# II. Portuguese Tort Law: A Comparison with the Principles of European Tort Law

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## A. The Portuguese Civil Code of 1966

If geography and linguistic family alone influenced law, no doubt one could include Portuguese civil law within the Romanistic legal family. Indeed, the modern Codification movement started in Portugal at the beginning of the 19th century and it was most influenced at that time by French law. 1

Not surprisingly, commercial law was the first branch of private law to be codified. The first Commercial Code dates from 1833; Ferreira Borges was its main mentor and it had a particular national character, it codified the national customs of the *lex maercatoria* and previous legislation. In 1888 it was replaced by a new code, which took account of the Commercial Codes of Italy and Spain, which had followed on the *Code de Commerce*. 2

### 1. From "L'école de l'Exegèse" to "Die Pandekten"

In 1867 the first Portuguese Civil Code was enacted[2]. Prof. Seabra, influenced by the *Code Napoleon*, wrote the whole Code alone. Other Codifications were also studied and taken into consideration, especially the *Allgemeines Landrecht* (Prussia), the *ABGB* (Austria) and the *Sardinian Civil Code*. But he was able to create a very peculiar style: the systematisation is different from the French Code[3]. The Civil Code, as the Code of the person, should follow "the personal biography" of the citizen. Naturally, it was meant the citizen of the 19th century, that is to say, a Code thought for the bourgeois and the landowner. 3

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[2] On that same date (1 July 1867) the death penalty was abolished in Portugal.

[3] Our first Civil Code of 1867 results from the movement of Codification and was also influenced by *L'école de l'Exegèse* (19th Century). See L. Menezes Leitão, *O Ensino do Direito das Obrigações* (2001).

4 In 1966, after more than 20 years of preparation, the new *Código Civil* (CC) was enacted (entered into force on 1 June 1967). Zweigert & Kötz[4] comment that this Code "is remarkable for the intelligent attention it pays to foreign legislation – especially German, Swiss, and Italian – to the point where *one may wonder whether Portuguese private law ought still to be included in the Romanistic legal family.*" We will briefly analyse its structure and we will conclude that Portuguese civil law has, over the last century, jumped over the Rhine and the Alps to establish a fruitful dialogue with German, Austrian, and Swiss as well as with Italian law.

5 First of all, one should note that the Portuguese legislator opted for the solution of keeping labour law and commercial law out of the CC, although it may be subsidiarily applicable. Thus, only "classical" private law will be found in its 2334 articles. In this respect the German model of 1900 (BGB) was followed, rather than the Italian *Codice Civile* of 1942. Another commission intended to simultaneously revise the entire commercial law but it was considered more appropriate to leave this aside.

6 Secondly, the Pandectistic divisions of the BGB and much of its conceptual apparatus were strictly followed. Thereinafter, the CC is divided into 5 books: Book I – General part (*Allgemeiner Teil*), Book II – Law of Obligations (*Schuldrecht*), Book III – Property Law and other rights *in rem* (*Sachenrecht*), Book IV – Family Law (*Familienrecht*) and Book V – Law of Successions (*Erbrecht*).

7 In Book I (General Part) one finds the following issues: Sources of law and Interpretation of law; Private international law; Law of natural persons; Legal persons (Corporations and Foundations); Things (*res)*; Rules relating to acts in law (contract law); Law of proof (which follows the Romanistic tradition).

8 Within the law of natural persons, one shall stretch the Chapter concerning personality rights: Artt. 70–81 were a space of freedom within the dictatorship that was keeping Portugal in the darkness. It is fair to say that civil law was the guardian of the liberties until the 1933 Constitution of the Corporative-Fascist regime was replaced by the Democratic 1976 Constitution. In this respect, the general personality right (*Allgemeines Persönlichkeitsrecht*) was established in Art. 70[5] and it has played a significant role in protecting the rights of persons against unlawful conduct.[6] This is a so-called *Rahmenrecht,* to be fulfilled by particular rights to be found elsewhere. We can find specific per-

[4] K. Zweigert/H. Kötz, *An Introduction to Comparative Law* (3rd edn. 1998), 108. For a different perspective of the legal families see J.M. Rainer, *Europäisches Privatrecht: Die Rechtsvergleichung* (2002), 57.

[5] Art. 70 (General protection of the personality): "The law protects individuals against any unlawful offence or threat of offence to his physical or moral entity."

[6] See R. Capelo de Sousa, *O Direito Geral de Personalidade* (1995). A. Menezes Cordeiro, Os Direitos de Personalidade na Jurisprudência Portuguesa, [2001] *Revista da Ordem dos Advogados* (ROA), 1229–1256.

sonality rights, like name; honour, reputation and credit; image; privacy and publication of one's picture or private letters in Artt. 72–80 CC, and many other recent personality rights like protection of genetic data, confidentiality of medical data, the right not to know, etc. in other legal sources such as the Constitution, Penal Code, International Conventions and case law. The remedies are not only *damages*, but also *restoration in kind* and *injunctive relief* (Art. 70 (2)).[7]

Artt. 217 et seq. (Subtitle III) provide rules relating to "acts in law" (*factos jurídicos*). The Portuguese legislator uses the concept of *Rechtsgeschäft* (*negócio jurídico*) and *Aussage* (*declaração negocial*), which proves the strong German-Pandectistic influence in the first half of the 20th century. Among others, there are rules concerning error, deceit, duress, form, agency, conditions, legality and immorality, and usury[8], which are the core of contract law elsewhere. 9

Book II – Law of Obligations – makes a distinction between (Title I) *Law of Obligations in General* (i.e., creditor-debtor relationships in general) and (Title II) *Special Types of Contract* (Sales contract; Donation; Partnership of civil law; Lease; Cattle breeding Partnership; Borrowing; Labour contract; Services Contract; Mandate; Deposit; Building contract; Rent (Perpetual rent and Life long Rent); Gambling and Transaction). 10

We will further concentrate on the law of obligations in general. The legislator enounces and regulates the sources of obligations: contract; unilateral legal acts (*einseitiges Rechtsgeschäft*); torts; *negotiorum gestio* and law of unjustified enrichment. Moreover this Title regulates the types of obligations, the transmission of credits and debts and security rights such as surety, the transfer of securities, pledges, mortgages, rights of priority, and also the oblique action of a creditor are dealt with in the general law of obligations. In fact, security rights ("lease-income consignment", pledges, mortgages, priority rights, retention rights), although considered as rights *in rem*, have an instrumental character: they only exist as long as the credit exists, and therefore it is dogmatically adequate to regulate these rights *in rem* in the Book of the Law of Obligations. The very important Chapter on performance and non-performance of an obligation is regulated in Artt. 762–816 CC. It is interesting to note this issue is not regulated as a specific contract law problem, but a general problem of the law of obligations, independently of its source: contract, unilateral legal act, tort, *negotiorum gestio* or unjust enrichment. However, the Chapter on performance and non-performance of obligations is indeed a core 11

[7] Art. 829-A regulates a private pecuniary sanction for every day or every event the tortfeasor breaches his duties. This is similar to the French *Astreinte* and it can be very important for avoiding continuous violation of personality rights.

[8] Art. 282 states that a contract concluded under usury can be declared *void*. Alternatively, Art. 283 allows *modification* of the contract according to "equity" in case of usury, that is when one party takes advantage of the other's necessity, inexperience, dependency, deftness, psychological weakness and obtains excessive or unjustified benefits.

area of contract law. The chapter concerning judicial fulfilment of the obligations (which establishes a bridge towards civil procedural law) is regulated in Artt. 817–836. Finally, this Title also regulates other ways of extinguishing an obligation rather than the performance of the duty (*Dação em cumprimento* [alternative payment]; consignment; set-off; novation, remission; confusion).

12 Book III regulates possession, ownership and other real rights. Its norms apply (except when otherwise provided) both to movable and immovable things. Intangible property is regulated elsewhere[9], but the Civil Code may apply when appropriate. The three main principles of Portuguese property law are: (1) Principle of "*numerus clausus*" of the rights *in rem* (Art. 1306); (2) Principle of consensual transfer of ownership (Art. 408 (1))[10]; and (3) Principle of Publicity.[11] In this field, especially considering the *consensual principle* (Art. 408), Napoleonic influence is obvious. In this important aspect of civil law, one can say that Portuguese law indeed follows the Romanistic legal family.

