Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní

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TORT LAW

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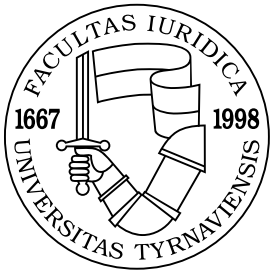

Tort Law

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Content

1 Non-contractual obligations from European point of view in general

From the perspective of harmonization activities in the field of European law the reparation mechanisms applicable in the cases of loss or other disadvantage of certain entity may be identified in various levels:

a) within the system of non-contractual obligations,

b) within the contract law system (in this case the reparation arises from the concept of liability for failure to fulfil the contractual obligation) and

c) within reparatory (and/or compensation) schemes based on insurance.

European private law is based on traditional continental classification of non-contractual obligations as torts (*obligationes ex delicto*) and obligations for other causes (*ex variis causarum figures*).

In case of tort, as the most common legal title for origination of non-contractual obligation relation, the source element is illegality derived from illegal act causing damage for which the originator bears tort liability.

On the contrary, in case of non-contractual obligations, the title for origination is not a tort, illegality as fundamental element is missing. This group commonly includes unjustified enrichment, benevolent intervention in another's affairs (*negotiorum gestio*) and pre-contractual liability (c*ulpa in contrahendo*). These non-contractual obligations identified as quasi torts or quasi contracts are on the edge between contract and tort law, whereas their particular classification as quasi tort and/or quasi contract is affected by legal doctrine making its way in particular member states. Typical example is *culpa in contrahendo* institute i.e. pre-contractual liability of the parties for breach of obligation during negotiations prior to conclusion of the contract, in which it is questionable whether it is a quasi contractual or quasi tort relationship or even *tertium quid relationship* (third option relationship). While according to some legal jurisdictions *culpa in contrahendo* is viewed as contract law institute (e.g. German law) due to the fact that it is primarily attached to the issue of breach of obligation during negotiating of the contract, according to other legal jurisdictions, on the contrary, the pre-contractual liability is classified in the tort law due to the fact that this institute does not include breach of contractual obligation, instead it includes breach of non-contractual obligation (e.g. French, Belgian or Spanish law).

1.1 Non-contractual obligations of European nature de lege lata

Unlike contract law issues, the regulation of non-contractual obligations is not subject to such a significant harmonization interest at European level within the legislation activity of the Union, whereas from this point of view it may be claimed that mainly certain partial fields of tort law are being focused on within the union law. This situation is argued by the opponents of unified and/or harmonized system of non-contractual obligations especially by the facts that diversity of systems of particular EU member states in this field is not significant in relation to the common market and free movement of persons and goods (e.g. compared to contract law, tort law is a secondary issue in the decision-making of the consumers and entrepreneurs, whether they enter into cross-border legal relationship or not) and/or this distance is argued by lack of competence of the Union to harmonize the non-contractual obligations system.

Due to the above mentioned reasons, also legislative activity of the Union in this field has been limited to isolated cases of legal regulations via directives or regulations which are directly or indirectly linked (or affected) with tort law, i.e. harmonization relates to either certain unified concept of European tort law or to certain specific field within which certain selected torts are subject to legislative and/or judicial attention of the Union.

Council Directive No. 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, amended and supplemented by European Parliament and Council Directive No. 1999/34/EC is currently the most significant, and at the same time, the oldest legal act of European tort law de lege lata Directive introduces the set of rules based on the concept of reasonable expectations of the consumer and built on strict liability of the manufacturer of defective product for damage caused by this product. However, the Directive does not offer total level of harmonization in all tort law issues related to damage caused as a result of defective product and leaves many of them to national legislation of the member states (e.g. scope of damage compensation).

To certain extent also **other directives and regulations** are related to liability relations, whereas however their primary objective is another field of private law:

- Directive No. 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council („Unfair Commercial Practices Directive"). Unfair Commercial Practices Directive indirectly intervenes to European tort law system in the sense of creation of Pan-European base for instruments of remedy of so-called economic torts formed from prohibition of unfair business practices. The Directive itself is not presented as a „tort law" directive (the goal

of the Directive is rather to create the borders in relation to B2C), despite of that in certain countries (e.g. Netherlands, Austria) it was implemented partly as the one representing the tort liability.

- Directive No. 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures which, in respect to tort law, imposes upon the member states an obligation to ensure that the provider of certification services is liable for damage *vis-à-vis* all entities who reasonably rely upon the given certificate.
- Council Directive dated 13 June 1990 on package travel, package holidays and package tours
- set of so-called „Motor Directives":
  - Council Directive No. 72/166/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability
  - the second Council Directive No. 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles
  - the third Council Directive No. 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles
  - Directive No. 2000/26/ES of European Parliament and Council on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and on amendment and supplement of Council Directives No. 73/239/EEC and 88/357/EEC (the fourth Directive on insurance of motor vehicles)
  - Directive No. 2005/14/ES of European Parliament and Council dated 11 May 2005 amending and supplementing the Council Directives No. 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive No. 2000/26/EC of Council and European Parliament on civil liability in respect of the use of motor vehicles.

Motor Directives regulate the issues of insurance of liability for damage caused as a result of operation of motor vehicles (insurance coverage amount, creation of insurance funds for uninsured or unidentified entities which caused damage as a result of operation of motor vehicles, issues of cross-border settlement of damage resulting from traffic accidents etc.). Although the above mentioned Directives do not harmonize the liability for damage caused as a result of operation of motor vehicles, they can be considered as a starting point for further step at European level which is harmonization of system of compensations for damage caused due to traffic accidents.

- so-called transportation regulations regulating the liability of the carriers for injuries and property losses:

- Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents which imposes upon the air carriers a liability *vis-à-vis* the passengers in case of accidents for loss caused by death, injury or other bodily injury to the passenger if the accident which caused the harm suffered occurred onboard the aircraft or during any activity related to boarding or exiting of the aircraft.
- European Parliament and Council Regulation (EC) No. 889/2002, amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents. By theis regulation, relevant provisions of Montreal convention on transportation of passengers and their luggage in the air carriage dated 1999 are executed, whereas the regulation extends the scope to the passenger luggage as well. At the same time it extends application of the provisions of the air carrier liability to air carriage within single member state.
- European Parliament and Council Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.
- European Parliament and Council Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents. This regulation introduces the regime which relates to the liability and insurance in case of carriage of passengers by sea according to relevant provisions of Athens convention relating to the carriage of passengers and their luggage by sea dated 1974, as amended by the Protocol on the carriage of passengers dated 2002.
- European Parliament and Council Regulation (EC) No. 1371/2007 on rail passengers' rights and obligations governing, *inter alia*, liability of rail companies *vis-à-vis* the passengers for death or injury, for loss or damage to their luggage as well as liability for delay of the train line, missing the connection line and cancellation of the train line.
- European Parliament and Council Regulation (EU) No. 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004. This regulation establishes, *inter alia*, the rules of bus and coach transport which relate to the passenger rights in case of accidents resulting from operation of a bus or coach resulting in death or injury of the passengers or loss or damage to their luggage (right to compensation in case of death, including compensation of reasonable costs for funeral or injury as well as loss or damage to luggage in case of accidents resulting from operation of a bus or coach) as well as passenger rights in case of cancellation or delay of bus line.

- European Parliament and Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II) which unifies

the collision regulation of non-contractual obligations arising from torts, unjustified enrichment, benevolent intervention in another's affairs, and *culpa in contrahendo* in civil and commercial matters in situations where collision of various legal jurisdictions occurs. By its nature this regulation falls under the framework of international private law.

- European Parliament and Council Directive No. 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. This Directive should not be viewed as part of general tort law, since it primarily governs the relations between the polluting operator and the state and private law aspects originally appeared in the draft Directive were deleted in the legislative process of adoption of the Directive.

1.2 Non-contractual obligations of European nature de lege ferenda

The *soft law* instruments leading to creation of Pan-European tort law system and/or in broader sense, the system of non-contractual obligations are represented especially by two academic initiatives of non-institutionalized nature: Principles of European Tort Law – PETL and Draft Common Frame of Reference – DCFR.

1.2.1 Principles of European Tort Law (PETL)

1.2.1.1 Creation

Principles of European Tort Law (*Principles of European Tort Law*, *Grundsätze eines Europäischen Deliktsrechts*, *Principes de droit européen de la responsabilité civile*, *Principi di diritto europeo della responsabilità civile*, with common abbreviation as PETL) are long-term established result of spontaneous europeization of European private law in the field of tort law. As a result of work of significant (not only) European civil law experts working under umbrella of European Group on Tort Law – EGTL the final text of PETL including a commentary was submitted in the conference in Vienna in 2005.[1]

The members of European Group on Tort Law, being mainly the significant university professors, have been meeting each other on regular basis since 1992, when so-called Tilburg Group was founded by professor of Tilburg University Mr. Jaap Spier as a predecessor of the currently existing EGTL. European Group on Tort Law has been developing its activity with institutional support of European

[1] *European Group on Tort Law*, Principles of European Tort Law: Text and Commentary. Wien : Springer Verlag, 2005.

Centre of Tort and Insurance Law – ECTIL in cooperation with Research institution for European tort law of Austrian Academy of Sciences (*Forschungsstelle für Europäisches Schadenersatzrecht der Österreichischen Akademie der Wissenschaften*) which provide organization base for their work.

1.2.1.2 Content

From systematic point of view the Principles of European Tort Law confirm traditional view of classification of civil tort law,[2] which in PETL copies the division into the chapters and sections which according to its content is covered by six titles.

Content of PETL may be determined as follows:

- Title I.: Basic Norm
  - Chapter 1: Basic Norm
- Title II.: General conditions of liability
  - Chapter 2: Damage
  - Chapter 3: Causation
- Title III.: Bases of liability
  - Chapter 4: Liability based on fault
  - Chapter 5: Strict liability
  - Chapter 6: Liability for others
- Title IV.: Defences
  - Chapter 7: Defences in general
  - Chapter 8 Contributory conduct or activity
- Title V.: Multiple tortfeasors
  - Chapter 9: Multiple tortfeasors
- Title VI.: Remedies
  - Chapter 10: Damage

1.2.1.3 Objectives and purpose

Principles of European Tort Law were drafted with the objective to create a common base for harmonization of tort law in Europe,[3] whereas it is considered

[2] *Schmidt–Kessel, M., Miller, S.* Reform des Schadenersatzrecht. Band I: Europäische Vorgaben und Vorbilder. Wien : MANZ` sche Verlags- und Universitätsbuchhandlung, 2006, p. 74, 84.

[3] Cf. *Spier, J.* The Principles of European Tort Law of the European Group on Tort Law. In *European Group on Tort Law*, Principles of European Tort Law, cit. supra, p. 16.

by its creators as fundamental sources for further work in the process of forming the common and unified European tort law.

When creating PETL, the base was formed especially by national reports in the form of questionnaires which created a base for subsequent preparation of comparative studies discussed in the EGTL sessions, whereas the authors of PETL sought inspiration also in so-called *Restatement of Torts* and in the draft revision of Swiss obligation law. The „sphere of authority" of PETL is not (despite of adjective „European" in its title) limited exclusively to EU member states, also civil law experts out of Europe participated in the preparation, whereas their added value of their work was interesting link of the continental tort law elements with certain common law elements.

The intention of EGTL was not creation of the original and innovative rules in the extent which would make it deviated, both by content and structure, from existing European legal regulations, on the contrary, for the sake of the broadest level of acceptability, a necessity to preserve the common fundamentals of all jurisdictions was emphasized.[4]

Even though it could be implied by the above mentioned, in its nature PETL is not formulated solely as *„common core"* of tort law since, in case of institutes where *„common core"* was not a suitable option from EGTL point of view, other approach was preferred.[5]

Despite of proclamation by its creators that the purpose of PETL is not presenting itself as a model law, legislative-technical approach to its formulation and overall systematic structure prove that its form is leaning more towards model law rather than set of principles (despite of higher level of abstractions of certain provisions).

Already in the early stages of work it was obvious that due to many various legal systems with various values and traditions deeply seeded in particular European states, the idea of PETL as unifying rules for entire Europe was an utopia image and efforts leading in this path would soon crash into unsurpassable obstacles. Therefore, European Group for Tort Law decided to submit created system of rules as a basic platform,[6] which would, in the form of *soft law*, serve to European countries as a common framework for further development of the tort law.

The EU member states reflected the said platform of the Principles as a source of reference for certain considerations within the reasoning of judicial ruling[7] in the process of creation of national court practice and/or directly as source of in-

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4 *Koch, B. A.* The Work of the European Group on Tort Law – The Case of „Strict Liability". Working Paper No. 129. In In Dret, 2003, Nr. 2, p. 4.

5 Cf. *Spier, J.* The Principles of European Tort Law of the European Group on Tort Law, cit. supra, p. 15.

6 *Van den Bergh, R., Visscher, L.* The Principles of European Tort Law: The Right Path to Harmonisation? In German Working Papers in Law and Economics, 2006, Paper 8, p. 2.

7 *Elischer, D.* Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu společného referenčního rámce (DCFR). In *Novotná, M., Jurčová, M. (eds.)* Súkromné právo v európskej perspektíve. Trnava : Typi Universitatis Tyrnaviensis, 2011, p. 39.

spiration in the revision of the provisions of tort law especially within the process of re-codification of the private law codes.

As a source of reference PETL was used for instance in the following rulings:

Spain: Sentencia del Tribunal Supremo, 6 March 2007, RJ 20071828; Sentencia del Tribunal Supremo, 10 October 2007, RJ 20076813; Sentencia del Tribunal Supremo, 2 March 2009, RJ 20093287.[8]

Portugal: Acórdão do Supremo Tribunal de Justiça, 22 October 2009, 409/09.4YFLSB

Czech Republic: the ruling of Czech Constitutional Court dated 13 July 2006, file no. I. US 85/04; ruling of Czech Constitutional Court dated 19 June 2007, file no. II. US 247/07; resolution of Czech Constitutional Court dated 17 January 2007, file no. I. US 642/06; ruling of Czech Constitutional Court dated 11 October 2006, file no. IV. US 428/05.

In Slovakia the ideal fundamentals of PETL were heavily reflected in the draft wording of tort law provisions within the Slovak Civil Code re-codifications.[9]

From methodology point of view, so-called multi-factor approach is heavily reflected in PETL, within which strict rules of judging of certain institute are replaced by series of relevant factors which must be inevitably borne in mind by the law application authority and given elements of factual conditions must be reviewed.

Multi-factor approach adopted by creators of PETL has its roots in the concept of so-called floating system created by Mr. Walter Wilburg in mid past century[10] and enhanced in terms of methodology Mr. Franz Bydlinski.[11]

It is a model which governs certain complex material which, due to its extent, is impossible to be fitted into the framework of rigid casuistic regulation. On the contrary, creation of legal framework of its regulation would require introduction of widely drafted (usually vague) basic general clauses, existence of which would shift the issue of review and „weighing" of particular values (factors) and judging on their clash to the judge without giving him certain guiding criteria. By this procedure the degree of legal certainty and foreseeability of judicial rulings would be significantly reduced. Therefore the substance of the floating system concept is creation of general fundamental legal standards which application is supplemented by further relevant factors which mutual evaluation and reflection helps

8 Available on-line on www.westlaw.es

9 See Third Chapter: Záväzky zo spôsobenia škody a z bezdôvodného obohatenia Draft of slovak Civil Code.

10 *Jansen, N.* The State of the Art of European Tort Law. In *Bussani, M.* (ed.) European Tort Law. Eastern and Western Perspectives. Berne : Stämpfli Publishers Ltd., 2007, p. 32. *Csach, K. et al.* Profesijná zodpovednosť. Zodpovednosť za škodu spôsobenú pri výkone vybraných činností s akcentom na europeizáciu deliktuálneho práva. Košice : Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta, 2011, p. 124.

11 *Koziol, H.* Die „Principles of European Tort Law" der „European Group on Tort Law". In Zeitschrift für Europäisches Privatrecht, 2004, Nr. 2, p. 234 ff, p. 236.

solve the given material. [12]

1.2.2 Draft Common Frame of Reference (DCFR)

1.2.2.1 Creation

The Draft Common Frame of Reference (DCFR) is an academic initiative prepared in the course of a programme of academic research by two bodies: The Study Group on a European Civil Code (the „Study Group") and the Research Group on Existing EC Private Law (the „Acquis Group").

The development of work on the DCFR can be dated back to July 2001, when the Commission published a *Communication on European Contract Law13*. With that first communication the Commission intended to broaden the debate on European contract law, which had so far been mainly limited to legal academia[14].

The next stage in a broad consultation which the Commission launched in July 2001 was the publication of the Communication of the European Commission to the European Parliament and the Council entitled: *A More Coherent European Contract Law; an Action Plan15* published in February 2003.

In December 2008 the DCFR was presented to the Commission as conclusion of the first stage on the way to more coherent European contract law.

An interim outline edition of the DCFR was presented to the Commission in December 2007 and published in early 2008, an outline edition was published in February 2009 followed later in that year by full edition entitled Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Full Edition. The Full Edition sets out principles, definitions and model rules of European private law together with explanatory and extensive comparative law material (commentaries and comparative notes) gathered in the course of the work.

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[12] *Bydlinski, F.* Juristische Methodenlehre und Rechtsbegriff. Wien : Springer Verlag , 1991, p. 529 ff; *Magnus, U.* Vergleich der Vorschläge zum Europäischem Deliktsrecht. In Zeitschrift für europäisches Privatrecht, 2004, Nr. 3, p. 562 ff, p. 565.

[13] Communication from the Commission to the Council and the European Parliament on European Contract Law, July 11th, 2004, COM(2001) 398 final (OJ 2001/C 255/01).

[14] See *Hesselink, M. W.* The European Commission's Action Plan: Towards a More Coherent European Contract Law? European Review of Private Law 4-2004, p. 397.

[15] Communication from the Commission to the European Parliament and the Council; A More Coherent European Contract Law; An Action Plan, 12 February 2003, COM (2003) 68 final (OJ 2003/C63/01).

1.2.2.2 Content

The revised and final text of DCFR contains principles, definitions and model rules in the form of a code covering wide areas of Civil Law extending beyond the law of contract to include much of private law, for example, the law of unilateral promise, or non-contractual obligations such as liability for damage, unjustified enrichment or benevolent intervention in another's affairs.

DCFR is divided into ten Books and that each Book is subdivided into Chapters, Sections, Sub-sections and Articles. In addition the Book on specific contracts and the rights and obligations arising from them was to be divided, because of its size, into Parts, each dealing with a particular type of contract. Structure of the DCFR could be summarized as follows:

- Book I General provisions
- Book II Contracts and other juridical acts
  - Chapter 1: General provisions
  - Chapter 2: Non-discrimination
  - Chapter 3: Marketing and pre-contractual duties
  - Chapter 4: Formation
  - Chapter 5: Right of withdrawal
  - Chapter 6: Representation
  - Chapter 7: Grounds of invalidity
  - Chapter 8: Interpretation
  - Chapter 9: Contents and effects of contracts
- Book III Obligations and corresponding rights
  - Chapter 1: General
  - Chapter 2: Performance
  - Chapter 3: Remedies for non-performance
  - Chapter 4: Plurality of debtors and creditors
  - Chapter 5: Change of parties
  - Chapter 6: Set-off and merger
  - Chapter 7: Prescription
- Book IV Specific contracts and the rights and obligations arising from them
  - Part A. Sales
  - Part B. Lease of goods
  - Part C. Services
  - Part D. Mandate contracts

- Part E. Commercial agency, franchise and distributorship
- Part F. Loan contracts
- Part G. Personal security
- Part H. Donation

- Book V Benevolent intervention in another's affairs
  - Chapter 1: Scope
  - Chapter 2: Duties of intervener
  - Chapter 3: Rights and authority of intervener
- Book VI Non-contractual liability arising out of damage caused to another
  - Chapter 1: Fundamental provisions
  - Chapter 2: Legally relevant damage
  - Chapter 3: Accountability
  - Chapter 4: Causation
  - Chapter 5: Defences
  - Chapter 6: Remedies
  - Chapter 7: Ancillary rules
- Book VII Unjustified enrichment
  - Chapter 1: General
  - Chapter 2: When enrichment unjustified
  - Chapter 3: Enrichment and disadvantage
  - Chapter 4: Attribution
  - Chapter 5: Reversal of enrichment
  - Chapter 6: Defences
  - Chapter 7: Relation to other legal rules
- Book VIII Acquisition and loss of ownership of goods
  - Chapter 1: General provisions
  - Chapter 2: Transfer of ownership based on the transferor's right or authority
  - Chapter 3: Good faith acquisition of ownership
  - Chapter 4: Acquisition of ownership by continuous possession
  - Chapter 5: Production, combination and commingling
  - Chapter 6: Protection of ownership and protection of possession
  - Chapter 7: Consequential questions on restitution of goods
- Book IX Proprietary security in movable assets
  - Chapter 1: General rules

- Chapter 2: Creation and coverage
- Chapter 3: Effectiveness as against third persons
- Chapter 4: Priority
- Chapter 5: Pre-default rules
- Chapter 6: Termination
- Chapter 7: Default and enforcement

- Book X Trusts
  - Chapter 1: Fundamental provisions
  - Chapter 2: Constitution of trusts
  - Chapter 3: Trust fund
  - Chapter 4: Trust terms and invalidity
  - Chapter 5: Trustee decision-making and powers
  - Chapter 6: Obligations and rights of trustees and trust auxiliaries
  - Chapter 7: Remedies for non-performance
  - Chapter 8: Change of trustees or trust auxiliary
  - Chapter 9: Termination and variation of trusts and transfer of rights to benefit
  - Chapter 10: Relations to third parties

In Books V, VI and VII DCFR includes regulation of three basic groups of non-contractual obligations (not being a complete list since certain specific non-contractual obligations are regulated also in other parts of DCFR, e.g. Article III.-4:107 – recourse between solidary debtors).

In Chapter V of DCFR regulates benevolent intervention in another's affairs, especially the scope of authority of this book, obligations, rights and authorization of the intervener. The substance of benevolent intervention in another's affairs is that the intervener acts with intention to acquire a benefit for the principal, whereas the intervener has a substantiated reason to act or the principal approves the intervention without such undue delay which would adversely affect the intervener. The provisions regarding benevolent intervention in another's affairs shall not be applied in case the intervener has contractual or other obligation *vis-à-vis* the principal, is entitled to act independently of approval of the principal or is bound to act *vis-à-vis* third party.

Book VI of DCFR, significant from European tort law point of view includes model regulation of the Principles of European Law – Non-contractual Liability Arising out of Damage Caused to Another – PEL. The rules included in this book were prepared by the working team on extra-contractual obligations under leadership of Prof. Christian von Bara, whereas the commentary to the mentioned rules together with comparative notes to the law of non-contractual liability for damage of the member states are part of publication of series of Principles of Eu-

ropean Law – PEL which was released under title Non-contractual Liability Arising out of Damage Caused to Another.

The content of Book VI of DCFR is a set of rules varying from significant basic rules to specific rules of largely casuistic nature. From terminology point of view the entire book is distinctive for its descriptive terminology which avoids the terms such as tort or delict, strict liability and/or fault within the fundamental rules etc. Due to this approach and due to „European nature" of DCFR it was necessary to avoid undesired results which would caused by interpretation of these terms in accordance with their content in the national jurisdictions.

