

Solatium Doloris in the Austrian Legal Framework

– The Search for Objective Criteria –

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Structure

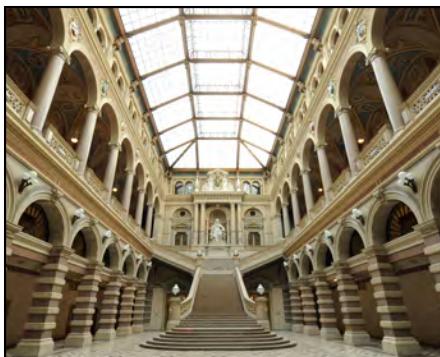
- Non-Pecuniary Loss (in general)
- Compensation for Pain and Suffering
- Assessment of Damages/Damages' Awards
- Special Topics (Comatose Victims, Relatives and Third Parties)

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Non-Pecuniary Loss

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Historical Background



- originally: Austrian Supreme Court (OGH) was relatively **broadminded**
- around 1900
 - influence of § 253 of the new German Bürgerliches Gesetzbuch
 - **result** in 1908
 - non-pecuniary loss only indemnified in cases provided expressly by statute

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Statutes regulating Compensation of Non-Pecuniary Loss

- large number, e.g.
 - § 1325 ABGB
 - damages for **pain and suffering** in case of **bodily injury**
 - § 1328 ABGB
 - damages for the impairment by violation of **sexual self-determination**
 - § 1331 ABGB
 - compensation for **sentimental value** if damage to **property**
- provisions are **not based** on **methodical** and consistent **concept**
- arbitrary, inconsistent accumulation due to historical and political **coincidences**

Doctrine vs Supreme Court

- against the Supreme Court – **prevailing doctrine**
 - existence of a general rule concerning compensation of non-pecuniary loss
 - §§ 1323 and 1324 ABGB

§ 1323 In order to compensate for damage caused, everything must be returned to its previous state, or, if this is inappropriate, the estimated value must be reimbursed. If compensation relates only to the damage suffered, it is termed actual indemnification; insofar as it also includes lost profit and reparation of the offence suffered, it is termed full satisfaction.

§ 1324 If damage was caused through malicious intent or conspicuous negligence, the person harmed is entitled to claim full satisfaction; otherwise, he can only claim actual indemnification. Pursuant to this, when the law uses the general expression compensation, it falls to be assessed which type of compensation is to be provided.

- a tortfeasor who acted **grossly negligently** must compensate not only the actual loss and the lost profits but also is under obligation of '**Tilgung der verursachten Beleidigung**', which means to **extinguish the caused insult**
- interpretation of legal scholars
 - general clause providing compensation of **non-pecuniary loss** in cases of **gross negligence or intent**
- Note: **modification** of principle by some **special rules**
 - **extension** (*c.f. § 1325 ABGB*)
 - **restriction** (*c.f. § 1331 ABGB*)
 - **exclusion** (*c.f. § 1330 ABGB*)

Comparison Pecuniary and Non-Pecuniary Loss



- *prima vista*, Austrian legal system restricts compensation for non-pecuniary loss much more than for pecuniary loss
 - compensation of **non-pecuniary loss** only in case of **gross negligence or intent**
 - compensation of **pecuniary loss** even in the case of **slight negligence**
- however, non-pecuniary interests **not of inferior quality**
- explanation (why, then?):
 - difficulties of **compensation** in money for **immaterial damage**
 - assessment of non-pecuniary interests in monetary terms
 - non-pecuniary damage depends on individual conditions
 - hardly measurable – **unless there are some objective clues**

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§ 1325 Whosoever injures a person's body must bear the costs of healing and compensate him for lost earnings, and, if the person harmed loses his earning capacity, also for the loss of future earnings, and moreover has to pay, on demand, damages for pain and suffering that are adequate in the circumstances.

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- §§ 1323, 1324 ABGB: no referral to various categories of immaterial damage
 - only 'Tilgung der verursachten Beleidigung' in cases of **gross negligence or intent**
- however
 - in case of **bodily injury** (§ 1325 ABGB)
 - tortfeasor has to compensate for pain and suffering even if he/she only acted **slightly negligently**
 - **reason:**
 - right of bodily integrity is of very high rank
 - **objective clues** about the seriousness of harm

Importance of Non-Pecuniary Damage Awards

- injured party's point of view: compensation of non-pecuniary loss is of **immediate importance**
 - **loss of income** is (quite often) covered by the employer's continued **payment of wages**
 - the **costs of healing** are usually paid by **medical insurers/social insurance**
 - compensation for pain and suffering (often) the only amount paid directly to the injured party by the tortfeasor
- nobody is contemplating the abolition of compensation for pain and suffering
- common opinion: **indemnification** of **non-pecuniary loss** is an absolutely indispensable completion of the protection of the highest ranking goods

