Non-Contractual Liability Arising out of Damage Caused to Another
(PEL Liab. Dam.)

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Chapter 1: Fundamental provisions

Introduction

A. The concept of non-contractual liability arising out of damage caused to another

1. Definition and purpose. In all the systems of the European Union the law of non-contractual liability arising out of damage caused to another (in the Common Law called tort law or the law of torts, in most but not all other jurisdictions referred to as law of delict) is that area of the law in which it is decided whether one who has suffered a damage can on that account demand reparation (whether in money or in kind) from another with whom there may be no other connection in law than the incident of causation of damage itself. That distinguishes the law of tort (or delict) from all other systems of compensation for damage – in particular therefore those in the law of contract and those compensation schemes which are organised on the basis of insurance law. In distinction to the latter, moreover, the law of tort guarantees to the victim only that there is someone who is liable and not, by contrast, that he is also able to satisfy his obligation. The purpose of the law of tort consists predominantly in protecting human and basic rights at the level of private law, that is to say horizontally between citizens inter se, with the legal remedies made mutually available.

2. Prevention of impending damage. For reasons of integral association, the following principles also deal with certain aspects of the rights of one who would suffer an impending damage to prevent it. The text takes no view on the theoretical question whether or not this branch of the law forms an integral segment of tort law, belongs to other parts of the law (such as e.g. property law or the law relating to natural persons) or stands on its own.

B. The structure of the existing laws of non-contractual liability arising out of damage caused to another

3. Differences in external representation. The differences between the existing national laws of non-contractual liability arising out of damage caused to another in the European Union lie much less in their substantive outcomes for given situations than in their external representation (their structures). Certainly there are also, here and there, differences in conception in judging concrete situations of conflict in society. The greatest obstructive boulder on the path to a better mutual understanding is, or rather has been until now, the divergence in theoretical constructs devised for the functioning of the law of non-contractual liability.
4. **Two strands.** This relates to both of the parts from which the law in this area is primarily made up and is quite independent of how strongly the differences between those parts are stressed or, from a pan-European perspective, should be stressed. The two strands are, on the one hand, liability for a deviation from the required standard of behaviour, i.e. liability for wrongs committed intentionally or negligently\(^1\) and, on the other hand, all those forms of liability according to which the defendant is accountable for a given damage although the defendant (whether a natural or legal person) has behaved perfectly correctly.

5. **The Common Law and the Scandinavian countries.** Leaving the details to one side, it is possible at least in regard to the structure of the law of liability for breach of duty to distinguish between three groups of jurisdictions. There is at one end of the spectrum the Common Law of England, Ireland and Cyprus with its system of individual torts, which resembles the way continental European systems set out their penal laws. There are roughly 70 to 75 torts.\(^2\) However, those which really matter in day to day practice are rather limited in number: trespass, negligence, breach of statutory duty, nuisance, and defamation. Among these, negligence is the most important. In addition one finds many statutory regulations, normally with a very small field of application. It is probably fair to say that no European jurisdiction has as many tort law statutes as England. All other European systems have their starting point in one (sometimes subdivided) basic tort law provision. This is true not only for continental Europe’s codifications, but also for the three Scandinavian tort law systems as well. The latter refer to this basic provision as the “culpa-rule”, be it part of their common law (as in Denmark) or expressly stated in a statute on the compensation of damage (as in Sweden and Finland).

6. **France, Belgium, Luxembourg, Spain.** On closer inspection, however, it emerges that these basic tort law provisions differ in many respects. It has become customary to place in one box those Romance systems which do no more than rely on the general principle that everybody who through their faute causes damage to another must make good the damage (French, Belgian and Luxembourgian CC arts. 1382 and 1383). Spanish CC art. 1902 is in very similar terms, the only difference being that its wording was deliberately drafted so as to cover the tortious liability of legal persons as well.

7. **Greece and Italy.** Whether or not one can say that Greece and Italy also rely on a “general clause” is probably open to debate. Greek CC art. 914 provides for what in German legal terminology is called a “blanket provision”. Taken literally Greek CC art. 914 contains no more than the tort of breach of statutory duty. A cause of action in tort requires that the defendant’s behaviour was “para ton nomon”, against the – or a – law. However, ever since the Greek courts decided that statutory provisions like the one on “Good Faith and Fair Dealing” amount to “statutes” within the meaning of CC art. 914 the conclusion seems inevitable that Greece, too, has been moving towards a “general clause”. The situation is rather similar in Italy. Italian CC art. 2043 differs from its French model only in so far as it expressly requires an “unjust damage”, a danno

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\(^1\) As to the technical meaning of these notions within the framework of these model rules see Articles 3:101 (Intention) and 3:102 (Negligence).

ingiusto. Originally this term was interpreted in a way very much along the lines of German CC § 823(1), but since then the Italian courts have changed the situation in many important respects, so much so that the present Italian tort law seems to be much closer to the French than to the German.