13 Family law and the law of succession are regulated in Books IV and V, respectively. There were great modifications in 1977, when the Civil Code was reformed so that it would be in accordance with the new democratic Constitution of 1976. Thus, equality between husband and wife, non-discrimination of children born out of wedlock, divorce also for Catholic marriages (since 1975), and a very strong inheritance position for the surviving spouse are some of the paramount modifications that brought Portuguese family law back to European standards.

14 In conclusion, the main influences of Portuguese civil law are *German* (in the structure of the Code, the existence of a General Part, including abstract concepts, the regulation of the law of obligations) and *French-Italian* in the field of property law. Moreover, the Portuguese legislator took into consideration other modern civil codes, like the Swiss Code of Obligations[12] and the Greek Civil Code.[13]

15 When analysing a legal system, one should look not only at the legal texts, but also at the law in action and other sources of law. The influence of German speaking countries has also been important regarding advanced academic works (PhDs and habilitation theses). In fact, academics pay attention to the

[9] Code of Intellectual Property (2003), Copyright Act, etc.

[10] Art. 408: "the creation or transfer of real rights to a specific thing occurs *simply by virtue of the contract* (…)." This rule is similar to the French and the Italian and different from the German, the Austrian or the Spanish one, as well as from Roman law.

[11] See the Land estate registry Code (1984) for immovable things. Registry is not mandatory, nor a condition to acquire ownership, it has merely declarative effects (i.e., not constitutive) and is a condition of publicity, which protects the acquirer against third parties who acquire later from the same *tradens*. In the field of movable things, publicity is achieved through possession. However, in Portugal the rule *possession vaut titre* does not apply.

[12] For example Art. 494 provides limitation of damages (*ad hoc*), like Art. 43 (1) of the Swiss Code of Obligations from 1911 (entered into force in 1912).

[13] Art. 334 on Abuse of a right was influenced by the Greek Civil Code.

doctrine in those countries and sooner or later this trend has some influence in the courts. On the other hand, there are strong Portuguese legal traditions that are really "autochthonous".

## B. Portuguese Tort Law: A Comparison with the Principles of European Tort Law

Presenting a national legal system, which is rather unknown to many, might be more appealing if a comparison with another normative system is established. The comparative law studies and the tentative efforts for the harmonization of private law, notably tort law, have been a very important contribution towards the emergence of common Principles and a common *Grammatik* of a truly European private law. In this respect the *Principles of European Tort Law* of the *European Group on Tort Law*[14] is an outstanding legal work. Therefore, I will compare Portuguese tort law with the *Principles*. At the same time this exercise allows an explanation of national law and a test of the aforementioned *Principles*. 16

At a first glance, we can observe that the *Principles* are sometimes broader, sometimes narrower, than the CC. They are *broader* in Chapter 3 (Causation) and Chapter 9 (Multiple tortfeasors). The last set of problems is regulated very briefly in Art. 490[15], all the questions concerning solidarity of the tortfeasors are rather established on general rules concerning solidary *obligations* and solidary credits (Artt. 512–533) that may apply independently of the sources of obligations (tort, contract, unjust enrichment, etc.). The first group of norms is more impressive. In fact, the Portuguese CC does not have such a set of norms regulating causation such as provided by Chapter 3 of the *Principles*. As we shall see, there is only one rule concerning causation (Art. 563) and some reference is made to the problem of *potential causes* in Artt. 491, 492, 493 (1), 616 (2) and 807 (2). The *Principles* are sometimes *narrower*; because they regulate neither all situations of strict liability nor limitation of action, deliberately leaving this to national law.[16] 17

Portuguese tort law is divided into three sets of norms.[17] The first one is on Artt. 483–510 concerning extra-contractual liability. In our law, besides the general clause of liability (Art. 483 CC), there are two particular cases: offences 18

[14] Published in H. Koziol/B.C. Steininger (eds.), *European Tort Law* 2002 (2003), 562 et seq. *Principles of European Tort Law* as of 3 May 2003. See the most recent and definitive version at http://www.egtl.org/Principles/index.htm.

[15] Art. 490 CC: "If there are multiple actors, instigators or collaborators of the wrongful act, all of them are liable for the damage caused by them."

[16] Art. 498 CC establishes a general rule of limitation in tort law of 3 years after knowledge of the right, even though without knowledge of the tortfeasor or the full amount of damage.

[17] See, in German, J. Sinde Monteiro/R. Moura Ramos/H. Hörster, Portugal, in: C. von Bar (ed.), *Deliktsrecht in Europa* (1994).

against consideration and credit (Art. 484 CC) and damages caused by advice and recommendations[18, 19]; Art. 486 (Omissions); Artt. 487–489 (Fault and capacity to commit torts); Art. 490 (Multiple tortfeasors); Artt. 491–493 (Inversions of the burden of the proof); Art. 494 (Limitation of damage); Art. 495 (Compensation in case of death or physical injury); Art. 496 (Non-pecuniary losses); Art. 497 (Solidary liability);[20] Art. 498 (Limitation); Artt. 499–510 (Strict liability). Another set of rules is to be found in Artt. 562–572 (obligation to compensate), because these rules are common to tort and contract liability[21]. Here one finds the rules about damages, causation and contributory negligence: Art. 562 (General principle) – *restitutio in natura*; Art. 564 (Causation); Artt. 564–569 (Damages); Artt. 570–572 (Contributory negligence). Thirdly, norms regulating defences are to be found in Artt. 334 et seq., especially: Art. 336 (self-help), Art. 337 (self-defence), Art. 339 (necessity) and Art. 340 (consent).

### 1. Basic Norm

19 The Basic Norm of the *Principles* states: (1) "A person to whom damage to another is legally attributable is liable to compensate that damage. (2) Damage may be attributed in particular to the person (a) whose behaviour constituting fault has caused it; or (b) whose abnormally dangerous activity has caused it; or (c) whose auxiliary has caused it."

20 The basic norm establishes very clearly the old principle *casum sentit dominus*.[22] This principle is obviously recognised by Portuguese law as well, in

[18] Art. 484 (*Action injurious to personal standing or good name*): "Whoever affirms or disseminates a fact capable of prejudicing the credit or good name of any person, private individual or legal person, is responsible for the damage caused." Art. 485 (*Advice, recommendations or information*): "(1) Mere advice, recommendation or information do not confer liability on whoever gives it, even though there may be negligence on their part. (2) The obligation to compensate exists, however, when the responsibility for damage has been assumed, when there is a legal duty to give advice, recommendation or information and this has been done with negligence or intent to harm, or when the behaviour of the agent constitutes a punishable act."

[19] Recent special torts are related with the certification service providers and online service providers (the Directive 2000/31/EC: Directive on electronic commerce). Decree-Law 62/2003, 3 April implements EC Directive EC/1993/93 on Digital Signature. Art. 26 establishes civil liability of the certifying entity towards the certificate titular and third parties for non-accomplishment of legal duties. See J. Sinde Monteiro, Assinatura electrónica e certificação (A Directiva 1999/93/CE e o Decreto-Lei n.º 290-D/99, de 2 de Agosto), [2001] *Revista de Legislação e Jurisprudência* (RLJ), 261–272.

[20] Tortfeasors are liable *in solidum*, according to Art. 497 (1) CC. The definitive apportionment of compensation between several tortfeasors depends on the degree of fault and the consequences of their acts (Art. 497 (2) CC).

[21] The main differences between contractual liability and non-contractual liability in Portuguese law are the following: (1) the debtor is presumed to have acted in fault in case of non-performance or defective performance of a contractual duty (Art. 799 (1)); (2) Limitation period in tort law is 3 years (Art. 497) and 20 years in contract (Art. 309). The *cumul* of contractual and extra-contractual liability (*Anspruchsnormenkonkurrenz*) is accepted by literature and case law, and plays an important role in cases of medical liability and transport liability. Case law accepts that non-pecuniary damages may be compensated under contract law.

