

Causation in European Tort Law

Through a comprehensive analysis of sixteen European legal systems, based on an assessment of national answers to a factual questionnaire, *Causation in European Tort Law* sheds light on the operative rules applied in each jurisdiction to factual and legal causation problems. It highlights how legal systems' features impact on the practical role that causation is called upon to play, as well as the arguments of professional lawyers. Issues covered include the conditions under which a causal link can be established, rules on contribution and apportionment, the treatment of supervening, alternative and uncertain causes, the understanding of loss-of-a-chance cases, and the standard and the burden of proving causation. This is a book for scholars, students and legal professionals alike.

MARTA INFANTINO is Assistant Professor in the Legal Department at the University of Trieste, Italy. She has published extensively in Italian, English and French on comparative contract law, comparative tort law, human rights and global legal indicators. Some of her works have been translated into Chinese and Spanish. Her monograph on causation was awarded the Italian Lynx Academy's prize for emerging authors in 2013.

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The Common Core of European Private Law

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and University of Macao

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

A list of books in the series can be found at the end of this volume.

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Causation in European Tort Law

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Frontmatter
[More Information](#)

To Cloe and Ioli

Contents

<i>Contributors</i>	page xiii
<i>General Editors' Preface</i>	xv
<i>Preface</i>	xvii
<i>National Reporters</i>	xix
<i>Table of Legislation</i>	xxi
<i>Basic Provisions</i>	xxvii
<i>Abbreviations</i>	li

Part I Causation in Context

1	The Place and Space of Causation	3
	MARTA INFANTINO AND ELENI ZERVOGIANNI	
1.1	Introduction	3
1.2	Causation, Cognition, Culture	5
1.3	Causation across Legal Domains	8
1.4	The Law-Makers of Causation Rules	11
1.5	The Road Map	15
2	Causation in the Law: Philosophy, Doctrine and Practice	17
	INGEBORG PUPPE AND RICHARD W. WRIGHT	
2.1	Distinguishing Causation and Responsibility	17
2.2	Causation: Philosophical Foundations	20
2.2(a)	Overview	20
2.2(b)	David Hume's Regularity Theory	21
2.2(c)	Arthur Schopenhauer's Law of Causality	22
2.2(d)	John Stuart Mill's Laws of Nature (Covering Law) Theory	22

2.2(e)	John Mackie's INUS/Strong Necessity Analysis	25
2.2(f)	Objections to Generalist Theories	26
2.2(g)	David Lewis's Counterfactual Theory	29
2.2(h)	Singularist Theories and Negative Conditions as Causes	31
2.3	Causation in the Law	34
2.3(a)	Strong Necessity (<i>Sine Qua Non</i> /But For)	34
2.3(b)	Weak Necessity/Strong Sufficiency	42
2.4	Overdetermined Negative Causation	51
2.5	Proving Causation	54
2.6	Conclusion	58
3	Actual Causation in the Second and Third Restatements: Or, the Expulsion of the Substantial Factor Test	60
	ANTHONY J. SEBOK	
3.1	Introduction	60
3.2	Substantial Factor Revisited: Restatement (Second) §§ 431 and 432	63
3.2(a)	The Multiple Sufficient Contribution	64
3.2(b)	The Trivial Necessary Contribution	66
3.3	R3's Rejection of Substantial Factor	68
3.4	Conclusion	83
4	The European Ways to Causation	85
	MARTA INFANTINO AND ELENI ZERVOGIANNI	
4.1	A Variety of Approaches	85
4.2	Overarching, Bounded, Pragmatic Causation	87
4.3	Overarching Causation: France, Italy, Spain, Poland, Bulgaria	89
4.3(a)	France	89
4.3(b)	Italy	93
4.3(c)	Spain	96
4.3(d)	Poland	97
4.3(e)	Bulgaria	100
4.4	Bounded Causation: Germany, Czech Republic, Greece, Portugal, Denmark, Sweden	101
4.4(a)	Germany	101
4.4(b)	Czech Republic	105

