

## Table of Contents

Foreword	vii
Our Sponsors and Donors	xi
Preface to this volume	xiii
Text of Articles	
English Non-Contractual Liability Arising out of Damage Caused to Another	3
Bulgarian Извъндооговорна отговорност, произтичаща от вреда, причинена другиму	16
Danish Erstatning uden for kontrakt for skade, som tilføjes en anden	30
Dutch Buitencontractuele aansprakelijkheid voor schade veroorzaakt aan een ander	42
Estonian Teisele isikule kahju tekitamisest tulenev lepinguväline vastutus	55
Finnish Sopimuksenulkoinen Korvausvastuu Toiselle Aiheutetusta Vahingosta	67
French Responsabilité extra-contractuelle pour dommage causé à autrui	80
German Außervertragliche Haftung wegen eines einem anderen zugefügten Schadens	93
Greek Εξωσυμβατική ευθύνη για την ζημία που προκλήθηκε σε έναν άλλον	107
Hungarian Szerződésen kívüli kártérítési felelősség	121
	xix

Italian	
Responsabilità Civile Extracontrattuale	134
Polish	
Niekontraktowa odpowiedzialność za szkodę wyrządzoną drugiemu	147
Portuguese	
Responsabilidade civil extracontratual por danos causados a terceiro	161
Romanian	
Răspunderea extra-contractuală pentru prejudiciul cauzat altuia	175
Slovenian	
Neposlovna odgovornost zaradi škode povzročene drugemu	189
Spanish	
Responsabilidad extracontractual por daños causados a otro	201
Swedish	
Utomkontraktuellt ansvar för skador som orsakats annan	215

## Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another

### Chapter 1: Fundamental provisions

#### Introduction

A.	The concept of non-contractual liability arising out of damage caused to another	
1.	Definition and purpose	229
2.	Prevention of impending damage	229
B.	The structure of the existing laws of non-contractual liability arising out of damage caused to another	
3.	Differences in external representation	229
4.	Two strands	230
5.	The Common Law and the Scandinavian countries	230
6.	France, Belgium, Luxembourg, Spain	230
7.	Greece and Italy	230
8.	Portugal, Austria, Germany	231
9.	The Netherlands	231
10.	Cyprus and Malta	231
11.	Eastern central Europe	232

12. The Baltic States	233
13. "Pure economic losses"	233
<b>C. Overview of the concept underpinning the text</b>	
14. Non-contractual liability arising out of damage caused to another, tort or delict	234
15. Initial considerations	234
16. No exhaustive list of protected interests and rights	235
17. Accountability, damage, causation	235
18. An all-embracing basic rule	236
19. Seven chapters	236
20. Interaction of the chapters	236
21. Legally relevant damage	236
22. A new expression	237
23. Causation	237
24. Remedies	238
25. Liability for and without conduct falling short of a required standard	238
<b>D. Relationship to other areas of the law</b>	
26. Liability for crimes included	238
27. Co-ordination with criminal law	239
28. Tort law and contract law	239
29. No independent obligations "between" contract and tort	239
30. Concurrence of actions	240
31. Tort law and unjustified enrichment law	240
32. Tort law and negotiorum gestio law	241
33. Tort law and property law	241
34. Compensation under insurance law and performances rendered by third parties	242
35. Procedural law	242

## Article 1:101: Basic rule

### Comments

<b>A. The general approach</b>	
1. The basic rule in overview	243
2. Terminology: "tort" and "delict"	243
3. Other terms	244
4. The injured person's perspective	244
5. Economic and non-economic loss	244
6. Damage and reparation	244
7. Reparation and compensation	245
8. Grounds of accountability	245
9. Grounds of accountability and causation	245
10. Omissions	245

11. Burden of proof	246
12. Natural and legal persons	246
13. Liability under public law not covered	246
<b>B. How the basic rule works</b>	
14. A single cause of action	246
15. Article 1:103(a) (Scope of application)	246
16. No general clause	247
17. No liability beyond the boundaries of the following provisions	247
<b>Notes</b>	
I. General	249
II. Structures and formulations of the existing basic rules	249
III. Wrongfulness as a prerequisite for liability	251
IV. Fault, intention and negligence	254
V. Strict liability	258
VI. Burden of proof	260

## Article 1:102: Prevention

### Comments

<b>A. Prevention of impending damage</b>	
1. General	265
2. Substantive law	265
3. Prohibition of damage and compensation for loss averting damage	265
4. Prevention and the law on non-contractual liability	266
<b>B. Claimant and responsible person</b>	
5. Claimant	266
6. Responsible person	266
7. Responsible person under strict liability	266
<b>C. Essential elements entitling the claimant</b>	
8. Impending damage	267
9. Aggravation of damage	267
10. Protection of rights	267
11. Accountability	267
12. Restriction of the claim	268
<b>D. Relationship to Article 5:202 (Self-defence, benevolent intervention and necessity)</b>	
13. General	268
14. Persons incapable of being accountable for their causation of damage	268

## Notes

I.	Basis of the right to prevent impending legally relevant damage	269
II.	Basis of the claim for damages in respect of expenditure incurred in averting the damage	273

**Article 1:103: Scope of application**

## Comments

<b>A:</b>	<b>Sub-paragraph (a)</b>	
1.	Article 1:101 (Basic rule) and Article 1:102 (Prevention) not self-sufficient rules	274
<b>B:</b>	<b>Application to legal and natural persons (sub-paragraph (b))</b>	
2.	Legal persons as claimants	274
3.	Legal persons as responsible persons	275
4.	Bad organisation	275
5.	Legal persons under public law	275
6.	Imputation of knowledge and state of mind of legal persons	275
<b>C:</b>	<b>The relationship of the law on non-contractual liability to other areas of private law (sub-paragraph (c) and sub-paragraph (d)): general</b>	
7.	The principle of free concurrence of actions	276
8.	Preconditions of a situation of concurrent actions	276
<b>D:</b>	<b>Sub-paragraph (c)</b>	
9.	Scope of application	277
10.	The law on non-contractual liability and the law of contract	278
11.	Priority of contract law in case of conflict	278
<b>E:</b>	<b>Sub-paragraph (d)</b>	
12.	The law on non-contractual liability does not oust other bases of claim	280
13.	No limitation to the law of obligations	281
14.	Special regimes relating to Article 1:103(d)	281