Book VII of DCFR regulates unjustified enrichment, whereas, in accordance with the provisions of this book, not only cases of unjustified enrichment of non-contractual nature are being dealt with but, based on reference rule, also cases of restitution claims from void contracts or contracts where the parties invoked nullity. However, Book VII does not regulate all the claims related to restitution as a complex – claims for return of compensation due to termination of contract relationship or part thereof by notice are governed in Book III of DCFR.

DCFR created autonomous unified model of unjustified enrichment arising from the fundamental rule according to which a person acquiring unjustified enrichment attributable to the disadvantage of the other person, has an obligation *vis–á-vis* this other person to return unjustified enrichment (meaning physical return, transfer of unjustified enrichment or payment of its financial equivalent). This fundamental rule is accompanied by further qualification criteria. In DCFR the concept of regulation of particular types of unjustified enrichment was not applied in DCFR and in respect of classification of subject matters DCFR does not follow any of the existing national approaches.

1.2.2.3 Objective and purpose

DCFR is intended to function as a toolbox, i.e. inspiration for european and national legislators mainly regarding concepts and terms used.

According to the drafters, one purpose of the text is to serve as a draft for drawing up a 'political' Common Frame of Reference (CFR) which was first called for by the European Commission's 'Action Plan on A More Coherent European Contract Law' of February 2003.[16]

A political CFR would not necessarily have the same coverage and contents as the academic DCFR. However, the DCFR ought not to be regarded merely as a building block of a political CFR. The DCFR as an academic text sets out the results of a large European research project and this way it will promote knowledge of private law in the jurisdictions of the European Union.[17]

[16] *Von Bar, Ch., Clive, E., Schulte-Nölke, H. (eds.)* Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. München : Sellier, 2009, p. 3

[17] *Von Bar, Ch., Clive, E., Schulte-Nölke, H. (eds.)* Principles, Definitions and Model Rules of

The drafters of the DCFR nurture the hope that it will be seen also outside the academic world as a text from which inspiration can be gained for suitable solutions for private law issues.[18]

European Private Law. Draft Common Frame of Reference (DCFR), cit. supra, p. 7.

[18] Ibid, p. 7-8.

2 Non-contractual liability for damage from European perspective

2.1 Definition of term „European tort law"

Tort law, as certain homogenous part of European private law, covers the situations within which it is necessary to judge whether certain entity suffering harm and/or other loss is entitled to claim on these grounds a reparation from other entity with whom it is not linked by any legal relationship other than the one based on the fact leading to occurrence of harm (loss). By this concept the tort law is distinguished from other systems of reparation of harm suffered.

Concept of „European tort law" is generally used to identify harmonization activities in the field of tort law, however it permits wide extent of further possible interpretations since the concept itself is not strictly defined. In general three groups of rules may be identified which are linked to the concept of European tort law:

a) first group of rules of European tort law is represented by EU legislation and practice of European Court of Justice (European tort law de lege lata),

b) second group is represented by national tort law regulations of the member states, and

c) third group is formed by future European *ius commune* (European tort law de lege ferenda) which includes also academic initiatives of PETL (Principles of European Tort Law) and DCFR (Draft Common Frame of Reference).

The mentioned sets of rules are mutually influenced and create mutual links whereas the link between the first and the second level is formed by comparative law which, based on comparison and analysis of national jurisdictions leads to identification of the third level, i.e. future European *ius commune*.

The result of this process is a convergence of legal regulations of the member states in the field of tort law called europeization of tort law. Europeization of tort law (whether by harmonization, unification or approximation) is realized either by regulative methods of the union lawmaking in the form of adoption of the regulations and directives as secondary legal acts of the Union as well as by methods of spontaneous europeization of the tort law the result of which are especially the *soft law* instruments.

2.2 European tort law de lege lata

The foundations of European tort law de lege lata which is formed by regulation activity of the Union was laid down by Council Directive No. 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, amended and supplemented by European Parliament and Council Directive No. 1999/34/EC.

The fundamental tort law sources of the Directive upon which a system of liability for damage caused by defective product is built, can be summed up into the following paragraphs:

- Article 1 of the Directive which imposes upon manufacturer a liability for damage caused by defect of the product. Pursuant to Article 3 of the Directive the importer alos has a position of the manufacturer and in case it is impossible to discover the manufacturer, also supplier shall have the position of the manufacturer.

According to decision No. C-402/03 Vestre Landsret: Skov Æg vs. Bilka Lavprisvarehus A/S a Bilka Lavprisvarehus A/S vs. Jette Mikkelsen, Michael Due Nielsen, the Directive on liability for defective products is in contradiction to the national rule according to which the supplier assumes strict liability beyond the cases enumerated in Article 3 par. 3 of the Directive which is assigned by the Directive to the manufacturer, but on the contrary, it is not in contradiction to national rule according to which the supplier is bound to assume liability in unlimited extent for manufacturer's fault.

By decision no. C-495/10 Centre hospitalier universitaire de Besançon vs. Thomas Dutrueux, Caisse primaire d'assurance maladie du Jura, in respect of definition of liable entity it was decided that there is an option to introduce a system when the hospital service provider (which is not manufacturer of the product) is liable *vis-a-vis* the aggrieved party for damage caused by defective product even in case of non-existence of any fault by it, however, provided that the aggrieved party and/or the mentioned service provider shall have the option to claim, on the basis of the mentioned Directive, the liability of the manufacturer in case the conditions laid down by this Directive are met. In our system it is the option to claim liability *vis-à-vis* given service provider based on factual status of liability for damage caused by circumstances having origin in the nature of a device or a thing used during performance of the obligation.

- Article 4 of the Directive which imposes upon the aggrieved party an obligation to demonstrate damage, the defects and causal link between the defect and damage. In accordance with decision no. C-285/08 Moteurs Leroy Somer vs. Dalkia France a Ace Europe the Directive on liability for defective product should be interpreted in the sense that it does not obstruct the interpretation of national law or application of conventional national court practice according to which the aggrieved party may claim the compensation of damage caused to a thing designated for professional use and used for such purpose, provided that such aggrieved party submits only the evidence on damage, defect of the product and

causal link between the damage and the defect.

- Article 5 of the Directive which establishes joint and severable liability of entities which are liable for the same damage.

- Article 8 of the Directive which excludes the reduction of the extent of liability of the manufacturer for caused damage if the damage were caused also by action or omission of third party (however, there is an option for reduction of the extent of liability in case of shared fault of the aggrieved party)

- Article 12 of the Directive which prohibits limitation or exclusion of liability of the manufacturer.

Article 1 implies that the concept of liability for damage caused by defective product is based on strict liability, within which the faulty illegal act of the manufacturer is not reviewed, however, at the same time this regime is subject to various limitations (it does not apply to real estate and it offers relatively broad range of liberation reasons and in Article 10 and 11 it requires establishment of time limitation of the right to claim the compensation of damage).

The scope of authority of the Directive applies to loss of health or life as well as to property loss. The issues of compensation of non-pecuniary loss are left to regulation by national legal jurisdictions of the member states.

The Directive triggered not only the discussions on how it should be implemented and how to take advantage of the options left to regulation by national legal jurisdiction, but in some countries the implementation of the Directive lead to re-evaluation of certain national laws (in the form of legislation changes or new judicial interpretation) which were not directly affected by given Directive, for the sake of preservation of homogenous nature of the law. The Directive on liability for defective products was implemented into Slovak law by Act No. 294/1999 Coll. on liability for damage caused by defective product within the process of fulfilment of the requirements by the Slovak Republic as associated country for approximation of laws.

2.3 Status of liability based on fault and liability without fault and their normative basis in the system of European private law

The solution of the issue leading to determination of position of strict liability and subjective liability in European private law has been primarily developed, similarly to legal institutes, from research and subsequent evaluation of these liability systems in European national legal jurisdictions. Neither of these legal jurisdictions is currently based solely upon one of the mentioned approaches, on the contrary, national regulations offer wide range of various alternatives bordered on one side by *common law* regulations which permit application of liability without fault only to minimum extent of cases and on the other side by French regulation of widely permissible strict liability.

Although *commom law* system established application of liability without fault in case of *Rylands v. Fletcher*, however, as may be viewed in the English court

practice, the efforts are made towards gradual limitation and curtailing of this liability principle. In *common law* legal system liability without fault may not even be applied within liability for damage caused by operation of a motor vehicle which is assessed on the basis of demonstration of fault (negligence).

English common law comprises a few strict liability torts, whose development took place before the rise of the tort of negligence (and of the general idea that fault should be an ingredient of each tort), at a time when the conditions for liability to arise could differ widely from one tort to the other, and there was no particular reason to include fault as an ingredient of the tort. They are enumerated in the excerpt above:

- trespass to land, where liability ensues as long as the act of the defendant was voluntary,
- nuisance, in some cases
- the rule in Rylands v. Fletcher, usually considered as the classical instance of strict liability under English common law,
- conversion, which occurs even if the defendant acted in good faith,
- defamation, where liability can be engaged even if the defendant had no intention to defame and was not negligent.

As the case below demonstrates, the tort of negligence has had sucha n impact on the overall tort law that i tis now difficult[19]

Alongside strict liability at common law, the Parliament has introduced certain strict liability regimes – the Animals Act 1971, the Consumer Protection Act 1987 (implementing the 85/374 Directive).

In French law, strict liability is based primarily on the decision-making activities of French courts.

The most remarkable development in French case law regarding civil liability and certainly one of the distinctive features of French civil law in that respect, was the creation, by the end of the 19th century, of an autonomous regime of liability without fault for damage caused by things under one's garde, on the basis of Article 1384 (1) *Code civil*, ktoré sa z funkcie pravidla správania sa skôr popisného charakteru vyvinulo v samostatný základ pre vznesenie žaloby, z ktorého je možné vyvodiť všeobecnú klauzulu objektívnej zodpovednosti zaťažujúcu každého, kto má určitú vec v svojej držbe alebo kto je zodpovedný za konanie iných osôb. („*On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde*".)

The main features of that regime cristallized in the first half of the 20th century. Broadly speaking, it can apply to almost all „accidents", as that term is commonly understood, since an object usually intervenes in causing accidental damage. At some point in time, the regime of Article 1384 (1) CC probably played a more significant role that the general fault-based regime of Article 1382 CC. In

[19] *Van Gerven, W., Lever, J., Larouche, P.* Cases, Materials and Text on National, Supranational and International Tort Law. Oxford : Hart, 2000, p. 571.

recent times, however, its field of application has been progressively curtailed by the enactment of specific statutes which created particular regimes for certain categories of accidents, the main one being the Loi Badinter which removed traffic accidents from the realm of Article 1384 (1) CC. Nevertheless, these statutory regimes all build on the developments that took place in the case law concerning Article 1384 (1) CC.

The traditional distinction in German tort law is between *Verschuldenshaftung* (fault liability) and *Gefährdungshaftung* (strict liability). Fault liability includes liability for intentional as well as negligent conduct. German legal writers have developed a fairly sophisticated theoretical framework to try to make sense of the various instances of liability not based on conduct under German law and, if possible, to give them some overall consistency. The work of these writers has to some extent been reflected in the case law.[20]

The core concept behind risk-based liability under German law (Gefährdungshaftung) is the concept of exceptional danger, because of either the high risk of injury or the gravity of potential injury, or both. The basic principle is that the risk of loss resulting from the creation of an exceptional danger to others must be transferred from the persons subjected to that danger to the person creating it.[21] Rules of strict liability can be found outside the BGB in specific acts.

In Scandinavian countries the law of non-contractual liability is based on individual wrongful behaviour. Reference is made to the culpa rule. In Finland and Sweden this rule is primarily anchored in extensive statutory rules, in Denmark it is based on a combination of judge-made and customary law.[22]

2.3.1 Relationship between liability based on fault and strict liability in European law de lege ferenda

The goal of the European journey of tort law is to find, in respect of determination of position of liability based on fault and liability without fault, such a solution which, in respect of particular countries, would constitute acceptable compromise creating on one side the framework of common European tort law, which would however honour, at the same time and to certain extent, current basis of the legal jurisdictions of the affected countries.

In general it is possible to identify very clearly the abolition of the view of liability based on fault as general base category and liability without fault as an exception from such category (objectification of liability)[23], however, on the other

[20] Ibid., p. 539

[21] Ibid., p. 545.

[22] Von Bar, Ch. The Common European Law of torts. Volume One. Oxford: Clarendon Press Oxford 2003, p. 268-269.

[23] *Józon, M.* Non-contractual Liability Arising out of Damage Caused to Another. In *Antoniolli, L., Fiorentini, F.* (eds.) A Factual Assessment of the Draft Common Frame of Reference. Munich : Sellier, 2011, p. 208.

hand, despite of growing significance of strict liability principle, these tendencies should not be viewed as an attempt to replace subjective liability by liability without fault.

Although the considerations on total replacement of subjective liability principle by principle which would be based solely upon demonstration of causal link occurred in national legislation level, however no real reflection of these considerations into positive law ever occurred.

Prioritization of liability without fault *vis-à-vis* other forms of liability and/or total exclusion of fault element as a precondition for origination of liability is not foreseen by any of currently available initiatives dealing with the issues of harmonization of tort law at European level.

Modern tort law which reflection may be derived quite from initiatives seeking common base of European legal jurisdictions has no tendencies to prefer any of the liability systems, on the contrary it is based on proposition that liability based on fault and liability without fault are neither contradictory, nor should they be viewed as mutually independent categories strictly separated by exact borders,[24] but as equal form of liability which mutually complement each other and are continually linked.[25]

This conclusion is supported by formulation of the source rule[26] of the Sixth Book of DCFR, which refers to causing of damage intentionally or due to negligence or causing of damage for another reason as a cause of origination of liability. By this formulation DCFR clearly tries to mutually interconnect the form of liability traditionally formulated as „liability based on fault" with liability which is not based on fault (intention, negligence) within the commonly shared platform of provision of Article VI - 1:101 of DCFR.

Pursuant to the mentioned provision a person who suffered legally relevant damage is entitled to a compensation *vis-à-vis* a person who caused such loss intentionally or by negligence or if causing damage is attributable to such person for other reason. Where a person did not cause legally relevant damage intentionally or by negligence it shall be liable for causing legally relevant damage only if so stipulated in Chapter 3 Book VI of DCFR.[27]

The source provision of Article VI-1:101 DCFR covers all mentioned cases of origination of liability (whether based on intention, negligence or in absence of the above) by three preconditions which must be cumulatively present in order to establish a claim for compensation of damage:

a) loss having a nature of so-called „legally relevant damage"

[24] See *Koziol, H.* Basic Norm. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary. Wien : Springer-Verlag, 2005, p. 20.

[25] See *Baudisch, B.* Die gesetzgeberischen Haftungsgründe der Gefährdungshaftung. Aachen : Shaker Verlag, 1998, p. 212.

[26] Art. VI - 1:101 DCFR.

[27] Art. VI-1:101 sec. 2 DCFR.

b) grounds for liability (attributability) of damage and

c) causal link.

Since the grounds for liability in DCFR are equally represented by intention, negligence and other grounds for liability, whereas this other ground includes enumeration of special cases of strict liability, by this structure DCFR adopted a concept based on which liability based on fault and liability without fault represent equal, mutually non-contradictory and non-competing forms of liability. Their relationship in DCFR regulation may be defined as mutual interconnection which is proved by the fact that liability without fault is more like hybrid institute between causal liability and liability for fault.[28]

Similar procedure was applied within PETL project in respect of determination of relationship of particular forms of liability.

Basic norm of PETL[29] is based on the assumption according to which certain entity is liable to compensate caused damage only in case the requirements laid down by PETL for origination of liability legal relationship were met, i.e. when causing of damage may be attributable to such entity from legal point of view. The mentioned structure corresponds to a Roman law legal principle „*casum sentit dominus*" expressing a thought that everyone must bear a damage sufferred, except for cases where a legal base exists for shifting liability to another entity. The structure of shifting of liability to other entity than aggrieved party is formulated in PETL as so-called legal attributability of damage to an entity other than person who suffered damage. In accordance with the basic norm damage may be attributed to certain entity if:

a) damage was caused by faulty violation of required standard of conduct of such entity,[30] or

b) damage was caused by abnormally dangerous activity of such entity[31] or

c) damage was caused by other persons for which an entity is liable (auxiliary within his assignment or a minor or a mentally disabled person over which an entity exercises care). [32]

From the above mentioned fundamental provision of PETL the preconditions may be derived the existence of which is necessary for origination of claim for compensation of damage and which are, within the PETL concept a damage (recoverable damage), existence of either of three reasons of attributability of damage (fault, dangerous activity or liability for others) and causal link.

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28 *Jansen, N.* Auf dem Weg zu einem europäischen Haftungsrecht. In: Zeitschrift für Europäisches Privatrecht, 2001, Nr. 1, p. 30 ff.

29 Art. 1:101 PETL.

30 Art. 4:101 PETL.

31 Art. 5:101 PETL.

32 Art. 6:101 PETL.

A general consensus was achieved in creation of the rules for liability without fault based on which a method (until then applied in many legal jurisdictions), comprising of particular rules governing certain increased source of danger of occurrence of damage, was abandoned. The above mentioned casuistic system of strict liability was replaced in PETL by generally valid rule derived from the nature of hazardousness of activity. However, the aspect of hazardousness (in PETL view) plays important role not only in central areas of traditional liability without but also similarly in the area based on fault[33] (cases of turning the burden of proof regarding the fault depending on severity of danger)[34]

The concept of nature of danger related to activity is one of the reasons (however, by far not the only one) which in PETL concept do not enable exact and clearly determined line between strict and subjective liability, on the contrary, from point of view of their nature, they point at continuous transition and overlapping of these forms of liability.[35] With the degree of danger increasing, the fault, as a precondition for origination of liability, is gradually replaced by other elements which border strict liability in its restricted understanding. According to scale of intensity of presence of subjective and objective element in subject matter of particular liability it is assumed that certain subject matters include both elements of objective as well as subjective nature, which results in impossibility to strictly attribute the same under solely one of the traditionally recognized forms of liability.

Therefore, the grounds of attributability of damage create fluent transition of particular categories of liability up to the degree permitting the existence of so-called „grey zones" i.e. the cases of liability standing (in traditional view) between the category of liability based on fault and liability without fault.[36] In cases of these so-called grey zones when the degree of danger of activity is not high and liability is very close to liability based on fault in traditional view, it shall be sufficient for liable entity, in order to be relieved from liability, to prove that it acted in accordance with all objective standards of necessary care. In this case the precondition for establishment of liability shall be objective illegal behaviour on one side and hazardousness of situation on the other, whereas the latter of the preconditions replaces the subjective precondition for fault. In case the hazardousness of activity is higher, liable entity must prove that it acted in accordance with the highest possible degree of care, whereby an objective standard of conduct is established. With the rising danger of occurrence of loss the judgment of the actions of the liable entity becomes less important,[37] whereas in abnormally

[33] *Koch, B. A.* The Work of the European Group on Tort Law – The Case of "Strict Liability", cit. supra, p. 7.

[34] Art. 4:201 PETL.

[35] *Rogers, W. V. H.* England. In: *Koch, B. A., Koziol, H.* (eds.) Unification of Tort Law. Strict Liability. Kluwer Law International, 2002, p. 101.

[36] Art. 4:201 PETL and Art. 4:202 PETL.

[37] *Koch, B. A.* The Work of the European Group on Tort Law – The Case of "Strict Liability", cit. supra, p. 8.

dangerous cases of activities the liability is excluded only in cases of *force majeure*.

The structure of equal position of grounds of occurrence of liability was rejected by some EGTL members, especially due to predominantly accepted opinion on priority status of liability based on fault within which particular cases of strict liability are deemed just as exceptions from general principle of fault.

2.4 Preconditions for origination of liability for damage in European tort law

2.4.1 Modified concept of wrongfulness

From the point of view of national laws, the institute of wrongfulness is usually linked either to violation of certain statutory duty or in general to violation of certain legally protected interest and/or certain harmful condition which is against the law. In most cases the wrongfulness may be defined as objective element of preconditions of liability since it is based on objective base (*unlawfulness, illicéité* as objective element)[38], separated from fault. In certain laws (typically French) the above mentioned is accompanied by – in precondition for wrongfulness itself – focus on subjective liability (*culpability, culpabilité*), whereby various combinations apply in relation to attributability of harmful acts or its culpable occurrence.[39,40]

When viewing the concept of wrongfulness in national legislations[41], inconsistency and conceptual deviations lead the authors of DCFR and PETL to creation of separate concept inspired by German BGB. The concept of wrongfulness itself (*wrongfulness, Rechtswidrigkeit*) is not mentioned in DCFR and PETL texts, is not even explicitly expressed in PETL and DCFR rules as obligatory feature of civil law liability and/or is not expressed in the manner common for national laws. The reason for such approach was not only the fact that this institute, as the concept worth following[42], was unconvincing, but also the fear that in the future interpretation misunderstandings and ambiguities may occur as result of different ap-

38 *Koziol, H.* (ed.) Unification of Tort Law: Wrongfulness. Kluwer Law International, 1998.

39 *Elischer, D.* Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR). In *Novotná, M. – Jurčová, M.* (eds.): Súkromné právo v európskej perspektíve. Trnava: Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, 2011, p. 41.

40 *Van Gerven, W., Lever, J., Larouche, P.* Cases, Materials and Text on National, Supranational and International Tort Law. Oxford : Hart Publishing, 2000, p. 352 ff

41 *Koziol, H.* Conclusions. *Koziol, H.* (ed.) Unification of Tort Law: Wrongfulness. cit. supra, p. 129 ff

42 *Von Bar, Ch.* Ausservertragliche Haftung für den Einem Anderen zugefügten Schaden. Das Buch VI des Draft Common Frame of Reference. In European Review of Private law, 2010, Nr. 2, p. 205-207.

proaches of national laws towards assessment of the concept of wrongfulness in its Pan-European perception.

DCFR

The concept of wrongfulness in legal regulation of DCFR is not based on its traditional perception but is modified in favour of the concept of attributability of legally relevant damage,[43] which forms one of the fundamental preconditions for origination of liability. The said concept may be derived from Chapter 2 of Book VI of DCFR which more closely defines the subject matter of legally relevant damage, i.e. such loss which recoverable from DCFR point of view in connection with Chapter 3 of DCFR and its calculation of grounds of attributability.

Subsequently the concept of wrongfulness may be derived from recoverability of legally relevant damage arising from:

a) directly from DCFR (legally relevant damage is the one which is explicitly referred to by Chapter 2 of Book VI of DCFR)

b) *ex lege* (in case of violation of statutory law)

c) from violation of interest worthy of legal protection.[44]

The first set of cases of wrongfulness is derived directly from „normative" rules of DCFR, while the other two sets are derived from the norms of national laws and/or legal review by authority applying the law.

The concept of „ wrongfulness" directly derived from DCFR is linked with particular subject matters stipulated in Articles VI.-2:201 to VI.-2:211 which are deemed illegal acts by DCFR:

a) personal injury and consequential loss

b) loss suffered by third persons as a result of another's personal injury or death

c) infringement of dignity, liberty and privacy

d) communication of incorrect information about another

e) breach of confidence

f) infringement of property or lawful possession

g) incorrect advice or information

h) unlawful impairment of business

i) unfair competition

j) impairment of natural elements constituting the environment

[43] *Swann, S.* Conceptual Foundations of the Law of Delict as Proposed by the Study Group on a European Civil Code. Working Paper No. 130. In InDret, 2003, Nr. 2, p. 8.

