

**COMPARATIVE ANALYSIS OF NATIONAL LIABILITY
SYSTEMS FOR REMEDYING DAMAGE CAUSED BY
DEFECTIVE CONSUMER SERVICES**

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FINAL REPORT

ULRICH MAGNUS – HANS-W. MICKLITZ

Project Manager: Prof. Dr. Hans-W. Micklitz

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Part D: The Comparative Part

| | |
|--|----|
| <i>Chapter I: Short Summary</i> | 4 |
| <i>I. Objectives of the study</i> | 4 |
| <i>II. Specificity of the examined services</i> | 4 |
| <i>III. Main findings of the study</i> | 5 |
| 1. Concurrent tendencies | 5 |
| a) Merger of contract and tort law | 5 |
| b) Negligence as basis of liability | 6 |
| c) Specific allocation of burden of proof..... | 6 |
| d) Vicarious liability | 7 |
| e) Compensation of damage | 7 |
| f) Contributory negligence | 8 |
| g) Prescription..... | 8 |
| h) Out-of-court settlements..... | 8 |
| 2. Remaining differences | 8 |
| a) France | 9 |
| b) Germany | 9 |
| c) Italy..... | 9 |
| d) Spain..... | 9 |
| e) Sweden | 9 |
| f) United Kingdom | 10 |
| g) United States..... | 10 |
| <i>IV. Consequences under the Internal Market perspective</i> | 10 |
| 1. Weight and importance of similarities and differences..... | 10 |
| 2. Transborder element..... | 11 |
| 3. Free movement of services..... | 11 |
| 4. Consumer protection | 12 |
| 5. Harmonisation of European law | 13 |
| <i>Chapter II: Comparative Part – Comprehensive Analysis</i> | 14 |
| <i>I. Introduction – The different Sources of the Law within the seven Countries</i> | 14 |
| <i>II. Comparison with regard to leisure activities</i> | 15 |
| 1. Relevance of distinction between tort and contract law | 15 |
| 2. Scope of protection..... | 16 |
| 3. Vicarious liability | 16 |
| 4. Bodily Injury | 17 |
| 5. Type of Liability..... | 17 |
| 6. Standards of care | 18 |
| 7. Causation | 18 |
| 8. Proof..... | 19 |
| 9. Compensation and damage..... | 19 |
| 10. Contributory negligence | 20 |
| 11. Limitation period | 20 |
| 12. Exclusion of liability | 20 |
| 13. Specific institutions | 21 |
| <i>III. Comparison for medical malpractice</i> | 28 |

| | | |
|-----|--|----|
| 1. | Relevance of distinction between tort and contract law | 28 |
| 2. | Scope of protection | 29 |
| 3. | Vicarious liability | 29 |
| 4. | Bodily injury | 29 |
| 5. | Type of liability | 29 |
| 6. | Standard of care | 29 |
| 7. | Causation | 30 |
| 8. | Proof | 31 |
| 9. | Compensation and damage | 31 |
| 10. | Contributory negligence | 32 |
| 11. | Limitation period | 32 |
| 12. | Exclusion of liability | 32 |
| 13. | Specific institutions | 32 |
| IV. | <i>Comparison with regard to tourism services</i> | 39 |
| 1. | Relevance of distinction between tort and contract law | 39 |
| 2. | Scope of protection | 40 |
| 3. | Vicarious liability | 40 |
| 4. | Bodily injury | 41 |
| 5. | Type of liability | 41 |
| 6. | Standard of care | 42 |
| 7. | Causation | 42 |
| 8. | Proof | 42 |
| 9. | Compensation and damage | 43 |
| 10. | Contributory negligence | 43 |
| 11. | Limitation period | 44 |
| 12. | Exclusion of liability | 44 |
| 13. | Specific institutions | 44 |
| V. | <i>Comparison with regard to general interest services</i> | 51 |
| 1. | Relevance of distinction between contract and tort law | 51 |
| 2. | Scope of protection | 51 |
| 3. | Vicarious liability | 51 |
| 4. | Bodily injury | 51 |
| 5. | Type of liability | 52 |
| 6. | Standard of care | 52 |
| 7. | Causation | 52 |
| 8. | Proof | 52 |
| 9. | Compensation and damage | 52 |
| 10. | Contributory negligence | 53 |
| 11. | Limitation period | 53 |
| 12. | Exclusion of liability | 53 |
| 13. | Specific institutions | 54 |
| VI. | <i>Reflections on Liability for defective Services</i> | 60 |
| 1. | General concept | 60 |
| a) | Common system combined of contract and tort law | 60 |
| b) | Justification: social contact | 60 |

| | | |
|----|-------------------------------|----|
| 2. | Elements of liability | 61 |
| a) | Type of liability | 61 |
| b) | Standard of care | 62 |
| c) | Scope of protection | 63 |
| d) | Vicarious liability | 64 |
| e) | Bodily Injury | 64 |
| f) | Causation | 65 |
| g) | Proof | 65 |
| h) | Compensation and damage | 66 |
| i) | Contributory negligence | 67 |
| 3. | Exclusion of liability | 67 |
| 4. | Specific institutions | 68 |

Chapter I: Short Summary

I. Objectives of the study

The study has two objectives.

- *First:* to present a comparative analysis of existing national civil liability systems for remedying damage caused by certain defective consumer services, whose scope is clearly defined
 - the study is limited to France, Germany, Italy, Spain, Sweden, UK and the United States,
 - the study covers consumer services, i.e. services mainly intended for physical persons in their private capacity, thereby excluding financial services and public services connected with police, security, defence and education,
 - the study focuses on liability and compensation in relation to health and physical safety of consumers, thereby excluding economic and financial damages and damages to goods,
 - the study focuses on civil liability systems. Administrative and criminal liability shall only be covered if this is relevant and important in order to reach the overall objective of the study,
 - the results are to be found in Part A-B-C of the study. They are published in volume I.

Second: as far as possible to serve as a major contribution to the factual basis for the Commission when considering the needs and possibilities for Community measures with regard to liability for defective services.

- the full results are presented in Part D chapter II of the study,
- these findings are condensed in a short summary here as chapter I of Part D.

II. Specificity of the examined services

The examined services have one element in common that can be described as their “public nature”.

- Firstly, to a greater extent than other sectors of services the services in the medical field, in the field of public utilities, in the leisure and tourism field serve vital needs of the clients, namely the basic need for safe water and energy supply, for reliable health care and for safe recreation possibilities.

- Secondly, also to a greater extent than is the case with other services the clients depend on these services and are set here more or less “at the mercy” of the service provider. If for instance a patient has chosen a doctor he or she is then first in the doctor’s hands and has to trust that the treatment will not create unnecessary further risks.
- Thirdly, services in all of these four fields can and often do concern the clients’ bodily integrity and imply high risks. This becomes obvious when the examined services are compared with “normal” services like, e.g., shoe repair, wall papering or rendition of financial advice where the potential danger for the clients’ most valuable interests – namely life and limb – is regularly much lower if it exists at all.
- Fourthly, the services here reviewed are rendered publicly in a certain way: either with less than normal possibilities to choose between different providers (medical services; public utilities) or bringing into contact crowds of people who are unknown to each other and thereby creating a specific public (leisure services [theatres, sports events etc.]; tourism [hotels, organised tours etc.]).

The reviewed services have a strong link with the common good as such, stronger than is inherent in other kinds of services. For this reason it is of particular interest to the public that a high level of safety is secured when services of the examined kind are rendered.

III. Main findings of the study

The present study has revealed certain common features in the examined legal systems from which only one or few countries depart. The concurrent tendencies are stated below under III. 1, whilst the deep-rooted remaining differences will be listed below under III. 2 for each of the examined countries. However, it should be stressed that any such abbreviated summary always runs the danger of oversimplification and overstatement.

1. Concurrent tendencies

a) Merger of contract and tort law

The most striking feature of the comparison is that the distinction between contract and tort law becomes more and more meaningless in the field of liability for personal injuries caused through any of the examined services. Contract and tort law are coupled here in a specific way: As a basis for liability a factual service provider-client-relationship must be established. Regularly, in most cases of services here discussed a contract will exist or at least the protective scope of a contract will cover the person

injured through the service. But it is by no means a formal requirement that a valid contract has been concluded; a mere factual provider-client-relationship suffices. Furthermore, the duties which a valid contract would establish are simply incorporated into tort law. It constitutes likewise tortious negligence when duties are disregarded which a reasonable and careful service provider would have observed had a valid contract been concluded. Finally, the liability is “fix” in that it cannot be limited in advance by standard term disclaimers.

There is, however, one exception to this tendency of merger of tort and contract law. Namely in France the “non-cumul” rule still prevails and requires that only the contract can found liability where a contract exists. Here the strict distinction between contract and tort law is of essential importance, still.

b) Negligence as basis of liability

With very few exceptions liability for personal injuries resulting from the rendition of the here relevant services is based on the fault principle and not on strict liability. The provider is liable in case of negligence only. It is the common understanding of the examined legal systems that providers with respect to the services at stake do not owe an “obligation de resultat” but regularly – unless otherwise clearly agreed – only an “obligation de moyen”. The provider cannot, and is not obliged to, guarantee the result of his or her services but has to provide the services in a careful and professional manner. In consequence the provider cannot be made strictly liable but is held liable only when he or she has neglected the duty of care which had to be reasonably observed in the circumstances.

The standard of care is generally a high one which corresponds to the high value of the clients’ interest in bodily integrity. The standard is also generally an objective one and disregards personal shortcomings or deficiencies of the service provider. The provider must come up to the standard which a reasonable and careful provider under like circumstances would observe.

c) Specific allocation of burden of proof

The burden of proof plays an important role and is – together with the standard of care – the main instrument used by the courts to adapt liability with sufficient flexibility to the level of risk which the provider created. In general, the burden of proof for both causation and fault (and also for the damage) lies with the client. But there is a common tendency to alleviate that burden. The method can be described as a “half” reversal of burden of proof. If either causation or fault has been proved then the still missing element – fault or causation – is presumed: if for instance the client has proved that the service has caused the damage and if the damage is of a kind that normally will not

occur without negligence then the provider's negligence is presumed and the provider has the burden to prove that he or she was not at fault. On the contrary if the client has proved that the provider neglected a duty and that a damage occurred which could be the consequence of such kind of negligence then causation is presumed and the provider must prove the contrary.

Besides that tendency traditional but more limited concepts are used like *prima facie evidence* or *res ipsa loquitur* which also alleviate the claimant's burden of proof but generally require a sequence of events which is so clear and typical that at first glance no other explanation appears probable.

d) *Vicarious liability*

With respect to vicarious liability no specific but the general rules apply to the four services sectors at stake. All countries under review hold the employer liable for tortious acts of employees when the latter have acted within the scope of their employment and have thereby caused damage to others. In a sense this liability is strict in that the employer cannot escape it when the mentioned conditions are met. However, German law constitutes an exception. It is the only one of the reviewed legal systems which allows the employer to avoid liability by proving that the employee was carefully selected and controlled.

e) *Compensation of damage*

Also in the field of damage and damages there are no specific rules for the service sectors under review. The general rules on damage and compensation vary, however, considerably among the examined countries. It is beyond the scope of this study to state all these differences in detail. But three aspects should be stressed:

- firstly, all countries provide for the compensation also of immaterial harm with one exception – the Italian statutory law still formally limits damages for immaterial harm to cases where the tort constitutes a crime (art. 2059 Codice civile). However, the Italian courts have extended the notion of compensable damage in order to comprise also psychic impairments like pain and suffering. Yet, the Italian development is still under way.
- Secondly and contrary to product liability where strict liability is linked with caps on the amount of compensation, in the field of liability for services the reviewed European countries do not limit the amount of damages by any maximum figure or cap whereas such caps can be found in some US states.
- Thirdly, again with the exception of the USA compensation does not serve punitive functions but compensatory and preventive functions only. In the field

under review the examined European legal systems do not award punitive damages.

f) Contributory negligence

The common attitude of the reviewed legal systems is to take into account the injured person's contributory negligence and to reduce this person's damages claim accordingly. However, the courts are reluctant to accept contributory negligence where the injured person relied, and was entitled to rely, on the superior knowledge and skill of the service provider as particularly in medical cases. Swedish law generally provides that mere negligence of the injured person has to be disregarded unless the injured person acted with intent or gross negligence.

g) Prescription

Under practical aspects prescription has often a decisive part. But there are no common tendencies concerning the period of limitation. On the contrary, the periods vary considerably from one year to fifteen years (Spain), two to thirty years (France), three years (Germany, United Kingdom, most US states), five to ten years (Italy) to ten years (Sweden). Partly, different periods apply to contractual and tortious liability. Moreover, the point of time when the period of limitation starts running varies as well being either the date when the damage occurred or when the injured person became aware of the damage and the identity of the tortfeasor. There is an apparent need for greater uniformity.

h) Out-of-court settlements

On the whole, alternative dispute settlement procedures play a minor role. An exception is the field of medical malpractice where respective arbitration boards or commissions can be found in the slight majority of the reviewed countries (Germany, Spain, Sweden, USA). In some US states it is mandatory that this institution is approached before a court procedure but normally these procedures are entirely voluntary.