## Notes

I.	Tort law and contract law: theories of concurrence of action	281
II.	In particular: liability in respect of self-contained damage in defective products and buildings	288
III.	Tort law and other areas of private law	292
IV.	Legal persons	297

## Chapter 2: Legally relevant damage

### Introduction

<b>A. The concept of legally relevant damage</b>	
1. Damage in specific contexts	299
2. No list of complete torts	299
3. Typical situations and a residual rule	299
4. “Danno ingiusto”	299
5. Overlaps	300
6. Distinct manifestations of legally relevant damage	300
7. Legally relevant damage as context-dependant	300
8. Damage caused intentionally and damage caused negligently	300
<b>B. The second chapter in overview</b>	
9. Not a mere restatement	301
10. Questions not specifically addressed	301
11. The order of the Articles	301

### Section I: General

#### Article 2:101: Meaning of legally relevant damage

##### Comments

<b>A. The function of the rule</b>	
1. Three pillars of legally relevant damage	303
2. Indications of legally relevant damage	303
3. Forms of legally relevant damage: loss and injury	304
4. Loss includes non-economic loss	304
5. Interests without a market value	305
6. Quantum of loss	305
<b>B. The flexibility of the rule</b>	
7. Multiformity of life	305
8. Constitutional issues	305
9. Underlying issues not yet harmonised	305
<b>C. Violation of a right otherwise conferred by the law (paragraph (1)(b))</b>	
10. Scope of application	306
11. Rights and interests worthy of legal protection	307
12. Rights otherwise conferred by the law	307
13. Purely contractual rights are, as a rule, excluded	308

<b>D. Violation of an interest worthy of legal protection (paragraph (1)(c))</b>	
14. Significance of the provision	308
15. Responsibility of the courts for the development of the law on non-contractual liability	308
<b>E. Paragraphs (2) and (3)</b>	
16. Application to rights and interests worthy of legal protection	309
17. The balancing process in ascertaining an interest worthy of legal protection	309
18. The ground of accountability	309
19. Nature of the damage	310
20. Damage suffered in business competition	310
21. Proximity of damage	311
22. Reasonable expectations on the part of the injured person	311
23. Considerations of public policy	312
<b>F. Paragraph (4)</b>	
24. General	312
25. Significance of the distinction between economic and non-economic loss	313
26. Economic loss	313
27. Increase in debts	313
28. Loss of income	313
29. Other forms of economic damage	313
30. Non-economic loss	314
31. Pain and suffering	314
32. Impairment of the quality of life	314
33. Bereavement	314
34. Other cases	315
35. Overlaps	315
<b>Notes</b>	
I. The notion of damage	315
II. Injury as damage	320
III. Economic loss	323
IV. Normative economic loss	327
V. Non-economic loss	329
VI. Non-economic loss of legal persons	336
VII. Breach of absolute rights	337
VIII. Particulars to certain rights	339
(1) Incorporeal rights of the personality	339
(2) Post-mortal protection of personality rights	341
(3) Further rights with personality aspects attached	342
(4) Personality rights of legal persons	343
IX. Violations of relative rights	344
X. Wrongful conception, wrongful birth and wrongful life	347
(1) Wrongful conception	348
(2) Wrongful birth	351
(3) Wrongful life	353

XI. Interests worthy of legal protection	355
XII. In particular: loss of chance	356

## Section 2: Particular instances of legally relevant damage

### Article 2:201: Personal injury and consequential loss

#### Comments

<b>A. Matters not regulated</b>	
1. Wrongful conception, wrongful birth and wrongful life	359
2. Detrimental impact on the quality of life without personal injury	359
3. Loss of chance	360
4. Quantum of damages	360
5. Type and mode of reparation	360
<b>B. Damage to a person's body or health</b>	
6. Body and health distinguished	360
7. Injury to the person	360
8. Medical treatment; sports injuries	361
9. Injury to health	361
10. Related interests worthy of legal protection	361
11. Mental health	362
12. Injury as such constitutes legally relevant damage	362
<b>C. Loss</b>	
13. Economic and non-economic loss	363
14. Cost of health care	363
15. Loss of income	363
<b>D. Damage to the injured person and damage to third parties</b>	
16. Personal injury	363
17. Economic or non-economic losses of third persons	364
18. Expenses of persons close to the injured person	364
19. Reasonable expenses of carers	364
20. Those close to the injured person	365

#### Notes

I. General	365
II. Injury to body and health	366
III. Harm to mental health	367
IV. Injury as such and "danno biologico"	371
V. Recoverable consequential economic damage	372
VI. Expenses of close relations	379
VII. Recoverable consequential non-economic damage	383



**Article 2:202: Loss suffered by third persons as a result of another's personal injury or death**

**Comments**

<b>A. General</b>	
1. Overview	389
2. Persons not covered	389
3. Non-economic losses	390
4. Structure and organisation of the rules	390
<b>B. Non-economic loss of close relations in cases of personal injury and death (paragraph (1))</b>	
5. Relation to Article 2:201(2)(b) (Personal injury and consequential loss)	390
6. Policy consideration	390
7. The circle of persons affected	391
8. Claim by third parties for loss of maintenance in case of death only	391
<b>C. Loss suffered as a result of another's death (paragraph (2))</b>	
9. Death as such not legally relevant damage	391
<b>D. The claim of the deceased's successors (paragraph (2)(a))</b>	
10. Succession to subsisting claims of the deceased to reparation	392
11. The limits of the claim	392
<b>E. Funeral expenses (paragraph (2)(b))</b>	
12. Funeral costs constitute legally relevant damage	393
13. Reasonable funeral expenses	393
14. Persons entitled to claim funeral expenses	393
<b>F. Loss of maintenance (paragraph (2)(c))</b>	
15. Loss of breadwinner	393
16. Persons entitled to compensation	394
17. "Statutory provisions"	394
18. Time limits	394