[44] *Elischer, D.*: Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR), cit. supra, p. 48.

k) fraudulent misrepresentation

l) inducement of non-performance of obligation.

The concept of „wrongfulness" arising from the other two sets may be more-less easily applied in case of violation of statutory law – this shall include cases and/or subject matters of such actions which are not expressly quoted by DCFR in its enumeration, however these shall include unlawful intervention to such rights which are imminent part of national legislation. However, detecting wrongfulness in case of third set shall be way more complicated, in this case it shall depend on review of law application authority whether in particular case of deciding upon compensation of damage it shall be possible to qualify certain interests as the ones worth legal protection and thus classify their violation into the wrongfulness concept.

Attributability of legally relevant damage in DCFR is built upon presence of three grounds: intention, negligence and cases of attributability with no presence of intention and negligence.[45] Within the attributability the concept of fault (in DCFR they tried to avoid using this term) was divided into two sub-categories comprising of intention and negligence, whereas as the reason for attributability the third category of stricter liability was added identified by descriptive term: attributability without intention and negligence.

DCFR expressly stipulates the definition of intention and negligence (despite tha fact that most national laws leave the issue of definition to doctrine approaches and jurisprudence[46]).

When causing legally relevant damage, the intention is present, if a person intended to cause damage of such type as caused or if legally relevant damage was caused by behaviour which was intended by this person and, at the same time, it was known to that person that such damage or damage of such type shall be certainly or almost certainly caused as a result of such behaviour.[47]

Negligence is primarily fixed to behaviour which does not correspond to level of care required by statutory provision which purpose is to protect a person from loss suffered[48] (statutory level of behaviour) and, secondarily, to behaviour which otherwise does not correspond to the level of care which could otherwise be required from reasonably cautious person given the circumstances.[49]

In respect of stricter liability as the grounds for attributability of legally relevant damage DCFR did not accept the general clause model, on the contrary it is based on principle of specific nature of individual cases of stricter liability stipulated in Articles VI.-3:201 through VI.-3:207 DCFR:

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45 Chapter 3 Book VI DCFR.

46 *Wagner, G.* The Law of Torts in the Draft Common Frame of Reference. Available on http://ssrn.com/abstract=1394343, p. 15.

47 Art. VI.-3:101 DCFR.

48 Art. VI.-3:102 a) DCFR.

49 Art. VI.-3:102 b) DCFR.

a) Accountability for damage caused by employees and representatives
b) Accountability for damage caused by the unsafe state of an immovable
c) Accountability for damage caused by animals
d) Accountability for damage caused by defective products
e) Accountability for damage caused by motor vehicles
f) Accountability for damage caused by dangerous substances or emissions
g) Other accountability for the causation of legally relevant damage

Accountability for damage caused by employees and representatives

A person who employs or similarly engages another is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged caused the damage in the course of the employment or engagement and caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage. This provision applies correspondingly to a legal person in relation to a representative causing damage in the course of their engagement. A representative is a person who is authorised to effect juridical acts on behalf of the legal person by its constitution.

Accountability for damage caused by the unsafe state of an immovable

A person who independently exercises control over an immovable is accountable for the causation of personal injury and consequential loss, loss suffered by third persons as a result of another's personal injury or death, and loss resulting from property damage (other than to the immovable itself) by a state of the immovable which does not ensure such safety as a person in or near the immovable is entitled to expect having regard to the circumstances including:

a) the nature of the immovable;
b) the access to the immovable; and
c) the cost of avoiding the immovable being in that state.

A person exercises independent control over an immovable if that person exercises such control that it is reasonable to impose a duty on that person to prevent legally relevant damage. The owner of the immovable is to be regarded as independently exercising control, unless the owner shows that another independently exercises control.

Accountability for damage caused by animals

A keeper of an animal is accountable for the causation by the animal of personal injury and consequential loss, loss suffered by third persons as a result of another's personal injury or death, and loss resulting from property damage.

Accountability for damage caused by defective products

The producer of a product is accountable for the causation of personal injury and consequential loss, loss suffered by third persons as a result of another's per-

sonal injury or death, and, in relation to consumers, loss resulting from property damage (other than to the product itself) by a defect in the product. A person who imported the product into the European Economic Area for sale, hire, leasing or distribution in the course of that person's business is accountable correspondingly. A supplier of the product is accountable correspondingly if the producer cannot be identified; or in the case of an imported product, the product does not indicate the identity of the importer (whether or not the producer's name is indicated), unless the supplier informs the person suffering the damage, within a reasonable time, of the identity of the producer or the person who supplied that supplier with the product.

A person is not accountable under the provisions relating to damage caused by defective products for the causation of damage if that person shows that:

a) that person did not put the product into circulation;

b) it is probable that the defect which caused the damage did not exist at the time when that person put the product into circulation;

c) that person neither manufactured the product for sale or distribution for economic purpose nor manufactured or distributed it in the course of business;

d) the defect is due to the product's compliance with mandatory regulations issued by public authorities;

e) the state of scientific and technical knowledge at the time that person put the product into circulation did not enable the existence of the defect to be discovered; or

f) in the case of a manufacturer of a component, the defect is attributable to the design of the product into which the component has been fitted; or instructions given by the manufacturer of the product.

"Producer" means:

a) in the case of a finished product or a component, the manufacturer;

b) in the case of raw material, the person who abstracts or wins it; and

c) any person who, by putting a name, trade mark or other distinguishing feature on the product, gives the impression of being its producer.

"Product" means a movable, even if incorporated into another movable or an immovable, or electricity.

A product is defective if it does not provide the safety which a person is entitled to expect, having regard to the circumstances including:

a) the presentation of the product;

b) the use to which it could reasonably be expected that the product would be put; and

c) the time when the product was put into circulation, but a product is not defective merely because a better product is subsequently put into circulation.

Accountability for damage caused by motor vehicles

A keeper of a motor vehicle is accountable for the causation of personal injury and consequential loss, loss suffered by third persons as a result of another's personal injury or death, and loss resulting from property damage (other than to the vehicle and its freight) in a traffic accident which results from the use of the vehicle. "Motor vehicle" means any vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled.

Accountability for damage caused by dangerous substances or emissions

A keeper of a substance or an operator of an installation is accountable for the causation by that substance or by emissions from that installation of personal injury and consequential loss, loss within article VI. – 2:202 (Loss suffered by third persons as a result of another's personal injury or death), loss resulting from property damage, and burdens within VI. – 2:209 (Burdens incurred by the State upon environmental impairment), if having regard to their quantity and attributes, at the time of the emission, or, failing an emission, at the time of contact with the substance it is very likely that the substance or emission will cause such damage unless adequately controlled; and the damage results from the realisation of that danger. "Substance" includes any chemicals whether solid, liquid or gaseous and microorganisms are to be treated like substances. "Emission" includes the release or escape of sub-stances; the conduction of electricity; heat, light and other radiation; noise and other vibrations; and other incorporeal impact on the environment. "Installation" includes a mobile installation and an installation under construction or not in use. However, a person is not acco-untable for the causation of damage under these provisions if that person does not keep the substance or operate the installation for purpo-ses related to that person's trade, business or profession; or shows that there was no failure to comply with statutory standards of control of the substance or management of the installation.

Other accountability for the causation of legally relevant damage

The last of the cases of stricter liability enables, under stipulated conditions, the extension of cases of liability without fault by exiting from liability schemes of stricter liability in favour of broader *victim-friendly* system of national law.[50] The question is, to what extent this compromise solution adopted probably due to absence of general clause of stricter liability, affected the efficiency and degree of harmonization in this field.

Introduction of general clause of stricter liability requires from the court of law to determine the extent of such liability in each particular case. The catalogue of cases of stricter liability derived from general clause is thus created *ex post,* unlike casuistic system adopted by DCFR, within which particular cases of stricter

[50] *Wagner, G.* The Law of Torts in the Draft Common Frame of Reference, cit. supra, p. 18.

liability are known *ex ante*. Within DCFR initiative this approach was chosen due to better legal certainty and foreseeability for the addressees of given rules as well as foreseeability of risk of occurrence of liability and the related possibility to secure the insurance coverage for such risk.[51]

PETL

In respect of wrongfulness concept the authors of PETL linked the concept of attributability of the caused damage on the basis of legally stipulated grounds (Swiss model) with more-less precisely defined set of legally protected interests (German model).[52]

The concept of legally protected interests in PETL is based on assumption that law assigns to subjective rights and interests of certain persons a protection whereby at the same time it requires from everyone else to honour this legally protected area. Thus finally the acceptance of the protected area of other person leads to restriction of own possibilities of behaviour (restriction of freedom to act) by determination of barriers by which violation by an entity the legally protected interests of others would be violated and/or threatened. Due to the fact that there are mutually contradictory interests facing each other, the extent of protection of subjective rights and interests must be determined in extremely sensitive manner, upon mutual "weighing" of contradictory interests.

With the goal to provide assistance to national courts, when deciding upon determination of the extent of the protected area, EGTL prepared, based on national reports and comparative analysis, the factors relevant for review of the extent of the protected area.

The extent of the protected area within PETL is derived from hierarchy of legal interests, whereas the scope of protection awarded depends on nature of the protected interest,[53] i.e. the higher the value, the more precise the determination and clarity, the broader protection. [54]

From the point of view of the value of the protected interests and their mutual hierarchy the highest protection is assigned to life, bodily and mental integrity, human dignity and liberty, another (lower) level is represented by property rights (*in rem* rights) including rights to intangible property, whereas the lowest level is represented by pure economic interests arising from contractual relationships. The extent of protection may be affected also by the type of liability in the sense that certain interest enjoys higher level of protection against caused loss than

[51] See Ibid., p. 18-19.

[52] *Elischer, D.* Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR), cit. supra, p. 41.

[53] Opposite view *Werro, F.* The Swiss Tort Reform: a Possible Model for Europe? Selected Remarks, Including a Short Assessment of the Principles of European Tort Law. In *Bussani, M.* (ed.) European Tort Law. Eastern and Western Perspectives. Berne : Stämpfli Publishers, 2007, p. 93 ff

[54] See Art.2:102 sec. 1 PETL.

other cases and last but not least, when deciding about the extent of protection it is necessary to consider both public interest as well as the interest of the acting entity, especially as far as freedom of acting and exercise of a right is concerned.

The question whether in particular case a violation of legally protected interest occurred is solved by application of so-called three-stage system based on which particular assessment criteria are subject to weighing. When creating this three-stage methodology[55] the authors of PETL were led especially by differences in perception of wrongfulness in national laws,[56] which required formulation of this separate approach.

The first step leads to a discovery whether an entity threatened the rights and interests protected by law. In case no violation of legally protected interest occurred, it is impossible to claim liability vis-à-vis the entity. On the contrary, if an entity violated legally protected interest, it acted unlawfully in abstract meaning,[57] i.e. illegally in the sense of traditional civil law definition of illegality. However this fact itself is not a sufficient ground for origination liability but it is necessary to review the second step. Despite of the above the completion of the first stage carries certain legal consequences including an option to apply the defence measures[58] (necessity, self-help).

The first stage of review is close to German concept of *Erfolgsunrechtslehre* which is oriented at illegality of the result of behaviour of entity.

The second stage of review is focused on review of behaviour of an entity in respect of required standard of conduct in accordance with fulfilment of objective criteria of its violation stipulated in Article 4:102 PETL. This step is reasonable in respect of establishment of liability for fault, whereas the conditions for fulfilment thereof are stipulated in Article 4:101 of PETL. In this stage the discovery of objective violation of due care may lead to establishment of liability provided that other liability elements also apply in concurrence (concurrence of increased danger may lead to turning of the burden of proof and thus to establishment of liability for presumed fault according to Article 4:201 of PETL).[59]

The second stage of review is close to Austrian concept of *Verhaltensunrechtslehre,* which is oriented to illegality of behaviour itself (manner of actions) and not to the result of behaviour.

The third step is linked with possibility to attribute the fault (intentional or negligent violation of the required level of behaviour) to particular entity according to Article 4:101 of PETL. The fulfilment of this third step is a justification for

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55 See *Koziol, H.* Die „Principles of European Tort Law" der „European Group on Tort Law". In Zeitschrift für Europäisches Privatrecht, 2004, Nr. 2, p. 240-241. *Dulak, A.* Princípy (európskeho) deliktného práva. In *Lazar, J., Blaho, P.* (eds.) Základné zásady súkromného práva v zjednotenej Európe. Bratislava : Iura Edition, 2007, p. 303.

56 *Dulak, A.* Princípy (európskeho) deliktného práva, cit. supra, p. 303.

57 *Koziol, H.* Die „Principles of European Tort Law" der „European Group on Tort Law", cit. supra, p. 240.

58 Ibid., p. 241.

59 Ibid.

establishment of of liability for caused damage (it is applied in case of subjective liability based on fault).

The grounds upon which it is possible to attribute the caused damage to the liable entity, creating together with the concept of legally protected interest the fundamental precondition for origination of liability, may be, under the classification by PETL, structured in two groups:

a) liability for fault
b) liability for risk
c) liability for other individuals.

Inclusion of liability for other individuals as a separate ground for liability was subject to criticism, whereas the basic criteria against the liability for others as a differentiating base of legal attributability of damage is especially the fact that liability for others (vicarious liability) may be of nature both subjective as well as strict liability, whereas as a result its designation as a separate category is not reasonable.[60]

Ad a) Liability based on fault

Origination of liability based on fault in PETL regulations assumes intentional or negligent violation of required standard (required level) of behaviour (acting or omission). Certain entity is imposed a duty to compensate damage if, provided that other preconditions for liability are fulfilled, his behaviour does not correspond to what may be reasonably expected from him.[61]

A duty to maintain certain standard of activity is included in Anglo-American concept of tort protection *duty of care*. The fundamental standard of activity is care/thoughtfulness of typical reasonable person. A liability for damage caused to another entity shall be claimed vis-à-vis an entity if such entity has a *duty of care* vis-à-vis that entity and it violates this duty. The violation of mandatory degree of care is a category standing between continental categories of fault and wrongful behaviour. *Duty of care* alone stipulates personal scope of duty of care, thus the issue, who must be respected and who has a claim for compensation of damage caused by another. [62]

Required standard of conduct is behaviour of so-called „reasonable person" taking into account the circumstances of particular case, whereas evaluation of standard of conduct depends on nature and value of protected interest affected (higher the value of protected interest, higher the protection assigned), hazard-

[60] *Panteleón, F.* Principles of European Tort Law: Basis of Lability and Defences. A critical view „from outside". In InDret, 2005, Nr. 3, p. 2. Available on-line na http://www.indret.com/pdf/299_en.pdf.

[61] Art.4:101 PETL.

[62] *Csach, K. et al.* Profesijná zodpovednosť. Zodpovednosť za škodu spôsobenú pri výkone vybraných činností s akcentom na europeizáciu deliktuálneho práva, cit. supra, p. 68-81.

ousness of activity (acting person must adapt its behaviour to the nature of activity performed by him), experience which may be expected from acting person (if an entity acts within the exercise of its profession the higher degree of experience to which aggrieved party relies on may be expected), foreseeability of occurrence of damage (foreseeability as objective category assessed as of the moment of activity which lead to occurrence of damage), mutual relationship between tortfeasor and the aggrieved party (closer the relationship between the entities, the higher degree of cautiousness is assumed on the side of the acting entity due to rightful interests of the other party which the acting tortfeasor should know due to the close relationship) as well as degree of achievability and the costs necessary for realization of precautionary or alternative methods (if a goal may be achieved by application of various methods, it is necessary to choose a method which in the lowest extent threatens the rightful interests of others, whereas it is necessary to choose a method which is safe despite of the fact that its price is higher).[63]

When judging the required standard of conduct it is necessary to take into account the rules which prescribe or prohibit certain behaviour, i.e. acting in contradiction with such rules (violation of such rules) shall constitute the grounds for classification of behaviour as faulty violation of required standard of conduct.

The mentioned criteria (factors) of judgment of standard of conduct of reasonable person have objective nature which is modified by Article 4:102 par. 2 PETL according to which required standard of conduct may be adjusted be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it. The goal of such formulated provision modifying the objective criteria of standard of conduct is to mitigate these criteria in the sense that the rigidity of criteria is remedied in respect of actual mental maturity of particular entity.

Model of standard of conduct of „reasonable person" should not be viewed, within the judgement of law application authority, as a behaviour of „average member of society", but standard of conduct of modern type „*bonus pater familias*" (*good family father*, *le bon père de famille*), who does not pursue only its own goals, but on the contrary, takes into account also interests of other entities.[64]

Structure of „reasonable person" is variable and may be adapted to a particular case, however not in relation to particular liable person but in relation to the group (category) which is represented by particular person (required standard of conduct shall not be same in category of „reasonable" expert – surgeon and in category of „reasonable" general practitioner).[65]

Ad b) Liability without fault (strict liability)

Unlike casuistic regulation of particular sources of danger, strict liability in

[63] See Art.4:102 sec. 1 PETL and *European Group on Tort Law*, Principles of European Tort Law. Text and commentary, cit. supra, p. 75-79.

[64] *Widmer, P.* Liability Based on Fault. In Principles of European Tort Law. Text and commentary, cit. supra, p. 76.

[65] Ibid.

PETL is based on general source clause which imposes upon person exercising abnormally dangerous activity stricter liability for damage typical for danger represented by the exercised activity and arising from such activity.

Danger in this view is defined as mutual effect of two elements – possible extent and probability of occurrence of damage. [66]

The presence of high degree of danger substantiates replacement of fault, as a precondition for occurrence of liability, by other elements which determine the area of stricter liability in its restricted approach.[67]

In PETL high degree of danger is fixed to the concept of abnormally dangerous activity identified by two factors – by creation of foreseeable and significant danger of occurrence of damage even in cases where upon exercising of the activity all due care is observed as well as by exclusion thereof as subject of common use.

Despite of the fact that the provision formulated as mentioned above extends the scope of liability without fault beyond the borders of common regulations of objective liability in EU member states,[68] the concept of "abnormal" hazardousness of an activity vastly limits the extent of application thereof. Restrictive formulation of the mentioned provision limiting applicability thereof to „abnormally" dangerous activities is to certain extent modified by the possibilities of national laws to designate other cases liability without fault for dangerous activities not reaching the degree of abnormally dangerous activities.[69] Other cases of stricter liability may be determined by application of analogy in respect of other sources of comparable danger of occurrence of damage unless otherwise stipulated by national law.[70]

Ad c) Liability for others

Legal regulation of liability for others includes both cases of liability for minors or persons subject to mental disability as well as cases of liability for auxiliaries. By the above mentioned differentiation PETL rejects generalizing approach to solution of issue of liability for other in order to avoid inappropriate mixture of liability for other based on fault with the cases of objective liability for other.[71]

The entity liable for damage caused by minor or person subject to mental disability is an entity who exercises custody over such person.

In European laws this case is dealt with by three different methods:

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66 *Koch, B. A.* The Work of the European Group on Tort Law – The Case of "Strict Liability", cit. supra, p. 7. Art.5:101 sec. 3 PETL.

67 Ibid., p. 8.

68 *Wagner, G.* The Project of Harmonizing European Tort Law. In Common Market Law Review, 2005, Nr. 5, p. 1269 ff, p. 1282.

69 Art.5:102 sec. 1 PETL.

70 Art.5:102 sec. 2 PETL.

71 Cf. *Moréteau, O.* Liability for others. In Principles of European Tort Law. Text and commentary, cit. supra, p. 113.

1. there is no rule and the aggrieved party must demonstrate the fault of the parents (and/or other persons) and causal link (Austria, England),
2. fault of the parents is presumed, the parents and/or other persons may be liberated from liability if they prove that they exercised all necessary effort for custody over minors and/or persons subject to mental disability (Germany, Switzerland)
3. objective liability of persons exercising custody (France via judicial practice).

Liability for minors and persons subject to mental disability is structured as a presumed liability,[72] from which a person conducting custody may be relieved if the custody duty was duly fulfilled (demonstration of acting in compliance with required standard of conduct during exercise of custody).

Liability for auxiliaries is a liability of relevant entity (individual or legal entity) for damage caused by its auxiliaries (for the purposes of the said provision independent contractual party is not deemed an auxiliary), acting within the exercise of task conferred upon them provided that the auxiliaries violated required standard of conduct. The impact of this provision is not limited solely to the field of employment (although the most frequent example of „auxiliary" (used person) falling under the mentioned provision shall be employee in relation to its employer), however application thereof is possible even in broader extent and in general in relation to the persons acting under supervision of liable party.

PETL, likewise DCFR, includes enumeration of facts the presence of which excludes liability in the legal relationship.

PETL construes these facts as tools for defence and/or objections of the tortfeasor *(defences),* which are subsequently differentiated to objections supported by justification of actions (grounds excluding wrongfulness in traditional view) - self-defence, necessity, self-help, consent of the aggrieved party, lawful authorization and objections related to liability without fault (facts leading to liberation from liability) – force majeure and behaviour of others.

Similarly, DCFR regulation introduces the detailed regulation of instruments which may be applied by the tortfeasor for its defence and which are designed as objections *(defences)* of the offender, whereas substantiated application thereof shall have legal effect of release of liability. Within the regulation of defences Chapter 5 of DCFR covers a set of rules which in continental law are usually viewed as separate institutes.[73] On one side, these include the cases where protective function of tort law does not apply, either due to the fact that the interest in question is not worthy protection in given particular situation or due to clash of contradictory interests, where it is necessary to assign the protection to

[72] Ibid., p. 114.

[73] *Wagner, G*. The Law of torts in Draft Common Frame of Reference, cit. supra, p. 30. *Elischer, D*. Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR), cit. supra, p. 51.

the "stronger" interest.[74] These facts form a category of traditional circumstances excluding wrongfulness (consent of the aggrieved party or acting at own risk[75], exercise of authority conferred by law (exercise of authority),[76] self-defence, benevolent intervention and necessity,[77] protection of public interest[78]). On the other hand, under the section of defences of the tortfeasor, in addition to the mentioned enumeration of the categories, DCFR stipulates also the issues which are deemed as separate institutes in traditional civil law approach and are stipulated separately from circumstances substantiating exclusion of liability (contributory fault,[79] mental incompetence,[80] events beyond control[81], contractual exclusion or limitation of liability[82]).

The concept of the *defences* primarily fixed to *common law* is, in its substance, broader than the concept of the grounds excluding wrongfulness - *grounds of justification* (*fait justificatif, Rechtsfertigungsgründe*) which is fixed to continental civil law. Due to broader coverage of the mentioned grounds excluding liability both DCFR as well as PETL initiatives elected the superior term *defences.*

2.4.2 Existence of damage

Legal institute of damage („*damage*", „*dommage*", „*Schaden*") and its existence as one of necessary preconditions for establishment of tort law liability relationship leading mainly towards reparation of unfavourable consequence and, similarly, solution of content definition of this term is, without a doubt, one of the major issues of national and international initiatives in the field of tort law.

