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TORT LAW SYSTEMS IN SELECTED COUNTRIES

This report provides an overview of tort law systems or comparable legal provisions in Brazil, China, England & Wales, France, Germany, India, Italy, Japan, and Russia.

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BRAZIL

TORT LAW SYSTEM

Executive Summary

In cases of moral or patrimonial damage, Brazilian constitutional principles grant victims the right to obtain reparation, while infra-constitutional laws like the Consumer Protection and Defense Code and the Civil Code offer a detailed set of rules in regard to the civil liability of the offenders and the respective punishments.

I. Legal Framework

The closest concept under Brazilian law to the common law notion of torts is that of “civil responsibility” (*responsabilidade civil*),¹ which encompasses a range of wrongs and liabilities, both civil and criminal, that are set forth by statutory law. The consequences for these wrongs can be found, depending on the situation, in several laws, including the Brazilian Consumer Protection and Defense Code (*Código de Proteção e Defesa do Consumidor – CDC*) and the Civil Code (*Código Civil – CC*). The Brazilian Constitution guarantees the right to reparations for such wrongs, as discussed below.

¹ “Civil liability” (*responsabilidade civil*) is defined as the application of measures requiring someone to repair moral and/or patrimonial damage caused to a third party because of an act practiced by that person, by someone under that person’s responsibility, or a fact or thing or animal under the person’s care, or even by mere legal imposition. Civil liability (*responsabilidade civil*) requires damage to a third party, private or public, so that the victim may seek compensation for damages, resulting in the restoration of the way things were before (*status quo ante*) or a sum of money. 4 MARIA HELENA DINIZ, *DICIONÁRIO JURÍDICO 200* (São Paulo, SP: Editora Saraiva 2005) (this and all subsequent translations by the author).

“Moral damage” (*dano moral*) involves damage to the nonpecuniary interests of individuals or legal entities caused by a harmful fact. The repair of the moral damage is not compensation for pain, embarrassment, humiliation, or loss of peace or joy of living, but compensation for the damage and injustice suffered by the injured party, likely to give the person an advantage, as it may, with the sum of money received, satisfy material or ideal needs that the person deems convenient, thereby diminishing the person’s suffering. 2 MARIA HELENA DINIZ, *DICIONÁRIO JURÍDICO 6* (São Paulo, SP: Editora Saraiva, 2005).

“Patrimonial damage” (*dano patrimonial*) is a concrete injury that affects an interest relating to the property of the victim consisting of loss or damage, in whole or in part, of property belonging to the victim, being susceptible to monetary assessment and payment of compensation by the person responsible for the damage. The loss of use of the thing, the damage caused to it, the work-related incapacitation of the victim, and damage to the victim’s reputation, when such damage has an effect on the victim’s career or business, constitute property damage. *Id.* at 7.

II. Constitutional Principle

Article 5 of the Constitution establishes that everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the country the inviolable right to life, liberty, equality, security, and property.² The right of reply is assured, in proportion to the offense, as well as compensation for patrimonial or moral damage or damage to one's reputation.³ Personal intimacy, private life, honor, and reputation are inviolable, and the right to compensation for patrimonial (property) or moral damage resulting from the violation of these rights is guaranteed.⁴

III. Consumer Protection and Defense Code

The CDC establishes norms for the protection and defense of the consumer, public order, and social interest pursuant to constitutional provisions⁵ and defines, *inter alia*, “consumer,”⁶ “supplier,”⁷ “products,”⁸ and “services,”⁹ as well as the liability of manufacturers, producers, builders, and importers.¹⁰

Article 12 of the CDC determines that the manufacturer, producer, and builder (whether domestic or foreign), as well as the importer, are liable, regardless of fault, for repairing damages caused to consumers by defects resulting from the design, manufacture, construction, assembly, formulation, manipulation, presentation, or packaging of their products, as well as insufficient or inadequate information about their use and risks.¹¹

A product is defective when it does not offer the security that is legitimately expected, taking into account the relevant circumstances, including its presentation; the use and risks that can reasonably be expected from it; and the time that it was put into circulation.¹²

The manufacturer, builder, producer, or importer will not be liable if he proves that he did not put the product on the market; although the product was placed on the market, the defect is inexistent; or fault lies exclusively with the consumer or a third party.¹³

² CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL, promulgada em 5 de Outubro de 1988, art. 5, http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm.

³ *Id.* art. 5(V).

⁴ *Id.* art. 5(X).

⁵ CÓDIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR [C.D.C.], Lei No. 8.078 de 11 de Setembro de 1990, art. 1, http://www.planalto.gov.br/ccivil_03/leis/L8078compilado.htm.

⁶ *Id.* art. 2.

⁷ *Id.* art. 3.

⁸ *Id.* art. 3(§1).

⁹ *Id.* art. 3(§2).

¹⁰ *Id.* art. 12.

¹¹ *Id.*

¹² *Id.* art. 12(§1)(I)(II)(III).

The suppliers of durable or nondurable products are jointly liable for defects in quality or quantity that make such products unfit or unsuitable for consumption as intended or diminish their value, as well as for defects arising from a disparity between the product and information on the container, packaging, labeling, or advertising message for that product, observing the variations due to the product's nature. In such cases the consumer may require the replacement of the defective parts.¹⁴ If the defect is not addressed within thirty days, the consumer may alternatively require the replacement of the product by another of the same type, in perfect condition; the immediate return of the amount paid with appropriate monetary adjustments, without prejudice to any damages; or a proportional reduction of the price.¹⁵

The supplier's ignorance about quality defects caused by the inadequacy of products and services does not exempt the supplier from liability.¹⁶ The legal guarantee of suitability of the product or service is independent of expressed terms, and the exemption of the supplier's responsibility by contract is prohibited.¹⁷ Including contractual clauses that prevent, exempt, or mitigate the duty to indemnify is prohibited.¹⁸ If more than one person/entity is responsible for causing the damage, all must be held jointly liable for the duty to repair.¹⁹ If the damage is caused by a component or part incorporated into the product or service, the manufacturer, builder, importer, and person/entity responsible for incorporating the component are jointly liable.²⁰

The right to complain for any apparent or easily identifiable defects expires within thirty days in the case of services and nondurable products,²¹ and ninety days in the case of services and durable products.²² The statute of limitation starts to run on the day that the product is delivered or upon the date of termination of services.²³ The statute of limitation is interrupted from the time when an effective complaint is made by the consumer to the provider of products and services until a negative response is received by the consumer, which should be conveyed unequivocally,²⁴ and from the filing of a civil lawsuit until its conclusion.²⁵ In the case of latent defects, the statute of limitation begins at the time the defect is discovered.²⁶

¹³ *Id.* art. 12(§3)(I)–(III).

¹⁴ *Id.* art. 18.

¹⁵ *Id.* art. 18 (§1)(I)–(III).

¹⁶ *Id.* art. 23.

¹⁷ *Id.* art. 24.

¹⁸ *Id.* art. 25.

¹⁹ *Id.* art. 25(§1).

²⁰ *Id.* art. 25(§2).

²¹ *Id.* art. 26(I).

²² *Id.* art. 26(II).

²³ *Id.* art. 26(§1).

²⁴ *Id.* art. 26(§2)(I).

²⁵ *Id.* art. 26(§2)(III).

²⁶ *Id.* art. 26(§3).

The right to complain for damages caused by the fact that the product or service provided for in Section II of the CDC (arts. 12–17) expires in five years from the time the complainant obtains knowledge of the damage and the person/entity responsible for it.²⁷

The judge may disregard the legal personality of the company when, at the expense of the consumer, there is an abuse of rights; an abuse of power; a violation of law, fact, or wrongful act; or a violation of statutes or social contract. Legal personality may also be disregarded when bankruptcy, insolvency, closure, or inactivity caused by corporate mismanagement is present.²⁸ The groups that are part of companies and corporate subsidiaries are jointly liable for the obligations set forth in the CDC, as well as associated companies, which only respond for fault. The legal personality of the company may also be disregarded if it somehow poses an obstacle to recovering damages caused to consumers.²⁹

The Union,³⁰ the states, and the Federal District may, according to their respective administrative areas, establish standards for the production, processing, distribution, and consumption of goods and services.³¹

The Union, the states, the Federal District, and the municipalities must monitor and control the production, manufacture, distribution, advertising of products and services, and consumer market in the interest of preserving life, health, safety, information, and consumer welfare, and are responsible for establishing the necessary standards for doing so.³²

Federal, state, and municipal organs, as well as organs of the Federal District that have the power to monitor and control the consumer market, must have standing committees for the preparation, review, and update of the standards referred to in article 55(§1) of the CDC, with the mandatory participation of consumers and suppliers.³³

The official agencies may issue notices to suppliers so that, under penalty of contempt, they provide information on issues of interest to the consumer, with the exception of industrial secrets.³⁴

Article 56 of the CDC lists the administrative sanctions for infringement of the rules of the CDC, without prejudice to civil and criminal sanctions or sanctions defined in specific rules,

²⁷ *Id.* art. 27.

²⁸ *Id.* art. 28.

²⁹ *Id.* art. 28(§§2–5).

³⁰ “União, (a) legal entity of public internal law of the direct administration, endowed with the central power, internal autonomy and sovereignty of the country in the international order, which represents Brazil; (b) Brazilian Federation; (c) Brazilian State.” 4 MARIA HELENA DINIZ, *DICIONÁRIO JURÍDICO* 794 (São Paulo, SP: Editora Saraiva 2005).

³¹ C.D.C. art. 55.

³² *Id.* art. 55(§1).

³³ *Id.* art. 55(§3).

³⁴ *Id.* art. 55(§4).

which include, but are not limited to, fines, temporary suspension of activities, or administrative intervention.

Fines, which are established according to the seriousness of the infraction, the benefit obtained, and the economic condition of the supplier, are implemented through an administrative procedure.³⁵ A fine must be in an amount not less than two hundred and not more than three million times the Fiscal Reference Unit (*Unidade Fiscal de Referência*, UFIR) or equivalent index.³⁶

Without prejudice to the provisions of the Penal Code and specific laws, articles 61 to 80 of the CDC list the crimes against consumer relations and their respective punishments. For example, whoever fails to notify the competent authority and consumers of harmful or hazardous products after those products have been placed on the market is punishable with six months to two years in prison and a fine.³⁷ Whoever fails to immediately withdraw harmful or dangerous products from the market, when determined by the competent authority, incurs the same penalties.³⁸

Making false or misleading statements, or omitting relevant information about the nature, characteristics, quality, quantity, safety, performance, durability, price, or warranties of products or services is punishable with three months to one year in prison and a fine;³⁹ repairing products by making use of parts or replacement components previously used without the permission of the consumer is punishable with three months to one year in prison and a fine;⁴⁰ failing to deliver to the consumer a properly completed warranty certificate that clearly specifies the product's contents is punishable with one to six months in prison and a fine.⁴¹

Whoever contributes in any way to the crimes referred to in the CDC is subject to penalties to the extent of the person's fault, as well as the director or manager of the corporation that promotes, allows, or in any way approves the supply, offer, exposure for sale, or maintenance of products in storage, or offers and provides services under conditions prohibited by the CDC.⁴²

³⁵ *Id.* art. 57.

³⁶ *Id.* art. 57 (sole para.). In the state of Rio de Janeiro, the UFIR is established annually. According to Resolution No. 465 of December 21, 2011, of the State Finance Secretariat (*Resolução SEFAZ No. 465, de 21 de Dezembro de 2011*), http://www.fazenda.rj.gov.br/portal/index.portal?_nfpb=true&_pageLabel=tributaria&codigo=2388019&siteo=fazenda&file=/legislacao/tributaria/resolucao/2011/465.shtml, the UFIR for 2012 is R\$2.2752 (about US\$1.31).

³⁷ C.D.C. art. 64.

³⁸ *Id.* art. 64 (sole para.).

³⁹ *Id.* art. 66.

⁴⁰ *Id.* art. 70.

⁴¹ *Id.* art. 74.

⁴² *Id.* art. 75.

The monetary penalty provided for in the CDC must be set as a daily fine (*dia-multa*)⁴³ corresponding to the minimum and maximum days of the deprivation of liberty applied to the crime. In the individualization of the fine, the court must observe the provisions of article 60(§1) of the Brazilian Penal Code.⁴⁴

In addition to prison time and fines, a temporary suspension of rights, publication of news about the facts and the decision in a media source of wide circulation or audience at the expense of the party that loses, and community service may also be imposed cumulatively or alternatively, observing the regulations set forth in articles 44-47 of the Penal Code.⁴⁵

IV. Civil Code

Civil liability (*responsabilidade civil*) is regulated throughout the Civil Code (*Código Civil*, CC),⁴⁶ specifically in articles 186 and 187.

