Modern tendencies in the German law of delict

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Professor W. von Marschall paid a brief visit to the New Zealand law faculties in the autumn of 1980. The following is a paper presented during that visit. It is concerned with recent developments in the tort law of West Germany and in particular with the nature and extent of departures from the fault concept.

The German law on liability not arising from contractual relations is in many ways different from the Common Law of torts. It therefore seems appropriate to use the term "the law of delict", which is found in English speaking civil law jurisdictions, rather than the term "the law of torts" in order to describe the principles of liability which are applied in Germany.

It is the aim of this paper to give an introduction to the basic principles of the German law of delict as well as to give information on some recent tendencies in this field of the law. It will be seen that the German law, although not going so far as to abolish delictual liability for personal injuries as has been done in New Zealand, has developed different ways of coping with losses and distributing them by means outside the traditional fault liability. On the legislative front good examples are the solutions used for compensating victims of industrial accidents and traffic accidents. Good examples of the case law are the principles which were developed by the courts to meet the problems of vicarious liability and products liability and of bringing into harmony the many sources out of which victims of accidents are entitled to receive compensation in our modern world of social security.

I. BASIC PRINCIPLES

In German law, three different ways of distributing losses arising outside the field of contractual liabilities have been developed.

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A. Fault Liability

The original concept of the German law of delict was the fault principle. It was established in the German Civil Code (the BGB) which was drafted during the last two decades of the 19th century and which came into force on the first day of this century.

The German Civil Code deals with delictual liability in 31 articles.[1] It has to be kept in mind that these articles have to be read and applied in conjunction with rules in the general part of the law of obligations, for example article 276 which gives a definition of the term "negligence".

The German Civil Code has not followed the example of the French Civil Code which contains the following sweeping general clause in article 1382:

> Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage.

The German Code uses three general clauses with a narrower phrasing. The basic provision is article 823 para. 1:

> A person who, intentionally or negligently, injures unlawfully the life, body, health, freedom, property or any other right of another person is bound to compensate him for any damage arising therefrom.

Thus, liability arises only if one of the rights or assets enumerated in this article is violated. There must be an injury to life or health or body or freedom or property. A violation of a contractual right would not be sufficient to create delictual liability.

The injury must be caused by the fault of another. The German Civil Code is based on the fault concept. In principle, the fault of a person is regarded as the only acceptable basis for imposing liability for harm which has been caused to another person. The degree of fault is not regarded to be of importance. Intentional fault, gross negligence and even slight negligence are treated alike in this respect. They lead to the same liability to pay for all damage caused by the unlawful act or omission. The result is based on the explanation that the only question to be decided by private law is which of two persons has to bear the loss already created. As between an innocent victim and a slightly negligent wrongdoer shifting the loss to the latter seems justified.

The principle has been criticised though, because of its harshness in exceptional cases. A proposal for law reform of the German Federal Ministry of Justice[2] contains a provision permitting a judge to reduce an exceptionally high liability in cases of only slight negligence in a situation where full liability would — even in view of the justified interests of the victim — be grossly unfair to the wrongdoer.

The second general provision of the code is found in article 823 para. 2:

> A person who infringes a statutory provision intended for the protection of others, is liable to pay compensation for any damage arising from this violation.

1 Articles 823-853.
2 Draft Proposal of the Federal Ministry of Justice January 1967, art 255

It is the purpose of this provision to create a liability to pay damages not only in cases of serious criminal offences but also of violations of police ordinances and other statutory norms which aim at the protection of others. Thus, the victim of a fraud has a claim for compensation which would not be based on article 823 para. 1, since a mere pecuniary loss was caused and none of the assets mentioned in paragraph 1 was injured. The two paragraphs overlap; in case of theft, for example, liability could be based on either one of the two provisions. Details cannot be mentioned in this short survey.

A third general provision of the code is article 826:

> A person who intentionally causes damage to another in a manner contra bonos mores is bound to compensate the other for this damage.