2. Remaining differences

The following tries to summarise those differences which are of major importance and do not fit into the stated common tendencies. They are listed here per country. Partly they have been already mentioned above. And it should be repeated that there are particular discrepancies in the field of prescription.

a) *France*

The French doctrine of non-cumul has already been mentioned. It excludes the possibility to rely on tort rules as basis of liability when there is a contract between the parties. This doctrine is an important hindrance that stands in the way when a closer relation between tort and contract liability or even their merger is envisaged as is the common tendency in the other countries.

b) *Germany*

The most striking difference which distinguishes German law from the other legal systems is its restricted employers' liability in tort law. This restriction still necessitates a rather strict distinction between contract and tort law though the recent German reforms have a good deal lowered the wall between these two branches of law.

c) *Italy*

Seen under the aspect of common tendencies Italy is a certain outsider with respect to compensation of immaterial harm though there is a development towards full compensation of this head of damage on its way. On the other hand, although Italy like France belongs to the Romanic legal family, it does not follow the French non-cumul-doctrine and is therefore much more open and better prepared to merge contract and tort law standards in the field here under review.

d) *Spain*

Similarly to Italy and unlike France Spain has not adopted the non-cumul-doctrine. In the courts the pragmatic solution prevails while dogmatic reasoning plays a lesser role often leaving open the underlying dogmatic basis of a decision.

e) *Sweden*

The Swedish scene differs considerably from the other countries in that mainly social or mandatory, partly voluntary private insurance (of liability) steps in to compensate damage in the fields under review. This "Swedish model" has come under pressure because of financial constraints in recent years leading to certain reductions in compensation. Nonetheless it offers an alternative to the traditional compensation model under tort or contract liability. However, the clear general tendency of the other countries is to retain the traditional compensation model with its partial preventive elements.

A further distinctive feature of Swedish law is the general disregard of light and medium contributory negligence when personal injury damage is at stake. Again, this is a position not shared by the other examined countries.

f) United Kingdom

The comparison reveals as a certain characteristic of English law that generally the obligations of the service provider are slightly less extended than in the other countries. There is a stronger attitude than on the European continent to activate the self-protection of the injured person who is – for instance as a visitor or spectator – expected to take better care of his or her own safety and who is modestly less allowed to rely on the fact that the provider will take all precautionary measures.

g) United States

The most striking differences which distinguish US law from that of the other countries lie in the field of compensation and damages. Many single US states allow for punitive damages; many do also provide for certain caps on the amounts of compensation. Quite unique is the mandatory institution of arbitration procedures in some states. The USA have taken the lead in merging tort and contract law concerning liability in the services fields under review.

IV. Consequences under the Internal Market perspective

Even from an Internal Market angle, the services here under review may be looked at under rather different perspectives and the consequences to which the discovered common tendencies and remaining differences may lead depend on the respective point of view.

1. Weight and importance of similarities and differences

In sum the common tendencies prevail over the remaining differences between the examined laws in the reviewed services sectors, - at least if the comparison of the common tendencies against the remaining differences is taken on the basis of the law in action. The widely consented solution prescribes liability for damage caused through these services when the provider has neglected the required – high – standard of reasonable care. Neither causation nor negligence is generally presumed but the client's respective burden of proof is reversed if at least one of these two elements is established and if a damage occurred which could have been the consequence of negligent conduct.

However, nonetheless the differences between the examined legal systems cannot be overlooked. As indicated above they mainly lie in irreconcilable peculiarities of the single laws. In effect, they still lead to finally differing solutions always depending on

the applicable law which in future will be in principle the law of the place where the damage – the violation of the victim’s protected interest – occurred.¹

2. Transborder element

Two sectors of the examined services imply a strong transborder element even within the EU. This is the sector of leisure and tourist services. One figure may exemplify the inner-EU-dimension of these services: The figure of overnight stays of other EU citizens in hotels only in Germany in the year 2002 amounted to about 20 million of such stays.² For the EU as a whole the figure is several times higher and evidences the true Internal Market dimension of the services connected with accommodation and related leisure activities (though not all these stays are for holiday purposes).

For the other two sectors of services a transborder and Internal Market element is less evident though not entirely lacking. Concerning medical services one might assume, not least with regard to the enlargement of the EU, that medical services outside the own national territory may become more and more an alternative to home-bound services, be it for economic reasons only or for reasons of timely availability of necessary medical treatment.³ In the field of public utilities the supply of gas, electricity and water is already today not longer bound to the Member States’ territory; however, for connected services the consumer is still likely to conclude the contract with a company which is located next door. But for both the medical and the public supply sector again the increased and still increasing mobility of the European citizens has to be taken into account. Medical treatment and also contact with public supply services during holiday or business stays in other European countries than the home country are becoming more and more common.

The transborder and particular Internal Market element has to be regarded as an argument that militates in favour of an EU-wide reglementation of the examined services since the existing differences between the national laws would still lead to differing responsibilities and rights. To maintain these differences in compensation claims can hardly be justified.

3. Free movement of services

For the examined services sectors regularly not the services but their recipients circulate in the European Union. Since *Cowan*,⁴ however, it is plain that the consumer-recipient

¹ See Art. 3 par. 1 Draft Proposal of the “Rome II” Regulation.

² See Statistical Yearbook for Germany, 2003.

³ See as an examples in this respect: ECJ, C-158/96 *Kohll*, – Luxembourg patient of German dentist, ECR 1998 I-1931; ECJ, C-157/99 *Smits & Teerbooms*, ECR 2001 I-5473.

⁴ ECJ, C-186/87, *Cowan*, ECR 1989, 195.

too benefits from the free movement of services in the Internal Market. In so far the free movement of services may be essentially concerned when the Member States maintain different rules on the liability for services. However, it is doubtful whether different, but non-discriminatory rules on liability for certain services may violate the freedom of movement of services. Outside and beyond the pure reach of the freedom of services in the interpretation of the European Court of Justice, it has to be highlighted that a different level of liability of service providers and of protection of service recipients may influence where providers locate their business and offer their services and where recipients then go and have to go to receive the services.

4. Consumer protection

As shown above the services under review concern fields which are essential for virtually everybody, namely services in relation to health, supply of water and energy and recreation. In addition, the safe and careful rendition of these services and avoidance of unnecessary risks to the recipients' personal integrity is of major interest. The health and safety dimension of consumer protection here at stake requires a high level of care in the relevant services and favours the elimination of unjustified or non-convincing restrictions to consumer protection which one or the other country still foresees. There will never be a fully integrated Internal Market without building consumer confidence. This is all the more true with regard to services that imply a health and safety dimension and too the enlargement of the EU increases considerably the need for reliable, all-European liability rules in the examined fields of services.

As has already been pointed out the services here under review affect the Internal Market dimension to a different degree. In travel, leisure and medical services it is the consumer-recipient who asks for the same standard of protection if he or she travels and moves around within the European Community. This is less so with regard to public utilities. However, there is a second more hidden Internal Market dimension to be taken into account which also affects consumer confidence. EC law has contributed to privatise public utilities operating in the field of gas, water and electricity supply. Whilst the consumer-recipient remains home bound the character of the services has changed from public supply to commercial services of private providers. The same phenomenon can equally be discovered in the field of leisure. It might not be the direct result of an EU policy, however, the EU impact on privatisation can hardly be neglected. Here state-run entities increasingly withdraw and private companies take over playgrounds, swimming-pools, public supply etc. formerly provided by local communities or other public entities. This change, too, creates an increased need for common European rules on private liability.

5. Harmonisation of European law

Harmonisation of European law is not a goal in itself but has to further the goals of the EU, primarily to serve the functioning of the Internal Market which includes consumer confidence building. A reglementation of liability for personal injury in the examined four services sectors would have the merit to create a level playing field for the active European consumer throughout the EU in fields of essential importance. European standards might become even more important if the ten new Member States are taken into consideration where rule building with regard to the liability of private companies has just started a decade ago. The present study therefore supports rather than not that the European Commission might take action in the particular field of “public” services.

Chapter II: Comparative Part – Comprehensive Analysis

I. Introduction – The different Sources of the Law within the seven Countries

The seven selected countries, France, Germany, Italy, Spain, Sweden, United Kingdom and United States represent the four big families of law: Romanic law – France, Italy, Spain; Germanic law – Germany; Scandinavian law – Sweden and common law – the United Kingdom and the United States. Insofar the study covers the full range of legal systems, in a selected though representative manner.

For the comparison the present study intensively tried to focus on the law in practice in the respective countries and not so much on the ‘law in the books’. It is in particular the court practice which represents the governing law in the examined fields. Therefore, as far as possible, concrete case studies of leading or at least representative cases are throughout appended at the end of each subject matter. The cases are meant to exemplify how the problems are dealt with in practice.

The differences and potential similarities in the four legal families with regard to contractual and tortious liability lie at the heart of legal research for decades if not centuries. The study is not meant to focus on contractual and tortious liability for services *as such*, but on contractual and tortious liability for services *in four selected areas: leisure, health care, tourism and public utilities*. Therefore the overall focus is not on a general comparison of the selected legal systems and countries, but on a comparison within the selected fields of interests. Nevertheless such a comparison can only be undertaken on the basis of a general introduction into the different legal systems. This has been done under the heading of “sources of law”.

The short survey over the seven countries indicates that it becomes more and more difficult to classify legal systems according to their origin, Romanic, Germanic, Scandinavian or common law. Whilst Romanic law countries have largely maintained a common basis of codified rules on contract and tort law, the way in which they are applied in the court and interpreted by legal doctrine differs widely.

France remains the only country in which the *non-cumul* rule still applies. It is unknown to the Italian and the Spanish legal system as it is to all other countries and legal systems under review. The same is true for the rules on pain and suffering. Whilst the French and the Spanish legal systems do not face any difficulties to recognise compensation for pain and suffering, the Italian legal system takes a different stance. It is only most recently that the Italian courts have developed the concept of biological damage which will probably serve as an equivalent. Similarities within the Romanic law family, however, sustain with regard to a certain openness towards applying strict liability, be it under contract or tort law.

Common law countries, in particular the United Kingdom, put more emphasis on liability for negligence. However, considerable differences exist between the United Kingdom and the United States, although negligence as a prerequisite for liability claims has gained ground in recent years. Germany stands apart. Just like the United States' legal system, the German legal system is very much focusing on tort law to deal with cases for the liability of services even within contractual relations. The Swedish legal system can easily be distinguished from all the other countries and legal families, due to the so-called Swedish model, under which personal injuries are compensated via insurance schemes which have been established either by voluntary collective agreements or by mandatory legislation. Therefore the true value of contractual and tortious liability is much more difficult to determine.

The degree to which the legal systems are really differing or not, more particularly, the degree to which the systems, though remaining different at the outset are coming to similar if not identical results, will now be analysed with the regard to the four selected areas –step by step, firstly leisure, secondly health care, thirdly tourism and fourthly public utilities. It goes to show that the differences within the four law families, respectively the seven countries under review, are in court practice less important than they appear at first glance. Therefore it is feasible to shape in a final step basic elements and principles for future Community action in the field of liability for services.

