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*Conceptual Foundations of the Law of Delict
as Proposed by the Study Group on a European Civil
Code*

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1. Introduction

1.1. Personal standpoint

This paper attempts to outline the basic concepts and the fundamental approach which the Study Group on a European Civil Code has adopted or is developing (to date at least) in fashioning its European Principles of Tort Law. It should be emphasised that, while a part of the Study Group and contributing to its work, the following thoughts are offered not in the capacity of an ambassador for the current draft, but (with an acute sense of conflict of interest) as a critical insider. I confess that personally I am far from convinced that even in its basics the present approach is the best one that might be adopted. My hope, in so far as the following remarks make manifest a critical frame of mind, is that those more knowledgeable in tort law may be able to persuade me that my misgivings are ill-founded. If, on the other hand, I am merely articulating obvious concerns which others share, then I hope others will add their voice in constructing the case for revision and improvement.

On the positive side, which hopefully also emerges in what follows, it must be acknowledged at the outset that the notion that any one national approach to or structure for the rules of tort law could be adopted would involve a fantastical disregard of the different shortcomings which have been exposed in the various national legal systems. The first fundamental step is to develop a new assembly of legal tools and the draft rightly recognises that there must be fresh thinking in this field if a sustainable and less 'fictional' cabinet of instruments, fit for the job in hand, are to be applied on a pan-European basis.

1.2. Law of delict or law of tort?

As an incidental preliminary observation, I would point out that in our English language version of the articles, we have referred to the principles as forming "tort law" rather than the law of delict, but nothing turns on the fact that we have chosen to invoke the language of English law rather than that of Scottish law. In variable manner the nuance of legal words carries (or at least threatens to carry) over into the substance of the principles they formulate the particular

connotations those words signify. Language is sometimes such a dominant legal element that it strongly controls the direction of the law it expresses. This is hopefully not the case at the level of giving a label to the area of the law as a whole. None of the European legal systems really have an ideal term for what the rules embody, so that one is already alert to the problem that language should not be allowed to dictate the scope of application. Delict, with its emphasis on the notion of an offence, is appreciated to be an inapposite description for much of tort law which rests on liability without moral blame or at any rate accompanied by blame in a very reduced sense – in other words, the sense of blameworthiness arising merely from a failure to prevent a damage which the law charges an individual with preventing. The German notion of *unerlaubte Handlung* encapsulates what is in effect a conclusion rather than a starting point, for it is often the fact that a given conduct incurs the sanction of tortious liability that first enables us to say that this is conduct from which private law demands one should abstain. The Danish legal term *Erstatningsret* rather emphasises a remedy (reparation) which has a width well beyond the parameters of the law of tort. A similar point may be made about the Swedish label *Skadeståndsrätt* with its emphasis on damages. Focusing on damage and reparation certainly directs attention to core elements of the law of tort, but those elements are equally present in other areas of private law. Damage, for example, is relevant not merely in contract law; it is also – perhaps wrongly, as a mistaken notion of impoverishment or detriment – a feature of some European legal systems as an element of the law of unjustified enrichment.¹ Even the notion of “extra-contractual civil responsibility” invoked by Romance legal languages conveys no more than a sense of legal accountability (which is a feature of all areas of the law of obligations) in a ballpark defined only by an overly-wide negative (that which is not contractual). There is really no ideal short description that encapsulates the full remit of that area of non-contractual liability which focuses on the reparation of harm done. Perhaps, being accustomed to the obtuse and archaic notion of a tort, the English lawyer is fully conscious that one is grappling with a linguistically ill-defined field of law.

If there is any major point to be drawn out of this mismatch between linguistic label and legal remit, it must be that the development of the law of delict during the last century reflects a pronounced expansion of liability and (for example, in the growth of strict liability law) a partial shift of focus. It should not surprise us, therefore, if some of the conceptual instruments or structures in current use are not similarly outdated in relation to the functions they serve and in need of modification or replacement.

2. The scheme of the Study Group's draft in outline

2.1. Scope and relation to other areas of the law

It must be appreciated at the outset that the Study Group conceives its draft on tort law to be part of a whole. It is intended to form a substantial pillar within a body of principles (and potentially a codification) relating to what we broadly term patrimonial law, that is to say, those areas of private law most directly connected to commercial or economic activity. Paradoxically, it is the limiting boundary of that vision which is clearly pointed to in the text of the draft at a number of

¹ Cf. Art. 6:212(1) BW.

points. In the first place, the draft relates only to what may be termed private tort law. Administrative or public tort law – i.e. liability for misfeasance or non-feasance in the discharge of duties governed by public law and the exercise of authority granted by public law – falls outside the scope of the draft: see Art. 8:203.² That is, of course, a major restriction, but it is also one which is logically implied by a focus on private law and the desire to build up a minimum of rules regulating the patrimonial rights between citizens and businesses as the basis for a completion of the internal market and as a juridical complement to the integrative effect of the common currency.

Secondly, it is envisaged, for the purposes of our exercise, that areas of the law, such as family law and the law of succession, would likewise continue to be based on diverse national regimes. Account needs to be taken of the fact that a harmonised tort law will be buttressed by national rules outside the contractual and extra-contractual law of obligations which may attempt in their own way to deal with problems of tort law addressed by the common principles. Provision is made in the draft for both a general concurrency of actions (Art. 1:102(2)) and also the potential for more specialised national rules to take priority (Art. 1:102(1)). Only a very detailed analysis of possible points of conflict between non-harmonised private law rules and the tort law principles would make manifest whether the latter concession would threaten in practice to render the tort law rules of marginal and merely subsidiary significance in important cases. As a matter of principle, it is certainly unusual (and generally out of keeping with European policy) that national law should be able to drive out harmonised law. Theoretically it would enable national law to undermine the harmonised tort law (and reinstate, by the back door, the former national tort law) by the simple mechanism of re-dressing rules in the garb of other areas of private law and re-locating them outside tort law as, for example, extensions to family law. Given that contract law and extra-contractual obligations generally are also the subject matter of common principles within the scheme of the Study Group, however, the potential for this covert challenge to the tort law draft may not be especially great. There is only so much tort law which lends itself to re-packaging as family law or the law of succession, for example.

A third point is that there can be no assumption of a shared criminal law. This emerged most clearly when the Study Group turned to the provisions in the draft relating to defamation. The attempt to found tortious liability parasitically on a criminal offence, which an earlier draft of Art. 2:204 envisaged, with the German law of § 823 II as a role model, foundered. That was so not because it would never be possible to identify in which circumstances or to what extent rules of criminal law would serve the purpose of protecting individuals (rather than, for example, the function of preventing public disorder). The problem was rather that in some systems (in this case Scottish law) the criminal law has no role to play at all and the German model would have achieved no protection of the individual. That kind of derivative tort law based on non-harmonised rules outside private law is necessarily a venture which is saddled with insurmountable difficulty. In the end the draft has opted for a mixture: there is an 'intrinsic' tort

² The numbering system adopted for the articles being drafted by the Study Group follows that used by the Commission on European Contract Law in drafting its Principles of European Contract Law. In Art. *c: saa* the digit *c* before the colon refers to the chapter number, the first digit following the colon (*s*) refers to the *sth* section within that chapter, and the last two digits (*aa*) refer – in chronological order starting at 01 and ending, theoretically, at 99 – to the articles within that section.

law rule contained in Art. 2:204 confirming liability for incorrect information and a supplementary rule in Art. 2:203 further recognising tortious liability for defamation in so far as national law does so. It will then be up to national laws to determine how this additional 'extrinsic' tort liability for defamation is established. In some systems tort liability will continue to be carried into the arena on the camel's back of criminal law; in others, it will depend on a discrete tort.

