

Principles of European Tort Law*

TITLE I. Basic Norm

Chapter 1. Basic Norm

Art. 1:101. Basic norm

(1) A person to whom damage to another is legally attributed is liable to compensate that damage.

(2) Damage may be attributed in particular to the person

- a) whose conduct constituting fault has caused it; or
- b) whose abnormally dangerous activity has caused it; or
- c) whose auxiliary has caused it within the scope of his functions.

TITLE II. General Conditions of Liability

Chapter 2. Damage

Art. 2:101. Recoverable damage

Damage requires material or immaterial harm to a legally protected interest.

* European Group on Tort Law, 2005. See <http://www.egtl.org>

Art. 2:102. Protected interests

(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection.

(2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.

(3) Extensive protection is granted to property rights, including those in intangible property.

(4) Protection of pure economic interests or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim.

(5) The scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases.

(6) In determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration.

Art. 2:103. Legitimacy of damage

Losses relating to activities or sources which are regarded as illegitimate cannot be recovered.

Art. 2:104. Preventive expenses

Expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred.

Art. 2:105. Proof of damage

Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly.

Chapter 3. Causation

Section 1. Conditio sine qua non and qualifications

Art. 3:101. Conditio sine qua non

An activity or conduct (hereafter: activity) is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred.

Art. 3:102. Concurrent causes

In case of multiple activities, where each of them alone would have caused the damage at the same time, each activity is regarded as a cause of the victim's damage.

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.

Art. 3:104. Potential causes

- (1) If an activity has definitely and irreversibly led the victim to suffer damage, a subsequent activity which alone would have caused the same damage is to be disregarded.
- (2) A subsequent activity is nevertheless taken into consideration if it has led to additional or aggravated damage.
- (3) If the first activity has caused continuing damage and the subsequent activity later on also would have caused it, both activities are regarded as a cause of that continuing damage from that time on.

Art. 3:105. Uncertain partial causation

In the case of multiple activities, when it is certain that none of them has caused the entire damage or any determinable part thereof, those that are likely to have [minimally] contributed to the damage are presumed to have caused equal shares thereof.

Art. 3:106. Uncertain causes within the victim's sphere

The victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere.

Section 2. Scope of Liability

Art. 3:201. Scope of Liability

Where an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as

- a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and

- its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
- b) the nature and the value of the protected interest (Article 2:102);
- c) the basis of liability (Article 1:101);
- d) the extent of the ordinary risks of life; and
- e) the protective purpose of the rule that has been violated.

TITLE III. Bases of Liability

Chapter 4. Liability based on fault

Section 1. Conditions of liability based on fault

Art. 4:101. Fault

A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct.

Art. 4:102. Required standard of conduct

(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.

(2) The above standard may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it.

(3) Rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct.

Art. 4:103. Duty to protect others from damage

A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty.

Section 2. Reversal of the burden of proving fault

Art. 4:201. Reversal of the burden of proving fault in general

(1) The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity.

(2) The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur.

Art. 4:202. Enterprise Liability

(1) A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct.

(2) „Defect“ is any deviation from standards that are reasonably to be expected from the enterprise or from its products or services.

Chapter 5. Strict liability

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.
- (3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage.
- (4) This Article does not apply to an activity which is specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention.

Art. 5:102. Other strict liabilities

- (1) National laws can provide for further categories of strict liability for dangerous activities even if the activity is not abnormally dangerous.
- (2) Unless national law provides otherwise, additional categories of strict liability can be found by analogy to other sources of comparable risk of damage.

Chapter 6. Liability for others

Art. 6:101. Liability for minors or mentally disabled persons

A person in charge of another who is a minor or subject to mental disability is liable for damage caused by the other unless the

person in charge shows that he has conformed to the required standard of conduct in supervision.

Art. 6:102. Liability for auxiliaries

(1) A person is liable for damage caused by his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct.

(2) An independent contractor is not regarded as an auxiliary for the purposes of this Article.

TITLE IV. Defences

Chapter 7. Defences in general

Art. 7:101. Defences based on justifications

(1) Liability can be excluded if and to the extent that the actor acted legitimately

- a) in defence of his own protected interest against an unlawful attack (self-defence),
- b) under necessity,
- c) because the help of the authorities could not be obtained in time (self-help),
- d) with the consent of the victim, or where the latter has assumed the risk of being harmed, or
- e) by virtue of lawful authority, such as a licence.

(2) Whether liability is excluded depends upon the weight of these justifications on the one hand and the conditions of liability on the other.

(3) In extraordinary cases, liability may instead be reduced.

Art. 7:102. Defences against strict liability

(1) Strict liability can be excluded or reduced if the injury was caused by an unforeseeable and irresistible

- a) force of nature (force majeure), or
- b) conduct of a third party.

(2) Whether strict liability is excluded or reduced, and if so, to what extent, depends upon the weight of the external influence on the one hand and the scope of liability (Article 3:201) on the other.