Article 186 determines that a person, who, by voluntary act or omission, negligence, or imprudence, violates rights and causes damage to another, even though the damage is exclusively moral, commits an illicit act.⁴⁷ The holder of a right also commits an illicit act if, in exercising it, the person manifestly exceeds the limits imposed by its economic or social purpose, by good faith or good conduct.⁴⁸

Anyone who, through an illicit act (as defined in articles 186 and 187 of the CC), causes damage to another is obligated to repair it.⁴⁹ The obligation to repair the damage exists, regardless of fault, in the cases specified by law or when the activity normally carried out by the person who caused the damage entails, by its nature, a risk to the rights of others.⁵⁰

⁴³ *Dia-multa* is defined as a calculation unit determined by the judge in his decision. 2 MARIA HELENA DINIZ, DICIONÁRIO JURÍDICO 149 (São Paulo, SP: Editora Saraiva 2005).

⁴⁴ C.D.C. art. 77. Article 60(§1) of the Penal Code determines that when setting the fine, the judge must mainly observe the economic situation of the defendant. The fine may be increased up to three times if the judge finds that because of the economic situation of the defendant, the fine is ineffective, although applied at its maximum. CÓDIGO PENAL, Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848compilado.htm.

⁴⁵ *Id.* art. 78(I)–(III).

⁴⁶ CÓDIGO CIVIL [C.C.], Lei No. 10.406, de 10 de Janeiro de 2002, art. 186, http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406compilada.htm.

⁴⁷ An illicit act is an act practiced in disagreement with the law, violating an individual subjective right. The act must cause moral or patrimonial damage to someone, creating a duty to repair such damage, thereby producing legal effects that were not desired by the person but imposed by law. 1 MARIA HELENA DINIZ, DICIONÁRIO JURÍDICO 383 (São Paulo, SP: Editora Saraiva 2005).

⁴⁸ C.C. art. 187.

⁴⁹ *Id.* art. 927.

⁵⁰ *Id.* art. 927 (sole para.).

Civil liability is independent from criminal liability; the existence of the act and the identity of the perpetrator cannot be questioned further when those questions have been decided in the criminal courts.⁵¹

Indemnification is measured by the extent of the damage.⁵² If damage is excessive relative to the degree of fault, the judge may reduce the indemnification in an equitable manner.⁵³ If the victim, by his fault, contributed to the damaging event, the seriousness of his fault in comparison with that of the person who caused the damage must be taken into account when establishing the indemnification.⁵⁴

If an obligation is indeterminate, and neither the law nor the contract contains a provision determining the indemnification owed by the nonperforming party, the amount of loss and damages must be ascertained in the manner determined by procedural law.⁵⁵

In the case of injury or other harm to a person's health, the wrongdoer must indemnify the victim for the expenses of treatment and loss of profit until the end of convalescence, in addition to any other loss that the victim proves he has suffered.⁵⁶ If a deficiency results from the damage by reason of which the victim cannot exercise his occupation or profession, or which diminishes his capacity to work, the indemnification must include a pension corresponding to the amount of work for which he has become incapacitated, or to the loss of capacity that he has suffered, in addition to the expenses of treatment and loss of profits until the end of the convalescence.⁵⁷ If the injured person prefers, he may demand that the indemnification be assessed and paid in a lump sum.⁵⁸

In Brazil, pain and suffering are not compensable per se. Such injuries are most likely addressed under the concepts of moral and patrimonial damage.⁵⁹ The concept of moral damage strives to compensate the victim for the affliction or other negative feeling arising from the damaging event, representing, for the wrongdoer, a sanction capable of hindering the person from persisting in the practice of such behavior.⁶⁰

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⁵¹ *Id.* art. 935.

⁵² *Id.* art. 944.

⁵³ *Id.* art. 944 (sole para.).

⁵⁴ *Id.* art. 945.

⁵⁵ *Id.* art. 946.

⁵⁶ *Id.* art. 949.

⁵⁷ *Id.* art. 950.

⁵⁸ *Id.* art. 950 (sole para.).

⁵⁹ See discussion of civil liability, *supra* note 1.

⁶⁰ MILTON OLIVEIRA, *DANO MORAL* 47 (LTR Editora Ltda, 2nd ed. 2011).

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CHINA

TORT LAW SYSTEM

Executive Summary

China's 1987 General Principle of Civil Law (GPCL) includes provisions on torts. The Tort Liability Law was then passed in 2009, absorbing the general rules on torts in the GPCL and becoming the primary source of Chinese tort law.

Under the Tort Liability Law, producers are subject to tort liability for damage to other persons due to defects existing in their products. Punitive damages may be imposed in strictly limited situations in product liability actions.

According to the Product Quality Law, producers and sellers are liable for product quality in accordance with the law. If a producer's defective product causes physical injury to a person or damage to property, the producer is liable for compensation unless (1) the product has not been put into circulation, (2) the defect causing the damage did not exist when the product was put into circulation, or (3) the science and technology at the time the product was put into circulation was at a level incapable of detecting the defect.

The Consumer Protection Law sets out a special rule for compensation: if business operators are found to have engaged in fraudulent activities in supplying commodities or services, the consumer may demand additional compensation in the amount of one time the costs such consumer paid for the commodities purchased or services received.

I. Legal Framework

China's tort law system comprises general tort law and special tort law. The General Principle of Civil Law (GPCL), which took effect on January 1, 1987, includes provisions on torts.¹ On December 26, 2009, China passed its first Tort Liability Law, which absorbed the general rules on torts in the GPCL and became the primary source of Chinese tort law.² The Law took effect on July 1, 2010.³

¹ Minfa Tongze [General Principle of Civil Law] (promulgated by the National People's Congress (NPC) on Apr. 12, 1986, effective Jan. 1, 1987), LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (LAWS OF CHINA) (1983–1986), 225–49.

² Qinquan Zeren Fa [Tort Liability Law] (promulgated by the NPC Standing Committee on Dec. 26, 2009, effective July 1, 2010), LAWS OF CHINA (2009) 197–211.

³ *Id.*

In addition to the general provisions on torts in the GPCL and the Tort Liability Law, a number of laws contain tort provisions in special areas, such as the Product Quality Law⁴ and the Consumer Protection Law,⁵ which remained effective even after the passage of the Tort Liability Law.

II. General Tort Law

A. Provisions on Torts in the General Principle of Civil Law

Article 106(2) of the GPCL provides that “[c]itizens and legal persons who through their fault encroach upon state or collective property or the property or person of others shall bear civil liability.”⁶

Articles 117 to 133 of the GPCL then provide the basic rules for the protection of property and personal rights. Among them, article 122 provides the general principle of product liability: “If a substandard product causes property damage or physical injury to others, the manufacturer or seller shall bear civil liability according to law. If the transporter or storekeeper is responsible for the matter, the manufacturer or seller shall have the right to demand compensation for its losses.”⁷

B. Tort Liability Law

Chapters I–IV of the Tort Liability Law provide the general rules including: (1) general provisions, (2) attribution of liability and modes of assuming liability, (3) nonliability and mitigation of liability, and (4) special provisions on the subject of liability.⁸

Chapters V–XI provide seven special kinds of tort liability: (1) product liability, (2) motor vehicle accident liability, (3) medical malpractice liability, (4) environmental pollution liability, (5) high-risk liability, (6) liability for damage caused by domestic animals, and (7) liability for damage caused by objects.⁹

Article 2 of the Tort Liability Law provides that tort liability will be assumed pursuant to this law for any infringement of civil rights and interests.¹⁰ “Civil rights and interests” are

⁴ Chanpin Zhiliang Fa [Product Quality Law] (promulgated by the NPC Standing Committee on Feb. 22, 1993, amended July 8, 2000, effective Sept. 1, 2000), LAWS OF CHINA (2000) 65–81.

⁵ Xiaofeizhe Quanyi Baohu Fa [Law on the Protection of Consumer Rights and Interests] (promulgated by the NPC Standing Committee on Oct. 31, 1993, effective Jan. 1, 1994), LAWS OF CHINA (1993), 205–16.

⁶ Minfa Tongze [General Principle of Civil Law] (promulgated by the National People’s Congress (NPC) on Apr. 12, 1986, effective Jan. 1, 1987), LAWS OF THE PEOPLE’S REPUBLIC OF CHINA (LAWS OF CHINA) (1983–1986), 225–49.

⁷ *Id.* art. 122.

⁸ Qinquan Zeren Fa [Tort Liability Law] (promulgated by the NPC Standing Committee on Dec. 26, 2009, effective July 1, 2010), LAWS OF CHINA (2009) 197–211.

⁹ *Id.*

¹⁰ *Id.* art. 2.

defined by the law to refer to personal and property rights, including, inter alia, the right to life, health, name, reputation, honor, image, privacy, autonomy in marriage, guardianship, ownership, usufruct, security interest in property, copyright, patent, exclusive use of trademarks, discovery, equity interest, and inheritance.¹¹

According to the law, modes of assuming tort liability include (1) cessation of the infringement, (2) removal of an obstacle, (3) elimination of danger, (4) restitution of property, (5) restoration to the original state, (6) compensation for loss, (7) formal apology, and (8) elimination of adverse impact and restoration of reputation. These modes of assuming tort liability may apply individually or jointly.¹²

Where an infringement on personal rights and interests results in loss of property, compensation will be awarded according to the loss suffered by the infringer. If such loss is indeterminable and the tortfeasor gains from the tort, compensation may be determined according to such gains.¹³

Any person who harms other people and causes personal injury may be liable to pay compensation for medical expenses, nursing expenses, traveling expenses, and other reasonable expenses incurred for the purpose of treatment and recovery, as well as for reduction of income due to the loss of labor hours. In cases resulting in disability, payment must be made for disability appliance expenses and disability compensation; in cases resulting in death, payment must be made for funeral expenses and death compensation.¹⁴

Punitive damages may be imposed in strictly limited situations in product liability actions. Under the Tort Liability Law, producers are subject to tort liability for damages to other persons due to defects existing in their products.¹⁵ If the defects existing in the products result from the fault of the seller, the seller is also subject to tort liability for damages to other persons caused by the defects.¹⁶ The infringer may choose to claim compensation either from the producer or the seller of the products.¹⁷ The law states that “[i]n the event of death or serious damage to health arising from a product that is manufactured or sold when it is known to be defective, the infringer shall be entitled to claim corresponding punitive compensation.”¹⁸ According to this article, two conditions must be satisfied for punitive damages to be applied: (1) malice (the product is manufactured or sold when it is known to be defective), and (2) serious harm (the defective product caused death or serious damage to health).

¹¹ *Id.*

¹² *Id.* art. 15.

¹³ *Id.* art. 20.

¹⁴ *Id.* art. 16.

¹⁵ *Id.* art. 41.

¹⁶ *Id.* art. 42.

¹⁷ *Id.* art. 43.

¹⁸ *Id.* art. 47.

III. Special Tort Law

A. Product Quality Law

The Product Quality Law applies to anyone who manufactures or sells any product within the territory of the People's Republic of China.¹⁹

According to the Product Quality Law, producers and sellers are liable for product quality in accordance with the law.²⁰ If any defect existing in a product causes physical injury to a person or damage to property, the producer is liable for compensation unless: (1) the product has not been put into circulation, (2) the defect causing the damage did not exist when the product was put into circulation, or (3) the science and technology at the time the product was put into circulation was at a level incapable of detecting the defect.²¹ “Defect” is defined by the Product Quality Law as “one that constitutes an unreasonable threat to personal safety or to the safety of another person’s property; where there are national or industrial standards for ensuring human health, personal safety and safety of property to measure up to, ‘defect’ means failure to measure up to such standards.”²²

In addition to compensation for the damage caused by defective products, the Product Quality Law contains a chapter on penalties that may be imposed under the law. For example, the law provides that producers and sellers who produce or sell defective products will be ordered to discontinue the production or sale of such products. The products illegally produced or ready for sale will be confiscated and a fine imposed in the amount of one to three times the value of the products illegally produced or ready for sale (including those already sold and those not yet sold). Any illegal gains will also be confiscated. If the circumstances are serious, the business license will be revoked, and if a crime has been committed, criminal responsibility must be investigated according to law.²³

¹⁹ Chanpin Zhiliang Fa [Product Quality Law] (promulgated by the NPC Standing Committee on Feb. 22, 1993, amended July 8, 2000, effective Sept. 1, 2000), art. 2., LAWS OF CHINA (2000) 65–81.

²⁰ *Id.* art. 4.

²¹ *Id.* art. 41.

²² *Id.* art. 46.

²³ *Id.* art. 49.

B. Consumer Protection Law

According to the Law on the Protection of Consumer Rights and Interests (Consumer Protection Law), if a commodity or service causes damage to the property of consumers, the business operator must bear civil liability in the form of repair, remanufacture, replacement, return of goods, makeup for the short commodities, return of payment for goods and services, or compensation for losses, etc., as demanded by consumers.²⁴ The law sets out a special rule for compensation: if a business operator is found to have engaged in fraudulent activities in supplying commodities or services, the consumer may demand additional compensation in the amount of one time the costs such consumer paid for the commodities purchased or services received.²⁵ This compensation, however, appears to be based on the contractual relationship between consumers and business operators rather than on tort law.

