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# TOWARD A EUROPEAN *IUS COMMUNE* IN TORT LAW: A PRACTICAL EXPERIENCE

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## 1 Introduction

It is common knowledge that the principles of tort law (or the law of delict) in various European countries differ considerably. The traditional differences between the casuistic common-law approach in England (and other countries that remain close to that system) and the generalising approach of the continental civil-law countries are well-known.<sup>1</sup> Moreover, even civil-law countries, such as France and Belgium on the one hand, and Germany and Austria on the other, differ fundamentally as far as particular aspects of tort law are concerned.<sup>2</sup> Seen in this light, it is quite understandable why, until the 1990s, there had not been any serious attempt to harmonise the field of European tort law in a consistent manner.<sup>3</sup>

## 2 European Group on Tort Law

### 2.1 Establishment, aim and members

In 1992, Jaap Spier, then Professor at the University of Tilburg in the Netherlands,<sup>4</sup> established a working group of tort law scholars (the Tilburg Group) who met on a regular basis to discuss aspects (fundamental issues as well as recent developments and future directions) of this area of the law. Initially the group had eleven members and focused on questions dealing with the limitation of tortious liability.<sup>5</sup> Over time, the group expanded to twenty members and became known as the European Group on Tort Law which broadened its horizon and decided to embark on the development and drafting of *Principles of European Tort Law*.<sup>6</sup>

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1 See eg Neethling, Potgieter & Visser *Law of Delict* (2006) 4-5.

2 This is especially so as far as the element of wrongfulness is concerned, which is, contrary to the position in the latter two countries, unknown in France and Belgium (see Neethling "Personality rights: A comparative overview" 2005 *CILSA* 218-219).

3 See European Group on Tort Law "Introduction: Goals and objectives" at <http://www.egt.org> (29 Nov 2005). Until now, there has not been any attempt to harmonise tort law by the European Union or the Council of Europe.

4 Now Advocate General of the Hoge Raad der Nederlanden.

5 See Spier (ed) *The Limits of Liability: Keeping the Floodgates Shut* (1996); Spier (ed) *The Limits of Expanding Liability. Eight Fundamental Cases in a Comparative Perspective* (1998).

6 See Spier "General introduction" in European Group on Tort Law *Principles of European Tort Law: Text and Commentary* (2005) 12; Spier "The European Group on Tort Law" in Koziol & Steiniger (eds) *European Tort Law* (2003) 541ff; Koziol "Introduction" in Koziol (ed)

The aim of this project was to identify the common fundamental principles that underpin each European tort law system, and consequently to search for and extract a European *ius commune*. This process of establishing the common ground that underlies all the legal systems would obviously be indispensable for an eventual promulgation of a European civil code on tort law. In the meantime it could provide fertile soil for legislatures, academics and practitioners to come to a better understanding of the fundamental principles underlying the tort law of any particular country, and even start the process of introducing (some of) the principles into the positive law of that country.<sup>7</sup>

The members of the group inevitably consisted mainly of experts from England and European countries. These include Italy, Belgium, Sweden, the Netherlands, Greece, Austria, Germany, Spain, France, Portugal, Czech Republic and Switzerland.<sup>8</sup> However, leading scholars from other important jurisdictions were also invited to participate: First, from countries with a mixed or hybrid system of tort law, notably South Africa and also Israel whose legal system may to an extent be characterised as mixed or hybrid. Since the *Principles of European Tort Law* had to consider both English and continental legal principles, which are not always so easy to reconcile, it was necessary and indeed beneficial to utilise information especially about South African law<sup>9</sup> where Roman-Dutch and English law have been merged into a harmonious unit.<sup>10</sup> Secondly, scholars from the United States of America were included in the group since important developments in that country could not be ignored as a result of their increasing influence on European tort law.<sup>11</sup>

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*Unification of Tort Law: Wrongfulness* (1998) 3-4; Koziol "The 'Principles of European Tort Law' der 'European Group on Tort Law'" 2004 *ZeUP* 234.

7 See Koziol (2004, n 6) 234; European Group on Tort Law "Need for principles" at <http://www.egtli.org> (29 Nov 2005). This is already happening in Austria where the reform of tort law in the *ABG* is being undertaken.