4.4(c)	Greece	107
4.4(d)	Portugal	110
4.4(e)	Denmark	112
4.4(f)	Sweden	114
4.5	Pragmatic Causation: Austria, the Netherlands, Lithuania, England, Ireland	117
4.5(a)	Austria	117
4.5(b)	The Netherlands	119
4.5(c)	Lithuania	122
4.5(d)	England	124
4.5(e)	Ireland	126
Part II	The Comparative Evidence: Case Responses and Editors' Comparative Comments	
5	Preliminary Remarks on the Methodology	131
	MARTA INFANTINO AND ELENI ZERVOGIANNI	
5.1	Aims and Method of the Study	131
5.2	The Common Core Approach to Tort Law	132
5.3	The Three-Level Responses	134
5.4	Causation and the Common Core Methodology: Some Caveats	136
6	The Case Studies	139
Case 1	Against Faith	139
	Case	139
	Discussions	139
	Comparative Remarks	181
Case 2	Fire Knocks Twice	185
	Case	185
	Discussions	185
	Comparative Remarks	215
Case 3	A Dangerous Photograph	218
	Case	218
	Discussions	218
	Comparative Remarks	239
Case 4	Financial Judgments	242
	Case	242
	Discussions	242
	Comparative Remarks	269

X CONTENTS

Case 5 A Cancerous Drug	272
Case	272
Discussions	272
Comparative Remarks	294
Case 6 Hiking in the Storm	298
Case	298
Discussions	298
Comparative Remarks	319
Case 7 Asbestos or Cigarettes?	322
Case	322
Discussions	322
Comparative Remarks	350
Case 8 A Multi-Contaminated River	353
Case	353
Discussions	353
Comparative Remarks	376
Case 9 An Epidemic in Town	380
Case	380
Discussions	380
Comparative Remarks	403
Case 10 The Defective Trunk Lid	405
Case	405
Discussions	405
Comparative Remarks	421
Case 11 Too Many Creditors	423
Case	423
Discussions	423
Comparative Remarks	440
Case 12 Head Protection Lacking	442
Case	442
Discussions	442
Comparative Remarks	465
Case 13 The Good Samaritan	467
Case	467
Discussions	467
Comparative Remarks	488
Case 14 Fragile Victims I: A Stroke of Misfortune	492
Case	492
Discussions	492
Comparative Remarks	512

Case 15	Fragile Victims II: Teenage Anxiety	515
	Case	515
	Discussions	515
	Comparative Remarks	533
Case 16	An Uninvestigated Threat	535
	Case	535
	Discussions	535
	Comparative Remarks	555
Case 17	Delay in Medical Care	558
	Case	558
	Discussions	558
	Comparative Remarks	582
 Part III The Comparative Assessment		
7	Summary and Survey of the Results	587
	MARTA INFANTINO AND ELENI ZERVOGIANNI	
7.1	Outline of the Chapter	587
7.2	The Cartography of Causation	588
	7.2(a) Causation and Liability	588
	7.2(b) The Scope of Causation	590
	7.2(c) Causation across Stages	597
	7.2(d) Causation Theories at Trial	601
	7.2(e) Scrutinizing the Proof of Causation	609
7.3	Beyond Causation	617
	7.3(a) Remote Consequences	617
	7.3(b) Broken Chains	621
	7.3(c) Supervening Events under Review	628
7.4	Uncertainty and Probability	631
	7.4(a) The Jungle of Alternative Causation	631
	7.4(b) Loss of a Chance	644
7.5	Multiple Causes	646
	7.5(a) Causation among Multiple Tortfeasors	646
	7.5(b) The Victim under the Spotlight	654
7.6	The (Un)Common Core of Causation	660
	<i>Bibliography</i>	667
	<i>Index</i>	705

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General Editors' Preface

It is a special pleasure to welcome the seventeenth book in the series *The Common Core of European Private Law* published by Cambridge University Press.

A book written by two young and brilliant women, whose scholarship is already renowned and appreciated well beyond the 'Common Core' circles. The Common Core project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the Common Core project, then novel, is now quite a classic. By making use of case studies, it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when further volumes are published. The availability of materials attempting a genuine analysis of how things seem to be is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. As of today, the Common Core Project is the oldest active scholarly enterprise in the field. The analytical work carried on by the more than 300 scholars that have been involved over time in the Common Core Project is also a precious asset of knowledge and legitimization for any such normative enterprise.