2.2. A unitary scheme

A central problem in establishing common European principles in tort law is clearly that of constructing a workable structure within which those principles may unfold. This is of course not a problem which is unique to tort law, but, given that in contract law there are at least some widely shared common concepts (such as offer and acceptance), even if others enjoy more chequered use across the EU, the problem seems more acute in relation to extra-contractual obligations. (The problem is equally difficult within the law of unjustified enrichment, where not all systems have a separate regime for *condictio indebiti*, for example.) The first task is to build a framework around which the diverse national approaches can come together. The task is a demanding one, not least because the different systems are not instantly reconcilable and attachments to old ways of thinking must necessarily be superseded to some extent. The familiar must be re-presented in new packaging which does not alienate and the unfamiliar is to be both easily comprehensible (without straining the mind of the non-specialist) and convincing as a comparably strong apparatus for the solution of problems. The challenge of that task is easily underestimated. Criticism of the current draft of the Study Group which a fine analysis may prompt must be set against that background of achievement.

As an English lawyer, seeking to identify the strengths of the Study Group's draft, I would start with the most fundamental decision which has been made – namely, the attempt to construct a unitary scheme of liability. There can be little doubt, I think, that if one were to re-design a law of tort from scratch, one would not follow the English (and Irish) model – a multitude of heads of liability, some narrow in scope and focused on particular interests (such as nuisance and the developing tort of interference with another's privacy), others (like negligence) all-embracing in nature and defined only by the element of accountability for the damage or injury inflicted. Whatever the practical merits of the substantive rules, as an overall scheme this barely qualifies as coherent, being neither consistently orientated towards protection of identifiable interests, nor ensuring comprehensive legal protection (as the relatively contemporary development of rights in respect of privacy and confidence outside the pre-existing common law heads of liability demonstrates). English law seems as times to be underpinned by an almost implacable resistance to systematisation of heads of liability once old categories have become entrenched. For example, the Law Reform Committee's hardly revolutionary proposal of a (single) tort of wrongful interference to chattels³ never found its way into the Torts (Interference with Goods) Act 1977, though we should at least be grateful that detinue fell by the wayside so that there was some measure of simplification and assimilation. Irish law has not even advanced to that position. It is precisely this array of often overlapping torts whose peculiar scope is frequently explicable only

³ See *Conversion and Detinue*, Law Reform Committee, 18th Report (London: HMSO, 1971) Cmnd. 4774.

in terms of its historical origin that has prompted attempts in the literature to draw together common themes – most notably in recent years in Peter Cane’s *Anatomy of Tort Law*⁴ with its focus on sanctioned conduct, protected interests and sanctions.

A less extreme position is, of course, adopted in other legal systems, but (to a not so dramatic extent) these too often revolve around several distinct heads of liability within the law of delict – sometimes in contrast to other areas of the law of extra-contractual liability.⁵ This division of tort law liability is unhelpful because there are often common elements at work (most noticeably in the notion of what constitutes damage giving rise to liability to the claimant); indeed it may simply be a different element of accountability for the damage which gives rise to separate provision for the tortious liability. A more honest scheme – that is to say, one in which there is no illusory representation of complete independence as regards the various grounds of liability – would bring all those heads of liability under one umbrella. The draft of the Study Group makes precisely this attempt to integrate what is traditionally conceived as ‘fault’-based liability with strict liability regimes within a shared platform to be found in the opening article of the draft (Art. 1:101).

2.3. *The elements of the claim*

Art. 1:101 attempts to subsume all cases of tortious liability within a framework revolving around the elements of (i) a loss or injury constituting legally relevant damage, (ii) a ground of accountability for that damage, and (iii) causation. The presence of all those elements together gives rise to a right to reparation. Each of these elements is elaborated in turn, as paragraph (3) of Art. 1:101 (no doubt somewhat superfluously) indicates. Chapter II sets out the circumstances in which the existence of legally relevant damage is to be affirmed. Chapter III addresses the grounds of accountability; in addition to particularising what is meant by intention and negligence, it sets out instances in which the defendant is strictly liable for a damage suffered. As a structure this has a number of merits. In the first place, at least in principle, it makes it possible to articulate more precise rules and to address very specific situations and questions within the coherence of one overall scheme. (I will comment later on some of the specific failings, as I see them, in that concretisation of the general elements which the subsequent chapters entail.) A second virtue is that it is equally possible to provide for an undefined and residual sphere, beyond the area particularly addressed, in which the ambit and content of tort law remains open for judicial development – but, again, anchored within one overall framework. This, too, is perhaps sometimes more a strength in theory than in practice, given the actual way in which those residual open-ended provisions have been drafted and integrated within the system.

⁴ (Oxford: Hart, 1997).

⁵ E.g. compare the unitary scheme for unjustified enrichment within the BGB (§ 812 I) with among others § 823 I, § 823 II, § 826 and the various provisions governing such matters as occupiers’ liability and damage caused by animals. More unified, for example, are the provisions of the Italian civil code (cf. Art. 2043), but here too one has a number of provisions addressing discrete situations of strict liability.

2.4. Legally relevant damage

The notion of legally relevant damage is addressed in two sections in Chapter II of the draft. Taking them in reverse order (which was in fact their original order), Section 2 sets out specific instances in which legally relevant damage is identifiable, while Section 1 provides for general rules which are intended in other all cases to determine whether or not there is legally relevant damage. The rules of Art. 2:101 thus provides an open-ended regime catering for the residual cases not covered in the particular instances listed in the following articles of the chapter. All of these rules clearly proceed from the standpoint that not every form of loss or injury can amount to an actionable damage. Hence the notion of damage must be qualified as “legally relevant”. It is the purpose of Chapter II to set out the circumstances or conditions which render a loss or injury a detriment which, given the elements of accountability and causation, may form the basis of a claim in tort. At the same time the division of the Chapter into general and specific parts promotes this blend of the concrete and the relatively more abstract within the one combined framework.

