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COMMENTARY ON

Art. 51 CO

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2. On different legal grounds

Art. 51

¹ Where two or more persons are liable for the same damage on different legal grounds, whether under tort law, contract law or by statute, the provision governing recourse among persons who have jointly caused damage is applicable *mutatis mutandis*.

² As a rule, compensation is provided first by those who are liable in tort and last by those who are deemed liable by statutory provision without being at fault or in breach of contractual obligation.

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I. GENERAL REMARKS

- 1 Art. 51 CO regulates the recourse between tortfeasors who have caused the same damage on different legal grounds (i.e., under tort or contract law or by statute) and refers to the recourse regulation in Art. 50 CO for this purpose. However, Art. 51 para. 2 CO establishes an independent liability regime.¹ Art. 51 CO primarily concerns the **internal relationship** between tortfeasors and does not explicitly mention the external relationship.²
- 2 The **scope of application** of the provision is not limited to damages caused by multiple liable tortfeasors on different legal grounds. Damages caused by multiple liable tortfeasors on the same legal ground are also litigated according to Art. 51 CO.³ Furthermore, the provision applies to claims for compensation for personal suffering and, via Art. 99 para. 3 CO, to contractual claims for damages.⁴ Outside the Code of Obligations, special laws sometimes refer to Art. 51 CO.⁵ Finally, Art. 51 CO takes precedence over cantonal law that would provide for a different recourse order.⁶

II. CLAIM COMPETITION IN THE EXTERNAL RELATIONSHIP

- 3 Due to the regulation of recourse among the tortfeasors stipulated in Art. 51 CO, there must be **joint and several liability** in the external relationship.⁷ In this respect, each of the tortfeasors are liable for the entire damage to which they have contributed.⁸ The injured party may decide upon the tortfeasor against whom they wish to proceed.⁹
- 4 Because the injured party has individual claims against each of the tortfeasors, several claims exist side by side. Given the injured party can only be satisfied once, the claims compete with each other. Thus, there is a so-called **claim competition** in the external relationship.¹⁰ Since Art. 51 CO does not explicitly provide for joint and several liability, the relationship is also referred to as imperfect joint and several liability.¹¹ In general, the legal consequences of claim competition are the same as those of (perfect) joint and several liability.¹²
- 5 Since the tortfeasors act separately in the context of Art. 51 CO, the question arises whether one tortfeasor can claim, against the injured party, that they are only slightly at fault compared to the other tortfeasors. This could result in a reduction of liability (Art. 43 para. 1 CO). The Federal Supreme Court theoretically allows the assertion of such **individual grounds for reduction** in the external relationship. However, the application is limited to those cases in which the fault of the tortfeasor sued by the injured party is so much less and so disproportionate to the fault of another tortfeasor that it

1. BSK-Graber, Art. 51 CO mn. 1.

2. Decision of the Federal Supreme Court 4C.27/2003 of 26.5.2003 consid. 3.4; CR-Werro/Perritaz, Art. 51 CO mn. 4; Fellmann/Kottmann, mn. 2835; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 1.

3. BGE 80 II 247 consid. 5 p. 253 et seq.; KUKO-Schönenberger, Art. 50/51 CO mn. 9.

4. BGE 115 II 42 consid. 1b; BSK-Graber, Art. 51 CO mn. 3; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 1; KUKO-Schönenberger, Art. 50/51 CO mn. 1 and 9; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 5; Oftinger/Stark, § 10 mn. 26.

5. Cf. for an overview Brehm, Art. 51 CO mn. 12 et seq.

6. BGE 115 II 24 consid. 2b; BGE 103 II 330 consid. 4b/dd.

7. Brehm, Art. 51 CO mn. 6; BSK-Graber, Art. 51 CO mn. 2; Fellmann/Kottmann, mn. 2835; KUKO-Schönenberger, Art. 50/51 CO mn. 2; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 2; Oftinger/Stark, § 10 mn. 13; Rey/Wildhaber, mn. 1681.