We must thank the editors and contributors for their work. With a sense of deep gratitude, we also wish to recall our late Honorary Editor,

Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The International University College of Turin allows us to organize the General Meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Programme. The Italian Ministry of Scientific Research, the University of Turin, the University of Trieste, Salento University, the University of Gothenburg, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, the Centro Studi di Diritto Comparato of Trieste, the Collegio Carlo Alberto and the Consiglio Nazionale del Notariato all contributed or still are contributing to the funding of this project. Last but not least, we must thank all those involved in our ongoing Common Core projects in contract law, property, tort and other areas whose results will be the subject of future published volumes.

Our home page on the Internet is at www.common-core.org. There you can follow our progress in mapping the common core of European private law.

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Rudolf B. Schlesinger, Cornell University – University of California, Hastings College of Law

Preface

This book has proved for us a fascinating and enlightening field of research. We would like to take the occasion to say a word about the timing of this project, and to thank those who contributed to it.

As the reader will appreciate, a case study covering sixteen European jurisdictions and involving the collaboration of twenty-five scholars takes considerable time to complete. This collective enterprise began in the summer of 2011, and then took six years to reach publication. Our experience confirms once again that broad international and comparative efforts are complex, time consuming and presuppose the good will of many people who are seriously committed to the project.

In the latter respect, we were particularly blessed. We express our deepest thanks to all our national reporters and contributors, whose kindness and expertise made the project enjoyable and fruitful. We are thankful to all for their friendship, diligence, patience and timeliness, and for the discussions and exchanges from which we learned so much.

Our sincere thanks go to the general editors Mauro Bussani and Ugo Mattei, who founded the Common Core project, encouraged this particular research and provided all people concerned with the inspiration to undertake it.

We are grateful to the Law Department of Trieste University and the Faculty of Law of the Aristotle University of Thessaloniki, to the International University College of Turin, and to the Erasmus+ Mobility Programme of the European Commission. Without the contributions of all these institutions this book would not be what it is.

We owe a huge debt of gratitude to our language editor, Maitreyi Misra, who constantly and relentlessly monitored and eased the development of our work.

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[More Information](#)

xviii P R E F A C E

Special thanks go also to Ekkehard Hofmann, Paola Monaco and Franz Werro whose friendship and patience encouraged us and eased the path towards the publication of the results of our research.

Marta Infantino and Eleni Zervogianni
Trieste and Thessaloniki
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Table of Legislation

AUSTRIA

Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code, ABGB)
Wasserrechtsgesetz (Water Law Act, WRG)
Allgemeines Sozialversicherungsgesetz (General Social Insurance Act, ASVG)

BULGARIA

Obligations and Contracts Act
Act on the Liability of the State and the Municipalities for Damages
Act on the Ministry of Internal Affairs
Civil Procedure Code
Labour Code

CZECH REPUBLIC

Civil Code 2012 (entry into force 2014)
Act No. 13/1997 Sb., the Infrastructures Act
Act No. 262/2006 Sb., the Labour Code
Product Liability Act (derogated by Civil Code 2012 and incorporated into it)
Act No. 21/1992 Sb., on Banks
Act No. 40/2009 Sb., the Penal Code
Act No. 82/1998 Sb., on State Liability

DENMARK

Act on Complaints and Compensation in the Health Service, Act
No 1113 of 7 November 2011 with later amendments (CCH)

xxii TABLE OF LEGISLATION

Promulgation of Act on Damages, Act No. of 885 of 20 September 2005 with later amendments (Damages Act)
 Promulgation of Act on Occupational Injuries, Act. No. 848 of 7 September 2009 with later amendments (Occupational Injuries Act)

ENGLAND AND WALES

Civil Liability (Contribution) Act 1978
 Compensation Act 2006
 Protection from Harassment Act 1977
 Civil Procedure Rules 1998

FRANCE

Code civil
Code de l'action sociale et des familles
Code de l'environnement
Code monétaire et financier
Code de commerce
Code du travail
Code de la santé publique

GERMANY

Bürgerliches Gesetzbuch (Civil Code, BGB)
Zivilprozessordnung (Code of Civil Procedure, ZPO)
Strafgesetzbuch (Criminal Code)
Umwelthaftungsgesetz (Environmental liability Act)
Insolvenzordnung (Insolvency Act)
Versicherungsvertragsgesetz (Insurance Contract Act)
Arzneimittelgesetz (Medicinal Products Act)
Pflichtversicherungsgesetz (Obligatory Insurance Act)
Produkthaftungsgesetz (Product Liability Act)
Straßenverkehrsgesetz (Road Traffic Act)
Sozialgesetzbuch VII (Social Security Code, Book VII)
Wasserhaushaltsgesetz (Water Supply Act)