Intermediary Result

- general rule in §§ 1323, 1324 ABGB
- compensation in money for non-pecuniary loss depends on the rank of the legal interest
- **existence of objective clues to indicating the extent of the harm**

Compensation for Pain and Suffering

– Solatium Doloris –

Compensation for Pain and Suffering

- in case of **bodily injury**
 - (even) if the tortfeasor acted **slightly negligently** (§ 1325 ABGB)
 - when strict liability is given
- **bodily injury**
 - any negative effect on the bodily or spiritual health and integrity
 - broad concept of bodily injury (including injury to health) is implemented in § 1325 ABGB (which only mentions 'injury of the body')
- even **mere mental detriment** (without any interference with bodily integrity)
when infringement of **health**
 - psycho-traumatic suffering (when qualified as illness)

Examples for pain and suffering

- malfunction of brain or nerves
- nervous lesion and shattering of the nerves
- insomnia
- state of excitement and headache
- severe effect on the mental sphere
- arousing a specific situation of stress which has to be qualified as illness (shock)
- depressions, neurosis and psychosis
- **Note:**
 - Whether **psychological** injury (qualified as **illness**) **causes bodily injury** is **not decisive!**
 - **psychological health** is protected by § 1325 ABGB
 - e.g. noise pollution, telephone terrorism are covered (provided that the aggrieved party's **health** has been affected)

Awareness of Reduction of Life Expectancy

- If the injured party is aware that life expectancy is shortened
- emotional strain has to be taken into consideration in assessing damages
- **reason:** damages for pain and suffering designed to compensate all physical and mental pains caused by the bodily injury, including
 - grief over reduced life expectancy
 - fear of uncertain recovery
 - only exception: **instantaneous death**

Sense of Fear

- sense of fear **suffered before** bodily injury or death is a recoverable damage provided that the sensation has to be qualified as **illness**
- If injury to health is **not** given, such a sense of fear before the occurrence of the bodily injury does not meet the requirements of § 1325 ABGB
 - victim's fear is not caused by the bodily injury, but by the exposure to danger
- **doctrine:** in analogy to § 1325 ABGB in connection with §§ 1323, 1324 ABGB, such sensation of fear to be taken into account in assessing damages for pain and suffering if the tortfeasor caused the exposure to danger **grossly negligently or wilfully**

Measurement of Pain and Suffering

- **damages** (always!) aim at **compensation** (not punishment)
- hence: damages for pain and suffering as well have the function of compensation
 - cover the whole area of pain
 - compensation of the feeling of being wronged
 - putting the victim in a position to find **some amenities** and **facilitations** as an equalisation for the suffering and **lost joie de vivre**
- Decisive – the **whole complex** of sensations of pain
 - **duration** and **intensity** of the pain
 - **seriousness** of the injury
 - extent of the **physical and psychological reduction** of the state of health
 - emotional **strain** (e.g. owing to deformation)
- **compensation: feeling of inferiority, restoration of inner harmony**

Objective Standards

- problem: individual **proneness to harm** of victim
 - impossible to ascertain to which extent the concrete victim suffered physically/emotionally
- objective clues (again!) when adjusting the amount of damages
 - **seriousness of the injury**
 - extent of **hindrance** of the victim's **way of life**
 - **tertium comparationis:** person with a **normal emotional** life in the **situation of the victim**
- **not** considering the victim's individual ability and willingness to be compensated
- instead: which amenities the injured party can **typically** obtain with the awarded amount

Damages Awards

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Assessment of Damages for Pain and Suffering



- no fixed **statutory sums** – but '**judicial tariffs**' for bodily injuries
- (often) **day rates** according to the different levels of pain
- Note: **Supreme Court** disapproves of this method and insists on an **overall assessment**
- (nevertheless, the day rates are very helpful for calculation)
 - importance for less serious injuries, e.g. physical problems
 - **less important with serious** victim's psychological **harm**
 - **serious injuries** (long-lasting consequences) day rates do not provide qualified indications for calculating compensation for pain and suffering

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Degree of the Tortfeasor's Fault

- the degree of the tortfeasor's fault **not decisive** for the amount of indemnification
- however, it has to be considered whether a **particularly serious** fault has **enlarged** the **non-pecuniary loss**