[22] See H. Koziol, Die „Principles of European Tort Law" der „European Group on Tort Law", [2004] *Zeitschrift für Europäisches Privatrecht* (ZeuP), 237.

Art. 483, because compensation is only possible if all the conditions are fulfilled.

21 The *Principles* start by a dynamic and plural source of tort liability, which indeed reflects the reality of our times. Perhaps in a still romantic way, the Portuguese CC concentrates the *General Principle* (Art. 483) on the individual person, who acts with fault and causes damage to another. Art. 483 (1) CC states, "Whoever, whether by wilful misconduct (*dolus*) or by negligence unlawfully infringes the rights of another person or any legal provision intended to safeguard the interests of others, must compensate the injured party for damage arising from such violation." Strict liability, liability for dangerous activities and liability for auxiliaries are seen as a deviance from the main rule. Art. 483 (2) confirms this idea by stating: "an obligation to pay compensation when there is no fault shall arise only in cases specified by law." Thus, fault liability is the principle and strict liability is an exception. Neither analogical application, nor a general clause is accepted. This might seem to be only a question of style, but I suppose it shows that the *Weltanschauung* of the Portuguese legislator of the 50s and 60s was quite different from that of the drafters of the *Principles*. An urban society of risk, rather than a rural society; an economy based on enterprises, rather than on individual entrepreneurs, might well be the explanation why the drafters of the *Principles* gave fault a place which is at the same level as an "abnormally dangerous activity" or the liability for the "auxiliary".

22 This is indeed not a matter of drafting style, since this will have effects in the whole structure of the tort law presentation. The Portuguese CC structures the whole question on the basis of the General Principle of a faulty and wrongful behaviour of a person with capacity to commit torts and from then on inserts exceptions, inversions of the burden of the proof, or particular regimes.

23 The Portuguese CC distinguishes between *liability for wrongful acts* (Subsection I: Artt. 483–498) – where one also finds general rules about non-pecuniary losses, multiple tortfeasors, solidarity, limitation – from *strict liability* (Subsection II: Artt. 499–508). On the other hand, rules concerning damages, causation and contributory negligence are common to contract law and, thus, are provided in another section of the CC (Artt. 562–572).

24 The *Principles* follow another structure: there a title (I) on the *General Conditions of Liability* (damage and causation); one (II) on the *Bases of Liability* (Liability based on fault, Strict Liability, and Liability for Others); another (IV) on *Defences*; another one (V) on *Multiple tortfeasors* and finally one title (VI) on *Remedies*.

25 Summarizing, some of the substantial differences we have already mentioned are: the *Principles* are an isolated body of norms on tort law, and thus have to regulate some issues that in a Civil Code could be regulated elsewhere (solidarity, causation, damages, contributory negligence, defences). The division

between liability for wrongful and faulty acts on the one hand, and strict liability on the other is a signal of a rural and less dynamic society of the 50s in Portugal.

## 2. General Conditions of Liability

### a) Damage

26 As a general comment, one can observe that, although the *Principles* accept the concept of wrongfulness, they avoid the use of such "name".[23] That is understandable in an effort to conjugate different European traditions. For the CC wrongfulness is also a basic concept in tort law. Art. 483 (1) enounces two types of wrongfulness: (1) violation of "rights of another" (*erga omnes* rights) and (2) violation of legal provisions intended to protect the interests of others ("protective norms"). Moreover, the literature agrees that there is a third type of wrongful behaviour: intentional damage *contra bonos mores* (*Gute Sitten*) that is to be found in Art. 334 – abuse of a right (*Rechtsmissbrauch*, *abuso do direito*).

27 As Koziol states, "in essence, the European Group's *Principles* acknowledge wrongfulness as one decisive factor."[24] In that respect, the *Principles* describe the scope of protection of interests (Art. 2:102). The most extensive protection to *life, bodily or mental integrity, liberty and dignity* (Art. 2:102 (2)) is guaranteed by the *Principles*. So does the CC. In fact, Art. 483 (1) protects "rights of another", which include *personality rights*. Artt. 70–81 CC provide an extensive protection of personality rights, including the General Personality Right (*Allgemeines Persönlichkeitsrecht*).[25] Thus the CC provides an extensive protection to personality rights. The enumeration of protected rights in the *Principles* is only indicative; however the catalogue of personality rights may be considered short, taking into account European case law.

28 Property rights' protection (including rights over intangible property) seems to be narrower than that of personality rights. That may well be the case also in court practice in Portugal. But technically, no distinction is made between the protection provided to personality rights and rights *in rem*, since the law states that it is wrongful to violate (absolute) "rights of another" (Art. 483 (1)).[26]

[23] See R. Zimmermann, Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact, in: H. Koziol/B.C. Steininger (eds.), *European Tort Law 2003* (2004).

[24] H. Koziol, The concept of wrongfulness under the Principles of European Tort Law, in: H. Koziol/B.C. Steininger (supra fn. 14), 552 et seq.

[25] Some authors (Oliveira Ascensão, Carvalho Fernandes) do not accept the concept of a general personality right. They state that Art. 70 provides a general clause, where one can include the fundamental rights provided by the extensive catalogue of our Constitution or by the European Convention on Human Rights or even the European Charter of Fundamental Rights (especially after the approval of the Constitutional Treaty).

[26] See R. Zimmermann (supra fn. 23), 12.

But the most important difference – at least in style – lies in paragraph (4) of Art. 2:102. The *Principles* protect, to some extent, as a starting point, pure economic interests and contractual relationships (Art. 2:102 (4)).[27] This has been subject of a hard discussion in Portugal. In fact, Art. 483 (1) establishes an obligation to compensate for damage caused whenever the "rights of another" have been unlawfully violated. According to the intent of the author of the preparatory work on the Civil Code[28], as well as the doctrine and prevailing jurisprudence, only the "absolute rights" (*erga omnes*) are to be protected by tort law, and that is the traditional solution in Portuguese law. There was some influence from the German law and doctrine in the preliminary work of the current CC, although the formulation of Art. 483 (1) is considerably more open than the corresponding § 823 I of the BGB.[29] Thereinafter, the main doctrine and case law state that *relative rights* deserve no protection under tort law.[30] 29

Exceptionally, an action grounded in Art. 483 and Art. 334 (abuse of a right, intentional behaviour *contra bonos mores*) may be accepted in an intentional case of *inducement of breach of a contract*.[31] Another possibility may be the existence of *culpa in contrahendo*[32] or other legal instruments, such as, "contracts whose protective scope extends to certain third parties" (*Verträge mit Schutzwirkung zugunsten Dritter*). But at this point, we are already outside tort law. 30

Portuguese tort law can be considered as following a "middle road". It follows the recent tendency to avoid a general and virtually unlimited scope of 31

[27] See the critics of R. Zimmermann (supra fn. 23), 13–14. However, the intention of the drafters is not to provide such an extensive protection as Zimmermann states, as explains H. Koziol (supra fn. 22), 243. The correct interpretation of the whole Art. 2:102 leads to a scarce protection of pure economic loss or contractual relationships under tort law.

[28] A. Vaz Serra, Responsabilidade Civil (Requisitos), [1960] *Boletim do Ministério da Justiça* (BMJ), no. 92, 37 et seq. (122, no. 13) and Responsabilidade de Terceiros no Não-Cumprimento das Obrigações, [1959] BMJ, 85, 345 et seq.

[29] See J. Sinde Monteiro, Manuel de Andrade und der Einfluss des BGB auf das Portugiesische Zivilgesetzbuch von 1966, in: E. Jayme/H.P. Mansel (eds.), *Auf dem Wege zu einem gemeineuropäischen Privatrecht – 100 Jahre BGB und die lusophonen Länder* (1977), 41.