In this approach, first of all, the point will be the consolidation of certain type of „damage" recognized by law as significant "damage" from legal point of view, whereas the issue of legal relevance of damage is always a legal issue which must be solved by the court in accordance with the principle *jura novit curia*. Not any "damage" in common understanding, may be deemed as damage in legal sense. Classification of damage is derived from the concept of damage elected by law which may either be of "factual" or "normative" nature. Factual nature of damage is obvious when all kinds of actual loss may be qualified as damage in legal sense, whereas no legally relevant „damage" may arise in case of absence of factual loss of certain type. Normative nature of damage means that only certain selected

74 *Wagner, G*. The Law of torts in Draft Common Frame of Reference, cit. supra, p. 30-31.

75 Art.VI.-5:101 DCFR.

76 Art.VI.-5:201 DCFR.

77 Art.VI.-5:202 DCFR.

78 Art.VI.-5:203 DCFR.

79 Art.VI.-5:102 DCFR.

80 Art.VI.-5:301 DCFR.

81 Art.VI.-5:302 DCFR.

82 Art.VI.-5:401 DCFR.

types of actual loss may be qualified as legally relevant "damage", whereas the law permits the existence of legally relevant damage even in cases when factual loss is not externally visible.[83]

Despite of the fact that the existence of damage (as institute in view *sensu lata*) is a fundamental condition for occurrence of obligation to compensate damage arisen, arisen pecuniary or non-pecuniary loss, only exceptionally did European civil law codes take the path of exact legal definition (general or particular nature) of the said legal institute; on the contrary, most laws resigned on exact legal terminology definition. Thanks to this approach broad possibilities opened up to various theoretic interpretations of legal (especially judicial) practice, whereas current results of these interpretations do not lead, and they actually never did, to the same or at least similar solutions in the level of practical realization in particular countries.

Legal definition of damage from tort law point of view is included for example in Austrian law: see Section 1293 first sentence of Austrian ABGB: „Schade heißt jeder Nachteil, welcher jemandem an Vermögen, Rechten oder seiner Person zugefügt worden ist, Davon unterscheidet sich der Entgang des Gewinnes, den jemand nach dem gewöhnlichen Laufe der Dinge zu erwarten hat." Under Austrian law, damage is each loss caused to someone on property, rights or his/her personality, whereas lost profit must be separated from such damage. In common law damage is defined separately for each „tort", resulting in absence (and no possibility to exist) of general definition of damage. This status arises from the nature of the system of various *torts*, whereas some of those have very limited scope of application.

Despite of absence of statutory definition the courts of law and academic theories adopted certain widely formulated definitions of recoverable damage which should serve as a lead, the use of which in particular case however requires further considerations and more detailed definition: „any loss which is suffered by anyone with regard to its legally protected rights, things or interests" (Germany), „loss the value of which may be determined from economic point of view" (Italy), „factual loss arising from certain circumstances" (Netherlands).[84]

It would be an illusion to think that only theoretic and/or statutory definition of term damage would solve all the issues of tort law, however it is necessary to fairly define (especially in European projects and initiatives in the field of tort law, within which most of the used legal terms carry semantic connotations with which these terms are associated in relevant laws) so-called "reparable" damage, i.e. such loss (in the sense of *ius naturale*) which is, according to law, deemed as damage and/or loss (in the sense of positive law) and which may be recovered.

Likewise, European institutions (especially Commission) significantly support the idea of creation of common European legal terminology (see for example

[83] *Banakas, S.* Unde venis et quo vadis? European tort law revisited. In Schweizerisches Zeitschrift für Internationales und Europäisches Recht, 2008, Nr. 4, p. 295-320, p. 299-300.

[84] *Magnus, U.* (ed.) Unification of tort law: Damage. Kluwer Law International, 2001, p. 191.

Simone Leitner case[85]), whereas the concept of damage is primary candidate for its classification to the list of unified legal terms.[86] Despite of this fact the creation of common European definition of damage is quite complicated due to the following:

a) this term is at the same time also a word of everyday language as well as technical legal term,
b) it is a part of union law as well as each particular European national law (and language) whereas
c) these national laws do not assign equal meaning to equal (or similar) word (d*amage, dommage, danno, dano, Schade a Schaden*).[87]

The concept of damage („*damage"*) as one of the fundamental construction stones of both harmonization initiatives is built on definition of so-called recoverable damage in PETL and definition of so-called legally relevant damage in DCFR.

This structure of „damage" in PETL and in DCFR points to the fact, that not each unfavourable consequence suffered by an entity is relevant also from the point of view of the tort law. On the contrary, legal relevance is assigned only to recoverable and/or legally relevant damage assuming pecuniary or non-pecuniary loss on legally protected interest.

From terminology (and strictly linguistic) point of view, in relation to usage of terms damage and loss in DCFR and PETL texts, it is necessary to state that term damage used in PETL as well as DCFR as term covering the recoverable pecuniary and non-pecuniary loss may be, in the context of European initiatives of tort law, deemed as legal structure of unfavourable consequences which hit the legally protected interest (i.e. in this view damage is a legal category). Term harm, loss is based more on natural law approach to unfavourable consequences and PETL and DCFR initiatives use these terms in order to differentiate pecuniary and non-pecuniary loss.

On the other hand, due to used concepts of recoverable damage in PETL and legally relevant damage in DCFR, the strict differentiation of these two categories of terms is not really significant and both initiatives use them rather synonimically in their text.

85 C-168/00 Simone Leitner v. TUI Deutschland (2002) ECR I-2631.

86 *Von Bar, Ch*. The notion of damage. In *Hartkamp, A. S., Hesselink, M. W. et al*. (eds.) Towards a European Civil Code. Fourth Revised and Expanded Edition. The Netherlands : Kluwer law International, 2011, p. 387.

87 Ibid., p. 391.

DCFR

In relation to the definition of damage as fundamental precondition of civil law liability DCFR deals, as already mentioned above, with the concept of legally relevant damage which may have a form of pecuniary loss, non-pecuniary loss and loss of health.

The chapter dedicated to regulation of legally relevant damage consists of two sections within which a combination of specification approach is applied (the second section regulates specific cases of legally relevant damage) and abstract approach (the first section consists of the rules of general nature which broaden the area of explicitly mentioned cases of legally relevant damage by determination of conditions fulfilment of which gives rise to qualification of loss not falling under Section 2 as legally relevant damage). Definition of legally relevant damage, as combination of both approaches, is thus built on three pillars[88] including the loss:

a) arising from the rules of Chapter 2 of DCFR
b) arising from violation of right otherwise granted by law
c) arising from violation of interest worthy of legal protection.

The losses which may be assigned under second or third category of legally relevant damage are subject to two-stage test within the process of qualification as legally relevant damage, within which the first stage refers to fairness and reasonability (*fair and reasonable*) of granting a right to reparation or prevention. The second stage (dispersing to certain extent overall vagueness of given criteria[89]) in more detail specifies the facts upon which it is judged whether granting of a right to reparation or prevention is fair and reasonable. Within this evaluation process the following shall be taken into account: the grounds of attributability, nature and proximity of damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy.

The first category of legally relevant damage is built on casuistic approach of enumeration of particular types of loss the content of which is determined by Articles VI.-2:201 through 2:211 DCFR.

The first area of legally relevant damage explicitly arising from DCFR is fixed to:

a) personal injury and consequential loss
b) loss suffered by third persons as a result of anothers personal injury or

[88] *Von Bar, Ch.* Principles of European Law. Non-contractual liability arising out of Damage caused to Another. Munich : Sellier, 2009, p. 303.

[89] *Elischer, D.* Pojetí škody, resp. újmy v akuálních dokumentech evropského deliktního „soft law". In Právník, 2011, Nr. 4, p. 378 ff, p. 392.

death

c) infringement of dignity, liberty and privacy
d) loss upon communication of incorrect information about another
e) loss upon breach of confidence
f) loss upon infringement of property or lawful possession
g) loss upon reliance on incorrect advice or information (legally relevant damage inspired by *Hedley Byrne case90*)
h) Loss upon unlawful impairment of business
i) Burdens incurred by the state upon environmental impairment
j) Loss upon fraudulent misrepresentation
k) Loss upon inducement of non-performance of obligation

Personal injury and consequential loss means loss caused to a natural person as a result of injury to his or her body or health and the injury as such. According to the Book VI DCFR such loss includes the costs of health care including expenses reasonably incurred for the care of the injured person by those close to him or her. Personal injury includes injury to mental health only if it amounts to a medical condition.

Loss suffered by third persons as a result of another's personal injury or death

Non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person.

Where a person has been fatally injured:

a) legally relevant damage caused to the deceased on account of the injury to the time of death becomes legally relevant damage to the deceased's successors;
b) reasonable funeral expenses are legally relevant damage to the person incurring them; and
c) loss of maintenance is legally relevant damage to a natural per-son whom the deceased maintained or, had death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support.

Infringement of dignity, liberty and privacy

Loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant damage. Loss caused to a person as a result of

[90] Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.

injury to that person's reputation and the injury as such are also legally relevant damage if national law so provides.

Loss upon communication of incorrect information about another

Loss caused to a person as a result of the communication of information about that person which the person communicating the information knows or could reasonably be expected to know is incorrect is legally relevant damage.

Loss upon breach of confidence

Loss caused to a person as a result of the communication of information which, either from its nature or the circumstances in which it was obtained, the person communicating the information knows or could reasonably be expected to know is confidential to the person suffering the loss is legally relevant damage.

Loss upon infringement of property or lawful possession

Loss caused to a person as a result of an infringement of that person's property right or lawful possession of a movable or immovable thing is legally relevant damage. Loss includes being deprived of the use of property. Infringement of a property right includes destruction of or physical damage to the subject-matter of the right (property damage), disposition of the right, interference with its use and other disturbance of the exercise of the right.

Loss upon reliance on incorrect advice or information

Loss caused to a person as a result of making a decision in reasonable reliance on incorrect advice or information is legally relevant damage if:

a) the advice or information is provided by a person in pursuit of a profession or in the course of trade; and

b) the provider knew or could reasonably be expected to have known that the recipient would rely on the advice or information in making a decision of the kind made.

Loss upon unlawful impairment of business

Loss caused to a person as a result of an unlawful impairment of that person's exercise of a profession or conduct of a trade is legally relevant damage. Loss caused to a consumer as a result of unfair competition is also legally relevant damage if Community or national law so provides.

Burdens incurred by the state upon environmental impairment

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.

Loss upon fraudulent misrepresentation

Loss caused to a person as a result of another's fraudulent misrepresentation, whether by words or conduct, is legally relevant damage. A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and it is intended to induce the recipient to make a mistake.

Loss upon inducement of non-performance of obligation

Loss caused to a person as a result of another's inducement of the non-performance of an obligation by a third person is legally relevant damage only if:

a) the obligation was owed to the person sustaining the loss; and

b) the person inducing the non-performance:

- intended the third person to fail to perform the obligation, and
- did not act in legitimate protection of the inducing person's own interest.

Particular image of the second category of legally relevant damage depends on incorporation of certain subjective right that was violated into normative text of national legal regulation whereby this way fulfilment of condition of recognition by national law takes place. Rights otherwise conferred by law are deemed all those rights which are qualified by relevant law as absolute rights, whereas it shall apply that it need not be just absolute rights of private law nature (such as right to vote). On the contrary, the rights of relative nature which are applied *inter partes* are excluded from concept of rights otherwise conferred by law.

Particular form of the third category of legally relevant damage depends on judgement by law application authority, whether in given case of violation of certain interest it is an interest worthy of legal protection and whether loss arising from this violation may be qualified as legally relevant damage.

The concept of legally relevant damage formulated in this manner creates open and flexible system enabling in the future its further formation especially by way of judicial interpretation.

PETL

The concept of damage as one of the preconditions of occurrence of liability in PETL is built on view of the damage in its restrictive meaning which was „normatively" reflected into the conceptual definition of so-called recoverable damage, i.e. damage capable of compensation.[91] The precondition so structured may imply that PETL leads rather to legal than natural understanding of loss.

Legal definition of damage as pecuniary and non-pecuniary loss to interest protected by law does not trigger doubts regarding the possibility to compensate not only material loss but also immaterial loss.

According to PETL recoverable damage includes also so-called costs of pre-

[91] Art.2:101 PETL.

ventive measures such as *costs arisen upon preventing the threatening damage*. These costs constitute recoverable loss in the extent as reasonably incurred.[92] The possibility to demand compensation of costs of preventive measures is subject to cumulative fulfilment of the conditions of direct threat of occurrence of damage and reasonability of incurring such costs, whereas the fact whether or not damage actually occurred is irrelevant.

Alongside the legal definition of damage Article 2:103 PETL includes negative definition of the concept of damage (this approach may be deemed innovative) specifying the type of damage which unrecoverable. In accordance with the provision of this Article it is impossible to claim the compensation of damage in respect of losses related to the activities or sources viewed as illegal. If an activity or source of advantage is illegal or reprobated by law, loss of revenue from such illegal activity does not constitute the grounds for compensation of damage. In this respect it is however necessary to note that only the damage directly subject to activities or sources viewed as illegal is not recognized. Therefore, other damage arising from this source or activity (such as non-pecuniary loss or bodily injury) is not excluded from compensation.

Pecuniary and non-pecuniary damage

Within PETL initiative as well as DCFR initiative recoverable damage includes both pecuniary loss (material loss) as well as non-pecuniary loss (immaterial) loss.

DCFR

Alongside the recognition of possibility of compensation of pecuniary and non-pecuniary loss these terms are directly defined in Article VI.-2:101 par. 4 of DCFR. While pursuant to the above mentioned provision pecuniary loss (*economic loss*) includes *loss of revenue or profit, costs incurred and reduction of asset value,* non-pecuniary loss (*non-economic loss*) includes *pain and suffering as well deterioration of life quality*.

From the point of view of terminology of the used terms of pecuniary and non-pecuniary loss (damage), it is necessary to specify that upon preparation of the rules of non-contractual liability for damage it was not important to decide which of the terms *economic loss – pecuniary loss* or *non-economic – non-pecuniary loss* is to be chosen, due to the fact that, *inter alia*, even in UK the use of these terms is not consistent.

Enumeration of particular types of pecuniary loss is only demonstrative and may include also other types of loss, whereas only the most significant are listed as examples (due to inability to create exhaustive enumeration of all types of pecuniary loss). In general, pecuniary loss in DCFR may be classified as negative

[92] Art.2:104 PETL.

difference between current asset status of the aggrieved party (*status quo*) and status primarily prior to occurrence of the damaging event (*status quo ante*).[93] In addition to such reduction of assets the pecuniary loss also includes increase of liabilities.

Similar situation, that is inability to define all types of loss, is also related to its immaterial side within which pain, suffering and reduction of life quality form only „the least controversial"[94] cases of non-pecuniary loss which, for this reason, were included in the exemplificative enumeration of its types. Due to the above, also other types of loss arising from the intervention in the moral rights which are not implied *expressis verbis* from definition of non-pecuniary loss may be considered as non-pecuniary loss under DCFR.

PETL

Following the definition of recoverable damage PETL defines in general the concept of recoverable pecuniary damage[95] as diminution of the victim's patrimony caused by the damaging event. Such damage should be in principle determined as specific as possible, which however does not exclude (if appropriate) also its abstract determination, for example by reference to a market value. The concept of recoverable non-pecuniary loss is not directly defined in the Principles, however its content can be derived from the concept of pecuniary loss, whereas following which damage is considered non-pecuniary in case it does not lead to the reduction of assets[96] (i.e. if the loss incurred can not be classified under pecuniary damage). When judging the extent of protection[97] damage to interest may excuse compensation of non-pecuniary loss (it includes especially cases of personal loss, loss of freedom, dignity or other moral rights). From the point of compensation of non-pecuniary loss the fundamental indicators are severity, duration and consequences of loss, whereby PETL enables law application authority to decide directly about compensation thereof based on procedure and subject to judgment of particular factors stipulated in PETL.

In relation to the institute of loss which is recoverable within European tort law initiatives there is a special place for the concept of *pure economic loss (reines Vermögenschaden, dommage purement économique)*[98] (so-called pure economic

93 *Von Bar, Ch*. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 313.

94 *Von Bar, Ch.* The notion of damage, cit. supra, p. 398.

95 Art.10:201 PETL.

96 *Koziol, H.* Damage. In European Group on Tort Law, Principles of European Tort Law. Text and commentary, cit. supra, p. 28.

97 Art.2:102 PETL.

98 *Bussani, M., Palmer, V. V.* (eds.) Pure economic loss in Europe. New York : Cambridge University Press, 2003; *Van Boom, W.* Pure Economic Loss: A comparative perspective. In: *Van Boom, W., Koziol, H., Witting, Ch.* (eds.) Pure economic loss. Wien : Springer-Verlag, 2004; *Gauch, P., Sweet, J.* Deliktshaftung für reinen Vermögensschaden. Festschrift für Max Keller. Zürich,

loss which did not occur as a result of direct unauthorized intervention to moral rights or property of an entity, i.e. which is not derived from physical damage to a person or property of given entity).

Category of pure economic loss is an institute which is not known in all legal jurisdictions[99] and/or the content of this term may be understood with quite different connotation. The common attribute is the fact that neither of the legal jurisdictions could find appropriate general criteria for compensation of pure economic loss, whereas this is an area highly controlled by *ius in causa positum*.[100] English and German laws represent the most intensive rejection of equalizing of pure economic loss with the categories of personal loss and pecuniary loss, whereas this attitude is supported by economic analysis of tort law. [101]

DCFR

Chapter 2 of Book VI of DCFR admits that pure economic loss represents certain problem, however the concept of *pure economic loss* is not directly mentioned in DCFR text, this institute is present in DCFR implicitly[102], arising from certain provisions.[103] However, the possibility of compensation for *pure economic loss* is also admitted by von Bar stating that DCFR, in principle, does not distinguish between economic loss and pure economic loss[104] and/or that liability based on fault (on the contrary to strict liability) permits considerably more cases of legally relevenat damage, especially loss which is currently identified as „*pure economic loss*" in many legal jurisdictions.[105]

PETL

The concept of *pure economic loss* in PETL is derived from concept of loss on legally protected pure economic interests protection of which may be of lower degree compared to subjective rights of personal and property nature, as mentioned in Article 2:102 par. 4 of PETL. In these cases it should be specially observed

1989; *Van Dunné, J. M.* Liability for Pure Economic Loss: Rule or Exception? A Comparatist's View of the Civil Law – Common Law Split on Compensation of Non-Physical Damage in Tort Law. In European Review of Private Law, 1999, Nr. 4, p. 397 ff

99 *Bussani, M., Palmer, V. V.* (eds.) Pure economic loss in Europe, cit. supra.

100 *Van Dam, C*. European Tort Law. cit. supra, p. 171.

101 *Wagner, G*. The Law of torts in Draft Common Frame of Reference, cit. supra, p. 8 ff.

102 Ibid., p. 10-11.

103 Art. VI.2-204, VI.-2.205, VI.-2.207, VI.-2.208, VI.-2.209, VI.-2.210, VI.-2.211 DCFR.

104 *Von Bar, Ch.* Ausservertragliche Haftung für den Einem Anderen zugefügten Schaden. Das Buch VI des Draft Common Frame of Reference, cit. supra, p. 205. *Von Bar, Ch.* Non-contractual Liability arising out of Damage caused to Another under the DCFR, cit. supra, p. 36.

105 *Von Bar, Ch*. The notion of damage, cit. supra, p. 396.

whether there is a close relation between the acting and threatened person, or whether the acting person is aware that it shall cause damage, despite of the fact that the value of its interest is in any way lower than the value of interests of the aggrieved party. Limitation of granting a protection to pure economic interests is a consequence of not only their lower degree of classification in the hierarchy of protected interests but also the fact that pure economic interests are not obvious and lack the clear lines.[106]

2.4.3 Causal link

Consolidation of causal link is required by all modern liability systems as necessary precondition for occurrence of liability, whereas causal link is preferred over any other link (e.g. spatio-temporal).[107] Despite of substantial position awarded to institute of causal nexus by tort law and despite of various (although rather partial) doctrinal approaches as well as approaches of judicial practice, seeking appropriate criteria for determination of legally relevant causal link, it can be concluded that „causal link is the court's and academic's headache more than any other tort law issue"[108].

In the European national doctrines of continental nature the issue of determination of causal link is related to the concept of *„conditio sine qua non"*, which is mirrored in the common law countries by concept of *„but for test",* whereas these are the most known methods of determination (discovery) of causation. The point is proving the factual causation, whereas the court of law conducts a hyphothetic evaluation whether loss of the victim occurred even without wrongful act of the liable entity or without damage incident.[109]

Application of concept of *conditio sine qua* non or concept of *but for test* as the concepts consolidating the factual causation, has significant restrictions and insufficiencies (especially in case of chaining of more circumstances leading to occurrence of loss, whereas these rules are practically inapplicable in case of alternative and cumulative causal link). Some authors even consider these concepts outdated (especially Dutch and Spanish academics rank amongst the most critical[110]).

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106 *Koziol, H.* Damage. European Group on Tort Law, Principles of European Tort Law. Text and commentary, cit. supra, p. 33.

107 *Banakas, S.* Unde venis et quo vadis? European tort law revisited, cit. supra, p. 302.

108 *Fleming, J. G.* The Law of Torts, 9th edition. Sydney : Law Book Company, 1998, p. 218.

109 *Stühmcke, A.* Essential Tort Law. Sydney, London : Cavendish Publishing, 2001, p. 48.

110 *Von Bar, Ch.* The common European law of Torts. Volume Two. New York : Oxford University Press, 2000, p. 437.

DCFR

According to fundamental rule[111] determining causal link in DCFR, legally relevant damage is caused by certain person, 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. The above mentioned general rule implies that according to DCFR causal link is deemed as necessary connection between a) intentional and negligent acts of a person against whom a liability is to be claimed or source of danger for which such person is responsible and b) legally relevant damage.

Due to controversial nature of distinguishing between factual and legal causation DCFR did not lean towards this step, whereas (as mentioned in the commentary to the said provision[112]) generally formulated fundamental rule of claiming the causal link leaves the issue of such theoretic differentiation and/or extent thereof open for further discussion.

As stated by Wagner,[113] formulation of the definition of concept of „causation" in Article VI.-4:101 of DCFR is remarkable especially by application of word "is regarded..". This formulation rather points at normative understanding of causation going beyond simple „*but-for*" thinking by overlapping of the factual elements with normative ones. Therefore, identification of causal link in DCFR is rather normative legal element than factual or scientific one.

In DCFR general rule of determination of causation is supplemented by so-called „*egg shell skull*" rule which is applied within DCFR in case of personal injury (bodily injury) or in case of death of the injured. According to the mentioned rule, in cases of personal injury or death the injured person's predisposition with respect to the type or extent of the injury sustained is to be disregarded.[114] In respect of determination of causal link the application of this rule leads to the fact that (original) health of the injured is disregarded for the purposes of the type and extent of loss which is suffered by the injured which does not leave liable person with the option to contest causal link (and thus cause liberation from liability) arguing that the bodily injury or death would have finally occurred, due to personal predisposition of the injured, even without existence of given grounds of attributability of liability on the side of the tortfeasor (acting of the tortfeasor and/or the source of danger for which it is liable for). However, depending on particular situation, it is possible to admit that some previously existing bodily injuries of the injured may be relevant in respect of reduction of the amount of awarded compensation for damage caused.[115]

Special category of determination of causal nexus include the cases of so-

111 Art.VI.-4:101 DCFR.

112 *Von Bar, Ch*. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 751.

113 *Wagner, G*. The Law of torts in Draft Common Frame of Reference, cit. supra, p. 24.