General amounts

- amounts of damages for pain and suffering criticised as being too low
- noticeable increase in the last **25 years**
- 1992: amount of damages for pain and suffering subject of a **parliamentary question**
- observation of **minister of justice**
 - amounts adjudicated in Austria **below the West European average**
 - **minor** and **moderately severe** injuries rather **considerable amounts**
 - somewhat **reserved** in cases of **very serious** injuries

Judicial Control of Awards

- (in principle) awards controllable on appeal as well as in cassation
- But: the **amount of damages for pain and suffering** depends on the individual case
- usually is **not** a 'substantial point of law'
- therefore, is **not controllable** in cassation by the Supreme Court
- **exceptions** (cassation by the Supreme Court is permissible):
 - assessment of damages for pain and suffering is a **glaring mistake** and entirely departs from the ordinary Supreme Court's ruling
 - if the **court of appeal** adjudicates a **higher amount** than the one awarded thus far by the Supreme Court

Special Topics

- Comatose Victims, Relatives & Third Parties –

Comatose Victims

- problem: claimant is **not sensitive to pain**/no restoration of inner harmony
- OGH: injured person may recover damages for non-pecuniary loss even if comatose; victim entitled to compensation because of severe **impairment of personality**
- damages (nearly) the same as for sentient plaintiff with the same physical injuries
- **Objective clues:**
 - objective method of assessment
 - compensation calculated solely on the **basis of the injury**
 - subjective circumstances are of no relevance (victim does not feel mental distress)

Comatose patients (cntd)

- where victim suffered great pain before dying as a consequence of the bodily injury, his estate can claim compensation for this immaterial damage
 - the claim for compensation for pain and suffering is hereditary
- where death is **instantaneous**, there is
 - **no claim**
 - victim was **never aware** of his **reduced life expectancy**
 - **no emotional strain**

Third Parties' 'Emotional Shock'

- e.g. **watching or hearing** of a very severe accident **involving relatives** (or others: **strong emotional bonds**)
- **own** claim of **bodily injury**, i.e. for **compensation** of pain and suffering
- qualification of shock as **injury to health** (= psychological injury)
 - contrary to the view of the German Supreme Court
 - no normative restriction of the notion of bodily injury regarding 'distant damage'
 - only problem: **dividing line** between parties entitled
 - solution: precise prerequisites for the liability of the tortfeasor
 - here: **wrongfulness** and violation of duty of care

Claims of Relatives

- claims of the relatives of the victim are possible in addition to the victim's claim
- same rules apply as to the cases of mental shock of third persons (see *infra*)
- regardless of whether the victim's death is instantaneous or not
 - the relatives have a claim if they suffer a **psychological injury** (qualifying as illness)
 - no claim if no injury to health
 - minority opinion: award compensation for the emotional harm (analogy to § 1327 ABGB)

AUSTRIA

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1. Civil Code²

Part II | Section 2 | Chapter 30 Of the Law of Compensation and Satisfaction

Damage

§ 1293 Damage means every loss inflicted upon the patrimony, rights or person of another. To be distinguished from it is the loss of profit the other can expect according to the normal course of events.

Sources of Damage

§ 1294 Damage arises either from another person's unlawful act or omission or from chance. Unlawfully inflicted damage is caused either voluntarily or involuntarily. The voluntary infliction of damage is based either on malicious intent, if the damage is caused knowingly and willingly; or on negligence, if the damage was caused by culpable ignorance, or by a lack of proper care or diligence. Both are to be termed fault.

1 I would like to thank Ken Oliphant for his most useful comments. Moreover, I would like to draw readers' attention to two drafts for reforming Austrian tort law published in recent years. Translations of the drafts, and of a revised version of the first of them can be found as annexes to the Austrian reports in Yearbooks 2005, 2007 and 2008 (*H Koziol/BC Steininger* (eds), European Tort Law 2005, 142 ff; *H Koziol/BC Steininger* (eds), European Tort Law 2007, 158 ff; *H Koziol/BC Steininger* (eds), European Tort Law 2008, 138 ff; all translated by F Salter-Townshend).

2 *Allgemeines Bürgerliches Gesetzbuch* (ABGB), enacted on 1 June 1811. Available online in German at <<http://www.ris.bka.gv.at/bundesrecht>>. For alternative English translations of the entire ABGB see *J v Winiwarter*, General Civil Code for all the German Hereditary Provinces of the Austrian Monarchy (1866) and *P Baeck*, The General Civil Code of Austria (1972).

Of the Obligation to Compensate

1. Of Culpably Inflicted Damage

§ 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.

§ 1296 In case of doubt, it is presumed that damage occurred without fault on the part of another.

