



# The Law of Torts in the DCFR

**Hamburg, 8 October 2009**

# Basic Structure

## 3 Elements of Liability:

- legally relevant damage
- accountability: intention, negligence, strict liability
- causation: causal link between behavior and damage



# Art. 1:101: Basic Rule

- (1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.**
  
- (2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 (Accountability) so provides.**



# Protected Interests as Gatekeepers

- **Art. VI. – 1:101** suggests that (only) damage is required, not infringement of a protected interest.
- **Art. VI. – 2:101 (1)** corrects this impression.



# Art. 2:101: Meaning of Legally Relevant Damage

- (1) **Loss, whether economic or non-economic, or injury is legally relevant damage if:**
  - a) one of the following rules of this Chapter so provides;
  - b) the loss or injury results from a violation of a right otherwise conferred by the law; or
  - c) the loss or injury results from a violation of an interest worthy of legal protection.
- (2) **In any case covered only by sub-paragraphs (b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be *fair and reasonable* for there to be a right to reparation or prevention, as the case may be, under articles 1:101 (Basic rule) or 1:102 (Prevention).**
- (3) **In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the *ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy.***

# Damage vs. Protected Interests

- **Function of Art. VI. – 2:101:** delineating the scope of protection
- **During the 19th Century:** move to abstraction; cf. Art. 1382, 1383 Cc; §§ 823, 826 BGB
- **The DCFR:** return to specificity; enumeration
  - detailed description of the scope of protection in Art. VI. – 2:201 to Art. VI. – 2:211
  - additional supply of a general clause, Art. VI. – 2:101 (1) (a):
    - proviso of “fair and reasonable“ Art. VI. – 2:101 (2)
    - laundry list of criteria, Art. VI. – 2:101 (3):
      - ground of accountability
      - nature and proximity of the damage
      - reasonable expectation of the person who suffers the damage
      - considerations of public policy

# Scope of Protection – Criticism

- **Human Life and Bereavement Damages, Art. VI. – 2:202**
  - damages for non-pecuniary loss incurred by third parties in cases of wrongful death or injury of the primary victim
  - no compensation for loss of human life as such
  - multitude of claims and claimants in ordinary personal injury cases instead of concentrating compensation on the primary victim in cases of mere injury → high transaction costs
- **What Kinds of Property Are Protected in Art. VI. – 2:206?**
  - only things? – cf. Art. VI. – 2:206 (1)
  - intellectual property rights? – relation to Enforcement Directive 2004/48/EC?



# Injury as Such, Art. 6:204

- **3 Categories of Damage:**
  - economic loss, Art. VI. – 2:101 (4) (a)
  - non-economic loss, Art. VI. – 2:101 (4) (b)
  - injury as such, Art. VI. – 2:201 (1),
- **Annex I:** “Damage’ means any type of detrimental effect. It includes loss and injury.”

# Injury as Such – Discussion

- Injury as such is a reception of „*danno biologico*“, as developed in Italian law.
- **Italian law** operates with a narrow concept of non-pecuniary loss: pain and suffering only.
- **Member States** other than Italy have a broader concept of non-pecuniary loss, including loss of amenities of life.
- **Art. VI. – 2:101 (4) (b) DCFR** supplies a broad definition of non-economic loss, including „impairment of the quality of life“.
- Recognizing injury as such as a supplementary category of loss (in addition to impairment of quality of life) results in double compensation.