8 Koziol (2004, n 6) 234; Spier (2005, n 6) 12-13.

9 Spier (2005, n 6) 12.

10 See Neethling, Potgieter & Visser (n 1) 4 n 12. Neethling "Tort law in South Africa – The mixing of the general and the particular" in Smits (ed) *The Contribution of Mixed Legal Systems to European Private Law* (2001) 81ff 102; Smits *Europees Privaatrecht in Wording – Naar een Ius Commune Europaeum als Gemengd Rechtsstelsel* (1999) 241-242; Walter *Actio Iniuriarum: Der Schutz der Persönlichkeit im südafrikanischen Privatrecht* (1996) 211.

11 Spier (2005, n 6) 12.

As may be expected, the members of such a relatively large group<sup>12</sup> have different backgrounds, and true to their right to academic and scientific freedom and resultant individualism, they sometimes held – and adamantly adhered to – very different views. Moreover, while some tended to emphasise dogma and systematic arguments, others were inclined to be more pragmatic. Also, some members were very concerned about opening the floodgates of liability, others considerably less. The fundamentally different approaches to delictual liability in the common-law and civil-law systems merely added to this clamour of voices.<sup>13</sup>

In the final analysis, the *Principles of European Tort Law* was drafted on the basis of extensive comparative research over more than a decade, and is clearly a compromise between different and sometimes diametrically opposed views and solutions in the respective countries and of its scholars. In short, it is a first step towards the introduction of a European *ius commune* in tort law which reconciled differences and produced a result that most members found reasonable enough to accept, justify and even defend.<sup>14</sup>

No group of academics can function effectively without efficient organisational assistance and sufficient financial support. The success of the European Group of Tort Law may largely be attributed to the staff of the European Centre of Tort and Insurance Law (ECTIL) in Vienna under the directorship of Helmut Koziol. Their support has been invaluable in organising meetings and assisting in publication of the group's work. The generous financial assistance came from the Austrian Academy of Sciences.<sup>15</sup>

## 2.2 *Modus operandi*

When embarking on a topic or theme, one member (reporter) drew up a questionnaire based on a mix of theoretical (abstract) aspects and problematic

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12 At the time of the conclusion of the final draft of the *Principles of European Tort Law*, the members of the Group were Proff Francesco Busnelli (Pisa, Italy), Giovanni Comandè (Pisa, Italy), Herman Cousy (Leuven, Belgium), Dan Dobbs (Tucson, USA), Bill Dufwa (Stockholm, Sweden), Michael Faure (Maastricht, the Netherlands), Israel Gilead (Jerusalem, Israel), Michael Green (Wake Forest University, USA), Konstantinos Kerameus (Athens, Greece), Helmut Koziol (Vienna and Graz, Austria), Bernhard Koch (Innsbruck, Austria), Ulrich Magnus (Hamburg, Germany), Miquel Martin-Casals (Girona, Spain), Olivier Moreteau (Lyon, France), Johann Neethling (Pretoria, South Africa), Horton Rogers (Leeds, England), Jorge Monteiro (Coimbra, Portugal), Jaap Spier (the Hague and Maastricht, the Netherlands), Lubos Tichy (Prague, Czech Republic) and Pierre Widmer (Lausanne, Switzerland).

13 See Spier (2005, n 6) 13-14.

14 Nevertheless, some members were not happy with particular principles and explicitly expressed dissenting opinions: see Spier (2005, n 6) 16.

15 Koziol (2004, n 6) 234; Spier (2005, n 6) 13.

(concrete) cases<sup>16</sup> – hypothetical cases or often examples from case law in various countries – that was discussed and revised at a meeting. Thereafter the members drafted their national reports in accordance with the questionnaire, and based upon these reports, the reporter compiled a comparative report. This report identified the main points on which there were agreement (or disagreement) in the legal systems and consequently indicated the basic normative issues the Group should deal with. The comparative report thus guided the agenda for the subsequent meeting where the topic was discussed at length, with the primary aim of reaching consensus on the important issues. On that basis the reporter drafted provisional principles which were discussed at the following meeting.<sup>17</sup>