114 Art.VI.-4:101 sec. 2 DCFR.

115 *Von Bar, Ch*. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 754.

called „collaboration" in causing the legally relevant damage, i.e. specific cases of co-participation of more persons in causing the occurrence of damage, whereas these „collaborating" persons did not directly participate in causing the damage, however they contributed to the existence of the primary source of occurrence thereof. According to VI.-4:102 of DCFR *a person who participates with, instigates or materially assists another in causing legally relevant damage is to be regarded as causing that damage.*

The above mentioned includes especially the situations which may be labelled as cases of „psychological causation",[116] comprising of responsibility of the „collaborating" person for the decision on intention of directly acting person or for initiating an impulse for action at such directly acting person.

The mentioned provision has its real applicability especially within the liability for intention, whereas the intention is present on the side of "principal" tortfeasor as well as on the side of „collaborating" entity. On the contrary, in cases of liability where no relevance is given to the intention or negligence of the tortfeasor, this provision may not be applied due to the fact that in these liability cases the action of the liable party is not required.[117]

The above mentioned cases of participation of „collaborating" persons in causing legally relevant damage lead to establishment of solidary liability of the directly acting person and „collaborating" persons.

Critical responses in respect of the rule of Article VI.-4:102 of DCFR[118] deal mainly with excessive abstract character of the used concept of collaboration, instigation and assistance, the detailed structure of which is left to jurisprudence and judicial practice. Application of these vague, insufficiently defined concepts is inappropriate for solution of the issue of liability of the participating persons in the solidary liability regime. (Rule of application of solidary liability established for example only on requirement of *material assistance to another in causing legally relevant damage* means too large area of applicability without any restrictions.

In respect of the issues of causal uncertainty (as special cases of causation) DCFR deals with (as opposed to PETL) expressis verbis cases of alternative causation only. In this respect the following is stipulated in Article VI.-4:103 of DCFR: *„Where legally relevant damage may have been caused by any one or more of a number of occurrences for which different persons are accountable and it is established that the damage was caused by one of these occurrences but not which one, each person who is accountable for any of the occurrences is rebuttably presumed to have caused that damage."*

According to DCFR a rebuttable legal presumption of causing damage by any and all applicable alternative tortfeasors is established in respect of alternative causation, whereby DCFR apparently deviates from the concept of alternative causal link stipulated in PETL. Adoption of this structure is reasoned by the commentary to relevant provision of DCFR by idea of more equitable benefit for the

[116] Ibid., p. 774.

[117] Ibid., p. 773.

[118] *Wagner, G*. The Law of torts in Draft Common Frame of Reference, cit. supra, p. 26.

injured,[119] in respect of whom, when considering the issue of placing a burden of risk of inability to discover the actual cause (causes), it seems more equitable to place the burden of this risk upon those whose liability is considered, despite of the doubts regarding of the cause truly leading to occurrence of damage.

In this case in respect of causal link the injured demonstrates the fact that certain entity would have been liable for caused damage if it is possible to admit causal link of contribution of this entity to occurrence of damage, whereas at the same time it should be demonstrated at the same time that given entity belongs to the group of entities in respect of which it is certain to declare that one of them surely did not cause the damage.

According to the statement of the authors the regulation of DCFR dedicated to causal link was intentionally left within more restricted extent of general clause of Article VI.-4:101 which is followed only by three special rules (*egg shell skull* principle, rule of collaborating persons and rule of alternative causes). Most of the problematic aspects of causation is impossible to be inserted into the framework of general abstract solutions, therefore they are left to legal theory and judicial practice thus resulting in belief of the authors of the rules on causal link that the regulation via general clause is sufficient. [120]

PETL

When determining the causation, PETL primarily argues by content of the formula *conditio sine qua non* (*csqn*) which represents a factual causation (requirement which formulates a rule according to which an activity or conduct is a cause of the victim's damage if, in the absence of the activity (omission), the damage would not have occurred[121]) and the scope of liability constituting legal causation which enables limitation of attributability of damage. The above mentioned concept indicates that for determination of causal link it is necessary to determine both factual causal link as well as to judge the circumstances (especially the foreseeability of damage, nature and value of protected interest, grounds for liability etc.) determining the actual fact and/or extent of attributability of damage to certain person. In case it is impossible to consolidate the factual causation, legal causation constituting the scope of liability is not determined. [122]

In third chapter of the Principles dedicated to causal link the members of EGTL tried to offer, in addition to defining the general rule of determination of causa-

[119] *Von Bar, Ch.* Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 781.

[120] *Von Bar, Ch.* Ausservertragliche Haftung für den Einem Anderen zugefügten Schaden. Das Buch VI des Draft Common Frame of Reference, cit. supra, p. 221.

[121] Art.3:101 PETL.

[122] Cf. *Spier, J.* Causation. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 44.

tion, for the first time[123] a solution to problematic aspects of causation in theory as well as practice, especially as far as the issues of cumulative causation, alternative causation, interrupted causation or minimum causation are concerned.

In case of plurality of actions, from which any would independently cause damage at the same moment, according to the Principles, each such action is deemed a cause of damage occurred to the injured. Despite of the fact that neither of actions is *csqn*, since damage would have occurred even by force of the other action, each such action is deemed a cause of occurrence of damage (concurrent causes). The mentioned structure of cumulative causation leads to a solution of solidary liability of multiple tortfeasors generally recognised by legal theory.

Alternative causation includes the cases in which – as opposed to cumulative causation, where each action would have caused damage – it is demonstrated with certainty that damage was caused either by acting of person A or person B, despite of that it is not possible to determine exactly which one of the actions was a genuine cause of damage.[124] Each such action which would have independently be sufficient as cause of damage is deemed a cause, however, only in the extent corresponding to the probability of causing damage to the injured, i.e. given actions are viewed as proportionate causes of damage. The entity liable for occurrence of damage shall be obliged to compensate only such loss which, from probability point of view, could have been caused, whereas the entity shall not be liable for damages which, from probability point of view, was caused by other entity, the injured himself or damage occurred due to *force majeure*.[125]

Separate solution is provided for a situation, where in case of more injured entities it is not sure whether particular loss of the injured was caused by certain acts, whereas however it is obvious that such actions did not cause damage to all of the multiple injured entities. Therefore, from „global" point of view, there exists a causal link between loss suffered by multiple injured entities and actions of multiple potential tortfeasors, but it is not possible that each particular tortfeasor caused the entire damage in respect of all of the injured. [126] Actions of each of the tortfeasors is therefore deemed as cause of damage suffered by each of the injured only in the extent of liability in which the actions could have caused damage to particular injured.

The advantage of the concept of proportionate causes of occurrence of damages in case of alternative causation and related duty of the injured to provide

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123 *Koziol, H.* Die „Principles of European Tort Law" der „European Group on Tort Law", cit. supra, p. 244.

124 Cf. *Spier, J.* Causation. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 48.

125 See: *Van den Bergh, R., Visscher, L*. The Principles of European Tort Law: The Right Path to Harmonisation? In German Working Papers in Law and Economics, 2006, Article Nr. 8, p. 13, 22 ff. Dostupné on-line na http://www.bepress.com/gwp/default/vol2006/iss1/art8.

126 Cf. *Spier, J.* Causation. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 49.

partial compensation corresponding to probability of causing of damage is undoubtedly the waiving of borderline solutions of either solidary liability *vis-à-vis* all potential tortfeasors and thus giving injured the option to claim compensation damages to the full extent from any of them or, on the contrary, a denial of any compensation for damage due to the fact that liability was not exercised *vis-à-vis* any of potentially liable entities.

The concept of individual share on causation reflecting the degree of probability in respect of actual cause of damage was adopted by the House of Lords in well known case *Barker v. Corus*,[127] by which a rule of solidary liability dealt with in similarly well known Fairchild case was overrun.[128]. The decision in *Barker v. Corus* case triggered negative reactions of public resulting in adoption of *Compensation Act 2006*, by which the original concept of solidary liability was re-established.

In case of two actions independent to each other, whereas one of them lead definitely and unavoidably to causing of damage to the injured, while the other – subsequent action would have independently caused the same damage as the first action, the subsequent action is not taken into account (arguing that the subsequent action does not constitute *csqn* for occurrence of damage) and full liability is placed upon the first of the tortfeasors, except for case if the subsequent action lead to occurrence of additional or more severe loss – it must be reflected in that case. [129]

The mentioned concept of so-called potential causal link generally leading to exclusion of liability of the other one from the acting tortfeasors has various insufficiencies and from economic point of view it is not the most appropriate solution of given situation. Regardless of the fact that neither of the actions of the first tortfeasor constitutes csqn for occurrence of damage and his liability is based purely on potential causation, subsequent action would cause the same loss, thus imposing the same liability upon the other tortfeasor seems to be more equitable solution.[130]

The cases of so-called minimum causation (so-called indefinite partial causation) deal with the issues where it is obvious that more homogenous actions jointly contributed to occurrence of damage, however, despite of the above, it is impossible to prove which consequence was caused by which particular action. However, there is one thing certain, that no action could have caused the entire damage autonomously, due to this fact PETL presumes that the actions which apparently (in minimum) contributed to occurrence of damages caused damage equally.

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127 *Barker v. Corus UK Ltd.* (2006) 2 A.C. 572 (HL 2006).

128 *Fairchild v. Glenhaven Funeral Services Ltd*. (2003) 1 A.C. 32 (HL 2002).

129 Art.3:104 PETL.

130 *Van den Bergh, R., Visscher, L*. The Principles of European Tort Law: The Right Path to Harmonisation?, cit. supra, p. 14.

2.5 Remedies

DCFR

The remedies are regulated in separate Chapter 6 of DCFR (Remedies) in relation to Chapter 7 (Ancillary Rules).

In this case reparation is distinguished from prevention as separate types of remedies.

According to subjective right to reparation of legally relevant damage, a person who suffered such damage has at disposal a basic rule of regulation of non-contractual liability for damage in DCFR,[131] whereas the method by which fulfilment of obligation to provide reparation should be realized is subject to regulation by chapter regulating the remedies. The source for provision of reparation of caused damage is a rule according to which the reparation provided should cause reinstatement of person who suffered legally relevant damage to the position it would have held should no legally relevant damage ever occur. The reparation may be a financial compensation or other compensation, whereas the criteria include suitability of given form of compensation taking into account the type and extent of suffered damage.

In relation to compensation of damage according to DCFR a rule of *de minimis* is applied according to which minor damage is disregarded.[132] In relation to classification of damage as a minor one, economic view is not decisive, instead, nature of the affected legal interest is assessed as well as particular grounds for attributability of damage (intentionally caused damage will unlikely be qualified as as minor damage) as well as other circumstances of causing the damage.[133]

Financial compensation should be awarded as a one-time amount, except, if for some reason, award of periodic payments is necessary. As far as quantification of non-pecuniary loss and personal loss are concerned DCFR refers to *lex fori* of the application court of law, i.e. to the relevant provisions of national law stipulating the extent of compensation of non-pecuniary loss.

The structure referring the extent of compensation of non-pecuniary loss to *lex-fori* of the court of law deciding on compensation of damage is understandable due to vastly different concepts of compensation of non-pecuniary loss in national laws of EU countries, on the other hand though, this way harmonization function of DCFR initiative became very marginal in relation to non-pecuniary loss.

Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable

131 Art.VI.-1:101 sec. 1 DCFR.

132 Art.VI.-6:102 DCFR.

133 *Von Bar, Ch*. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 928.

to take them into account.

In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the nature of the accountability of the person causing the damage and, where the benefits are conferred by a third person, the purpose of conferring those benefits.

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.

Injury as such is to be compensated independent of compensation for economic or non-economic loss.

Prevention (prevention of damages) as a remedy[134] is a specification of Article VI.-1:102 DCFR, therefore both rules should be interpreted in mutual relation. The basic thought on which the prevention as a remedy is based is that the person who faces the direct threat of damage is awarded a right by tort law regulations to active action with the goal to prevent the occurrence of damages.

Application of prevention as a remedy may be in the form of a right of the threatened person to claim vis-à-vis a person who is liable for the threat of occurrence of damages to remove the source of danger[135] or, in case the threatened person itself diverted the damage threatening to it, to demand from the person to which damage would otherwise be attributed, a compensation of reasonable costs.[136]

The right to prevention exists only in so far as:

c) reparation would not be an adequate alternative remedy; and

d) it is reasonable for the person who would be accountable for the causation of the damage to prevent it from occurring.

Where the source of danger is an object or an animal and it is not reasonably possible for the endangered person to avoid the danger the right to prevention includes a right to have the source of danger removed.

PETL

Under PETL the remedies are classified as damage compensation which in PETL view includes solely the financial amount which should reinstate a condition in which the injured would have been, should the damaging activity never occurred, and restoration in kind which may be claimed by the injured, if it is

[134] Art.VI.-6:301 DCFR.

[135] Art.VI.-6:301 sec. 1 DCFR.

[136] Art.VI.-6:302 DCFR.

possible and this remedy is not too much of a burden for the other party.[137] The compensation of damage is possible either in the form of one-time lump sum or periodic compensation, whereas the choice between them depends on suitability of given form, especially due to the interests of the injured. Despite of the fact that the given provision formally applies to all kinds of losses, provision of periodic compensation shall be practical almost solely in the cases of compensation of personal loss.[138]

In exceptional cases under PETL certain restrictions of compensation of damage are permitted in case full recovery of damage would constitute unjust burden to the defendant due to the financial situation of the parties. It is obvious that from the point of view of economic and legal analysis of tort law the institute of limitation of compensation of damage is viewed negatively as it reduces the motivation of the tortfeasor in relation to effective care and choice of optimal degree of conduct,[139] it creates another element of unforeseeability in solution of the disputes and/or it is not compatible with some other provisions of PETL (such as Article 10:301 par. 3 of PETL).[140]

[137] Art.10:101 PETL.

[138] *Magnus, U.* Remedies. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 154.

[139] *Van den Bergh, R., Visscher, L*. The Principles of European Tort Law: The Right Path to Harmonisation?, cit. supra, p. 20.

[140] *Moréteau, O.* Reduction of Damage. In European Group on Tort Law, Principles of European Tort Law, cit. supra, p. 180.

3 Selected institutes discussed in the field of European private law

3.1 Wrongful life and wrongful birth

In 2000 a wave of contradictory reactions was triggered by the decision of the French Cour de cassation in case of *Nicolas Perruche*, in which the parents of severely disabled child were awarded a compensation of loss against the doctor who wrongfully interpreted the results of the tests for antibody to rubeola in the mother's body during the pregnancy. As a result of the overcome disease of the mother, a child was born with severe disabilities, despite of previous notices of mother that she would interrupt the pregnancy if it is discovered that she overcame this disease during the pregnancy. In parallel the court of law awarded the compensation of loss also to the disabled child who was represented by the parents as her statutory representatives which was demanded by the parents on her behalf.

Similarly, in 2005 compensation was awarded for unwanted birth and unwanted life by the Dutch Supreme Court in case of *Kelly Molenaar* – a child who was born severely disabled, inable to walk, speak, with the hearing and sight disability, heart disorder and later diagnosis of autism.[141] In this case the court of law awarded the compensation of the costs for nutrition and upbringing of Kelly as well as compensation for her handicap and pain suffered.

In the expert literature both mentioned examples are amongst the most frequently presented examples of actions for wrongful life and actions for wrongful birth. Especially recently, the permissibility and/or impermissibility of these actions in national laws of particular countries is a heavily discussed issue in relation to the liability of the doctor within the tort law. In general these include the actions on the basis of which a liability of the doctor and/or the healthcare facility for birth of unwanted disabled child and/or moreover, even healthy child who would not have been born, should a failure by the doctor never occurred (non-lege artis actions) (wrongly performed abortion or sterilization, failure to perform

[141] *Giesen, I*. Of wrongful birth, wrongful life, comparative law and the politics of tort law systems. Tydskrif vir Heedendaagse Romeins-Hollandse Reg, Vol. 72, 2009, p. 257. Available at SSRN: http://ssrn.com/abstract=1424901.

or wrongful performance of prenatal diagnostics or wrongful interpretation of the results of prenatal diagnostics etc.).

It is obvious that the nature of the mentioned institutes triggers various questions of not only legal but also ethical and moral nature and legal solution of the above mentioned, whatever it is, triggers contradictory reactions of both legal expert public as well as general public.

3.1.1 The substance of the institutes of wrongful birth and wrongful life

Despite of the fact that both types of legal actions are mutually connected as far as subject matter is concerned, they constitute separate types of legal actions are distinguished especially by the plaintiff (i.e. a person who files an action against the doctor and/or is entitled to file it).

Legal action regarding „wrongful birth" is a legal instrument by which the parents as the plaintiffs claim the compensation of material and mitigation of immaterial loss as a consequence of birth of unwanted child. This could be a situation when the parents do not wish for any other child for any reason or a situation when they do not want the birth of given specific child (as a result of genetic disorder discovered during the pregnancy), despite of that the child is born due to failure by the doctor who

a) failed to prevent the conception of a child (so-called wrongful conception) – for example by wrongful implanting of anti-conceptive instrument, by wrongful performance of sterilization etc. (Action for wrongful conception is in some countries structured as a separate action, different from wrongful life, whereas the separation criteria is a moment in which a faulty action of the doctor occurred – either prior to the conception or after the conception. However, in most countries which admit this action the issue of wrongful conception is solved within the institute of wrongful birth.)
b) did not terminate the pregnancy due to its failure or
c) failed to perform or wrongly performed necessary prenatal diagnostics[142]
d) provided wrong information to the future parents.

The substance of the mentioned legal action is that as a result of the faulty wrongful act of the doctor a child was born which would not have been born as a result of the mother's decision, should there be no failure by the doctor. In case of institute of wrongful birth the case may include birth of not only unwanted disabled child whose parents were determined to terminate the pregnancy should they be correctly informed by the doctor regarding the harm to the feetus, but it may also include also birth of healthy child whose birth was unwanted for any reason (in this context the cases of birth of healthy child are sometimes referred

[142] Ibid., p. 259.

to as wrongful pregnancy).

Within the legal action for wrongful birth of a child the parents demand the compensation of the costs for upbringing and nutrition of the wrongful child – i.e. the costs by which their assets were reduced as a result of birth of their child and which, if not born, would not have to be incurred, as well as compensation of non-pecuniary loss represented by the fact that a child whose birth was unwanted, impacted their life, whereby it adversely affected their routine family life and/or it denied them the opportunity to live a family life they wanted to live without this child.

Legal action for „wrongful life" is a legal instrument by which a child itself – in this case solely disabled child - claims vis-à-vis the doctor a compensation of pecuniary loss and mitigation of non-pecuniary loss for life which a child must live in suffering as a result of its disability. The substance of this legal action is that the disabled child who claims the compensation of loss and who was not supposed to be born in the first place, was born despite of the above as a result of failure by the doctor (failure to perform or wrong performance of prenatal diagnostics, wrongful interpretation of the results of prenatal diagnostics etc.). Should such faulty failure of the doctor not occur and on the basis of the prenatal diagnostics, the parents would have had information about the disability of the child, the pregnancy would have been terminated in accordance with their decision, which however did not occur since the option to decide in this manner was taken from them due to failure of the doctor. Despite of the fact that the disabled child is an entity entitled to file the action for wrongful life, the action is usually filed via statutory representative, i.e. the parents in most cases.

As a part of action for wrongful life a child usually claims compensation of the costs of his disorder which include the increased costs caused by his disorder, i.e. costs which would have not been incurred by a person without disorder, as well as compensation of non-pecuniary loss for a child consisting of the fact that a child considers his life so painful and full of suffering that it would have been better for him not to be born.

Institute of wrongful life is also present, even in more controversial form, in the legal action by a child born with a disability sues not a doctor and/or health care facility, but his own parents who, by not deciding to terminate the pregnancy (despite of the fact that they knew about the child's disability), made way for his birth. Loss suffered by the disabled child consists of the fact that a life with a disability is worse than non-existence itself, should the parents and/or the mother decided to terminate the pregnancy.

3.1.2 Foreign judicial approach to the decisions about the actions for wrongful birth and wrongful life

Despite of the fact that they have significantly resonated in the society only in the past decades, the mentioned legal actions are no new institutes in the judicial

practice of the foreign courts of law.[143]

A legal action of the parents for „wrongful birth" is accepted in certain form by most of foreign national laws as permissible legal institute and it enables compensation of pecuniary as well as non-pecuniary loss which occurred as a result of failure of a doctor resulting in birth of (mostly) disabled child. On the contrary, legal actions for „wrongful life" are mostly opposed by foreign courts of law and most of foreign laws do not grant to a child the claims for compensation of loss as a result birth of a child as a disabled one. [144]

The reason for this trend is probably the fact that the courts consider more acceptable to recognize a loss of parents consisting of an absence of option to freely terminate the pregnancy as a response to a question whether non-existence of a child may be given a preference over life, which is however difficult and full of suffering due to disability. As opposed to judicial practice, number of academics dealing with tort law came to conclusion that both types of legal actions for wrongful birth as well as for wrongful life should be permissible.[145]

The following are the examples of jurisdictions which reject the concept of wrongful life, i.e. provision of compensation to disabled child: Austria, Australia, Canada, Denmark, France, Germany, Hungary, Italy, Portugal, Spain and Great Britain. In some of these countries these actions were prohibited by law (Belgium, France, Great Britain).[146] In France the legislative prohibition of these actions was a direct result of passionate expert as well as all-society discussion which followed the decision of French Cour de cassation in the case of *Nicolas Perruche* mentioned in the beginning of this chapter, where a court of law awarded compensation of loss not only to the parents but also to a child for the fact that a child was even born. The law – so-called *loi anti Perruche* which was adopted afterwards, stipulated that no one is entitled to claim a compensation of damage due to the mere fact of birth.

The countries which, on the other hand, permit the possibility to apply the actions for wrongful life include some states of USA or Netherlands. [147]

The legal actions which include the institute of wrongful birth and/or wrongful conception also appeared in the judicial practice in the Czech Republic. These include two cases which drew media attention and related to a failed abortion

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143 *Doležal, T.* Náhrada škody za nechtěné dítě? Právní rozhledy 21/2006, p. 784.

144 See *Magnus, U. (edt.)* Unification of tort law: Damage. Hague, Kluwer Law International, 2001, Part II – Cases. *Essebier, J.* „Wrongful Birth" in der Schweiz, Entscheidung des schweizerischen Bundesgerichts vom 20. Dezember 2005. Zeitschrift für Europäisches Privatrecht 3/2007. *Von Bar, Ch.* Wrongful life in Frankreich - Neue Urteile der französischen Cour de Cassation. Zeitschrift für Europäisches Privatrecht 1/2000. *Bottis, M. C.* Wrongful birth and wrongful life actions. European Journal of Health Law, 1/2004.

145 *Hensel, W.-F.* The Disabling Impact of Wrongful Birth and Wrongful Life Actions. Harvard Civil Rights-Civil Liberties Law Review, Vol. 40, 2005, p. 143.
Available at SSRN: http://ssrn.com/abstract=932688.

146 *Ruda, A.* I Didn't Ask to be Born': Wrongful Life from a Comparative Perspective In: Journal of European Tort Law 2/2010, p. 206.

147 Ibid., p. 206.

and sterilisation.