[30] See J. Sinde Monteiro, Portugal, in: J. Spier (ed.), *The Limits of Expanding Liability, Eight Cases in a Fundamental Perspective* (1998). See also M Almeida, *A Responsabilidade Civil do Banqueiro Perante os Credores da Empresa Financiada* (2003) and M. Frada, O problema e os limites da responsabilidade dos auditores, [2002] *Direito e Justiça*, 159–169.

[31] See the recent work of S. Júnior, *Responsabilidade Civil de Terceiro por Lesão de Direito de Crédito* (2003). This dissertation deals with the question of liability of third parties that cause damage to a credit right of another. The traditional Portuguese doctrine advocates that a credit right only has *inter partes* effects, and thus – except in cases of abuse of right – a third party may not be held liable for violating it. On the contrary personality rights, real rights or intellectual property rights are absolute rights, with efficacy *erga omnes* and their violation might be argued against any wrongdoer. The author, however, after a comprehensive analysis of comparative law, defends that Portuguese law should follow the North-American (e.g., *tort of interference with contractual relations)*, French and Italian doctrine, which accepts, under some circumstances, that a third party might be held liable when breaching a credit right.

[32] See E. Silva, *Da Responsabilidade Pré-Contratual por Violação dos Deveres de Informação* (2003).

Artt. 1382 and 1393 Code Civil,[33] as well as the overly compartmentalized model of the BGB and the piecemeal approach of the English law of torts.[34]

32 Preventive expenses as recoverable damage were accepted by some Portuguese courts. These cases deal with accidents with public transport buses, which had to stop running for some time due to necessary repair work. The bus company had replacement buses that were used and the Court awarded compensation for a proportion of the costs of maintenance and even a proportion of the costs of the replacement buses.[35]

33 Art. 2:103 (legitimacy of damage) cannot be found in the aforementioned Portuguese rules. However, Art. 334 CC, which forbids the exercise of a right against the *Gute Sitten*, leads to the same conclusion, i.e., "losses relating to activities and sources which are regarded as illegitimate cannot be recovered."

34 The *Principles* state that the court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly. Such a rule does not exist in Portugal. However Art. 566 (3) accepts a calculation of damage according to *equity* if the exact extent of losses cannot be proved, and Art. 564 (2) allows forwarding to an ulterior decision when a future damage is not yet possible to calculate.

**b) Causation**

*(i) Conditio sine qua non*

35 The *Principles* depart from the *conditio sine qua non* theory, the "but-for test". This seems the logical solution. Portuguese CC (tries to) escape from this starting point, and rather adopts adequacy theory as the *moto* for all causation problems.[36]

[33] For a complete overview of the question in Portugal, see C. von Bar, *The Common European Law of Torts* I (1998), 22 et seq.

[34] W. van Gerven/J. Lever/P. Larrouche/C. von Bar/G. Viney, *Tort Law – Scope of Protection* (1997), 55. This recent trend is also followed by the Dutch, Swiss, Italian and Greek codifications. They take as a "starting point a general provision founded on sufficiently flexible concepts to adjust to new situations, while at the same time limiting or excluding certain heads of damage." See also D. Moura, *Da Responsabilidade Pré-contratual em Direito Internacional Privado* (2001), 188.

[35] Awarding compensation for a proportion of the costs of the replacement buses is, however, already outside the scope of protection of the rule concerning "preventive expenses". See A. Abrantes Geraldes, *Indemnização do dano da privação do uso* (2001), 42 et seq. The author quotes a decision of the Lisbon Court of Appeal (9 March 1989), and decisions of the Court of Justice of Lisbon from 31 October 1994 and 7 March 1996. More recently the Lisbon Court of Appeal decision of 21 January 1999 denied this damage.

[36] This is beginning to be criticized, See A. Menezes Cordeiro, *A Responsabilidade dos Administradores das Sociedades Comerciais* (1997), who defends a return to *conditio sine qua non*, complemented, in a second step by the *protective purpose of the rule theory*. His theory is in accordance with the *Principles* in what a return to *conditio sine qua non* would concern, but the over-consideration of the protective purpose of the rule theory and the "abandonment" of the adequacy theory is a little too exaggerated. The *Principles*, on the contrary, do take into consideration the adequacy theory (Art. 3:201 a)).

And indeed, as Varela[37] states, *conditio sine qua non* is sometimes too broad (leading to liability for unforeseeable or unpredictable damage),[38] sometimes too narrow (as in the cases of potential causes). The *Principles* also deviate from the *conditio sine qua non* in a number of cases: Art. 3:102 Concurrent causes, Art. 3.104 (1) Potential causes, and Art. 3.105 (uncertain partial causation or minimal causation).

36 The *Principles* regulate in detail the delicate problems of causation (Chapter 3. of Title II) and the connected problem of multiple tortfeasors (Title V); on the contrary, the Portuguese CC only provides two articles concerning these problems (Artt. 563 and 490). Art. 563 states that: "the obligation to compensate only exists in relation to damage that the injured *probably* would not have suffered had he not suffered harm". Literature and case law agree that the theory of adequacy has been adopted and they normally omit the reasoning of the "but-for test".[39] On the other hand, if the damage was caused by several tortfeasors, be they joint tortfeasors or instigators, the solution is considered to be the following: the victim shall have the right to demand full compensation from any of the tortfeasors who are liable *in solidum*;[40] redress action, thereinafter, shall be decided upon according to each of the tortfeasor's participation in the damage; but there is a *presumption of equal shares* in that liability (Art. 497 (2) and Art. 516 CC).

37 The *Principles* offer solutions to some very delicate problems on causation that are not definitively solved under Portuguese law (concurrent causes, alternative causes, potential causes and uncertain partial causation). The solutions proposed are very progressive and are not to be found in Portuguese literature. However, since there is no mainstream doctrine in these issues, the *Principles* might be well-accepted in the future. As Zimmermann acknowledged "the chapter on causation breaks new ground."[41] An example of an innovative proposal is Art. 3:106. Koziol states the solution proposed is important in order to recognise the theory of "loss of a chance".[42] Portuguese case law recognises this theory and has applied it.[43]

[37] J. Antunes Varela, *Das Obrigações em Geral* (1996).

[38] This critic to *condition sine qua non* theory is only valid if it were the only criterion of causation. However, the *Principles* use some other "normative" criteria.

[39] However, one could argue that Art. 562 is normally considered as establishing the principle of natural restitution. Nevertheless, one can read it as a statement of the *conditio sine qua non*. It says that one shall reintegrate the situation that would exist if the damaging event had not taken place. Moreover, Art. 483 imposes liability for damage that "results" (*resultantes*) from the activity. To *result* from an activity leads us to the 'but-for test' reasoning.

[40] J. Antunes Varela (supra fn. 37).

[41] R. Zimmermann (supra fn. 23), 27.

[42] H. Koziol (supra fn. 22), 246.

[43] Lisbon Court of Appeal decision of 8 July 1999, in [1999] *Colectânea de Jurisprudência* (CJ), IV, 97–104. The decision was taken on the basis of "equity", and it is stated in Art. 566 (3) that damage may be calculated that way, when there are no other solutions.

38 Our literature and case law state that since an activity has *definitely and irreversibly* led the victim to suffer damage, a *subsequent* activity or occurrence or other circumstance, including natural events, which alone would have caused the same damage, is to be disregarded even if it lies within the victim's sphere. In Portuguese law the rule is that the *potential* cause (*causa virtual*) is irrelevant. However, in exceptional cases the legislator attributed relevance to the *potential* cause, excluding liability if that is proven. This happens in Artt. 491 (liability for damage caused by incompetent persons), 492 (ruined buildings), 493 (1) (liability for detention, surveillance or maintenance of immovable or movable things or animals), 493 (2) (liability for dangerous activities),[44] 616 (2) (third party liability in case of "paulianus action" [oblique action of a creditor]) and 807 (2) (delay on the part of a debtor). In these cases there are *presumptions of fault* (or for other reasons an aggravated liability) and the legislator tries to "compensate" that "hard regime" giving the possibility to escape liability by proving that such damage would have occurred for a different reason, that is, the damage would have occurred even if the wrongdoer had not breached any duty of care.[45] In all other cases, the potential cause is disregarded.