GREECE

Greek Constitution
 Greek Civil Code (GCC)

Introductory Law of the GCC
 Greek Penal Code (GPC)
 L. 551/1915 on Accidents at Work
 L.D. 2458/1953 regarding the Regulation of the Profession of Policemen
 L. 1481/1984 for the Branch of the Police Order
 L. 1650/1986 for the Protection of the Environment
 L. 2800/2000 on the Creation of the Greek Police Headquarters
 L. 3950/2011 on Liability Arising from Cars

IRELAND

The Irish Constitution 1937
 Civil Liability Act 1961
 The Protection of Life during Pregnancy Act 2013
 Civil Liability (Miscellaneous Provisions) Act 2011 (section 51A1)

ITALY

Civil Code
 Penal Code
 Law 28 March 2001, n. 145
 Law 22 May 1978, n. 194
 Legislative Decree 30 June 1965, n. 1124

LITHUANIA

LR *Konstitucija* (Constitution of the Republic of Lithuania, 6 November 1992)
 LR *Civilinio kodekso patvirtinimo įsigaliojimo ir įgyvendinimo įstatymas* (The law on the Civil Code of the Republic of Lithuania, 18 July 2000)
 LR *pacientų teisių ir žalos sveikatai atlyginimo įstatymas* (The Law on the Rights of Patients and Compensation of Damage to their Health, 3 October 1993)
 LR *darbuotojų saugos ir sveikatos įstatymas* (Law on Employee's Safety and Health, 1 July 2003)
 LR *nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo įstatymas* (The Law on Occupational Accidents and Professional Illnesses, 23 December 1999)

THE NETHERLANDS

Dutch Civil Code
 Dutch Road Traffic Act
Wet aansprakelijkheidsverzekering motorrijtuigen

POLAND

Civil Code
 Act of 22 May 2003 on Compulsory Insurance, the Insurance Guarantee Fund and Polish Bureau of Traffic Insurers
 Act of 30 October 2001 on the Social Insurance for Work Accidents and Occupational Diseases
 Act of 7 January 1993 of Law on Family Planning, Protection of Foetus and Conditions for Terminating Pregnancy
 Act of 6 November 2008 of Patient Rights' and Patients' Ombudsman
 Act of 27 April 2001 of Environmental Protection Law

PORTUGAL

Civil Code
 Decree-Law No 383/89 (Products Liability Act)
 Securities Code
 Insolvency Act
 Medicinal Products Statute
 Decree-Law No 147/2008
 Decree-Law No 291/2007
 State's Liability Act
 Labour Code
 Law No 98/2009 (Workplace Accidents Act)

SPAIN

Spanish Constitution of 1978
 Spanish Civil Code of 1889
 Spanish Penal Code of 1995
 Law 30/1992 of 26 November, General Government and the Common Administrative Procedure Act
 Law 30/1995 of 30 November, Private Insurance Organization and Supervision Act

Royal Decree 396/2006 of 31 March, Transposition of Directive 2003/18/EC

Royal Decree 1/1994 of 20 June, General Law on Social Security

Organic Law 1/1999 of 5 May, Protection of Reputation, Personal and Family Privacy and Rights to Image

Law 1/2004 of 28 December, Act against Gender Violence

SWEDEN

The Tort Liability Act (1972:207)

The Liability for Patient Damages Act (1996:799)

The Code of Procedure (1942:740)

The Electricity Act (1997:857)

The Environmental Code (1998:808)

The Motor Traffic Damage Act (1975:1410)

The Product Liability Act (1992:18)

Basic Provisions

Austria

*Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code, ABGB)*¹

- § 1295: “(1) Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by the breach of a contractual duty or independently of any contract.
- (2) A person who intentionally inflicts damage in a manner contrary to public morals is also liable; however, if the damage was inflicted in the exercise of a right, he is liable only if the exercise of the right evidently had the object of harming the other.”
- § 1300: “An expert is also liable if, for payment, he negligently gives someone prejudicial advice in a matter pertaining to his art or science. Apart from this case an advisor is liable only for the damage he has knowingly caused to another by giving the advice.”
- § 1301: “Multiple persons may become liable for unlawfully inflicted damage by contributing thereto jointly, in a direct or indirect manner, by instigating, threatening, ordering, helping, concealing or the like, or by omitting to comply with a special duty to prevent the harm.”
- § 1302: “In such a case, if the damage was caused negligently and the contributions to it can be determined, each participant is liable only for the part of the damage caused through his negligence. If, however, the damage was caused intentionally, or, if the contributions of each to the damage cannot be ascertained, all are liable for one, and one for all; the person having compensated the damage will, however, have a right of recourse against the others.”