The topics that the Group workshoped were wrongfulness, causation, damage and damages, fault, strict liability, liability for damage caused by others, multiple tortfeasors and contributory negligence. Books (including the questionnaires, national reports and the comparative report) on all the above topics have been published in the Group's series *Unification of Tort Law* under the auspices of ECTIL.<sup>18</sup>

In 2002, the work on drafting a full set of principles commenced, as well as an explanatory commentary, on the basis of the work done up to that point. This task was assigned to a drafting committee consisting of ten leading European members. The committee took the provisional draft of the principles and on-going discussions as premise for its endeavour. The final text of the draft was adopted by the drafting committee in 2004, and it was subsequently distributed among all the members of the Group for their final comments. The draft was also discussed with various other interest groups.<sup>19</sup>

The project of the European Group on Tort Law has in the meantime been completed and in 2005 the *Principles of European Tort Law* was publicly presented at a conference in Vienna. In addition, a book,<sup>20</sup> containing the final

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16 Koziol (2004, n 6) 235. A more case-oriented comparative methodology, which could ascertain whether the solutions in the various legal systems are indeed different, notwithstanding the legal rules on which they are based, was therefore preferred to the classic or traditional comparison of rules: see European Group on Tort Law "Working method" at <http://www.egtll.org> (29 Nov 2005).

17 See Spier (2005, n 6) 14.

18 See Koziol (ed) *Unification of Tort Law: Wrongfulness* (1998); Spier (ed) *Unification of Tort Law: Causation* (2000); Magnus (ed) *Unification of Tort Law: Damages* (2001); Koch & Koziol (eds) *Unification of Tort Law: Strict Liability* (2002); Spier (ed) *Unification of Tort Law: Liability for Damage Caused by Others* (2003); Magnus & Martin-Casals (eds) *Unification of Tort Law: Contributory Negligence* (2004); Rogers (ed) *Unification of Tort Law: Multiple Tortfeasors* (2004); Widmer (ed) *Unification of Tort Law: Fault* (2005).

19 See Spier (2005, n 6) 14-15.

20 *European Group on Tort Law Principles of European Tort Law: Text and Commentary* (2005).

version of the principles in many European and other languages, as well as a full commentary on each principle, in English, was published and presented at the conference. The *Principles of European Tort Law* is available on the Internet.<sup>21</sup>

### 2.3 Toward a European *ius commune* in tort law

As indicated, the goal of the principles is to serve as a foundation for the enhancement and harmonisation of tort law in Europe. *De lege feranda*, the principles could provide a framework for the further development of a truly European *ius commune* in tort law.<sup>22</sup> However, *de lege lata* the decision to promulgate European tort law as a set of binding rules should naturally be taken on a political level.<sup>23</sup> This could be done in the form of a directive of the European Union as happened in the case of, for example, products liability<sup>24</sup> and data protection.<sup>25</sup> But the attainment of this end will not be a smooth road.<sup>26</sup> Jaap Spier<sup>27</sup> concludes in this regard about the work of the European Group on Tort Law:

We do not even dream that our Principles are the ideal, final model for Europe. A lot of work still has to be done. No doubt similar projects, still in progress, by other groups may also contribute to a more uniform tort law in Europe. We sincerely hope that our Principles will stimulate and intensify the debate on the future of this tremendously important field of the law in Europe.

## 3 Principles of European tort law

### 3.1 Overview

To start with, a few general remarks should be made. In determining the principles of European tort law, the Group did not endeavour to postulate merely a possible

21 At <http://www.egtl.org> (29 Nov 2005).

22 In this regard it is important to note that other groups have also worked on tort law. The significant contribution of the Working Team on Extra-Contractual Obligations of the Study Group on a European Civil Code under the direction of Christian von Bar (Osnabrück) should specifically be mentioned. There are many similarities between their principles and the principles of the European Group on Tort Law but there are also substantial differences: for a discussion see Spier (2005, n 6) 17-18.

23 See Spier (2005, n 6) 16-17.

24 Directive 83/374/EC: see Koch & Koziol "Comparative conclusions" in Koch & Koziol (eds) (n 18) 402; Neethling "Aanspreeklikheid vir 'nuwe' risiko's: Moontlikhede en beperkinge van die Suid-Afrikaanse deliktereg" in Faure & Neethling (eds) *Aansprakelijkheid, Risico en Onderneming: Europese en Zuid-Afrikaanse Perspectieven* (2003) 79 n 48 (also 2002 *THRHR* 581 n 49).