# Environmental Damage, Art. 2:209

- **“Burdens incurred by the State or designated competent authorities in restoring substantially impaired natural elements constituting the environment, such as air, water, soil, flora and fauna, are legally relevant damage to the State or the authorities concerned.”**
- **Questions:**
  - „burdens incurred“ are explicitly recognized as a category of loss in Art. VI. – 2:209 only – what about the other heads of tort?
  - Directive 2004/35/EC on Environmental Liability
    - incorporates liability for environmental harm into a regime of administrative law
    - is much more restrictive with regard to both, the scope of protection and the measure of damages



# Pure Economic Loss – Economic Analysis

## Reasons for Discriminating Pure Economic Losses:

- divergence between private and social loss – fair competition
- protection of contractual risk allocation – no liability in tort for breach of contract
- channelling compensation to the primary victim – lost earnings



# Pure Economic Loss in the DCFR

- **List of Specific Heads of Liability for Pure Economic Loss:**
  - dissemination of incorrect information (2:204),
  - breach of confidence (2:205),
  - incorrect advice (2:207),
  - impairment of business (2:208),
  - fraud (2:210),
  - inducement of breach of contract (2:211)
- **What Is Missing:**
  - wrongful trading and other insolvency-related torts,
  - capital market fraud (Rule 10b(5) USC),
  - corporate torts (veil piercing etc.)



# Pure Economic Loss – Critique

## Combination of List of Specific Torts and a General Clause

- introduced to balance certainty and flexibility
- however: specific torts are not conclusive, general clause allows for anything
  - high degree of uncertainty, little foreseeability of outcomes
  - no harmonization across European jurisdictions



# Accountability

## 3 Categories of Accountability

- **intention**, Art. VI. – 3:101
- **negligence**, Art. VI. – 3:102
- accountability **without intention or negligence**, Art. VI. – 3:202 ff.



# Negligence, Art. VI. – 3:102

**“conduct which either does not meet the particular standard of care provided by a statutory provision (...) or does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case.”**

## **Critique:**

- Hand-Test or other economic principle is missing – but “reasonable person” standard broad enough to embrace economic concept.

# Strict Liability, Art. VI. – 3:202 ff.

- **buildings**, Art. VI. – 3:202
- **animals**, Art. VI. – 3:203
- **defective Products**, Art. VI. – 3:204
- **motor cars**, Art. VI. – 3:205
- **dangerous substances and emissions**, Art. VI. – 3:206
- **escape clause for member states**, Art. VI. – 3:207

**but:**

- **airplanes and railroads** are missing

# Strict Liability – Basic Features

- **Divergent Principles of Accountability:**
  - keeping and controlling a source of danger: animals, cars, dangerous substances and emissions
  - accountability for defects of a movable or immovable thing: buildings and products
- **Economic Analysis:**
  - Strict liability should attach to activities where substantial damages cannot be prevented by taking due care – first category above.
  - Negligence is appropriate for activities where taking care is sufficient to avoid harm – second category above.



# Products, Substances, Emissions

- **Art. VI. – 3:204** is a short version of the Products Liability Directive.
- **Art. VI. – 3:206** is a hybrid between liability of operators of installations and liability for environmental harm.
  - In passing, Art. VI. – 3:206 (2) (cl. 2) mentions liability for damage caused by genetic engineering.
  - Art. VI. – 3:206 (5) accepts *regulatory compliance defence* even though the environmental liability directive does not and economic analysis advises against it.



# Strict Liability – Questions

- **Why No General Clause For Abnormally Dangerous Activities?**
  - too little legal certainty?
  - political / strategic reasons?
  
- **PETL Art. 5:101. Abnormally Dangerous Activities**
  - (1) A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.
  - (2) An activity is abnormally dangerous if
    - a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and
    - b) it is not a matter of common usage.

# Strict Liability – Escape Clause

- **Art. VI. – 3:207:**  
**A person is also accountable for the causation of legally relevant damage if national law so provides where it**
  - a) relates to a source of danger which is not within Articles VI.-3:104 – VI.-3:205,**
  - b) relates to substances or emissions, or**
  - c) disapplies Article VI.-3:204 (4)(e).**
  
- Why does the escape clause authorize the Member States to expand the catalogue of strict liability but not the European judges?