§ 1297 It is also presumed that every person of sound mind is capable of exerting the degree of diligence and care that can be applied by a normally competent person. Whosoever fails to attain this degree of diligence and care in the course of acts causing prejudice to another person's rights is guilty of negligence.

§ 1298 Whosoever claims to have been prevented from fulfilling his contractual or statutory duties without fault on his part has the burden of proof thereof. If, by reason of a contractual agreement, he is liable only for gross negligence, he also has to prove its absence.

In Particular

a) Experts

§ 1299 Whosoever publicly professes an office, art, business or craft, or voluntarily and without necessity undertakes a task the execution of which requires particular expertise or extraordinary diligence, thereby holds himself out as capable of the necessary diligence and the extraordinary expertise required; he is therefore liable for their absence. If, however, the person assigning the task to him knew about his inexperience, or ought to have known about it had he exerted proper care, the latter is also guilty of negligence.

§ 1300 An expert is also liable if, for payment, he negligently gives 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.

Or

b) **Multiple Participants**

§ 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.

§ 1303 The extent to which several joint debtors are liable for merely omitting to comply with their obligation is to be assessed on the basis of the nature of the contract.

§ 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.

2. **Through Exercise of a Right**

§ 1305 Whosoever exercises his right within the limits established by the law (§ 1295, para 2), is not liable for the harm thereby caused to another.

3. **Through Blameless or Involuntary Acts**

§ 1306 A person is generally not liable for the damage he has caused without fault or through an involuntary act.

§ 1306a If a person, in a situation of necessity, causes damage to avert imminent danger to himself or another, the judge has to decide whether

er and to what extent the damage has to be compensated, thereby taking into account whether the person harmed refrained from a defence out of consideration for the imminent danger to the other, the relation between the extent of the damage and the danger and lastly, the financial means of the injurer and of the person harmed.

§ 1307 If a person culpably places himself in a state of mental disorder or necessity, the damage he causes in such state is also attributed to his fault. The same applies to a third party who has culpably caused the injurer to be in such a state.

§ 1308 If persons of unsound mind or minors under the age of 14 harm another person, who himself induced the injury through any fault on his part, he is not entitled to compensation.

§ 1309 Excepting such a case, he is entitled to compensation from those to whom the damage can be attributed on account of the neglect of their supervisory duties towards such persons.

§ 1310 If the person harmed cannot obtain compensation in such a manner, the judge shall award complete compensation, or an equitable part thereof, taking into account whether some fault can be imputed to the injurer under the particular circumstances notwithstanding the fact of him normally not having capacity; or whether the person harmed refrained from a defence out of consideration for the injurer; or, lastly, the financial means of the injurer and of the person harmed.

4. Through Accident

§ 1311 A pure accident is to be borne by whoever it is in whose patrimony or person it occurs. If, however, someone caused the accident culpably, if he violated a legal norm aiming at the prevention of harm by accident, or if he intervened in another's affairs without necessity, he is liable for all harm which would not otherwise have occurred.

§ 1312 Whosoever has rendered someone else a service in an emergency is not responsible for the damage he did not prevent, unless he culpably impeded another who would have done yet more from doing so. But even in such a case he can set off against the damage any benefit he definitely provided.

5. Through Acts of Third Persons

§ 1313 One is generally not responsible for unlawful acts of third persons in which one has had no part. Even in those cases in which the law provides the contrary, such person is entitled to recourse from the culprit.

§ 1313a Whosoever is under an obligation of performance to another is liable towards such person for the fault of his legal representative, and of persons he engages to perform the obligation, as if it were his own fault.

§ 1314 Whosoever takes into his service a person who is lacking in certification or knowingly keeps a person in his service who is dangerous due to his bodily or mental condition, or accommodates such person, is liable to the landlord and housemates for compensation of any damage caused by the dangerous nature of such person.

§ 1315 Whosoever, for the procurement of his affairs, avails himself either of an unfit person, or knowingly of a dangerous person, is liable for the harm such person causes to another in such capacity.

§ 1316 Innkeepers accommodating strangers, as well as the other persons identified in § 970, and moreover waggoners are liable for the loss their own servants or servants assigned by them cause to a guest or traveller in their house, establishment or vehicle by damaging things brought in or taken on.

§ 1317 The extent to which there is liability on the part of public postal service institutions is determined by specific regulations.

§ 1318 If a person is harmed by a dangerously suspended or positioned object falling down, or through something being thrown or poured out of an apartment, the person out of whose apartment it was thrown or poured, or from which the object fell, is liable for the damage.

6. Through a Building

§ 1319 If a person is injured or some other harm is caused through the collapse or the detachment of parts of a building or of any other structure erected on land, the possessor of the building or structure

is liable for compensation if the event was a consequence of the structure's defective condition and he cannot prove that he exercised all care necessary to avert the danger.