25 Directive 95/46/EC. See also Roos *The Law of Data (Privacy) Protection: A Comparative and Theoretical Study* (unpublished LLD thesis, Unisa) (2003) 189ff.

26 See Spier (2005, n 6) 16-17.

27 *Idem* 18.

common core, but searched for the best solution for Europe.<sup>28</sup> The principles are thus a proposal for a comprehensive system of tortious liability for the future, though necessarily linked to existing regimes. This led, at the one extreme, to the acceptance of principles that indeed reflected a common core, and, at the other extreme, to principles that broke completely new ground in European systems. In other instances a clear reconciliation was reached between the English common law and continental systems, while in at least one instance a Swiss solution was married to American law.<sup>29</sup> A general characteristic of all the principles is that they are open-ended or flexible. Despite the fact that this approach may result in a rather high level of legal uncertainty, hard and fast rules were not an option, simply because they lack the possibility of manoeuvring room to adapt them to the changing needs and requirements of the future.<sup>30</sup> Moreover, to facilitate the task of applying these flexible principles, a series of relevant factors were added to them where considered necessary.<sup>31</sup> If the principles become law, in the course of time courts will be able to develop a predictable blueprint, enabling practitioners to act with more certainty.<sup>32</sup> In this they may be assisted by the detailed commentary that accompanies the principles and explains how the weighing of the various factors is to be accomplished. In addition, the books by the Group on Unification of Tort Law may also serve as a valuable source of information.<sup>33</sup>

As far as the principles are concerned, realistically this overview can only be a snapshot of their content and composition and is not intended to be a detailed exposition. The principles commence with the basic norm that a person must compensate damage legally attributable to him in three instances: where his culpable act, or his abnormally dangerous activity, or his auxiliary has caused the damage. The basic norm thus provides the main bases for delictual liability.<sup>34</sup> From this the necessary general conditions of liability, applying to all three bases, are clearly evident, namely damage<sup>35</sup> (which means harm to a

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28 Spier (2005, n 6) 15.

29 Examples of these principles will be discussed below in 3.2.

30 See Spier (2005, n 6) 15.

31 *Ibid*; Koziol (2004, n 6) 236.

32 This happened in South Africa with regard to, eg, liability for pure economic loss and negligent misrepresentation (see Neethling, Potgieter & Visser (n 1) 268ff 274ff; Van der Walt & Midgley *Principles of Delict* (2005) 90-91 93-95).

33 See Spier (2005, n 6) 15-16 n 18.

34 A 1; see Koziol "Title I. Basic norm" in *European Group on Tort Law* (n 20) 19-22; cf also Koziol (2004, n 6) 237-238. A 41 of the Draft Revision of Swiss Tort Law was used as an example: see Koziol in *European Group on Tort Law* (n 20) 21.

35 A 2; see Koziol "Title II. General conditions of liability (damage)" in *European Group on Tort Law* (n 20) 23-34; Magnus "Title II. General conditions of liability (damage)" in *European Group on Tort Law* (n 20) 34-42; cf also Magnus "Comparative report on the law of damages" in Magnus (ed) (n 18) 185ff; Koziol "Conclusions" in Koziol (ed) (n 18) 129ff; Koziol (2004, n 6) 238-244.

legally protected interest) and causation (encompassing factual as well as legal causation).<sup>36</sup>

The conditions of liability based on fault are the intentional or negligent violation of the standard of the reasonable person in the circumstances. The burden of proving fault may be reversed in the light of the gravity of the danger presented by the activity.<sup>37</sup> Liability based on an abnormally dangerous activity is strict for damage characteristic to the risk presented by the activity.<sup>38</sup> Finally, liability based on damage caused by others is either strict in the case of auxiliaries who caused damage in the course of their functions, or in the case of the supervision of minors and disabled persons, is based on the fault of the supervisor.<sup>39</sup>