Producers and sellers engaging in activities proscribed by the Consumer Protection Law, including producing or selling commodities that fail to meet the requirements for the protection of personal and property safety, are subject to confiscation of illegal gain and a fine in the amount of one to five times the value of the illegal gain. In cases where there is no illegal gain, a fine of up to RMB10,000 (about US\$1,600) may be imposed. If the circumstances are serious, the business will either be suspended for rectification or the business's licenses will be revoked.²⁶

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²⁴ Xiaofeizhe Quanyi Baohu Fa [Law on the Protection of Consumer Rights and Interests] (promulgated by the NPC Standing Committee on Oct. 31, 1993, effective Jan. 1, 1994), art. 44, LAWS OF CHINA (1993) 205–216.

²⁵ *Id.* art. 49.

²⁶ *Id.* art. 50.

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ENGLAND AND WALES

TORT LAW SYSTEM

Executive Summary

England has a highly developed common law system of tort law, which has been supplemented by statutes. The general premise of tort law is to protect individuals from the negligent actions of others, and, when negligence occurs, to award damages to injured parties that compensate them for their loss. Areas of tort law affecting businesses include product liability and defamation. British defamation law has been subject to intense criticism around the globe owing to the ease of obtaining jurisdiction for these cases in England and the high awards of damages that may be paid out. Access to justice in civil cases is another issue that may affect businesses. The English system of the loser pays costs has served as a deterrent for many individuals seeking to file lawsuits. This principle has been diluted through both case law and statute; however, it is still a factor for many when considering litigation. The amount of damages awarded is also a factor when deciding whether to litigate, as traditionally these are low compared with those in the US and generally only aim to restore the parties to the position they occupied before the injury occurred.

I. Introduction

The tort law system in England and Wales is highly developed common law, supplemented by statutes in certain areas. Tort law serves to provide individuals with a remedy for losses in a number of areas, including those pertaining to personal, property, public, and economic interests, as well as for loss of chance.¹ Certain areas of tort law, most notably defamation laws, which may be heard before a jury and often result in high awards of damages, have made England a forum of choice for such causes of action.

Additionally, a number of areas of tort law have been supplemented by statutes providing strict liability and product liability. However, often it is not the laws themselves, but rather the general system of justice in England and Wales and the relatively low amount of damages awarded, that make England and Wales attractive for businesses in the context of tort laws.

¹ CLERK AND LINDSELL ON TORTS 1 (Michael Jones et al. eds., 20th ed. 2010).

II. Product Liability

The law requires that products sold to consumers be safe. Producers, manufacturers and importers bear the responsibility for ensuring the safety of the products they deal with² and may be liable for any damage caused, either wholly or in part, by a defective product, even if the injured party did not purchase the item. Those responsible may be liable for the payment of damages, with no cap applied, and, in certain cases, may even face imprisonment.³

III. Defamation

Despite attempts at reform, England is known around the world as one of the premiere legal destinations for libel cases. An opinion piece in *The New York Times* has described England's libel laws in harshly critical terms:

English libel law ... predates not only the Internet, but also the light bulb. It chills free speech through the award of disproportionate damages, a lack of viable defenses and the application of the law to cases with only the slightest links to Britain, even when neither party lives there, a practice that has led to what is known as "libel tourism." Wealthy foreign claimants have turned London into the "Mecca of libel tourism" and made the English Bar happy. On the other side, a shortage of funds has led many authors to retract, apologize and often pay damages rather than lose a case against a well-funded claimant and potentially go bankrupt.⁴

Defamation is an unusual tort as it is frequently heard by a judge and jury, rather than a single judge sitting alone, and is one of the few civil law issues for which a jury trial is available. The purpose of the law is to protect a person from having his or her reputation disparaged.⁵ Defamation occurs when someone publishes (communicates to a third party) information "which is untrue and likely in the course of things substantially to damage the reputation of ... a person."⁶ The defamation may refer to a person's personal character, office or vocation, and the claimant is not required to show that the matter is false.⁷ The basis for a claim of defamation is that the claimant is presumed to have an unblemished reputation. It falls to the defendant to rebut this presumption, either by proving that the alleged defamatory matter is truthful, or through establishing that the claimant has a generally bad reputation.⁸

The term "defamation" refers to two torts—those of libel and slander. Libel typically involves a written defamatory statement, but also encompasses items in a permanent form, such

² Consumer Protection Act 1987, c. 43, <http://www.legislation.gov.uk/ukpga/1987/43/contents>.

³ *Id.* §§ 12–14.

⁴ Rachel Ehrenfeld, Op-Ed., *Britain's Half-Hearted Bid to Reform Libel Law*, *NEW YORK TIMES* (July 24, 2012), http://www.nytimes.com/2012/07/25/opinion/britains-half-hearted-bid-to-reform-libel-law.html?_r=0.

⁵ CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 23-01.

⁶ *Id.*

⁷ *Id.* ¶ 23-28.

⁸ GATLEY ON LIBEL AND SLANDER ¶ 1.4 (Patrick Milmo et al. eds., 10th ed. 2004).

as a painting or “any disparaging object.”⁹ Slander is defamation in a transitory form, traditionally through spoken words. The main distinction between the two is that special damages must be proven for slander to be actionable; the law presumes that damages will follow from libel as it occurs in a more permanent form.¹⁰ Special damages are more aptly described as actual damage because, in order to pursue the claim, the claimant must show there has been some damage that is a “legal and natural consequence”¹¹ of the defamation—either monetary or other “material advantage estimable in money ... ostracism [from society] is not enough.”¹² For cases of libel, the claimant may recover general damages for the loss of his reputation “without adducing any evidence that it has in fact been harmed, for the law presumes that some damage will arise in the ordinary course of things.”¹³

There are a number of common law elements that must be proven to show defamation has occurred. These are that the statement must be defamatory; refer to the claimant; and have been published. In this instance, publication refers to communication to another person, rather than publication in the traditional sense.

The tort of defamation is generally one of strict liability¹⁴—the law considers the consequences of the statement, rather than the motive or intention of the defendant.¹⁵ Provided the statement is untrue and “would reasonably be understood by members of the public who knew the claimant to refer to him, the defendant is liable.”¹⁶ Malice is not relevant to show a cause of defamation unless the defendant seeks to utilize a defense that may be defeated on proof of malice or required in claims for aggravated or exemplary damages.¹⁷

As noted above, it is frequently financially advantageous for the defendant in a defamation case to settle out of court, regardless of guilt, rather than to pursue a case, which can be lengthy and expensive. The fact that a jury can be responsible for an award of damages also adds the element of uncertainty, as such awards can be substantial.

IV. Access to Justice: The Loser Pays

One fundamental difference between English and American tort law lies not within the tort laws themselves, but rather in the way in which the justice system operates. One significant difference concerns who is responsible for paying legal fees. It is a long established principle of English law that the losing party in civil litigation pays the legal costs for both sides. The

⁹ CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 23-21.

¹⁰ GATLEY ON LIBEL AND SLANDER, *supra* note 8, ¶ 1.3.

¹¹ *Id.*

¹² WINFIELD AND JOLOWICZ ON TORT ¶ 12-4 (WVH Rogers ed., 17th ed. 2006).

¹³ *Id.*, referring to *Jameel (Yousef) v. Dow Jones & Co Inc.*, [2005] EWCA Civ. 75.

¹⁴ CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 23-21. See, e.g., *Carr v. Hood* (1808) 1 Camp. 355.

¹⁵ GATLEY ON LIBEL AND SLANDER, *supra* note 8, ¶ 1.6.

¹⁶ WINFIELD AND JOLOWICZ ON TORT, *supra* note 12, referring to *Vicars v. Wilcocks* (1806) East 1.

¹⁷ CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 23-21.

statutory basis for the “English Rule,” or the “loser pays” system, is found in the Senior Courts Act 1981.¹⁸ This Act grants the County, High, and Civil Courts of Appeal the discretion to determine by whom, and to what extent, the costs of litigation should be paid.¹⁹ The rule has been gradually diluted, and currently the majority of cases generally do not result in the losing party paying the full amount of the costs to the successful party. Rather costs are assessed on a “standard basis” where the amount awarded is “proportionate to the matters in issue and are reasonably incurred and reasonable in amount.”²⁰ To encourage the highest standards in litigation, the courts have the authority to disallow “wasted costs,” or to order the other side to meet these costs, either in part or their entirety.²¹

This system aims to encourage that only the most meritorious cases with a high expectancy of success be brought before the courts.²² While preventing frivolous law suits, it has been criticized as having the adverse effect of promoting selective litigation, thereby depriving many individuals with meritorious cases of the opportunity for recourse to the courts because of the deterrent effect of potentially high legal fees. The Woolf Report on Access to Justice stated that the “loser pays” system “engenders in litigants a ‘win at all costs’ mentality that ... has the tendency to increase expenditure on cases.”²³ The system was also criticized as disproportionately discriminating against the less wealthy population, with less of a deterrent affect upon wealthier litigants because a negative outcome would not pose as heavy a financial burden upon them.

Procedures to prevent excessive litigation are in place under the Civil Procedure Rules 1998,²⁴ which serve to prevent unjustified legal costs from being awarded. These rules require the courts, when considering an award of costs, to look at the extent of success of the winning party, for example, how many issues they were successful with, how they conducted themselves and conformed with the objective of the lawsuit, and then award the costs accordingly.²⁵ This provides a more proportional response in the award of costs and aims to deter excessive litigation, as the courts can grant costs only in relation to the winning issues of the case.

¹⁸ Senior Courts Act 1981, c. 54, <http://www.legislation.gov.uk/ukpga/1981/54/contents>.

¹⁹ *Id.* § 51.

²⁰ The Supreme Court Rules 2009, SI 2009/1603, http://www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf.

²¹ *Id.* ¶ 51. “Wasted costs” are defined as “any costs incurred by a party—(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.”

²² Lord Woolf MR, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES, at 11 (1995).

²³ *Id.*

²⁴ Civil Procedure Rules 1998, SI 1998/3132, <http://www.legislation.gov.uk/uksi/1998/3132/contents/made>. These rules have been substantively amended.

²⁵ Civil Procedure Rules, *Costs Practice Direction*, Rule 44.3, http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_parts43-48#IDALKUJC.

The “loser pays” system functions effectively in part as a consequence of the legal aid system, which provides financial support to individuals who meet a number of means-based criteria.²⁶ Concerns over the rising costs of the legal aid system²⁷ and the fact that many individuals with meritorious claims could not obtain justice for fear of the cost brought the system under scrutiny. In response the UK brought forward in 1996 a “conditional fee,” or “no win, no fee” system and reduced the amount of legal aid available to individuals who could take advantage of this system.²⁸ This gave many people who had been previously blocked by financial constraints from seeking justice the opportunity to bring claims before the courts. The conditional fee system originally applied only to personal injury cases. Based upon its success, it was expanded in 1998 to apply to all non-family civil litigation cases.²⁹

As the lawyers operating under this payment system have a vested financial interest in the outcome of such cases, the criteria of acceptance is normally high, with lawyers only taking on cases they believe will succeed. The “no fee” system only applies to the litigants’ own lawyers, and, if the case fails, they remain liable for the successful parties’ legal costs. Protective insurance has been introduced to help individuals with these fees, and the Access to Justice Act 1999³⁰ contains provisions that make the cost for such insurance recoverable in an award of costs. This system has served to partially reduce the legal costs that the losing party must pay and encouraged the widespread use of legal insurance. However, the system still places a financial burden on individuals who are unable to afford protective legal insurance and lose their case. It has also come under review because of the “success uplift” charged by the winning lawyers in the litigation, whose fees are considerably more than those who work on cases on a traditional fee basis.³¹

V. Damages

There is a significant difference in the award of damages in England compared to the US. The aim of an award of damages in England is generally to place the injured party in the same position had he not sustained the wrong,³² rather than to punish the defendant. In the case of personal injury, this principle cannot be readily followed for pain and suffering, and instead the

²⁶ *Legal Aid*, GOV.UK, <https://www.gov.uk/legal-aid/overview> (last visited Nov. 21, 2012).

²⁷ Between the years 1992/93 and 1998/99 there was a 48% increase in the net expenditure on legal aid. Access to Justice Act 1999, c. 22, EXPLANATORY NOTES, ¶ 36, <http://www.legislation.gov.uk/ukpga/1999/22/notes>.

²⁸ Courts and Legal Services Act 1990, c. 41, § 58, <http://www.legislation.gov.uk/ukpga/1990/41/contents>.

²⁹ *Id.*

³⁰ Access to Justice Act 1999, c. 22, <http://www.legislation.gov.uk/ukpga/1999/22/contents>.

³¹ Ministry of Justice, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson’s Recommendations*, Consultation Paper 13/10, Nov. 2012, pt. 2.1, <http://www.justice.gov.uk/downloads/consultations/jackson-consultation-paper.pdf>.