*(ii) Scope of Liability*

39 The *Principles* list in detail several criteria and theories that might be used in order to determine the scope of liability (Art. 3:201). The inclusion of this Section on the Chapter concerning causation is due to a "compromise"[46] because some legal systems do not make the separation between causation and scope of liability. The Portuguese legal system is in fact one of these. This list is also welcome in Portugal, where adequacy dominates and the protective purpose of the rule theory is sometimes adopted. But under "adequacy" Portuguese courts sometimes apply some other policies although not expressly recognized. For example some scholars and some courts defend that, in the field of wrongful acts, the scope of liability should be broader than in the field of strict liability,[47] which is in accordance with Art. 3:201 (c).

40 As I previously said, both scholars and courts defend that Art. 563 adopts the *Adäquanzlehre* elaborated by Von Kries.[48] Art. 563 departs from the *Äquivalenztheorie* (theory of equivalence), however the adverb "*probably*" is understood by the literature as consecrating the *adequacy* theory. The fact must not only be a *conditio sine qua non*, it must also be adequate, i.e., the probable cause of damage.[49] Recently, the adequacy theory has been challenged in Por-

[44] Liability for damage caused by things and dangerous activities is similar to Artt. 2050 and 2051 *Codice Civile* – see C. von Bar (supra fn. 33), 118.
[45] I. Galvão Telles, *Direito das Obrigações* (7th edn. 1997), 410 et seq.
[46] H. Koziol (supra fn. 22), 244.
[47] See J. Antunes Varela (supra fn. 37).
[48] M. Andrade, *Teoria Geral das Obrigações* (3rd edn. 1966), 351 et seq.; J. Antunes Varela (supra fn. 37), 916; L. Menezes Leitão, *Direito das Obrigações* (3rd edn. 2003), 346.
[49] L. Menezes Leitão (supra fn. 48), 347.

tuguese literature by the protective purpose of the violated rule theory (*Schutzzweck der Norm*).[50] This theory is applied and complements the reasoning of the adequacy theory avoiding establishing causation in some cases. Portuguese courts are beginning to accept the method of interpreting the law according to its purpose ("teleologische Interpretation").[51]

## 3. Bases of Liability

The *Principles* distinguish conditions of liability based on fault (Chapter 4), strict liability (Chapter 5) and liability for others (Chapter 6). 41

### a) Liability Based on Fault

In Portugal, one distinguishes two categories of fault: intent (*dolus*) or negligence. The required standard of conduct is abstract (objective standard on the assessment of fault), as prescribed in Art. 487 (2) taken "by reference to the diligence expected of a dutiful *pater familia*s, having regard to the circumstances of each case." The burden of proof lies on the plaintiff.[52] There are no main differences between this norm and the *Principles*, except that these are much more detailed in the description of the criteria to assess the required standard of conduct (Art. 4:102). Moreover, the *Principles* suggest some interesting criteria such as the foreseeability of the damage, the relation of proximity or special reliance between those involved, and the availability and the costs of precautionary or alternative methods. According to Portuguese law, a "higher" standard is demanded in case of professionals. For example, a physician must act according to his skills and mainly according to his field of activity. The reasonable person is not the "person in the street". 42

Koziol[53] explains that the goal of paragraph (2) of Art. 4:102 is to avoid liability of persons with below-average abilities (such as children, incompetent adults, etc.). Under Portuguese law, Art. 488, regulating the capacity to commit torts (*Deliktsfähigkeit*), achieves the same objective: "1. A person who, when the event occurred, was incapable for any reason of understanding or of forming intent shall not be liable for the consequences of the injurious event, unless he wilfully caused himself to be in that condition, and that condition was temporary[54]. 2. Persons who are aged less than seven years or are subject to a psychiatric disorder shall be deemed not to bear liability." Persons with disabilities, children and the elderly are subject to a comparison where the model becomes "a reasonable person with disabilities, a reasonable child of 43

[50] See: L. Menezes Leitão (supra fn. 48), 348; L. Menezes Leitão *Responsabilidade do Gestor*, 281 and A. Menezes Cordeiro (supra fn. 36), 532 et seq.

[51] H. Koziol, Austria, in: J. Spier (ed.), *Unification of Tort Law: Causation* (2000), 12.

[52] Art. 487. *Fault*. 1. It shall be incumbent on the injured party to prove the fault of the person who caused the injury, unless there was a legal presumption of fault. 2. Fault shall be assessed, in the absence of any other legal criterion, by reference to the diligence expected of a dutiful *paterfamilia*s, having regard to the circumstances of each case."

[53] H. Koziol (supra fn. 24), no. 16.

[54] This second part recognises the rule *actio libera in causa*.

that age, a reasonable old person of that age with that kind of problem". However, Portuguese doctrine defends that, "except for children, a new requisite is added in order to avoid the judgment of fault: these kinds of persons must act taking into consideration their own limits, which may lead to *abstentions* from acting in extreme cases."[55]

44 Art. 4:102 (3) of the *Principles* states, "Rules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct" and Portuguese doctrine also defends that when someone violates a protective rule, she shall be considered liable in fault for the damage caused. A judicial presumption of fault follows the violation of a protective rule. In fact, "if causing damage when performing a dangerous activity was sufficient for the legislator to establish a presumption of fault [Art. 493 (2) CC], it seems even more convincing that a presumption also exists whenever a rule that aims in abstract to avoid certain danger is infringed, and the danger becomes a reality".[56] In case law, this viewpoint has been accepted[57], even if not always supported by a tenable argumentation. Case law is giving more attention to literature that defends the existence of a "judicial presumption of fault".[58] Nowadays, it is said to be one of the most interesting and practical features of the Portuguese tort law system. Legal provisions such as safety regulations (on lifts, for instance), a significant set of traffic rules or criminal rules and rules commanding professional good practice can be regarded as "protective rules".[59]

45 There is no specific norm imposing a duty to protect others from damage but Art. 486 (omissions) states, "Mere omissions shall give rise to an obligation to make reparation for the damage where, regardless of any other legal requirements, there was a duty, by *law* or by virtue of a *legal act*, to take the action which was not taken." Thus, if a law or a contract imposes the duty to protect others from damage, that action is required. For example, Art. 200 Penal Code imposes a duty to rescue; Art. 284 of the Penal Code imposes the duty of the physician to treat patients in a severe condition. In the field of family law, spouses have the duty to protect the other from damage (Artt. 1672 and 1674 CC) and parents are obliged towards their children (Art. 1878 CC). The doctrine also considers the case when the actor creates or controls a dangerous situation. Other situations like the special relationship between the parties or dis-

[55] J. Sinde Monteiro/M. Veloso, Portuguese report, in: P. Widmer (ed.), *Unification of Tort Law: Fault* (2005). H. Koziol (supra fn. 24), 556, seems to defend a different position. He states, "their [persons with below-average abilities] mere existence, which inevitably implies their participation in social intercourse, cannot be sufficient reason for establishing liability, even if their unavoidable behaviour does not comply with objective standards."

[56] J. Sinde Monteiro, *Responsabilidade por conselhos, recomendações ou informações* (1989), 264; M. Teixeira de Sousa, *O concurso de títulos de aquisição da prestação* (1988), 319.

[57] *Supremo Tribunal de Justica* (Supreme Court of Justice, STJ) 21 February 1961, in J. Sinde Monteiro (supra fn. 56), 267 and fn. 305.

[58] Évora Court of Appeal 9 December 1977, [1977] CJ IV, 90; Porto Court of Appeal 11 December 1981, [1981] CJ V, 274.