Defences generally excluding liability are private defence, necessity, self-help, consent and lawful authority, while in the case of strict liability *force majeure* and the conduct of a third party are applicable.<sup>40</sup> Liability may also be excluded or reduced by the victim's contributory fault or any other relevant factor.<sup>41</sup> The liability of multiple tortfeasors, that is, persons who cause the same damage to the victim, is solidary and several.<sup>42</sup>

Finally, provision is made for remedies (damages and restoration in kind) for patrimonial as well as non-patrimonial damage to restore the victim to the position he would have been in if no tort had been committed. Damages may nevertheless be reduced if, in the light of the financial situation of the parties, full compensation would be oppressive to the defendant.<sup>43</sup>

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36 A 3; see Spier "Title II. General conditions of liability (causation)" in *European Group on Tort Law* (n 20) 43-63; cf also Spier & Haazen "Comparative conclusions on causation" in Spier (ed) (n 18) 127ff; Koziol (2004, n 6) 244-247.

37 A 4; see Widmer "Title III: Bases of liability (fault)" in *European Group on Tort Law* (n 20) 64-93; cf also Widmer "Comparative report on fault as a basis of liability and criterion of imputation (attribution)" in Widmer (ed) (n 18) 331ff; Koziol (2004, n 6) 247-251.

38 A 5. See Koch "Title III: Bases of liability (strict liability)" in *European Group on Tort Law* (n 20) 101-111; cf also Koch & Koziol (eds) "Comparative conclusions" in Koch & Koziol (eds) (n 18) 395ff; Koziol (2004, n 6) 251-252.

39 A 6. See Moréteau "Title III: Bases of liability (liability for others)" in *European Group on Tort Law* (n 20) 112-119; cf also Galand-Carval "Comparative report on liability for damage caused by others" in Spier (ed) (n 18) 289ff; Koziol (2004, n 6) 252-253. As regards persons in charge of children or a disabled person, the onus of disproving fault is on the supervisor (*ibid*).

40 A 7. See Koch "Title IV: Defences" in *European Group on Tort Law* (n 20) 120-129.

41 A 8. See Martin-Casals "Title IV: Contributory conduct or activity" in *European Group on Tort Law* (n 20) 130-137; cf also Magnus & Martin-Casals "Comparative conclusions" in Magnus & Martin-Casals (eds) (n 18); Koziol (2004, n 6) 253-255.

42 A 9. See Rogers "Title V: Multiple tortfeasors" in *European Group on Tort Law* (n 20) 138-148; cf also Rogers "Comparative report" in Rogers (ed) (n 18); Koziol (2004, n 6) 255.

43 A 10. See Magnus "Title VI: Remedies (damages)" in *European Group on Tort Law* (n 20) 149-171; Rogers "Title VI: Remedies (damages)" in *European Group on Tort Law* (n 20) 171-178; Moréteau "Title VI: Remedies (damages)" in *European Group on Tort Law* (n 20) 178; cf also Magnus "Comparative report on the law of damages" in Magnus (ed) (n 18) 185 ff; Rogers "Comparative report" in Rogers (ed) *Damages for Non-Pecuniary Loss in a Comparative Perspective* (2001) 262ff; Koziol (2004, n 6) 255-258.

### 3 2 Specific principles

As indicated, some principles reflect the common core in Europe and England, some demonstrate a clear reconciliation between the English common law and continental systems, some break completely new ground not known in any of the relevant systems, and in at least one principle a Swiss solution is married to American law. An example of each of these principles will follow:

#### 3 2 1 *Multiple tortfeasors: Common core*

The principles relating to multiple tortfeasors may serve as an example where the common core was accepted as the best solution for Europe.<sup>44</sup> There is indeed a significant similarity in the results reached by both the civil- and common-law systems.<sup>45</sup> By far the majority of the European Group on Tort Law therefore readily accepted that the basic rules prevailing in the systems should be continued, namely, first that each person who causes the same damage to the victim is liable for the whole of such damage; and secondly, that tortfeasors between themselves may claim apportionment, or have a right of recourse, according to their degree of fault.<sup>46</sup>

#### 3 2 2 *Protected interests: Reconciliation of common and civil law*

The fact that damage requires harm to a legally protected interest<sup>47</sup> compelled a more precise description in *The Principles* of the interests at stake and the scope of their protection.<sup>48</sup> The scope of protection of an interest depends on its nature: the higher its value, the precision of its definition and its obviousness, the more extensive its protection. Life, bodily or mental integrity, human dignity and liberty enjoy the greatest protection, but extensive protection is also granted to property rights, including those in intangible property. Protection of pure economic interests or contractual relationships is more limited and has to be ascertained in each case with reference to applicable factors. The scope of protection may also be affected by the fault of the actor (an interest may receive more extensive protection against intentional harm than in other cases), his interests (especially in liberty of action and in exercising his rights), as well as the public interest.<sup>49</sup>

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44 See above n 42.