³² *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25 at 39, *cited in* CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 28-07.

focus is on “providing the claimant some solace for his misfortunes,”³³ the guiding principle being that the award should be “fair reasonably and just.”³⁴

The traditional view of the courts was that punitive, or exemplary, damages that served to punish the defendant rather than right a wrong were an anomalous civil remedy that should be limited as far as possible.³⁵ Despite this, there are certain cases where exemplary damages may be awarded, with the objective being to punish the defendant rather than provide compensation to the claimant.³⁶ However, they are rarely awarded and, unless otherwise expressly provided for by statute, only arise in two categories:

- oppressive, arbitrary or unconstitutional action by a public servant, or
- when the defendant’s wrongful conduct was calculated to make a profit which might well exceed the compensation payable to the claimant.³⁷

Exemplary damages are further restricted by the “discretion given to the courts not to award them in any given case.”³⁸ While reform of the system of exemplary damages has been recommended over the past decade, the government has rejected these proposals, noting that:

The purpose of the civil law on damages is to provide compensation for loss, and not to punish. The function of exemplary damages is more appropriate to the criminal law, and their availability in civil proceedings blurs the distinctions between the civil and criminal law. The Government does not intend any further statutory extension of their availability.³⁹

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³³ *Id.* ¶ 28-07.

³⁴ *Rowley v. London & North Western Ry. Co.*, (1873) L.R. 8 Exch. 221 at 231, *cited in* CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 28-07.

³⁵ The Law Commission, *Aggravated, Exemplary and Restitutionary Damages, Part I*, http://lawcommission.justice.gov.uk/docs/lc247_aggravated_exemplary_and_restitutionary_damages.pdf (last visited Nov. 21, 2012).

³⁶ CLERK AND LINDSELL ON TORTS, *supra* note 1, ¶ 28-07.

³⁷ *Rookes v. Barnard*, [1964] AC 1129, *referred to in* HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT, PRESS STANDARDS, PRIVACY AND LIBEL, Ev. 253, H.C. 362-II (2009-10), <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362ii.pdf>.

³⁸ HOUSE OF COMMONS JUSTICE COMMITTEE, SIXTH REPORT, DRAFT CIVIL LAW REFORM BILL: PRE-LEGISLATIVE SCRUTINY, 2009-10, H.C. 300-I, ¶ 151, <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/300i.pdf>.

³⁹ *Id.* (citing Department for Constitutional Affairs, *Consultation Paper: The Law of Damages*, CP9/07, ¶ 198).

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FRANCE

TORT LAW SYSTEM

Executive Summary

The general structure of the tort liability system in France is based on personal liability for fault and on liability for the conduct of others or for things under the tortfeasor’s custody. The core of the French law on torts is embodied in five provisions of the Civil Code. Specific statutes regulate special tort liability regimes applicable to motor-vehicle accidents, medical liability, and product liability.

I. General Principles and Statement of the Law

French civil liability is traditionally divided between tort law (*responsabilité délictuelle*) and contract law. Contractual liability imposes sanctions for the breach of contractual obligations, while tort law brings about liability for noncompliance with standards of behavior required by law.¹ Tort liability in the French legal system is based on articles 1832 through 1836 of the Civil Code² and these five provisions represent the core of French law on torts.

The general rule of tort liability is provided for by articles 1382 and 1383 of the Civil Code, which include the three basic elements that generate tort liability: fault, harm, and the causal link between the two. The burden of proof of all these elements falls on the claimant.³

As a general principle there is fault when a standard of care has not been observed.⁴ Fault may consist of an intentional or negligent act.⁵ Fault may also arise from the violation of a legal obligation or a breach of unwritten duties deriving from regulations, customs or technical standards.⁶ To determine fault, French courts have used a “good *pater familias*” (*bon père de famille*) standard of reference, which is when someone’s actions or omissions do not meet the

¹ GEORGE A. BERMAN & ETIENNE PICARD, INTRODUCTION TO FRENCH LAW 23 (Kluwer Law International, The Netherlands, 2012).

² CODE CIVIL [C. CIV.] arts. 1382–1386 (Dalloz, 2013).

³ CEES VAN DAM, EUROPEAN TORT LAW 46 (Oxford University Press, 2006).

⁴ *Id.* at 47.

⁵ JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 364 (Oxford University Press, 2d ed. 2008).

⁶ VAN DAM, *supra* note 4, at 47.

standard of a reasonable man. This standard has been extensively developed by legal scholars and generally applied in all fault liability cases by the courts.⁷

The proof of fault, damage, and causal link is sufficient to claim compensation for damages.⁸ In order to succeed in a tort claim, it is necessary for the victim to prove harm. Compensable harm includes harm inflicted on one's person or property, loss of profits, and moral damages.⁹

The general nature of tort provisions in the Civil Code has left the courts with the job of developing a large body of case law to address the specifics of tort law.¹⁰ Because fault is mainly a subjective notion, the courts have had great discretion in establishing liability through considering the specific circumstances of each case.¹¹

II. Strict Liability

Strict liability is based on two general rules provided for under article 1384: One is applicable to harm caused by another person and the other to harm caused by a thing. The provision basically holds that a person is liable both for the harm caused by his own actions and for the harm caused by the actions of persons for whom he is responsible or by things under his care or custody.¹² Thus, vicarious liability in France is based on the concept of strict liability.

In addition to the general standard for strict liability set forth in the first paragraph of article 1384, specific rules of strict liability applicable to damage caused by animals, motor vehicles, products, buildings, minors, and employees are provided in subsequent provisions.¹³

The custodian of a thing has two defenses available: contributory negligence of the victim, which would eventually reduce the victim's compensation; or an unforeseeable or unavoidable event that caused the damage, which may include a *force majeure*, or the acts of a third person or the victim.¹⁴

⁷ *Id.*

⁸ *Id.*

⁹ BERMANN & PICARD, *supra* note 1, at 257.

¹⁰ *Id.*

¹¹ VAN DAM, *supra* note 4, at 43.

¹² *Id.* at 50.

¹³ C. CIV. arts. 1384–1386.

¹⁴ VAN DAM, *supra* note 4, at 50.

III. Special Liability Regimes

There are three special liability regimes: liability for motor-vehicle accidents, medical liability, and product liability.¹⁵ Each of these special regimes has its own standard of liability, specific categories of claimants, and specific types of harm and defenses.¹⁶

Liability for motor vehicle accidents is governed by Law 85-677,¹⁷ while medical liability is governed by Law 2002-303.¹⁸ Regarding product liability, Law 98-389 of May 19, 1998,¹⁹ added arts 1386-1 to 1386-18 to the Civil Code, to provide for liability for defective products. Under these new provisions, it is necessary to prove a defect in addition to the causal link to the defective thing that caused damage in order to obtain compensation for damages based on a defective product.²⁰

IV. Damages

Neither the Civil Code nor the courts have provided any specific definition of legally recognized harm.²¹ Therefore, any harm, be it material or moral, is susceptible to compensation. This broad concept of harm is shared both by the courts and French scholars. The only requirement established by the courts is that the damage be direct, certain, and personal.²² Consequently, a victim cannot be compensated for any harm if it is hypothetical, or if the affected interest is not personal but rather collective or affecting the general public.²³

Compensation for harm is based on the principle of full compensation. It may be awarded in the form of monetary or in-kind compensation, which may consist of replacing or restoring the damaged item to its unharmed condition.²⁴ Judges are empowered to determine the amount of compensation for harm by assessing the real value of the harm and making sure the

¹⁵ BELL ET AL., *supra* note 6, at 400.

¹⁶ *Id.* at 362.

¹⁷ Loi 85-677 du 5 Juillet 1985 Tendait A L'Amélioration de la Situation des Victimes D'Accidents de la Circulation et à L'Accélération des Procédures d'Indemnisation [Law No. 85-677 of July 5, 1985, regarding the Improvement of the Situation of Victims of Traffic Accidents and the Speeding up of Compensation Procedures], LEGIFRANCE, <http://legifrance.gouv.fr> (File: Les textes législatifs et réglementaires).

¹⁸ Loi 2002-303 du 4 mars 2002 relative aux Droits des Malades et à la Qualité du Système de Santé [Law 2002-303 of March 4, 2002, Regarding the Rights of the Sick and the Quality of the Health Care System], LEGIFRANCE, <http://www.legifrance.gouv.fr> (File: les textes législatifs et réglementaires).

¹⁹ Loi No. 89-389 du 19 Mai 1998, relative à la Responsabilité au fait des Produit Defectueux [Law No. 89-389 of May 19, 1998, Relating to Defective Product Liability, LEGIFRANCE, <http://www.legifrance.gouv.fr> (File: Les textes législatifs et réglementaires).

²⁰ *Id.*

²¹ FRANCOIS TERRÉ, POUR UNE RÉFORME DU DROIT DE LA RESPONSABILITÉ CIVILE 131 (Daloz, 2011).

²² 2 B. WINIGER ET AL., DIGEST OF EUROPEAN TORT LAW 24–25 (De Gruyer, 2011).

²³ *Id.*

²⁴ BERMANN & PICARD, *supra* note 1, at 260.

compensation provided is proportional. According to these criteria, compensation for any legally recognized harm may not enrich the victim and should not exceed the real value of the harm.²⁵

Punitive damages have not been legislated in France, and French courts have never explicitly awarded them as such.²⁶ However, there are some mechanisms provided under statutory law that are similar to punitive damages, such as the penalty clauses in cases of breach of contract, penalty provisions in intellectual property rights violations, multiple damage compensation under insurance law, and civil fines to be paid to the Treasury provided by a civil statute.²⁷

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²⁵ *Id.* at 261.

²⁶ Jean-Sébastien Borghetti, *Punitive Damages in France*, in 25 PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, TORT AND INSURANCE LAW 55 (Helmut Koziol & Vanessa Wilcox eds., 2009).

²⁷ *Id.* at 61.

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GERMANY

TORT LAW SYSTEM

Executive Summary

German tort law consists of fault-based, delictual remedies of the Civil Code and several strict liability regimes for dangerous instrumentalities, such as railroads, aircraft, motor vehicles, pharmaceutical products, genetically modified plants, and nuclear installations. Strict liability also exists for manufactured products (product liability).

Compared with the United States, damage awards are still lower in Germany, even though they have risen in recent years. Among the substantive reasons for the lesser damage awards in Germany are caps per event and injury in the strict liability regimes, the absence of punitive damages, and the treatment of personal injury victims by socialized medicine.

The most important reasons for a predictable level of damage awards in Germany are procedural. There are no juries in civil litigation. In addition, the losing party pays for all the costs of litigation, including the attorney costs of the winning party. Moreover, if the damages claimed by the winning party are considerably higher than those awarded, the winner is deemed to be a partial loser of the lawsuit and the costs are apportioned accordingly.

Nevertheless, the German cost of compensating for torts is considerable. At 1.1% of GDP, it is exceeded in Europe only by Italy's. Among the factors that increase tort costs are strict liability in and of itself and legal insurance for plaintiffs that allows tort victims to pursue their rights.

I. Fault-Based Liability Under the Civil Code

The heart of the German tort law system is section 823 of the Civil Code.¹ It makes the wrongdoer who willfully or negligently injures another liable for damage to life, health, freedom, property, or rights (§ 823(1)) and establishes the same liability for someone who violates a law having a protective purpose (§ 823(1)). Such protective provisions are found in the Criminal Code and throughout the vast body of regulatory law. Even the Civil Code contains some

¹ Bürgerliches Gesetzbuch [BGB] [Civil Code], repromulgated Jan. 2, 2002, Bundesgesetzblatt [BGBl.] I at 42.

provisions with a recognized protective purpose, such as section 226, which prohibits the use of a right for the sole purpose of harassing someone.² Anyone who violates a protective provision and thereby causes harm is liable in tort.

In addition to section 823, the Code contains a liability provision for causing any kind of damage intentionally and unconscionably (§ 826)³ and a few special provisions that establish fault-based liability, among them section 824, on liability for defamation; sections 833 and 834, on liability for kept animals; section 839, on an official's liability for breach of duty; and section 839a, on the liability of court experts. The German Code provisions on the liability of minors (§ 828) and on the joint and several liability of tortfeasors (§§ 830 and 840) do not lead to significantly different results than could be expected under common law or statutory law in the US states.⁴

Generally it appears that the causes of action under the fault-based liability regime of the German Civil Code yield comparable results to claims sounding in tort in the United States.⁵ In years past, the German adherence to comparative negligence principles in the proportional admeasuring of damages (§ 254, 846) (see below, Part III, Damages) was in contrast to the then preponderant doctrine of contributory negligence in the US states.⁶ This difference, however, no longer exists since most US jurisdictions now reduce damage awards proportionally when there is comparative negligence.⁷ The main difference that remains between the two countries is the size of damage awards. As explained below (Part V, Tort Costs), damage awards in Germany are still significantly lower than in the United States.