In the first case a woman sued hospital in Jihlava and claimed compensation – compensation of non-pecuniary loss of CZK 400,000.00 due to wrongly performed abortion during which, out of two feetuses in the uterus, the doctors removed only one (the court concluded that a doctor performed the abortion insufficiently from technical point of view and radically and at the same time a doctor wrongfully performed the immediate inspection of surgery performance). As a result of such action of the doctor, woman gave birth to a child who was healthy. Regional Court in Brno approved the filed action only in partial extent, whereas it calculated non-pecuniary loss of woman at CZK 240,000.00, whereas, however, it finally reduced this amount to CZK 80,000.00 due to contributing fault of the woman to her loss. Contributory fault was due to irresponsible attitude towards unwanted pregnancy (woman and her spouse did not use any form of birth-control) as well as due to negligence in medical inspection after performance of the surgery when it was possible to discover faulty abortion and surgery could have been repeated.

Non-pecuniary loss of CZK 80,000.00 awarded by the court was due to long-term mental fears and stress of the mother regarding growth and health of a child due to failed abortion as well as due to making impossible for a plaintiff to freely decide about her future life (i.e. as a result of failure of the doctor the woman was denied an option to live her life in the way she planned without a child).

The other cases was about a woman who sued hospital in Kutná Hora for CZK 500,000.00 due to the fact that, despite of performed sterilisation, the woman got pregnant and had a child which she and her husband could not afford due to their difficult financial situation as well as due to the fact that they did not want another child since they already had three children. Despite of the fact that during the lawsuit it was demonstrated that sterilisation was performed *lege artis*, the Regional Court of Prague awarded to woman a compensation of non-pecuniary loss of CZK 30,000.00 due to insufficient instruction of the patient regarding possible complications of the performed sterilisation (in this case regarding the fact that in certain cases a body may spontaneously renew the path between ovary and uterus and a pregnancy may occur). However, the decision of the Regional Court in Prague was revoked by the Supreme Court in Prague and finally the woman was not awarded with any compensation of loss.

3.1.3 Controversial nature and contradictory nature of opinions regarding the substance and particular aspects of the actions

Controversial nature of the institutes of wrongful birth and wrongful life does not lie only in the substance of these legal actions, in which the legal aspects collide with ethical and moral aspects, but also terminology of these institutes may be subject to criticism (wrongful=unlawful), as a result of which the terms wrongful birth and wrongful life are used in their original identification and in most cases they, being the common concepts, are not translated into other lan-

guages. However, term wrongful in relation to birth or life should not apply to the fact that birth or life would be against the law and thus unlawful, however, term wrongfulness is related to the activity of the doctor which leads to unintended birth of the affected child.[148]

In case of deciding on the above mentioned legal actions, problematic aspect is also the extent of compensation of loss which should be awarded to the parents and/or child. The range of compensable types of loss which are awarded in particular countries varies from compensation for upbringing and nutrition of a child including additional costs as a result of disability of a child, mother's loss of income, costs of childcare as a pecuniary loss up to compensation of non-pecuniary loss including for example pain and suffering of the disabled due to its existence, pain suffered by the mother during the pregnancy and labour, loss incurred by intervention of the unwanted child to original family plans as well as mental suffering of the parents as a result of necessity to take care of the disabled child. [149]

Regardless of different approaches of particular countries to awarding the compensation non-pecuniary loss, the award of compensation of the costs for nutrition and upbringing of a child as a pecuniary loss is problematic. Arguments against award of the costs for upbringing and nutrition is the fact that, despite of the fact that the parents primarily did not wish to have a child, they subsequently accepted birth of the child and incurred the costs of upbringing and nutrition voluntarily (e.g. they did not decide to give a child out for adoption) and therefore incurring these costs should not be deemed a damage. On the contrary, counterargument points to the fact that despite of later "acceptance" of a child, the failure of the doctor caused that the parents could not afford termination of pregnancy as primarily preferred option.

Another issue with various solutions in particular countries is, whether, as a part of upbringing and nutrition of unwanted child, the courts should award the entire amount of these costs which had to be incurred by the parents or, whether these costs should be limited to those related solely to the disability of a given child and due to this disability the costs exceed the costs of upbringing and nutrition of a healthy child.

Both courts as well as legal theory are not unified in respect of the issue of the benefits (pecuniary as well as non-pecuniary) which were gained by the parents by birth of unwanted child (i.e. allowances from the state as pecuniary benefit or joy caused by a child as a non-pecuniary benefit etc.) in respect to the loss caused by birth of a child. On one hand there is an opinion that the amount of awarded compensation of loss should be reduced by these benefits, on the other hand there is a contradictory opinion arguing against such set off.

Ethical point of view is also a significant factor which had to be taken into account also by Czech courts deciding upon the above mentioned cases of legal

148 *Van Dam, C*. European Tort Law, cit. supra, p. 706-707.

149 *Steininger, B. C*. Wrongful birth and wrongful life: Basic questions. In: Journal of European Tort Law 2/2010, p. 128.

actions on wrongful birth by assessment whether the legal action itself is not in contradiction to the institute of good morals, based on thinking that birth of every child must be viewed as a "blessing (a gift)", whereby the view of a loss (damage) is thus excluded.

Similarly, it is necessary to solve, in accordance with ethical principles, also the issue, whether the courts are even authorities authorized to classify the value of life with disability in respect of non-existence of such life and/or whether they are the authorities authorized to decide whether a healthy child could be considered damage.

3.2 Reparation of "new" types of loss

As far as the issues of compensation of various types of loss (whether material or immaterial) are concerned, foreign legal regulations and/or foreign judicial practice as well as European trend of the liability law represent a trend leading to compensation from point of view of Slovak legal environment of new forms of loss such as for instance so-called loss of chance, pure economic loss and/or compensation of loss of indirectly injured parties who suffered a derived loss (so-called dommage par ricochet).

3.2.1 Loss of chance

Damage for loss of chance is damage for the loss of an opportunity to obtain or receive a desired outcome.

Rahter than compensating a plaintiff for what actually happened in the past, loss of change damage compensate a plaintiff based on the probabilities of what may have happened.

Compensation of damage for loss of chance is significant especially for the field of liability relations in providing the health care services. In the filed of medicine compensation for so-called „loss of chance"[150] applied in certain national laws (such as France, Spain, USA) consists of provision of partial compensation for the fact that, as a result of failure of a doctor, no improvement of health occurred which could have occurred due to certain degree of probability. In these cases the injured is not able to demonstrate causal link between failure of the doctor and occurrence of damage with certainty, but only to some degree of probability. For instance, as a result of objectively wrong diagnosis, a general practitioner fails to send a patient on time to a specialized medical examination, which could have detected disease in the stage when a real chance existed that the applied treat-

[150] See *Müller, C*. La perte d'une chance, étude comparative en vue de son indemnisation en droit suisse, notamment dans la responsabilité médicale. Berne, Stämpfli Verlag, 2002. *Koziol, H.* Schadenersatz für verlorene Chancen? Zeitschrift des Bernischen Juristenvereins, 12/2001.

ment would lead to improvement of patient's health. In this given case wrong procedure of the doctor caused that chance (hope) of the patient for recovery considerably dropped in percentage figure compared to the chance for recovery which would be present should the doctor proceed lege artis. In the above mentioned case we are unable to prove with certainty, whether in given case of a patient, permanent effects could have been avoided, should he be professionally treated on time. However, there exists certain degree of statistical probability (i.e. chance) for his recovery in case immediate treatment is applied. The scope of compensation is this chance expressed by the degree of probability the amount of which is awarded at least partially as compensation of loss.

Therefore, if the degree of probability of patient's recovery (chance, hope for patient's recovery) was, in case procedure lege artis, for example 25 %, a court shall award to the patient compensation of bodily injury of 25 % of the extent of injury despite of the fact that the patient failed to prove in certainty that there is a causal link between the action of the general practitioner and his loss. Therefore, by compensation of so-called loss of chance the principle „all or nothing" is broken, i.e. provision of full compensation in case of demonstration of the required extent of the causal link or denial of any compensation in case the injured fails to prove the required extent of causal link.

For compensation of loss of chance it is sufficient if the injured proves in the lawsuit certain degree of probability of causation which is sufficient for award of the claim for compensation of damages in medical law (Austria - Wahrscheinlichkeit eines ursächlichen Zusammenhangs, Italy – criterio probabilistico, Great Britain – so-called prevailing probability, USA – proximate cause of the injury).

Slovak law does not recognize the institute of loss of chance due to generally applicable principle based on which in order to fulfil the precondition of causal link it is not sufficient to prove just probability of causation or circumstances proving its existence, on the contrary, the causal link must be determined and discovered with certainty and must always be demonstrated. There is no option to award e.g. partial compensation of damage in cases where causal link was demonstrated only as possible (probable) causal link, however, not certain one.

3.2.2 Pure economic loss

3.2.2.1 Definition of pure economic loss

Pure economic loss is one of the most discussed topics of comparative tort law scholarship. There has never been a universally accepted definition of 'pure economic loss,' nor of its many synonyms.

A number of legal systems neither recognize the legal category, nor distinguish it as an autonomous form of damage.

Nevertheless, where the concept is recognized, as in Germany and common

law systems, it is apparently associated with a rule of no liability and there a definition is likely to be found.[151]

3.2.2.2 The typical instances of pure economic loss

The list of typical instances of pure economic loss given below will not exhaust all the conceivable ways in which such damage may arise. It is the list of most recurrent and typical patterns which were referred to as the 'standard cases' by several authors. They set forth four categories of pure economic loss that seem to be functionally and relationally distinct:[152]

a) 'Ricochet loss'

Ricochet loss classically arises when physical damage is done to the property or person of one party and that loss in turn causes the impairment of a plaintiff's right.[153]

There are two kinds of victims:

a) a direct victim having sustained physical damage done to the property or person and
b) a secondary victim (indirect victim) - plaintiff, having incured only economic harm.

b) 'Transferred loss'

Transferred loss cases are those cases in which a tortfeasor causes damage to a victim's property or person (person C), but a contract between A and B or the law itself transfers the loss to a third party (the loss that would ordinarily be B's is transferred onto A).[154] In this way a loss ordinarily falling on the primary victim is passed on to a secondary victim. These transfers frequently result from leases, pending sales, insurance agreements and other contracts that separate property rights from rights of use or specifically reallocate risk bearing.[155]

c) Closed markets, highways and public facilities

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151 *Bussani M. – Palmer, V. P.* Pure economic loss in Europe. Cambridge University Press 2003, p. 9-10.

152 *Bussani M. – Palmer, V. P.* Pure economic loss – New Horizons in Comparative Law. Routledge Cavendish, London and New York 2009. *Von Bar, Ch. – Drobnig, U.* The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study. Munchen: Sellier 2002, p. 121ff.

153 *Bussani M. – Palmer, V. P.* Pure economic loss in Europe, cit. supra, p. 10.

154 Ibid, p. 11. Faure, M. Tort Law and Economics. Edward Elgar Publishing p. 202.

155 Ibid.

According to Bussani and Palmer economic loss in this case arises without a previous injury to anyone's property or person. There may be physical damage, but it is to'unowned resources' that lie in the public domain.[156]

Almost all European jurisdictions deny compensation for pure economic loss in closure of public service and infrastructure cases.

d) Unprofessional advice or services

Finally, cases of pure economic loss deal with the liability of those who provide professional advice, prepare data or render services concerning financial matters. These so called flawed professional advice cases cover the situations when third parties rely on advice, data or services that are carelessly compiled or executed, leading to suffering a pure economic loss.

In flawed professional advice cases, almost all European courts allow compensation for pure economic loss arising from flawed services provided by lawyers and notaries, an opposite approach is common in the case of auditors and accountants.

3.2.2.3 Pure economic loss in comparative point of view

As generally understood in the law and economics literature, the economic loss rule states that a plaintiff cannot recover damages for a pure financial loss. The comparative study of the pure economic loss rule reveals that the recognition and significance attributed to such rule and to the notion of "economic loss" varies considerably across Western legal systems.[157]

Comparative legal studies show that European legal systems have not undertaken a common approach to the policies and rules governing tortious liability for pure economic loss in Europe. The European jurisdictions use different definitions and follow different formulations of this problem.

In certain countries, the compensation issue was decided by very flexible causal reasoning that frequently permitted recovery (a characteristic of liberal regimes such as France).[158]

Relevant provisions of French Civil Code

Article 212
Spouses mutually owe each other fidelity, aid, assistance.

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156 *Goldberg, V. P.* Recovery for Economic loss Following the Exxon „Valdez" Oil Spill. Journal of Legal, Vol. 23, 1/1994, p. 37.

157 Parisi, F. Liability for pure financial loss: Revisiting the Economic foundations of a legal doctrine. Available on www.papers.ssrn.com

158 *Bussani M. – Palmer, V. P.* Pure economic loss – New Horizons in Comparative Law, cit. supra.

Article 1141

If the thing which one is obligated to give or to deliver to two persons successively is purely movable property, that one of the two who has been put in actual possession of it is preferred and remains owner of it, although his title is subsequent in date, provided, however, that the possession is in good faith.

Other countries, however, were using a very rigid causal approach (Sweden and Finland).

Relevant provisions of Swedish Tort Liability Act 1972

Chapter 1 § 2

By pure economic loss in this Act is to be understood such economic loss arising without connection with anybody suffering bodily injury or property damage.

Chapter 2 § 1

Anybody who intentionally or negligently causes a personal injury or a damage to things shall compensate it, as far as this Act does not prescribe otherwise.

Chapter 2 § 4

Who causes pure economic loss through the commission of a crime shall compensate it according to what is established in §§ 1–3 concerning personal injury or damage to things.

Relevant provisions of Finish Tort Liability Act 1974

Chapter 2 § 1

One who by intent or by negligence causes another a damage shall compensate it, as far as this Act does not prescribe otherwise.

Chapter 5 § 1

Compensation includes recovery for personal injury and property damage.

If damage has been caused through an act sanctioned by criminal law or through an act of authority or if in other cases there are specially important reasons, compensation includes also recovery of such economic losses which are not in connection with personal injury or property damage.

In other jurisdictions, results were based on a *numerus clausus* conception of absolute rights' that generally negated this type of recovery in tort (a characteristic of conservative regimes like Germany and Austria).[159]

Relevant provisions of German Civil Code

Article 823

[159] *Bussani M. – Palmer, V. P.* Pure economic loss – New Horizons in Comparative Law, cit. supra, p. 7-8.

(1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damages arising therefrom.

(2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement is possible even without fault, the duty to make compensation arises only in the event of fault.

Article 824

(1) A person who declares or publishes, contrary to the truth, a statement which is likely to endanger the credit of another, or to injure his earnings or prosperity in any manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, but should know of it.

(2) A person who makes a communication, the untruth of which is unknown to him, does not thereby render himself liable to make compensation, if he or the receiver of the communication has a lawful interest in it.

Article 825

A person who by cunning, by threats, or by the abuse of a relationship of dependence, induces a woman to permit extra-marital cohabitation, is bound to compensate her for any damages arising therefrom.

Article 826

A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.

Austrian Civil Code

Article 1295

(1) A person is entitled to demand indemnification for the damage from a person causing an injury by his fault; the damage may have been caused either by the violation of a contractual duty or without regard to a contract.

(2) A person who intentionally injures another in a manner in violation of public morals, is liable therefor; however, if the injury was caused in the exercise of legal rights, the person causing it shall be liable therefor only when the exercise of this right obviously has the purpose to cause damage to the other.

Article 1299

A person who claims publicly an office, art, trade or handicraft, or who assumes voluntarily without necessity a business which demands specialized knowledge or extraordinary diligence, warrants thereby that he trusts himself to possess the necessary diligence and extraordinary knowledge; therefore, such person is liable for the lack thereof. However, if the person who entrusted the business to him knew of his inexperience, or could have known thereof by applying the usual attention, such person is also guilty of negligence.

Article 1300

An expert is liable when he negligently gives, for a consideration, bad advice in matters of his art or science. In other cases, a person giving advice is liable only

for damage which he has knowingly caused to another by giving the advice.

Article 1311

Mere accidents affect only the person to whose property or person they occur. However, if another person has occasioned the accident by his fault, or if such person has acted in violation of a law in endeavouring to prevent incidental injuries, or if he has interfered unnecessarily with the business of another, he is liable for any damages which would not

otherwise have occurred [. . .]

Article 1330

(1) If a person has suffered actual damage or loss of profit through libel and slander he is entitled to demand indemnity therefor.

(2) This provision is also applicable where a person makes notorious matters which might endanger the credit, business or property of another person and which he knew or should have known were untrue.

3.3 Nuclear liability regime – its basic principles

The international nuclear liability regime currently in force governs liability on the system of civil law. It is based on two underlying international conventions that establish comprehensive and almost identical regimes for civil liability for nuclear damage. International contracts on the subject of the liability for nuclear damage adopted in the 1960s were The Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960[160] as nuclear damage regulation of regional character and The Vienna Convention on Civil Liability for Nuclear Damage[161] as nuclear damage regulation of global character.

After the Chernobyl accident, States under the auspices of the IAEA, carried out a review of the existing nuclear liability regime and of the regulations specified in the 1960s, taking especially into account the lessons learned by the Chernobyl accident. This exercise resulted in 3 new instruments, namely the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention[162], broadened the coverage of the two Conventions combining them into one expanded liability regime, the 1997 Convention on Supplementary Compensation for Nuclear Damage[163], which provides for the payment of additional com-

[160] The Convention on Third Party Liability in the Field of Nuclear Energy was established on 29 July 1960 under the auspices of the OECD Nuclear Energy Agency (NEA).

[161] The Vienna Convention on Civil Liability for Nuclear Damage was established on 21 May 1963 under the auspices of the International Atomic Energy Agency (IAEA).

[162] On the Joint Protocol see: *Busekist, O.* A bridge between two conventions on civil liability for nuclear damage: The Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. Nuclear Law Bulletin, 1989, No. 43.

[163] The 1997 Convention on Supplementary compensation defines additional amounts to be provided through contributions by States Parties collectively based on installed nuclear capacity and a UN rate of assessment, at 300 SDRs per MW thermal. The Convention is an instrument to which all States may adhere regardless of whether they are parties to any

pensation out of public funds in the event of damage in excess of the operator's liability amount, and the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage[164].

To provide adequate protection to the public from possible damage and to ensure a fair and sufficient compensation for the victims of a nuclear accident, the nuclear liability regime established by the above-mentioned conventions was founded on several important principles.[165]

Over the preceding four decades, the principles of international nuclear liability regime had become binding under public international law on their respective Contracting Parties[166] and had built international standard of a risk-adequate liability legislation, which was also implemented by non-contracting parties at national level.

According to the basic principles, all liability for a nuclear accident should be channelled to one responsible person – to the operator of a nuclear installation (person designated or recognized as the operator of a nuclear installation by the installation state[167])[168], who is exclusively liable for accidents at and in relation to that installation, including in the course of the transport of nuclear materials.

The operator cannot be held liable under other legal provisions (e.g. tort law).[169]

This "channeling" of liability onto the operator facilitates the bringing of claims by or on behalf of the victim. It also minimizes the burden upon the nuclear industry, as a whole, as the various persons who contribute to the operation of a nuclear installation, such as suppliers and carriers, do not require insurance

existing nuclear liability conventions or have nuclear installations on their territories. On the 1997 Convention on Supplementary compensation see: *McRae, B*. Overview of the Convention on Supplementary Compensation. In: Reform of civil nuclear liability. Budapest symposium. Paris, OECD 1999. *Lagorce, M*. The Brussels Supplementary Convention and its Joint Intergovernmental Security Fund. Nuclear Law for a Developing World. IAEA, Vienna, 1968. *Boulanenkov, V.* Main Features of the Convention on Supplementary Compensation for Nuclear Damage – an Overview. In: Reform of civil nuclear liability. Budapest symposium. Paris, OECD 1999.

164 On the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage see: *Lamm, V.*: The Protocol amending the 1963 Vienna Convention. Nuclear Law Bulletin, 1998, No. 61.

165 On the basic principles of nuclear civil liability regime see: *Trevor, J.P.H.* Principles of civil liability for nuclear damage. Nuclear Law for a Developing World. IAEA, Vienna, 1968.

166 *Pelzer, N.* Focus on the Future of Nuclear Liability Law. In: Reform of civil nuclear liability. Budapest symposium. Paris, OECD 1999, p. 424.

167 Installation State, in relation to a nuclear installation, means the contracting party within whose territory that installation is situated or, if it is not situated within the territory of any State, the contracting party by which or under the authority of which the nuclear installation is operated. See Article I (1) (d) of the Vienna Convention.

168 See Article 1 (a) (vi) of the Paris Convention and Article I (1) (c) of the Vienna Convention.

169 *Stoiber, C. – Baer, A. – Pelzer, N. – Tonhauser, W.* Handbook on nuclear law. Austria, IAEA 2003, p. 112.

coverage additional to that held by the operator.[170]

Under the Conventions, the operator of a nuclear installation is held liable, regardless of whether fault can be established. It follows that the claimant does not need to prove negligence or any other type of fault on the part of the operator. The simple existence of causation of damage is an adequate basis for the operator's strict liability.

The operator is held liable even if the incident is caused by vis maior (i.e. "an act of God"). He may be exonerated from nuclear liability only under special circumstances provided in nuclear law conventions, for example if he proves, that the nuclear incident was directly due to an armed conflict, hostilities, civil war or insurrection, or that it resulted from a grave natural disaster of an exceptional character.[171]

While the liability imposed upon the operator is exclusive and absolute, it is limited in both amount and time.

Limitation of nuclear liability in amount was considered to be necessary in order not to jeopardize the development of the nuclear industry. It was a consequence of the congruence principle between liability and mandatory coverage, i.e. limitations of liability amounts in national legislation are dependent on insurance market and its insurance offers.

Under the Paris convention, the maximum liability of an operator is set on 15 million SDRs.[172] A contracting state may establish a greater or lesser amount by its legislation to a lower limit of 5 million SDRs, taking into account the availability of obtaining insurance or other financial security. The Vienna convention provides primary for unlimited liability, but under national legislation, it could be limited to a smaller amount not less than USD 5 million.[173] Under the amended Vienna Convention effected by the Protocol[174] is the possible limit of the operator's liability set at not less than 300 million SDR.[175] Naturally, the upper limit may be under the national law a higher amount. Provided the upper limit of the operator's liability

[170] NEA Issue Brief: An analysis of principal nuclear issues, No. 4 – 1st revision, November 1993, International nuclear third-party liability. www.nea.fr.

[171] Article 9 of the Paris Convention; Article IV (2) of the Vienna Convention.

[172] SDR stands for the Special Drawing Right as defined by the International Monetary Fund. This unit of Account is calculated on the basis of a basket of currencies of five of the most important trading nations.

[173] Defined by reference to its value in terms of gold on 29 April 1963. That is USD 35 per one troy ounce of fine gold.

[174] According to Article 19 of the Protocol "A State which is Party to this Protocol but not to the 1963 Vienna Convention shall be bound by the provisions of that Convention as amended by this Protocol in relation to other States Parties hereto, and failing an expression of a different intention by that State at the time of deposit of an instrument referred to in Article 20 shall be bound by the provisions of the 1963 Vienna Convention in relation to States which are only Parties thereto." This means, that after the entry into force of the Protocol (4 October 2003) there are "two" Vienna Conventions in force - the original text of The 1963 Vienna Convention and its new version as amended by the Protocol.

