Book Review

Eva Ondreasova, *Die Gehilfenhaftung – Eine rechtsvergleichende Untersuchung zum österreichischen Recht mit Vorschlägen zur Reform [Liability for auxiliaries – A Comparative Law Study on Austrian Law with Proposals for Reform]* (Manz Vienna, 2013). XXXVI + 258 pp. ISBN 978-3-214-00763-8. € 54 (paperback).

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Some time ago in this journal we reviewed a monograph on 'Vicarious Liability' written in 2010 by Paula Giliker[1] and we began the review by wondering about the fact that the idea of liability 'for others' could provoke so much controversial debate in the common law area while it seemed quite natural to a continental lawyer that the principle of *respondeat superior* should find its expression in the framework of tort law.

Now we are reviewing a more recent study taking up a closely related subject from an Austrian perspective: the liability of a person (whether a natural or a legal one), usually called the 'principal', for other persons who carry on an activity in his interest and/or on his behalf, normally designated as 'agents' or 'auxiliaries'. As the author – a staff member of the Vienna-based Institute for European Tort Law – explains, it is her intention to describe the historical evolution of the law in this field, to examine the problems posed by its application and interpretation and, finally, to deduce from this picture proposals for an up-to-date approach, taking into account the insights drawn from a comparison with other legal systems (mainly Belgian, Dutch, English, French, German, Greek, Italian and those of some Eastern-European countries) and from reform-projects existing on the national as well as the European level.

After having outlined the developments in the relevant provisions of the Austrian ABGB (*Allgemeines Bürgerliches Gesetzbuch*, Civil Code) since its first enactment in 1811 and through the amendments introduced in 1916 (Part II), Eva Ondreasova clarifies in Part III the different reasons which, from the angle of legal policy, may justify the attribution of the damaging conduct of a person acting as

1 *P Widmer*, Review of Paula Giliker, Vicarious Liability in Tort – A Comparative Perspective (2012) 3 JETL 140.

an auxiliary to another person who takes advantage of such activity. She shows how the concepts of the enlarged sphere of action and risk are combined with the principle of equation of benefit and disadvantage as well as with the economic rationale of risk spreading and socialisation of costs. An interesting aspect is also the idea – promoted by an economy which is increasingly based on the division of labour – that the principal's liability for his personnel helps to prevent a possible exoneration by the delegation of duties to actors on a lower level. This aspect is of particular importance in the context of a contractual relationship where the debtor remains responsible for the proper implementation of the performance promised, irrespective of the person who actually executes such obligation. Eva Ondreasova indicates from the outset via her comments that – in conformity with the tenor of the ABGB – she supports a holistic approach to delictual and contractual liability.

The peculiarity of contractual liability – or liability characterised by a special relationship or reliance (*Sonderbeziehung*) between the wrongdoer and the victim – is also the subject of the fourth Part of the thesis which deals with the provision of § 1313a ABGB. In this context, the author examines in particular up to what extent an intentional act of the auxiliary (*Erfüllungsgehilfe*) can be attributed to the principal. This issue is related to the question of whether damaging conduct of the auxiliary can be considered as lying within the scope of its functions or that of the fulfilment of the contract or if such behaviour has been adopted only on the specific occasion, on which the activity is carried out for the principal, that is, incidentally. A famous example raising this issue is the Italian case of a rape committed by a tax-inspector of a woman whom he had to inspect at her home. Ondreasova pleads for a more generous acceptance of the principal's liability in cases where the latter is in a better position to control the risk than the person suffering damage and in particular where this person is constrained in permitting access to his or her private sphere to possible interferences by the auxiliary. In other words, the question is whether the prejudice appears to result from the general risk of life which anybody has to bear for himself or if it has been caused by the activity which can be imputed to the principal.

In Part V of her book, Ondreasova discusses the question of an application by analogy of provisions regulating the responsibility for auxiliaries in the framework of strict liabilities. She supports this extension of liability as it is advocated by Austrian scholars and jurisprudence. It may be added to this convincing position that one can also come to this conclusion simply by arguing that, where someone is responsible for a certain objective risk, created by a particularly dangerous activity, he must also assume the responsibility for any person who is involved in such activity and thus contributes – precisely as an auxiliary – to the realisation of the specific risk. Swiss doctrine has described

and categorised this phenomenon as 'collateral liability for the behaviour of others'.

Part VI of Ondreasova's study, the most comprehensive and consistent chapter of the book, is dedicated to the liability for auxiliaries in a extra-contractual (delictual) context. The German expression for the auxiliary acting outside a special relationship between principal and victim is *Besorgungsgehilfe* as opposed to the *Erfüllungsgehilfe* which is involved in the performance of specific duties arising especially from a contract. In this respect, Austrian law is particularly restrictive in that it requires in § 1315 ABGB, as a condition of the principal's responsibility, that either the auxiliary has to have been unfit and incompetent for the job assigned to him or that he simply was a dangerous person. Ondreasova's endeavour, which corresponds to her unitary approach to the liability for auxiliaries, is directed towards a substantive convergence of such liability in- and outside the contractual (or some other special) relationship. This is – by the way – what already happens *de lege lata* but only via different tricky means aimed – in a more or less artificial way – at expanding the scope of contractual liability.

The target of renewal and unification is pursued – after a short critical digression on the question of assimilating technical means to human auxiliaries (Part VII) – on the basis of the previous comparative models and foremost by referring to three Austrian reform projects conceived by two different working parties with diverging approaches and one mediating draft of the Ministry of Justice. But the author is fully satisfied by none of these proposals and puts forward her ideal solution for discussion. She advocates a unique and integrated provision covering both situations – the simple recourse to an auxiliary for one's own business in general as well as resorting to other person's support for the performance of contractual or statutory obligations and duties. The only fundamental difference between the two scenarios is that, outside any special relationship (based on contract, statute or a specific duty of care triggered by a situation of heightened risk), an autonomous auxiliary (independent contractor) may also be regarded as belonging to the principal's sphere of risk and as acting on his behalf. An additional distinction is to be made depending on whether the principal is an entrepreneur (in the sense of the legislation on consumer protection) or not; if he is an ordinary private person drawing on an auxiliary's services for activities of daily life, he should – in Ondreasova's opinion – continue to be liable only for damage caused by the lack of ability or competence (*Untüchtigkeit)* of the auxiliary.

Eva Ondreasova's monograph is undoubtedly a very valuable contribution to legal research in the topical field of liability of employers and enterprises operating with a greater or smaller number of auxiliaries, and it will certainly be given consideration as soon as the reform movement in Austria and elsewhere – which

presently seems to remain in a dormant state – gets under way again. Perhaps one could even imagine a slightly more refined concept which would base itself on the idea of 'organisational risk' and, if followed through to its logical conclusion, could lead to a strict liability of enterprises for damage caused by any defect in the organisation of their work, be it in the deployment of human resources or in the use of technical equipment.

One thing is certain: liability in Biedermeier style, where the principal was held liable only for his or her negligence in the choice, instruction and supervision of a small group of employed craftsmen or domestics, has definitely passed. Eva Ondreasova's thesis constitutes a decisive step in the right direction.