A criticism which has been made of this chapter – perhaps more strongly in relation to its earlier draft and most distinctly from French jurists – is that it really sets out a list of torts. If that were so, it would indeed mean that the scheme of the draft, whereby all forms of liability are referable to the basic rule as fleshed out by the subsequent chapters, would be a complete misrepresentation. On detailed examination, however, I think that criticism falls away. Certainly many of the provisions stipulate for a number of circumstances which must coincide in order that loss may constitute legally relevant damage, but those circumstances are never in themselves sufficient. They must always be buttressed (even when causation is implicit in those circumstances) by an element of accountability. Admittedly the distinctions may be subtle, but they are present none the less. An illustrative case is provided by Art. 2:207, a provision unashamedly based on *Hedley Byrne*.⁶ In paragraph (b) the condition is stipulated in order that loss suffered as a result of reasonable reliance on incorrect information or advice may constitute legally relevant damage that the provider of that information or advice knew or ought to have known that the recipient would rely on it to make a decision of the kind made. To some this may look like an element of accountability. The element of constructive knowledge in describing something which the information provider ought to have taken into account smacks of a standard of care. The function of this condition of liability, however, is merely to demarcate the set of possible claimants and to narrow the field of potential liability to which any person providing incorrect information through want of care will be exposed. It is a restriction imposed *in addition to* the element of accountability. If the requirements of Art. 2:207 are satisfied, one will still have to consider the question whether the loss has been caused negligently, for example, which in turn (Art. 3:102) will involve a consideration of whether there has been a failure to take reasonable care in passing on information or advice which is incorrect. This leads in turn to the question of whether the provider of that information or advice ought to have known it was incorrect – a point not addressed in the description of legally relevant damage in Art. 2:207. An English lawyer perhaps has less difficulty than some with this conceptual demarcation precisely because he would recognise that the reasonable foreseeability - from the tortfeasor’s standpoint -

⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

of the claimant's interests being affected by his conduct may go to establish the existence of a duty to take care, a matter which leaves open the issue of breach of that duty.

2.5. Accountability (including breach of statutory duty)

The Study Group's draft envisages three grounds of accountability: intention; negligence; and other accountability. The latter embraces a non-exhaustive range of specific cases of strict liability set out in the second section of Chapter III and culminates in an open-ended clause intended to facilitate judicial development of the law (Art. 3:210). In this way - very much in contrast to the scheme of the contemporary European codifications - strict liability is brought within a systematic whole as merely one basis on which a person may be held liable for a damage which they have caused or has been caused by some element potentially under their control. Also of note on this point is that vicarious liability is subsumed within accountability without intention or negligence as being in effect merely one form of strict liability (a strict liability, in other words, for an indirectly caused damage).

Less transparent within the scheme of Chapter III is the predicament of breach of statutory duty. Here a small diversion is necessary to explain something of the history of the drafting. An earlier approach to the grounds of accountability was to identify three bases for liability: intention; breach of duty; and other accountability. Under that approach breach of statutory duty fell to be treated alongside negligence (breach of duty *of care*) as merely an alternative mode of breach of duty. During the process of translation of the articles into other European languages it emerged that this approach to the notion of breach of duty was unworkable and it was abandoned in favour of the current approach. It has to be said that some had articulated misgivings about the breach of duty concept beforehand and were not convinced that there was a specific need for it to be invoked in this way in place of a negligence standard. The breach of duty concept involved an inapt formula in this context because it presupposed the existence of a duty to take the required degree of care referred to in Art. 3:102. The system of the Study Group's draft did not directly operate with any notion of a duty not to cause harm 'at the top level', so to speak, from which legal consequences are derived. To put it another way, the existence of such a duty is not a formal requirement of the basic rule and it can only be affirmed once one can determine that a person would be liable for a given damage if they cause it negligently, because they would then be accountable for a legally relevant damage. Such a scheme differs from that adopted in the English law of negligence, where the existence of a duty to take reasonable care not to cause the harm in question (based at least nominally on a threefold test of proximity of the parties, foreseeability of harm and considerations of reasonableness, fairness and justice) must be affirmed. Under the Study Group's scheme the starting point is the *legal relevance* of the damage. In functional terms this may involve much the same mental processes; in technical terms, however, it is not the establishment of a duty not to cause harm. Most critically, the basic rule is not formulated in terms of a duty along those lines. I leave open here, for the moment, the question whether that approach would have been preferable in order to return to the question of breach of statutory duty.

In the earlier conception of Chapter III, as I have already outlined, breach of statutory duty was subsumed within a general category of breach of duty which embraced both careless conduct and conduct reprehensible in legal terms simply because it failed to achieve a stipulated result or outcome. In the current version of Chapter III, these two forms of behaviour are divorced. Negligence, within the meaning of Art. 3:102, embraces both want of care in the general sense of failure to achieve the standards expected of the man on the Clapham omnibus and want of care in those specific instances where there has been non-compliance with a statutory provision which stipulates some particular standard of care (which may be more, less or equally as exacting as the standard of care expected of the reasonable man). Some instances of breach of statutory duty – especially those where statute merely provides a particularised standard of the general requirement of care – thus fall under the heading of negligence within this scheme. Other statutory provisions insist on the achievement of an environment with given safety and a breach of the duty imposed may occur irrespective of a failure to take reasonable or indeed all care to prevent a deviation from the required safety. Those cases where statute imposes a strict standard now fall to be regarded as coming within “accountability without intention or negligence” and are embraced by the general clause on strict liability contained in Art. 3:210.

The terms of Chapter II defining legally relevant damage are drafted primarily against the assumption that the ground of accountability (if any) will be (at the very least) negligence. In principle, where such damage is caused intentionally or negligently, there will be liability because all the elements of the basic rule are satisfied. The situation differs only in relation to the various grounds of strict liability envisaged by Section 2 of Chapter III. In providing for special cases in which strict liability suffices a balance must be struck between the competing interests of potential claimant and potential defendant. The liability of the latter may require some clear limits. This has been proposed in relation to those supervising persons under supervision who are likely to cause personal injury or property damage. In that case liability of the supervisory institution is limited to the realisation of that risk in the event of defective supervision; they will not be liable for other forms of legally relevant damage caused by those under their supervision. See Art. 3:202(2). In passing, however, one might make at least one criticism of this provision, namely that in placing it within the provisions on strict and vicarious liability its location, on a proper analysis, seems misplaced. Liability is apparently vicarious because the supervisor is ultimately rendered liable for a damage caused by someone under his supervision, but, as the article stipulates, it is a liability founded on a defective supervision – a want of the reasonable care to be expected of a competent supervisor. Indeed, under English this would be regarded not as a case of strict liability, but one of negligence (as *Dorset Yacht* demonstrates). It is certainly a case of *indirect* responsibility for a damage – and to this extent shares something of the quality of (strict) vicarious liability – but it is a liability based on the ingredient of intentional or negligent failure to prevent damage. It is in fact an illustration of a wider point, treated further below, that the draft deals very uncomfortably with what English lawyers would regard as the fundamental question of the existence of a duty whose breach gives rise to liability (in negligence).

3. Critique

There is of course an almost endless number of controversial questions regarding the substance of the rules which any system of tort law must confront. Some of those questions – such as the issues of wrongful life and wrongful birth – have been deliberately left unregulated. This is not an admission of cowardice or intellectual laziness. The refusal to take a stand on such matters of legal policy is more a reflection of the enduringly unsettled nature of the law in many European legal systems. It makes little sense to attempt to codify an area of tort law which remains in a state of flux.⁷ These areas are left by the draft (most notably in the context of the general rule on the meaning of legally relevant damage, set out in Art. 2:101) to be developed by the courts.