II. Comparison with regard to leisure activities

1. Relevance of distinction between tort and contract law

Leisure activities have gained an ever growing importance in the Member States. Therefore it is not at all surprising that the sheer number of cases has increased, too. Leisure activities mainly comprise sports and games, though to a varying degree. The supplier of services may be private companies and/or public institutions like municipalities. Sport activities add a further dimension to the set of conflicts handled in the courts. The claimant often is a competitor or a team-mate who has been injured. For the purpose of the study undertaken, this sort of conflicts, will not be set aside, however, they do not lie at the heart of the analysis.

The comparison of the seven countries demonstrates that leisure accidents are put in essence under the regime of the civil law. No particular rules on leisure activities are to be reported. Whilst the basic distinction between contract and tort subsists, it is striking to see that the courts in present practice stay away from the differences and apply the same standards of care – except France due to the non-cumul rule and Italy, due to the lack of damage for pain and suffering in contractual relations. Sometimes it is even hard to discover the legal basis on which the decision is based. Therefore it can safely be said

that the distinction between tort and contract law has lost importance for most of the categories here under review.

Such a finding invites to more general conclusions of the type of relationship between the customer/consumer and the supplier. The law in the seven countries imposes a general duty of care onto the supplier to protect the health and safety of the customer of leisure facilities. Whether the duty is to be found in contract law or in tort law fades away. The customer may conclude a contract or not, in any case, the law protects his or her justified expectations in safe leisure services. If any, the conclusion of the contract is just a mere starter to the building of a social contact with the supplier of services. The customer is equally protected as long as he or she does not actively participate in the sports competition and team-play.

2. Scope of protection

The distinction between contracting parties and mere bystanders is well-known to all legal orders here at stake. However, in leisure activities, the scope of those involved is much broader. This is particularly true with regard to those third parties who are integrated into the contract although they are not a party to the contract. The rule is of particular relevance for the UK, which has changed the privity doctrine and for France due to the non-cumul rule, which usually excludes to integrate third parties into the contract (see under I). The French doctrine of implied consent offers the opportunity to overcome that hurdle. Tort law usually deals with mere bystanders who remain outside the contract and are violated more or less haphazardly.

Whilst the distinction between contract and tort law is still alive, it seems more promising to look at a classification of the customer according to his or her degree of involvement. US law distinguishes between invitees, licensees and trespassers. Only invitees are coming under the law of contract. They are engaged in a mutual contractual relation. Mere licensees are allowed to use the service of the provider's premises or facilities but do so solely for their purposes and not to the advantage of the provider. This is the US concept of common calling. Leisure facilities are often publicly accessible without there being any need to pay for using the service. The customer reacts to the common calling in simply using the facilities. Trespassers, however, are those who enter the providers premises or use his or her facilities without permission or justified reason. Here the social relationship is determined by an element of illegality, which excludes almost all protection.

3. Vicarious liability

The suppliers of leisure facilities often have to engage employees to organize and monitor the leisure facilities and to advice and supervise the customer. The point then is

to what extent the supplier can be held liable in case his or her employee has violated the respective duties of care. Member States' legal orders hold the employer liable irrespective of whether the liability results from contract or tort law – with one notable exception, Germany. Under German law, the tortfeasor is still allowed to escape from liability under § 831 German Civil Code. The employer needs only to prove that he selected and controlled the employee with reasonable care. Whilst it is true that in none of the cases here to be evaluated liability of the service provider has been refuted, one might wonder whether the time is not ripe for Germany to simply abolish the outdated provision. It has pushed German courts into defining new duties of care outside the scope of § 831 German Civil Code.

4. Bodily Injury

The scope of the study is limited to bodily injuries. Three types of injuries might be distinguished, mere bodily injury however severe, death and immaterial harm. The latter category concerns situations under which a customer is not physically injured but where the injury ends up in non-physical, immaterial or psychological harm. In essence all legal orders provide for compensation whatever the type of the injury might be. However, some of the legal systems are quite reluctant in granting compensation for immaterial harm. In particular, Italy still faces some at least dogmatic problems in that respect.

5. Type of Liability

Irrespective of the legal basis, contract law or tort law, the service provider's liability in the Member States and the United States overwhelmingly depends on negligence. Outside Spain and to some extent France, none of the countries relies on strict liability rules. However, even in France and Spain, strict liability is the exception to the rule. In France the "obligation de résultat" or the liability of the "gardien" shows up in exceptional cases. Spanish courts apply strict liability only in non-sport activities, if under the particular circumstances of the case, a blatant violation of the duty of care is at issue. However, the legal basis of the decisions is often not fully developed.

There is no strict choice between either strict liability or negligence. Often the legal orders and the courts tend to ease or to fully reverse the burden of proof. None of the countries has gone so far as to reverse the burden of proof. There is, however, a certain preparedness in the courts to ease the burden of proof, be it through presumed liability, *prima facie* or *res ipsa loquitur*. The courts tend to build a flexible link between the type of accident and the easing of the requirements on the proof of causation and of negligence, where one of either element is established the other is often presumed (See also below I.7. and 8.).

6. Standards of care

Except Sweden, all countries under review start from an average standard of care, whatever the standard formula might be, the *bon père de famille*, sensible prudent and reasonable person, *buen padre de familia*, reasonable care or ordinary reasonable care. In Sweden the yardstick seems to be beyond the average at least in certain medical malpractice cases. In the US ordinary and reasonable care is bound to constructive knowledge of the risks.

The courts in all the countries have developed a set of duties, which are imposed on the service provider of leisure activities. Three types of duties are standing at the forefront of the analysis, the duty to organize the leisure activity so as to avoid unreasonable risks to the customer, the duty to supervise and control the technical equipment, last but not least the duty to provide assistance to the customer, be it in form of information or advice. As far as the leisure activities are guided by binding rules or even non-binding recommendations, the courts tend to refer to these rules though without feeling bound to the enshrined standards. They accept rules and regulations, national technical standards or even international standards on the organization of leisure activities (skiing) as a yardstick against which the behaviour of the service provider can be measured. Compliance with these rules and standards, however, does not exempt the service providers from liability.

The broad variety of cases to be reported in the field of leisure accidents, however, makes it difficult to define a common denominator beyond the standard formula of the average standard of care, beyond classifying the duties and beyond reference to rules and recommendations. What the courts are really doing is to link the standard of care to the type of leisure activity. Usually the courts distinguish between sports activities and all other sorts of leisure activities. Sport activities presuppose a certain preparedness of the customer to engage in the risk, at least if he or she actively participates in the game. Italian courts have gone far in defining standards of care related to the type of sports. The situation is different whenever the customer remains a mere passive participant, mostly as a spectator. The same logic can be found in the no-sport leisure activities. They vary between active involvement and more passive entertainment.

What is really striking is that here in the core field of the liability, the distinction between contract and tort law is practically irrelevant.

7. Causation

In causation the same standards for contract and tort law applies. This means that all the countries start from the standard formula that the injured party has to prove causation between the bodily injury and the violation of the duty of care. No particular standards have been developed with regard to leisure activities. This does not mean the courts are

not willing to provide for specific instruments to ease the burden of proof. Again, however, it is difficult to detect a common policy. There is obviously a certain preparedness to help the customer, in case he faces difficulties. Common law countries refer if any to *res ipsa loquitur*, continental law countries are bound to the concept of prima facie evidence.

There is one particularity reported from Spain. In case, the courts hold the service provider strictly liable, they impose the full burden of proof on causation onto the injured party. Strict liability is outweighed by strict requirements on the burden of proof of causation. In so far the balance is maintained. Otherwise it would be too easy for the customer of no-sport leisure activities to claim compensation.

8. Proof

The analysis of the set of cases in seven countries has demonstrated that the courts are using the rules on the burden of proof in a very flexible manner. This is true with regard to negligence – presumed liability, *prima facie* liability or *res ipsa loquitur* and with regard to causation – *prima facie* liability and *res ipsa loquitur*. However, what is even more important is the courts' general policy to relate the type of liability to the type of standard of care, further to the requirements of causation and finally to the burden of proof.

This means in essence that in hard cases, the courts either apply strict liability or start from presumed liability. The standards of care are the higher the harder the case, i.e. the more blatant the violation of the duty of care. The same logic applies to causation. If strict liability is at stake, it is on the customer to provide full evidence on causation. The concept can easily be turned upside down. The weaker the case, the stronger is the plea of liability for negligence. The customer then has to prove not only the violation of the duty of care but also of causation. In so far the courts have established a relatively well balanced system of liability.

9. Compensation and damage

The customer may claim full compensation under all seven legal orders for the restoration of his or her health, be it under contract law or under tort law. With the exception of Italy, all countries here under review grant the customer compensation for pain and suffering irrespective of the legal basis. Italy starts from a rather narrow understanding, where compensation for pain and suffering, if any is given only under tort law. The scope is further narrowed down as the Italian law used to bind compensation to the existence of a crime and has only recently begun to change this attitude.

Caps or ceilings to claims for compensation are unknown in the Member States of the European Community. The true exception to the rule, however, is the United States where a whole set of rules exist to define the upper limits of compensation claims. As the US system can hardly be compared to the ones of the Member States, the US rules do not provide guidance for possible solutions to differing legal orders.

10. Contributory negligence

Contributory negligence is a common principle well-known all over the European Community and the United States. The principle comes to bear in contract and in tort law. In leisure activities more particularly contributory negligence plays a prominent role with regard to sports accidents as well as to non-sport accidents as far as the customers engages in a certain risk. The doctrine of the assumption of risk is well established and heavily used in those types of accidents.

It seems as if the courts are referring to contributory negligence to a varying degree. Contributory negligence serves as a means to fine-tuning the degree of the service providers' liability. Somewhat overstated one might distinguish between the tough English-American sportsman and its softer continental European counterpart. In so far contributory negligence helps to balance out cultural differences in civilized nations.

One further particularity deserves attention. Whenever children are involved, the question comes up to what extent the claim for damage has to take into account a possible violation of the parents supervisory duty. In principle, courts are quite reluctant to assume contributory negligence of children and tend to fully protect the later, even if they may be blamed for their negligent behaviour.

11. Limitation period

The limitation periods vary considerably. There are countries which define a common standard for tort and contract law, like Germany (3 years), the UK (3 years), the US (6 years) and Sweden (10 years), others define different limitation periods with regard to contract and tort law, like France (30 years in contract law, 10 years in tort law), Italy (10 years in contract law, carriage contracts 1 year and for contracts outside Europe 1 ½ year; generally 5 years in tort law), Spain (15 years in contract law, 1 year in tort law). Moreover, the point of time when the period of limitation starts running varies as well being either the date when the damage occurred or when the injured person became aware of the damage and the identity of the tortfeasor.

12. Exclusion of liability

Exclusion of liability is one of the few areas where the differences between contract and tort law remain important.

The directive 93/13/EEC has defined a common standard for exclusion clauses. They are forbidden as long as they are contained in standard business conditions. They remain admissible if they are individually negotiated. This might occur in extremely risky leisure and sport activities. Courts are willing to accept such exclusions in contractual relations, as long as they are clearly formulated, readable and do not exclude the providers liability for injuries caused with intention and gross negligence. In sum, the courts remain reluctant and are prepared to overrule the exemption if the bodily injury does not result from the risky sport or leisure activity but from unsafe equipment or insufficient information and advice.

In tort law cases, the starting point is different. The customer may base his claim either on contract law or on tort law – except France, where the customer has to make a wise choice. Therefore in six of the seven countries here under review it has to be distinguished between cases where there is a contract, which excludes tortious liability and cases where there is no such contract. The former variant is dealt with under the directive 93/13/EEC, the latter is mainly subject to the doctrine of assumption of risk. As the liability cannot be excluded, the only way to balance out the responsibility of the tortfeasor and the customer is to look at the customers contributory negligence.