# Causation, Art. VI. – 4:101

- (1) **“A person causes legally relevant damage to another if the damage is to be regarded as a consequence of that person’s conduct or the source of danger for which that person is responsible.”**

## **Critique:**

- **“is to be regarded** as a consequence of that person’s conduct”.
  - doing away with the but-for test?
  - „normative“ concept of causation?
  - discretion of the judge?

# Multiple Tortfeasors

- **Art. VI. – 4:102: Collaboration** (cf. § 830 (1) (cl. 1), (2) BGB)
  - does it work without an European Criminal Law as a guide and reference system?
- **Art. VI. – 4:103: Alternative Causes**
  - model: Art. 6:99 NBW
  - broad concept of alternative causation
  - implicit rejection of proportional liability in favour of joint and several liability (*Fairchild, Barker*)

# Proportional Liability as an Alternative

## PETL Art. 3:103. Alternative Causes

- (1)** In case of multiple activities, where each of them alone would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity is regarded as a cause *to the extent corresponding to the likelihood* that it may have caused the victim's damage.
- (2)** If, in case of multiple victims, it remains uncertain whether a particular victim's damage has been caused by an activity, while it is likely that it did not cause the damage of all victims, the activity is regarded as a cause of the damage suffered by all victims *in proportion to the likelihood that it may have caused the damage of a particular victim*.

***Barker v. Corus UK Ltd., [2006] 2***

**W.L.R. 1027**

<b>Asbest Exposition</b>	<b>Duration total: 33 weeks</b>	<b>Liability: total: 100%</b>
<b>Employer No. 1:</b> 1958, 6 weeks	6/33 or 2/11	2/11 or 18%
<b>Employer No. 2:</b> 1962, 6 months	24/33 or 8/11	8/11 or 73%
<b>self-employed:</b> 3 weeks in 1968 – 75	3/33 or 1/11	1/11 or 9%



# Defences

- **consent**, Art. VI. – 5:101 (1)
- **acting at own risk**, Art. VI. – 5:101 (2)
- **contributory fault**, Art. VI. – 5:102
- **collaboration of criminals**, Art. VI. – 5:103
- **legal authority**, Art. VI. – 5:201
- **self-defence, necessity**, Art. VI. – 5:202
- **protection of public interest**, Art. VI. – 5:203
- **insanity**, Art. VI. – 5:301
- **force majeure**, Art. VI. – 5:302
- **contractual exclusion**, Art. VI. – 5:401



# Contributory Fault, Art. VI. – 5:102

## Model of the *Loi Badinter*:

no reduction of compensation in cases  
of

- “**insubstantial fault**“, Art. VI. – 5:102 (2)  
(a)
- “**insubstantial causation**“, Art. VI. –  
5:102 (2) (b)
- **motor accidents**, Art. VI. – 5:102 (2) (c)



# Art. 5:102 (2) – Questions

- **Art. VI. – 5:102 (2) (a)**
  - “insubstantial fault” is not confined to cases of personal injury
- **Art. VI. – 5:102 (2) (b)**
  - “insubstantial causation“ does not exist (either/or)
- **Art. VI. – 5:102 (2) (c)**
  - not confined to drivers as tortfeasors (other than loi Badinter)
- **Central Issue:**
  - DCFR underestimates importance of victim’s incentives to take care, particularly in cases of strict liability, like motor accidents.
  - Why favoring the victim by holding it to a more lenient standard than the tortfeasor?

# Art. 5:203: Protection of Public Interest

- “A person has a defence if legally relevant **damage is caused in necessary protection of values fundamental to a democratic society**, in particular where damage is caused by dissemination of information in the media.”
- **Critique:**
  - general clause allowing to reject liability, well founded otherwise
  - fundamental values are plentiful – who is to decide?