[175] *Lamm, V.* The Protocol amending the 1963 Vienna Convention. Nuclear Las Bulletin, 1998, No. 61, p. 15.

is less than 300 million SDRs, the difference between that upper limit and 300 million SDRs must be secured from public funds.

The increase in liability amounts can be explained by the fact that one of the main motives for revising the Convention was the consideration that the US 5 million dollar limit, as the lowest amount of the operator's liability, had become unrealistic in view of the extent of damage that might result from an eventual nuclear incident.

For economically weaker states or for states who are currently coping with significant economic difficulties, a special regulation was introduced[176] to encourage participation in the revised regime by states with nuclear installations which might be dissuaded from joining the new regime by increased limits.[177]

The operator liable for nuclear damage is obliged to have and to maintain an insurance or other financial security to cover the nuclear liability. This congruence principle ensures that the liability amount of the operator is covered by an equal amount of money so that the claims of victims are financially ensured. In most cases, the coverage of the operator's liability is to be provided by the insurance industry but it may be provided by financial security other than insurance (e.g. bank guarantees or the capital markets).

Negotiations on revision of the Vienna Convention have brought together with the raised amount of liability, an expanded definition of nuclear damage as well, including the cost of measures taken with the aim of preventing or reducing the damage caused by a nuclear accident and damage to the environment, which was explicitly not covered by the former definition of nuclear damage (definition of nuclear damage under the 1963 Vienna Convention covered only loss of life, personal injury, and loss of or damage to property. Any other nuclear damage was made subject exclusively to the law of the court having jurisdiction) and which could be now compensable under the nuclear liability regime.

Measures taken with the aim of preventing or reducing the damage caused by a nuclear accident may include the evacuation of populations and restrictions on the sale of foodstuffs, loss to individuals, such as farmers who are deprived of expected profits by the prohibition of the sale of crops.

The redefinition of the term „nuclear damage" by the Protocol clearly demonstrates the intention to ensure as full compensation as possible to victims of nuclear damage.

The nuclear liability regime provides a time limit for the submission of claims as an instrument which helps to re-establish legal peace after a certain period of time.[178] The Vienna and the Paris Convention provide extinction period of ten years, which may be prolonged by national legislation, provided coverage is avail-

[176] From the time the protocol enters into force, these states are given the opportunity to define a transitional period of 15 years during which the minimum limit of liability of an operator may be set at 100 million SDRs.

[177] *Suransky, F.* Increased Liability Amounts under the 1997 Vienna Protocol and Elsewhere. In: Reform of civil nuclear liability. Budapest symposium. Paris, OECD 1999, p. 120.

[178] *Pelzer, N.* Focus on the Future of Nuclear Liability Law, cit. supra, p. 429.

able. There is also a possibility of establishing a period of two and three years respectively, running from the time when the damage and the operator liable have become known to the victim, provided that the ten-year period is not exceeded.

Taking into account, that personal injury caused by radioactive contamination might not become apparent for a longer time after exposure and to strengthen the principle of victims protection, the Protocol to Amend the Vienna Convention established a longer extinction period of 30 years for compensation for loss of life and personal injury, leaving the ten-year extinction period for all other types of damage. The extension of the extinction period and the split of periods between personal injury and all other damage inevitably give rise to certain practical problems, when it comes to compensating damage. According to Prof. Pelzer, as the period for personal injury is considerably longer than the period for other damage, money has to be set aside to make sure that there are still funds available to compensate late personal injury. This could inhibit from prompt compensation of other damage.[179]

Compensation of victims of a nuclear event is based on the system of individual actions brought in civil process. Jurisdiction over actions lies exclusively with the courts of the Contracting Party in whose territory the nuclear incident occurred[180] and each State Party shall ensure that only one of its courts has jurisdiction in relation to any one nuclear incident.[181]

The concentration of procedures within one exclusive competent court not only creates legal certainty and a fair distribution of the available amount but also excludes the possibility that victims of nuclear incidents will seek to submit their claims in States in which their claims are more likely to receive favourable treatment.[182]

Nevertheless, the system of individual actions seems to be unconvincing in the main, as it could be considered appropriate for the compensation of minor incidents, but it would be hardly conceivable in the event of a catastrophic nuclear accident resulting in thousands or millions of claims. In the case of a major nuclear accident, there could be considered as grave barriers administrative and technical capacities of the national courts adjudicating the compensation of nuclear damage or from the perspective of victims, distances in the case of transboundary damage, expenses or the duration of the individual case decision.[183] Accordingly the point at issue is, if civil liability system based upon the liability of the operator is appropriate to cope with a catastrophic nuclear accident of Chernobyl magnitude and if it is adequate to compensate victims of such a major nuclear accident. Provided that civil liability law is only designed to deal with

179 *Pelzer, N*. Focus on the Future of Nuclear Liability Law, cit. supra, p. 430.

180 Article XI (1) of Vienna Convention; Article 13 (a) of Paris Convention.

181 Article 12 (4) of Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (Article XI (4) of the revised Vienna Convention).

182 *Stoiber, C. – Baer, A. – Pelzer, N. – Tonhauser, W.* Handbook on nuclear law, cit. supra, p. 115.

183 See *La Fayette, L*. Towards a New Regime of State Responsibility for Nuclear Activities. Nuclear Law Bulletin. 1992, No. 50, pp. 16-17.

damage which can normally be compensated by the means of the tortfeasor[184], the obvious conclusion in nuclear liability theory is, that expletively to the civil liability principle, there must be some other source of funding such as state liability to reach the primary goal of protecting and fully compensating the victims of nuclear damage.[185]

3.4 Precontractual liability - culpa in contrahendo

3.4.1 Notion of culpa in contrahendo

The doctrine of culpa in contrahendo is based on the doctrine of culpa in contrahendo introduced by Rudolf von Jhering and goes back to his famous article, published in 1861, entitled "Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen."

The basis of that doctrine is that damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection.[186]

However there are several problems relating to the concept of culpa in contrahendo. First, the precontractual phase is difficult to characterise and analyse, the negotiating parties have entered into a relationship by virtue simply of their negotiations. The question is, whether the relationship which is created between the parties by virtue of their negotiations is a relationship to which the law should attribute legal significance at all, in the sense that it should of itself attract the protection of the law for each of the parties vis-a-vis the other. [187]

Another question is, whether the culpa in contrahendo relationship has the contractual or non-contractual nature, thus whether it gives rise to a specific set of contractual or non-contractual liability rules or whether the culpa in contrahendo concept creates a separate, third type of liability alongside the contractual and delictual liability. Nevertheless, acknowledging the *sui generis* nature of precontractual liability there are still uncertainties in determination of quasi-contractual or quasi-delictual nature of this relationship.

In legal literature the issue remains unclear but it seems that contract law is considered to be the most suitable body of law to complement the provisions

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184 Pelzer, N. Focus on the Future of Nuclear Liability Law, cit. supra, p 445.
see also La Fayette, L.: Towards a New Regime of State Responsibility for Nuclear Activities, cit. supra.

185 *La Fayette, L*. Towards a New Regime of State Responsibility for Nuclear Activities, cit. supra, pp. 16 - 17.

186 Kessler, F., Fine, E. Culpa in contrahendo, bargaining in good faith, and freedom of contract: a comparative study. 77 Harvard Law Review 77/1964.

187 Cartwright, J. - Hesselink, M. Precontractual liability in European Private Law. New York, Cambridge University Press 2008, p. 450.

on precontractual liability and it would be appropriate to apply the contractual provisions by analogy.[188]

3.4.2 Culpa in contrahendo in comparative view

The authors of the German Civil Code did not approve of the doctrine of Jhering and it was not established in the Civil Code. However, the doctrine was supported by the courts, which broadened the application of the obligation to act in good faith, as provided for in Article 242 of the BGB (Bürgerliches Gesetzbuch) or German Civil Code (debtor must fulfill his obligations in good faith and in accordance with the customs) to the pre-contractual relationships, thus creating a whole set of new precedents.[189]

The concept of *culpa in contrahendo* (mainly in form of establishing the rule to act in good faith during negotations in the pre-contractual phase) was legally established only in few countries (e.g. Article 1337 of the Italian Civil Code, Article 12 of the Israeli Contract Law (General Part) 5733-1973, Article 197 of the Greek Civil Code, Article 227 of the Portuguese Civil Code).

Some other jurisdictions establish the obligation to act in good faith only for the contractual phase, nevertheless the concept of acting in good faith could be applied per analogy to pre-contractual relationships (France, Belgium, and Luxemburg). In this way, the duty of good faith is extended to negotiation period by legal doctrine or court decisions.

However, the countries in common law system have been reluctant to adopt the doctrine of culpa in contrahendo. This is related to different interpretation of a contract in common law and civil law countries,[190]whereas common-law courts are reluctant to extend the boundaries of the contract law beyond the point of time of signing contract.

[188] Ibid., p. 38.

[189] *Kiršiene, J., Leonova, N.* Qualification of pre-contractual liability and the value of lost opportunity as a form of losses. Jurisprudence 1/2009, p. 227.

[190] Ibid.

4 Liability for damage in Slovakia

4.1 Concept

Legal liability can be described by means of the generally accepted sanction concept of liability, according to which liability is considered as a secondary legal duty resulting from breaching or jeopardizing a primary legal duty. Thus, it is a negative legal consequence foreseen by the sanction element of a legal rule (sanction duty) incumbent on the infringer of the primary legal duty. The person having breached a primary legal duty resulting from statute (non-contractual liability) or from contract (contractual liability) has a subsequent (secondary) legal duty based on liability, which is a duty to compensate the damage caused or, in cases stipulated by statute, to provide satisfaction.

4.2 Functions

Liability for damage has a reparation (compensation) function and a satisfaction function. The reparation function means that the injury (loss) caused to the injured person will be fully compensated by the liable person either in the form of a pecuniary compensation or in the form of an *in natura* compensation (restitution). The satisfaction function is associated with explicitly defined cases of immaterial injury, in which the Civil Code or a particular civil-law act recognizes the right to have this injury alleviated by means of pecuniary satisfaction.

Besides the reparation and satisfaction functions, the civil-law liability system also has an important prevention function**,** by which it minimizes or eliminates threats to and breaches of rights protected by law. Within the scope of prevention of damage, the law imposes on each and every person the general prevention duty to behave in a way that does not cause injury to health, property, nature or the environment (Section 415). The persons imminently threatened by an injury have a specific prevention duty to take appropriate measures to avert it [Section 417(1)]. In case of a serious danger, the threatened person shall have the right to demand that the court commands taking of suitable and adequate measures in order to avert the threatening damage [Section 417(2)]. A person who caused damage averting a directly threatening danger that he has not evoked shall not be liable for the damage unless the danger could be averted otherwise under the

given circumstances or unless the caused consequences are obviously equally extensive or even more extensive than were those that threatened. A person who caused damage in a necessary defence against a threatening or lasting attack shall not be liable for them. The defence shall not be considered necessary if it was obviously inadequate to the nature and dangerousness of the attack [Section 418]. A person averted threatening damage shall be entitled to a compensation of usefully spent costs and of damage suffered therein. This right may be exercised even against the person in whose interest he acted. The compensation shall be given maximally in the extent corresponding to the damage that was averted.

4.3 Liability prerequisites

The prerequisites of liability for damage are, in the theory of civil law, all conditions stipulated by statute, which are necessary for establishing and enforcing liability. There are four prerequisites of civil liability for damage:

1. An illegal act or an event causing damage foreseen by statute (damage event)
2. Existence of injury (loss)
3. Causal link between the illegal act (damage event) and the injury (loss)
4. Fault

4.3.1 Illegal act

An illegal act is an act (or an omission) contrary to objective law, i.e. it is an expression of will (conscious and intentional behaviour) of a party to a civil-law relationship that is prohibited by law. Liability can be established both by action as a wilful activity of the person concerned and by omission (failure to act) if the person concerned was bound by statute to act in a certain way.

The liability relationship does not exist where illegality of action is excluded by any of the circumstances excluding illegality. Such circumstances include necessity, self-defence, permissible self-help, exercise of a right, discharge of a duty and the injured person's consent.

4.3.2 Damage (loss, harm)

Material injury (loss) can be, according to the settled case-law, defined as injury caused in the injured person's material sphere and can be expressed on an objective basis by a general equivalent (money) and therefore can be compensated by providing performance consisting of property, in particular by providing money (unless natural restitution is provided). This loss can be either real loss

(the injured person's property was diminished) or lost profit (the injured person's property was not increased to the extent which could be reasonably expected under usual conditions). Immaterial (moral) injury is caused by an infringement of the injured person's personal sphere.

Slovak judicial practice[191] as well as civil law theory[192] dealt with the substance of concept of damage (as a civil law category) by reference to a loss which occurred (is manifested) in the property sphere of the injured and which is objectively expressed by general equivalent, i.e. by money, which indicates that it is recoverable by provision of pecuniary compensation, especially by provision of money (unless a natural restitution is in place). From the point of view of Slovak civil law terminology, damage means solely a pecuniary loss actually expressed in money as well as pecuniary loss which is expressable by money and which, according to applicable legal regulation Act No. 40/1964 Coll. Civil Code as amended (hereinafter as „CC") may be manifested in the form of actual damage (damnum emergens) and lost profit (lucrum cessans).

The structure of compensation of damage in Slovak law[193] in respect of terminology determination of the concept of damage in judicial practice and civil law theory opens an interesting question of the extent of the loss attributable under the concept of damage and thereby compensable according to the sixth chapter of CC. Based on the content of the concept of damage, as understood by judicial practice, civil law theory as well as structure of regulation of compensation of damage in valid and effective CC, which, being tributary to the period in which it was created, continues with materialistic concept of principal compensation of pecuniary loss (damage) with the option of „compensation" (remedy) of non-pecuniary loss only in the limited extent, in enumerative range of cases[194], it is possible that immaterial loss constitutes an autonomous institute, separated from damage, currently not falling under general concept of compensation of loss.

Although under Civil Code a right to compensation of damage caused by pain and deterioration of social opportunities is as well as compensation of non-pecuniary loss in case of infringement or threat to intellectual property rights and in case of crime of corruption are explicitly granted in relation to bodily injury and death, these institutes (despite of the fact that they are systematically structured in chapter regulating the liability for damage and they are subject to „compensation" in money) can not be labelled as damage as defined by judicial practice and civil law literature, since, in all of the above mentioned cases an intervention to the values of immaterial nature occurs.

Therefore, remedy of non-pecuniary loss may not be classified within the institute of compensation of damage in the sense in which damage is currently

191 See R 55/1971**.**

192 *Svoboda, J. et al.* Občiansky zákonník. Komentár a súvisiace predpisy. Eurounion, Bratislava 2004, p. 316. *Dulak, A.* Záväzky zo spôsobenia škody a z bezdôvodného obohatenia. In.: Lazar, J. a kol.: Občianske právo hmotné. Iura Edition, Bratislava 2006, p. 308.

193 Cf. § 442 ff. OZ.

194 Cf. § 442 sec. 2 OZ, § 442a OZ, § 444 OZ.

viewed, on the contrary, from the point of view of the structure of Slovak tort law, the option of compensation (remedy) of non-pecuniary loss should be understood as a separate regime of enumerative regulation in the Civil Code, despite of the fact that systematically the regulation of „compensation" of non-pecuniary loss is structured in the Civil Code under the provisions on compensation of damage.

The limits of definition of damage, linguistic inconsistency of the lawmakers and non-compliance of scientific definition of damage with the nature of the institutes so labelled has the most significant impact in relation to bodily injury which is identified as damage to health under Sections 415 and 444 of the Civil Code, despite of the fact that health and life are immaterial values linked to moral side of legal relationship and expressability of the value of health and life in money (as a prerequisite of damage) is at least questionable.

4.3.3 Causal link

Under Slovak law, the existence of causal link as a precondition to creation of subjective right to compensation of damage is necessary regardless whether obligation to compensate the caused damage is based on the principle of fault or on the basis of strict liability. An entity – a subject of civil law relations may be claimed for liability for damages only provided that certain fact to which a creation of legal relationship of liability for damages is attached, i.e. illegal act or an event defined by law, i.e. certain fact, actually caused damage. There must be a relationship of cause and consequence between illegal act and/or damaging event, there must be an internal link between them arising from the causation patterns which applies to the full extent also for legal relations regarding the nuclear damage liability which are based on strict liability without need for demonstration of fault as subjective precondition for occurrence of liability for damage.

Since causal link must be established as a precondition to for determination of civil law liability for damage, it is without a doubt that even procedural law imposing upon a judge a duty to establish the facts, at the same time, in case of deciding on compensation of damage, implicitly imposes also duty to establish a causal link.[195] The fundamental issue for determination of causal link shall be, based on what criteria, out of complicated set of various causes from philosophical point of view, such cause should be established which is a cause also in legal sense from point of view of civil law regulating the liability for damage. It is deemed that not every event as a cause in philosophical view is a cause recognized as relevant from legal point of view. Not only damage, but also its cause must be the fact which is recognized by the law as a legally relevant incident to which legal consequences are attached (in connection with other facts, especially by the result). Therefore, the cause can be only the fact isolated in some way as

[195] *Luby, Š.* Príčinná súvislosť v občianskom práve. In: Výber z diela a myšlienok. Iura Edition, Bratislava 1998, p. 349.

legally relevant from general causation.[196]

A duty to claim, the burden of claim, the duty of proof as well as burden of proof lie upon the injured in case of investigation and demonstration of causal link.

In relation to legal understanding of causation it may be claimed that in most countries theory of so-called „adequate causal link" theory was applied in civil law theory and is applied even today (although in certain variations). According to adequate causal link theory, damage in particular case is caused by illegal act or by separate damage event qualified by law in such cases, when illegal act or qualified damage event, not only as a result of conditions of certain damage, but also as a result of common (natural) operation of matters and also as a result of general experience usually – typically (generally) lead to causing of damage. Only such illegal act or damage event are adequate causes of damage and thus at the same time sufficient – attributable grounds for occurrence of civil law liability.[197] Statement that illegal act or damage event is legally irrelevant cause of damage must be understood in a way that damage (its type and extent) was, given the circumstances and status of the tortfeasor at the time of causing the damage, foreseeable. This way foreseeability becomes a subject of logical assessment by the court, which, when making a decision, must take into account all circumstances of the case and general experience. [198]

4.3.4 Fault

Fault can be characterized as the injured person's internal (mental) psychic relation to his own illegal act and to the injury caused by this act. Fault can either have the form of (direct or indirect) intention or the form of (conscious or unconscious) negligence.

The existence of liability prerequisites must be in each particular case sufficiently established. If one of the prerequisites cannot be established to the determined extent, there is no liability relationship between the offender and the injured person, i.e. the injured person cannot be awarded a compensation of loss (damage).

The above prerequisites are divided into objective prerequisites (illegal act or a damage event, existence of injury and a causal link) and a subjective one (fault). In case of strict liability, the three objective prerequisites must be satisfied. In case of subjective liability, besides the objective criteria, fault as a subjective prerequisite must be present, as well.

The liable person may discharge himself from his liability under certain circumstances. In case of subjective liability, the liable person can exculpate himself

196 Ibid, p. 378.

197 *Knappová, M. – Švestka, J. et al.:* Občanské právo hmotné. Svazek II. Díl třetí: Závazkové právo. Praha: Aspi Publishing, 2002, p. 459-460.

198 Ibid, p. 459.

(exculpation) by demonstrating that the damage caused was not caused by his fault. In case of strict liability, the liable person can liberate himself (liberation) by demonstrating the existence of a liberation title provided by statute (e.g. in case of liability for damage caused to things brought to or deposited in certain premises by demonstrating that the damage would have occurred anyway). In certain cases, there is no specific liberation title for strict liability provided by statute. In such cases, the liable person cannot discharge himself from his liability under any circumstances. This liability is called absolute strict liability (e.g. liability for damage caused by the nature of a thing or a device used in performing an obligation).

The Slovak Civil Code does not differentiate between contractual and non-contractual (tortious) liability.

4.4 Liable persons

The liable persons in case of civil liability can be both natural persons and legal entities (including the state).

In case of subjective liability, the offender must have delictual capacity (capacity to be liable for his illegal conduct). Natural persons have delictual capacity if they have attained the age of majority (objective criterion) and they do not suffer from a mental disorder preventing them from controlling their conduct or assessing the consequences of their conduct (subjective criterion of maturity of intellect and will). Delictual capacity of legal entities coincides with their legal personality. Therefore, legal entities have delictual capacity from the moment of being established. The criterion of maturity of intellect and will is assessed in case of legal entities by assessing this criterion in persons acting on behalf of legal entities.

The injury suffered by the injured person can be, in certain cases, partially caused by the fault of the injured person himself. In such cases, if the loss (injury) was caused exclusively by the injured person's fault (illegal act committed by fault), it is borne fully by him, i.e. he cannot claim a compensation of this loss (injury) from another person. If the loss (injury) was caused partially by the injured person's fault (illegal act committed by fault) and partly by the offender, the loss is borne by the injured person proportionally according to his share in causing the loss. In this case, the injured person may be awarded damage from the liable person only to the extent corresponding to the liable person's share in causing the loss (injury) suffered by the injured person.

In case of a loss caused by several offenders, these persons are liable for the loss towards the injured person jointly and severally (solidary liability), i.e. one offender is liable for all offenders and all offenders are liable for any of them. In justified cases, the court may decide that the persons having caused the loss together are liable for the loss according to their share in causing it (divided liability).

4.5 Scope, content, and the form of compensation

The scope of compensation means the amount of compensation to be provided by the offender to the injured person. Slovak law is based on the principle of full compensation of loss caused to the injured person. This principle fully applies in case of loss caused to things (property). In case of injury to health and life, the amount of compensation of respective forms of such injury is based on calculation formulas contained in the applicable civil-law legislation.

As far as the scope of compensation is concerned, the court may, in certain cases, exercise its power of moderation and decrease the compensation proportionally for specifically justified reasons (Section 450). In this assessment, the court takes account of the offender's and the injured person's personal situation and means, the circumstances in which the loss was caused etc. The power of moderation cannot be used in case of loss caused by intent.

The content of compensation means what injury is to be compensated by the offender to the injured person. In principle, in case of damage to property, both the actual loss and what could have been earned by the injured person (lost profit) are compensated. In case of injury to health and life, the compensation consists in:

- compensation for pain and aggravated social status (see Act No. 437/2004 on Compensation for Pain and Compensation for Aggravated Social Status),
- compensation for lost income during the period of inability to work,
- compensation for lost income after the period of inability to work,
- compensation for lost pension,
- one-time settlement,
- compensation of appropriate treatment-related costs, and
- compensation of adequate costs associated with funeral and a survivor accident allowance (in case of death).

The form of compensation means the way of providing compensation. Slovak law is based primarily on the principle of pecuniary compensation, i.e. the loss is compensated in form of money. If it is possible and appropriate and the injured person claims such compensation, the loss may also be compensated by restitution to the original state (*restitutio in integrum*).