The German fault-based Civil Code remedies are available for all torts, even those for which a strict liability regime exists. Plaintiffs may choose to prove negligence instead of relying on strict liability when full damages under the Civil Code regime would exceed the capped damages available under the strict liability regime. In such cases, plaintiffs plead their claim by relying on both bases of liability, and damages will then be awarded depending on whether the plaintiff succeeds in proving fault.⁸

² Gerhard Wagner, in MÜNCHENER KOMMENTAR BÜRGERLICHES GESETZBUCH § 823 nn.357–67 (Kurt Rebmann et al. eds., 4th ed. 2001).

³ This provision has not attained much practical importance. See Harald Koch, *The Law of Torts*, in INTRODUCTION TO GERMAN LAW 213 (Matthias Reimann & Joachim Zekoll eds., 2005).

⁴ DAN B. DOBBS, *THE LAW OF TORTS* 297–99, 414 (2000).

⁵ *Id.* at 2-4.

⁶ *Id.* at 503.

⁷ *Id.* at 504.

⁸ Hartwig Sprau, in OTTO PALANDT, BÜRGERLICHES GESETZBUCH, Einf v 823 n.4 (70th ed. 2011).

II. Strict Liability Regimes

A. Overview

Strict liability regimes exist for railroads,⁹ motor vehicles,¹⁰ aircraft,¹¹ nuclear installations,¹² various environmental hazards,¹³ pharmaceutical drugs,¹⁴ genetically modified organisms,¹⁵ and manufactured products in general (product liability). The common feature of these systems is that the plaintiff need not prove that the person who caused the injurious event was at fault.¹⁶ Some defense, however, may be available, depending on the governing statutory law. In any event, comparative negligence principles are applied to prorate damages if the victim was partially at fault.¹⁷

Most strict liability regimes cap damages per injured party and per injurious event. Since the tort law reform of 2002, damages for pain and suffering are also awarded in strict liability cases, as specifically provided in each liability statute.¹⁸ Prior to the 2002 reform, damages for pain and suffering were only awarded in fault-based adjudications under the Civil Code regime. The extension of pain and suffering damages to strict liability cases brought Germany closer to the practice in other European countries and also decreased the workload of the courts, which previously had to scrutinize each strict liability case for fault so that pain and suffering could be awarded.¹⁹

The most commonly used strict liability regimes are those for motor vehicles and product liability. These are also the most complex and difficult to understand, in part because the principles of fault and no-fault liability are blurred in the adjudication of these cases.²⁰

⁹ Haftpflichtgesetz [Liability Act], repromulgated Jan. 4, 1978, BGBL. I at 145, as amended.

¹⁰ Strassenverkehrsgesetz [StVG] [Road Traffic Act], repromulgated Mar. 5, 2003, BGBL. I at 310, as amended, §§ 8–18.

¹¹ Luftverkehrsgesetz [LuftVG] [Air Traffic Act], repromulgated May 10, 2007, BGBL. I at 698, as amended, §§ 33–51.

¹² Atomgesetz [Nuclear Energy Act], July 15, 1985, BGBL. I at 1565, as amended.

¹³ Koch, *supra* note 3, at 221.

¹⁴ Arzneimittelgesetz [AMG] [Pharmaceutical Drug Act], repromulgated Dec. 12, 2005, BGBL. I at 3394, as amended, § 88.

¹⁵ Gentechnikgesetz [Genetic Technology Act], repromulgated Dec. 16, 1993, BGBL. I at 2066, as amended, § 32.

¹⁶ Koch, *supra* note 3, at 215.

¹⁷ Christian Grüneberg, *in* PALANDT, *supra* note 8, § 254 n.1.

¹⁸ ANDREAS CAHN, EINFÜHRUNG IN DAS NEUE SCHADENERSATZRECHT 89–91 (2003).

¹⁹ *Id.*

²⁰ Thomas Kadner Graziano & Christoph Oertel, “EC Tort Law” and the German Legal Family, *in* TORT LAW OF THE EUROPEAN COMMUNITY 458–59 (Helmut Koziol & Reiner Schulze eds., 2008).

B. Product Liability

Germany transposed the European Product Liability Directive of 1985²¹ into the German Products Liability Act of 1989.²² The Directive left much leeway for national transposition, and Germany opted to impose caps per injury and defect while allowing for a state-of-the-art defense that includes considering the economic feasibility of an alternative design.²³ When the Product Liability Act became effective in 1990, Germany already had a highly developed case-law system of product liability that was based on the Civil Code law of contracts and torts. This system is often pleaded and adjudicated because German law allows pleading fault-based and no-fault liability at the same time.²⁴

C. Motor Vehicles

The keeper of a motor vehicle is strictly liable for death, personal injury, or property damage caused by the operation of the vehicle.²⁵ The only available defense is force majeure. Damages, however, are apportioned if there is contributory fault.²⁶ When two vehicles collide, the damage is apportioned between them according to the degree of fault of each driver.²⁷ The driver of a vehicle who is not the keeper of the vehicle is generally liable on the basis of the general tort clause of section 823(1) of the Civil Code. The driver's liability extends to the holder and the victim.²⁸

III. Damages

A. Overview

According to some comparative scholars, compensation is the only purpose of German damages in tort cases, “and deterrence is not one of its avowed goals.”²⁹ German scholars, on the other hand, are of the opinion that prevention of the injurious act and emotional satisfaction of the victim are also purposes in German law, albeit subordinated ones.³⁰ There is agreement,

²¹ Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29.

²² Produkthaftpflichtgesetz [ProdHG] [Product Liability Act], Dec. 15, 1989, BGBL. I at 21988.

²³ Rebekah Rollo, Note, *Products Liability—Why the European Union Does Not Need the Restatement (Third)*, 69 BROOK. L. REV. 1073 (2004).

²⁴ Koch, *supra* note 3, at 213.

²⁵ StVG § 7.

²⁶ StVG § 9, referring to BGB § 254; *see also* MICHAEL NUGEL & ANDRÉ SCHAH SEDI, ANWALT/FORMULARE ch. 53, ¶ 288(7th ed. 2012).

²⁷ StVG § 17.

²⁸ StVG § 18.

²⁹ Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy*, 52 AM. J. COMP. L. 133 n.227 (2004).

³⁰ *Id.* at Vorb v § 249, nn.1, 2.

however, that such considerations rarely increase the size of the damage awards,³¹ and that compensation of the victim is the main purpose of damage awards in German tort law.³²

The damages that can be compensated are tightly prescribed by law and serve to make the plaintiff “whole.” Compensation is generally awarded only for foreseeable damages. Consequential damages may be claimed only for malicious acts.³³ For loss of earnings and other long-term consequences of an injury, German courts frequently award damages in the form of an annuity.³⁴ If the circumstances of the annuitant change significantly, a lawsuit can be brought to change the award either to his benefit or detriment.³⁵

Among the reasons for the predictability of German tort-related damage awards are the absence of punitive damages, the controlled growth of damages for pain and suffering, caps on strict liability, and the absorption of much of the cost of personal injury and loss of earnings through the tightly woven social net, which includes universal health care and generous disability benefits.

B. Punitive Damages

Punitive damages are abhorrent to German legal thinking. They are not awarded in Germany, and foreign judgments that award punitive damages are not recognized in Germany on the grounds that they violate German public policy.³⁶ In Germany, criminal law is punitive and civil law is compensatory, and the two principles are kept separate.³⁷

C. Pain and Suffering

Until 2002, damages for pain and suffering could be claimed only in fault-based tort actions and not in strict liability cases.³⁸ Following the major tort law reform of 2002,³⁹ the strict liability laws were amended to allow damages for pain and suffering, as provided in section 253 of the Civil Code, which now applies to all damages for pain and suffering. The provision is restrictive in that it allows damages for pain and suffering only for the victim of an injurious act; the death of a relative generally does not qualify for an award unless the claimant’s health was injured through the shock of the event.⁴⁰

³¹ Sprau, *in* PALANDT, *supra* note 8, at § 823 n.1.

³² *Id.* at Einf.v 828, n.1; Graziano & Oertel, *supra* note 20, at 440.

³³ BGB § 826; *see* Sprau, *in* PALANDT, *supra* note 8, § 826 n.14.

³⁴ BGB § 843.

³⁵ Sprau, *in* PALANDT, *supra* note 8, § 843 n.15.

³⁶ Bundesgerichtshof [BGH] [Federal Court of Justice], June 4, 1992, 118 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 312.

³⁷ Wagner, *supra* note 2, at Einf v 823 n.36.

³⁸ Matthias Killian, *Immaterieller Schaden*, *in* PRAXIS DER SCHULDRECHTSREFORM 213 (Martin Henssler & Friedrich Graf v. Westfalen eds., 2003).

³⁹ Schadensrechtsänderungsgesetz, July 25, 2002, BGBL. I at 264.

⁴⁰ Grüneberg, *in* PALANDT, *supra* note 8, at § 253 n.11.

In Germany, the amount awarded for pain and suffering is determined by the trial judge and is reviewable on appeal.⁴¹ Tables are published that list awards for all kinds of injuries and combinations thereof. Over the years, the size of awards has increased gradually. Whereas the highest award in 1979 was about €50,000 (approx. US\$65,000), it had increased to about €500,000 (US\$650,000) by 2001. One of the highest awards paid in 2012 was a lump sum of €500,000 plus a monthly annuity of €500 (US\$650), representing a capitalized value of €120,000 (US\$156,000), thus amounting to a total of €620,000 (US\$806,000).⁴²

D. Caps on Strict Liability

Following the 2002 tort law reform, the caps for damage awards per personal injury were harmonized among many of the strict liability statutes.⁴³ Currently, the most common cap per injured person is €500,000 (US\$780,000) for a lump sum award or an alternative annuity of €6,000 (US\$47,800) per year.⁴⁴ The caps per injurious event, however, differ according to the scope of the dangerous instrumentality. Thus, the cap per motor vehicle accident is €3 million (US\$3.9 million) for lump sum awards, or, alternatively, €180,000 (US\$234,000) for annuities.⁴⁵ If the motor vehicle transported hazardous materials, however, the caps per injurious event are doubled for lump sum awards and annuities.⁴⁶ The cap per injurious event for air traffic accidents varies according to the size of the aircraft.⁴⁷

For pharmaceutical drugs, the caps per injury are €500,000 (US\$780,000) for lump sum awards and €6,000 (US\$47,800) annually for an annuity; yet the caps per defective drug are €20 million (US\$156 million) for lump sum awards or, alternatively, €7.2 million (US\$ 107.4) for annuities.⁴⁸ For product liability there is no cap per harmed or injured claimant. Instead, there is a €500 (US\$650) deductible rule for property damage—awards are only granted for property damage above that amount. The cap per injurious product, on the other hand, is €5 million (US\$110.5 million).

E. Social Insurance Coverage

Germany has universal health insurance, and the working population is covered by old-age, disability, and accident insurance (which is comparable to workmen's compensation).⁴⁹ Most German tort victims find it more convenient to seek medical treatment for personal injury

⁴¹ BECK'SCHE SCHMERZENGELD-TABELLE 2012 (2012).

⁴² Lothar Jaeger, *Anmerkung*, MEDIZINRECHT 598 (2012).

⁴³ RAINER HESS & JÜRGEN JAHNKE, DAS NEUE SCHADENSRECHT 3 (2002).

⁴⁴ StVG § 12; LuftVG § 37.

⁴⁵ StVG § 12.

⁴⁶ StVG § 12a.

⁴⁷ LuftVG § 37.

⁴⁸ AMG § 88.

⁴⁹ Sabine Giehle, *Social Security*, FACTS ABOUT GERMANY, <http://www.tatsachen-ueber-deutschland.de/en/society/main-content-08/social-security.html> (last visited Dec. 17, 2012).

from their social health insurance carrier than to seek private treatment and wait for reimbursement after winning a lawsuit.⁵⁰ The health insurer has a statutorily subrogated claim against the tortfeasor and his liability insurer, but only if the tortfeasor acted intentionally or with a high degree of culpability.⁵¹ Moreover, it is quite common in Germany for social insurers and liability insurers to make blanket agreements about these types of claims so that they rarely end up being adjudicated in court.⁵² The situation is similar with regard to accident insurance. In many situations the injured person opts to claim the benefits under this branch of social insurance instead of pursuing the claim in court.⁵³

IV. Procedural Aspects

In Germany, professional judges adjudicate tort cases, and no juries or lay judges are involved.⁵⁴ It appears that German judges are more consistent in awarding damages than juries in the United States, and this seems to be particularly true for damages for pain and suffering.⁵⁵

The procedural rules on awarding the costs of litigation also have an influence on German tort litigation. In Germany, the losing party in a civil law suit pays for all the costs of litigation, including attorneys' fees and the expenses of the winning party.⁵⁶ Consequently, plaintiffs are deterred from engaging in risky litigation, even though many Germans carry legal insurance⁵⁷ that covers the plaintiffs' costs for pursuing tort claims.⁵⁸ Moreover, if the damages claimed by the winning party are considerably higher than those awarded, the winner is deemed to be a partial loser of the lawsuit and the costs are apportioned accordingly.⁵⁹

⁵⁰ Ulrich Magnus, *Schadenersatz für Körperverletzung in Deutschland*, in COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE 148 (Bernhard Koch & Helmut Koziol eds., 2003).