13. Specific institutions

Except France and Germany, the countries under review provide for particular out of court dispute settlement procedures, however, in the field of sports only. This finding is not amazing as all sorts of out-of-court dispute settlement mechanisms are available here in particular if conflicts between teammates or between competitors are to be solved. This is different with regard to passive participants of sports events or with regard to leisure activities where customers tend to see their conflicts solved in the courts.

| LEISURE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|------------------------------------|--------------------------------------|--------------------------|------------|--------|---------------|------------------------|---------------|
| Contract Liability | | | | | | | |
| Contract tort distinction relevant | Yes | Not really | Not really | No | | Not really | No |
| Contracting party, incl. | Yes, implied agreement | Yes, incl. children | Yes | Yes | Yes | Yes, when identifiable | Yes |
| Bystanders | No | No | No | No | Partly family | No | No |
| Vicarious liability without excuse | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Bodily Injury | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Death | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm | Yes | Yes, in principle | Yes | Yes | Yes | Yes | Yes |
| Fault | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Strict liability | Exceptionally obligation de résultat | No | No | Partly | | No | No |
| Objective liability | Yes | Yes, technical standards | Yes | Yes | No | Yes | Yes |

| LEISURE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|-------------------------------------|---|---------------|----------------|-----------------|-------------------|------------------------|
| Presumed liability | Yes, in case of obligation de moyen | Yes, prima facie | Yes | Yes | No | Res ipsa loquitur | Yes |
| Average/high standard | Average | Average | Average | Average | Average | Average | Average |
| Organization | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Advice | | Yes | | | Yes | | |
| Supervision | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Proof of violation of duty of care | Yes | Yes | Yes | Yes | User | Yes | Yes |
| Presumption Reversal | Yes, in case of obligation de moyen | Prima facie | Yes | Yes | Probably partly | Res ipsa loquitur | Constructive knowlegde |
| Specific and frequent fields of professional liability | Sports Game and leisure | Sports Game Playgrounds Skiing as a forerunner | Mainly sports | Sports Game | Rare cases | Sports game | |

| LEISURE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|-------------------------------------|--|--|------------------|--|-------------------------|---------------------------|
| Causation | | | | | | | |
| Full proof | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | No | No | No | No | No | | No |
| Specific instruments to ease the burden of proof | Yes, in case of obligation de moyen | Prima facie, if any | Yes, presumption | Yes, presumption | No | Under narrow conditions | No, but res ipsa loquitur |
| Compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | Yes | Since 2002 | No | Yes | Yes | Yes | Yes |
| Caps | No | No | No | No | Reduction possible | No | Yes |
| Contributory negligence | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Restrictions children type of negligence | Force majeure | Yes, no in case of violation of supervisory duty | | | Only in case of intent or gross negligence | | |
| Limitation | 30 years | 3 years | 10 years, 1 year for carriage contracts, 1 ½ for carriage contracts outside Europe | 15 years | 10 years | 3 years | 6 years |

| LEISURE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|---|------------------|-----------------------------|--|--|--------------------|-------------------|-------------------------------------|
| Tortious liability | | | | | | | |
| Parties differentiation between service customer and non-customer | Yes | Yes | Yes In particular with regard to the sport activities | Yes | Any injured person | Yes | Yes |
| Vicarious liability | Yes | No | Yes | Yes | | Yes | Yes |
| Bodily injury | | | | | | | |
| Death | Yes | Yes | Yes | Yes | Yes | | Yes |
| Immaterial harm | Yes | Yes | Yes | Yes | Yes | | Yes |
| Wrongful conduct | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Violation of professional duties | Of game rules | Technical standards | Technical standards | | Yes | Standards | Technical standards and regulations |
| Fault | Yes | Yes | Yes | Yes | | Yes | Yes |
| Strict liability | Yes, plein droit | No | Yes, in particular fields | Yes, outside sports possible | | No | No |
| Objective liability | Yes | Yes | Yes | | No | Yes | |
| Presumed liability | Yes, Art. 1385 | Yes for unsafe construction | Yes | Yes to the benefit of passive participants | No | Res ipsa loquitur | Res ipsa loquitur |

| LEISURE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|----------------------|-------------------|---|--|---|-------------------------|---------------------------|
| Causation | | | | | | | |
| Full proof | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | No | No | No | No | No | No | |
| Specific instruments to ease proof | Presumption possible | Prima facie | Presumption | Presumption, but not in case of strict liability | No | Under narrow conditions | No, but res ipsa loquitur |
| Damage and compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | Yes | Yes | Yes, if there is a crime | Yes | Yes | Yes | Yes |
| Caps | No | No | Yes, under quity | No | Reduction possible | No | Yes |
| Contributory negligence | Yes | Yes | Yes | Yes, very well developed | Yes | Yes | Yes |
| Restrictions Children and type of negligence | | Yes, for children | | | Only in case of intent and gross negligence | | |
| Limitation | 10 years | 3 years | 5 years, 2 years for accidents caused by circulating cars | 10 years | 1 year | 3 years | 6 years |

| LEISURE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|-----------------------------|--|---|--|--|-------------|--|------------------------|
| Exclusions | | | | | | | |
| Waiver Admissible | In contract law, but not in standard business conditions, In tort law, acception of risk and garde en commun | In contract law, but not in standard business conditions, not in tort law | In contract law, but not in standard business conditions, not in tort law, but acception of risk | In contract law, but not in standard business conditions, not in tort law, but acception of risk | Probably no | In contract law, but not in standard business conditions, not in tort law, but acception of risk | Yes, if clearly shaped |
| Procedural questions | | | | | | | |
| Specific institutions | No | No | Yes | Yes | Yes | Arbitration boards in sports | Arbitration in sports |

III. Comparison for medical malpractice

1. Relevance of distinction between tort and contract law

In all countries under review health care is a public task which to a large extent is performed by publicly organised service providers. Nevertheless liability for personal injuries which medically treated persons sustain through the treatment is adjudicated according to the rules of civil liability. However, the well known and traditional distinction between contract and tort liability plays an ever less important role here. Liability for medical malpractice is a particular example of a kind of liability, which combines features of both branches of law mainly with the aim of securing adequate protection and safety of patients. It may be simplified not too much to state that the duties in a physician⁵-patient-relationship are those, which a valid and adequate contract between both sides would contain. On the other hand a violation of one of these duties is dealt with like a tort with all consequences of tortious liability.

For most requirements of liability for medical malpractice the distinction between contract and tort can therefore be neglected. The following comparison treats liability for medical malpractice for this reason as one single set of rules for which it is mainly unnecessary to distinguish between contract and tort situations. The specificities of contract law appear to remain relevant only for the few cases where a physician has taken over the obligation to achieve a certain result. Absent an express agreement of the parties the compared systems, however, do not presume such an obligation.

Moreover, a physician-patient-relationship with its implied duties comes into existence in most of the reviewed countries by the mere fact that a patient requests or needs treatment on the one side and is, or should have been, accepted for treatment by the medical health care service provider on the other. This purely factual situation suffices to establish a physician-patient relationship. Though a private contract is still rather frequently concluded between the parties at the beginning of the treatment it is no necessary basis for a physician-patient-relationship and the specific obligations arising from this relationship. As in particular the report on the Italian law but also the reports on the English, German and US law show it is the factual situation or the social contact that someone in need for medical treatment is, or must be, accepted for treatment which brings about a physician-patient-relationship. The main reasons behind this concept of far-reaching and binding obligations which normally arise only from a valid contract seem to be several: that the patient nearly entirely depends on the medical service provider's skill; that it is the patient's most valuable and vulnerable interests (life, health) which are at stake; that the service provider holds him- or herself out to possess

⁵ Physician includes also a hospital.

the necessary skills; that often a high risk of aggravation of illness or independent injury is involved.

2. Scope of protection

It is the more or less unanimous conviction of the compared countries that the obligations originating from the physician-patient-relationship extend only to the persons directly involved in the physician-patient-relationship. Thus normally the patient alone is protected and can rely on the specific duties, which the physician/hospital has to comply with when medically treating a patient. Only if there is the danger that the patient may infect near family members, in particular the spouse, a duty of information or protection toward this third person may arise.

3. Vicarious liability

Generally the physician or hospital is vicariously liable for employees. With one exception all compared legal systems agree that a provider of health care services is liable for acts by which his or her employees injure patients as long as the employees act within the course of their employment. The service provider is not exempted from liability if s/he proves careful selection and control of the employee. This rule is applied irrespective whether liability is based on contract or tort. The mentioned exception is Germany. There, if liability is based on tort – as in case of hospital treatment without valid contract – the hospital is exempted from liability if it proves careful selection and control of the doctor or other staff person who has medically treated, and thereby injured, the patient.

4. Bodily injury

Bodily injury includes regularly material and immaterial harm. All compared countries provide further for claims of dependants in case of the death of a patient.

5. Type of liability

Liability for medical malpractice requires fault on the part of the physician. Fault means at least negligence. This is the unanimously accepted general rule. The compared countries do neither provide for strict liability nor do they generally presume a doctors fault. However, concerning proof and evidence there is a widespread use of rules, which in certain cases lead to a presumption of negligence.

6. Standard of care

The central aspect of liability for medical malpractice is the definition of duties which the medical service provider owes to the patient as well as the degree of care with which

the provider is obliged to act. A physician or other medical service provider must generally act with such reasonable skill and care which an ordinarily careful specialist of the same profession under same circumstances would be expected and required to exercise. Though a high degree of care is generally required the countries under review regard it generally as sufficient if the level of skill and care of the average specialist in the same field is met. Only Sweden appears to request in certain cases (difficult diagnosis) that even the standard of an exceptionally careful specialist must be observed. And only few countries – for instance some US states – deny negligence when the physician admits an “honest error” which even sometimes happens to an average specialist. The other countries do not accept it as an excuse that the physician made an error which might be understandable in the circumstances but still remains a violation of the average standard of care.

The country reports show that also a number of further specific duties must be generally observed. The first one is the obligation to inform the patient on all relevant aspects of the illness and the treatment in a reasonable way and to get his or her – informed – consent to the treatment. In some countries – Italy, US states, Sweden – central importance is placed on this duty, which also relates to constitutional aspects of personality rights and of the right of self-determination.

A further duty extends to a reasonable supervision and control of technical or other equipment and appliances, which are used in the course of the medical treatment. A physician is therefore liable if he or she did not inspect and care for safe instruments in a reasonable way. However, the service provider is not strictly liable for defects of instruments, which could not be discovered with that degree of care, which is expected of a careful physician. The possible liability of the manufacturer of the instruments remains unaltered.

A still further duty is not uniformly accepted but recognised in few countries only – namely in France and Germany: a duty to document all relevant steps of medical treatment. In particular in Germany it is presumed that measures which have not been documented have not been taken and vice versa.

7. Causation

All compared countries agree that liability for medical malpractice requires causation between the patient’s injury and the physician’s negligence. But the general concepts, which the compared countries apply with respect to causation vary to some degree but less so the final results when the question of causal nexus between negligence and injury has to be answered. Remoteness (Great Britain), adequacy (Germany), proximity (US states), directness (France) or similar concepts are often not finally conclusive since it is rather frequent and typical for medical malpractice cases that it remains uncertain

how the patient's condition would have developed had the physician acted in a proper way. Even then the illness could have deteriorated and led to the same consequences. Therefore rather often the burden of proof or certain presumptions become decisive (see under 8.).

8. Proof

In practice the burden of proof plays an important role in medical malpractice cases. Though the compared legal systems regularly place the burden of proof of all essential elements of liability on the patient all these systems except Sweden allow for some alleviation of this burden. In certain cases these countries accept a presumption either of negligence or of causation and then the defendant physician is under the duty to rebut this presumption. By these presumptions in certain cases the general fault principle is smoothed in the interest of the injured patient who otherwise might fail in proving the physicians liability.

Partly negligence is presumed when lack of informed consent is invoked (France) or when the performance of the medical treatment was easy (Italy) or where the medical treatment resulted in consequences which were typically the outcome of negligence and for which no other explanation was given (Great Britain, US states – *res ipsa loquitur*).

On the other hand partly causation is presumed where it is established that a grave fault in medical treatment occurred (Germany) or where the damage is of such a kind that the defendant physician must explain its existence and prove other causes (Spain) or that the result of medical treatment is the typical outcome of an (established) failure of treatment (Great Britain, US states – *res ipsa loquitur*).