**Notes**

I. No civil liability for death as such	394
II. Recoverability of non-economic damage to relatives in the case of death or injury to the primary victim	395
III. Survival of the deceased person's claims	402
IV. Funeral costs	406
V. Loss of maintenance	409
VI. Pecuniary and non-pecuniary claims of other third parties harmed	415

**Article 2:203: Infringement of dignity, liberty and privacy****Comments****A. General**

- |                                       |     |
|---------------------------------------|-----|
| 1. Purpose of the provision           | 419 |
| 2. Horizontal effects of human rights | 419 |

**B. Infringement of human dignity (paragraph (1))**

- |  |     |
|--|-----|
| 3. Infringement  | 419 |
| 4. Injury and loss   | 419 |
| 5. Trivial injury  | 420 |
| 6. Groups of cases   | 420 |
| 7. Sexual harassment; Community law; DCFR II. – 2:101<br>(Right not to be discriminated against) | 420 |
| 8. Protection of minors  | 421 |
| 9. The right to liberty  | 421 |
| 10. Arrest and imprisonment of innocent persons  | 422 |
| 11. The right to privacy   | 422 |
| 12. Persons of contemporary celebrity  | 422 |
| 13. Protecting a public interest   | 422 |

**C. Legal persons**

- |  |     |
|--|-----|
| 14. Application of the general rule on legally relevant damage | 423 |
|--|-----|

**D. Posthumous protection of personality rights**

- |  |     |
|--|-----|
| 15. Post-mortem protection of personality and protection of one's own rights | 423 |
|--|-----|

**E. Defamation (paragraph (2))**

- |   |     |
|---|-----|
| 16. Defamation not specifically addressed in the Chapter 2, Section 2 | 424 |
| 17. Criminal defamation   | 424 |
| 18. Freedom of expression   | 425 |

**F. Relation to other provisions in Chapter 2, Section 2**

- |              |     |
|--------------|-----|
| 19. Overlaps | 425 |
|--------------|-----|

**Notes**

- |   |     |
|---|-----|
| I. Infringement of liberty                              | 425 |
| II. The protection of incorporeal rights of personality | 426 |
| III. The right to privacy                               | 433 |
| IV. Defamation  | 438 |

**Article 2:204: Loss upon communication of incorrect information about another****Comments**

<b>A. General</b>	
1. Liability for misinformation instead of protection of honour	443
2. Protection of the media	443
3. Personal honour need not be affected	444
4. Persons	444
5. Defences	444
<b>B. Communication</b>	
6. Communication and dissemination distinguished	444
7. Internet communication	445
8. Repetition of incorrect information	445
9. Telling lies	445
<b>C. Incorrect information</b>	
10. Facts and value judgements distinguished	445
11. Information about a person	446
12. Burden of proof	446
<b>D. The mental state of the responsible person</b>	
13. Carelessness in relation to the incorrectness	446
<b>E. Relationship to other provisions</b>	
14. Article 2:203 (Infringement of dignity, liberty and privacy)	447
15. Reporting suspicions	447
16. Freedom of expression and the right to respect of dignity	447
17. Article 2:205 (Loss upon breach of confidence) and Article 2:207 (Loss upon reliance on incorrect advice or information)	448
18. Article 2:208 (Loss upon unlawful impairment of business)	448

**Notes**

I. Liability for misinformation	448
II. Distinction between assertion of fact and value judgment	454
III. Reporting suspicions	459
IV. Liability of internet service providers	463

**Article 2:205: Loss upon breach of confidence****Comments**

<b>A. General</b>	
1. Source of inspiration	467
2. Relationship to other rules	467

3.	DCFR II.–3:302 (Breach of confidentiality)	467
4.	Relation to Chapter 3, Section 1	468
<b>B.</b>	<b>Communication of confidential information</b>	
5.	Communication	468
6.	Information	468
7.	Third parties	468
8.	Absolute and relative confidentiality	469
<b>C.</b>	<b>Legal consequences</b>	
9.	Reparation and prevention	469
	Notes	470

## Article 2:206: Loss upon infringement of property or lawful possession

### Comments

<b>A.</b>	<b>General</b>	
1.	The Article in overview	479
2.	Accountability	479
3.	Loss as legally relevant damage	479
4.	Relationship to other regimes	479
5.	Remedies	480
<b>B.</b>	<b>Property rights and questions arising from property law</b>	
6.	Terminological difficulties	480
7.	Property rights	480
8.	Nuisance	480
9.	The owner-possessor relationship	481
10.	Stolen goods	481
11.	Property rights in corporeal things	482
12.	Mere contractual or other relative rights excluded	482
<b>C.</b>	<b>Lawful possession</b>	
13.	Possession	483
14.	Detention included	483
15.	Lawful possession	483
16.	Several possessors	483
17.	Property law protection of possession remains unaffected	484
18.	Loss caused by infringement of lawful possession	484
<b>D.</b>	<b>Infringement</b>	
19.	The concept	484
20.	Defences	484