8. BGE 133 III 6 consid. 5.3.2; BGE 130 III 591 consid. 5.5.1.

9. BGE 114 II 342 consid. 2b; BGE 112 II 143 consid. 4a; Brehm, Art. 51 CO mn. 18.

10. Cf. for a more detailed description of the distinction between joint and several liability and claim competition Casanova, p. 9; CR-Werro/Perritaz, Intro. to Art. 50–51 CO mn. 30 et seq. and Perritaz, mn. 204 et seq.

11. Cf. commentary on Art. 50 CO mn. 3 et seq. for more information,

12. BGE 112 II 138 consid. 4a. BSK-Graber, Art. 51 CO mn. 8; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 4.

would be manifestly unjust and unacceptable to make the former liable for all damages in the external relationship.¹³ The majority of legal scholars wish for a more generous leeway for the assertion of individual grounds for reduction in the external relationship.¹⁴

- 6 **Objections** that can be raised jointly by the tortfeasors as well as those to which a tortfeasor is personally entitled are to be admitted in the external relationship without restriction.¹⁵
- 7 It should be noted that, according to the Federal Supreme Court, in the case of imperfect joint and several liability under Art. 51 CO, actions by the creditor that **interrupt the prescription** only affect the tortfeasor or tortfeasors concerned but not the other tortfeasors (cf. Art. 136 para. 1 CO).¹⁶

III. RECOURSE IN THE INTERNAL RELATIONSHIP

A. Recourse in general

- 8 If a claim was made against a tortfeasor by the injured party, and the claim amounted to more than the tortfeasor would have had to bear in the internal relationship, then a **right of recourse** against the other tortfeasors arises *ex iure proprio*.¹⁷ As soon as the debtor against whom the claim has been realised has satisfied the injured party, the claim of recourse arises and becomes due,¹⁸ including interest on the claim.¹⁹
- 9 An additional claim from **subrogation**, according to Art. 149 CO, does not exist in the case of imperfect joint and several liability.²⁰

B. Extent of the recourse

- 10 For the extent of the recourse, a distinction must be made between two constellations. Art. 51 CO regulates the case in which several persons are liable on different legal grounds (so-called **multi-typical joint and several liability**). In addition, there is the variant in which several persons are liable on the same legal grounds, but they cannot be accused of joint fault. This so-called **single-typical joint and several liability** is also covered, at least analogously, by Art. 51 CO.²¹ The order of recourse in the case of multi-typical joint and several liability is determined by the cascade provided for in Art. 51 para. 2 CO. The extent of the recourse in the case of single-typical joint and several liability is determined by judicial discretion.²²

13. BGE 127 III 257 consid. 6b; BGE 112 II 138 consid. 4a.

14. Casanova, p. 33; CR-Werro/Perritaz, Art. 51 CO mn. 6; Deschenaux/Tercier § 35 mn. 24; Fellmann/Kottmann, mn. 2907; Perritaz, mn. 507 et seq.; Rey/Wildhaber, mn. 1717; Schwenzer/Fountoulakis, mn. 88.19. Different opinion Brehm, Art. 51 CO mn. 29 et seq.; BSK-Graber, Art. 51 CO mn. 9; CHK-Mazan, Art. 51 CO mn. 12.

15. BSK-Graber, Art. 51 CO mn. 8; CHK-Mazan, Art. 51 CO mn. 10; Fellmann/Kottmann, mn. 2893; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 10. Cf. commentary on Art. 145 CO for further information.

16. BGE 133 III 6 consid. 5.1; BGE 127 III 257 consid. 6a; BGE 115 II 42 consid. 1b; BGE 104 II 225 consid. 4b.

17. BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; Brehm, Art. 51 CO mn. 45a; BSK-Graber, Art. 51 CO mn. 11; CR-Werro/Perritaz, Art. 51 CO mn. 10.