8. Portugal, Austria, Germany. Countries like Portugal, Austria\(^3\) and Germany must, at least on the face of it, be put in another box. The approach of their basic provisions is much narrower, the narrowest being Portuguese CC art. 483(1). It has the infringement of an absolute right and the breach of statutory duty as fundamental causes of action. There is nothing more. Even the subsidiary tort of causing damage intentionally and in breach of bonos mores, of good morals, as known (albeit with differences in wording) in Austria, Estonia, Germany, the Netherlands, Greece and Finland, is missing from the Code (though Portuguese law knows techniques to fill this gap). Austria, too, relies on a list of protected interests. Although Austrian CC § 1295(1) recognises no such list of “absolute rights” (the wording of this provision amounts to a classical general clause) the Austrian courts interpret it very much along the lines of the wording of the German Civil Code. The latter divides its basic tort law provision into three separate headings. There are three fundamental causes of action: the infringement of an absolute right, breach of statutory duty and breach of bonos mores with the intention to cause damage (CC §§ 823(1), (2) and 826).

9. The Netherlands. Dutch CC art 6:162 reads (in the translation by Haanappel/Mackaay/Warendorf/Thomas, Netherlands Business Legislation): “(1) A person who commits an unlawful act against another which is attributable to him, must repair the damage suffered by the other as a consequence thereof. (2) Except where there are grounds for justification, the following acts are deemed unlawful: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct. (3) A wrongdoer is responsible for the commission of an unlawful act if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.” The Dutch solution thus contains a compromise between the German and the French model. Dutch tort law operates (like the German) with the infringement of a right and the breach of statutory duty as distinct causes of action. The “rights” are not enumerated, however, and need not be “absolute” in character. Furthermore, the third alternative of Dutch CC art. 6:162(2) is sufficiently flexible to cover all other situations. Unlike the equivalent Austrian, German and Greek provisions on liability for breach of bonos mores, it does not require an intention to cause damage.

10. Cyprus and Malta. In May 2004 the European Union was enlarged to include ten further Member States. Among the tort laws of these countries too the differences in legal systems referred to above are likewise evident. Cyprus, as far as tort law is concerned, is a Common Law jurisdiction. While there is a dedicated statute on tort law (the

\(^3\) A proposal has been made to reform the law on damages in the ABGB in Austria; a draft to this effect was submitted to the Department of Justice in 2005. Particulars in Griss, JBl 2005, 273-288 as well as in Griss/Kathrein/Koziol (-Griss), Entwurf eines neuen österreichischen Schadensersatzrechts.
Civil Wrongs Law), s. 29(1)(c) of the Courts of Justice Law (Law 14 of 1960) provides that the Common Law and the principles of equity apply in Cyprus, provided that they do not conflict with existing Cyprus legislation. The Civil Wrongs Law is not regarded as an exhaustive codification. Cyprus courts therefore apply the English Common Law.\(^4\) The Maltese CC of 1874 is the only European civil code that opens its law of tort (Part II, Title IV, Sub-title II § 11: “Of Torts and Quasi-torts”) with the principle *casum sentit dominus*.

CC art. 1029 states that “any damage which is produced by a fortuitous event, or in consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs”. Following up on CC art. 1030, which exempts from liability the legitimate exercise of a right, CC art. 1031 gives expression to a classical general clause for non-contractual liability for damage: “Every person, however, shall be liable for the damage which occurs through his fault”.