45 See Rogers in *European Group on Tort Law* (n 42) 140.

46 *Idem* 138-140.

47 See n 35.

48 See a 2:102. See generally on this article, Koziol in *European Group on Tort Law* (n 35) 29-34; cf also Koziol "Conclusions" in Koziol (ed) (n 18) 131-135; Koziol (2004, n 6) 242-244.

49 Cf also Van der Walt & Midgley (n 32) 33-34 on the interests that the law of delict protects and the scope of their protection.

These principles focus on the central issue of private-law protection of interests. The question is whether such protection should take the form of prohibitions against certain forms of conduct directed against interests (as in English law with its different torts),<sup>50</sup> or the recognition of substantive rights or interests, the interference with which is generally in principle forbidden (for example, in Germany).<sup>51</sup> It is submitted that the latter approach is not only theoretically sound, but also of considerable practical importance. The identification and delimitation of legally protected interests facilitate their protection by rendering them dogmatically and practically manageable and promotes legal certainty.<sup>52</sup>

Be that as it may, for the sake of uniformity the difference in approach of the common-law (torts) and several civil-law systems (protected interests)<sup>53</sup> had to be overcome by the European Group on Tort Law. Fortunately, the key to a reconciliation was the fact that the protected interest approach could also be found in the common-law doctrine of duty of care,<sup>54</sup> where the primary enquiry of whether a duty of care was owed to the victim (the duty issue) is determined by ascertaining whether the interest of the victim is legally worthy of protection against negligent infringement.<sup>55</sup> Seen thus, the best solution for Europe was also acceptable for England.

### 3 2 3 *Factual causation: New solutions*

The *conditio sine qua non* approach to factual causation was adopted by the European Group on Tort Law, namely that an activity (conduct) is the cause of the victim's damage if, in the absence of the activity, the damage would not have occurred. The Group was reluctant to extend liability to persons who did

50 See Neethling (n 2) 215-216 and 220 as to the protection of the personality in England.

51 See Koziol in *European Group on Tort Law* (n 35) 30; cf also, as far as personality interests are concerned, Joubert *Grondslae van die Persoonlikheidsreg* (1953) 115ff; Neethling, Potgieter & Visser *Neethling's Law of Personality* (2005) 4.

52 See Neethling (n 2) 217-218. The precise description of legally protected interests is indeed very important for, *inter alia*, the law of tort, since it increases the courts' (or the legislature's) ability to articulate, develop and apply principles of legal protection. This approach assists in determining how one interest, like privacy, differs from what has already been recognised or refused recognition under established legal theory, as well as which measures are necessary for its protection: see Neethling in Smits (ed) (n 10) 86; Neethling, Potgieter & Visser (n 51) 24.

53 There are also continental systems, like French law, that do not overtly recognise the idea of protected interests: Koziol in *European Group on Tort Law* (n 35) 31.

54 See Koziol in *European Group on Tort Law* (n 35) 30-31; Koziol in Koziol (ed) (n 35) 18-130.

55 This approach may also be discerned in South Africa. In eg *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833 the court emphasised that the "duty issue" "is not at all concerned with reasonable foresight; it is to do with the range of interests which the law sees fit to protect against negligent violation". See also *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA) 32; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27; *Saaiman v Minister of Safety and Security* 2003 3 SA 496 (O) 504-505; Neethling & Potgieter "Statutêre bevoegdheid: Die rol van redelike voorsienbaarheid by onregmatigheid en skuld" 2004 *Obiter* 482-486; Neethling, Potgieter & Visser (n 1) 137; cf also Van der Walt & Midgley (n 32) 81-82.