18. BGE 127 III 257 consid. 6c; BGE 115 II 42 consid. 2a; decision of the Federal Supreme Court 4A_656/2011 of 12.3.2012 consid. 4.2.

19. Decision of the Federal Supreme Court 4A_301/2016 of 15.12.2016 consid. 10.2; Brehm, Art. 51 CO mn. 48b; OFK-Fischer/Böhme/Gähwiler, Art. 50 CO mn. 17.

20. BGE 133 III 6 consid. 5.3.3; BGE 130 III 362 consid. 5.2; BGE 127 III 257 consid. 6c; BGE 115 II 42 consid. 2a. Special legal exceptions exist in the case of recourse by an insurer (see below mn. 29 et seq.).

21. BGE 80 II 247 consid. 5 p. 253 et seq.; Brehm, Art. 51 CO mn. 95; Deschenaux/Tercier, § 35 mn. 11; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 30; Perritaz, mn. 567; Rey/Wildhaber, mn. 1691.

22. See below mn. 12 et seq. and 21 et seq.

- 11 In the internal relationship there is **no longer joint and several liability**. The tortfeasor entitled to recourse can only sue the other tortfeasors to the extent of their internal share.²³ An exception to this principle is found in the recourse of the social insurer according to Art. 72 para. 2 Federal Act of 6 October 2000 on the General Part of Social Insurance Law (SR 830.1; hereinafter: GPSL). The inability of a tortfeasor to pay is governed by Art. 148 para. 3 CO.²⁴

C. Recourse in case of multi-typical joint and several liability

1. Liability groups

- 12 Art 51 para. 2 CO distinguishes between **three types** of liability groups: liability under tort law, under contract law and by statute.
- 13 Tortfeasors who are liable in **tort** within the meaning of Art. 51 para. 2 CO primarily include those liable under Art. 41 CO and must be personally at fault.²⁵ If a person liable by statute is also at fault, they must also be assigned to this category.²⁶ Someone who is simultaneously liable for the same damage under both contract and tort law is included as well.²⁷ Finally, a legal person may likewise be liable on tortious grounds because of the culpable actions of its governing bodies (Art. 55 para. 2 CC).²⁸
- 14 The second group includes those liable under **contract law**. Liability under contract law includes primary obligations to perform, such as contractual obligations to assume damages or to remedy damages (e.g., guarantee agreement or indemnity bond). In addition, it includes secondary obligations to perform, such as a breach of contract according to Art. 97 et seq. CO or the liability for associates according to Art. 101 CO.²⁹ Meanwhile, the insurer's recourse is governed exclusively by special law. Therefore, it is excluded from the recourse order of Art. 51 para. 2 CO.³⁰
- 15 Tortfeasors by **statutory provision** form the last group. Liability by statute consists of two types of strict liabilities: the simple objective liability and the aggravated objective liability.³¹ The former comprises the legal liability standards that are linked to a breach of the duty of care or a defective condition. This includes, but is not limited to, the liability of persons lacking capacity to consent (Art. 54 CO), employers (Art. 55 CO), property owners (Art. 58 CO), the head of the family (Art. 333 CC) and landowners (Art. 679 CC). In contrast, aggravated objective liability is linked to the mere operation of a dangerous object. The basis for this can be found, for example, in Art. 58 Federal Act of 19 December 1958 on Road Traffic (SR 741.01; hereinafter: RTA) for motor vehicle owners, in Art. 64 Federal Act of 21 December 1948 on Aviation (SR 748.0) for aircraft owners, in Art. 33 Federal Act of 4 October 1963 on Pipeline Systems for the Transport of Liquid or Gaseous Combustibles and Motor Fuels (SR 746.1; hereinafter: Pipelines Act) for owners of a pipeline system, or in Art. 27 Federal Act of 24 June

23. BGE 103 II 137 consid. 4d; Brehm, Art. 51 CO mn. 89; BSK-Graber, Art. 51 CO mn. 21; Casanova, S, 153 et seq.; Deschenaux/Tercier, § 36 mn. 49; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 16. Cf. commentary on Art. 148 CO mn. 10.