11. **Eastern central Europe.** The Czech and Slovakian CC (the civil code of the former Czechoslovakia which continues to be in force in both countries) sets out the rules of tort law in the sixth Book (“Liability for damage and unjustified enrichment”). Its first section relates to the prevention of an impending damage (CC §§ 415-419); its second governs liability for damage (CC §§ 420-450). CC § 420 contains the basic norm of tort law (“Everyone shall be liable for damage caused by violating a legal duty”\(^5\)). The Hungarian CC of 1959, whose basic norm on tort law (CC § 339(1)) contained in its 29th Chapter will in all probability not be affected by the anticipated reform of Hungarian private law,\(^6\) contains a typical general clause.\(^7\) Its only peculiarity is a general reversal of the burden of proof for “fault”: “A person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation.”\(^8\) The most recent civil code in this region – the Slovenian Law of Obligations Act 2002\(^9\) – adopts this rule in LOA § 131(1) almost word for word. The Polish CC has its tort law in the 6th Title of the third Book (CC arts. 415-449). CC art. 415 is formulated in extremely concise terms: “Whoever by his fault caused a damage to another person shall be obliged to redress it”. The tort law part of the Romanian Civil Code adopts the structure of the French code (Romanian CC arts. 998-1002 correspond to French CC arts. 1382-1386). Under Romanian tort law, it is notable that a distinction is drawn between unlawfulness and fault; on this point, the Romanian tort law belongs more to the Germanic than the Romance legal systems. The proposed Draft Civil Code contains a rule in art. 1097 which provides that a person who causes damage by his unlawful act is liable for the slightest degree of negligence (Proiectul Noului Cod civil, 215-216).

\(^4\) Neocleous and Campbell (Christoforou/Glykis/Markouli), Introduction to Cyprus Law, 545-546.


\(^7\) For details see Szécsényi, ZRV 1999, 175-185. For the development of the law of tort in Eastern Europe in general see Küpper, OER 2003, 495-541 (both in German).


12. The Baltic States. Estonia and Lithuania have recently enacted new codes. The Estonian Law of Obligations Act of 5th June 2002 (cited here as LOA) provides for the law of tort in chapter 53.\(^\text{10}\) The basic norm of the Estonian LOA § 1043 (“A person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law”) is clearly influenced by German law. This influence is evident even more clearly in the Estonian LOA § 1045(1) – the provision which lists the most important forms of causing damage (causing death, personal injury or damage to health, deprivation of liberty, violation of a personality right, violation of the right of ownership or a similar right or right of possession, interference with the economic or professional activities of a person, behaviour which violates a duty arising from law, intentional behaviour contrary to good morals). The critical contrast with the German system, however, is that this list is not exhaustive and allows room for further development. The Lithuanian CC of 18 July 2000 addresses tort law in the 13th Chapter of its sixth Book.\(^\text{11}\) The starting point is art. 6.246(1), a provision which works with the notion of unlawfulness, but foregoes an express list of interests protected by tort law (“Civil liability shall arise from non-performance of a duty established by laws or a contract (unlawful refrainment from acting), or from performance of actions that are prohibited by laws or a contract (unlawful acting), or from violation of the general duty to behave with care”). Art. 6.263(1) is formulated in the style of a general clause: “Every person shall have the duty to abide by the rules of conduct so as not to cause damage to another by his actions (active actions or refrainment from acting)”. The Latvian Civil Code of 1938,\(^\text{12}\) brought back into force on a phased basis from 1992, for its part adopts in CC art. 1635 the Romance concept of the general clause (“Every delict, i.e., every wrongful act per se, shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, in so far as he or she may be held at fault for such act”).

13. “Pure economic losses”. Probably the most important point of substance in these various ways of drafting is the treatment of compensation for pure economic loss. The German Civil Code deliberately excluded pure economic interests from the protection afforded by CC § 823(1); they are recoverable only under CC §§ 823(2), 824 and 826. Whereas – even after *Hedley Byrne & Co. Ltd. v. Heller*\(^\text{13}\) (which broadened the scope of negligence so as to allow for the recoverability of pure economic loss under certain well defined conditions) – Germany and England remained relatively close to each other, a rather dramatic gap developed between France and Germany. Dutch CC art. 6:162 has tried to bridge this gap, as has Italian CC art. 2043. Swedish and Finnish Law have special provisions on the recoverability of pure economic losses, the main rule being that a cause of action in this field requires a criminal behaviour. This rule, however, is not exhaustive. The central east European States mostly follow the French model; on the other hand, among the Baltic legal systems the Estonian position is close to the German. However, present day Europe does not even share a common notion of what constitutes “pure economic loss”. The Italian Corte di Cassazione developed a right to the integrity

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11 English translation online at http://www3.lrs.lt/cgi-bin/getfmt?c1=w&c2=245495.