This article creates liability for any kind of damage, when it is caused by conduct contra bonos mores. The Supreme Court has explained this term as a violation of the feelings of decency of all those who think justly and fairly.[3] Extreme cases of unfair exercise of an economic monopoly have been brought under this article in the period before the Statute on Restrictive Trade Practices. Another example falling under the article are cases where a plaintiff has succeeded in obtaining a final judgment in his favour by deceiving the judges through false statements and false evidence. If this can be shown, the defendent is entitled to demand compensation from the plaintiff for the damage caused by the execution of such a judgment.[4]

Some special articles on liability for animals,[5] on liability of owners of buildings,[6] and on liability for minors[7] supplement the general provisions. With the exception of a strict liability for certain animals, the fault concept of the code has been followed in these provisions as well as in article 831 relating to vicarious liability for delicts of other persons. It differs from similar provisions of other countries insofar as it permits the master to escape liability for wrongful acts of his servants if he can prove that he exercised due diligence in the selection and supervision of the servant. Thus, the article is based on the concept that the master's liability depends on his own fault. If he can show the absence of negligence, he is not held liable. The courts have used various techniques[8] to limit the cases in which the master can escape liability.

B. Strict Liability (Gefährdungshaftung)

The age of industrialization has opened up new dimensions of the problem of how to cope with accidents and the resulting losses. The classical law of delict, based on the fault concept, proved to be inadequate as the only way of distributing losses. The creation of a liability without fault for certain areas was the first answer to the problem.

3 BGHZ 17, 327 [332] (1955).
4 BGHZ 13, 71.
5 BGB art. 833.
6 BGB art. 836-838.
7 BGB art. 832.
8 See infra Part II. *A.*

A need for a liability without fault was felt to exist already in the last century. As early as 1838, three years after the first German railway between the cities of Nürnberg and Fürth was built, Prussia enacted a statute declaring railway companies strictly liable for all damages caused to persons or property. It was the general opinion of lawyers of this time that the new railways, regarded to be dangerous, should be held liable regardless of actual fault in the operation. This can be demonstrated by an interesting case of a court in Bavaria where strict liability of railways had not then been introduced by legislation. Some sparks from a locomotive had set fire to a house near the railway track. In a decision rendered in the year 1861 the court held the railway company liable to pay damages for the destruction of the house, although no actual negligence could be found. The court reached the desired result by expanding the traditional concept of fault. It declared that the railway company could have foreseen the emission of sparks from the locomotive. Therefore, the operation of a locomotive on a railway was declared to be a negligent act per se and it was held that no additional violations of the standards of due care had to be found in order to establish liability. This decision amounted in fact to the introduction of a strict liability in the disguise of a fault liability.

Ten years later, one of the first statutes to be enacted by the new founded Reich was the Reichshaftpflichtgesetz of 1871 (Statute concerning the liability for damages caused by death and personal injuries incurred in the operation of railways, mines, factories and some other enterprises). Article 1 of this statute declared a railway liable to pay damages if a person was killed or injured in the course of the operations of the railway. The railway can escape liability only if it can prove that the damage was caused by an act of God or by the sole fault of the injured person. Article 2 introduced a liability for anyone operating a mine, factory and some other enterprises for death or bodily injuries caused by the fault of authorized agents, representatives and other persons in similar capacity. This liability is based on some fault of the servant. It was regarded as going beyond the fault concept insofar as it introduced liability of the master in cases where he was not at fault. The concept of this article 2 is thus wider than the general provision on vicarious liability of article 831 BGB (which came into force almost a generation later), which is based on the concept of the master's fault.

