

De minimis non curat praetor

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Introduction

"De minimis non curat praetor" proclaimed the old Roman rule. Nowadays too, it is considered that petty matters do not belong before the court. Hence, in a decision of the House of Lords from the year 2007 one can read: "An action for compensation should not be set in motion on account of a trivial injury. De minimis non curat lex". Further, the Study Group on a European Civil Code provided for a "de minimis threshold" in its Principles of "Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab.Dam.)" in the context of extra-contractual liability in Art 6:102, under the heading "De Minimis Rule": "Trivial damage is to be disregarded."

At first glance, this maxim appears thoroughly persuasive and it accords with the oft expressed desire of insurers not to be burdened with the compensation of numberless trivial injuries and to be able to concentrate better on more serious cases. In present day law, there is also certainly some support for the notion that the victim should have no claims in case of merely trivial injuries. Thus, the impression is created that the Study Group's draft finally gathers the basic notions of scattered individual rules into a general norm. On closer consideration, however, doubt arises as to whether these individual provisions are really so capable of generalisation. In the following I will be looking at Swiss, German and Austrian tort law, but also take other legal systems into consideration.

I. The "de minimis threshold" in applicable tort law

1. Law of neighbours

Clear bases for a de minimis rule are to be found in the law of neighbours. In Swiss law, Art 684 of the Civil Code (ZGB) provides that everyone is obliged to avoid "excessive im-

pact" on his neighbour's property in the exercise of his own property rights. It may be inferred therefrom that neighbours must put up with moderate nuisance.

According to § 906 of the German Civil Code (BGB), the owner of a piece of land cannot prohibit the impact originating from another piece of land insofar as such "does not impair or only negligibly impairs the use of his own property". § 364 of the Austrian General Civil Code (ABGB) contains a corresponding provision, the same is true for § 100 of the Hungarian Civil Code and also § 4:24 of the new Hungarian draft, Art 844 of the Italian Codice civile and the French draft Avant Projet Catala..

2. Product liability law

Further, the product liability directive for damage to property stipulates a deductible of € 500 for damage to property. Accordingly, all the legal systems discussed here provide for such deductibles.

As compared with an actual "de minimis threshold", however, the difference is that not only is minor damage passed unheeded but serious damage is also not compensated in full because of the structure with the deductible.

3. Compensation of non-pecuniary damage

Further, it is recognised manifold that there should be a threshold of significance for the compensation of non-pecuniary damage when it comes to infringements of personality rights. For instance, in Switzerland Art 49 Code of Obligations (OR) provides for satisfaction for violations of personality in cases where "*the gravity of the offence justifies such*". In Germany, on the other hand, the plan to introduce a minimal threshold was ultimately dropped; it was nonetheless assumed that the courts could take the bagatelle threshold into the equation by recourse to the notion of the "equity" of the compensation. Moreover, for infringements of the general personality rights, a gross violation is still required.

In Austria, numerous provisions explicitly limit the compensation of non-pecuniary losses to gross violations. It ought also to be mentioned that the Austrian Draft Tort Law (version of June 2007) also attaches decisive importance to the gravity of the infringement: compensation may also be due for infringements which are not qualified as severe, but only if this is counterbalanced by the weight of other factors, for example serious culpability.

It seems that in Italy compensation for minimal infringements is rejected with the argument that in such cases no duty of care has been violated.

II. Reasons for a minimal threshold

In the *law of neighbours*, the duty to tolerate insignificant encroachments is rationalised with reference to the social adequacy of the encroachment and emphasis that insignificant encroachments must be tolerated so that under consideration of their different interests, it is possible for neighbours to have the most economically useful enjoyment of their properties.

As far as the *Product Liability Directive* which provided for the deductible is concerned, its rationale merely explains that the deductible has the purpose of preventing an excessive number of cases. This consideration related, however, not to the courts, with the intention of protecting these from being overwhelmed, but rather was introduced in the interests of industry. The commentaries to the Directive discuss the exclusion of bagatelle cases, although one can hardly still talk of a bagatelle when the amount goes up to € 500.

The notion of social adequacy is also used to justify the requirement for a threshold of significance when it comes to the compensation of *non-pecuniary damage* – as in the law of neighbours: we must proceed from the fact that any kind of participation in society is subject not only to pleasant consequences but also necessarily to disagreeable situations.

Insofar as mere disagreeableness does not exceed a certain threshold of significance, it must be attributed to the general risks that belong to life and does not give rise to any claims for damages. *Hans Stoll* stresses that everybody must be expected to accept a certain degree of emotional distress in his social life.