(3) When reduced according to paragraph (1)(b), strict liability and any liability of the third party are solidary in accordance with Article 9:101 (1)(b).

Chapter 8. Contributory conduct or activity

Art. 8:101. Contributory conduct or activity of the victim

(1) Liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor.

(2) Where damages are claimed with respect to the death of a person, his conduct or activity excludes or reduces liability according to para. 1.

(3) The contributory conduct or activity of an auxiliary of the victim excludes or reduces the damages recoverable by the latter according to para. 1.

TITLE V. Multiple Tortfeasors

Chapter 9. Multiple Tortfeasors

Art 9:101 Solidary and several liability: relation between victim and multiple tortfeasors

(1) Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where:

- a) a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim; or
- b) one person's independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person.
- c) a person is responsible for damage caused by an auxiliary in circumstances where the auxiliary is also liable.

(2) Where persons are subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him.

(3) Damage is the same damage for the purposes of paragraph (1)(b) above when there is no reasonable basis for attributing only part of it to each of a number of persons liable to the victim. For this purpose it is for the person asserting that the damage is not the same to show that it is not. Where there is such a basis, liability is several, that is to say, each person is liable to the victim only for the part of the damage attributable to him.

Art 9:102 Relation between persons subject to solidary liability

(1) A person subject to solidary liability may recover a contribution from any other person liable to the victim in respect of the same damage. This right is without prejudice to any contract be-

tween them determining the allocation of the loss or to any statutory provision or to any right to recover by reason of subrogation [cessio legis] or on the basis of unjust enrichment.

(2) Subject to paragraph (3) of this Article, the amount of the contribution shall be what is considered just in the light of the relative responsibility for the damage of the persons liable, having regard to their respective degrees of fault and to any other matters which are relevant to establish or reduce their liability. A contribution may amount to full indemnification. If it is not possible to determine the relative responsibility of the persons liable they are to be treated as equally responsible.

(3) Where a person is liable for damage done by an auxiliary under Article 9:101 he is to be treated as bearing the entire share of the responsibility attributable to the auxiliary for the purposes of contribution between him and any tortfeasor other than the auxiliary.

(4) The obligation to make contribution is several, that is to say, the person subject to it is liable only for his apportioned share of responsibility for the damage under this Article; but where it is not possible to enforce a judgment for contribution against one person liable his share is to be reallocated among the other persons liable in proportion to their responsibility.

TITLE VI. Remedies

Chapter 10. Damages

Section 1. Damages in general

Art. 10:101. Nature and purpose of damages

Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he

would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.

Art. 10:102. Lump sum or periodical payments

Damages are awarded in a lump sum or as periodical payments as appropriate with particular regard to the interests of the victim.

Art. 10:103. Benefits gained through the damaging event

When determining the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit.

Art. 10:104. Restoration in kind

Instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party.

Section 2. *Pecuniary damage*

Art. 10:201. Nature and determination of pecuniary damage

Recoverable pecuniary damage is a diminution of the victim's patrimony caused by the damaging event. Such damage is generally determined as concretely as possible but it may be determined abstractly when appropriate, for example by reference to a market value.

Art. 10:202. Personal injury and death

(1) In the case of personal injury, which includes injury to bodily health and to mental health amounting to a recognised illness, pecuniary damage includes loss of income, impairment of earn-

ing capacity (even if unaccompanied by any loss of income) and reasonable expenses, such as the cost of medical care.

(2) In the case of death, persons such as family members whom the deceased maintained or would have maintained if death had not occurred are treated as having suffered recoverable damage to the extent of loss of that support.

Art. 10:203. Loss, destruction and damage of things

(1) Where a thing is lost, destroyed or damaged, the basic measure of damages is the value of the thing or the diminution in its value and for this purpose it is irrelevant whether the victim intends to replace or repair the thing. However, if the victim has replaced or repaired it (or will do so), he may recover the higher expenditure thereby incurred if it is reasonable to do so.

(2) Damages may also be awarded for loss of use of the thing, including consequential losses such as loss of business.

Section 3. Non-pecuniary damage

Art. 10:301. Non-pecuniary damage

(1) Considering the scope of its protection (Article 2:102), the violation of an interest may justify compensation of non-pecuniary damage. This is the case in particular where the victim has suffered personal injury; or injury to human dignity, liberty, or other personality rights. Non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.

(2) In general, in the assessment of such damages, all circumstances of the case, including the gravity, duration and consequences of the grievance, have to be taken into account. The de-

gree of the tortfeasor's fault is to be taken into account only where it significantly contributes to the grievance of the victim.

(3) In cases of personal injury, non-pecuniary damage corresponds to the suffering of the victim and the impairment of his bodily or mental health. In assessing damages (including damages for persons having a close relationship to deceased or seriously injured victims) similar sums should be awarded for objectively similar losses.

Section 4. Reduction of damages

Art. 10:401. Reduction of damages

In an exceptional case, if in light of the financial situation of the parties full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Article 1:101), the scope of protection of the interest (Article 2:102) and the magnitude of the damage have to be taken into account in particular.