Although the provisions of the Reichshaftpflichtgesetz, introducing a strict liability of railways and a strict vicarious liability of owners of other enterprises had been in force for almost one generation when the Civil Code was enacted, they were not incorporated into the new code. It was the general opinion of that time that statutes creating a strict liability were only limited exceptions to the general principle of fault as the sole basis for imposing liability. The Civil Code should, it was felt, contain the fault principle in its pure form; it should not be tainted with the compromise of accepting liability without fault in certain areas. Such provisions must be left outside the Code.

It is due to this attitude that until recently only few treatises on the German law of obligations have given adequate attention to the areas in which liability without fault has been introduced. Special statutes introducing strict liabilities

similar to that of railways were enacted after the Civil Code had come into force. The first one, in 1909, affected the owners of motor-vehicles. Statutes introducing strict liability for the owners of aircraft of any type (1922), for property damage caused by railways (1940), for keepers of atomic energy plants (1959) followed. One of the last statutes of this kind is the Act regulating matters of water supply (Wasserhaushaltsgesetz 1957) which creates a strict liability of persons who have caused an alteration to the physical, chemical or biological characteristics of surface or subterranean water. This statute is the only one of its kind which does not set a maximum on the strict liability; the other statutes on liability without fault prescribe limits to the liability. The ceiling for strict liability of the owners of motor vehicles, for example, is DM500,000 for personal injuries and DM100,000 for property damages.[9]

The idea that the statutes creating strict liability are exceptions to the general fault principle has had the effect that it took some time before a general theory of liability without fault was developed and generally accepted. And it is still the prevailing opinion of writers and the opinion of the judiciary that the courts are not permitted to expand strict liability into new areas.[10] Although large fields are covered by the various statutes on strict liability, it is not yet accepted that a general principle, capable of being expanded, can be taken from the individual statutes. Whenever a need for liability without fault for a new area is seen, a new statute has to be enacted.

In order to secure the victim's right to compensation regardless of the economic resources of the defendant, it is frequently provided that the persons subject to such strict liability have to cover the risk by taking adequate liability insurance which is compulsory. Thus, no motor vehicle or aircraft may be operated without liability insurance.

As a further way of protecting the right to compensation of victims of traffic accidents, the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles of 1959 has given them a direct claim against the insurer. The Federal Republic of Germany ratified this convention in 1965 and has enacted such a provision.[11]

Strict liability and fault liability do not exclude each other. Even in the fields of strict liability statutes, the fault liability of the Civil Code has remained important for two reasons. First, it provides a remedy in cases where the actual damage is greater than the maximum amounts covered by strict liability. In addition, fault liability is the only remedy to obtain damages for pain and suffering which are generally excluded by the statutes introducing strict liability. Thus, if the victim of a traffic accident can only offer proof of causation by a motor vehicle, he can claim his damages for injury. If he can also prove fault, he can also recover for his pain and suffering.

9 Currently approximately NZ$250,000 and NZ$50,000 respectively.

10 BGHZ 55, 229 (1971).

11 Bundesgesetzblatt 1965 part II p. 281 and part I p. 213.

C. Compensation for Industrial Accidents

At an early date, also before the enactment of our Civil Code, a third system of distributing losses arising from accidents was established. It has to be seen together with fault liability and liability without fault as a third way to justify a shifting of losses from the party on whose person or property such damages occur.

This new system was introduced for the area of industrial accidents as early as 1884.[12] A compulsory accident insurance for industrial workers was developed. It was from the beginning different from other similar insurance systems insofar as it was designed to be the only means of compensating losses arising from industrial accidents; for this area it almost completely replaced the delictual liability of the employer.

The reason for this new development has to be found in a general dissatisfaction with the practical results of the application of article 2 of the Reichshaftpflichtgesetz of 1871. The injured worker had the burden of proving that the employer or one of the supervisors was to blame for contributing to the cause of the accident. Whenever an accident was caused by the worker's own inadvertence, or when nobody's fault or inadvertence could be shown, the worker was left with his loss. And since most workers had no resources of their own on which they could fall back, this meant that public welfare had to care for their basic needs. In addition, the necessity of proving a fault of the employer or of one of his supervisors or persons of similar capacity led to disturbances of the harmony at the working place. All these reasons were brought forward by the advocates of the new system, among whom were many conservatives. When Bismarck decided to introduce such legislation, he did so also for political reasons; it was part of his various measures aimed at the Social Democrats at that time.