24. Cf. commentary on Art. 148 CO mn. 16 et seq. for further information.

25. BSK-Graber, Art. 51 CO mn. 15; Casanova, p. 143; Fellmann/Kottmann, mn. 2844; Perritaz, mn. 559.

26. BGE 107 II 489 consid. 5b; BSK-Graber, Art. 51 CO mn. 15; CR-Werro/Perritaz, Art. 51 CO mn. 28; Fellmann/Kottmann, mn. 2941. Effectively the same Deschenaux/Tercier, § 36 mn. 39; Rey/Wildhaber, mn. 1762. Critical Casanova, p. 165 et seq.

27. BGE 120 II 58 consid. 3a; BGE 113 II 246 consid. 3; Brehm, Art. 51 CO mn. 54a; CR-Werro/Perritaz, Art. 51 CO mn. 28; Fellmann/Kottmann, mn. 2846; Perritaz, mn. 559.

28. BGE 96 II 172 consid. 3; BSK-Graber, Art. 51 CO mn. 16; Bugnon, p. 73; CR-Werro/Perritaz, Art. 51 CO mn. 28; Fellmann/Kottmann, mn. 2845; Perritaz, mn. 559.

29. Brehm, Art. 51 CO mn. 57; BSK-Graber, Art. 51 CO mn. 17 et seq.; Casanova, p. 144 et seq.; CR-Werro/Perritaz, Art. 51 CO mn. 29; Fellmann/Kottmann, mn. 2850 et seq.; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 21; Perritaz, mn. 560.

30. BSK-Graber/Casanova, Art. 95c IPA mn. 12; CR-Werro/Perritaz, Art. 51 CO mn. 57; Werro, p. 20. See below mn. 29 et seq.

31. Brehm, Art. 51 CO mn. 74 et seq.; BSK-Graber, Art. 51 CO mn. 19; Casanova, p. 148; Fellmann/Kottmann, mn. 2862; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 22.

1902 concerning the Electrical Weak and Heavy Current Installations (SR 734.0) for owners of such an installation.³²

- 16 Special mention must be made of an **employer's recourse**. Assume an employee becomes incapacitated due to a car accident. In this case, the employer has a duty to continue paying wages under Art. 324a CO. However, because they have fulfilled their statutory or contractual duty irrespective of the harmful event, the employer does not belong to any of the groups mentioned in Art. 51 para. 2 CO.³³ Nevertheless, in such a case, the Federal Supreme Court has ruled that Art. 51 para. 2 CO applies by analogy, granting the employer a right of recourse against the party liable by statute. The obligation to continue to pay wages shall not work in favour of the strictly liable party.³⁴ The extent of the recourse amounts to the hypothetical damage that the employee would have suffered without the employer's payments.³⁵

2. Liability cascade

- 17 The three types of tortfeasors just identified above are not equally responsible for satisfying a claim. Rather, Art. 51 para. 2 CO presents a **cascade of liability**, according to which it is primarily the party liable on tortious grounds that must compensate a plaintiff for damages. Those liable on the ground of contract are liable in the second instance. Finally, those liable on statutory grounds must provide for compensation. This has the consequence that a person liable by statute, against whom the injured party has realised their claim, must proceed against a person liable in tort in order to recover damages. If there is a contractually liable party aside from the party liable in tort, the former's internal share is zero and cannot be sued by the strictly liable party. The contractually liable party only bears an internal share if there is no party liable under tort law.³⁶
- 18 If several liable parties against whom recourse is sought are in the **same liability group**, the apportionment of the internal quota is at the discretion of the court, in particular the personal fault of each party (Art. 50 para. 2 CO analogously).³⁷ The inability of a tortfeasor to pay is to be borne by the other tortfeasors in the same group, not by the tortfeasor of a more privileged group.³⁸
- 19 The law describes the cascade as a rule, although **exceptions** to it are conceivable.³⁹ Still, the courts consider themselves very much bound by the recourse rule of Art. 51 para. 2 CO and hardly deviate from it.⁴⁰ In BGE 144 III 319, the Federal Supreme Court granted a notable exception to the rule. An employee suffered burns in a shaft as a result of a leaking gas leak because he smoked while working. At issue was the employer's contractual liability for not having banned smoking, as well as the strict liability of the owner of the pipeline system from which the gas leaked (Art. 33 Pipelines Act). According to the Federal Supreme Court, the typical operational hazard emanating from pipelines manifested itself in the air-gas mixture regardless of the breach of contract. The conduct in breach of contract had only influenced the triggering of the hazard. As a result, a deviation from the liability cascade was necessary and the damage was divided equally between the employer and the pipeline owner.⁴¹