<b>E. The most important modes of infringement of another's property right (paragraph (2)(b))</b>	
21. Damage to property	485
22. Ineffectual products	485
23. Self-contained damage in defective products and buildings	485
24. Sale of land	485
25. Disposition of the right	486
26. Law of unjustified enrichment	486
27. Interference with use	486
28. Deprivation of use: infringement and loss distinguished	487
29. Other disturbance of the exercise of the right	487
<b>F. Loss</b>	
30. General	487
31. Depreciation in merchantable value	487
32. Non-economic loss	488
33. Deprivation of use (paragraph 2(a))	488
34. Cable cases	489
<b>Notes</b>	
I. Tort law protection of property rights	489
II. Infringement of other rights in rem and of lawful possession or detention	498
III. Loss, in particular, recoverability of non-economic losses and loss of use	504

## Article 2:207: Loss upon reliance on incorrect advice or information

### Comments

<b>A. General</b>	
1. Policy considerations	510
2. European community law	511
3. Relationship to contractual liability	511
4. Relationship to Article 2:204 (Loss upon communication of incorrect information about another)	511
<b>B. The circle of protected recipients of the information</b>	
5. Professional advice or information	512
6. "The" recipient, not "a" recipient	512
<b>C. Reliance</b>	
7. Reasonable reliance	512
8. Foreseeability of reasonable reliance	513

<b>D. Incorrect advice or information</b>	
9. An inseparable composite term	513
10. Causation	513
11. Accountability	514
<b>Notes</b>	<b>514</b>

## **Article 2:208: Loss upon unlawful impairment of business**

### **Comments**

<b>A. Purpose and scope</b>	
1. Purpose	520
2. Prevention	520
3. Scope	520
4. Groups of cases covered	521
5. Infringement of EU competition law	521
<b>B. Unlawful impairment of profession or trade</b>	
6. Profession or trade	521
7. Exercise of a profession	522
8. Impairment	522
9. Unlawful impairment	522
10. Unfair competition to the detriment of competitors included	522
11. Unfair competition to the detriment of consumers excluded	523
<b>Notes</b>	<b>523</b>

## **Article 2:209: Burdens incurred by the state upon environmental impairment**

### **Comments**

<b>A. Pure ecological damage</b>	
1. Directive 2004/35/EC on environmental liability	529
2. Public and private law	529
<b>B. Legally relevant damage and accountability</b>	
3. Damage to individuals and damage to the society at large	530
4. Environmental organisations	530
5. Relationship to Article 3:206 (Accountability for damage caused by dangerous substances or emissions)	530
6. Article 3:207 (Other accountability for the causation of legally relevant damage)	531

<b>C. Other matters</b>	
7. Expenditure incurred by private persons	531
8. Environmental impairment	531
9. The State or designated competent authorities	531
10. Burdens incurred and loss in preventing damage	531

## Notes

I. Implementation of the Directive	532
II. Collective damage relevant to the environment in other national law	532

**Article 2:210: Loss upon fraudulent misrepresentation**

## Comments

<b>A. The legally relevant damage</b>	
1. General	538
2. Relationship to Article 2:204 (Loss upon communication of incorrect information about another)	538
3. Article 2:207 (Loss upon reliance on incorrect advice or information)	538
4. Loss	539
5. Non-economic losses	539
6. Damage and accountability	539
<b>B. Fraudulent misrepresentation</b>	
7. Misrepresentation	540
8. 'Fraudulent' misrepresentation	540
9. Intention to induce the recipient to make a mistake	540

Notes	541
-------	-----

**Article 2:211: Loss upon inducement of non-performance of obligation**

## Comments

<b>A. The Article in overview</b>	
1. Inducing non-performance of an obligation	546
2. Intention required	546
3. Damage and accountability	547
4. Loss	547
5. The entitled claimant	547
<b>B. Non-performance of obligation</b>	
6. Contractual and other obligations	548
7. Obligation 'owed to the person sustaining the loss'	548

8. Breach of conjugal obligations	548
9. Non-performance	549
<b>C. Intentional inducement</b>	
10. Intentional inducement	549
11. Absence of legitimate interest	549
<b>Notes</b>	<b>550</b>

## Chapter 3: Accountability

### Introduction

<b>A. General</b>	
1. Three distinct grounds of liability	557
2. "Fault" based liability vs. "strict" liability	557
<b>B. Liability for intention or negligence</b>	
3. Intention and negligence as generally recognised grounds of liability	557
4. Accentuation of liability within liability for negligence	558
5. Spain	558
6. Hungary	559
7. The Netherlands	559
<b>C. Liability without intention or negligence: the current situation in overview</b>	
8. The point of departure	560
9. French and Belgian gardien liability	560
10. Italy	560
11. Hungary	561
12. Germany, Austria, Greece, Portugal, and Poland	561
13. The Netherlands	562
14. Nordic Countries	562
15. England	562
<b>D. International instruments and EU law</b>	
16. International Instruments	563
17. EU law	563
<b>E. The concept of the text</b>	
18. Accountability	564
19. Intention and negligence	564
20. Presumed negligence	564
21. Minors	565
22. Mentally disabled persons	565



23.	Liability without intention or negligence	565
24.	No general theory of liability without intention or negligence	565
25.	Vicarious liability	566
26.	Guiding considerations for the third Chapter's second Section	566
27.	Specific issues and a general rule	566
28.	Liability confined to the causation of death, injury to health and property damage	567
29.	Consequences of liability; ceilings, etc	567

## Section 1: Intention and negligence

### Article 3:101: Intention

#### Comments

<b>A.</b>	<b>General</b>	
1.	Intention as ground of accountability	568
2.	Natural and legal persons	568
<b>B.</b>	<b>Intention</b>	
3.	The need for a definition	569
4.	Intention to do the act required but not sufficient	569
5.	Conduct	569
<b>C.</b>	<b>Sub-paragraph (a)</b>	
6.	Deliberate causation of legally relevant damage	569
7.	Breach of a statutory rule of behaviour	570
8.	Omissions	570
9.	Causation	570
10.	"Damage of the type caused"	570
<b>D.</b>	<b>Sub-paragraph (b)</b>	
11.	General	571
12.	Dolus eventualis	571
13.	Gross negligence	572
14.	"by conduct which that person means to do ..."	572
15.	"... knowing that ... damage ... will almost certainly be caused"	572
	<b>Notes</b>	573