The new insurance against industrial accidents was taken out of the field of private law and was organized along the lines of public law. Special employers' associations (*Berufsgenossenschaften*) are created as juristic persons under public law. Every employer in a certain field, for example the building trade, is automatically a member of the association by force of law, without applying for membership. In the same way, everybody working in the trade is insured, whether his private law contract of employment is valid or not. In the case of an accident, he is entitled to the benefits of the insurance which consist of medical treatment, compensation for loss of wages, and of annuities in cases of permanent partial or complete disability — or a pension for the widow and orphans in case of death. The claim for these benefits is independent of the worker's or the employer's possible responsibility for the accident, as long as no intent to cause the accident can be shown. The association of the employers has to provide the necessary means out of which the benefits are paid.

On the other hand, the employer is freed from delictual liability for industrial accidents toward his workers as far as such liability is based on the private law (statutory law as well as judge-made law). The only exception is the liability

12 Reichsgesetzblatt 1884 p.69.

for accidents caused by the employer intentionally. In 1963 the exclusion of the ordinary civil law liability was extended to fellow-workers.

Thus, a system of compensation has been created in which the private law rules are not applicable, unless a third person is responsible for the accident and thereby liable according to the ordinary rules. The result, that a worker who is victim of an industrial accident can obtain only the benefits of the insurance, but has no claim for damages for pain and suffering against the employer or his fellow workers has been declared to be constitutional by the Federal Constitutional Court in 1972.[13] The court argued that the absence of a claim for pain and suffering in the case of industrial accidents was compensated for by the right to claim the benefits even in cases when the worker's own fault was the only cause of the accident.

Proposals to establish a similar system of compensation for victims of traffic accidents[14] have not been accepted so far.

II. DEVELOPMENTS SINCE THE ENACTMENT OF THE CIVIL CODE

The short outline of the three different ways of distributing losses outside the field of contractual liabilities in German law can provide a basis for the discussion of some tendencies and developments of the law of delict since 1900.

A. Vicarious Liability for Employers

Within the field of traditional fault liability, the rules of the code with regard to the master's vicarious liability for losses caused by his servants have met with a growing criticism. As was mentioned earlier, the German law differs from the law of most other countries by providing for the master's liability only in cases where damage can be attributed to his own fault and not only to the fault of an employee.

The German courts have used two ways of holding masters responsible for the wrongful acts of their servants even when they offered proof that they had shown due care in the selection and supervision of their servants. One of the two ways is familiar to lawyers in all countries. The judges frequently use an extremely strict standard of care and do not accept the standard of care shown by a master as being sufficient to meet their standards. A whole set of rules was developed on how an enterprise must be organized to provide adequate supervision of the workers. The courts also require that the supervisors of the first level must themselves be supervised so that a whole hierachy of supervisors is created. The top position in this hierarchy must be filled by a member of the management of a corporation who is not an employee in the ordinary sense but a representative, for whose fault the corporation is absolutely liable.[15] If the organization of such supervision is not tight and shows loopholes, then the lack

13 Decision of 7 November 1972 — BVerfG, NJW 1973, 502.

14 See especially Eike von Hippel *Schadensausgleich bei Verkehrsunfällen, Haftungsersetzung durch Versicherungsschutz* (Tübingen, 1968).

15 BGB art. 31.

of an adequate organization of an enterprise is regarded to amount to fault of the entrepreneur, thereby opening a claim for damages based on his own fault, and not on the vicarious liability for the wrong done by his employees.