32. Cf. Brehm, Art. 51 CO mn. 74 et seq. for further examples.

33. Different opinion CHK-Mazan, Art. 51 CO mn. 16 that includes the employer among those liable by statute.

34. BGE 126 III 521 consid. 2b.

35. BGE 126 III 521 consid. 2c.

36. Brehm, Art. 51 CO mn. 86; Casanova, p. 154; CHK-Mazan, Art. 51 CO mn. 19; Fellmann/Kottmann, mn. 2942; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 25. Different opinion Perritaz, mn. 564.

37. Brehm, Art. 51 CO mn. 92; CR-Werro/Perritaz, Art. 51 CO mn. 35; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 27.

38. Brehm, Art. 51 CO mn. 93. Differentiating Bugnon, p. 115; Casanova, p. 50.

39. Explicitly BGE 56 II 396 consid. 2 p. 400.

40. BSK-Graber, Art. 51 CO mn. 22; CR-Werro/Perritaz, Art. 51 CO mn. 25; Perritaz, mn. 566. See for an overview Brehm, Art. 51 CO mn. 80a et seq.

- 20 The cascade only applies in the **internal relationship**. In the external relationship, the injured party is free to choose whether to turn to the strictly liable party or directly to the party liable in tort.⁴²

D. Recourse in case of single-typical joint and several liability

- 21 The recourse in the case of single-typical joint and several liability is measured at the free **discretion of the court**.⁴³ In the absence of different legal grounds, the application of the cascade of para. 2 is to be omitted. The distribution of the liability to pay damages is based on the following factors:
- 22 In the case of multiple tortfeasors **liable for separate faults**, the distribution shall be made according to the severity of the individual faults.⁴⁴ Further factors may be kinship, interest in the harmful act or additional grounds for liability.⁴⁵ In the case of equal fault, there is an equal distribution.⁴⁶ As already mentioned,⁴⁷ if the fault of governing body is attributed to the legal person, that party is tortiously liable in the external relationship. However, in the internal relationship the fault of the governing body is applied to the legal person by statute (Art. 55 para. 2 CC). This grants the legal person a full right of recourse against the culpable member of the governing body.⁴⁸
- 23 If more than one party is liable under **contract law**, the distribution is again at the discretion of the court. The extent of the (contractual) fault and the special nature of the legal transaction play a role.⁴⁹ For the insurer's recourse, see below.⁵⁰
- 24 If several parties liable **by statute** exist, the distribution is also at the discretion of the court, unless a special legal provision provides otherwise (cf. Art. 60 para. 2 RTA).⁵¹ Many legal scholars postulate that those liable to pay compensation on the ground of aggravated objective liability, due to the operational risk they pose, have to bear a part of the damage in advance, provided that they compete with those liable to pay compensation on the ground of simple objective liability.⁵²

E. Quota priority of the injured party

- 25 It may be that the injured party cannot claim the entire damage from the liable tortfeasor. This may be due to the fact that the tortfeasor can assert a reason for reduction or is contractually liable only up to a certain amount. In this case, the question of the relationship between the injured party's residual claim and the possible recourse claim of the liable debtor arises if both want to take action against another tortfeasor. A **problem** arises if the liability quota of the recourse debtor is also to be reduced, and they do not have to answer for the entire damage. In this case, the injured party has a quota priority so that they can satisfy their residual claim before the recourse claim of the other tortfeasor.⁵³

41. BGE 144 III 319 consid. 5.5.2 et seq. It should be noted that in casu it was not the employer directly, but the social insurers, who had entered the employer's position as a result of subrogation and wanted to take recover damages.