[59] See J. Sinde Monteiro/M. Veloso (supra fn. 55).

proportion between the seriousness of the harm and the ease of avoiding it are still being discussed in the literature. Thus, Art. 4:103 of the *Principles* is indeed a step ahead from the individualistic regulation of the CC.[60]

The *Principles* prescribe an inversion of the burden of proving fault in case of dangerous activities (Art. 4:201) as does Portuguese law (Art. 493 (2)). In this case the defendant has to provide positive proof that he used all necessary preventive measures required by the circumstances. Potential cause does not exclude causation. 46

The CC has some other situations of reversal of the burden of proof. Art. 491 on liability for minors or mentally disabled persons will be analysed later. Art. 492 (1) imposes liability on the owner or the tenant of a building or other facility if it falls down due to a construction or maintenance defect and causes damage to another. However, if the damage is caused by a maintenance defect, only the person obliged, by law or by contract, to preserve the building is liable, according to paragraph (2). Art. 493 imposes liability on the person who possesses a movable or immovable thing, as well as on the persons who are in charge of surveying animals for the damage they (the things or the animals) cause. In all these cases the defendant may prove he acted in accordance with the required standard of conduct or that a potential cause would have also caused the damage. A similar solution (inversion of the burden of the proof of fault) can be found in the *Principles* for situations like ruined buildings or detention of animals, as these normally involve an increased risk. 47

Enterprise liability is an "innovative proposal"[61] of the *European Group on Tort Law* and as such is not to be found in the CC. However, the CC provides strict vicarious liability and there is no-fault product liability. However, the scope of enterprise liability is clearly broader, although its regime consists only in an inversion of the burden of the proof. But from a careful analysis, we can conclude that it does not enlarge liability that much compared with Portuguese law. Under "Enterprise Liability" we can find cases concerning liability for: (1) auxiliaries; (2) technical equipment; (3) products; and (4) services. 48

Under Portuguese law there is strict liability for the acts of auxiliaries (Art. 500 and Art. 800 CC). Technical equipment may fall under the inversion of the burden of the proof of Art. 493 (1) CC. Product liability is strict, according to the European Directive. Concerning liability for services, the parties to the contract are protected by the contract law regime, which also provides an inversion of the burden of proof (Art. 799 (1) CC). Thus, Portuguese law only offers less protection than the proposed Enterprise Liability of the *Principles* to third parties who suffer damage arising from a service. 49

[60] H. Koziol (supra fn. 22), 249: "Die Principles gehen weiter als die meisten Rechtsordnungen (…)".

[61] R. Zimmermann (supra fn. 23).

**b) Strict Liability**

50 On this issue there is also a basic difference: the *Principles* accept a general clause of strict liability for abnormally dangerous activities[62] and accept analogical application of strict liability legal categories. The CC prescribes that there is only strict liability when the law so provides (Art. 487 (2)).

51 The most important cases of "liability without fault" in the CC are[63]: vicarious liability (Art. 500 CC); liability of the holder of an animal (Art. 502 CC); liability of the keeper of a car (Art. 503 CC); liability of the keeper of gas or electric energy structures (Art. 509 CC), and liability for damage caused to immovables in the neighbourhood (such as damage caused by nuisance or by excavations) (Artt. 1346–1352 CC).

52 Some of the most important supplementary statutes imposing strict liability are: Product Liability Act (DL 131/2001, 24 April); State Liability Act (Decree 48051, 21 November 1967); Environmental Basic Law 11/87, 7 April 1987; Clinical Trials Act (Law 19/2003, 19 August); Organ Donation Act (Law 12/93, 22 April); Activities with radioactivity sources (Decree-law 153/96, 30 August [with amendments]); protection of people exposed to ionising radiation (Decree-law 348/89, 12 October [with amendments]).

**c) Liability for Others**

*(i) Liability for Minors or Mentally Disabled Persons*

53 There are very strong similarities between Art. 6:101 of the *Principles* and Art. 491 CC. The small difference is that the CC only directly applies when the obligation to take care of others derives from *law* or *contract*. The *Principles* do not have such a positivist perspective. Nevertheless the practical results may be the same, since some non-legal or non-contractual relations could – according to some doctrine – lead to the obligation of surveillance of another who is a minor or subject to mental disability if the principle of *good faith* and *bonus morus* so imposes. Both under Portuguese law and the *Principles*, is this not really a case of strict liability[64], since the defendant may prove that "he took all proper care to prevent it [the damage]."

54 "Art. 491 CC establishes a presumption of fault of supervisors of persons lacking natural capacity for the damage caused to others. "Natural incapacity" is a concept different from tortious incapacity. It means the incapacity of self-determination. A conspicuous example of this difference would be the case of minors. Minors of seven or more, although incapable of ruling their own lives, are, nevertheless, tortiously liable (in general). Amongst other features of this

[62] Art. 927 of the Brazilian Civil Code introduced a general clause of strict liability for *dangerous activities*. See A. Pereira, Brazil, in: H. Koziol/B.C. Steininger (supra fn. 23), 457.

[63] See also the special cases of: Emergency situation (Art. 339 (2) second part CC); Liability based on equity of incapable agents (Art. 489 CC).

[64] See H. Koziol (supra fn. 22), 253.

kind of liability[65], we would like to enhance the fact that it has been deemed as a case of liability for one's own act[66]. Another interesting dimension of supervisor's liability (in particular, parental liability) is the fact that the courts accept the idea of a *culpa in educando,* which shows that the judgment of fault might in some cases take into consideration facts previous to the act (of the direct agent, the minor)."[67]

*(ii) Liability for Auxiliaries*

55 The rule provided by Art. 6:102 of the *Principles* is similar to Art. 500 CC, which prescribes *vicarious strict liability*. Also in contract law, Art. 800 CC imposes liability of the debtor for acts committed by helpers or representatives.

56 A possible defence, accepted by Portuguese case law, for the principal is to prove that the auxiliary caused damage outside the scope of his functions, even if the action took place during the time schedule of the service. On the other hand, Art. 500 (2) expressly considers the principal liable even if the auxiliary acted intentionally or against his instructions (but within the scope of her functions). Portuguese literature considers that the dogmatic ground for this strict liability lies in a "guarantee theory", rather than in the "risk theory". That is, the principal is an economic guarantor of the victim, since he has the right of redress towards the auxiliary (Art. 500 (3)).[68]

## 4. Defences

### a) Defences in General

57 Defences are regulated in the General Part of the CC (Artt. 336–340). There we find *self-help*, *self-defence*, *necessity* and *consent*[69]. The CC tries to define the defences; the *Principles* leave it to the courts and the doctrine. Furthermore, the Principles state: "(2) Whether liability is excluded depends upon the weight of these justifications on the one hand and the conditions of liability on the other. (3) In extraordinary cases, liability may instead be reduced." This solution is in accordance with Portuguese law where Art. 339 (necessity) imposes an obligation to compensate if the tortfeasor was the only individual responsible for the danger; in other cases the court may, according to equity, impose compensation as well. On the other hand, in case an individual acts in

[65] For a detailed explanation of supervisors' liability, see H. Sousa Antunes, *Responsabilidade civil dos obrigados à vigilância de pessoa naturalmente incapaz* (2000).

[66] R. de Alarcão**,** *Direito das Obrigações* (1983), 227.

[67] J. Sinde Monteiro/M. Veloso (supra fn. 55).

[68] Each one's contribution depends on their faults. Often the auxiliary is the only one who acted with fault.

[69] Art. 81 CC concerning voluntary limitation of personality rights is also to be taken into account when discussing consent and personal values are at stake. It states: "(1) All limitation to the exercise of personality rights is void if it is against the principles of *ordre publique*. (2) The voluntary limitation, when legal, is always revocable, even though with the duty to compensate damage to other party's legitimate expectations."

self-defence or on the basis of self-help, when they in fact have no right to do so (Art. 338), there might be a duty to compensate, depending on fault.[70]

58 Portuguese doctrine considers that there is no "*numerus clausus*" of justifications.[71] The same shall naturally be valid in the interpretation of the *Principles*. I could mention, for example, the *exercise of a right* (the exercise of the right of retention, for example), the *accomplishment of a duty*, the *prosecution of a legitimate right* (so relevant in the field of the media), or *acting within allowed risk*.

**b) Defences against Strict Liability**

59 The *Principles* accept only two defences against strict liability: force of nature and conduct of a third party (Art. 7:102). Thus, the fault of the victim or the conduct of the victim is not regarded as a defence.