6a. Through a Road

§ 1319a (1) If a person is killed, or sustains injury to his body or health, or if a thing is damaged through the defective state of a road, whoever is responsible for the proper state of the road as its keeper is liable for compensation of the harm, provided that he or one of his staff caused the defect intentionally or with gross negligence. If damage was caused in the course of an illicit use of the road, in particular a use falling outside the scope of its designated usage, and if the fact of the use being illicit was clear for the user either from the type of the road or through appropriate prohibition signs, a barrier or some other boundary, the person harmed cannot invoke the road's defect.

(2) A road in the sense used in para 1 is an area of land which may be used by everyone under the same conditions, for traffic of every kind or for specific types of traffic, even if it is only designated for a restricted group of users; a road also includes structures in its path that serve traffic, such as in particular bridges, supporting and lining walls, apertures, ditches and plantations. Whether the state of the road is defective depends on what is adequate and reasonable for its construction and maintenance in consideration of the type of the road, especially its designated usage.

(3) If the defective condition was culpably caused by the staff of the person liable, they too are liable only in the case of intent or gross negligence.

7. Through an Animal

§ 1320 If someone is harmed by an animal, the person who incited it to do so, or irritated it, or neglected to keep it safe, is responsible. The keeper of the animal is responsible if he does not prove that he provided for the required safekeeping or supervision.

§ 1321 Whosoever comes across someone else's livestock on his land is not entitled to kill it on that account. He may chase it away with appropriate force, or, if he has suffered damage from it, he may exercise

the right of private seizure over as many head of stock as is required for his compensation. He must, however, either settle the issue with the owner within eight days or bring his claim before a judge, failing which he must return the seized stock.

§ 1322 The seized stock must be returned if the owner provides for another adequate security.

Types of Compensation

§ 1323 In order to compensate for damage caused, everything must be returned to its previous state, or, if this is inappropriate, the estimated value must be reimbursed. If compensation relates only to the damage suffered, it is termed actual indemnification; insofar as it also includes lost profit and reparation of the offence suffered, it is termed full satisfaction.

§ 1324 If damage was caused through malicious intent or conspicuous negligence, the person harmed is entitled to claim full satisfaction; otherwise, he can only claim actual indemnification. Pursuant to this, when the law uses the general expression compensation, it falls to be assessed which type of compensation is to be provided.

In Particular:

1. Bodily Injury

§ 1325 Whosoever injures a person's body must bear the costs of healing and compensate him for lost earnings, and, if the person harmed loses his earning capacity, also for the loss of future earnings, and moreover has to pay, on demand, damages for pain and suffering that are adequate in the circumstances.

§ 1326 If the person injured was disfigured by the maltreatment received, this must be taken into account insofar as the victim's future prospects are thereby adversely affected, particularly when she is of female sex.

§ 1327 If bodily injury results in death, not only must all expenses be compensated, but also what is lost thereby by the surviving dependants for whose maintenance the deceased was obliged to provide by law.

1a. Violations of Sexual Autonomy

§ 1328 A person who abuses another either through sexual intercourse or any other sexual act procured by criminal conduct, or otherwise by deceit, threat or exploitation of a relation of dependency or authority, must compensate the actual damage suffered and the lost profit, and provide appropriate compensation for the encroachment suffered.

1b. Violations of the Right to Protection of the Private Sphere

§ 1328a (1) Whoever unlawfully and culpably invades a person's private sphere, or discloses circumstances from a person's private sphere or exploits them, is liable to compensate the damage thus arising. In case of serious violations of the private sphere, for instance if circumstances relating to it are exploited in a manner apt to discredit the person in public, the compensation claim shall also include an indemnity for the personal encroachment suffered.

(2) Para 1 is not applicable if the violation of the private sphere is to be assessed according to special provisions. Responsibility for violations of the private sphere by the media depends exclusively on the provisions of the Media Act, BGBL³ no 314/1981, as amended.

2. Violations of Personal Liberty

§ 1329 Whosoever deprives a person of his liberty through violent abduction, private seizure, or intentionally through unlawful arrest, is obligated to restore the person harmed to his previous liberty and to provide full satisfaction. If he can no longer restore liberty, he has to compensate the surviving dependants, in the same way as in the case of homicide.

3. Violations of Honour

§ 1330 (1) If a person has suffered actual loss or loss of profit through defamation, he is entitled to claim compensation.

3 *Bundesgesetzblatt*, Austrian Federal Law Gazette. Available online at <<http://www.ris.bka.gv.at/Bgbl-Pdf/>>.