4.6 Types of liability

The Civil Code distinguishes the following types of liability:

1. general liability for damage caused by an illegal act committed by fault (Section 420),
2. liability for damage caused by operational activity (Section 420a),

3. liability for damage caused to an accepted thing intended to be the object of an obligation (Section 421),
4. liability for damage caused by the nature of a device or a thing used in performing a duty (Section 421a),
5. liability for damage caused by persons unable to assess the consequences of their actions (Sections 422 *et seq*.),
6. liability for damage caused by an intentional act against good morals (Section 424),
7. liability for damage caused in exercising public authority (Act No. 514/2003 Coll. on Liability for Damage Caused in Exercising Public Authority),
8. liability for damage caused by operating vehicles (Sections 427 *et seq*.),
9. liability for damage caused by a particularly dangerous operation (Section 432),
10. liability for damage caused to things brought to or deposited in certain premises (Sections 433 *et seq*.), and
11. liability for damage caused by a defective product (Act No. 294/1999 Coll. on Liability for Damage Caused by a Defective Product),
12. nuclear liability

4.6.1 General liability for damage caused by an illegal act committed by fault

The prerequisites of general liability for damage under Section 420 are:

a) illegal act (breach of a legal duty),

b) injury (loss),

c) causal link between the offender's illegal act committed by fault and the injury, and

d) fault (which is, in this case, presumed).

According to the Section 420, everyone shall be liable for damage caused by breaching a legal duty. This type of liability is a subjective liability. The liable person is the natural person or legal person having breached a legal duty either by his act or omission (failure to do what he had to do). Legal person are also liable for the acts of their employees or other persons used by them in their activities. If these persons cause damage when performing the legal person's activities, the damage is ascribed to the legal person concerned, which has to provide compensation to the injured person.

The liable person may discharge himself from the liability for damage caused by an illegal act committed by fault by means of exculpation, i.e. by proving that the damage at issue was not caused by his fault.

4.6.2 Liability for damage caused by operational activity

This type of liability is a strict liability based on the principle that any person is liable for damage caused to another person by operational activity. Damage caused by operational activity is any damage caused by:

- an activity of operational nature or by a thing used in this activity,
- physical, chemical or biological effects of an operation on the environment, or
- authorized exercise or provision of work causing damage to another's immovables or considerably limiting or precluding the use of another's immovables.

The person having caused the damage may discharge himself from his liability if he proves that the damage was caused by an event not originating in the operation that could not have been averted or by the injured person's own action.

4.6.3 Liability for damage caused to an accepted thing intended to be the object of an obligation

The prerequisites of the liability for damage caused to an accepted thing being the object of an obligation are the acceptance of a thing intended to be the object of an obligation, the existence of an obligation-law relationship, in which the thing was accepted, damage to or loss or destruction of the thing at issue and a causal link between the damage event and the damage. It is a strict liability. The person having accepted a thing from another, which is intended to be the object of his obligation, can discharge himself from this liability if he proves that the damage would have occurred anyway.

4.6.4 Liability for damage caused by the nature of a device or a thing used in performing a duty

The prerequisites of this liability consist of an injury (damage) caused by the effect of circumstances resulting directly from the nature of a device or a thing used as a means for performing a duty (a damage event), the injury itself and a causal link between the injury and the damage event.

Liability caused by the nature of a device or a thing used in performing a duty is objective. Moreover, it is made stricter by the fact that no liberation reasons allowing the liable person to discharge himself of this liability are permitted under the Civil Code (absolute strict liability).

In case of using a device, an instrument or a thing, liable entity bears its liability as well as a duty to compensate damage also in case of proceeding in accordance with manual or common method of use of given thing, as well as when proceeding in accordance with conducted technical or expert training etc. In these

cases any unilateral statements of the providers, bilateral agreements between the provider and the patient executed ex ante or ex post or any other acts which would limit or exclude the liability of the provider are legally irelevant.

A device or other thing used during performance of an obligation means any material object provided that it was used, exclusively or predominantly, for provision of the services. In accordance with available judicial practice, for the purposes of this liability, the things are deemed also such things and devices which, though not directly used for the provision of services, are used in close relation to the provision of given services (e.g. chair serving a patient in the doctor's premises). An object in the above mentioned meaning is not only object itself, but also any accessories or parts thereof, nature of which caused a loss. Accessories include anything that is designed to be used together with the main object permanently, whereas however, from legal point of view, accessories may exist also separately, as opposed to parts of the object, which, if separated from the main object, the main object would lose its economic purpose for which it was designed for.

From the point of origination of liability it is not important what was legal title based on which liable entity used relevant device or a thing, it could have been its owner based on purchase, donation or other alienation contract, it could have leased the thing or borrowed it. At the same time in respect of determination of the liable entity the following is irrelevant: the fact who was obliged to perform maintenance of the things, to inspect common operation and fault-free operation of the device, who and to what extent was obliged to perform the training in use of technically more challenging device or instrument or who was liable to perform the repairs of the things.

As far as the liability prerequisites under Section 421a are concerned, it is crucial whether the injury was caused by circumstances originating in the nature of a device or a different thing used in performing a certain duty or not. The circumstances originating in the nature of a device or a thing include not only circumstances resulting from inappropriate or inadequate operation or insufficient knowledge about the characteristics of the thing used, but also circumstances resulting from the fact that the device does not work or has defects, whether they are defects occurring rarely, more frequently or regularly.

Further, these may include the circumstances arising from inappropriate or insufficient service or insufficient knowledge on features of the used thing (e.g. in application of certain medicine) but also circumstances which arise from malfunction of a device.

Circumstances having origin in the nature of a device or other thing may be based on insufficient sterility or other missing feature which should be part of the thing or a device during provision of medical services (e.g. use of non-sterile syringe or other non-sterile device, whereas non-sterility leads to bodily injury). If certain feature of a device or other thing is assumed or prescribed and device or thing lack this feature and such missing feature was a cause of occurrence of damage, the above mentioned shall constitute the grounds of liability for damages caused by circumstances.

This definition of liability is construed as liability for flawlessness of a thing and its features at the time of provision of activity for fulfilment of obligation and for failure of a device, resulting in a conclusion that liability is established even when a substance or a device triggered harmful effects as a result of external circumstances.

However, liability for use of a thing can not be a base for liability for damage which cause did not lie in the nature of particular used device or other thing, but instead, in wrongly performed action or in the method of performance thereof (in medicine, for instance, non-lege artis act), despite of the fact that a device or a other thing was applied during surgery. In this case liability shall be assessed according to Section 420 of the Civil Code as a liability for damage caused by faulty breach of obligation.

The issue of determination of an entity which, in this case, bears liability based on which such entity is liable to compensate the loss incurred, is related to determination of an entity which fulfilled an obligation during which a device or a thing was used, whereas the nature of such device or a thing caused a harm to a patient.

4.6.5 Liability for damage caused by persons unable to assess the consequences of their actions

This liability applies to cases in which damage was caused by a minor or by person suffering from a mental disorder. When determining the liable person, the decisive factors are the degree of maturity of thinking and will of the minor or of the person suffering from a mental disorder and whether the person exercising supervision over them (e.g. a parent, an adopter, a school facility, a health care facility) did not neglect this supervision. The following situations may occur when it comes to determining the liable person:

a) only the minors or the persons suffering from a mental disease are liable if they were, when causing the damage, able to command their action and to assess its consequences and the persons exercising supervision prove that they did not neglect the supervision,

b) only the persons exercising supervision are liable if the minors or the persons suffering from a mental disorder were, when causing the damage, not able to command their action or to assess its consequences and the persons exercising supervision neglected the supervision,

c) both groups of persons are liable jointly and severally if the minors or the persons suffering from a mental disorder were, when causing the damage, able to command their action and to assess its consequences and the persons exercising supervision neglected the supervision, or

d) there is no liability if the minors or the persons suffering from a mental disease were, when causing the damage, not able to command their action or to assess its consequences and the persons exercising supervision

did not neglect the supervision.

If someone causes himself to be in a state in which he is not able to command his action or to assess its consequences (e.g. by alcohol consumption), he is liable for damage caused in such a state. Those who, by intention, caused him to be in such a state are liable jointly and severally with him.

4.6.6 Liability for damage caused by an intentional act against good morals

The main prerequisite of this liability is an intentional act of an offender contravening good morals causing damage to another person. It is a subjective liability based on the offender's intention.

4.6.7 Liability for damage caused in exercising public authority

Either the state or territorial self-governing units (municipalities or self-governing regions) are liable for damage caused in exercising public authority.

The state is liable for damage caused by public authorities in exercising public authority cased by:

a) an illegal decision or

b) an illegal arrest, apprehension or other deprivation of personal liberty or

c) a decision imposing a penalty, a protective measure or detention or

d) by wrong official procedure.

Territorial self-governing units are liable for damage caused by territorial self-governing authorities in exercising self-governing authority caused by:

a) an illegal decision or

b) by wrong official procedure.

This liability is a strict liability permitting no liberation (absolute strict liability). Prior to claiming compensation in court, the injured person must submit a written application for preliminary examination of his claim to the competent authority. If the competent authority fails to satisfy the claim for compensation or a part thereof within six months of the application being submitted, the injured person can claim compensation or the part of it that was not satisfied in court.

Both the state and the territorial self-governing authorities have, once the injured person's claim for compensation is satisfied, a right of regress towards the persons indicated in Sections 22 to 24 of the Act No. 514/2003 Coll.

4.6.8 Liability for damage caused by operating vehicles

The following persons are liable for the damage caused by the particular nature of operating vehicles:

a) the natural or legal person performing carriage as well as any other operator of a motor vehicle, a motor vessel or an airplane,

b) instead of the operator, the person having used a vehicle without the operator's knowledge or against his will; however, the operator is liable together with this person such use of the vehicle was made possible by his negligence, or

c) if the vehicle is being repaired, instead of the operator, the operator of the undertaking by which the vehicle is being repaired is liable during the period of such repair.

This liability is objective; the liberation title consists of two cumulative conditions: the damage was caused by circumstances not originating in the operation's nature (e. g. *force majeure*) and it could not have been averted even if all reasonable care had been taken. Where damage was caused by circumstances originating in the operation of the vehicle, the liable person cannot discharge himself from his liability.

If operations of two or more operators concur, the operators are liable for damage caused to third parties jointly and severally. As to their internal settlement, they are liable according to their share in causing the damage.

4.6.9 Liability for damage caused by a particularly dangerous operation

This type of liability is based on the fact that the damage was caused by the specific nature of a particularly dangerous operation causing damage. The dangerous character of the operation may consist in the production itself, in the nature of the operation in which production takes place or in the nature of the manufactured products (manufacturing explosives, operating power plants, mines etc.).

The Slovak Civil code does not contain any legal definition of dangerous operation. This term is relative and it must be interpreted in respect to the partucilar circumstances of each case. A hazardous operation is usually understood as a human activity which is connected with the high probability of causing damage, mostly using technical means and natural energy sources. For a dangerous operation it ist typical that, despite exercising due care and using the latest knowledge, objective control over the process arising from this activity is not always possible.

From the point of view of occurrence of liability it is irelevant whether given operation was approved within relevant administrative proceedings or an operation is expressly prohibited.

An operator shall be liable for damage caused by a nature of abnormally dan-

gerous operation (Section 432 of CC).

The substance of this liability is fulfilment of condition that damage is triggered by special nature which pertains to abnormally dangerous operation. Damage is caused by nature of abnormally dangerous operation when caused by such circumstances (such force) which externally represent special danger of the operation and which, due to the increased risk of occurrence of damage, are objectively capable to cause such damage (e.g. handling of explosives). Liability for damage caused by abnormally dangerous operation shall not apply if damage has no origin in the nature of abnormally dangerous operation, i.e. damage does not occur in causal link to operation of the source of increased danger (e.g. in case someone trips in the power plant premises and suffers a bodily injury).

Operator of abnormally dangerous operation is a person who performs abnormally dangerous operation, i.e. it actually organizes and manages its activity. The term operator is not equal to the term owner of abnormally dangerous operation, even though in most cases the owner shall be the entity which operates a source of increased danger and decides on objectives and methods of running of an operation.

Only an entity having factual and legal opportunity to handle the source of the increased danger can be identified as an operator. Exceptionally, also entity having factual but not legal opportunity to handle the source of the increased danger can be identified as an operator of abnormally dangerous operation (e.g. in case of illegal capture of the source of increased danger).

Liability of an operator for damage caused by abnormally dangerous operation is based on objective principle regardless of the operator's fault. The structure of strict liability of the operator of abnormally dangerous operation leads especially to provision of the increased protection to the injured party on one side (injured need not demonstrate the fault of the operator) and on the other hand, it should motivate the operator to exercise increased care and effort in order to prevent the occurrence of damage.

The operator may not be liberated from its liability if damage was caused by circumstances having origin in the operation (so-called internal damage event). Circumstances having origin in the operation are the circumstances related to organization, management and performance of operation and are causally linked to damage (e.g. during the blast in the stone quarry one of the stones causes damage). Circumstances having origin in the operation inlcude also insufficiencies or defects of material and equipment as well as hidden and not recognizable effects (R 9/72) as well as unforeseeable failures of persons used in abnormally dangerous operation (e.g. epileptic spasm of an employee).

Liberation (release from liability) of the operator is possible in case damage was caused as a result of circumstances not having origin in the operation (so-called external damage event – e.g. earthquake, flood, thunder stroke), whereas a condition that damage could not have been averted despite of making the best effort which could have been required must be cumulatively fulfilled. Making best effort means any objectively possible care that could have been taken by the

operator of abnormally dangerous operation given the circumstances. The question whether the operator made its best effort which could have been requested to avert the damage is assessed strictly objectively in the sense that, given the circumstances of a particular case, damage could not have been averted by anyone else in the operator's shoes.

Pursuant to Section 441 of CC the operator may be released from liability fully or partially in case damage was caused either by exclusive or by contributory fault of the injured, however only in the case that damage was triggered by the nature of abnormally dangerous operation, but not caused by circumstances having its origin in the operation (R 3/84). If the injured's fault was the exclusive cause of damage, the operator shall be released from liability fully and damage shall be fully borne by the injured. If a faulty illegal act of the injured is only one of the causes of occurrence of damage caused by abnormally dangerous operation, the injured shall bear this damage pro rata.

4.6.10 Liability for damage caused to things brought to or left in certain premises

This liability applies to premises in which persons entering those premises temporarily deposit their belongings. Three groups of operators are liable for this type of damage to these things:

a) operators providing accommodation (e.g. hotels) are liable for damage to things brought by the accommodated persons or for these persons to the accommodation premises or to premises reserved for depositing things or handed over to the operator or an employee of the operator for this purpose;

b) operators of activities usually involving depositing things (e.g. doctor rooms, theatres, fitness centres) are liable for damage to things deposited in a place intended for depositing things or in a place where they are usually deposited;

c) operators of garages and similar facilities are liable for damage caused by loss, damage or destruction of vehicles located in such garages or similar facilities and for the damage caused to accessories of such vehicles.

d) This type of liability can be excluded neither by the liable person's unilateral declaration nor by agreement between the offender and the injured person.

The operator may only discharge himself from his liability if he proves that the damage would have occurred anyway.

The operator's liability for jewellery, money and other valuables is limited by the amount stipulated by delegated legislation (€ 331.94). However, if the damage to these things was caused by persons employed in those premises or if these things were accepted into deposit, the damage is fully compensated without any restriction.

The compensation must be claimed from the operator without undue delay. The injured person's right will become extinct if it is not asserted within 15 days from the day on which the injured person became aware of the damage.

4.6.11 Liability for damage caused by a defective product

The main prerequisites of liability for damage caused by a defective product are:

a) the product's defective character;

b) injury to health or to life or damage to a thing other that the defective product itself, provided that the thing was of a type ordinarily intended for private use or consumption and was used by the injured person mainly for his own private use or consumption;

c) a causal link between the product's defect and the injury (damage).

If a defect of a product results in damage to health, in death or in damage to a thing that is different from the defective product and that is designed and used predominantly to other than entrepreneurial purposes, the producer shall be liable to the damaged party for the arisen damage if the damaged party proves the defect of the product, the arisen damage and a causal link between the defect and damage.

A product is any movable produced, extracted or acquired otherwise intended for being put into circulation. A product is defective when it does not provide the safety of use that may be reasonably expected.

A product shall be considered defective according to this Act unless its use guarantees qualities that may be legitimately expected for it from the point of view of safety, in particular with regard to

a) the presentation of the product including the attached information, or

b) the presumed purpose to that the product is to serve; or

c) the moment when the product was introduced to the market.

A product shall not be considered defective only because a more perfect product was later introduced to the market.

The liable person is the producer. The producer shall be defined as

a) the producer of the final product, raw materials or component of the product as well as the person who specifies its name, trademark or other distinctive sign, or

b) any person who, in the framework of its commercial activities, imports the product for the purpose of its sale, lease or other way of use; liability of the producer according to letter a) shall hereby not be affected, or

c) any supplier of the product provided that the producer according to letter a) can not be identified, unless the supplier notifies the damaged party within one month from the vindication of the claim to compensation of

the damage about the identity of the producer according to letter a) or of the person who delivered the product to the supplier; the same rule shall also apply in case of import unless the person who imported the product according to letter b) is known even if the producer according to letter a) is known.

This means, that importers and suppliers are regarded as producers, as well. If more producers are liable for the damage, they shall be liable for it jointly and severally.

The damaged party may claim the damage against any of them. The mutual settlement of more jointly and severally liable producers shall be done according to the participation of each of them.

This type of liability is objective. The producer may discharge himself from this liability if he proves that:

- he did not put the product into circulation;
- the product was not defective at the time when it was put into circulation or the defect came into being afterwards;
- the product was neither manufactured by him for sale or other use for business purposes nor distributed by him in the course of his business activity;
- the defect is due to compliance of the product with a duty imposed on the producer by a generally binding regulation;
- the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the product's defect to be discovered,
- the producer of a component of the product shall exonerate itself from the liability if it proves that the defect was caused by construction of the product into that the component was installed or that it was caused by directions to the product.

The right to compensation of damage caused by a defective product is subject to a limitation period of three years, beginning to run from the day on which the injured person became or could have become aware of the damage caused by the defective product and the identity of its producer. However, this right will become statute-barred at the latest after ten years from the date on which the producer put into circulation the defective product which caused the damage.

4.6.12 Liability for nuclear damage

There are currently 4 units of nuclear power plants in commercial operation in the Slovak Republic, whereas two units are located in Mochovce area (nuclear power plants Mochovce 1,2) and another two in Jaslovské Bohunice area (nuclear power plants Bohunice V-2).

The number of nuclear installations which has a nature of energy nuclear in-

stallations is completed by nuclear power plant A-1 currently located in the 2nd stage of decommissioning, nuclear power plant Bohunice V-1 which is currently in the 1st stage of decommissioning and 2 units of nuclear power plant Mochovce 3,4 currently under construction.

Civil liability for nuclear damage in Slovak Republic is governed by the Act No. 541/2004 Coll. on Peaceful Use of Nuclear Energy (Nuclear Energy Act) and on amendment and supplement of certain acts, approved by the Parliament on 9 September 2004 with effective date of 1 December 2004. This currently valid and effective fundamental national source of nuclear law adopted at national (Slovak) legislation level has replaced the then valid Act No. 130/1998 Coll. on Peaceful Use of Nuclear Energy.

The primary goal of the newly adopted Nuclear Energy Act which nature falls into the field of public law (except for regulation of civil law liability for nuclear damage in the seventh chapter) was to reflect in its provisions the development and new trends of the nuclear liability legislation in Europe and at international level.[199] This act sets out the principles of nuclear liability of the operator of nuclear installations and contains detailed provisions on third party liability for nuclear damage, which largely reflect the provisions of the 1963 Vienna Convention on Civil Liability for Nuclear Damage. The Slovak Republic acceded to the 1963 Vienna convention on Civil Liability for Nuclear Damage and to the 1988 Joint Protocol Relating to the Application of the Vienna Convention and The Paris Convention on 7 March 1995. Both the Vienna Convention and the Joint Protocol entered into force for Slovak Republic on 7 June 1995.

From the point of national lawmaking, the regulation of civil liability for nuclear damage is not extensive in Slovak law – it comprises the provisions of two sections of Nuclear Energy Act.[200] However, this condition is understandable and logically reasonable especially in relation to § 29 par. 1 of Nuclear Energy Act under which, within regulation of liability for nuclear damage, the international treaties bound for Slovakia are recognized as the source of law (these treaties including Vienna Convention on Civil Liability for Nuclear Damage and Joint Protocol to Application of Vienna Convention and Paris Convention[201]) and in relation to regulation of Vienna Convention and Nuclear Energy Act, unless otherwise stipulated therein, under Nuclear Energy Act subsidiary application of generally binding regulations on liability for damage is also recognized.[202]

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199 See the Explanatory Report to bill no. 541/2004 Coll. on Peaceful Use of Nuclear Energy (Nuclear Energy Act).

200 Section 29 and Section 30 of Act No. 541/2004 Coll. on Peaceful Use of Nuclear Energy (Nuclear Energy Act).

201 Notice of Ministry of Foreign Affairs of the Slovak Republic published under no. 70/1996 Coll. on accession of the Slovak Republic to Vienna Convention on Civil Liability for Nuclear Damage and Notice of Ministry of Foreign Affairs of the Slovak Republic published under no. 71/1996 Coll. on accession of the Slovak Republic to Joint Protocol to Application of Vienna Convention and Paris Convention.

202 Section 415 through 450 of Act No. 40/1964 Coll. Civil Code as amended and Act No. 513/1991 Coll. Commercial Code as amended.

Pursuant to Article 29 (2) of the Slovak Nuclear Energy Act, the subject liable for nuclear damage as laid down in the binding international conventions is "license holder for commissioning of a nuclear installation, license holder for operation of such installation, with the exception of storages, and the license holder for the discarding phase or license holder for transport of nuclear material."

If a license holder operates a number of installations located on the territory for which a common internal emergency plan has been approved, they will be taken as a single nuclear installation for the purposes of liability for nuclear damage. More than one nuclear installation on one site, where the operators are different holder of authorizations, may not be taken as a single installation, even if these installations are technically linked together.[203]

The operator's liability, which is strict, is limited to a sum equivalent to 75 million EUR for nuclear energetic installations and 50 million EUR for other nuclear installations and transport of nuclear waste materials. The lower financial security amount fixed by other nuclear installations and transport of nuclear materials was provided with regard to installations and activities which create a lower risk than nuclear power plants, following the statement "low-risk activities only create low damage".

An operator shall ensure that his liability for nuclear damage is covered by insurance or some other form of financial cover to the sum specified above. The cover for the liability of an operator for nuclear damage as mentioned above shall be in place for the duration of operation of the nuclear installation and at least twenty years after a nuclear incident. There is an exemption from nuclear damage liability cover for nuclear incidents caused by small amounts of nuclear materials and nuclear waste, which are assumed not to be capable of giving rise to nuclear damage.

Under Slovak law, the following shall be deemed as nuclear damage:

a) loss of life or bodily injury,

b) destruction and damage to property,

c) loss arisen as a result of incurring the costs for necessary measures for averting or mitigation of radiation taken upon occurrence of a nuclear incident for the purpose of elimination and/or minimization of the occurrence of nuclear damage (so-called preventive measure costs – e.g. costs of evacuation of public),

d) loss arisen as a result of incurring the costs for reinstatement of the previous or similar status of the environment (so-called environmental loss – e.g. costs of remedy of the consequences of contamination, costs of achievement of acceleration of natural regeneration process of the destroyed environmental elements), subject to a condition that the measures specified under c) and d) were triggered as a result of a nuclear incident and nature of matter allows it.

[203] Section 29 (3) Act No. 541/2004 Z.z. on the Peaceful Uses of Nuclear Energy (Atomic Act)

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