Where, by contrast, it seems appropriate to express a clear position of legal policy, the draft of the Study Group does not shy away from doing so. An instance which one could point to here is the question of vicarious liability of employers. That is extended in Art. 3:203 beyond the bounds of what is strictly a master-servant relationship - even to the extent of imposing vicarious liability for damage caused by independent contractors. A similar (and politically more contestable) strict liability is envisaged for parents in relation to 'fault'-based damage caused by their children (Art. 3:202(1)). Another (even more controversial case) is proposed in Art. 4:102(2), whereby members of a group may be liable for damage caused intentionally by one of their number to a third party, the intentional causation of such damage being foreseeable. Whether and in what form those provisions survive further deliberation within our tort law advisory council and the Study Group's plenary coordinating group remains at present unpredictable. These are clearly issues on which a spectrum of viewpoints from a legal policy perspective may be entertained. The debate as regards such issues of substance is an open one and arises regardless of the structure and technical composition of the rules. I will leave such issues to one side in the following critique of the Study Group's draft.

3.1. Scope and relation to other areas of the law

It is when one turns to the fine details that the difficulties with the scheme adopted by the Study Group come to light. It must be stressed that these weaknesses are, I think, largely features of the particular manner in which the scheme has been packaged together; they are not in the main inherent in the underlying concept based on the elements of legally relevant damage, ground of accountability and causation. (A fundamental exception, to which I have already alluded, is constituted by the set of difficulties arising from the absence of a 'top level' concept of a duty not to cause harm.) A central criticism might be that the purity of what is apparently a coherent and self-standing system is diluted at a number of points which lets in a certain amount of unnecessary confusion.

A first point of concern is in the scope of the draft itself. Paragraph (1) of the basic rule (Art. 1:101) grants a right to reparation for those suffering damage involving tortious liability. Paragraph

⁷ For details of the judicial change of stance in the 1990s in English law (and the outstanding uncertainties) see Andrew S. Burrows in *Clerk & Lindsell on Torts*, 18th edn by Anthony M. Dugdale and others (London: Sweet & Maxwell, 2000), paras. 29-51 – 29-53.

(2) confers a right to prevent such damage. However, paragraph (2) also goes beyond this in conferring a right to protection from an infringement of a right even where that infringement does not in itself amount to legally relevant damage. Certainly there will be cases where prevention of damage would be justifiable, though reparation if damage occurs might be inappropriate, but paragraph (2) goes beyond such cases in protecting all rights, irrespective of legally relevant damage. Thus while legally relevant damage is placed at the core of the scheme as being the central element around which the rights under the law of tort cluster, a fundamental departure is made from that in bringing the protection of rights generally within the scope of tort law. This is very much a loose thread in the draft because, for example, the defences are focused either on the denial of a legally relevant damage or the denial of a liability to make reparation – neither of which has any relevance when the existence of a damage ceases to be material.

Certainly the protection of rights from infringement even though no loss may result is an essential part of private law. This is so not least for the purposes of the law of unjustified enrichment. It is the right to exclude another's enjoyment of a right which is our own which enables the right-holder to determine its enjoyment, helps confer on the right a negotiable value and results in a patrimonial enrichment of one who usurps the use of that right without the right-holder's consent, for which restitution ought to be given, even though the right-holder had no plans for its commercial exploitation and has suffered no loss in consequence. Protection of such a general nature, however, might be thought to belong to general provisions on private law, given that the protection is not confined to what are conceived to be tort law cases. That this general protection is to be found here is no doubt a reflection of the fact the "slimmed down" set of private law principles which the Study Group envisages does not (yet) contemplate an extensive general part (along German lines) which could embrace a general right to prohibition of interference with legal rights, irrespective of damage in the technical sense provided for in the tort law rules.

This problem that the tort law draft is to some extent being drafted in substantial ignorance of the likely shape and form of European legal principles for other areas of private law (beyond the general part of contract law contained in Parts I to III of the Commission on European Contract Law's Principles of European Contract Law and areas of law already addressed by the Study Group) is apparent also in relation to "loss upon infringement of property" (Art. 2:206). This provision starts from the standpoint that an infringement of a property right is not as such legally relevant damage. The rigours of the English law of trespass to chattels are not an example to follow here, for example, for the simple reason that the function of that tort is in large part to serve as a forum for settling disputes as to title. Such disputes (the tort law draft envisages) could be settled either within the framework of rules on vindication (and conceivably the law of unjustified enrichment, if that grants a concurrent personal claim to restitution) or, under Art. 1:101(2) of these rules, on the simple basis there is an infringement of a right, irrespective of damage. This has the virtue that it is unnecessary to give the concept of legally relevant damage an artificial meaning. Another merit of the article is that it particularises in an open-ended way ("loss includes ..."; "infringement includes ...") two of the essential elements defining legally relevant damage in relation to property rights. However, as regards the very element of 'property right' itself, the draft is forced to make certain choices which, if unchallenged, might well cement

in historical (and not necessarily desirable) moulds the established and perhaps outdated notions of what should constitute a property right. The term is substantially left undefined – unavoidably so, as no European principles have yet been drafted within the Study Group in that sphere of private law. Implicitly, however, the notion of property right excludes a right to lawful possession which is given separate mention alongside, although a right to possession, protected against third party interference, might well be regarded as amounting to a property right. In this way the very success of the tort law draft of the Study Group, based on an unobvious structural schemata, might threaten to instil an unhelpfully conservative attitude in those other areas of private law whose existence the draft presupposes. There is a danger that the innovative format of the tort law provisions is being built up on a regrettably conservative view of other fields of private law.

3.2. Legally relevant damage

Chapter II is clearly a major plank in the construction of the Study Group's draft and some may regard it as carrying too much weight. A first criticism I would make is that its structure stands partially in contradiction of the approach adopted in the overall structure, as made clear in the basic rule. The fundamental approach of the draft is that all forms of tortious liability are subsumed within a single overarching rule (Art. 1:101). One might well have hoped for a similar approach to the definition of legally relevant damage. It would have been possible to have constructed a general and open-ended definition along the lines of Art. 2:101 and to have subsumed the special instances listed in the following section, which recognise particular types of legally relevant damage by reference to specified circumstances, under the umbrella of the general definition on the basis that the special provisions merely illustrate the application of the general definition in particular concrete situations. The merit of that approach, which was put forward by French colleagues within the Study Group, would be that the specific provisions would easily lend themselves in appropriate cases to reasoning by analogy (whether positive or negative) in order to flesh out the meaning of the general definition in instances not specifically provided for. As the draft currently stands, such reasoning by analogy would be logically unwarranted. The specific provisions have no systematic connection with the general definition; the latter applies only when the former do not. The only constraining principle in determining the application of the general provision is that it should not contradict the thrust of the specific provisions in allowing or disallowing liability. In practice the outcome may be no different because the specific recognition of legally relevant damage in the cases referred to in Section 2 necessarily implies that a loss or injury is worthy of legal protection and that it is fair, just and reasonable that the claimant have a remedy: if it were not, it would not be legally relevant damage. That will allow the specific provisions to be used as a judicial tool for comparison and analogy in providing the residual field of Chapter 2 with particular content. It would have been a more coherent starting point, however, if that reasoning process had been more openly acknowledged by the draft in a formal declaration of the relationship between the two sections of Chapter II.