not in this way factually cause the damage, but nevertheless did so by introducing proportional liability in a few instances. The idea behind these cases is that a person is liable for damage that he might have caused (but did not actually cause). This approach is not in line with the common core of European systems and is therefore *terra nova*.<sup>56</sup>

Proportional liability may be illustrated by the well-known conundrum of the three hunters, X, Y and Z. In a forest, frequently visited by hikers, all three of them fire a shot to bring down a bird. One bullet hits and kills P. While there is no doubt that all three acted negligently, it is unknown whether the fatal shot was fired by X, Y or Z.<sup>57</sup> It is thus a situation of multiple activities where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it.<sup>58</sup> The legal systems proffer various solutions to the problem.<sup>59</sup> The European Group on Tort Law considered these and proposed that in the present case of multiple activities, the best solution is that each activity should be regarded as a cause to the extent corresponding to the likelihood that it may have caused the damage. This means that in the case of the three hunters, each of them would in principle be liable for one third of the damage (loss of support by P's dependants) since the likelihood that any of the three shots killed P, is similar.

It is submitted that this solution may be justified on grounds of fairness, reasonableness and justice. One must remember that although only one

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56 See Spier in *European Group on Tort Law* (n 36) 43-44 46-47 as to aa 3:103, 3:105 and 3:106; cf also Spier & Haazen in Spier (ed) (n 36) 153; Koziol (2004, n 6) 245-246.

57 See Spier in *European Group on Tort Law* (n 36) 48-49; Spier & Haazen in Spier (ed) (n 36) 154; see also Neethling "The case of the three hunters, or delictual liability for alternative causes" 2003 *SALJ* 263ff.

58 An analogous example is personal injuries caused by a stone during a fight in which several individuals were throwing stones.

59 Spier & Haazen in Spier (ed) (n 36) 154; Neethling (n 57) 264-265. On the one hand, South African law will deny delictual liability where the plaintiff cannot, on a balance of probability, prove – as is the case with the three hunters – who of X, Y or Z factually caused P's death. Boberg *The Law of Delict: Vol I Aquilian Liability* (1984) 380 emphatically states that "the defendant is not liable *unless* his conduct *in fact* caused the plaintiff's harm": see too Neethling, Potgieter & Visser (n 1) 160 n 7. Van der Walt & Midgley (n 32) 198. The Greek and Italian systems provide a more or less similar solution: Spier (ed) (n 18) 77 91 154. On the other hand, German law holds each hunter liable in full as joint wrongdoers since persons are regarded as joint wrongdoers even where it is unclear who caused the damage: Magnus in Spier (ed) (n 18) 68 72. A similar result is reached in the Netherlands by reversing the burden of proof: see a 6.99 *BW*, or in England by applying a modified approach to the proof of causation: see *Fairchild v Glenhaven Funeral Services Ltd*; *Fox v Spousal (Midlands) Ltd*; *Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] 3 *WRL* 89; Neethling (n 57) 266-268. In contradistinction to these two extreme poles, the *via media* approach is followed by quite a number of countries. Under Austrian law the hunters will be liable as joint wrongdoers only if the negligent shooting of each was highly dangerous: Koziol in Spier (ed) (n 18) 20. In Belgium the plaintiff will be compensated where every member of the hunting group negligently (in concert) participated in the damage-causing activity, and thus had collective fault in relation to the damage. In such circumstances a hunter will be liable even if he can prove that his shot did not kill P: Cousy & Vanderspikken in Spier (ed) (n 18) 35. The position is similar in the French system: Galand-Carval in Spier (ed) (n 18) 61.

hunter caused P's death, it is impossible to prove who he or she was. It could therefore have been any of them. But rather than letting them all go scot-free because of lack of proof,<sup>60</sup> each is regarded as having caused the loss to an extent corresponding to the likelihood that he or she may have caused it. This solution is clearly based on policy considerations and not on traditional principles of tort liability.<sup>61</sup> As such it introduces a new form of delictual liability, namely partial liability for the tort of another person.<sup>62</sup>

### 3 2 4 *Abnormally dangerous activities: Swiss and American mix*

As indicated, one of the bases of liability accepted in the *Principles* is that a person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it. An activity is considered abnormally dangerous if (a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management, and (b) it is not a matter of common usage. A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.<sup>63</sup>

This formulation was based mainly on American<sup>64</sup> and Swiss<sup>65</sup> sources.<sup>66</sup>

60 The South African, Greek and Italian solution seems to fly in the face of all justice towards the innocent victim (see n 59).