42. Brehm, Art. 51 CO mn. 47; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 25.

43. BGE 80 II 247 consid. 5 p. 253 et seq.; Fellmann/Kottmann, mn. 2976; Oftringer/Stark, § 10 mn. 60; Perritaz, mn. 567.

44. BGE 112 II 138 consid. 4a; Bugnon, p. 78; Casanova, p. 215; Deschenaux/Tercier, § 36 mn. 25; Fellmann/Kottmann, mn. 2978; Rey/Wildhaber, mn. 1774.

45. Brehm, Art. 51 CO mn. 100 et seq.; Bugnon, p. 66 et seq.; Fellmann/Kottmann, mn. 2979; Perritaz, mn. 568.

46. Fellmann/Kottmann, mn. 2978; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 32; Rey/Wildhaber, mn. 1774.

47. See above mn. 13.

48. Brehm, Art. 51 CO mn. 102; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 33.

49. Brehm, Art. 51 CO mn. 105a et seq.; Deschenaux/Tercier, § 36 mn. 29; Fellmann/Kottmann, mn. 2980; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 35; Perritaz, mn. 569; Rey/Wildhaber, mn. 1776.

50. Mn. 29 et seq.

51. Brehm, Art. 51 CO mn. 133; Fellmann/Kottmann, mn. 2985. Cf. BGE 116 II 645 consid. 3b.

52. Bugnon, p. 83; Fellmann/Kottmann, mn. 2986; Perritaz, mn. 573; Rey/Wildhaber, mn. 1779. Disapproving Casanova, p. 216. Cf. Brehm, Art. 51 CO mn. 133 et seq. for further reference.

- 26 So far, case law has applied the quota priority only if the recourse claim is based on **subrogation**.⁵⁴ However, legal scholars would also apply it to recourse claims under Art. 51 CO.⁵⁵ In certain special laws, the quota priority has already found its way into the codification (e.g. Art. 88 RTA or Art. 73 para. 1 GPSL).

F. Prescription of the recourse claim

- 27 The right of recourse becomes **time-barred** within three years from the day on which the injured party has been satisfied, and the tortfeasor entitled to recourse learns of their recourse claim (Art. 139 CO). Moreover, an absolute ten-year prescription period is to be assumed from the time of performance to the injured party.⁵⁶
- 28 In addition, the Federal Supreme Court derived from Art. 2 para. 2 CC that the recourse creditor must **notify** the recourse debtor (as soon as it is reasonable to do so) that they intend to make a claim against them. Otherwise, according to the Federal Supreme Court, the claim of recourse is forfeited. Under certain circumstances, the prescription period for the recourse claim may not have been prescribed yet, whilst the liability of the recourse debtor in the external relationship has already been time-barred. Without such notification, the recourse debtor runs the risk of disposing of exculpatory evidence.⁵⁷