Of even greater importance are the successful attempts to bring many cases that sound in delict into the sphere of contractual liability. Contractual liability for employees is governed by article 278 of the BGB which declares the debtor vicariously liable for any fault (intentional as well as negligent acts or omissions) of a person whom he employs in the performance of his contractual obligations. A fault of the employer is not required. The courts have expanded the notion of contractual liability greatly in order to be able to apply the strict rule of contractual vicarious liability. Thus, it is regarded as a contractual duty to see that the person or the property of the other party to a contract is not exposed to harm. A few examples will illustrate this tendency which has been seen since the turn of the century:

> A railway company is responsible to provide safe exits from its station for its passengers. If a servant of the railway fails to remove snow or ice from such an exit on a winter morning, the railway company is held liable for such a breach of its contractual duty and has to pay damages to a passenger who fell down and received injuries.[16]

In another case,[17]

> a guest in a restaurant was injured when a waiter at another table opened a bottle of champagne, the cork of which flew up into the glass-roof and a piece of glass got into the eye of the guest. The owner of the restaurant was held liable for this breach of his contractual duty to protect his guests from harm. His offer to prove that the waiter was experienced and well selected and supervised was not accepted, because such a proof would only have helped to escape delictual liability.

The scope of contractual liability is also expanded to situations where a contract has not yet come into existence. In a newer case[18]

> a woman had entered a department store in order to buy a coat. She stepped on a banana peel, slipped and was injured when she fell down. The German Supreme Court found that a contractual duty towards all pospective buyers existed to keep the floors clean. It amounted to fault that no employee had seen the banana peel, although the accident happened in the clothing department which was some distance from the food department. The burden of proof for absence of fault was shifted to the enterprise that owned the store. The court based the judgment also on a fault in the organization because no precaution was taken to provide a sufficient number of waste baskets for people who might decide to eat in the clothes department bananas that they had bought in the food department.

Another expansion of the scope of contractual liability is the invention of a contractual duty in favour of third persons (*Vertrag mit Schutzwirkung für Dritte*). Thus, a landlord owes contractual duties not only to his tenant and his family, but also to the cleaning woman hired by the tenant, or to his guests.

> A plumber whose helper had installed a gas stove in the bathroom of a tenant was held to owe a contractual duty to the cleaning woman hired by the tenant who was injured by an explosion of the gas stove.[19]

16 RGZ 55, 335 (1903).
17 RG LZ 1915 Sp. 1525.
18 BGH NJW 1962, 31-32.
19 RGZ 127, 218 (1930). See also BGH NJW 1959, 1676 (Capuzol No. 22).

B. Distribution of Liability between Employer and Employee

Whenever an employer is held to be vicariously liable for a wrongful act of his employee, the employee is usually also liable according to article 823 para. 1 of the code. Article 840 para. 1 declares them liable as *Gesamtschuldner*, which is more or less the counterpart of the joint and several liability of the Common Law. In practice, the victim will usually direct his claim against the employer who is more likely to have sufficient funds to meet his liability. This leaves the question how the loss must finally be distributed between employer and employee. Article 840 para. 2 gives a clear rule: the employee who actually caused the loss by his fault is the one to bear it finally, the employer has a claim for recovery against his employee.

Within the last twenty years, this provision of the code has been restricted to a narrow field of applicability by German courts, especially by the special courts for labour relations.[20] The argument has been put forward — and it was readily accepted by the courts — that there are many kinds of work to be done where it is likely that short moments of inadvertence will lead to the causing of accidents or other harm and that such moments of inadvertence can happen to an otherwise responsible and careful worker. A typical example is the work of an automobile driver. It is one of the hazards of his work that short moments of inadvertence can lead to great losses. A doctrine was developed and accepted by the courts that the special hazards of such risk-prone or accident-prone jobs have to be taken in account. The statistical likelihood that a moment of slight negligence may cause great damage is held to be one of the typical business risks which should be borne by the employer. Thus, a rule was developed that in such cases of losses caused by only slight or "normal" negligence in the course of risk-prone work, the employer should be the one to bear the resulting losses. This means that he has no claim against an employee who, under such circumstances, causes damage to the property of the employer.[21] And the employer has no claim for recovery against the employee who has caused harm to a third person under such circumstances.[22] And the employee who is asked by the third victim to pay damages can even demand the employer pay such damages for him.[23]