61 The two "innocent" hunters plainly did not commit any tort against P for the obvious reason that their conduct – albeit negligent in the air – did not (wrongfully) cause P's death. What may perhaps be applicable, is legal causation (cf Spier & Haazen in Spier (ed) (n 18) 150-154) where the basic question is whether there is a close enough relationship between a person's conduct and the victim's loss that the loss can be imputed to such a person, depending on the presence of certain relevant factors: see Neethling (n 57) 265-266; Spier in *European Group on Tort Law* (n 36) 59-62 on the scope of liability; and cf Neethling, Potgieter & Visser (n 1) 171-176.

62 It should be noted that tort law already recognises full liability for the tort of another in instances of vicarious liability, albeit for entirely different considerations: see n 39; cf Neethling, Potgieter & Visser (n 1) 338ff.

63 See n 38; Koch in *European Group on Tort Law* (n 38) 105-109; cf also Koziol (2004, n 6) 252.

64 See §§ 519-520 of the *Second Restatement of Torts*, as reformulated in § 20 of the *Tentative Draft No 1: Third Restatement of the Law – Torts: Liability for Physical Harm* (2001) 293; cf Schwartz "United States" in Koch & Koziol (eds) (n 18) 359. § 20 reads as follows: "(a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. (b) An activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not a matter of common usage." The limitation in § 20 to bodily injuries is clearly too narrow (see Widmer "Switzerland" in Koch & Koziol (eds) (note 18) 348). See with regard to common usage Schwartz *Tentative Draft No 1: Third Restatement of the Law – Torts: Liability for Physical Harm* (2001) 306-308; Koch in *European Group on Tort Law* (n 38) 106-108.

65 See a 50 of the recent *Draft Revision of Swiss Tort Law* (see Widmer in Koch & Koziol (eds) (n 64) 333). A 50 reads as follows: "An activity is deemed to be particularly dangerous if, by its nature or by the nature of substances, instruments or energies used thereto, it is prone to cause frequent or serious damage, notwithstanding all care which can be expected from a person specialised in this field; such assumption is justified, in particular, where another statute already provides a special liability for a comparable risk."

66 Cf also on the views of German and Dutch writers, Van der Walt *Risiko-Aanspreeklikheid uit Onregmatige Daad* (1974) 61-65 432 n 2. For commentary – positive and negative – on the American §§ 519-520 and the Swiss a 50, see Koch & Koziol (eds) (n 18) 37 97 122-124 142 172 203-204 251-252 267 347-348 and 359. See further Neethling (n 24)

Although such a general principle for strict liability is foreign to most systems, the justification for strict liability is clear: Where an activity is so dangerous that its risks of causing damage cannot be eliminated even where all due care is exercised, that is, even in the absence of negligence on the part of the actor, the actor should still be liable.<sup>67</sup> Consequently, strict liability for abnormally dangerous activities was accepted as the best solution for Europe.

#### **4 Conclusion**

It was a wonderful and indeed very enriching experience to work for a decade in many beautiful European cities (especially Vienna) with some of the finest minds in tort law on the European scene (and also from the United States and Israel). The frequent contact over so many years understandably created close, lasting friendships and a warm collegiality among members of the European Group on Tort Law. But most importantly, in the words of Jaap Spier,<sup>68</sup> the Group is proud to present the results of their work: a full set of principles on the major part and most important aspects of European tort law. A solid foundation for further steps towards the creation of a truly European *ius commune* in tort law has been laid. Moreover, tort law in countries outside Europe can benefit from the in-depth comparative research of the group and their well-motivated solutions to problematic areas of this important area of the law.

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591-592.

67 Cf Widmer in Koch & Koziol (eds) (n 64) 333; Schwartz (n 64) 302-305; Koch & Koziol in Koch & Koziol (eds) (n 38) 409-410.

68 In *European Group on Tort Law* (n 38) 15.