¹ Translations by Barbara C. Steininger (Austrian rapporteur), first published in K. Oliphant and B.C. Steininger (eds.), *European Tort Law: Basic Texts* (Vienna: Sramek Verlag, 2011).

xxviii BASIC PROVISIONS

§ 1304: “If, in a case of damage, there is also fault on the part of the person harmed, he has to bear the loss proportionately with the injurer, and, if the proportion cannot be determined, in equal shares.”

*Wasserrechtsgesetz (Water Law Act, WRG)*²

§ 26 (1): “The duty of the legitimate water user to compensate damage brought about by the existence or the operation of a water use facility will be assessed according to the provision of Part II Chapter 30 of the Allgemeines Bürgerliches Gesetzbuch unless the current Act provides differently. . . .

(5) In so far as there will be liability for water pollution (§ 30 Abs 2) on the basis of para 1 to 4, it is presumed that such damage was caused by those who come into question according to their location and the sewage (impact) composition; this presumption can be rebutted by proving the unlikelihood of causation. Several persons are liable solidarily if the damage was caused intentionally or with gross negligence. Otherwise they will only be liable for their contribution to the resulting damage. If contributions cannot be determined, several persons will be liable in equal shares.”

*Allgemeines Sozialversicherungsgesetz (General Social Insurance Act, ASVG)*³

§ 333 (1): “The employer will only be liable to compensate the insured for harm resulting from personal injury suffered due to a work accident or a work-related disease if the work accident (the work-related disease) was caused intentionally. This limitation of liability also applies in relation to the insured’s surviving dependents if the former’s death can be attributed to the personal injury suffered as a consequence of the work accident or the work-related disease.”

Bulgaria⁴

Obligations and Contracts Act

Article 45: “Every person must redress the damage he has guiltily caused to another person.

In all cases of tort guilt is presumed until proven otherwise.”

Article 50: “The owner of a chattel and the person under whose supervision the said chattel is shall be liable jointly and severally for the damage caused by the chattel. If the damage is caused by an animal,

² Translation by Barbara C. Steininger. ³ Translation by Barbara C. Steininger.

⁴ Translation of the main Bulgarian laws is available at www.lexadin.nl/wlg/legis/nofr/eur/lxwebul.htm.

the above persons shall also be liable when the animal has run away or has been lost.”

Article 51: “Compensation shall be due for all damages that are a direct and immediate consequence of the tort. This compensation may be payable as a lump sum or in scheduled payments.

If the person suffering the damage has contributed to its occurrence, the compensation may be reduced.

Where compensation for impaired capacity to work has been awarded, it may be reduced or increased if the injured person’s capacity to work changes in connection with the damages caused.”

Article 53: “Where the damage is caused by several persons, they shall be liable jointly and severally.”

Czech Republic

Civil Code 2012

§ 2900: “Everyone must act so as to avoid unreasonable harm to freedom, life, health or ownership of another person, if the circumstances of the case or customs of private life so require.”

§ 2909: “A tortfeasor who causes harm to a victim by an intentional breach of good morals has the duty to provide compensation for it; however, if the tortfeasor was exercising his right, he has the duty to provide compensation for the damage only if his main purpose was to harm another.”

§ 2910: “A tortfeasor who is at fault for breaching a statutory duty, thereby interfering with an absolute right of the victim, shall provide compensation to the victim for the harm caused. A tortfeasor also becomes obliged to provide compensation if he interferes with another right of the victim by a culpable breach of a statutory duty enacted to protect such a right.”