(2) This also applies if someone divulges facts which endanger the credit, earnings or prospects of another when he knows or ought to have known of their untruthfulness. In such case revocation and its publication may also be demanded. For communications made in private, when the person making the communication does not know of its untruthfulness, he is not liable provided that the recipient of the communication had a legitimate interest in it.

4. Patrimonial Damage

§ 1331 If a person's patrimony is damaged through intent or conspicuous negligence of another, he is also entitled to claim lost profits and, if the damage was caused through an act forbidden by criminal law, or through wantonness and spitefulness, such value as is attributable to his particular preferences.

§ 1332 Damage which was caused through a lower degree of negligence or carelessness is compensated according to the ordinary value of the thing at the time of the damage.

§ 1332a If an animal is injured, the costs of healing or attempted healing that were actually incurred are due even if they exceed the animal's value, insofar as they would have been incurred by a rational keeper of animals in the position of the person harmed.

Part III | Chapter 4 Of Prescription and Adverse Possession

§ 1489 Compensation claims prescribe within three years starting from the time when the person harmed becomes aware of the damage and the identity of the injurer, whether the damage was caused by the breach of a contractual duty or independently of any contract. If the person harmed has not become aware of the damage or the identity of the injurer or if the damage arose from one or more criminal offences, which can only be committed intentionally and are punishable with imprisonment of more than one year, the claim only expires after 30 years.

2. Railway and Motor Vehicle Liability Act⁴

Scope of Application

§ 1 If a person is killed, or sustains injury to his body or health, or if a thing is damaged, through an accident in the operation of a railway or motor vehicle, the damage arising therefrom shall be compensated according to the provisions of the current Federal Act.

§ 3 In the case of death or injury of a person transported by a railway or motor vehicle this Federal Act is not applicable with regard to the transporting railway or motor vehicle in as far as the person harmed was, at the time of the accident

1. transported by the railway without the carrier's consent and without the latter receiving any, albeit inappropriate, remuneration or
2. transported by the motor vehicle without the keeper's consent or
3. taking part in the operation of the railway or motor vehicle.

§ 4 (1) In the case of damage to a thing transported by a railway or motor vehicle, this Federal Act is applicable in respect of the transporting railway or the transporting motor vehicle only insofar as the thing was, at the time of the accident, either carried as hand luggage or on the person of the passenger towards whom application of the current Federal Act is not excluded according to § 3.

(2) This Federal Act is not applicable in respect of things which were, at the time of the accident, accepted for transport or custody by the railway.

Liability

§ 5 (1) In the case of railways, the operator is liable for compensation of the damage mentioned in § 1; in the case of motor vehicles the keeper is liable.

4 *Eisenbahn- und Kraftfahrzeughaftpflichtgesetz* (EKHG). Available online in German at <<http://www.ris.bka.gv.at/bundesrecht>>. The EKHG provides for different caps in §§ 15 and 16, which are not included in the present translation.

(2) Several operators of the same railway and several keepers of the same motor vehicle are jointly and severally liable.

§ 6 (1) If a person, at the time of the accident, used the railway without the consent of the operator or the motor vehicle without the consent of the keeper, he is liable for compensation of damage in the place of the operator or keeper. In addition, the operator or keeper remains liable for compensation of the damage if the use of the railway or motor vehicle was facilitated through his fault or that of such persons as took part in the operation of the railway or the operation of the motor vehicle with his consent.

(2) Para 1 does not apply if the user was employed by the operator or keeper in the operation of the railway or the operation of the motor vehicle or if he was entrusted with the railway or the motor vehicle by the operator or keeper. Liability of such a user on the basis of general civil law is excluded if he proves that the damage was not caused through his fault.

(3) User in the sense of para 1 and 2 is anyone who arrogates the use of the railway as such or the motor vehicle as such with the aim of taking control.

§ 7 (1) If fault on the part of the person harmed contributed to the occurrence of the damage, § 1304 of the Civil Code is to be applied.

(2) Fault on the part of the person harmed is equated, in the case of death, to fault on the part of the deceased and, in the case of damage to a thing, to fault on the part of the person exerting factual control over the thing.

§ 8 (1) If the damage was caused by several railways or several motor vehicles or by one or several railways and one or several motor vehicles, the person harmed may address his compensation claims to anyone involved in the accident, unless his liability is excluded according to the provisions applicable to his compensation duty.

(2) If, in a case falling under para 1, several parties of different railways or motor vehicles are liable alongside each other, their liability is joint and several; however, none of the several operators or keepers is liable beyond the caps applicable to him except in the case of fault.