The function of Chapter II is of course to qualify the set of harms which may generate liability on the basis that not every injury negligently caused should give rise to a right to compensation. It is

of course a matter of taste as to how detailed a draft ought to be, but some might take the view that Chapter II might have provided more detailed guidance in its general provisions of section 1 in order to map out the basic criteria to be applied. When all is said, to be told (as Art. 2:101(3) tells us) that notions of fairness, justice and reasonableness are to be infected by considering, among other things, the ground of accountability for the damage does not help us apply a self-standing component of the scheme because it threatens to define the content of one component by dependence on another. No doubt the same underlying factor may be invoked in determining the existence of one or another element, but where the content of one element plays a role in determining the content of another the coherence of the system based around nominally discrete elements of legally relevant damage, accountability and causation threatens to disappear. As both 'pure economic loss' cable cases and nervous shock cases show, legal systems often find it necessary to ring-fence the outer limits of potential liability by reference to factors such as directness or proximity (or remoteness) of damage. Questions of foreseeability may be relevant not just in ascertaining whether there has been negligence, but also in determining whether a given damage should give rise to a right to reparation, at any rate negatively, not least because the unreasonableness of foreseeing a harm makes it hard to expect an actor to guard or insure against it. One might therefore have hoped for clearer guidance in Art. 2:101 on the relevance of such considerations beyond the mere allusion to proximity of damage as something to be taken into account. Giving the judiciary a wide discretion to develop the law is one thing, but handing out balls to juggle and offering them little substantial guidance as to the rules of the sport might for some amount to an invitation to too much uncertainty. The position as regards foreseeability is doubly complicated because it is expressly made relevant to the question of causation, which I will deal with shortly.

3.3. *Accountability*

One of the fundamental problems with the concept of accountability in the Study Group's draft is that it is invoked with a shifting sense of meaning within the text. From Art. 1:101(1) and (3)(b) it emerges that accountability means a combination of two things. On the one hand, there must be a ground of accountability, be it intention or negligence or something else (the something else being the connections to the damage causing agent provided for in strict liability cases). On the other hand, there must be a causation of damage. When we turn to Chapter III, however, we are again confronted with the concept of accountability *in toto*, although in Section 1 what is under consideration in those provisions is merely the *ground of* accountability (intention; negligence) and the causation element of accountability is addressed separately in Chapter 4. The unnamed additional ground of accountability, besides intention and negligence, detailed in Section 2 of Chapter 3, turns out to be 'responsibility in law' (Art. 3:201). The provisions of that section, however, focus on stipulating an accountability in the broad sense of a ground of accountability (parental or employment relationship, custody of the dangerous item, or other 'responsibility' for the damage causing agent) coupled with causation. It would not be hard to achieve clarity here, but one would first have to decide which of the two possible meanings accountability is to carry – whether, in other words, it subsumes (for integral treatment) or excludes (for separate consideration) the element of causation.

3.4. Causation

Perhaps the rules on causation may be singled out for particular criticism. There can be no doubt that causation in tort law cannot be reduced to a mere question of natural science. There are clearly questions of judgment at stake involving subtle issues of legal policy. At the other extreme the resolution of disputes and the assignment of rights and liabilities requires something more than a counsel of despair. The philosophical judgment that every event is bonded to another in some chain of causation is best left alone as a philosophers' football; it does not provide legal advisers and judges with a framework serving the needs of the legal community. What is called for is some concrete guidance or points of anchorage.

The general rule on causation in Art. 4:101 certainly lists factors which, from a policy point of view, are relevant in determining whether a given defendant should ultimately be regarded as responsible for a damage which has been sustained. However, it does no more than this. In the first place, from a stylistic point of view, it might be argued that it would be more honest to admit that this is no definition of causation at all (as the article purports to provide for), but rather a mere direction to the court to have regard to certain factors when deciding whether there is causation. In the second place, it may be doubted whether an instruction to have regard to all the circumstances of the case achieves anything more than simply reminding the judge that the attribution of causation is not a mechanistic exercise. It is only when one turns to the specific cases addressed in the other articles of the chapter that one can identify substantive rules of law which enjoy perceptible contours.

As indicated earlier, one of the factors given mention in Art. 4:101 is foreseeability of the damage, and in paragraph (2) we are provided with a relatively concrete rule (albeit of a negative nature) along the lines of what English lawyers recognise as the egg-shell skull principle. While it is no doubt right that causation be treated as more than a mere matter of natural cause and effect and that policy considerations should be entertained in determining whether a given damage is to be regarded as caused by the defendant, one would at first glance expect matters such as the directness of the damage – the role of third parties and the claimant himself in bringing about the loss or injury – to lie at the heart of the rules here. Equally pertinent is liability for omissions. Whether, however, one would wish to regard a remote damage as not 'caused' by the defendant, as opposed to being a damage for which he is not to be held responsible in law might well be more than a mere matter of taste. There is something of an air of legal fiction in asserting, for example, that a person is to be regarded as "causing" damage which he intended to cause it, no matter how indirect and remote, but not necessarily "causing" the same damage (in fact caused in the same way) if he caused it negligently. If the chain of causation is the same, it is difficult to see why the chain should assume a different length from a legal point of view merely because the defendant acted with a different state of mind. The notion that a state of mind alone determines causation sounds frankly absurd. A more honest approach, I think, is to recognise that one is concerned with adjusting the legal responsibility for damage to accord with the ground of accountability and to address this question of remoteness of damage specifically. Within the scheme of the current draft the more natural home, perhaps, would be in determining the legal relevance of a damage.

A final difficulty is posed by those more exceptional cases in which tortious liability arises out of an omission. Not every omission to prevent harm to another, where the defendant who failed to act has not created the danger, can attract liability. A fundamental task of tort law is to sort out the cases of culpable omission. The draft of the Study Group does not deal explicitly with this point and it may be regarded as a weakness of the draft that the matter is relegated to the sub-text of the general rule on causation. A recent case⁸ from the Court of Appeal in England, decided at the end of last month, may help to illustrate the weakness inherent in the draft. The case concerned a Kenyan resident in Britain who was convicted for a sexual offence and served an 18 month term of imprisonment. Following a subsequent offence of burglary, he was again sentenced to 18 months imprisonment and the court recommended his deportation. A deportation order was made, but not carried out. After his release from prison the Kenyan raped the claimant. Her action against the Secretary of State for damages was based on the fact that he ought to have known of the danger the criminal posed and had omitted to deport him once he had served his prison term. The Court of Appeal held that there was no liability for the omission to safeguard the claimant from her assailant. The merits of that decision as a matter of principle may be left to one side. Equally it is irrelevant for present purposes that this type of case – involving questions of liability arising out of the exercise of public law powers (i.e. the power to deport or to detain pending deportation) is outside the scope of the Study Group’s draft, as already explained. The aspect under consideration is simply how the absence of liability (if such is to be the outcome) is to be established. English law addresses this problem by means of an absence of a duty of care. The defendant was not to be placed in the position of the world’s insurer; there was insufficient nexus or proximity between the parties where the danger posed by the third party was general in nature. This is a fairly direct instrument at getting at the problem because the underlying concern (exposure to a wide and barely foreseeable array of claimants) is the very reason for denying a legal obligation to prevent members of this wide and indeterminate class from suffering harm. By contrast, denial of liability in a case like this, where the victim suffers personal injury or interference with bodily integrity or any other form of damage recognised by the specific provisions in Chapter II, is not achieved very systematically by the Study Group’s draft. Where the damage suffered is not of a specified type and is covered by the general provision on legally relevant damage in Art. 2:101, it is always possible to say that it would not be fair, just and reasonable for a right to reparation to subsist. The difficulty comes when the damage suffered is, for example, personal injury. That is, for all cases, a legally relevant damage: Art. 2:201. In this case, therefore, the denial of liability must be based in some other element; one cannot resort to the criteria in the general definition of legally relevant damage in modification of the rigour of the explicit and unambiguous special rules of section 2 of Chapter II. Since accountability in this case is negligence and this is also apparent, the only remaining element left whose denial saves the defendant is that of causation. We are reduced to saying that the failure to deport the third party did not cause the claimant’s injury. This strikes me as a very indirect way of resolving the problem. The real underlying concern hardly expresses itself at the surface. It is also disingenuous because in cases where an omission to act will lead to liability we are forced to accept the existence of causation, though the difference between the two may have nothing to do with the directness or remoteness of the damage and more to do with a stronger