9. Compensation and damage

The injured patient is under most legal systems here under review entitled to full compensation of his or her pecuniary and non-pecuniary loss. The pecuniary loss includes all reasonable costs of healing and rehabilitation and lost income; non-pecuniary loss normally comprises an indemnification for pain and suffering, for lasting impairments and loss of quality of life. The prevailing view seems to be that even mere emotional distress can be recovered.

Few countries – some US states – limit the maximum amounts (by caps or ceilings), which can be recovered. In effect, also the Swedish Patients' Insurance, which is the normal and regular way to deal with medical malpractice cases in Sweden knows of limits up to which compensation can be claimed under this scheme.

Further differences concern the compensation of mere emotional distress of near relatives of patient who died due to the negligence of the medical service provider. The

clear majority of the compared countries acknowledges that compensation of such damage can be claimed (in particular France, Great Britain, Italy, Sweden) while Germany still denies such a claim.

10. Contributory negligence

Contributory negligence plays a minor role in medical malpractice cases. The compared legal systems constitute a 'duty' of the patient to protect the own interest and not to impede the success of medical measures by unreasonable behaviour. If the patients injury or illness is aggravated by a failure to comply with the directions of the physician the patients' claim for any damages can be reduced proportionately. But cases of this kind are rare and it is no contributory negligence if the patient trusted an – even evidently – wrong advice of the physician. Swedish law is the only one among the compared legal systems, which generally disregards contributory negligence in cases of personal injuries as long as the injured person does not act with intent or gross negligence.

11. Limitation period

The limitation periods vary considerably. There are countries which define a common standard for tort and contract law, like Germany (3 years), the UK (3 years) and Sweden (6 years) and Sweden (10 years), others define different limitation periods with regard to contract and tort law, like France (2 years in contract law, 10 years in tort law), Italy (10 years in contract law, 5 years in tort law), Spain (15 years in contract law, 1 year in tort law) and the US (1 to 3 years in contract law, generally shorter in tort law). Moreover, the point of time when the period of limitation starts running varies as well being either the date when the damage occurred or when the injured person became aware of the damage and the identity of the tortfeasor.

12. Exclusion of liability

The exclusion of liability for personal injury is generally viewed with disfavour if agreed upon in advance since it may encourage a physician to act with carelessness. Most of the reviewed countries therefore disallow exclusion clauses at least in standard forms. For the EU countries the EC directive 93/13/EEC on unfair terms has already settled this point.

13. Specific institutions

In the medical field more often than not do the countries under review provide for mediation or arbitration procedures, for claims panels or the like in order to encourage

the parties to settle their conflict without employing the courts. It is evident that the necessary knowledge can be better brought to bearing in less formal procedures.

| MEDICAL MALPRACTICE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|------------------------------------|---------|---------|------------|---------|----------------------|----------------|---------------|
| Contract Liability | | | | | | | |
| Contract tort distinction relevant | Yes | No | No | Yes | No | No | No |
| Contracting party incl. Bystanders | No | No | No | No | No | No | No |
| Vicarious liability without excuse | Yes | Yes | Yes | Yes | Yes | Yes | yes |
| Injury | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Death | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Fault | Fault | Fault | Gen. fault | Fault | Fault | Fault | Fault |
| Objective liability | No | No | No | No | No | No | No |
| Presumed liability | No | No | Partly | No | No | No | No |
| Average/high standard | Average | Average | Average | Average | Partly above average | Average | Average |
| Professional treatment | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

| MEDICAL MALPRACTICE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|-----------------------------------|-------------------------------|-----------------------------------|------------------------------|-----------------|--------------------------|--------------------------|
| Information | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Documentation | Yes | Yes | No | No | No | No | No |
| Proof of negligence | Patient | Patient | Patient | Patient | Patient | Patient | Patient |
| Presumption | No | No | No | No | No | No | No |
| Reversal | No | Partly | Partly | Partly | No | Partly | Partly |
| Specific and frequent fields of professional liability | Surgery, births | Surgery, births | Surgery | Surgery, Births | Almost no cases | Surgery | Surgery, births |
| Causation | | | | | | | |
| Full proof | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | No | No | No | No | No | No | No |
| Specific instruments to ease the burden of proof | Yes, Physician must prove consent | Yes In case of grave fault | Yes Where performance was easy | Yes in 'one cause situation' | No | Yes Res ipsa loquitur | Yes Res ipsa loquitur |

| MEDICAL MALPRACTICE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|---|--------------|------------------|--------------|--------------|---------------------------------|----------------|---------------|
| Compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Caps | No | No | No | No | No | No | Yes |
| Contributory Negligence | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Restrictions Children, type of negligence | No | No | No | No | Only intent or gross negligence | No | No |
| Limitation | 2 years | 3 years | 10 years | 15 years | 10 years | 3 years | 2-5 years |
| Tortious liability | | | | | | | |
| Parties | Only patient | Only patient | Only patient | Only patient | Only patient | Only patient | Only patient |
| Differentiation between service customer and non-customer | | + family members | | | | | |
| Vicarious liability | Yes | No | Yes | Yes | Yes | Yes | Yes |

| MEDICAL MALPRACTICE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|----------------------------------|-----------------------------------|-----------------|---------------------------|--------|--------------------------|--------------------------|
| Bodily injury | | | | | | | |
| Death | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Wrongful conduct Violation of professional duties | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Fault | Fault | Fault | Generally Fault | Partly Fault | Fault | Fault | Fault |
| Objective liability | No | No | No | Partly yes | No | No | No |
| Presumed liability | No | No | Partly | No | No | No | No |
| Causation | | | | | | | |
| Full proof | Yes | Yes | No | Yes | Yes | More likely than not | Yes |
| General reversal | No | No | Yes | No | No | No | No |
| Specific instruments to ease proof | Causation of negligence presumed | Causation of grave fault presumed | No | Yes in case of negligence | No | Yes Res ipsa loquitur | Yes Res ipsa loquitur |

| MEDICAL MALPRACTICE | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|--------------|---------|---------|--------|---|---------------------|--|
| Damage and compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Caps | No | No | No | No | No | No | Yes |
| Contributory Negligence | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Restrictions Children and type of negligence | No | No | No | No | Only intent and gross negligence | No | No |
| Limitation | 10 years | 3 years | 5 years | 1 year | 10 years, 3 years after the victim became aware | 3 years | Generally shorter than in contract law |
| Exclusions | | | | | | | |
| Waiver | Generally no | No | No | Yes | No | On individual basis | No |
| Admissable | | | | | | | |
| Procedural questions | | | | | | | |
| Specific institutions | No | Yes | No | Yes | Yes | No | Yes |

IV. Comparison with regard to tourism services

1. Relevance of distinction between tort and contract law

The legal starting point in the Member States is the directive 90/314/EEC on package tours. This directive has set common standards not only for the contract making and for the mandatory content of such a contract, but also for liability claims. Therefore the package tour directive defines the fundamental rules for action at least in the Member States. The basic idea is that the traveller who has booked a package tour may hold the tour operator and/or the travel agency liable not only for its own duties of care, but also for the intermediaries' duties of care, such as hotels or transport companies. However, the applicability of the directive is bound to its scope of application. It applies only in case, the parties have concluded a package tour contract, as legally defined in the directive. If the traveller acts on his or her own and concludes different contracts with different service providers, he or she remains outside the protection provided for in the directive.

The directive starts from the premises that in tourist services, the parties are interacting on a contractual basis. Therefore harmonized contract law and contract law litigation is supposed to set the standards for liability claims. The Member States have implemented the directive, however, the directive left tort law claims under national law unaffected. In so far the contract based directive 90/314/EEC and national tort law rules are standing side by side, at least in theory. In substance the relationship between EC based national contract law and national based tort law is much more complicated.

The hypothesis to be defended here is that the EC directive due to its firm set of liability rules has shifted liability claims into the area of contract law, whilst the criteria taken to awake the broad legal principles in the directive, such as, standards of care, causation, bodily injury, fault, damage, contributory negligence are largely taken from national tort law, at least where the directive does not provide for clear-cut guidance. In so far contract law and tort law are densely intertwined, though to a different degree.

The sole country out of seven where liability claims may be based on contract law *alone*, is France. Tour organizer and traveller are coming into social contact under the regime of contract law. Due to the non-cumul rule, French travellers cannot base their claims on tort law. Contract law alone defines the prerequisites under which the traveller may file a law suit. Whilst in Germany and in the United Kingdom travellers may choose between contract law and tort law like in any other country except France, there are two areas where the rules are mutually exclusive. In an important number of health claims, German travellers may feel tempted to use their contract law remedies to enforce their rights. Then, they have to make a choice between price reduction and a

claim for damages. Often the travellers will stay away from liability claims, as they require negligence, which is not asked for under the remedy of price reduction.

US law is different in so far as there are no particular rules on package tours. Whilst US law like all other legal orders starts from contract, the basic justification for holding the tour operator – or more generally speaking the provider of tourist services – liable is tort law. Similar to liability for unsafe leisure services, the idea laying behind the common law and the US legal system is the so-called common calling. In the middle ages, certain professions, among them the innkeepers, carriers and others who had easy access to the goods of their customers were for these reasons bound in law to observe rather far-reaching duties of care for their customers and partly even faced strict liability. The conclusion of the contract be no more than a starting point of a social involvement, the duties of care are largely defined independently from the contractual rights and duties under the aspect that the service providers offer services to the public at large. It lies within that logic not so much to define a strict border line between contract law and tort law, but to distinguish potential addressees according to their degree of the social contact: the invitee, the licensee and the trespasser.

2. Scope of protection

All legal orders here under review start from a broad understanding of contract parties. Not only the person who concludes the contract, but also all direct beneficiaries are regarded as being contracting parties in a broader sense. All are allowed to invoke liability claims under the contract law regime.

Bystanders, strictly speaking are hard to imagine in tourist liability claims. What is really meant are all those persons who, although not party to the contract are affected by the neglect of duties of care. These may well be licensees as well as trespassers who suffer from injuries for which the service provider as the offerer of a publicly accessible service may be held liable.

3. Vicarious liability

The traveller who books a package tour concludes a contract with the tour operator, often via the travel agency. It is the tour operator who selects the hotel keeper, the transport company and the supplier of leisure activities. The traveller buys the “package” of services, he or she relies on the tour operator to take responsible decisions. In the early days of the tourist industry tour operators tried to exclude liability for the so-called intermediaries, i.e. the hotel keepers and the transport companies. The directive 90/314/EEC has set an end to these tactics. Nowadays the tour operator and/or the travel agency are the main addressees of liability claims. EU law has imposed on the tour operator and/or the travel agency vicarious liability for all intermediaries. This is at

least true with regard to contract law. But even in the US where no such Act exists, the tour operator is held liable for all wrongful conduct of its intermediaries.

In tort law, the general rules apply. This means that Germany remains the only country where the tour operator is offered the opportunity to escape vicarious liability. All other regimes apply the same standards in contract and in tort law.

4. Bodily injury

The traveller may claim compensation for bodily injury, his heirs may claim compensation in case of fatal accidents and the traveller may claim compensation for immaterial harm. The last category is not beyond doubt. On the other hand, all legal systems allow the traveller to claim compensation for spoilt holidays. Suffering from spoilt holiday may end up in immaterial harm. Strictly speaking the two cases have to be kept separate. Compensation for spoilt holidays is the exception to the rule.

5. Type of liability

The legal systems in the Member States vary considerably not only with regard to the type of liability but also with regard to possible difference in contract and tort law.

In common law countries and in Germany *contractual* liability for negligence prevails over strict liability. The situation is different in countries with a code civile background. France, Italy and Spain distinguish between two types of contracts, or perhaps better two types of services, those which are result orientated come under the doctrine of *obligation de résultat*, those which are means orientated come under the doctrine of *obligation de moyen*. Whilst the borderline between the two cases is far from being clear, the consequences are far reaching. In case there is an obligation de résultat, the tour operator may be strictly liable, in case there is an obligation de moyen, the liability of the tour operator will usually be presumed. In court practice the key point always is the agreement the parties have taken. Countries where no such differentiation exists, such as Germany, the United Kingdom and the United States either presume negligence or tend to ease the burden of proof under the doctrine of *prima facie evidence* or *res ipsa loquitur*.