The rules exempting employees from liability in such cases of risk-prone jobs were developed by the courts following proposals of legal writers.[24] The provision of article 840 para. 2 of the code was thereby abrogated by judge-made law. This judge-made law has already achieved the quality of customary law (*Gewohnheitsrecht*) and the development is the most startling of the small number of examples of the abrogation of statutory law by customary law.

C. Collateral Benefits

This leads to the general problems of distributing among the various persons and institutions who have, in some way or another, to contribute to making

20 Arbeitsgerichte.
21 E.g. Where he damages a machine of the employer, see BAG NJW 1959, 1796 and NJW 1967, 269.
22 BAG NJW 1959, 1003.
23 BAG NJW 1963, 1940 (1941).
24 For a full discussion see the leading case BAGE 5,1 = NJW 1958, 235.

good the original loss. René Savatier has very appropriately spoken of "La surabondance des débiteurs de réparation autour de la victime d'accident et l'enchevêtrement de leurs dettes".[25] The overflow of debtors who owe reparation for the consequences of an accident starts to present new problems in our age of widespread social security and private insurance.

In Germany the victim of an accident may easily have claims against his employer for continuing payment of wages for a period of at least six weeks, against the social security institutions for medical treatment, against his private insurance company for additional benefits, against the liability insurance of the wrongdoer for all his losses and also for pain and suffering. If the victim is a servant of the government, he has various claims against his public employer.

Frequently, a victim may have two claims against different persons with regard to the same loss, for example a claim for medical treatment against his social insurance, and for the costs of such treatment against the wrongdoer's liability insurance as well as against the wrongdoer himself. So far, the problem of bringing into harmony the different ways and means of giving compensation to victims of accidents has not been finally solved. Several different principles are still applied with regard to details of a conflict between social security and liability to pay damages, as compared with private insurance benefits and the liability to pay damages. As a general rule it can be said that as far as possible German law attempts to avoid an accident turning into a windfall for the victim. Most rules developed aim at the prevention of a double recovery by the victim. At the same time, a definite tendency can be observed to leave the traditional liability of a wrongdoer unchanged despite modern forms of providing benefits for the victims of accidents. This is usually achieved by an assignment of the original claim of the victim for damages by operation of law (*Legalzession*). In some ways it can be compared to a subrogation.

The prevailing solution seems to correspond in its result with the opinion of the majority of the Law Reform Committee in its eleventh report concerning the action for loss of services. If an employer continues to pay wages to an employee struck by an accident, he should be entitled to claim the sums paid from the person who is responsible for the accident. The same result can be reached, and this was the opinion of a minority of the English Law Reform Committee and of the Scottish Law Reform Committee, when the employer does not continue to pay "normal" wages but pays only in the form of a loan or a cash-advance under the condition of repayment as soon as the wrongdoer has paid the damage claim. In this way the problem can be avoided, whether or not an employer did, in fact, continue to pay the wages. The result should not depend on the kind of label which is attached to the employer's payment after the accident. The respective purposes of a legal duty to pay wages even if the counterpart is not rendered and the legal duty to pay damages for loss of wages have to be evaluated. A statutory or contractual duty to continue the paying of wages after an accident has generally the purpose only of providing the employee

25 D.1962. Chron. 173.

with the necessary means of existence in cases of his inability to work. And this duty is owed without regard to the existence, or non-existense, of a third party wrongdoer who might, or might not, have the necessary means to pay the damages which he owes for having caused such an accident. The evaluation of the respective merits of both positions is not a matter of dogmatics but of legal policy.