A major reason why the compensability of non-pecuniary damage is handled with so much reserve is that it is very hard to determine whether and to what extent someone has suffered non-pecuniary damage. *Franz Bydlinski* refers furthermore to the fact that simple emotional injury is largely dependent on the will of the victim, a duty to compensate all injuries of this type would call forth self-pity and inability to deal with life.

Thus, it may be stated as a general principle that compensation for non-pecuniary damage only enters into consideration where there are *significant* infringements of personality rights, but it must be remembered that the gravity of the infringement can be substituted by especially strong grounds for imputation on the side of the tortfeasor. Accordingly, even mere emotional distress can be compensable, if the tortfeasor acted precisely in order to cause such non-pecuniary injury or if the injury was inflicted by an immoral act.

III. A general minimal threshold for non-pecuniary damage?

Even if one thus acknowledges that in principle only significant infringements of personality justify compensation of non-pecuniary damage, the question nonetheless arises as to whether there should not be a gradation according to the worth of the personality rights themselves. For these can also be ranked: the right to bodily integrity, sexual self-determination or liberty has more significance for the protection of the personality than the rights to one's image or the right to use one's name. Accordingly, minor damages for pain and suffering are awarded in Austria even for relatively slight physical injuries, although Austrian law also knows a certain bagatelle threshold. In the case of physical injuries, however, it has no institutionalised, rigid significance threshold.

In Switzerland, on the other hand, the law provides that the compensation of non-pecuniary damage for physical injury is only foeseen in case of grave violation of personality. No satisfaction is due for bagatelle injuries.

As this short overview has already shown, a significance threshold is indeed widely recognised in the case of injury to *non-pecuniary interests*. When it comes to physical injuries, however, there are definite differences, as the minimal threshold is also applied unreservedly to such in Switzerland, whereas in Germany and in Austria there is a certain reservation in this regard.

In my opinion, a general, rigid significance threshold, as was first conceived for the reform to the German law of obligations, is not to be advocated in the case of injury to non-pecuniary interests: the argument that everyone must be expected to bear a certain amount of emotional distress as a result of participation in social life is certainly persuasive. It must also be acknowledged that self-pity would be encouraged, if damages could be sought for any and every minimal emotional injury. On the other hand, it must not be forgotten that different non-pecuniary interests are of differing rank, which supports the idea of also setting a lower significance threshold, the higher the rank of the injured right; hence very low in the case of the fundamental personality right to bodily integrity. Finally, the notion of deterrence also speaks for setting a lower minimal threshold, the more serious the ground for imputation. In the case of intent, therefore, a duty to compensate for very minimal injuries should be recognised. Ergo, only a flexible significance threshold can be appropriate.

IV. A general “de minimis threshold” for pecuniary damage?

In the field of pecuniary damage, the short overview has shown that the legal systems referred to here only recognise a significance threshold in the law of neighbours and in product liability law.

As far as the *law of neighbours* is concerned, it seems that special interests play a role. The significance threshold can namely be justified in this context because very normal life events and processes may easily lead to an inconvenience for the neighbour and it would be an unreasonable limitation of freedom of movement if everyday life had to be directed at not encroaching upon the neighbour in any even minimal way. Without doubt, it works in the interest of peaceful coexistence, if all property owners who are part of the neighbourhood are required to exercise a certain tolerance – which benefits each in turn – and the often long-lasting relationships are not strained by continual litigation. Thus, the following notions clearly play a decisive role in this context: the often lengthy duration of coexistence within a community relationship, which makes peaceful coexistence particularly desirable; the hindrance of the economically useful enjoyment of property as a result of excessive duties to consider the interests of the neighbour; the unreasonable limitation of the freedom of movement by extensive duties of care, in particular also in the private sphere, which should serve the development of the personality and also relaxation; the mutual high risk of inconveniencing the neighbour in everyday life and thus being exposed to injunctions and claims for damages; the “trade-off” of inconveniences tolerated on both sides over the long-term.

These arguments, very weighty as a whole with respect to the law of neighbours, can however, definitely not justify the general introduction of a significance threshold in the case of injuries outside of such context. It would be worth considering, nonetheless, whether for similar reasons corresponding *de minimis* thresholds should apply in other community relationships, for example within the family or within a partnership based on close personal relationships.

The Civil Code (BGB) has followed this line of thought insofar as it has lowered the standard of care between married spouses (§ 1359 BGB) as well as between parents and children (§ 1664 BGB): such are required in this context only to exercise the care which must be used in their own affairs. Much the same is advocated for Austria. In Switzerland, however, this is contentious.