§ 2915: “(1) If several tortfeasors are obliged to provide compensation for damage, they shall do so jointly and severally; if any of the tortfeasors has the duty under another statute to provide compensation only up to a certain limit, he is obliged jointly and severally with the other tortfeasors within that scope. This also applies where several persons have committed separate unlawful acts, each of which may have caused a harmful consequence with a high degree of certainty, and if the person who caused the damage cannot be ascertained.

(2) Where there are reasons deserving special consideration, a court may decide that the tortfeasor shall provide compensation for the damage in proportion to his participation in the harmful consequences; if the participation cannot be determined accurately, account is taken of the degree of probability. Such a decision may not be made if a

tortfeasor knowingly participated in causing the damage by another tortfeasor, or instigated or supported it, or if the entire damage can be attributed to each tortfeasor, even where they acted independently, or if the tortfeasor is to pay for the damage caused by a helper where the helper also incurred the duty to provide compensation.”

- § 2918: “If the damage occurred or was increased as a consequence of circumstances which are assigned to the injured party, the wrongdoer’s duty to provide damages is reduced proportionally.”
- § 2924: “A person who operates an enterprise or another facility intended for gainful activities shall provide compensation for the damage resulting from the operations, whether it was caused by the actual operating activities, by a thing used in these activities or by the impact of the activities on the environment. The person is released from this duty if he proves that he has exercised all care that can be reasonably requested to prevent the damage.”
- § 2952: “The actual damage and what the victim lost (lost profit) is paid. If the actual damage consists in the creation of a debt, the victim has the right to be released from the debt or provided with compensation by the tortfeasor.”
- § 2956: “Where a tortfeasor incurs a duty to compensate an individual for harm to his natural right protected by the provisions of Book One of this Act, he shall compensate the damage as well as non-pecuniary harm thus caused; compensation of the non-pecuniary harm shall also include mental suffering.”

Denmark

Damages Act

- § 1: “Any person who is liable for injury to another person must pay compensation for lost earnings, medical and rehabilitation expenses and any other loss caused by the injury as well as remuneration for pain and suffering.

Where the injury has had permanent consequences, remuneration for permanent impairment and compensation for loss of earning capacity will also be payable.

The value of work in the home is treated as earned income.”

The Occupational Injuries Act

- § 5: “Under occupational injuries in the meaning of this Act fall accidents according to § 6 and occupational illnesses according to § 7, which are caused by the occupation or by the conditions under which the occupation has taken place.”

§ 6: (1) “An accident under this Act is understood as personal injury which occurs due to an incident or impact which takes place suddenly or within 5 days.”

§ 7: “Occupational illness under this Act consists of:

Illnesses, which according to medical documentation are caused by specific influences that certain groups of people, due to their occupation, are more subjected to than groups of people which do not share that occupation. Also illness with a live born child which has been incurred before birth due to the mother’s occupation during the pregnancy is included. The Director of the National Board of Industrial Injuries provides, after negotiation with the Occupational Illnesses Board cf. § 9, a list of which illnesses are considered to qualify under this provision.

Other illnesses, including illnesses with a live born child which were incurred before birth, if it is proven whether that the illness according to the latest medical documentation satisfies the requirements under § 7.1(1) or that the illness solely or primarily must be seen to be caused by the particular nature of the occupation.”

Complaint and Compensation in the Health Service Act

§ 20: “Compensation is provided if the injury is most likely to be caused in one of the following ways:

If it must be assumed that an experienced specialist within the given area under the circumstances given would have acted differently during the examination, treatment, etc. thus avoiding the injury.

If the injury is caused by technical errors or malfunctioning of the technical apparatus, tools or other equipment which is being used in or in connection with the examination, treatment, etc.

If the injury based on a subsequent evaluation could have been avoided using a different treatment or method which was available and was based on a medical evaluation which would have been just as efficient in the treatment of the patient’s illness, or

If, as a consequence of examination, including diagnostic procedures, or treatment, injury occurs in the form of infections or other complications which are more extensive than what the patient reasonably should endure. In assessing what the patient should endure regard is to be had partially to the severity of the injury, partially to the illness and general health of the patient as well as to the rarity of the injury and the possibility of taking the risk of its occurrence into account beforehand.”

France⁵*Code civil*

Article 1231–2 (former Art. 1149): “Damages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived of, subject to the exceptions and modifications below.”

Article 1231–3 (former Art. 1150): “A debtor is liable only for damages which were foreseen or which could have been foreseen at the time of the contract, where it is not through his own intentional breach that the obligation is not fulfilled.”