IV. THE INSURER'S RECOURSE

- 29 Accord-
ing to Art. 95c para. 2 Insurance Policies Act of 2 April 1908 (SR 221.229.1; hereinafter: IPA), the **indemnity insurer** steps into the rights of the insured for the item of loss covered by it. This is a subrogation according to Art. 149 CO. The insurer can thus take recourse against all tortfeasors, regardless of whether they are liable on the ground of tort law, contract law or by statutory provision.⁵⁸ Until the entry into force of Art. 95c IPA on 1 January 2022, the provision on the insurer's recourse was governed by Art. 72 IPA. The old provision stipulated in para. 1 that the claim for compensation against third parties arising from a tortious act was transferred to the insurer. Therefore, for a long time, the Federal Supreme Court assumed that the insurer only had recourse against third parties liable in tort. There was no provision for recourse against parties liable by contract or by statute in application of the liability cascade of Art. 51 para. 2 CO.⁵⁹ In BGE 144 III 209, it changed its case law and granted the insurer the right of recourse against all those who are not contractually liable within the meaning of Art. 41 et seq. CO, thus also including persons liable by statute. Art. 51 para. 2 CO no longer applies.⁶⁰

53. Brehm, Art. 51 CO mn. 135 et seq.; BSK-Graber, Art. 51 CO mn. 33; BSK-Graber/Casanova, Art. 95c IPA mn. 47; CR-Werro/Perritaz, Art. 51 CO mn. 46; Werro, p. 21.

54. BGE 134 III 636 consid. 1.3.2; BGE 60 II 178 consid. 5 p. 189.

55. Brehm, Art. 51 CO mn. 139; BSK-Graber, Art. 51 CO mn. 34; Schaer, mn. 715 et seq.

56. Cf. commentary on Art. 51 CO and on Art. 148 CO mn. 14 for further reference. Different opinion notably OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 51 regarding the case law on the old prescription law (BGE 133 III 6), according to which the ten-year period already begins at the time of the damaging event. Critical of the case law BSK-Graber, Art. 51 CO mn. 36.

57. BGE 133 III 6 consid. 5.3.5 p. 29; BGE 127 III 257 consid. 6c; disapproving Casanova, p. 132; controversial in CR-Werro/Perritaz, Art. 51 CO mn. 22.

58. CR-Perritaz, Art. 95c IPA mn. 42; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 41; Werro, p. 20.

59. BGE 137 III 352 consid. 4.1.

60. BGE 144 III 209 consid. 2.6.

- 30 The rights of the insured are also subrogated to the **liability insurer** pursuant to Art. 95c para. 2 IPA. However, the insurer is still bound by the liability cascade of Art. 51 para. 2 CO. Otherwise, the position of the other liable parties would deteriorate.⁶¹
- 31 Art. 96 IPA applies to the **fixed sum insurer**. Under this provision, the injured party's claim against the tortfeasor is not transferred to the insurer. Rather, there are two separate, not mutually exclusive claims against the tortfeasor as well as against the insurance company.⁶²
- 32 The **social insurance institution** has an integral right of recourse according to Art. 72 GPSL. The cascade of Art. 51 para. 2 CO does not apply.⁶³ The claims of the insured person are subrogated up to the amount of the statutory benefits (Art. 72 para. 1 GPSL). In principle, the social insurer can fully recover from any tortfeasor and the tortfeasors are jointly and severally liable to the insurer (Art. 72 para. 2 GPSL).⁶⁴ However, Art. 75 GPSL provides for restrictions on the institution's claim in favour of spouses, relatives, employers and others. In recent Federal Supreme Court rulings, the institution's right of recourse has been further restricted. The strictly liable party, who is not privileged by Art. 75 GPSL, is only liable to the social insurer to the extent that they would have to bear the damage in the internal relationship with the liable employer of the injured party, as if the employer's privilege did not exist.⁶⁵ Subsequently, the social insurer may no longer have a claim against the strictly liable tortfeasor due to the liability cascade of Art. 51 para. 2 CO favouring the tortfeasor by statutory provision over the contractually liable employer.⁶⁶

BIBLIOGRAPHY

Brehm Roland, Berner Kommentar, Obligationenrecht, Allgemeine Bestimmungen, Die Entstehung durch unerlaubte Handlung, Art. 41–61 OR, 5th ed., Bern 2021.

Bugnon Hubert, L'action récursoire en matière de concours de responsabilités civiles, Entlebuch 1982.