**Article 3:102: Negligence**

## Comments

<b>A. General</b>	
1. Scope	580
2. “by conduct”	580
3. Sources of duties of careful conduct	581
4. Positive acts and omissions	581
5. Persons under eighteen	581
6. Mentally handicapped persons	581
7. Physically disabled persons	582
<b>B. Duties of care required by statute (sub-paragraph (a))</b>	
8. Statutory provisions	582
9. Criminal law provisions	582
10. Mere references to the duty to act with reasonable care	582
11. Provisions reducing the standard of care	582
12. Provisions requiring a higher standard of care	583
13. Provisions particularising the general duty of care	583
14. Adherence to the provision does not automatically exclude liability in negligence	583
15. Prohibitory norms and norms of care	584
16. The purpose of the statute	584
<b>C. The general duty of care (sub-paragraph (b))</b>	
17. An objective standard	585
18. Conclusive list of deciding factors impossible	585
20. Organisational defects	586

## Notes

I. The concept of negligence in general	586
II. Negligent omissions	592
III. Breach of statutory duty	596

**Article 3:103: Persons under eighteen**

## Comments

<b>A. The Article in overview</b>	
1. Matters covered	601
2. Purpose	601
3. Persons under eighteen	602

<b>B. Intention; violation of a statutory norm of conduct</b>	
4. Intention	602
5. Article 3:102 (Negligence) sub-paragraph (a)	603
<b>C. The general standard of care for persons under eighteen (paragraph (1))</b>	
6. A group-specific standard of care	603
<b>D. Children below the age of seven (paragraph (2))</b>	
7. No liability in principle for intentional or negligent infliction of damage	604
8. Strict liability remains unaffected	604
<b>E. Liability according to equity and fairness (paragraph (3))</b>	
9. Purpose of the rule	604
10. Situations covered	604
11. Subsidiarity of liability according to equity and fairness (sub-paragraph (a))	605
12. Liability to make reparation must be equitable (sub-paragraph (b))	605
13. Article 5:301 (Mental incompetence)	605
<b>Notes</b>	
I. Personal accountability of persons under eighteen	605
II. Liability on equitable grounds	611

### **Article 3:104: Accountability for damage caused by children or supervised persons**

#### **Comments**

<b>A. General</b>	
1. Subject matter of the rule in Article 3:104	613
2. The regime of liability	613
3. No strict liability	614
<b>B. Liability for children under fourteen (paragraph (1))</b>	
4. The risk covered by liability	614
5. Various age brackets	615
6. Persons liable	615
7. Relationship to Article 3:103 (Persons under eighteen)	615
8. Children as victims	615
<b>C. Liability of institutions (paragraph (2))</b>	
9. Policy considerations	616
10. The duty to supervise	616
11. Institution or body	616
12. Persons likely to cause personal injury or property damage	616
13. Requisites personal to the direct injurer	617

<b>D. Defective supervision (paragraph (3))</b>	
14. General	617
15. Supervision of children	617
16. Supervision of high-risk groups	618

## Notes

I. Liability of the individual who is required to exercise parental care	618
II. Liability of other persons and institutions for damage caused by others	625

**Section 2: Accountability without intention or negligence****Article 3:201: Accountability for damage caused by employees and representatives**

## Comments

<b>A. The Article in overview</b>	
1. Instances of strict liability for others	632
2. Liability of legal persons for their representatives	632
3. Public sector bodies	633
4. "Legally relevant damage ..."	633
5. "... suffered by a third person"	633
6. Defences	633
<b>B. Employer's liability (paragraph (1))</b>	
7. Employees	634
8. "Similarly engages"	634
9. Temporary relief workers	636
10. In the course of employment or engagement (sub-paragraph (a))	636
11. Employees excluded from service	637
12. Personal requisites of the person acting (sub-paragraph (b))	637
13. "... is otherwise accountable for the causation of the damage"	637
14. Solidary liability	638
<b>C. Liability of legal persons for their representatives (paragraph (2))</b>	
15. Purpose of the rule	638
16. Representative	638

## Notes

I. Employers' liability and liability for independent contractors	638
II. Liability of legal persons for their representatives	651

## Article 3:202: Accountability for damage caused by the unsafe state of an immovable 656

### Comments

- A. The legal policy
  - 1. Liability for the unsafe state of an immovable 657
  - 2. Liability is strict 657
  - 3. Policy considerations 657
  - 4. Legally relevant damage 658
  - 5. Public roads excluded 658
  - 6. Relationship to Article 3:206 (Accountability for damage caused by dangerous substances or emissions) 658
  - 7. Relationship to contract law 659
  - 8. Defences 659
- B. The risk embraced by liability
  - 9. Basis 659
  - 10. Immovable 660
  - 11. "Other than to the immovable itself" 660
  - 12. "In or near the immovable" 660
  - 13. "Such safety as a person ... is entitled to expect" 660
  - 14. The nature of the immovable (paragraph (1)(a)) 661
  - 15. The access to the immovable 661
  - 16. Costs 661
- C. Persons liable
  - 17. Policy considerations 662
  - 18. Paragraph (2) 662
  - 19. Occupier and keeper 662
  - 20. Paragraph (3) 662
  - 21. Abandonment 663

### Notes 663

## Article 3:203: Accountability for damage caused by animals

### Comments

- A. General
  - 1. Strict liability for animals of all types 673
  - 2. Animals living in the wild excluded 674
  - 3. Legally relevant damage; relationship to contract law 674
  - 4. Defences 674