D. Product Liability

A presentation of modern tendencies in the law of delict cannot end without a mention of product liability. The discussion among German lawyers followed the same lines that could be observed in the United States insofar as two basic solutions were proposed.[26] Some writers advocated the use of an expanded contractual basis of liability, extending contractual claims to persons who are not partners to a contract. Other lawyers preferred a delictual basis of liability. This met with the difficulty, already mentioned, that a general liability without fault is not accepted, so that only the concept of fault liability was open to the courts. A decision of our Supreme Court of 1969 has become a leading case of great importance.[27]

> The owner of a chicken-farm had all his chickens vaccinated against a chicken disease. More than 4000 chickens died because of the very disease against which the vaccination should protect them. It could be shown that some of the bottles of the vaccine produced at this time contained some viruses causing the disease which had not been sufficiently immunized. A damage claim was successful in all three instances. The Supreme Court, in its decision, held all contractual theories of liability to be unacceptable. It required as the basis of any delictual liability that the plaintiff must prove that the disease was caused by the vaccine produced by the defendant company. This proof was held to be established by admitting a prima facie show. The court admitted that the plaintiff had not been able to prove a fault on the side of the defendant, but it declared that in such cases the burden of proof must be shifted. The defendant as producer was the only one who could explain how the viruses had come into the vaccine. If he failed to prove the absence of fault on his side he must be held responsible.

Thus, causation must be shown by the plaintiff, but this renders the defendant liable as long as he cannot prove the absence of fault on his side.

In the case of a direct sale from the manufacturer to the plaintiff who suffered financial loss[28] the Supreme Court held the general rules on product liability not to be applicable in cases of actual contractual relations between the parties. It declared in a dictum that a defendant could be held responsible on the ground of a breach of a warranty implied in fact from the advertising and the description of the goods sold. This is remarkable since in German law in general liability of a seller to pay damages is accepted only in cases where fault can be shown or an express warranty including a promise to pay damages exists. Three years

26 The problem was discussed at the "Karlsruher Forum 1963", at the meeting of the German Association of Comparative Law at Kiel 1965 and at the 47th "Deutscher Juristentag" at Nürnberg 1968 as well as in many publications. See the citations given by von Marschall, Zeitschrift für Rechtsvergleichung 1976, 241-253.

27 BGHZ 51, 91 (1969); see the report on and discusion of this case by Mankiewicz in (1970) 19 I.C.L.Q. 99.

28 BGH NJW 1973, 843.

later, the Supreme Court changed its mind and decided[29] that a contractual relation between a plaintiff and a producer is no obstacle to an application of the new principles of delictual liability for defective products. This is in harmony with the general principle that a plaintiff is free to base a claim on contract as well as on tort.

> The defendant was a producer of installations for the purging of metals of oil and grease. The plaintiff had acquired such an installation which was set afire during its operation because an automatic switch to turn off electricity was defective. The Supreme Court held the defendant liable in delict to pay not only damages for the destruction of the building in which the fire occurred, but also for the value of the installation — a contract claim for such damage could not be pursued since the limitation period had run out.

The award of a delictual claim for the value of the installation has been criticized,[30] however, since it is not in harmony with the principle that article 823 BGB provides only for damages for loss of property and not for economic loss.

Finally strict liability without fault for personal injuries caused by defective medical drugs has been introduced by special statute of 1976 which came into force on 1 January 1978.[31]

III. CONCLUSION

Thus, it can be seen that the fault concept is no longer regarded as the only sound basis for imposing liability. It has been supplemented by other principles for certain delimited areas. Those principles, however, are not likely to replace the fault concept in the forseeable future.

29 BGHZ 67, 359 (1976).
30 See Rengier, Juristenzeitung 1977, 346.
31 Arzneimittelgesetz of 24 August 1976.