Casanova Gion Christian, Ausgleichsanspruch und Ausgleichsordnung, Zurich et al. 2010.

Deschenaux Henri/Tercier Pierre, La responsabilité civile, 2nd ed., Bern 1982.

Fellmann Walter/Kottmann Andrea, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG, Bern 2012.

Fischer Willi/Böhme Anna/Gähwiler Fabian, commentary on Art. 50 CO and on Art. 51 CO, in: Kren Kostkiewicz Jolanta/Amstutz Marc/Wolf Stephan/Fankhauser Roland (eds.), OR Kommentar, 4th ed., Zurich 2022.

Graber Christoph K., commentary on Art. 51 CO, in: Widmer Lüchinger Corinne/Oser David (eds.), Basler Kommentar, Obligationenrecht I, 7th ed., Basel 2020.

61. BSK-Graber, Art. 51 CO mn. 28c; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 42; Werro, p. 21.

62. BGE 95 II 411 consid. 1b; Brehm, Art. 51 CO mn. 66; BSK-Graber/Casanova, Art. 96 IPA mn. 1 and 17; CR-Perritaz, Art. 96 IPA mn. 55; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 44.

63. BGE 119 II 289 consid. 5b; Brehm, Art. 51 CO mn. 67b; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 45.

64. BSK-Graber, Art. 51 CO mn. 30; CR-Werro/Perritaz, Art. 51 CO mn. 40.

65. BGE 143 III 79 consid. 6.1.3.3 and confirmed in BGE 146 III 362; BSK-Graber, Art. 51 CO mn. 30a; CR-Werro/Perritaz, Art. 51 CO mn. 45; OFK-Fischer/Böhme/Gähwiler, Art. 51 CO mn. 46.

66. It has to remain noted that the court may deviate from the liability cascade as seen in BGE 144 III 319 (see above mn. 19).

Graber Christoph K./Casanova Gion Christian, commentary on Art. 95c IPA and on Art. 96 IPA, in: Grolimund Pascal/Loacker Leander D./Schnyder Anton K. (eds.), Basler Kommentar, Versicherungsvertragsgesetz, 2nd ed., Basel 2023.

Mazan Stephan, commentary on Art. 51 CO, in: Furrer Andreas/Schnyder Anton K. (eds.), Handkommentar zum Schweizer Privatrecht, Obligationenrecht Allgemeine Bestimmungen, 3rd ed., Zurich et al. 2016.

Oftinger Karl/Stark Emil W., Schweizerisches Haftpflichtrecht, Allgemeiner Teil, Band I, Zurich 1995.

Perritaz Vincent, Le concours d'actions et la solidarité, Zurich et al. 2017.

Perritaz Vincent, commentary on Art. 95c IPA and on Art. 96 IPA, in: Brulhart Vincent/Frésard-Fellay Ghislaine/Subilia Olivier (eds.), Commentaire romand, Loi sur le contrat d'assurance, Basel 2022.

Schaer Roland, Grundzüge des Zusammenwirkens von Schadenausgleichssystemen, Basel et al. 1984.

Schönenberger Beat, commentary on Art. 50/51 CO, in: Honsell Heinrich (ed.), Kurzkommentar Obligationenrecht, Basel 2014.

Schwenzer Ingeborg/Fountoulakis Christiana, Schweizerisches Obligationenrecht Allgemeiner Teil, 8th ed., Bern 2020.

Werro Franz, Le recours du responsable civil (art. 51 al. 2 CO), celui de l'assureur privé (art. 95c al. 2 LCA) et la prescription de l'action récursoire (art. 139 CO), ZSR 140 (2021) I, p. 3-32.

Werro Franz/Perritaz Vincent, commentary on Introduction to Art. 50–51 CO and on Art. 51 CO, in: Thévenoz Luc/Werro Franz (eds.), Commentaire romand, Code des obligations I, 3rd ed., Basel 2021.