⁸ *K v Secretary of State for the Home Department* [2002] EWCA Civ 775 (31st May 2002).

policy case for intervention by the defendant (i.e. a clearer and more tightly defined class of possible victims, perhaps connected to the defendant by a relationship independent of the tort).

4. Conclusion

A necessary (but not a sufficient) test of whether principles of tort law are ripe for application across the European Union must be whether they are capable of application by jurists from across the continent to achieve broadly similar outcomes, at any rate in those areas which, having regard to the difficult and inextricable issues of policy, have not been deliberately left open-ended and uncertain. It may well be doubted whether the current draft of the Study Group satisfies that test. It is certainly true that many disputes relevant to tort law can be resolved using different elements to achieve the same outcome. In any given case it may be possible to say that there is no liability because there is no relevant damage, or damage but no accountability for the damage, or no causation of the damage. If a person is jostled in a crowd so as to bump into another, we might say this kind of physical contact is a trivial interference with bodily well-being (no damage), an involuntary act (no accountability) or caused by another (no causation). It would be unrealistic (and perhaps undesirable) to expect a scheme which dictates that given considerations always be forced into the straightjacket of one element and be denied relevance to another. Equally, there must be scope for legal development. The use of open-ended rules in any codification is essential. Each element of the claim, however, must be sufficiently self-standing as a concept and sufficiently well-drawn that it can be fleshed out with substantive meaning when one turns to apply the principles to typical and problematic scenarios alike. My impression at least is that the current draft at many points (most notably in relation to causation and the unspecified part of legally relevant damage) is too indeterminate. One has to remember that any modern codification on a European scale is able to build on the detailed exploration of policy and principle which has unfolded in the wake of the current codes and case law. To opt for provisions so essentially question-begging as to re-open matters the various national legal systems have already answered for themselves might be thought to be a step backwards. The continually interlocking nature of the concepts invoked by the draft – the relevance of accountability in determining whether legally relevant damage is present or whether there is causation of the damage – does not help to make the application of the provisions especially transparent. For all that, when one appreciates the mammoth scale of the task in distilling over a dozen different systems of tort law into a consensual and intellectually defensible synthesis, the draft is an ambitious step forward and future revision may iron out many of the present difficulties.

Study Group on a European Civil Code**[Book ?]****Principles of European Tort Law****[European Principles of Non-Contractual Obligations Arising out of Damage Caused to Another]****Text of Articles (in English) (as at 22nd May 2002)****Chapter I: Fundamental Provisions****Art. 1: 101: Basic Rule**

- (1) *A person who suffers legally relevant damage has a right to reparation under this Book against someone who caused the damage intentionally or negligently, or who is otherwise accountable for the damage.*
- (2) *Where such or such further damage or the infringement of a right is impending, this Book also confers on a person who would suffer the damage or the infringement rights to prevent it. These are rights against someone who would be accountable for the damage or infringement if it occurred.*
- (3) *In this Book:*
 - (a) *Chapter II determines whether there is legally relevant damage;*
 - (b) *Chapter III determines whether there is intention, negligence or other ground of accountability for damage; and*
 - (c) *Chapter IV determines whether there is causation of the legally relevant damage.*
- (4) *Rights under this article are conferred as provided for by the following provisions of this Book.*

Art. 1: 102: Relation to Other Private Law Rules

- (1) *The provisions of this Book are not applicable in so far as their application would contradict the purpose of other private law rules.*
- (2) *The provisions of this Book do not affect remedies available on other legal grounds.*

Chapter II: Legally Relevant Damage

Section 1: General

Art. 2: 101: Meaning of Legally Relevant Damage

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

Section 2: Particular Types of Legally Relevant Damage

Art. 2: 201: Personal Injury

- (1) *Loss caused to a natural person as a result of injury to his or her body or health and the injury as such constitute legally relevant damage.*
- (2) *In this article:*
- (a) *non-economic loss includes the pain suffered and the impairment of the injured party's amenity of life;*
 - (b) *economic loss includes loss of income and the costs of health care including the expenses of close relations for the care of the injured party; and*
 - (c) *personal injury includes injury to mental health only if it amounts to a medical condition.*

**Art. 2: 202: Loss Suffered by Third Parties
as a Result of Another's Personal Injury or Death**

- (1) *Persons who at the time of personal injury to another are in a particularly close personal relationship to the injured party have a claim for appropriate compensation for non-economic loss suffered as a consequence of that party's injury or death.*
- (2) *Where a person has been fatally injured:*
 - (a) *the deceased's successors have a claim for all legally relevant damage which the deceased suffered on account of the injury to the time of death;*
 - (b) *a person who has incurred reasonable funeral expenses has a claim to reimbursement; and*
 - (c) *persons 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 have a claim for their loss of maintenance.*

Art. 2: 203: Infringement of Personal Dignity, Liberty and Privacy

- (1) *Loss caused to a natural person as a result of infringement of his or her right to respect for his or her personal dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant damage.*
- (2) *Loss caused to a person as a result of injury to that person's reputation and the injury as such are also legally relevant damage if national law so provides.*

Art. 2: 204: Loss upon Communication of Incorrect Information

Loss caused to another where a person communicates information about that other which the person communicating the information knows or ought to know is incorrect constitutes legally relevant damage.

Art. 2: 205: Loss upon Breach of Confidence

Loss caused to another where a person communicates information which, either from its nature or the circumstances in which it was obtained, that person knows or ought to know is confidential to that other, constitutes legally relevant damage.

Art. 2: 206: Loss upon Infringement of Property

- (1) *Loss caused to another where a person infringes that other's property right or right to lawful possession of a movable or immovable thing is legally relevant damage*

- (2) *In this article:*
- (a) *loss includes a reduction in value and deprivation of use;*
 - (b) *infringement includes destruction of or physical damage to the subject-matter of the property right, disposition of the right, deprivation of its use or other interference with the exercise of the right.*

Art. 2: 207: Loss upon Detrimental Reliance on Incorrect Advice or Information

Loss suffered in consequence of making a decision in reasonable reliance on incorrect advice or information constitutes 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 ought to have known that the recipient would rely on the advice or information in making a decision of the kind made.*

Art. 2: 208: Loss upon Unlawful Impairment of Business

- (1) *Loss caused to another where a person unlawfully impairs another's exercise of a profession or conduct of a trade is legally relevant damage.*
- (2) *Loss caused to a consumer arising from unfair competition is also legally relevant damage if national law so provides.*

Art. 2:209: Loss upon Environmental Impairment

Costs incurred by the State or designated competent authorities in restoring seriously and enduringly 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.