The same method of limiting liability by reducing the duty of care was also chosen by the BGB in § 708 for partners. Equally, Art 538 Section 1 OR stipulates that for the simple partnership, each partner is merely obliged to exercise the care that he exercises in his own affairs when it comes to those of the partnership. In Austrian law, the General Civil Code does not provide for any comparable limitation of partners' liability (cf. § 1191).

Looking at those liability rules which concern, on the one hand, relations between neighbours and, on the other, relations within the family or partnerships, it is striking that two different methods have been chosen for the limitation of liability, differing not only in their approach but also in terms of their results: the law of neighbours takes the consequence, i.e. the inconvenience, as the starting point; in the context of family and – apart from Austrian law – also in the context of partnership relations, on the other hand, the duty of care applicable, i.e. a ground for imputation, is taken. The results of the two methods may be the same insofar as violation of the duty of care can be refuted when conduct only brings about a minimal endangerment, and thus there is no liability for the minimal loss. The question is whether there are concrete reasons for the choice of different methods or whether the difference is coincidental, whether one of the two approaches is preferable or whether both can be combined. We will be looking into this more closely later. At this point, it must firstly be established that there are in any case important reasons for thresholds of liability within the community relationships cited above.

This is not the case outside of such community relationships on the other hand, or at least not to the same extent. Furthermore, another argument against a general significance threshold for pecuniary damage like that for non-pecuniary damage is that there can be no issue of checking self-pity – which is always subject to influence at least to some degree – and reasonably requiring the victim to “swallow his anger”; monetary losses or expenses are always palpable. Rather, the issue is whether the victim or the tortfeasor should have to bear a financial burden. If all grounds for attribution are given, then everything speaks for having the tortfeasor bear it and there is no good reason for

an exception to the principle of compensation in the case of minimal damage; one could even say, vice versa, that in the case of low compensatory amounts there is even less reason for releasing the tortfeasor from liability.

Moreover: whereas objective assessment is necessary in the case of non-pecuniary damage because the subjective non-pecuniary injuries are not measurable, it is also logical to proceed from a comparability of the immaterial situation for all victims and in general to assume a – nonetheless elastic – bagatelle threshold, which applies to all victims equally. Pecuniary damage, on the other hand, can be measured with relative precision; above all, however, the economic situation of victims is extremely various. Therefore, it is self-evident that one cannot assume that the exclusion of compensation for minimal damage would affect all victims in a like manner. Thus, a general minimal threshold would, on the one hand, be unjustified, affecting victims in difficult economic situations much harder than economically well-off victims. On the other hand, a differentiation according to economic situation would lead to well-off victims always having to bear a more or less substantial deductible. However, deviating from the general principle of compensation in the case of one group of victims for such reasons is out of the question. Hence, only the general inhibition levels counteract an overwhelming litigation of minimal claims for compensation: on the one hand, the general prohibition of chicanery (the exercise of a right is not permitted if its only possible purpose consists in causing damage to another) and, on the other hand, as a rule the risk involved in litigation is a factor which prevents the litigation of minimal claims.

V. The dogmatic status of significance thresholds

In the law of neighbours, each owner of land must put up with minimal nuisances; thus he also has no right to injunctive relief. Since injunctive relief does not require any violation of a duty of care but only the wrongfulness of the result or the realisation of the prohibitory norm of the offence, the law of neighbours does not merely exclude the

violation of the duty of care if only minimal damage is caused but also the protective scope of the property.

Much the same can be assumed with respect to the de minimis threshold for damage to non-pecuniary interests: the legal system provides protection only against grave infringements; minimal infringements must be tolerated; there are also no defensive rights.

According to product liability law on the contrary, the defensive rights are not restricted, just the right to compensation is limited by the deductible.

Insofar as the duties of care are limited, e.g. in the case of injuries caused within the family or partnership or in Italy in case of minimal infringements, those put at risk therefore have the right to injunctive relief; only damages are excluded.

Thus, the type of "de minimis threshold" to be chosen by the legislator depends on what limitation it wants to achieve: if the protective scope of property should be subject to a general limitation, i.e. not only claims for damages but also injunctive relief excluded, then the acceptance of certain inconveniences must be stipulated, in other words the consequence must be taken as the starting point. If the intention, on the other hand, is only to limit the duty to compensate but not to limit the protective scope, then the duties of care should be restricted.