⁵¹ *Id.*

⁵² G. Schiemann, in ERMANN BGB KOMMENTAR at Vorbemerkung n.10 (13th ed. 2011), available at <http://www.juris.de> (by subscription).

⁵³ Magnus, *supra* note 50.

⁵⁴ BASIL MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS 4 (2002).

⁵⁵ Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 195 (2005).

⁵⁶ ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], repromulgated Dec. 5, 2005, BGBl. I at 3202, as amended, § 91.

⁵⁷ In Germany, every second household carries a legal insurance policy and among motorists the rate is 65%. See Hubert van Bühren, *Rechtsschutz – aktuelle Entwicklung des Bedingungsmarktes*, ANWALTSBLATT 473 (2007).

⁵⁸ An interesting feature of German legal insurance is that it usually does not cover the cost of defending against a tort claim. *Id.*

⁵⁹ ZPO § 92.

V. Tort Costs—Conclusion

In Germany, factors that decrease tort costs include the absence of juries, the allocation of the costs of a lawsuit, caps on strict liability regimes, and the absorption of medical costs by social health insurers. Factors that increase tort costs are the strict liability regimes in and of themselves and the widespread use of legal insurance in the German population. While strict liability regimes decrease the size of damages through caps, they increase the incidence of recovery by making it easier for plaintiffs to pursue their claims. Legal insurance policies make it easier for plaintiffs to pursue tort and strict-liability claims in court by covering the cost of counsel.

At 1.1% of gross domestic product, the German cost of tort compensation is about half of the cost accrued in the United States.⁶⁰ In Europe, however, Germany ranks second; its tort costs are exceeded only by Italy's.⁶¹ For someone contemplating investing in a German plant, the predictability of German tort costs may be a desirable feature. If an investor should worry about the size of his contribution to the compensation of German tort victims through employer contributions to the social insurance system, he may find it comforting that the German level of nonwage payments is 28%, far below the European average of 32%.⁶²

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⁶⁰ Philip Thompson, Note, *Sanctioning Hard Bargaining: A Critique of State Offer-of-Settlement Rules*, 44 GA. L. REV. 1133, 1135 (2010).

⁶¹ *Id.*

⁶² *Rentenbeiträge*, KÖLNER STADT-ANZEIGER 3 (Oct. 7, 2012), available at LexisNexis (by subscription).

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INDIA

TORT LAW SYSTEM

Executive Summary

India's tort law system was inherited from the British legal system but adapted to "Indian conditions" and modified by statutes passed by the Indian legislature. India recognizes most common law torts, such as personal, negligence, defamation, economic, nuisance, and trespass-to-land torts.

*Notably, however, India diverges from the strict liability rule developed in the landmark British case of *Rylands v. Fletcher* in recognizing an "absolute liability" rule with no exceptions and defenses.*

Tort liability also arises from such major statutes as the Motor Vehicle Act and the Consumer Protection Act.

I. General Description

Tort law in India, as in other common law jurisdictions, is derived from both common law and codified statutes. It is, therefore, heavily influenced by English tort law but diverges on a number of significant issues. According to Ratanlal and Dhirajlal, "the law of torts as administered in India in modern times is the English laws as found suitable to Indian conditions and as modified by the Acts of the India Legislature."¹ Recognized common law torts include, but are not limited to personal torts (assault, battery, false imprisonment, etc.), economic torts, and torts of negligence, defamation, nuisance, and trespass to land.

Civil liability for environmental wrongs is also an important branch of tort law in India, emerging largely out of the tort of "public nuisance."²

A notable divergence from English law was the development of an "absolute liability" rule in the *MC Mehta* case.³ Under the rule, enterprises that engage in "hazardous or inherently dangerous activity" that results in harm to a person through an accident are subject to "absolute liability" (no exceptions) instead of "strict liability" (which is applied in the UK under the rule of

¹ RATANLAL RANCHHODDAS & DHIRAJLAL KESHAVLAL THAKORE, THE LAW OF TORTS 1 (2006).

² A. LAKSHMINATH, RAMASWAMY IYER'S THE LAW OF TORTS 343 (2007).

³ M.C. Mehta v. Union Of India & Ors, A.I.R. 1986 S.C. 1086, available at <http://indiankanoon.org/doc/59060/>.

Rylands v. Fletcher).⁴ In other words, India does not recognize exceptions or defenses, such as an act of God, to the strict liability rule developed in *Rylands*. Some critics feel this approach may undermine investment in science and technology by exposing high-risk enterprises to enormous liability.⁵ The National Environment Tribunal Act 1995⁶ has incorporated the rule of *MC Mehta* into statutory law in relation to cases involving environmental harm.⁷

Another concern, particularly from US and foreign nuclear suppliers, is the recently passed Civil Liability for Nuclear Damage Act.⁸ US officials have been opposed to certain provisions of the law that would expose foreign suppliers to “unlimited liability” for a “Fukushima-type accident.”⁹

Other statutes also impose tortious liability. The Motor Vehicles Act 1998¹⁰ and the Consumer Protection Act 1986¹¹ are two of the major laws with civil liability provisions. The Motor Vehicles Act provides relief for motor vehicle accidents on the basis of fault and strict liability. The three kinds of liabilities consist of (a) Liability for injuries to a third party on a no fault basis; (b) Liability for injuries caused by negligence, or fault liability; (c) Provision for some relief in hit-and-run cases.¹² The Consumer Protection Act “tries to secure the individual from the onslaught of goods and service providers by codifying the principles of breach of duty, negligence, product liability, rule of neighborhood, right to information about a product, its contents, date of make and expiry, price and other necessary details.”¹³ Other laws include: The

⁴ *Id.*, para. 844. According to the Supreme Court of India, “where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Rylands v. Fletcher*.” *Id.*

⁵ *Id.*

⁶ The National Environment Tribunal Act, 1995, No. 27, ACTS OF PARLIAMENT, 1995, available at <http://www.moef.nic.in/legis/others/tribunal.html>.

⁷ LAKSHMINATH, *supra* note 2, at 346.

⁸ *New Rules Give Some Relief to Nuclear Suppliers*, THE HINDU (Nov. 16, 2011), <http://www.thehindu.com/news/national/article2633545.ece>.

⁹ *Id.*

¹⁰ The Motor Vehicles Act, 1998, No. 59, ACTS OF PARLIAMENT, 1998, available at <http://indiacode.nic.in/fullact1.asp?tfnm=198859>.

¹¹ The Consumer Protection Act, 1986, No. 68, ACTS OF PARLIAMENT, 1998, available at http://www.ncdrc.nic.in/1_1.html.

¹² LAKSHMINATH, *supra* note 2, at 156.

¹³ *Id.* at 31.

Public Liability Insurance Act 1991,¹⁴ Environment Protection Act 1986,¹⁵ and Pre-Natal Diagnostic Techniques Regulation and Prevention of Misuse Act 1994.¹⁶

Indian law also recognizes “constitutional torts,” which grant a “remedy in public law under the Constitution,”¹⁷ and provide an “award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their power.”¹⁸

II. India’s Approach to Damages

In tort law as applied in India, damages are calculated using the basic principle of “restitutio in interregnum,”¹⁹ which “conveys the idea of ‘making whole’ ”²⁰ or enabling “total recompense.”²¹ In a tort where damages are not limited to pecuniary loss, “[taking into] account the defendant’s motives, conduct and manner of committing the tort, and where these have aggravated the plaintiff’s damage, e.g., by injuring his proper feelings of dignity, safety and pride,” Indian courts may award aggravated damages.²² India’s approach to punitive damages is heavily influenced by UK law.²³ However, Indian courts have awarded punitive damages in circumstances beyond the limited cases recognized under UK law.²⁴ Indian courts appear to use the multiplier method in assessing compensation.²⁵

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¹⁴ The Public Liability Insurance Act, No. 6 of 1991, <http://www.moef.nic.in/legis/public/public1.html>.

¹⁵ The Environment Protection Act 1986, No. 29 of 1986, <http://envfor.nic.in/legis/env/env1.html>.

¹⁶ The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, available at <http://indiankanoon.org/doc/151676/>.

¹⁷ Smt. Nilabati Behera v. State of Orissa, A.I.R. 1993 S.C. 1960, available at <http://indiankanoon.org/doc/1628260/>.

¹⁸ *Id.*, para. 602.

¹⁹ Destruction of Public and Private Properties v. State of A.P. and Ors, (2009) 5 S.C.C. 212, available at <http://www.indiankanoon.org/doc/531492/>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ RATANLAL & DHIRAJLAL, *supra* note 1, at 202.

²⁴ *Id.* at 203.

²⁵ Lata Wadhwa & Ors v State of Bihar & Ors, (2001) 3 L.R.I. 1112, available at <http://www.indiankanoon.org/doc/508534/>.

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ITALY

TORT LAW SYSTEM

Executive Summary

Italy follows the general civil law pattern of statutorily-enacted rules concerning tort liability. The Italian negligence-based civil liability system has increasingly yielded to an expansion of strict liability schemes due to legislative enactments and to case law; however, this trend is not completely settled in Italian law. The general elements of tort liability are: the existence of an unjustified injury, fraud or negligence, causation, and defenses to liability. Italian law also recognizes vicarious liability. In the case of damages caused by vehicles, a strict joint and several liability scheme for owners and operators exists. Several limits exist concerning damage caused by defective products. Finally, special tort laws exist concerning, among other, the public administration, environmental law, and product liability. Italy's annual tort costs are equal to 1.3% of its GDP.

I. Constitutional Provisions

The 1947 Constitution of the Italian Republic¹ contains two provisions relevant to tort liability. First, government officials or public agencies are “directly responsible under criminal, civil, and administrative law for acts committed in violation of rights” (art. 28), in which cases civil liability extends to the state and the respective public agencies. Second, the national congress has exclusive jurisdiction to pass legislation concerning civil and criminal law (art. 117)—that is, tort liability is an exclusive domain of enacted statutes in Italy.

II. General Tort Law

A. Background

The basic rules dealing with tort liability in Italy are contained in the Civil Code (arts. 2043–2059). Italy has established a fault-based civil liability system.

Article 2043 of the 1942 Italian Civil Code establishes the basic rule on tort liability: “[a]ny fraudulent, malicious, or negligent act that causes an unjustified injury to others obliges

¹ CONSTITUTION OF THE ITALIAN REPUBLIC (English version published by the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication of the Senato della Repubblica, Apr. 2009), available at http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

the person who has committed the act to pay damages.”² The Civil Code allows liability caused by one’s own conduct as well as the conduct of persons or things under one’s control (vicarious or respondeat superior liability).

B. Elements of Tort Liability

Under article 2043 of the Civil Code, Italian tort liability requires the following elements: (i) the victim’s protected right or interest; (ii) an unjustified damage/injury; (iii) fraud or negligence unless the law authorizes strict liability; (iv) causation; and (v) defenses to liability.³

Concerning protected rights or interests, the crucial element of “unjustified injury” must concur for tort liability to exist under Italian law. Originally, and historically, Italian law required that an “absolute right” of the victim be violated before damages can be recovered.⁴ Following the global paradigm of a “victim-centered” approach to tort liability—namely, a broad interpretation of the concept of “unjustified injury” considering a vast range of individual interests as protected rights—the scope of tort liability law has been expanded through judicial application of strict liability.⁵

The determination of the meaning and content of the notion of “unjustified injury” is not clear in Italian law. In effect, Italian law recognizes two types of harm: material harm, and pain and suffering (“nonpecuniary”)⁶ harm. Pain and suffering damages are available “only in cases provided by the law” (Civil Code art. 2059).⁷ Article 185 of the Criminal Code is the most important example of pain and suffering damages expressly provided by the law. As article 2059 allows compensation only for material damage (medical expenses, lost wages, property damage),⁸ case law has expanded the range of damages allowed by article 2059. In fact, courts have allowed damages for pain and suffering⁹ under the concept of “biological damage,” as a “recoverable loss stemming from any injury to health,”¹⁰ and also allowed, *inter alia*, damages for tortious interference with contractual obligations and privacy rights, including personal data, one’s own image, fame, and other *in personam* rights.¹¹

² JEFFREY S. LENA & UGO MATTEI, *INTRODUCTION TO ITALIAN LAW* 217 (Kluwer Law International, 2002).

³ *Id.* at 243.

⁴ *Id.* at 218.

⁵ *Id.* at 242.

⁶ PATRIZIA ZIVIZ, *LA RESPONSABILITÀ CIVILE. IL DANNI NON PATRIMONIALI* 243–303 (UTET Giuridica, 2012).