Chapter III: Accountability

Section 1: Intention and Negligence

Art. 3: 101: Intention

A person causes legally relevant damage intentionally when that person causes the damage either:

- (a) *meaning to cause damage of the type caused; or*
- (b) *knowing that such damage will be or is very likely to be caused and not caring whether it is caused.*

Art. 3: 102: Negligence

A person causes legally relevant damage negligently when that person causes the damage by an act which either:

- (a) does not amount to such care as it was reasonable to expect from that person in all the circumstances of the case; or*
- (b) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the injured party from the damage suffered.*

Section 2: Accountability without Intention or Negligence**Art. 3: 201: General Rule**

A person is accountable for a legally relevant damage if it is caused by another person, an animal, a thing, or a process for which he or she is responsible in law as provided by this section.

Art. 3: 202: Accountability for Damage Caused by Children or Supervised Persons

- (1) Parents or other persons obliged by law to provide parental care for children under fourteen years of age are accountable for legally relevant damage caused by the children in so far as the children acted intentionally or, according to Art. 3: 103, negligently.*
- (2) An institution or other body under a duty to supervise a person likely to cause personal injury or property damage to another outside its supervision is accountable for such damage if caused by defective supervision.*

Art. 3: 203: Employer's and Governor's Accountability

- (1) A person who engages another and is entitled to give instructions to that other, either as employer or otherwise without the authority of a third party, is accountable for legally relevant damage caused to a third party when the person engaged
 - (a) caused the damage in the course of an activity which was subject to the authority to give instructions, and*
 - (b) caused the damage intentionally or negligently[, or is otherwise accountable for the damage].**

[(2) Someone who engages persons who are not subject to the authority to give instructions in order to carry out a profession or trade on his or her behalf is accountable for legally relevant damage which those persons cause to a third party.]

Art. 3: 204: Accountability for Damage Occurring in Premises

[Text has yet to be formulated.]

Art. 3: 205: Accountability for Damage Caused by Animals

[Text has yet to be formulated.]

Art. 3: 206: Accountability for Defective Products

[With adjusted wording, the text will adopt the provisions of the EU directive.]

Art. 3: 207: Accountability for Damage Arising from Activities Dangerous to the Environment

Art. 3: 208: Accountability for Traffic Accidents

[Text has yet to be formulated on the basis of a general rule of keeper's strict liability.]

Art. 3: 209: Accountability for Dangerous Things, Activities and Processes

[Text has yet to be formulated.]

Art. 3: 210: Other Accountability for Damage Arising from Responsibilities in Law

A person is also accountable for legally relevant damage when it results from the realisation of a risk for which he or she is responsible according to statute or as a matter of judgment from the circumstances.

Chapter IV: Causation

Art. 4: 101: General Rule

- (1) Legally relevant damage is caused to another if, having regard to the type of injury or loss and its foreseeability, the ground of accountability, the conduct of others (including the injured party) and all other circumstances of the particular case, the damage is to be regarded as the consequence of the defendant's conduct or the source of danger for which the defendant is responsible.*
- (2) No regard shall be had to the foreseeability of the extent of the injury or loss. This applies in particular to bodily injury the severity of which was not foreseeable due to predispositions of the injured party.*

Art. 4: 102: Joint Tortfeasors

- (1) Co-perpetrators, instigators and accessories have the same liability as the tortfeasor.*
- (2) Where a member of a group intentionally causes a third party a legally relevant damage, other members of the group are also liable for the damage in so far as the risk of intentional occurrence of damage of that type was foreseeable and those members should have abstained from participating in the group.*

Art. 4: 103: Uncertain Contributions of Multiple Possible Tortfeasors

- (1) Where legally relevant damage sustained by a third party may be the consequence of more than one occurrence, but it is established at least that the damage was caused by one of those occurrences, then each of the persons who are accountable for one such occurrence are liable to the third party unless that person proves that the damage was not caused by an occurrence for which that person is accountable.*
- (2) Where vehicles collide on a public road, each person who is responsible for a vehicle involved in the collision is liable to every other participant in the collision in respect of their damage, unless that person proves that the damage was not caused by an occurrence for which that person is accountable.*

Chapter V: Specific Defendants and Multiple Tortfeasors

Art. 5: 101: Children

- (1) *Children under fourteen years of age are only liable for legally relevant damage for which they are accountable in so far as they were able to appreciate the wrongfulness of their act and did not behave in the manner that could have been expected of a careful child of the same age.*
- (2) *A child under [...] years of age is rebuttably presumed to be incapable of recognising the wrongfulness of his or her act.*

Art. 5:102: Legal Persons

The acts and state of mind of those authorised to effect the acts of the legal person constitute the acts and state of mind of the legal person.

Art. 5: 103: Employees

Employees are liable for damage which they cause to third parties in the course of their employment only if they act intentionally.

Art. 5: 104: Joint Liability

- (1) *Where several persons are liable under the provisions of this Part, they are liable as joint debtors.*
- (2) *In their relationship to one another:*
 - (a) *in the case of Art. 5: 103 the employee, and*
 - (b) *in the case of Art. 3: 203 (2), the person engaged unless the other was negligent are solely liable.*

Chapter VI: Defences

Art. 6: 101: Mental Incompetence

- (1) *Save where the person suffering damage is otherwise able to obtain full compensation, mental incompetence does not constitute a defence.*

- (2) *A person is mentally incompetent if he or she lacks sufficient insight into the nature of his or her behaviour, unless that situation is the result of his or her own misbehaviour.*

Art. 6: 102: Self-Defence, Negotiorum Gestio and Necessity

- (1) *Loss or injury caused by a person in reasonable defence of that person's or a third party's rights or a legally protected interest is not legally relevant damage if the injured party was accountable for endangering the right or interest defended.*
- (2) *The same applies to damage caused by a gestor to a principal without breach of the gestor's duties.*
- (3) *Where a person causes damage to the patrimony of a third party in a situation of imminent danger to life, body or health in order to save himself or another and that danger could not be eliminated without causing the damage, the person causing the damage is liable to provide reasonable compensation to the third party.*

Art. 6: 103: Furtherance of Family Life

Loss or injury caused by communication of information in a domestic or other situation of a private nature is not legally relevant damage to persons outside that situation.

Art. 6: 104: Protection of Public Interest

- (1) *Loss or injury caused to another in necessary defence of a serious public interest is not legally relevant damage.*
- (2) *This applies in particular to dissemination of information in the media.*

Art. 6: 105: Consent and Acting on own Risk

- (1) *Loss or injury to which the injured party consented is not legally relevant damage if the injured party was aware or ought to have been aware of the consequences of that consent.*
- (2) *If the injured party exposed himself to a risk which is commonly associated with conduct of the type undertaken and properly regarded as an integral hazard to be accepted, the realisation of that risk does not constitute legally relevant damage.*

Art. 6: 106: Contributory Fault and Accountability

- (1) *Where an injured party, or a person for whom the injured party is responsible within the scope of Art. 3: 203, contributed by their own fault to the damage occurring, compensation is to be reduced in proportion to the relative contributions of fault.*
- (2) *Compensation is to be reduced likewise if and in so far as a source of danger for which the injured party is responsible contributed to the damage occurring.*
- (3) **[Special rule for road traffic accidents – to be formulated following the formulation of the rule on accountability for damage in respect of road traffic accidents.]**

Art. 6: 107: Ex turpi causa non oritur actio

[Text has yet to be formulated. We are awaiting a draft by the English Law Commission]

Art. 6: 108: Force majeure

Loss or injury caused by force majeure is not legally relevant damage.