Exclusion of Liability

§ 9 (1) Liability is excluded if the accident was caused by an unavoidable event which was due neither to a defect in the condition nor to a malfunction in the apparatus of the railway or motor vehicle.

(2) An event is considered unavoidable in particular if it was caused by the conduct of the person harmed, a third party not employed in the operation or an animal, provided that the operator or keeper as well as the persons employed with his consent in the course of the operation exerted all care due according to the circumstances of the case and that the accident was not directly caused by an exceptional operational danger brought about by a third party not employed in the operation or by an animal.

§ 9a The operator of a drag lift is only liable for damage emanating from the condition of the drag-lift track in the case of fault on his part or on the part of his staff.

§ 10 The operator's or keeper's obligation to compensate persons transported for value in respect of death or injury may not be excluded or limited in advance; agreements to the contrary are null and void.

3. Public Liability Act⁵

Section I: Liability

§ 1 (1) The Federation, provinces,⁶ districts, municipalities, other public law corporations and social insurance agencies – referred to as legal entities in the following – are liable according to the provisions of civil law for the damage to patrimony or the person which persons acting as their organs in execution of the law have culpably inflicted upon whomsoever through unlawful conduct; the organ is not liable towards the person harmed. Damage is to be compensated only monetarily.

5 Amtshaftungsgesetz (AHG). Available online in German at <<http://www.ris.bka.gv.at/bundesrecht>>. An alternative translation of the entire Act is available online at <<https://www.ris.bka.gv.at/Englische-Rv/>>.

6 The Austrian Federation comprises nine provinces (*Länder*).

(2) Organs in the sense intended by this Federal Act are all natural persons when they are acting in execution of the law (jurisdiction or administration), no matter whether they are appointed permanently or temporarily or for the particular case, whether they are elected, designated or otherwise appointed organs and whether their relation to the legal entity is to be assessed according to public or private law.

(3) The legal entity of which the acting person was elected, designated or otherwise appointed organ is jointly and severally liable with the legal entity mentioned in para 1. If this legal entity has made any payments on the basis of this liability, it has a right of recourse against the legal entity mentioned in para 1.

§ 2 (1) When claiming compensation it is not necessary to name a specific organ; proof that the damage could only have occurred due to wrongdoing on the part of an organ of the defendant legal entity will suffice.

(2) No compensation claim exists if the person harmed could have averted the damage by exercising a right of appeal or review or by a complaint to the Administrative Court.

(3) No compensation claim may arise from a decision of the Constitutional Court, the Supreme Court or the Administrative Court.

§ 6 (1) Compensation claims according to § 1 para 1 prescribe within three years after expiry of the day on which the person harmed became aware of the damage, but in no case earlier than one year after the entry into force of the decision or enactment bringing about the infringement. If the plaintiff has not become aware of the damage or if the damage arose from a criminal offence, which can only be committed intentionally and is punishable with imprisonment of more than one year, the compensation claim only prescribes after 10 years from the emergence of the damage. [...]

(2) Recourse claims according to § 1 para 3 and § 3 prescribe within six months after expiry of the day on which the legal entity acknowledged the compensation claim vis-à-vis the person harmed or was condemned to pay compensation by a final decision.

Ken Oliphant/Babara C Steininger

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18 Isabelle C Durant

§ 2 The driver of a motor vehicle and his beneficiaries shall be paid to those persons who incurred the damage.

§ 3 'Motor vehicle' means any vehicle covered by article 3 with the exception of motorised wheel-chairs suitable for circulation by a handicapped person.

§ 4 The insurer or Motor Accident Compensation Fund to the victim in his rights against third parties shall ordinary law.

§ 5 Damages paid in execution of the present provision may be reduced by a view to pay other damages due to accident.

§ 6 Civil liability rules remain applicable for everything covered by the present provision.

4 Act of 10 February 2003 Concerning the Function of and for Members of Staff Serving Public Bodies⁷

Art. 2 Members of the staff serving a public legal body governed by statute, in case of damage caused by them of their functions to the public legal body or to third parties for fraud and gross negligence. They are responsible negligently only if this represents for them a usual accidental characteristic.

Art. 3 Public legal bodies are liable for the damage parties by members of their staff in the exercise of the same way as principals are liable for the damage agents, and this is the case both when the situation

(3) Costs of medical treatment and costs associated with the exercise of tasks falling within the scope of public authority shall be paid to those persons who incurred the damage.

§ 449a Compensation for future claims Future claims can be compensated by a lump-sum payment based on the agreement and the obliged party can fill and final settlement. The same shall apply to future claims.