# Remedies

- **principle of full compensation**, Art. VI. – 6:101 (1)
- **restitution in kind or compensation in money**, Art. VI. – 6:101 (2)
- **cost of repair or depreciation of value**, Art. VI. – 6:101 (3)
- **disgorgement of gains**, Art. VI. – 6:101 (4)
- ***de minimis non curat* ...**, Art. VI. – 6:102
- **freedom of the victim**, Art. VI. – 6:201
- **reduction clause**, Art. VI. – 6:202
- **injury as such**, Art. VI. – 6:204
- **right to prevention**, Art. VI. – 6:301

# Principle of Full Compensation

- applies to pecuniary as well as non-pecuniary losses
- equal treatment warranted from a deterrence point of view
- full compensation of non-pecuniary losses not warranted under the insurance rationale of tort liability



# Restitution in Kind vs. Compensation in Money

## Art. VI. – 6.101

- (1) ...
- (2) **Reparation may be in money (compensation) or otherwise, as is most appropriate, having regard to the kind and extent of damage suffered and all the other circumstances of the case.**
- (3) **Where a tangible object is damaged, compensation equal to its depreciation of value is to be awarded instead of the cost of its repair if the cost of repair unreasonably exceeds the depreciation of value. (...)**
- (4) ...

# Restitution in Kind vs. Compensation in Money

- **Art. VI. – 6:101 (2)** leaves decision to judicial discretion, (“as is most appropriate”).
- **Art. VI. – 6:101 (3)** awards cost of repair even if they exceed depreciation in value.
- **Art. VI. – 6:201** allows the victim to opt for “cost of repair“ even in cases of personal injury.



# Disgorgement of Gains, Art. VI. – 6:101 (4)

- “As an alternative to reinstatement under paragraph (1), but only where this is reasonable, reparation may take the form of recovery from the person accountable for the causation of the legally relevant damage of any advantage obtained by the latter in connection with causing the damage.”
- **Praise:** Recognition of “gains-based damages” – disgorgement of gains as a remedy in tort law
- **Criticism:** “but only where this is reasonable” is too weak a requirement to be operable. Relevant case:
  - lucrative torts: Tortfeasor derives a benefit from the wrong that is greater than the harm to the victim (Art. 1371 of the French Avant-Projet: *faute lucrative*).

## Art. 1371 Avant-Projet

„L’auteur d’une **faute manifestement délibérée**, et notamment d’une **faute lucrative**, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d’octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables“.

# Reduction Clause, Art. VI. – 6:202

**“Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.”**



# Reduction Clause – Questions

- **Where it is fair and reasonable** – there is nothing softer.
- **either wholly or in part** – complete exclusion of claims well-founded otherwise
- **liability in full would be disproportionate to ... the extent of the damage** – How can liability be disproportionate to the quantum of *damage*?
- **or the means to prevent it** – What does it mean?
- **What Is Missing: Financial Situation of the Parties**
  - financial imbalance between the parties (cliché: rich victim, poor tortfeasor) is primary concern
  - attitude towards risk of loss as a factor in allocating liability (secondary accident costs)
  - what about first party and of third party insurance?

# Book VI and the Acquis Communautaire

- **Art. VI. – 3:204** codifies the Products Liability Directive without reflection.
  - the relationship between the Directive and the general law of torts is being ignored
  - in spite of ECJ, 10.01.2006, Case 402/03 (*Skov ./ Bilka*)
- **Art. VI. – 2: 209** completely ignores the Directive on Environmental Liability.

# Much Law, Little Certainty

## Reasonableness as the Smallest Common Denominator

- Art. VI. – 2:101 (1) (c), (2), (3): scope of protection
- Art. VI. – 4:101: concept of causation
- Art. VI. – 5:401 (2) (b): exclusion of liability
- Art. VI. – 5:203: public interest exception
- Art. VI. – 6:101 (4): disgorgement of gains
- Art. VI. – 6:103: right to prevention
- Art. VI. – 6:202: reduction clause

# Crucial Issues Remain Unresolved

- scope of protection in the area of pure economic loss
- rationale and scope of strict liability
- prerequisites for disgorgement of gains