60 The CC has no general rule concerning defences against strict liability. However, we find those defences in some particular no-fault liability provisions: Art. 505 on traffic accidents accepts: *force majeure*, act of third party and act of the victim as defences; Art. 509 (2) on damage caused by electric energy or gas accepts alone *force majeure*; and Art. 7 of the Product Liability Act makes reference to *force majeure*, act of third party and act of the victim.

61 The *act of the victim* is thus mentioned in Art. 505 CC, leading to the exclusion of (strict) liability of the holder of a car. A traditional and prevailing opinion accepted that also the non-faulty activity of the victim would lead to the exclusion of liability[72]. However, some authors do not agree with such a solution, because they state there is the aim of protecting the victim (especially in case of compulsory insurance, as is the case). The solution of Art. 7 (1) of the Product Liability Act has been pointed out as an example to follow in strict liability cases.[73]

**c) Contributory Conduct or Activity**

62 Artt. 570–572 regulate contributory negligence in a very similar way to the *Principles*. The main difference is that the CC puts more emphasis on the contributory *negligence* and *its consequences*, and the *Principles* have a broader perspective ("*fault and any other matters*") but this may be only a matter of style. A substantial difference is to be found concerning the relation between contributory negligence and presumed fault. According to Art. 570 (2) CC,

[70] Art. 338 excludes compensation in case of error about the conditions of direct action and self-defence if the error is "excusable".

[71] The same rule applies in penal law (see Art. 31 Penal Code).

[72] See, for example, STJ 31 March 1993 (www.dgsi.pt). The Court disregards the fact that the victim was a three year old child and excluded liability of the holder of the car who ran over the child.

[73] This provision states: "If a faulty act of the victim also caused the damage, the Court may reduce compensation or exempt from liability the defendant, taking into consideration all circumstances".

contributory negligence excludes liability if it were based on a presumption of fault.

## 5. Multiple Tortfeasors

63 Art. 490 states: "If there are multiple actors, instigators or collaborators of the wrongful act, all of them are liable for the damage caused by them." Art. 497 prescribes the solidary regime in tort law. Details over solidarity are in Artt. 512 et seq, which prescribe norms very similar to Art. 9:102. The difference is that Art. 9:101 (3) accepts a hypothesis of *several liability*, when there is a basis for attributing only part of the damage to each of a number of persons liable to the victim. Under Portuguese law, this is debatable.[74] Varela states that the victim shall always be protected by the solidarity regime in cases of joint tortfeasors, cumulative causation or mere coincidence of causes of different nature. In the internal relations, there may be "perfect solidarity" or only "apparent solidarity". The regime prescribed by the *Principles* seems more fair towards the tortfeasors. Why should they bear the risk of the other's insolvency in cases when "there is reasonable basis for attributing only part of the damage to each of a number of persons liable to the victim?"

## 6. Remedies

### a) Remedies in General

64 Remedies are ruled in a Chapter that applies both to contractual and non-contractual obligations. This is the advantage of a complete regulation of patrimonial civil law. Remedies are reinstatement or restitution (Art. 562). Monetary compensation is ordered whenever reinstatement or restitution is not possible, does not fully repair the damage or is excessively costly. Thus, there is an important difference of approach in the field of remedies. Under Portuguese law (Art. 563), *restitutio in natura* (*Naturalherstellung*) is the primary solution,[75] and pecuniary compensation shall only be awarded when restoration in kind is not possible or too burdensome to the other party. However, in practice, money payment is the rule. On the contrary, the *Principles* state that "damages are a money payment to compensate the victim" (Art. 10:101), and admit that (Art. 10:104) "instead of damages, restoration in kind can be claimed by the injured party as far as it is possible and not too burdensome to the other party." Moreover, Portuguese law also accepts periodical payments (See Art. 565 CC and Art. 10:103).

65 Considering the benefits gained through the damaging event is a consequence of the *Differenztheorie* that is adopted in Art. 566 (2) Civil Code. The main relevance of Art. 10:103 is its last part: "unless this cannot be reconciled with the purpose of the benefit." This is a very fair proposal that is not to be found expressly in the CC. One could defend such result only through a *teleological reduction* of Art. 566 (2).

[74] J. Antunes Varela (supra fn. 37), 954.
[75] See R. Zimmermann (supra fn. 23), 18.

**b) Pecuniary Damage**

66 Art. 10:201 of the *Principles* states that, "recoverable pecuniary damage is a diminution of the victim's patrimony caused by the damaging event." This includes *damnum emergens* and *lucrum cessans*, as well as provided by Art. 564 (1), and Art. 566 (2), which adopts the *Theory of Difference*. The *Principles* explicitly prescribe that: "such damage is generally determined as concretely as possible but it may be determined abstractly when appropriate, for example by reference to a market value." This is not expressly stated in the CC, but it is the practice of our case law.

67 In the case of *personal injury and death*, pecuniary damage includes loss of income, impairment of earning capacity (even if unaccompanied by any loss of income) and reasonable expenses, including cost of medical care. Most of these items fall within the general clause of Art. 564 (1): the duty to compensate includes not only the loss that was caused, but also the benefits that the victim did not obtain because of the injury. Moreover paragraph (2) of the same Art. 564 states that future damage may be compensated if it is *predictable*. Thus, under Portuguese law, it is not clear if, for example, a housewife could obtain compensation for pecuniary damage, since there is no "predictable" loss of income. This has been under discussion.[76]

68 In the *case of death*, Portuguese law has a victim-friendly statutory provision, since it does not establish a closed list of persons to whom compensation may be provided, on the contrary it even converts natural obligations into civil obligations. In fact, Art. 495 (Compensation for third parties in the event of death or bodily injury) paragraph (3) states "The right to compensation shall also be available to those entitled to require maintenance (alimony) from the injured party and to those to whom the injured party paid maintenance in fulfilment of a natural obligation." This rule is not as broad as the *Principles*, since it does not always include the persons the deceased "would have maintained if the death had not occurred" (Art. 10:202 (2) of the *Principles*).

69 On the other hand, paragraphs (1) and (2) provide: "1. Where an injury leads to death, the person responsible shall be obliged to pay compensation for the costs incurred in seeking to save the injured party, and all other expenses, not excluding funeral expenses. 2. In any such case, and in all other instances of bodily injury, a right to compensation shall be available to those who tendered help to the injured party, and to hospitals, doctors or other persons or entities which took part in treating or assisting the victim."

70 Loss, destruction and damage of things give rise to some very debatable questions. The Supreme Court of Justice (27 February 2003) decided, in case of a road accident that destroyed an "old-timer" in very good condition, that the defendant had to pay not only the *market value* of the car, but also the *economic value* the owner of the car obtained from his car: that is the compensa-

[76] About this issue, see J. Dias, *Dano Corporal* (2001).

tion must be enough to buy a car that fulfils the same conditions as the destroyed automobile. According to some doctrine, there is not only one "market value" and accepting that compensation should be equal to the "market value" would mean that tort law is "a kind of private expropriation by the market value" which would be undesirable.[77] Such a solution is not to be found directly in Art. 10:203 (1) of the *Principles*. However, its last sentence may be interpreted in such a way as to accept this decision.

71 Compensation for *loss of use* is also accepted in Portuguese case law and doctrine. Consequential losses may be compensated as far as they are "predictable" (Art. 564 (2)).

**c) Non-Pecuniary Damage**

72 Art. 10:301 (1) provides compensation for non-pecuniary damage. In order to understand clearly the important differences between the *Principles* and the CC, we should distinguish between:

(a) non-pecuniary damage in general;
(b) personal injury (including injury to liberty or other personality rights);
(c) non-pecuniary damage suffered by persons having a close relationship with a victim suffering a fatal injury;
(d) non-pecuniary damage suffered by persons having a close relationship with a victim suffering a very serious non-fatal injury.

*(i) Non-Pecuniary Damage in General*

73 Non-pecuniary damage is regulated in Art. 496 CC. It is an apparently simple norm that states: "For the determination of compensation, regard must be had to *non-pecuniary damage* which, due to its *seriousness, deserves protection of the law*." Thus, the legislator left to the courts the decision on what "deserves the protection of the law". The *Principles* appeal to the notion of *scope of protection of the interest* (Art. 10:301).