In tort law, five out of seven countries start from liability for negligence. Spain is the exception to the rule. Here the tour operator might be strictly liable, however, the conditions under which strict liability might arise are not yet fully developed. France is particular in that due to non-cumul tort law does not play a role in tourist services. All countries which rely on negligence are willing to lower the burden of proof. Again the traditional instruments are applied such as the doctrine of *prima facie evidence* or *res ipsa loquitur*.

6. Standard of care

The services being part of the package tour deal differ widely. In essence they combine three to four elements: transport, accommodation, nutrition and leisure. However, there is a large difference between adventure holidays and a sojourn in a five star hotel where the activities are focused on the swimming-pool. Nevertheless all countries have in common that they have developed general and more abstract standards of duty of care.

The travel tour operator has to act professionally. He has to carefully select the appropriate service providers and to supervise the service providers and their facilities accordingly. He has to inform the consumer and to provide advice as far as necessary. The courts within the seven countries under review have demonstrated concern to develop carefully shaped supervision and control duties of care. However, the standards of care in the travellers country of origin and the country of determination must not be the same. Most notably English courts and German courts have restricted the standards of care to the local level. A German and/or English consumer who is traveling within the European Community or into a non-European country cannot expect his national safety standards to be respected – if they are higher than the European standard or if there are not European safety standards at all.

Just like in the field of leisure accidents it is amazing to see that the courts are developing the standards of care within the tort law regime or are simply shifting the standards developed within tort law, maybe even in other fields of the law, to contract law liability claims.

7. Causation

The rules on causation do not contain remarkable particularities regardless of whether the claim is based on contract or tort law.

In principle the burden of proof lies with the traveller. There is no reversal of burden of proof. However, the courts are willing to ease the burden of proof by referring to the doctrine of *prima facie evidence* or *res ipsa loquitur* – except Spain. As far as tort law is concerned the chain of causation is never presumed.

8. Proof

The liability regime differs widely within the seven countries under review, at least with regard to contract law. Code civile countries apply strict liability and presumed liability for fault side by side, depending on the character of the services. With all due respect to the particularities of each national legal order it seems possible to conclude from the French case-law that the classification depends on whether the customer keeps the possibility of taking the initiative – then *obligation de moyen* – or cannot help what is

happening to him, thus being completely at the providers mercy. However, even this distinction does not really provide for any guidance. That is why a second classification might be brought into the discussion, this time related to the degree of risk. One might wonder, taking the Italian and the Spanish experience into consideration as well, whether it is possible to argue that the courts are the more willing to accept strict liability the greater the inherent risk of the tourist service might be.

The situation is more coherent with regard to tort law. None of the countries under review starts from strict liability. If any courts are willing to ease the burden of proof, via the doctrine of *prima facie evidence* or *res ipsa loquitur*.

9. Compensation and damage

With the exception of the US, the traveller may claim full compensation without any caps or ceilings. The sole point of conflict is whether or not the traveller may claim compensation for pain and suffering

There is uncertainty on the relationship between liability for pain and suffering and liability for spoilt holidays, or to put it bluntly, whether liability of spoilt holiday may be regarded as liability for pain and suffering. Especially Italian courts have struggled hard to correctly classify liability for spoilt holidays into the national civil law regime. All countries here under review allow for claims of compensation for spoilt holidays. That is why the correct classification might be of less interest.

However, the study does not cover the laws of all fifteen countries and it is well known that not all countries have been willing to grant travellers compensation for spoilt holidays. Most recently the European Court of Justice has held in *Simone Leitner* that the directive 90/314/EEC obliges the Member States to provide for compensation of pain and suffering. That is why classification issues are no longer important. EC law had helped to overcome uncertainties in the correct shaping of immaterial damage claims.

10. Contributory negligence

Contributory negligence plays a certain role in tourist liability cases, though to a differing degree. The legal doctrine is well established in all countries, in contract law and in tort law.

Important cases have to be reported from Germany, Italy and Spain. In Germany and in Italy the non-notification, respectively the delayed notification of defects is regarded as contributory negligence. In Spain courts seem to outweigh the relatively strict standards of care with a certain preparedness to reduce the tour operators compensation by accepting contributory negligence on behalf of the traveller.

11. Limitation period

The limitation periods vary considerably. There are countries which define a common standard for tort and contract law, like Germany (3 years), the UK (3 years), and Sweden (10 years), others define different limitation periods with regard to contract and tort law, like France (30 years in contract law), Italy (2 to 3 years in contract law, 5 years in tort law), Spain (2 years in contract law, 1 year in tort law) and the US (varies from state to state). Moreover, the point of time when the period of limitation starts running varies as well being either the date when the damage occurred or when the injured person became aware of the damage and the identity of the tortfeasor.

12. Exclusion of liability

EC law has set the standards. The directive 90/314/EEC prohibits the exclusion of liability for health and safety claims. As far as necessary, the Member States have adjusted their rules to the EC standard. US law, however, does not differ from EC law. No particularities exist in tort law.

13. Specific institutions

There are no particular institutions dealing with claims of compensation resulting from package tours – except the United Kingdom. There exists a voluntary arbitration scheme instituted by the ABTA which is offered to customers of travel operators. Most of the conflicts, however, are solved in the courts all over the European Community and the US.

| TOURISM | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|------------------------------------|--|--|---|---|-----------------|--|---|
| Contract Liability | | | | | | | |
| Contract tort distinction relevant | No, due to non-cumul | Yes, with regard to price reduction | Not really, due to the broad scope of contractual liability | Not really, due to the broad scope of contractual liability | Yes | Yes, with regard to pain and suffering | Not really, tort law prevails over contract law |
| Contracting party, incl. | Yes | Yes, incl. Co-traveller | Yes | Yes | Yes | Yes, incl. Co-traveller | Yes, incl. Beneficiaries |
| Bystanders | No | No | No | Yes | Partly (family) | No | Yes |
| Vicarious liability without excuse | Yes, but force majeure | Yes, no for non-package tours | Yes, but force majeure | | Yes | Yes, but not for independent contractors | Yes |
| Bodily Injury | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Death | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm (spoilt holidays) | Yes | Yes | Yes | Yes | Yes | Yes | Yes, in principle |
| Fault | Yes, if obligation de moyen | Yes | Yes, if obligation de moyen (travel intermediary) | Yes, if obligation de moyen | Yes | Yes | Yes |
| Strict liability | Yes, in principle De facto obligation de résultat | No, but yes in case of price reduction | Yes, if obligation de résultat for (travel organizer) | Yes, obligation de résultat | No | No | No |

| TOURISM | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|------------------------------------|-------------------------------------|-------------------------|--|-----------------------------|---------|------------------------|--|
| Objective liability | Yes | Yes, standards | Yes | | | Yes | Yes |
| Country of origin standards | | No | | | | No, local standards | |
| Presumed liability | Yes, in case of obligation de moyen | Yes | Yes possible, in case of obligation de moyen (travel intermediary) | Yes, if obligation de moyen | Partly | Yes, res ipsa loquitur | Res ipsa loquitur |
| Average/high standard | Average | Average, maybe be lower | Average | Average | Average | Average | Average |
| Professional care | Yes, obligation de sécurité | Yes | Yes | Yes | Yes | Yes | Yes, according to invitees, licensees, and trespassers |
| Supervision and control | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Information and advice | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Proof of violation of duty of care | | | | | Partly | | |
| Presumption | | | | | Partly | | |
| Reversal | | | | | Partly | | |

| TOURISM | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|---|---|--|-------------|--------------------|--|---|
| Specific and frequent fields of professional liability | Courts sweeping between obligation de moyen et résultat | Lower courts are lowering the standards of care | Differentiation between the tour organizers duties, duties of third parties (Leistungs-träger) and duties of the travel intermediary | | Rare cases | Differentiation between national and local standards | Differentiation of duties with regard to the addressee, invitee, licensee or trespasser |
| Causation | | | | | | | |
| Full proof | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | No | No | No | No | No | No | No |
| Specific instruments to ease the burden of proof | Prima facie | Prima facie | Prima facie | Prima facie | No | Res ipsa loquitur | Res ipsa loquitur |
| Compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | Yes | Yes Since 2002 | Yes, since Case C-168/00 | Yes | Yes | Yes | Yes |
| Caps | No | No | Yes, under the doctrine of equity | No | Reduction possible | No | Yes |
| Contributory negligence | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

| TOURISM | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|---------------------------|---|---|---|---------|---|------------------------------|----------------------------|
| Restrictions | | Non-notification | Notification without delay | | Only in case of intent and gross negligence | | |
| Limitation | 30 years | 3 years but notification required in 6 months | 2 to 3 years depending on the law | 2 years | 10 years | 3 years | Varies from state to state |
| Tortious liability | | | | | | | |
| Parties | | | | | | | |
| Traveller | No tortious liability, due to non-cumul, only for non-parties to the contract | Yes | Yes as well as other tourists or passers-by | Yes | Any injured person | Yes, neighbour principle | Yes |
| Vicarious liability | | No | Yes | Yes | | Yes | Yes |
| Bodily injury | | Yes | Yes | Yes | Yes | Yes | Yes |
| Death | | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm | | Yes | Yes | Yes | Yes | Not for mere mental distress | Yes |

| TOURISM | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|------------------------------------|--------|---|--|---------------|--------|------------------------|------------------------|
| Wrongful conduct | | Yes | Yes | Yes | Yes | Yes | Yes |
| Violation of professional duties | | Yes, skilled and reasonable expert, but shaky | Yes | Yes | | Yes | Yes |
| Fault | | Yes | Yes | Yes | Yes | Yes | Yes |
| Strict liability | | | Possible, but uncertain under particular rules | | | No | No |
| Objective liability | | Yes, but difficult to find standards | Yes | Yes | No | Yes | Yes |
| Presumed liability | | Yes, prima facie | Yes, prima facie | Yes, possible | Partly | Yes, res ipsa loquitur | Yes, res ipsa loquitur |
| Causation | | | | | | | |
| Full proof | | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | | No | No | No | No | No | No |
| Specific instruments to ease proof | | Prima facie | Prima facie | No | No | Res ipsa loquitur | Res ipsa loquitur |
| Damage and compensation | | | | | | | |

| TOURISM | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|-----------------------------|--------------------------------------|--|--------------------------------------|------------------------------------|---|--------------------------------------|----------------------------|
| Full | | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | | Yes | Yes | Yes | Yes | Yes | Yes |
| Caps | | No | No | No | Reduction possible | No | Yes |
| Contributory negligence | Yes, | Yes in contract law, in case of non-notification of defect | Yes | Yes | Yes | Yes | Yes |
| Restrictions | | | | | Only in case of intent and gross negligence | | |
| Limitation | Non-cumul | 3 years | General rules 5 years | 1 year | 10 years | 3 years | Varies from state to state |
| Exclusions | | | | | | | |
| Waiver | | | | | | | |
| Admissible | Not admissible for health and safety | Not admissible for health and safety | Not admissible for health and safety | Not possible for health and safety | Probably no | Not admissible for health and safety | Not admissible |
| Procedural questions | | | | | | | |
| Specific institutions | No | No | No | | Yes | Yes | No |

V. Comparison with regard to general interest services

1. Relevance of distinction between contract and tort law

As is the case with other kinds of services which are offered to the public at large also for services of public utilities the distinction between contract law and tort law though still relevant is of decreasing importance. This is true at least as far as the liability of utilities for personal injuries is concerned which utilities cause to their customers when they supply gas, water or electricity and render services in this connection. Again a mixture of contract and tort rules constitutes a combined basis for liability within a service provider-customer-relationship. This relationship does not necessarily require a valid contract as basis for its specific obligations. A mere factual provider-customer-contact suffices, and the obligations of the provider with respect to the customers safety are mandatory and outside the parties' disposal. Thus to some extent specific contractual obligations are imported into tort law where their violation results in tortious liability.