⁷ *Id.* at 340–42. *See also* MARIO BARCELLONA, *TRATTATO DELLA RESPONSABILITÀ CIVILE* [TREATISE ON TORT LAW] 794, 824 (Utet Giuridica Ed., Torino, 2011) (stating that the Italian Constitution is silent with respect to nonpatrimonial damages).

⁸ BARCELLONA, *supra* note 7, at 792.

⁹ *Id.* at 227.

¹⁰ *Id.* at 791.

¹¹ *Id.* at 239.

With respect to the element of fraud or negligence, there has been a growing evolution from the general fault-based system established in article 2043 of the Italian Civil Code to a strict liability-based system. This evolution has taken place through numerous legislative reforms and via case law.¹² Ultimately, the difference between the traditional fault-based liability system and that based on strict liability resides in the greatly reduced pool of defenses available to the defendant under the latter scheme. However, even in strict liability cases, apportioning liability is allowed on a case-by-case basis.¹³

Two elements regulate the cause and effect relationship between the wrongful conduct and the injury: actual or potential possibility of causing the harm, and the concurrence of conduct that is legally relevant. Besides these general rules, Italian law is largely succinct on the topic of causation. As a result, case law and legal scholars have developed innumerable rules addressing this matter, such as, for example, comparative negligence, which is allowed as a defense to reduce or eliminate liability (Civil Code art. 2056),¹⁴ and imposition of joint and several liability to provide the victim with “broader guarantees of recovery”¹⁵ and preserve the payor’s action for contribution against the other tortfeasors (Civil Code art. 2055).

Most of the defenses to liability derive from criminal law¹⁶ and include (1) self-defense (Civil Code art. 2044); (2) state of necessity (Civil Code art. 2045; Criminal Code art. 52); (3) the intervening conduct of a third party; (4) an “Act of God”;¹⁷ and (5) in some situations assent of the victim (Criminal Code art. 50). These defenses generally include the requirements of inevitability and proportionality.¹⁸ Some of these defenses are available in the negligence and strict liability schemes as an absolute bar to recovery.¹⁹

The general statute of limitations for tort liability is ten years (Civil Code art. 2946).

C. Vicarious Liability

The Civil Code assigns civil liability not only for the injuries caused by a person,²⁰ but also for harm caused by persons with whom the defendant has a particular legal relationship (vicarious or respondeat superior liability): guardians (art. 2047), parents, tutors, and preceptors [tutors teaching an art, such as music, etc.] (art. 2048), and employers for injuries caused within the scope of their employment (art. 2049). Additionally, the Code provides for liability for

¹² MARCO GROTTI, PRINCIPIO DI COLPEVOLEZZA, RIMPROVERABILITÀ SOGGETTIVA E COLPA SPECIFICA 92–113 (G. Giappichelli Editore, Torino, 2012).

¹³ *Id.* at 225.

¹⁴ LENA & MATTEI, *supra* note 2, at 223.

¹⁵ *Id.* at 224.

¹⁶ *Id.* at 221.

¹⁷ *Id.* at 224.

¹⁸ *Id.* at 223.

¹⁹ *Id.* at 225–26.

²⁰ *Id.* at 220.

damage caused by things under one's control (art. 2051), animals (arts. 2052, 2053), and dangerous activities (art. 2050).²¹ Very limited defenses to liability are permitted in the case of vicarious liability.²²

The concurrence of tort and contractual liability often occurs during the performance of transportation contracts or for medical treatment.²³ The specific rules governing the concurrence of tort and contract actions is still unsettled in Italian law.²⁴

D. Assessment of Damages

Monetary (or legal) remedies are the general rule in Italy. Injunctive relief is available in specific situations where monetary damages would not cure the harm or would be insufficient, or where the victim rejects damages. For injunctive relief to proceed, three elements must exist: (1) a tort must have been committed, (2) continuation of the tort must be feared, and (3) there must be a reasonable fear of future harm.²⁵ Declaratory judgments are also available in certain cases (defamation and patent law, among others).²⁶

The Civil Code rules concerning the assessment of damages for tort liability are the following:

- Article 2055 states that if the injury is attributable to more than one person, all of them are jointly and severally liable for such damage. Those who paid more than their fair share have a right of indemnity against the other tortfeasors. If apportionment cannot be determined, all of the tortfeasors concur equally in the damage.
- Article 2056 indicates that in cases of contractual damages the judge may, in his or her discretion, evaluate the loss of earnings according to the circumstances of the case.
- Article 2057 states that in the case of “permanent damages” the judge assesses them taking into consideration the condition of the parties and the nature of the damage, and may award damages in the form of annuities. When damages are susceptible of restoration in a specific form (art. 2058) but this form of restoration becomes excessively costly for the tortfeasor, the judge may order compensation that is equivalent to the amount of the damage.

²¹ *Id.*

²² Codice Civile [Civil Code] art. 2048 para. 3 (stating that vicarious liability may be avoided “only if they [those responsible for others’ conduct] can prove that the fact could not have been prevented.”).

²³ LENA & MATTEI, *supra* note 2, at 235.

²⁴ *Id.*

²⁵ *Id.* at 234.

²⁶ *Id.*

E. Rules on Tort Liability Particularly Relevant to Automotive Traffic

The Civil Code contains the basic rule on harm caused by vehicular traffic (art. 2054). This provision makes the driver of a vehicle that does not run on rails (*senza guida di rotaie*) liable for damages unless he can prove he was unable to avoid the injury. That provision also states that in the case of a collision between vehicles, the presumption is that, unless proven otherwise, each of the operators contributed equally to the damage.

Article 2054 also attributes joint and several liability to the vehicle's owner for the damage caused by operators, unless the owner can prove that the driver took the vehicle without his consent. At any rate, owners and operators are always liable for the damage arising from workmanship vices or maintenance defects with respect to the vehicles.

The Civil Code includes a shorter statute of limitations of two years for tort actions arising from traffic accidents (Civil Code art. 2947).²⁷ In this case, if the tortious action also qualifies as a crime, whichever period is longer prevails.

III. Special Tort Law

Italian law has evolved to include, statutorily and via case law, new particularized schemes of tort liability, including the following:

A. Civil Liability of the Public Administration

Pursuant to Law 5992 of 1889, the only remedy available in the case of torts caused by the state was the declaration of the nullity of the wrongful act by the Council of State.²⁸ Ordinary judges systematically refused to grant damages to private plaintiffs against the state under the argument that the plaintiff had to prove that the government entity had acted “with injustice.” This was a very high threshold to overcome. Administrative judges, on their part, also rejected damages claims against the state based on their alleged lack of jurisdiction to punish government actions.²⁹ Over time, ordinary judges began to incorporate tort principles traditionally applied to private litigation (good faith, fair dealing, etc.) to deciding claims against the state. Later legislation addressed the state's tort liability, allowing the invalidation of government action and the awarding of monetary damages.³⁰ However, this is an area that it is still not completely settled in Italian law.³¹

²⁷ *Id.*

²⁸ BARCELLONA, *supra* note 7, at 521.

²⁹ *Id.* at 522.

³⁰ *Id.* at 523.

³¹ *Id.*

B. Civil Liability for Environmental Damage

Until 1986, judges awarded damages for environmental damage based on the generic provision of article 2050 of the Civil Code, which allows damages arising from dangerous activities according to the nature of the hazardous activity or the means used to perform such activities.³² The adoption of appropriate measures to avoid the damage is the only defense under article 2050. Pursuant to article 2050, when environmental damage affected persons directly, judges awarded damages by interpreting the constitutional right to health (Italian Constitution art. 32) in conjunction with article 2043 of the Civil Code.³³ In the case of property nuisances, damages are allowed without the need to prove fault “provided that the polluting effects exceed normal tolerability” (Civil Code art. 844).³⁴

The 1986 Italian statute on civil liability for environmental damage excludes strict liability and establishes a fault-based system.³⁵ Joint liability is excluded for environmental damages, as damages are determined according to the degree of negligence of each tortfeasor when a multiplicity of tortfeasors exists.³⁶

Additionally, Italy is a party to two international treaties establishing strict liability for environmental damage: (1) the 1961 Brussels Convention on civil liability for damages caused by hydrocarbon pollution to sea waters and the environment; and (2) the 1982 United Nations Convention on the Law of the Sea. Thus, civil liability for water pollution in Italy is subject to a dual regime: a fault-based system for internal waters, and a no-fault scheme for sea waters.³⁷

Liability for nuclear damage is regulated by Law 1860 of December 31, 1962.³⁸

C. Product Liability Law

Presidential Decree 224 of May 24, 1998,³⁹ introduced a strict liability scheme concerning damage resulting from defective products. This Decree is a transplantation of European Products Liability Directive 85/374/EEC on liability for defective products.⁴⁰

³² LENA & MATTEI, *supra* note 2, at 227 (“Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.”).

³³ CARMELITA CAMARDI, *LE ISTITUZIONI DEL DIRITTO PRIVATO CONTEMPORANEO* 336 (Jovene Editore, 2010).

³⁴ LENA & MATTEI, *supra* note 2, at 227–28. (indicating that art. 844 states that, “[t]he owner of land cannot prevent the emission of smoke, heat, fumes, noises, vibrations or similar propagation from the land of a neighbor unless they exceed normal tolerability, with regard to the condition of the sites. In applying this rule the court shall reconcile the requirements of production with rights of ownership. It can also take account of the priority of given use.”).

³⁵ Law 349 of 1986, art. 18, *translated by* LENA & MATTEI, *supra* note 2, at 228.

³⁶ LENA & MATTEI, *supra* note 2, at 229.

³⁷ *Id.* at 230.

³⁸ Law 1860 of December 31, 1962, *Impiego pacifico dell’energia nucleare* [Peaceful Use of Nuclear Energy], available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1962-12-31:1860>.

Under Decree 224, manufacturers' liability is limited in order to reduce the risk of compensation. To that effect, Decree 224 includes defenses vis-à-vis claims of design defects, which allow the manufacturer to claim that he used the best available technology and design to make the product as safe as possible.⁴¹ The statute of limitations for damages caused by defective products under Decree 224 is three years. Any pacts or agreements excluding or limiting any of the provisions of Decree 224 are null and void (art. 12).

Caps for damages caused by defective products or in cases where there is an assumption of risk by the victim or the intervention of a third party are established by national and EU legislation. For example, Legislative Decree 206, Codice del consumo [Consumer Code], of September 6, 2005, enacted pursuant to article 7 of Law No. 229 of July 29, 2003,⁴² contains several provisions capping liability for defective products in the aviation industry. Specifically, it limits damages for personal injury to the limits established by international conventions to which Italy or the European Union are members, and allows contracting parties to limit the compensation for non-personal injury by their contractual obligations.

IV. Procedural Aspects

A. Punitive Damages

The Italian legal system does not contemplate punitive damages. According to news reports, the Italian Supreme Court recently and unanimously held that punitive damages violate public policy considerations.⁴³ Moreover, Law 218 of May 31, 1995⁴⁴ forbids the recognition in Italy of a foreign judicial decision when the effects of the foreign law upon which such decision is issued “are contrary to the public order [public policy]” (art. 16(1)).

³⁹ Decreto 224, GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA [G.U.] [OFFICIAL JOURNAL OF THE REPUBLIC OF ITALY], No. 146, of June 23, 1988, available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:presidente.repubblica:decreto:1988-05-24:224>.

⁴⁰ Council Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:en:HTML>.

⁴¹ LENA & MATTEI, *supra* note 2, at 241.

⁴² G.U. no. 2005/235 of October 8, 2005, available at <http://www.consumatori.it/images/stories/documenti/Codice%20del%20consumo%20english%20version.pdf>.

⁴³ *Danni punitivi statunitensi e incertezza del diritto italiano* [US Punitive Damages and Italian Legal Uncertainty], DIRITTO 24 (July 12, 2012), <http://www.diritto24.ilsole24ore.com/avvocatoAffari/mercatiImpresa/2012/07/danni-punitivi-statunitensi-e-incertezza-del-diritto-italiano.html> (mentioning the decision of the Corte di Cassazione dated Feb. 8, 2012).

⁴⁴ Law 218 of 1995, Riforma del sistema italiano di diritto internazionale privato [Amendment to the Italian System on Private International Law], available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1995-05-31:218!vig>.

B. Litigation Costs

The Italian Code of Civil Procedure adheres to the “loser pays rule.” In effect, it establishes that in his final decision, the judge condemns the losing party to reimburse the litigation costs to the other party together with the legal fees incurred by the other party (art. 91). The judge may exclude this obligation when the expenses incurred by the winning party are excessive or superfluous, and may also condemn any of the parties to the reimbursement of litigation costs when a party or its counsel have violated their duty to conduct themselves with loyalty and probity at trial and that violation has caused the other party to incur litigation costs. Additionally, the judge may offset litigation costs between the parties in toto or partially when both parties lost or for grave or exceptional reasons (art. 92).