<b>B. Damage caused by animals</b>	
5. Animal	675
6. Causation by the animal	675
7. Notion of keeper	675
8. Examples	675
9. Ownership	676
10. Children	676
11. Several keepers	676
12. Thieves	677
Notes	677

<b>Article 3:204: Accountability for damage caused by defective products</b>	686
--	-----

Comments

<b>A. General</b>	
1. Council Directive 85/374/EEC	687
2. Detailed commentary unnecessary	688
3. Restriction to consumer protection	688
4. Burden of proof in relation to damage to business property	688
5. No contractual exclusion or restriction of liability	688
6. No punitive or aggravated damages	688
7. Primary agricultural products and game	688
8. Liability for development risks	689
9. Policy considerations	689
10. Further considerations	689
11. Application of the general provisions	690
12. Duty to warn of development risks	690
13. Deviations from the Directive; options left to discretion of Member States	690
<b>B. Damage to consumer property</b>	
14. Deviation from the Directive	690
15. Policy considerations	690
<b>C. Liability for non-economic losses; no maximum limit to liability</b>	
16. Liability for non-economic loss and injury as such	691
17. No maximum limit to liability	691

Notes

I. Implementation of the Directive	691
II. Liability for damage to property	692
(1) Damage to things intended for private use	692
(2) Damage to business property	696

III.	Liability for non-economic loss	698
IV.	Liability for development risks	699
V.	Financial ceiling on liability	702

### **Article 3:205: Accountability for damage caused by motor vehicles**

#### **Comments**

<b>A.</b>	<b>The concept of the rule</b>	
1.	Formulation of the principle; no detailed rules	703
2.	Article 3:207(a) (Other accountability for the causation of legally relevant damage)	703
3.	Insurance	704
4.	Legally relevant damage	704
5.	Property damage	704
6.	Personal injury	704
7.	Defences	705
<b>B.</b>	<b>Details</b>	
8.	Motor vehicles and trailers	705
9.	Keeper	705
10.	No special liability for drivers	705
11.	Traffic accident resulting from the use of the vehicle	705
12.	Causation	706

Notes	706
-------	-----

### **Article 3:206: Accountability for damage caused by dangerous substances or emissions**

#### **Comments**

<b>A.</b>	<b>A strict regime for environmental liability</b>	
1.	Structure of the regime	718
2.	Relationship to Article 2:209 (Burdens incurred by the state upon environmental impairment)	718
3.	Legally relevant damage	719
4.	Policy considerations	719
<b>B.</b>	<b>The persons liable</b>	
5.	Keeper of a substance and operator of an installation	720
6.	Private use excluded (paragraph (5)(a))	720
7.	Other legal bases for a claim remain unaffected	720

<b>C. The risk within the scope of the strict liability</b>	
8. Causation of damage by dangerous substances and emissions (paragraph (1)(a))	721
9. Dangerous quantity	721
10. Relationship to Article 3:202 (Accountability for damage caused by the unsafe state of an immovable)	721
11. Dangerous attributes	722
12. Realisation of the risk establishing liability (paragraph (1)(b))	722
13. Causation	722
14. Substance (paragraph (2))	723
15. Emission (paragraph (3))	723
16. Installation (paragraph (4))	723
17. No failure to comply with statutory standards	723
18. Other defences	723
Notes	724

### Article 3:207: Other accountability for the causation of legally relevant damage

#### Comments

<b>A. Policy considerations</b>	
1. Wide-ranging national law on strict liability; international treaties	736
2. Overview	736
3. Legally relevant damage; national law	736
<b>B. Details</b>	
4. Sub-paragraph (a)	737
5. Examples	737
6. Sub-paragraph (b)	737
7. Sub-paragraph (c)	738
Notes	738

### Article 3:208: Abandonment

#### Comments

<b>A. First sentence</b>	
1. Purpose of the rule	742
2. Abandonment	742



<b>B. Second sentence</b>	
3. Animals	742
Notes	743

## Chapter 4: Causation

### Article 4:101: General rule

#### Comments

<b>A. General</b>	
1. Scope	747
2. Policy considerations	747
3. The term causation	748
4. Causation by conduct	748
5. Causation by omission	748
6. Causation by a source of danger	749
7. Vicarious liability	749
8. Damage caused by animals and things	749
9. Connection between legally relevant damage, attributive cause and causation	750
10. Special rules	750
<b>B. Particulars</b>	
11. Cause in fact and cause in law not distinguished	751
12. No reduction to a “conditio sine qua non” formula	751
13. Elements of assessment	751
14. Break in the chain of causation	752
15. Self-harm of the victim; contributory fault	752
16. Causation of a legally relevant damage	753
17. Burden of proof	753
18. “Egg shell skull” (paragraph (2))	754

#### Notes

I. General theory of causation	755
II. Founding liability and determining the ambit (limits) of liability	763
III. Burden of proof	765
IV. The “egg shell skull” rule	769

**Article 4:102: Collaboration**

## Comments

1. Purpose	773
2. Scope	774
3. Relation to Article 4:103 (Alternative causes)	774
4. Relation to Article 6:105 (Solidary liability)	774
5. Collaboration	775
6. Members of a group	775
7. Participants	775
8. Instigators	775
9. Accessories	776

## Notes

776

**Article 4:103: Alternative causes**

## Comments

1. Relaxing requirements for establishing the chain of cause and effect	780
2. Policy considerations	781
3. General requirements	781
4. Different persons must be accountable	782
5. The damage must be caused by one of two or more occurrences	782
6. Defences	783

## Notes

783

**Chapter 5:  
Defences****Section 1: Consent or conduct of the person suffering the damage****Article 5:101: Consent and acting at own risk**