§ 450 Compensation clauses In cases requiring special consideration how the damage occurred as well as the circumstances and property of the person who inflicted the damage, the court may reduce compensation for damage. A reduction of compensation is not possible if the damage inflicted was caused intentionally.

§ 451 Compensation clauses In cases requiring special consideration how the damage occurred as well as the circumstances and property of the person who inflicted the damage, the court may reduce compensation for damage. A reduction of compensation is not possible if the damage inflicted was caused intentionally.

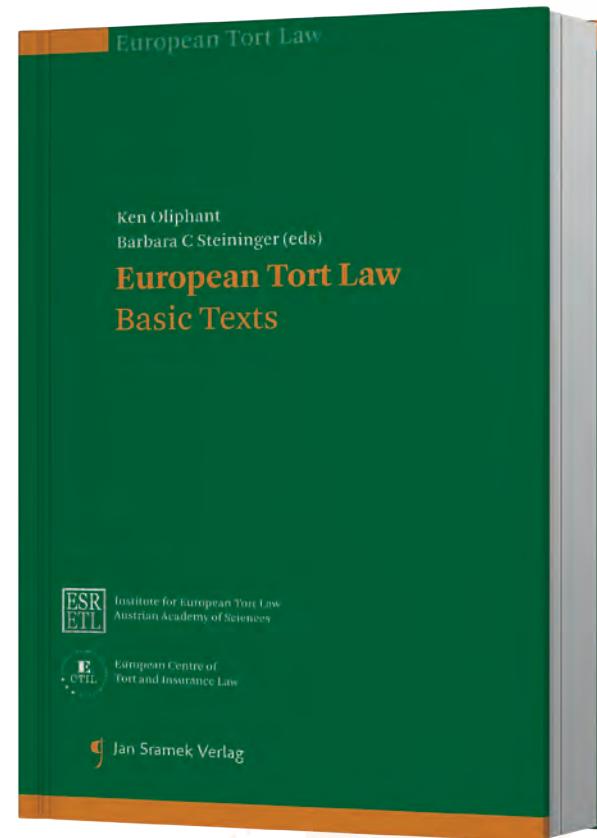
2 Commercial Code⁸

Part VIII | Third Section | Compensation for Damage

§ 373 Damage A person who breaches a duty arising from a relationship is obliged to provide compensation for damage to the other party, unless he proves that such a breach was not foreseeable at the time when he undertook to perform a task.

§ 374 Circumstances excluding liability (1) A circumstance which entirely or partially relieves the defendant of his responsibility for his negligent conduct, provided that it can be expected that he could avert or overcome such an obstacle, and further that the occurrence of such an unforeseeable at the time when he undertook to perform a task result in the exclusion of liability.

2 Act No 533/1993 Coll. Commercial Code (zákon č. 533/1993 Sb., obchodní zákoník). Available online in Czech at: <http://portal.gov.cz/wps/portal/ks/533/1993/>. A freely available English version of the Code which can be found at: www.csbc.org/.



POLAND 193

§ 2 If the exercise of tasks falling within the scope of public authority was delegated to a local authority or to a legal person by way of agreement, both the performer of the task and the State Treasury or the local authority who delegated the task are liable and their liability is joint and several.

Art. 417 § 1 If damage is caused as a result of the passing of a legitimate enactment, compensation may be demanded only after the enactment has been declared void following proper proceedings on the ground of its unconstitutionality or non-conformity with an international agreement or with statutory law.

§ 2 If damage is caused as a result of the rendering of a valid judgment or a final decision, compensation may be demanded only after the illegality of the respective judgment or decision has been declared in proper proceedings, unless special rules provide otherwise. This shall also apply to a case where a valid judgment or a final decision was rendered on the basis of a legislative act which was found not to conform to the Constitution or an international agreement or a statute.

§ 3 If damage is caused as a result of the breach of a legal duty to render a judgment or decision, compensation may be demanded only after the illegality of the failure to render the respective judgment or decision has been declared in proper proceedings, unless special rules provide otherwise.

§ 4 If damage is caused as a result of the breach of a legal duty to issue a legislative enactment, the court hearing the claim for compensation shall determine the illegality of the omission to issue the respective act.

Art. 411 The provisions of art. 417, art. 417^a and art. 417^b shall not apply if liability for damage resulting from the exercise of public authority is governed by special provisions.

Art. 412 Not only is the person who directly causes damage liable, but also anyone who induces or helps another person to cause the damage, as well as anyone who consciously benefited from damage caused to another person.

Art. 413 A person who acts in self-defense to resist a direct and unlawful attack on any of his interests or those of another person shall not be liable for the damage caused to the assailant.

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