

[41] J.N. v. Wening-Ingenheim, *Lehrbuch des Gemeinen Civilrechts*, vol. 1, 4th ed. (Munich, 1831), 238 (§100); G.F. Puchta, *Pandekten*, 9th ed. (Leipzig, 1863), 402 (§261); id., *Vorlesungen über das heutige römische Recht*, vol. 2, 3rd ed. (Leipzig, 1852), 82 (§261).

[42] Jansen, *Haftungsrecht*, 457 ff.

[43] Reichsgericht, RGZ 9, 158, 163 ff. (1883). Already at the end of the nineteenth century, however, the court was prepared to award damages on the grounds of a pre-contractual obligation; see Jansen, 107 f., with references.

[44] Jansen, 101, with references.

[45] *Derry* v. *Peek* [1889] 14 AC 337; cf. C. v. Bar, 'Unentgeltliche Investitionsempfehlungen im Wandel der Wirtschaftsverfassungen Deutschlands und Englands', (1980) 44 *RabelsZ* 455, 457 ff.

[46] Jansen, 102 ff.

other countries, such as Italy,[47] and apparently also the Netherlands,[48] it was regarded as a significant restriction of liability that fitted in well with general developments. The recovery of non-economic damages (*danno morale*), too, was limited; here conceptual arguments based on Roman law proved decisive.[49]

From a more practical perspective, other devices to limit liability may have been even more drastic: an example is the counterfactual idea of victims consenting to the dangers to which they were exposed by the defendant. Whereas the unsatisfactory rule of contributory negligence excluding any claim had been abolished in most countries before the twentieth century,[50] this idea of consent excluding liability remained apparently more vivid. In England, it was even proposed as a general argument against the liability of employers towards their employees.[51] Similarly, it was long a common practice in Germany to make employees waive their rights under the newly established strict liability for railway accidents in standard contracts.[52] Likewise, if someone got a gratuitous lift with a (drunken) driver, he was typically held to consent to the dangers resulting thereof.[53]

The most significant limitation of responsibility, however, resulted from the fault principle gaining axiomatic status. This fault principle was the basic idea of the prevailing natural law conception of extracontractual liability, as it had been clearly stated by Pufendorf.[54] Accordingly, 'no liability without fault' became the battle-cry of European tort lawyers from the beginning of the nineteenth century.[55] All national reports show significant restrictions of liability resulting therefrom. Thus formerly strict instances of liability were put under the fault principle, such as trespass to

[47] Graziadei, 130 ff.

[48] Hol, 167 ff. It is difficult to trace direct influence, though, because there are no indications, such as explicit citations, of such influence. Nevertheless the conceptual structure of the argument was remarkably similar to the pandectists' doctrine.

[49] Graziadei, 134 f.

[50] Jansen, in *HKK*, vol. 2, §254, nn. 22 ff. The idea of comparative negligence leading to an apportionment of the damage was apparently developed by Christian Wolff and had already found its way into the Austrian Allgemeines Bürgerliches Gesetzbuch (§1304). During the second half of the twentieth century it spread quickly over the rest of Europe. When English judges continued to decide on the basis of the old rule of contributory negligence, this may have been due to the fact that they found themselves bound by precedent and less so by the desire to keep liability limited. See also Ibbetson, 54 ff.

[51] Ibbetson, 55, references within.

[52] See Jansen, *Haftungsrecht*, 369.

[53] Jansen, in *HKK*, vol. 2, §254, n. 37; see also Ibbetson, 54 ff.

[54] Pufendorf (n. 3), *lib.* I, *cap.* V, §5: 'axioma in moralibus'.

[55] Martín-Casals and Ruda, 188 (on the reinterpretation of strict liability in terms of fault), 190 ff., 197 ff.; Graziadei, 127 f., 135 ff.; Ibbetson, 48 ff., 61 ff.; Jansen, 110; Modéer, 214 ff.

the person in England[56] or the *actio negatoria* in Germany.[57] In England, implied terms were introduced into contracts of carriage in order to avoid strict liability.[58] And in Germany, the liability of juristic persons was questioned, because arguably juristic persons were not capable of committing fault.[59]

One consequence of this development was a growing tension between the traditional Roman and common law rules of strict liability for disturbances among neighbours, on the one hand, and the general maxim of 'no liability without fault', on the other. During the nineteenth century this tension led to parallel fundamental discussions about the basis of such liability in most European legal systems.[60] Another consequence was the abolition of the formerly quasi-strict liability for *culpa levissima* everywhere in Europe. This development, which can be dated rather precisely to around the year 1800, had been already prepared on the basis of conceptual arguments by some humanists. In the early nineteenth century, these arguments were further developed by German writers.[61] The immediate success of these writers, not only in Germany but also abroad, can only be explained by the intellectual atmosphere of the time. Shortly before, delictual liability for *culpa levissima* had been abolished in the earlier natural law codifications,[62] and this was recognized as a significant restriction of liability by the commentators.[63] Elsewhere, such a position became good law as well.[64] It became a matter of course that delictual duties of care must not go beyond what could be reasonably expected from a normal defendant: the Spanish report gives an instructive picture of the reluctance of courts around the year 1900 to find negligence.[65] Thus it did not suffice to show that a train whistle had not been blown when a train approached a level crossing and that this crossing was – in violation

[56] Ibbetson, 61 ff. [57] Jansen, 110.
[58] Ibbetson, 63. [59] Jansen, 110. [60] Gordley (n. 10), 1 ff.
[61] A.F.J. Thibaut, *System des Pandekten-Rechts*, vol. 2, 4th ed. (Jena, 1814), 188 (§253); particularly influential was J.C. Hasse, *Die Culpa des Römischen Rechts*, 2nd ed. (Bonn, 1838), 4, 8, 12 ff., 65 ff., 90 ff.; for more details and references see Jansen, *Haftungsrecht*, 434 ff.
[62] Jansen, *Haftungsrecht*, 354 ff.
[63] G.A. Bielitz, *Praktischer Kommentar zum allgemeinen Landrechte für die preußischen Staaten* (Erfurt, 1823 ff.), vol. 2, 7; C.G. v. Wächter, *Handbuch des im Königreiche Württemberg geltenden Privatrechts*, vol. 2 (Stuttgart, 1842), 784 ff.; F. v. Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch*, vol. 3/1 (Vienna and Trieste, 1812), §1298, n. 11.
[64] For England, see Ibbetson, 48, 59; for Spain, Martín-Casals and Ruda, 190 ff., 177 ff. In Italy, however, this restriction was only slowly acknowledged by the courts: Graziadei, 143 ff., 155.
[65] Martín-Casals and Ruda, 190 ff.