Article 1231–4 (former Art. 1151): “Even in the case where the non-performance of the agreement is due to the debtor’s intentional breach, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an immediate and direct consequence of the non-performance of the agreement.”

Article 1240 (former Art. 1382): “Any act whatever of a man, which causes damage to another, obliges the one by whose fault it occurred, to compensate for it.”

Article 1241 (former Art. 1383): “Everyone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence.”

Article 1242 (former Art. 1384): “A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.

However, a person who possesses, regardless of the basis thereof, all or part of a building or of movable property in which a fire has originated is not liable towards third parties for damages caused by that fire unless it is proved that the fire must be attributed to his fault or to the fault of persons for whom he is responsible.

This provision may not apply to the landlord and tenant relationship, which remains governed by Articles 1733 and 1734 of the Civil Code.

The father and mother, in so far as they exercise ‘parental authority’, are jointly and severally liable for the damage caused by their minor children who live with them.

Masters and employers, for the damage caused by their servants and employees in the functions for which they have been employed;

⁵ Translation by G. Rouhette and A. Rouhette-Berton, www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations. All legislative sources and cases are available at www.legifrance.gouv.fr. The main texts are translated into English.

Teachers and craftsmen, for the damage caused by their pupils and apprentices during the time when they are under their supervision. The above liability exists, unless the father and mother or the craftsmen prove that they could not prevent the act which gives rise to that liability.

As to teachers, the faults, imprudence or negligent conduct invoked against them as having caused the damaging act must be proved by the plaintiff at the trial, in accordance with the general law.”

Article 1245 (former Art. 1386–1): “A producer is liable for damages caused by a defect in his product, whether he was bound by a contract with the injured person or not.”

Article 1382 (former Art. 1353): “The presumptions which are not established by a statute are left to the insight and carefulness of the judges, who shall only admit serious, precise and concurrent presumptions, and in the cases only where statutes admit the proof by all means.”

England

Compensation Act 2006

Section 3: “(1) This section applies where –

- (a) a person (‘the responsible person’) has negligently or in breach of statutory duty caused or permitted another person (‘the victim’) to be exposed to asbestos,
- (b) the victim has contracted mesothelioma as a result of exposure to asbestos,
- (c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and
- (d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

(2) The responsible person shall be liable –

- (a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos –
 - (i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or
 - (ii) by the responsible person in circumstances in which he has no liability in tort), and
- (b) jointly and severally with any other responsible person.

xxxiv BASIC PROVISIONS

- (3) Subsection (2) does not prevent –
 - (a) one responsible person from claiming a contribution from another, or
 - (b) a finding of contributory negligence.
- (4) In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection shall not apply –
 - (a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis, or
 - (b) if or to the extent that the court thinks that another basis for determining contributions is more appropriate in the circumstances of a particular case.
- (5) In subsection (1) the reference to causing or permitting a person to be exposed to asbestos includes a reference to failing to protect a person from exposure to asbestos.
- (6) In the application of this section to Scotland –
 - (a) a reference to tort shall be taken as a reference to delict, and
 - (b) a reference to a court shall be taken to include a reference to a jury.
- (7) The Treasury may make regulations about the provision of compensation to a responsible person where –
 - (a) he claims, or would claim, a contribution from another responsible person in accordance with subsection (3)(a), but
 - (b) he is unable or likely to be unable to obtain the contribution, because an insurer of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.
- (8) The regulations may, in particular –
 - (a) replicate or apply (with or without modification) a provision of the Financial Services Compensation Scheme;
 - (b) replicate or apply (with or without modification) a transitional compensation provision;
 - (c) provide for a specified person to assess and pay compensation;
 - (d) provide for expenses incurred (including the payment of compensation) to be met out of levies collected in accordance with section 213(3)(b) of the Financial Services and Markets Act 2000 (c. 8) (the Financial Services Compensation Scheme);
 - (e) modify the effect of a transitional compensation provision;
 - (f) enable the Financial Services Authority to amend the Financial Services Compensation Scheme;
 - (g) modify the Financial Services and Markets Act 2000 in its application to an amendment pursuant to paragraph (f);
 - (h) make, or require the making of, provision for the making of a claim by a responsible person for compensation whether or not he has already satisfied claims in tort against him;