## Comments

<b>A. Chapter 5 in overview</b>	
1. The notion of defence	789
2. Five Sections	789
3. Further defences	790
<b>B. Consent (paragraph (1))</b>	
4. The basic principle	790
5. The injured person	790

6.	Non-contractual liability and contract	791
7.	Consent, acting at own risk and contributory fault	791
8.	Consent	791
9.	Consent as a defence against purposeful conduct	792
10.	Valid consent	792
11.	Lack of capacity	792
12.	Informed consent	793
13.	Illegality	793
14.	Benevolent interventions in another's affairs	793
<b>C.</b>	<b>Acting at own risk (paragraph (2))</b>	
15.	The basic idea	793
16.	Systematic considerations	793
17.	Knowing the risk of damage of the type caused	794
18.	Voluntary exposure to and acceptance of the risk	794
	Notes	
I.	Consent	795
II.	Acting at own risk	801

## Article 5:102: Contributory fault and accountability

### Comments

<b>A.</b>	<b>General</b>	
1.	Contributory fault, contributory fault of auxiliary persons and contributory sources of danger	808
2.	Reparation	808
3.	Contribution to the occurrence or extent of the damage	808
4.	Type of damage	808
5.	The mirror principle	809
6.	Exceptions	809
7.	Fault	809
8.	Children and mentally handicapped people	809
9.	Paragraph (2)	810
<b>B.</b>	<b>Contributory fault (paragraph (1))</b>	
10.	Fault contributory to the materialisation of the damage	810
11.	Reduction of liability	811
12.	Co-responsibility for the extent of the damage	811
<b>C.</b>	<b>Exceptions (paragraph (2))</b>	
13.	Insubstantial fault and causation	812
14.	Traffic accidents	812
15.	Policy considerations	813
16.	Gross negligence	813

D. Extension of the mirror principle to the law of strict liability (paragraphs (3) and (4))	
17. Contributory fault of employees	813
18. Contribution of a source of danger	813

## Notes

I. Contributory fault in causing the damage	814
II. The duty to mitigate damage	822
III. Contributory fault in road traffic accidents	827
IV. Reduction in liability where the 'strict liability' of the injured party contributes to the cause of the accident	831

**Article 5:103: Damage caused by a criminal to a collaborator**

## Comments

1. Ex turpi causa non oritur actio	837
2. Illegality	837
3. Burden of proof	838
4. Damage must be caused unintentionally	838
5. Collaborator	838
6. Reparation must be contrary to public policy	838

## Notes

839

**Section 2: Interests of accountable persons or third parties****Article 5:201: Authority conferred by law**

## Comments

1. General	841
2. Applicable to private persons only	841
3. Relation to other defences	841
4. Scope	841
5. Authority	842
6. Conferred by law	842
7. Limits	842

## Notes

842

**Article 5:202: Self-defence, benevolent intervention and necessity**

## Comments

<b>A. Three grounds of defence</b>	
1. Overview	847
<b>B. Self-defence (paragraph (1))</b>	
2. Protecting personal rights and interests and those of another	847
3. Endangerment	847
4. Reasonable protection	848
5. Self-defence against children	848
6. Putative self-defence and excessive self-defence	848
<b>C. Benevolent intervention in another's affairs (paragraph (2))</b>	
7. Benevolent intervention as a defence within the framework of the law on non-contractual liability	849
8. Without breach of the intervener's duties	849
<b>D. Necessity (paragraph (3))</b>	
9. Situations covered	849
10. Precedence of the interest defended over the legally protected interest	850
11. Imminent danger	850
12. Liability	850
13. Reasonable compensation	850

## Notes

I. Self-defence	851
II. Benevolent intervention	856
III. Necessity	857

**Article 5:203: Protection of public interest**

## Comments

1. Purpose of the rule	862
2. Protection of public interest	862
3. Fundamental to a democratic society	863

Notes	863
-------	-----

**Section 3: Inability to control****Article 5:301: Mental incompetence**

## Comments

<b>A. Policy considerations and overview</b>	
1. Options	872
2. The preferred solution	872
<b>B. Mental incompetence</b>	
3. Lack of insight	873
4. Temporary lack of insight	873
5. Instinctive reflex actions	874
<b>C. Recompense according to equity and fairness</b>	
6. Parallel comments	874
Notes	874

**Article 5:302: Event beyond control**

## Comments

<b>A. General</b>	
1. Event beyond control as a defence in the framework of strict liability	881
2. Accountability without intention or negligence	881
<b>B. Event beyond control</b>	
3. Notion	881
4. Two elements	882
5. Abnormal event	882
6. 'Not to be regarded as that person's risk'	882
7. Relationship to contributory fault	883
Notes	883

**Section 4: Contractual exclusion and restriction of liability****Article 5:401: Contractual exclusion and restriction of liability**

## Comments

<b>A. Exclusion and restriction of liability</b>	
1. Pre-emptive exclusion of liability	891
2. Exclusion and restriction of liability	891
3. Implied exclusion of liability	891
4. Contractual exclusions	892
5. Unilaterally imparted information	892
6. Freedom of contract	892
7. Basis	892
8. Exceptions	893
<b>B. No exclusion of liability for damage caused intentionally (paragraph (1))</b>	
9. Policy considerations	893
10. Employers' liability	893
11. Line of demarcation with consent and acting at own risk	893
<b>C. Exclusion of liability in cases of gross negligence (paragraph (2))</b>	
12. Personal injury (sub-paragraph (a))	894
13. "Gross negligence"	894
14. Other types of legally relevant damage (sub-paragraph (b))	894
<b>D. Product liability (paragraph (3))</b>	
15. No contractual exclusion of liability	894
<b>E. Paragraph (4)</b>	
16. Exclusion of liability in cases of ordinary liability in negligence	895
17. Unless contrary to statute	895
Notes	895