Art. 6: 109: Exclusion of Liability

- (1) *Liability for causing legally relevant damage intentionally or by flagrant negligence cannot be excluded or limited.*
- (2) *A business undertaking may not exclude or limit liability to a consumer in respect of:*
 - (a) *personal injury (including fatal injury); or*
 - (b) *physical damage to the subject-matter of a property right.*

Chapter VII: Remedies**Section 1: General****Art. 7:101: Reparation**

- (1) *Reparation for legally relevant damage is to reinstate the injured party in the position he or she would have been in had the damage not occurred.*

- (2) *Reparation is to be awarded in a way that corresponds best to damage of the kind suffered.*
- (3) *Where an inanimate thing is damaged, compensation equal to its depreciation of value is to be awarded instead of the cost of its repair if the cost of repair unreasonably exceeds the depreciation of value.*

Art. 7: 102: De Minimis Rule

Trivial damage is to be disregarded.

Art. 7: 103: Equalisation of Benefits

- (1) *If the damaging event has also conferred benefits on the injured party, those benefits are only to be taken into account so far as that is fair, just and reasonable.*
- (2) *In deciding whether it would be fair, just and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the degree of fault on the part of the defendant and, where the benefits are conferred by a third party, the purpose of conferring those benefits.*

Art. 7: 104: Multiple Injured Parties

Where multiple parties suffer legally relevant damage and reparation to one party will also reinstate the other injured party or parties in the situation they would have been in had the damage not incurred, chapter 11(II) of the PECL applies with appropriate modification to the injured parties' claims for reparation.

Art. 7: 105: Assignment of Claims

[missing]

Section 2: Compensation

Art. 7: 201: Injured Party's Right of Election

The injured party may choose whether or not to spend compensation on the reinstatement of their damaged interest.

Art. 7: 202: Reduction of Liability

Where it is just and equitable to do so, a court may relieve a defendant of liability to compensate under the provisions of this section, either wholly or in part, if:

- (a) liability in full would be disproportionate to the defendant's fault,*
- (b) the damage according to its type or extent [...: text to be formulated.], or*
- (c) [Possible provision relating to insurance seen as a mitigating factor on one side, and a counter factor in the case of liability insurance. Text to be formulated.]**

Art. 7: 203: Lump Sum Compensation and Periodical Payment

[Text has yet to be formulated.]

Art. 7: 204: Compensation for Damage Per Se

[Text has yet to be formulated.]

Section 3: Other Remedies**Art. 7: 301: Injunctive Relief**

[Text has yet to be formulated. Pointer: Collective damage, but see Art. 8:102]

Art. 7: 302: Liability for Loss Averting Damage

A person who has reasonably incurred expenditure or suffered other loss in order to prevent an impending damage occurring, or in order to limit the extent or severity of a damage which occurs, has a right to compensation.

Art. 7: 303: Information and Account

[Text has yet to be formulated]

Art. 7: 304: Reparation other than Compensation

[Text has yet to be formulated.]

Art. 7: 305: Surrender of Unjustified Enrichment

[Text to be formulated. This provision is at present merely a 'place holder' for the time being. It is intended as a marker for the fact that we envisage there will be cases in which a plaintiff will be able to claim an enrichment which the defendant has obtained by committing the tort. This will have particular application where the unjustified enrichment obtained exceeds the damage for which the plaintiff can claim reparation, the purpose of allowing this relief being to prevent the defendant from profiting by his wrongdoing at the plaintiff's expense and to remove any incentive to inflict damage on the plaintiff. The precise relationship of this provision to the law of unjustified enrichment, which we envisage will embrace many, but by no means all forms of 'enrichment by (tortious) wrongdoing', has yet to be finalised. The terms of this provision will be fleshed out in conjunction with the text on the law of unjustified enrichment.]

Chapter VIII: Relation to National Laws**Section 1: Implementation of this Book****Art. 8: 101: Quantification of Damage**

National laws may provide for the manner in which compensation for personal injury and non-economic loss is to be quantified.

Art. 8: 102: Enforcement of Rights

National laws determine the manner in which the rights provided for in this Book are to be enforced. This applies in particular to representation in respect of collective claims, the availability of interim relief and the enforcement of judgments, including enforcement by attachment of earnings.

Section 2: Exclusion of this Book**Art. 8: 201: National Constitutional Laws**

The provisions of this Book are not applicable in so far as their application would contradict national constitutional law.

Art. 8: 202: Liability to Insured Parties

National laws may limit or exclude liability under this Book where the injured party is indemnified in respect of his or her damage under a contractual or statutory insurance.

Art. 8: 203: Liability for Exercising Public Law Functions

National laws determine whether and to what extent the provisions of this Book govern the liability of a person or body arising from the exercise or omission to exercise public law functions.

Art. 8: 204: Law on Liability for Damage in Criminal Proceedings

National law determines whether and to what extent the provisions of this Book govern liability for damage in proceedings before a court exercising criminal jurisdiction.

Text of Articles in Chapter I (in German) (as at 22nd May 2002)**Art.1:101: Grundregel**

- (1) Eine Person, die einen rechtlich relevanten Schaden erleidet, hat nach den Vorschriften dieses Buches das Recht auf Schadenersatz gegen die Person, die den Schaden vorsätzlich oder fahrlässig verursacht hat, oder der der Schaden in anderer Weise zuzurechnen ist.
- (2) Droht ein solcher oder solch ein weiterer Schaden oder die Verletzung eines Rechts, so gewährt dieses Buch der Person, die den Schaden erleiden würde, auch Rechte, ihn zu verhindern. Diese Rechte sind gegen die Person gerichtet, der der Schaden zuzurechnen wäre, wenn er entstände.
- (3) In diesem Buch
 - (a) bestimmt Kapitel II, ob ein rechtlich relevanter Schaden vorliegt;
 - (b) bestimmt Kapitel III, ob Vorsatz, Fahrlässigkeit oder die Zurechenbarkeit des Schadens in anderer Weise vorliegen
 - (c) bestimmt Kapitel IV, ob Verursachung des rechtlich relevanten Schadens vorliegt.
- (4) Die Rechte nach diesem Artikel bestehen nach Maßgabe der folgenden Vorschriften dieses Buches.

Art. 1:102: Verhältnis zu anderen Regeln des Privatrechts

- (1) Die Vorschriften dieses Buches sind nicht anwendbar, soweit ihre Anwendung dem Zweck anderer Regeln des Privatrechts widersprechen würde.
- (2) Rechtsbehelfe aus anderen Rechtsgründen bleiben von den Vorschriften dieses Buches unberührt.