C. Jury Trials

Jury trials do not exist in Italy. Article 102 of the Italian Constitution⁴⁵ establishes that, “[j]udicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary.” The Cortes Di Assise Di Appello, which are special criminal appellate courts,⁴⁶ hear appeals from Cortes Di Assise (trial courts), and the sitting judges of the appellate court are joined on the bench by six lay judges who are not common law jurors.⁴⁷

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⁴⁵ English version available at the Senato della Repubblica website, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁴⁶ Codice di procedura penale [Code of Criminal Procedure], art. 596, <http://www.altalex.com/index.php?idnot=36868>.

⁴⁷ See THOMAS GLYN WATKIN, *THE ITALIAN LEGAL TRADITION* (1997), at 130.

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JAPAN

TORT LAW SYSTEM

Executive Summary

Japan's Civil Code has provisions on torts. The case law states that the extent of damage to be compensated is what is ordinarily caused by the tortuous act. No punitive damages are awarded.

I. General Explanation of Torts

The Civil Code of Japan contains provisions on torts.¹ Article 709 defines the basic elements for establishing liability in tort, as follows:

- Intent or negligence: a tortfeasor acted intentionally or negligently;
- Infringement of right: a tortfeasor infringed any right or legally protected interest of another;
- Damage: damage was sustained by the victim; and
- Causal relationship: there was a causal relationship between the act and the damage.

The followings are supplemental explanations. Damages are explained in Part II.

A. Responsible Person

A person is exempt from tort liability if he or she lacks civil capacity. Article 712 of the Civil Code provides an exemption for minors and article 713 provides an exemption for persons with mental disabilities if they cannot appreciate their liability for their own acts when inflicting damage. However, the person with a legal obligation to supervise the minor or disabled person may be held responsible.²

A person may be responsible for another's acts. An employer may be responsible for an employee's acts.³ A person who hires a contractor may be responsible if the contractor inflicts damage on another person while following the person's orders.⁴ An owner or exclusive user of land or a facility attached to land may be responsible if the facility or plants on the land inflicted

¹ Minpō [Civil Code], Act No. 89 of 1896, *last amended* by Act No. 53 of 2011, arts. 709–724.

² *Id.* art. 714.

³ *Id.* art. 715.

⁴ *Id.* art. 716.

damage on another person.⁵ An owner of an animal may also be held responsible when the animal inflicts damage on another person.⁶ When multiple tortfeasors are involved, all of them may be fully responsible.⁷

B. Negligence

There are special laws to lighten the standards of proof for negligence. For example, the Product Liability Act requires proof of a defect in the product to make the manufacturer responsible for damage caused by the product, not negligence of the manufacturer.⁸ Under the Air Pollution Control Act, when an air pollutant injures human life or health, the person who released the pollutant is liable to provide compensation for any damages resulting from the pollutant.⁹

C. Legal Interests of Another

The protected legal interests of another are not limited to property rights. When a person's body, liberty, or reputation are infringed, the ensuing damage is subject to compensation.¹⁰

D. Causal Relationship

There must be a causal relationship between the act and the damage: without the act, there would be no damage. The Supreme Court decided the standard of proof for establishing a causal relationship in a medical malpractice case, holding that to prove a causal relationship in litigation, scientific proof that leaves no doubt is not required, but only proof of a strong probability that a specific event caused a specific loss by considering all the evidence based on commonly shared rules of experience or practice. It also held that “strong probability” means that a reasonable person would be convinced of the conclusion to the extent he or she can comfortably believe it.¹¹

D. Justification

A person who, in response to the tortious act of another, unavoidably commits a harmful act to protect himself/herself, the rights of a third party, or any legally protected interest, is not liable for damages. The victim can claim damages against the tortfeasor.¹²

⁵ *Id.* art. 717.

⁶ *Id.* art. 718.

⁷ *Id.* art. 719.

⁸ Seizōbutsu sekinin hō [Product Liability Act], Act No. 85 of 1994, art. 3.

⁹ Taiki osen bōshi hō [Air Pollution Control Act], Act No. 97 of 1968, *last amended by* Act No. 105 of 2011, art. 25.

¹⁰ Civil Code art. 710.

¹¹ 29 MINSHŪ 9, 1417, 1419–20 (S. Ct., 2nd petit bench, Oct. 24, 1975).

¹² Civil Code art. 720.

E. Statute of Limitation

There is a time limitation for tort litigation. The right to demand compensation for damages in tort extinguishes if it is not exercised by the victim within three years from the time when he or she comes to know of the damage and the identity of the perpetrator. The same applies when twenty years have elapsed from the time of the tortious act, regardless of the victim's knowledge.¹³

II. Damages

The case law states that the extent of damage to be compensated is determined by applying article 416 of the Civil Code *mutatis mutandis*.¹⁴ Article 416, paragraph 1 states that the extent of damage for a failure to perform an obligation is what is ordinarily caused by such failure. The victim may also demand compensation for damage that arises from any special circumstances if the party did foresee, or should have foreseen, such circumstances.¹⁵ There is no provision to allow for punitive damages. Only compensatory damages are available to a plaintiff. When assessing the amount of damages, a court takes the victim's fault into consideration and may reduce the amount of compensation based on such fault.¹⁶

Compensation is usually provided in monetary form.¹⁷ In defamation cases, however, the court may order the defendant to take appropriate measures to help the victim recover his or her honor, in addition to or instead of monetary compensation.¹⁸

Some special laws have provisions to ease the plaintiff's burden of proof regarding the amount of damages. For example, the 1998 amendment to the Patent Act¹⁹ added a provision setting forth a special method for calculating damages. Where a patentee claims compensation against an infringer for damage sustained by a patent infringement, the amount of damage sustained by the patentee may be presumed to be the amount of profit per unit of articles that would have been sold by the patentee if there had been no such act of infringement, multiplied by the quantity of articles assigned by the infringer.²⁰ However, if the infringer proves that the patentee or the exclusive licensee would have been unable to sell the assigned quantity in whole or in part, the amount of damages can be reduced.²¹

¹³ *Id.* art. 724.

¹⁴ So-called Fukimaru Case, 3 DAISHININ MINSHŪ 386 (S.Ct., May 22, 1926).

¹⁵ *Id.* See also Civil Code art. 416, para. 2.

¹⁶ Civil Code art. 722, para. 2.

¹⁷ *Id.* art. 722, para. 1.

¹⁸ *Id.* art. 723.

¹⁹ Act No. 51 of 1998.

²⁰ Tokkyo hō [Patent Act], Act No. 121 of 1959, art. 102, para. 1, *amended by* Act No. 51 of 1998.

²¹ *Id.*

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RUSSIAN FEDERATION

TORT LAW SYSTEM

Executive Summary

Russia does not recognize torts as a legal concept and has established that manufacturers, sellers, or service providers can be held liable for damage to the life, health, property of an individual, or to the property of a legal entity as a result of defective goods, work, or services. Either compensation must be provided in kind or damages paid in full. Legislation does not provide for punitive damages; however, pain and suffering may be compensated for in the amount determined by a court.

I. Introduction

The tort is not recognized as a legal concept under Russian law. As a civil law jurisdiction, Russia follows the doctrine of noncontractual obligations, and issues that would be covered under tort law in the US legal system are considered as matters of product liability and consumer protection.¹

The concept of product liability is relatively new in Russia, its development beginning in the 1990s. The Russian Civil Code (Part Two)² and the Law on Consumer Rights Protection,³ adopted in 1994 and 1992, respectively, are the two major legal acts regulating issues of product liability. The Civil Code includes several general provisions as well as specific rules applying to all kinds of harmful activity, while the Law on Consumer Rights Protection is a supplementary act containing additional rules establishing liability.⁴ Product liability requirements can be found in other legal acts, but they are implemented according to the principles established by these two acts.

II. General Liability Provisions

The goal of Russian legislation is to shift, where possible, the cost of harm to those responsible for causing it.⁵ Under law, it is left to the affected person's discretion to submit a

¹ Olga Anisimova & Alexey Barnashov, *Russia*, in INTERNATIONAL PUBLIC LIABILITY LAW 664 (Gregory Fowler ed., Aspatore Books, 2004).

² SOBRANIE ZAKONODATELSTVA ROSSIISKOI FEDERATSII (official gazette) 1994, No. 32, Item 3301.

³ VEDOMOSTI ROSSIISKOI FEDERATSII (then the official gazette) 1992, No. 15, Item 766.

⁴ WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 370 (New York: Juris Publishing, 2004).

⁵ *Id.* at 371.

claim for damage compensation to a general court, or to a local arbitration court in the case of a dispute between commercial enterprises.

According to article 1095 of the Civil Code, “[h]arm caused to the life, health, or property of an individual or the property of a legal entity as a consequence of design, prescription, or other defects in a good, work, or service, or as a consequence of unreliable or insufficient information concerning the good (or work, or service), shall be subject to compensation by the seller or manufacturer of the good, or by the person who performed the work or rendered the service, irrespective of whether he or she was at fault or whether the victim was in contractual relations with them or not.”⁶

According to Russian lawyers, the test for whether “insufficient information” was supplied to a consumer is ambiguous.⁷ An actual tortfeasor is usually a respondent under civil proceedings, although the liability to compensate for damage may be attached by law to any party other than a tortfeasor.⁸

The liability period is equal to the established lifetime or shelf life of a product, or ten years from the date of production if the lifetime or shelf life is not established and the manufacturer is not required to establish lifetime or shelf life.⁹

III. Penalties and Payment of Damages

Manufacturers, retailers, and service providers can be held liable for damages caused by the product.¹⁰ Article 1064 of the Civil Code states that that all damages shall be paid in full.¹¹ In case the retailer is held liable for damages, the latter can claim regression.¹² The court decides whether a wrongdoer must compensate for the harm in kind or pay for the losses caused.¹³

The Civil Code provides for payment of expenses actually incurred and expenses to be incurred. Such expenses may include breached contracts, property loss or damage, or lost profits. According to the Civil Code, liability may include regular payments based on the loss of earnings, payment for medical treatment and medicine, or, in case of wrongful death, payments to dependents.¹⁴ If stricter requirements are provided by contracts or other laws, they will likewise apply. The court may “consider contributory negligence or intent of the victim and

⁶ CIVIL CODE OF THE RUSSIAN FEDERATION 399 (William Butler trans., Oxford University Press, 2002).

⁷ Anisimova & Barnashov, *supra* note 1, at 667.

⁸ *Id.*

⁹ Civil Code art. 1097.

¹⁰ *Id.* art. 1095.

¹¹ BURNHAM ET AL., *supra* note 4, at 371.

¹² Civil Code art. 1081.

¹³ *Id.* art. 1082, as translated by Butler, *supra* note 6, at 392.

¹⁴ *Id.* arts. 1084–1094; Anisimova & Barnashov, *supra* note 1, at 664.

reduce the amount of compensation.”¹⁵ Even if such negligence is found, the court cannot decrease liability to zero under article 1083 of the Civil Code if the consumer’s health or life has been harmed through the use of the product.¹⁶ In the most recent tort-related decision of the Russian Supreme Court, the Court ruled that the amount of compensation payments awarded to the plaintiff cannot exceed the cost of the damaged property.¹⁷

According to article 1082 of the Civil Code, no punitive damages are provided for torts. Russian practitioners attribute this to the courts’ lack of power to set examples for similar violations.¹⁸ Meanwhile, they see the so-called “moral damage compensations” awarded for pain and suffering as a kind of punitive damages, regardless of whether they are physical or emotional. However, unlike punitive damages, “moral damages are intended to provide solace to the victim” for his/her sufferings and appear to be more compensatory.¹⁹ According to mass media reports on major court rulings in the area of consumer rights protection, it appears that courts tend to side with plaintiffs against manufacturers if they are big companies, especially foreign ones. The reported penalties are usually equal to or greater than the amount of compensation requested by the plaintiff.²⁰ However, they do not appear to be outrageously high, nor do they appear to be the subject of public discussion. The number of tort claims is constantly growing, and tens of thousands of such cases are resolved by Russian courts annually. Reportedly, the average amount of compensation awarded increased sixteen times during the last ten years.²¹

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¹⁵ Anisimova & Barnashov, *supra* note 1, at 664.

¹⁶ *Id.*

¹⁷ Supreme Court of the Russian Federation, Ruling No. 53-B11-10 of September 2, 2011, BIULETEN’ VERKHOVNOGO SUDA ROSSIISKOI FEDERATSII [Bulletin of the Supreme Court of the Russian Federation] 2012, No. 2.

¹⁸ Anisimova & Barnashov, *supra* note 1, at 662.

¹⁹ *Id.*

²⁰ *Id.* at 669.

²¹ Editorial, *Judicial Practice in Cases on Compensations for Damage Inflicted to Health*, GLAVNAIA MEDITSINSKAIA SESTRA 2009, No. 12, available at <http://www.zdrav.ru/articles/practice/detail.php?ID=76102> (in Russian).