2. Scope of protection

In most of the compared countries the specific obligations flowing from the service provider-customer-relationship extend to, and protect, not only the direct customer but also his or her family members and guests or other invitees. This seems different only in Italy and Spain.

Mere by-standers or other outsiders do not enjoy the protection provided by the specific provider duties under a service provider-customer-relationship. They have to rely on general tort law.

3. Vicarious liability

It is the unanimous view of the compared countries that a public utility is liable for acts by which its employees negligently injure customers. And a utility is not exempted from liability because of own careful selection and control of the employee.

4. Bodily injury

Bodily injury includes regularly material and immaterial harm. All compared countries provide further for claims of dependants in case of the death of a customer caused by the service rendered by the utility.

5. Type of liability

The compared countries regard liability of public utilities partly as strict (Italy), partly as based on presumed negligence (Germany, Great Britain), partly as based on fault (France, Spain, US states).

6. Standard of care

Where liability depends on – presumed or proven – fault the extent of required obligations and the standard of care remain decisive. The main duty requires the service provider to exercise such care and skill as is reasonable in the circumstances. The standard of care corresponds to the level, which an average utility would be expected to observe. But due to the inherent dangerousness in particular of gas and electricity the generally expected standard is high.

It is worth mentioning that in the US a specific duty is recognised to treat the customer with respect. The negligent violation of this duty may lead to damages even though no economic loss occurred.

7. Causation

A public utility is liable only if causation between the injury of the customer and the negligence of the utility is established. No specificities of causation apply here. Despite different dogmatic concepts of causation in the compared countries it is rather generally accepted that first the injury of the customer must not have occurred without the act or omission of the actor, and that further – mainly policy – considerations might restrict causation to sufficiently close consequences.

8. Proof

The injured customer is regularly burdened with the necessity to prove the own damage, the negligence of the utility and the causal link between the two elements. Some countries ease this burden by procedural rules of evidence to the effect that in certain cases a presumption either of negligence or of causation applies. It is generally necessary that a typical situation can be proved which implies that either negligence or causation must have been present. However, the defendant may rebut this presumption.

9. Compensation and damage

Under most legal systems here under review the injured customer can claim full compensation of his or her pecuniary and non-pecuniary loss. The pecuniary loss includes all reasonable expenses for healing and rehabilitation and also lost income; non-pecuniary loss normally entitles to an indemnification for pain and suffering, for

lasting impairments and loss of quality of life. In the US compensation even of mere emotional distress can be claimed if the duty is violated to treat the customer with the required respect.

Few countries – some US states – limit the maximum amounts, which can be recovered in that they introduce caps or ceilings.

A further difference concerns the compensation of mere emotional distress of near relatives of a customer who died due to the negligence of the public utility or its employees. The clear majority of the compared countries acknowledges that compensation of such damage can be claimed (in particular France, Great Britain, Italy, Sweden) while Germany still denies such a claim.

10. Contributory negligence

All compared legal systems recognise contributory negligence as a defence, however, with different consequences. Under Italian law it exempts the utility from any liability but only if it is the prevailing cause of the plaintiff's damage. Some US states regard any kind of, or at least a prevailing contributory negligence as a full bar to the service provider's liability. Swedish law disregards contributory negligence unless the victim acted with intent or gross negligence. But most countries reduce the victim's claim proportionately when the victim negligently contributed to the own damage.

11. Limitation period

The limitation periods vary considerably. There are countries which define a common standard for tort and contract law, like Germany (3 years), the UK (3 years) and Sweden (10 years, but shortened in tort law), others define different limitation periods with regard to contract and tort law, like France (30 years in contract law, 10 years in tort law), Italy (10 years in contract law, 15 years in tort law), Spain (15 years in contract law, 1 year in tort law) and the US (varies from state to state, but usually longer in contract law than in tort law). Moreover, the point of time when the period of limitation starts running varies as well being either the date when the damage occurred or when the injured person became aware of the damage and the identity of the tortfeasor.

12. Exclusion of liability

The exclusion of liability for personal injury is generally viewed with disfavour if agreed upon in advance. Most of the reviewed countries therefore disallow exclusion clauses at least in standard forms.

13. Specific institutions

Some of the countries under review provide for mediation or arbitration procedures, for claims panels or the like in case of disputes between public utilities and their customers. These procedures are designed to offer parties a rather quick and inexpensive procedure. Parties shall also be encouraged to settle their conflict without redress to the courts.

| GENERAL INTEREST | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|-----------------|-----------------|-------------------------------|----------|----------------------------|-----------------|-----------------|
| Contract Liability | | | | | | | |
| Contract/tort distinction | Yes | Yes | Less important | Yes | Yes | Less important | Yes |
| Contracting party incl. Bystanders | Partly (family) | Partly (family) | Gen. no | Consumer | Partly (family) | Partly (family) | Partly (family) |
| Vicarious without excuse | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Injury | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Death | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Average/high standard of professional care in relation to the specific service | Average | Average | Not relevant strict liability | Average | Partly higher than average | Average | Average |
| Proof of negligence | User | User | User | User | User | User | User |
| Presumption | No | Yes | Strict liability | No | Probably | Yes | No |
| Reversal | No | No | | No | Partly | Partly | Partly |

| GENERAL INTEREST | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|----------------|-----------------------------|------------|------------|------------|--------------------------|--------------------------|
| Specific and frequent fields of professional liability | Rare cases | Rare cases | Rare cases | Rare cases | Rare cases | Rare cases | Rare cases |
| Fault | Probably Fault | Fault | Partly | Fault | Fault | Fault | Fault |
| Objective liability | Partly | No | Generally | No | No | No | No |
| Presumed liability | No | Yes | No | No | Partly | Yes | No |
| Causation | | | | | | | |
| Full proof | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | No | No | No | No | No | No | No |
| Specific instruments to ease the burden of proof | No | Yes Prima facie evidence | No | No | No | Yes Res ipsa loquitur | Yes Res ipsa loquitur |
| Compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Pain and suffering | Yes | Yes | No | Yes | Yes | Yes | Yes |

| GENERAL INTEREST | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|---------------|---------------------------------|---------------------------|----------------|--|----------------|--|
| Caps | No | No | No | No | Reduction possible | No | Partly |
| Contributory Negligence | Yes | Yes | No unless contr. | Yes | Yes | Yes | Yes |
| Restrictions Children type of negligence | No | No | Negligence was main cause | No | Only in case of intent or gross negligence | No | No |
| Limitation | 30 years | 1 year for stoppage; 3 years | 10 years | 15 years | 10 years | 3 years | Varies from state to state, usually longer in contract law |
| Tortious liability | | | | | | | |
| Parties Differentiation between service customer and non-customer | User (family) | User (family) | Any injured person | Injured person | Any injured person | User (family) | User |
| Bodily injury | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Death | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Immaterial harm | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

| GENERAL INTEREST | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|---|--------|--------------------------|-------|-------|--------|--------------------------|--------------------------|
| Wrongful conduct of professional duties | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Causation | | | | | | | |
| Full proof | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| General reversal | No | No | No | No | No | No | No |
| Specific instruments to ease proof | No | Yes prima facie evidence | No | No | No | Yes Res ipsa loquitur | Yes Res ipsa loquitur |
| Fault | Partly | Partly | No | Yes | Yes | Yes | Yes |
| Objective liability | Partly | Partly | Yes | No | No | No | No |
| Presumed liability | No | Partly | No | No | Partly | Yes | No |
| Damage and compensation | | | | | | | |
| Full | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

| GENERAL INTEREST | FRANCE | GERMANY | ITALY | SPAIN | SWEDEN | UNITED KINGDOM | UNITED STATES |
|--|----------|---------|--|-----------------|--|----------------|---|
| Pain and suffering | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Caps | No | Partly | No | No | Reduction possible | No | Partly |
| Contributory Negligence | Yes | Yes | No, unless contributory negligence is full cause | Yes | Yes | Yes | Yes |
| Restrictions Children and type of negligence | No | No | | | Only in case of intent or gross negligence | No | No |
| Limitation | 10 years | 3 years | 15 years | 1 year | 10 years, but 2 years under particular legislation | 3 years | Varies from state to state, usually shorter in tort law |
| Exclusions | | | | | | | |
| Waiver Admissable | No | No | No | Probably no | Probably no | No | If reasonable |
| Procedural questions | | | | | | | |
| Specific institutions | Yes | No | Yes | Evidentially no | Yes | Yes | No |

VI. Reflections on Liability for defective Services

1. General concept

a) Common system combined of contract and tort law

Services here under review comprise only services with a certain element of public offer, namely medical services, leisure and tourism services, services of public utilities. They have gained an ever growing importance in the Member States and they pertain more than most other services to the essential interests of the recipient of the service. Therefore it is not at all surprising that the sheer number of conflicts has increased, too. The provider of these services may be private companies and/or public institutions like municipalities.

The comparison of the seven countries demonstrates that accidents resulting in personal injuries through unsafe services are put under the regime of civil law. Whilst the basic distinction between contract and tort still subsists, it is striking to recognize that the courts in present practice generally stay away from the differences and apply the same standards of care. Sometimes it is almost impossible to discover the legal basis on which the decision is based. Therefore it can safely be concluded that the distinction between tort and contract law has lost importance for most of the categories here under review.

A liability system for bodily injuries resulting from unsafe services (medical malpractice, leisure, tourism and public utilities) is largely and should be built on a combination of contract and tort law rules.

b) Justification: social contact

The relationship between the service provider and the recipient is based on social contract. Though a private contract is rather frequently concluded between the parties at the beginning of the relationship, it is no necessary basis for a service provider-recipient-relationship and the specific obligations under this relationship also arise irrespectively of the existence of a valid contract. The relationship is established by the mere factual contact that the recipient requests the service and that the provider accepts that request. The idea founding this concept has its roots mainly in the common law and the US legal system in the so-called common callings. In the middle ages, certain professions, among them the innkeepers, carriers and others who had easy access to the goods of their customers were for these reasons bound in law to observe rather far-

reaching duties of care for their customers and partly even faced strict liability. The conclusion of the contract is no more than a starting point for a social involvement, the duties of care are largely defined independently from the contractual rights and duties under the aspect that the service providers offer services to the public at large. The recipients of the services nearly entirely depend on the service providers skills. It is the recipients most valuable and vulnerable interests (life and health) which are at stake. The service provider holds him or herself out to possess the necessary skills often a risk of injury is involved.

A mere factual service provider-recipient relationship suffices and the obligations of the provider with respect to the recipient's health and safety are mandatory and outside the parties disposal. Specific contractual obligations are imported into tort law where their violation results in tortious liability.

2. Elements of liability

a) Type of liability

The service provider's liability in the Member States and the United States depends mainly on negligence. With the exception of Spain and to some extent of France, none of the countries relies on strict liability. However, even in France and Spain, strict liability is the exception to the rule. In France the "obligation de résultat" or the liability of the "gardien" shows up in exceptional cases. Spanish courts apply strict liability, if under the particular circumstances of the case, a blatant violation of the duty of care is at issue. The legal basis of the decisions is often not fully developed.

However, the French and Spanish approach is characteristic for a general attitude of courts in all countries under review to raise the standard of liability beyond that of pure negligence. This tendency of the courts is triggered if one of three factual situations are given: (1) clear evidence for negligent behaviour, (2) clear evidence for a bodily injury typical for negligence or (3) clear evidence for causation between bodily injury and negligence. The facts of the case must be such that one of the three elements is clearly given. The courts then apply certain tools to find the missing link required to establish liability.

These tools are the following ones: Often the legal systems and the courts tend to ease or to reverse the burden of proof for either causation or negligence if the other element exists. But none of the countries has gone so far as to reverse the burden of proof in its

entirety. There is a certain preparedness in the courts to ease the burden of proof with regard to the missing link be it through *presumed liability*, *prima facie evidence* or *res ipsa loquitur*. Beyond this tendency it is difficult to identify in the legal orders under review a further common core of legal principles.