**Section 5: Loss within Article 2:202 (Loss suffered by third persons as a result of another's personal injury or death)****Article 5:501: Extension of defences against the injured person to third persons**

## Comments

1. Aim	902
2. Examples	902
Notes	902

## Chapter 6: Remedies

### Section I: Reparation in general

#### Article 6:101: Aim and forms of reparation

##### Comments

<b>A.</b>	<b>Chapter six in overview</b>	
1.	Reparation, compensation, prevention	907
2.	Overlap between reparation and prevention	907
3.	Relationship to Chapter 2	908
4.	Substantive law, not procedural law	908
<b>B.</b>	<b>The Article in overview</b>	
5.	Aim and forms of reparation	908
<b>C.</b>	<b>Restoration of the previous situation (paragraph (1))</b>	
6.	The principle of reparation	908
7.	Reparation in kind and full reparation	909
8.	No punitive damages	909
<b>D.</b>	<b>Damages in money or by other means (paragraph (2))</b>	
9.	General	909
10.	Reparation not in money	909
11.	Forms of reparation not mutually exclusive	910
<b>E.</b>	<b>Economic total loss (paragraph (3))</b>	
12.	An exception to paragraph (1)	910
13.	Animals	910
<b>F.</b>	<b>Recovery of profit instead of compensation of loss (paragraph (4))</b>	
14.	Siphoning-off of profits	911
15.	Systematical issues	911
16.	Relationship to the law of unjustified enrichment	911
17.	Commercial trademark rights and copyright	911
18.	Right of choice	912
	<b>Notes</b>	
I.	Nature and extent of the compensation	912
II.	The injuring party's gains as a basis for recovery	922



**Article 6:102: De minimis rule**

## Comments

- |                          |     |
|--------------------------|-----|
| 1. Policy considerations | 927 |
| 2. Trivial damage        | 928 |
| 3. Products liability    | 928 |

Notes	928
-------	-----

**Article 6:103: Equalisation of benefits**

## Comments

- |   |     |
|---|-----|
| 1. General  | 932 |
| 2. Policy considerations  | 933 |
| 3. Causation  | 933 |
| 4. Article 7:105 (Reduction or exclusion of liability to indemnified persons) | 933 |
| 5. Several liable parties   | 933 |
| 6. Case groups  | 934 |
| 7. Kind of damage   | 934 |
| 8. Examples   | 934 |
| 9. Nature of the accountability   | 935 |
| 10. Performance by a third party  | 935 |
| 11. Examples  | 935 |

Notes	935
-------	-----

**Article 6:104: Multiple persons suffering damage**

## Comments

- |  |     |
|--|-----|
| 1. Reparation to one person will also make reparation to another | 945 |
| 2. Damage and damages  | 945 |
| 3. Reference to Book III   | 946 |
| 4. Significance for the rules in this Book                       | 946 |

Notes	947
-------	-----

**Article 6:105: Solidary liability**

## Comments

**A. Solidary liability of multiple liable persons**

- |                          |     |
|--------------------------|-----|
| 1. Common European law   | 952 |
| 2. Policy considerations | 952 |

3. Terminology	952
4. Scope of application	952
<b>B. Internal allocation of liability</b>	
5. DCFR III	953
Notes	953

## **Article 6:106: Assignment of right to reparation**

Comments	
1. General	961
2. Policy considerations	961
3. Moral reservations obsolete	961
4. Assignability in specific cases	961
Notes	962

## **Section 2: Compensation**

### **Article 6:201: Right of election**

Comments	
1. General	967
2. Property damage	967
3. Other cases	967
Notes	967

### **Article 6:202: Reduction of liability**

Comments	
1. A rule subject to policy debate	971
2. No reduction of liability where damage is intentionally inflicted	971
3. Grounds for and prerequisites of a reduction of liability	971
4. The reduction clause in the overall system of these model rules	972
5. Scope	972
6. Extent of the reduction	972
Notes	973

**Article 6:203: Capitalisation and quantification** 977

## Comments

1. The Article in overview 978
2. Paragraph (1) 978
3. Good reason 978
4. Heads of compensation 978
5. Procedural issues 979
6. Paragraph (2) 979

Notes 979

**Article 6:204: Compensation for injury as such**

## Comments

1. Injury as such 986
2. A new concept 986

Notes 986

**Section 3: Prevention****Article 6:301: Right to prevention**

## Comments

1. Prevention is better than cure 991
2. Forms of prevention 991
3. Paragraph (1) 991
4. Reparation not an adequate remedy 992
5. Paragraph (2) 992

Notes 993

**Article 6:302: Liability for loss in preventing damage** 998

## Comments

1. Fundamentals 999
2. Systematic significance 999
3. Reasonably incurred expenditure 1000

Notes 1001

**Chapter 7:  
Ancillary rules****Article 7:101: National constitutional laws**

## Comments

1. Chapter 7 in overview 1005
2. Article 7:101 1005

## Notes

1006

**Article 7:102: Statutory provisions**

## Comments

1007

## Notes

1008

**Article 7:103: Public law functions and court proceedings**

## Comments

1. Relationship with DCFR I.-1:101(2) (Intended field of application) 1010
2. Person or body exercising public law functions 1010
3. Performing duties during court proceedings 1011

## Notes

1011

**Article 7:104: Liability of employees, employers, trade unions and employers' associations**

## Comments

1. General 1019
2. Individual labour law 1020
3. Collective labour law 1020

## Notes

1020

**Article 7:105: Reduction or exclusion of liability to indemnified persons**

## Comments

1027

1. Channelling of liability 1027
2. Examples 1028

## Notes

1028

**Annexes**

Abbreviations	1035
Table of Codes and Statutes	1079
Table of Cases	1169
Table of Treaties and Enactments of the European Union	1189
Table of Literature Cited in Abbreviated Form	1193
Index	1249