The liability for unsafe services is based on negligence. However, there is ample evidence to introduce a flexible system to alleviate the burden of proof with respect to causation and negligence according to the existence of either factual evidence for negligent behaviour, for a bodily injury typical for negligence or for causation between bodily injury and negligence.

b) *Standard of care*

The law in the seven countries imposes a general duty of care onto the service provider to protect the health and safety of the recipient of the service. Whether the duty is to be found in contract law or in tort law fades away. The recipient's justified expectations set the standard of care irrespective of contract or tort. The standard of care corresponds to the type of service and its inherent risks.

All countries under review start from an average standard of care. This standard requires that reasonable care and skill is exercised. It complies with whatever the standard formula might be, the behaviour of the *bon père de famille*, sensibly prudent and reasonable person, *buen padre de familia*, reasonable care or ordinary reasonable care. Generally this means a high level of care, which reflects the dangerousness of the respective service. In Sweden this yardstick seems to be even higher in certain medical malpractice cases. In the US ordinary and reasonable care is bound to constructive knowledge of the risks.

The courts in all compared countries have developed a set of risk-related duties, which are imposed on the service provider which flow from the service provider-recipient relationship. Three types of duties are standing at the forefront, the duty to organize the service so as to avoid unreasonable risks to the recipient, the duty to supervise and control any equipment, last but not least the duty to provide assistance to the recipient, be it in form of information, warnings or advice.

As far as the services are regulated by binding rules or even non-binding recommendations, the courts tend to refer to these rules though without feeling formally bound by the enshrined standards. They accept rules and regulations, national technical standards or even international standards on the organization of services as a yardstick against which the behaviour of the service provider can be measured. Compliance with

these rules and standards, however, does not automatically exempt service providers from liability.

The broad variety of cases makes it difficult to define a common denominator beyond the standard formula of the average standard of care, beyond classifying the mentioned duties and beyond reference to existing rules and recommendations. The courts link the standard of care to the type of service. Therefore different duties apply to passive recipients (visitors, patient) in comparison to active recipients (competitor, teammate etc).

The general standard of care requires that reasonable care and skill is exercised. The standard must correspond to the respective service and its inherent risks. Therefore a high standard of care must be guaranteed. Non binding rules or recommendations may provide guidance for fixing the standard of care. Compliance with such rules does not automatically exempt service providers from liability.

c) *Scope of protection*

The distinction between contracting parties and mere bystanders is well-known to all legal systems here at stake. However, the circle of all those who are protected by the service provider-recipient relationship is broader. Such an approach is neither new nor unknown to the Member States. Their legal systems have already overcome the harsh doctrine of strict privity of contract. This is particularly true with regard to those third parties who are integrated into a services contract although they are not a party to the contract. The UK has rather recently changed the privity doctrine, France overrules the *non-cumul* rule by the doctrine of implied consent. German law has traditionally developed a concept of contracts with protective effects for third parties. For mere bystanders who remain outside the contract and are violated more or less haphazardly, tortious liability applies.

Under the concept of the service provider-recipient-relationship the classification of the customer according to his or her degree of involvement seems more appealing. The distinction is inspired by the US law, which distinguishes for these purposes between invitees, licensees and trespassers. Only invitees (direct recipient of the service, family members, other intended beneficiaries) come under the full protection of the service provider-recipient-relationship. They are engaged in a mutual consensual relation. Mere licensees are allowed to use the service of the provider's premises or facilities but do so solely for their purposes and not to the advantage of the provider. They must only be

warned of possible dangers. Trespassers, however, are those who enter the provider's premises or use his or her facilities without permission or justified reason. Here the service provider-recipient relationship is protected under general tort law.

The scope of protection of the service provider-recipient-relationship does not only include the direct recipient of the service but also those who are direct beneficiaries of the service. Those who come into contact with the service as mere licensees enjoy less protection and must only be warned of known dangers. Mere trespassers can only rely on general tort law.

d) *Vicarious liability*

Service providers are vicariously liable for acts by which their employees negligently injure third persons as long as these employees act within the scope of their employment. Member States' legal orders hold the service provider liable irrespective of whether the liability results from contract or tort law – with one notable exception, Germany. Under German law, the tortfeasor is still allowed to escape from liability under § 831 German Civil Code. Vicarious liability is extended even to cases where the service provider acts a principal who employs independent contractors as his or her agencies, such as in tourist services. Vicarious liability in this sense is well settled.

Service providers are liable for wrongful conduct of their employees. This rule applies to principal-agents relations as well, even if the agent is an independent contractor.

e) *Bodily Injury*

Three types of injuries have to be distinguished, mere bodily injury however severe, death and immaterial harm. The latter category concerns also situations under which a recipient of a service is not physically injured but where the injury ends up in non-physical, immaterial or psychological harm. It covers compensation for spoilt holidays as well. With some differentiation in detail all legal orders provide for compensation whatever the type of the injury might be.

The recipient must be protected against personal injury, death and immaterial harm. Immaterial harm includes spoilt holidays.

f) *Causation*

All compared countries agree that liability for services here under review requires causation between the recipient's injury and the service provider's negligence. But the general concept, which the compared countries apply with respect to causation vary to some degree, though less so the final results when the question of causal nexus between these elements has to be answered. Remoteness (United Kingdom), adequacy (Germany), proximity (US states), directness (France) or similar concepts are often not finally conclusive, but supplemented by additional considerations. Despite the different dogmatic starting points, it is rather generally accepted that first the injury of the recipient must not have occurred without the act or omission of the service provider and that further – mainly policy considerations – might restrict causation to sufficiently close consequences.

Liability for services requires causation between the recipients injury and the service providers negligence. Despite varying concepts in legal doctrine the final results are often similar. The main thrust lies in the proof of causation.

g) *Proof*

In order to adapt liability to the reasonably required standard of care the element of proof plays a particularly important role. The analysis of the law of the seven countries has demonstrated that the courts are using the rules on the burden of proof in a very flexible manner. This is true with regard to negligence – presumed liability, *prima facie* liability or the maxim of *res ipsa loquitur* and equally with regard to causation – *prima facie* liability and *res ipsa loquitur*. However, what is even more important is the courts general policy to relate the type of liability to the type of standards of care, further to the requirements of causation and finally to the burden of proof.

This means in essence that in hard cases, the courts come very close even to strict liability or at least presumed liability. The standards of care are the higher the harder the case, i.e. the more blatant the violation of the duty of care. The same logic applies to causation. In the few cases where strict liability is at stake, it is on the customer to provide full evidence on causation. The concept can easily be turned upside down. The weaker the case, the stronger is the plea of liability for negligence. The customer then has to prove not only the violation of the duty of care but also of causation. In so far the courts have established a relatively well balanced system of liability.

The courts adapt mainly by a flexible use of the instruments of proof the required level of care to the desirable protection of persons injured during the rendition of services. Whilst the type of liability varies in the countries between strict liability, negligence and presumed liability, due to the courts flexible application of instruments to ease the burden of proof at the level of negligence and/or causation, the final outcome is often similar. A common European concept will have to combine liability for negligence with a flexible system to alleviate the burden of proof. Therefore a general reversal of the burden of proof or a general rule on presumed liability would go too far.

Three variants have to be distinguished, (1) negligent behaviour will have to be presumed in case there is clear factual evidence for wrongful conduct, (2) negligence will have to be presumed in case there is factual evidence for a bodily injury typical for negligence; (3) causation will have to be presumed in case there is factual evidence for causal link between bodily injury and negligence.

h) Compensation and damage

The recipient of a service is entitled to claim full compensation under all seven legal systems for the restoration of his or her health, be it under contract law or under tort law. With the exception of Italy, all countries here under review grant the recipient also compensation for pain and suffering irrespective of the legal basis. Italy starts from a rather narrow understanding, where compensation for pain and suffering, if any, can be claimed only under tort law. The scope is further narrowed down as the Italian law usually binds compensation to the existence of a crime.

Caps or ceilings for compensation are mostly unknown in the Member States of the European Community. However, in Italy and in Germany there are limits to what the recipient might be legitimately claim. The true exception to the rule, however, is the United States where a whole set of rules exist to define the upper limits of compensation claims. As the US system can hardly be compared to the ones of the Member States, the US rules do not provide guidance for possible solutions to differing legal orders.

The recipient of service is entitled to full compensation of damage to his or her health and safety, including compensation for pain and suffering.

In case of death the heirs of the deceased recipient are entitled to lost maintenance. Near relatives are entitled to compensation for the emotional distress.

i) *Contributory negligence*

All compared legal systems recognize contributory negligence as a defense. It is a common principle well-known all over the European Community and the United States. Courts are referring to contributory negligence to a varying degree. Contributory negligence serves as a means to fine-tuning the degree of the service providers' liability. Somewhat overstated one might distinguish between the tough English-American recipient (in particular in sports) and its softer continental European counterpart. In so far contributory negligence helps to balance out cultural differences in civilized nations.

Whenever children are involved, the question comes up to what extent the claim for damage has to take into account a possible violation of the parents' supervisory duty. German law excludes the imputation of parents' negligence. In principle, courts are quite reluctant to assume contributory negligence of children and tend to fully protect the later, even if they may be blamed for their negligent behaviour.

The doctrine of assumption of risk is well-established. The prominent field of its application are sports and leisure services.

All compared legal systems recognize contributory negligence as a defense. Contributory negligence with respect to personal injuries should be viewed with caution. If it has to be taken into account it should result in a proportionate reduction of damages.

3. Exclusion of liability

So far in the Member States, the rules on whether or not exclusion of liability is admissible or not, very much depends on the traditional distinction between contractual and tort law relations. The European Community has intervened twice, with regard to standard business conditions in directive 93/13/EEC and with regard to package tours in directive 90/314/EEC. Both directives are formally bound to contractual relations, however, the concrete provisions which turn down exclusion clause reach beyond bilateral consensus, and unfold impact on the recipient-service provider relationship.

The directive 93/13/EEC has defined a common standard for exclusion clauses, whatever the type of services might be. They are forbidden as long as they are contained in standard business conditions. In theory they remain admissible if they are individually negotiated. Courts demonstrate a certain, though reluctant preparedness, to accept such exclusions in service provider-recipient relations, as long as they are clearly formulated, readable and related to the inherent risk of the service. Therefore exclusion clauses are hard to justify even if they form part of direct bilateral consensus. The

directive 90/314/EEC prohibits exclusion clauses in tourist services. Within the scope of the directive, i.e. within the recipient-service provider relationship exclusion clause are eliminated irrespective of their outer appearance, as standard business conditions or as individually negotiated terms.

In trespasser-service provider relations – the traditional tort law cases, – the starting point seems different. The recipient may base his or her claim either on contract law or on tort law, – except France, where the recipient has to make a wise choice. Therefore in six of the seven countries it has to be distinguished between cases where there is a contract which might exclude tortious liability and cases where there is no such contract. The former variant is dealt with under the directive 93/13/EEC or with directive 90/314/EEC, the latter is mainly subject to the doctrine of assumption of risk. As the liability cannot be excluded, courts balance out the responsibility of the service provider and the trespasser-recipient under the aspect of contributory negligence. Therefore it might safely be concluded that there is a tendency to eliminate exclusion clauses for the liability of health and safety irrespective of the type of recipient-service provider relationship, be it the recipient-invitee, the recipient-licensee or the recipient-trespasser. The doctrine of contributory negligence helps to take the recipient's self-responsibility into consideration.

Exclusion clauses for the liability of health and safety are prohibited in recipient service provider relationships.

4. Specific institutions

The seven countries under review demonstrate a certain preparedness to provide for out-of-court dispute settlement procedures. A relatively consistent policy can only be found in the field of sports, where mechanisms are available in particular if conflicts between teammates or between competitors are to be solved. The European Commission has established a relatively well-developed policy to set incentives for fostering the establishment of out-of-court dispute settlement procedures. The two recommendations 98/257/EC and 2001/310/EC provide ample evidence for the Commission's intention for giving shape to a European dispute settlement procedure.

Out-of-court dispute settlement procedures should be made available in recipient-service provider relationships. They should be shaped along the lines of the recommendations 98/257/EC and 2001/310/EC.