74 The norm under analysis does not exclude the possibility of awarding non-pecuniary damages in case of the destruction of a *pet* or a *thing* (for example: a family treasure or souvenir), but Portuguese case law has been very conscious and careful on deciding what "deserves the protection of the law".

75 On the other hand, case law accepts that non-pecuniary damage may be compensated also in the field of contractual liability. The literature has been divided concerning this question.[78]

[77] J. Gomes, Custo das Reparações, valor venal ou valor de substituição? – Anotação ao Acórdão do Supremo Tribunal de Justiça de 27.2.2003, Ver. 4016/02 [2003] *Cadernos de Direito Privado* I, 52–62.

[78] See J. Antunes Varela (supra fn. 37); A. Pinto Monteiro, *Cláusula Penal e Indemnização* (1990).

*(ii) Personal Injury (Including Injury to Liberty or other Personality Rights)*

76 Personality rights have played a very important role in this field. In the absence of a limited enumeration of protected rights in the general provision of Art. 483 (1) CC or in Art. 496, Portuguese courts have included personality rights in the scope of protection of tortious liability rules and award compensation for non-pecuniary damage when those rights are violated. Menezes Cordeiro states that, "the XXth Century was the period of the contracts and its refinement, through "*Treu und Glauben*", the 21st century can well be the time of the *rights of the person* …"[79] For the past 20 years there has been an increasing study and implementation of tort liability for the violation of personality rights in Portugal. We can find sentences recognising: the right to life, namely to compensate the death (a); the consecration of the right to a good environment (b); the right to health, to rest and to tranquillity (c); and the reinforcement of right to honour, reputation and credit, mostly by offences perpetrated by the mass media (d).[80]

77 In conclusion, I suppose that, in respect to problems (a) and (b), the *Principles* are in accordance with Portuguese law.

*(iii) Non-Pecuniary Damage Suffered by Persons Having a Close Relationship with a Victim Suffering a Fatal Injury*

78 On the contrary, concerning question (c) and (d) we will find some differences.

79 Art. 496 (2) states: "Where a victim dies, the right to compensation for non-material damage shall be available, jointly, to the spouse who is not legally separated … and to the children or other descendants; failing the latter, to the parents or other ascendants; and, finally, to the brothers and sisters or nephews and nieces representing them. (3) The amount of compensation shall be fixed equitably by the court, having regard in any event to the circumstances mentioned in Art. 494; *in the event of death*, regard may be had not only to non-material damage *suffered by the victim* but also to such damage *suffered by the persons* entitled to compensation by virtue of the foregoing paragraph." These quite difficult norms are interpreted as follows. There are two different kinds of non-pecuniary damage: one that is suffered by the relatives described in paragraph (2); the other that is "suffered" by the deceased himself. This is a peculiarity of Portuguese law. The ground for this norm is that if all personality rights deserve protection and deserve compensation (for non-pecuniary damage), the same shall apply for the most important of all the personality rights (life).[81]

[79] A. Menezes Cordeiro (supra fn. 6).
[80] A. Menezes Cordeiro (supra fn. 6).
[81] It is discussed in the literature, whether this compensation shall be received by the heirs or by the persons referred to in paragraph (2) of Art. 496.

Thus, on the one hand, Portuguese law concedes more protection than the *Principles* since it compensates the "death damage" (*dano da morte*). On the other hand, it is quite restrictive, since only close relatives referred to in the norm may receive compensation for their non-pecuniary damage. The *Principles* allow the compensation to any person "having a close relationship with a victim". 80

In brief, it shall be made clear that, concerning non-pecuniary damage, in case of death three (possible) losses shall be compensated: (1) "loss of life" of the victim; (2) the damage suffered by the victim before dying; and (3) damage suffered by the relatives. 81

There is some debate in the doctrine concerning the amount of damages that shall be awarded in case of death (in respect to the specific "death damage"). Some authors state it should be equal for everyone (arguing with the constitutional principle of equality)[82]; others claim general rules of assessing damage should apply. The Supreme Court of Justice decided on 25 January 2002[83] that, when establishing the amount of damages for loss of life, the concrete circumstances of the life of the deceased person are relevant. The fact that the victim was 24 years old "with a long life expectancy and a promising future in front of her" was taken into consideration.[84] 82

A right of a non-married partner to compensation in case of death of the partner has been an issue of lively debate in Portuguese case law. In 2002 the Constitutional Court decided this norm unconstitutional in one particular case;[85] one year later the Supreme Court decided that the non-married partner had no right to receive compensation for non-pecuniary damage.[86] If the *Principles* were to apply, no doubt he/she would have that right. The sentence of the Constitutional Court was a ground-breaking decision in the direction of recognizing some rights to unmarried couples. As we saw, according to Art. 496 (2) CC, compensation for non-pecuniary damage in case of death is 83

[82] See D. Leite de Campos, "A vida, a morte e a sua indemnização", [1987] BMJ, 365, 15, and J. Dinis, Dano Corporal em acidentes de Viação, [2001] CJ-STJ, 7.

[83] [2002] CJ-STJ I, 62.

[84] Similarly R. Dworkin, *Life's Dominion: an argument about abortion and euthanasia* (1993), 86 et seq.: "I am now asking, then, not about justice or rights or fairness, but about tragedy and the waste of life, and therefore the insult to the sanctity of life, on different occasions? (…) … the death of a young woman in an airplane crash is worse than the death of an old man would be. The young woman would probably otherwise have had many more years left to live. (…) But how bad this is – how great the frustration – depends on the stage of life in which it occurs, because the person has made a significant personal investment in his own life, and less if it occurs after any investment has been substantially fulfilled, or as substantially fulfilled as is anyway likely." See in Portuguese Case-law: STJ, 3-2-1976 (BMJ 254, 180); STJ 8-2-1969 (BMJ 184, 267); STJ 4-5-1971 (BMJ 207, 155); STJ 6-7-1971 (BMJ, 209, 102); STJ, 1-4-1975 (BMJ, 246, 126); STJ, 225–1979 (BMJ 287, 287); STJ, 7-5-1971 (BMJ, 207, 149).

[85] Decision of the Constitutional Court no. 275/2002, in *Diário da República* (DR), II, 24 July 2002. See A. Pereira, Portugal, in: H. Koziol/B.C. Steininger (supra fn. 14), 346.

[86] Supreme Court of Justice decision of 4 November 2003. See A. Pereira, Portugal, in: H. Koziol/B.C. Steininger (supra fn. 23), 343.

restricted to the spouse, the offspring or other descendents, subsidiary to the ascendants, and at last to the siblings or nieces/nephews of the deceased person. Thus, the traditional jurisprudence did not concede any compensation to a partner in a *de facto* marriage.[87] This Constitutional Court decision, on the contrary, considered this norm as unconstitutional, since Art. 36 of the Constitution protects all kinds of families. Art. 496 Civil Code should not exclude partners (who have lived together for more than 2 years) from the right to be compensated for non-pecuniary damage for the death of their partner.[88]

*(iv) Non-Pecuniary Damage Suffered by Persons Having a Close Relationship with a Victim Suffering a very Serious Non-Fatal Injury*

84 The *Principles* are also more generous than the CC in case of serious non-fatal injury. Non-pecuniary damage suffered by third parties (even close relatives) is normally not compensated by Portuguese courts, except in the aforementioned case of death. However, recently we can find some decisions that accept what the French doctrine calls *dommage par ricochet*. That was the case decided by the Oporto Court of Appeal on 29 June 2003 and a Supreme Court decision of 25 November 1998.

85 In the first case (Oporto Court of Appeal decision of 29 June 2003)[89], due to a car accident Mr. X suffered several injuries, including impotence. The plaintiff, his wife, sued the insurance company of the tortfeasor claiming compensation for her non-pecuniary damage (consisting of being unable to have sexual intercourse with her husband). The Court considered that this is a *direct* damage, since the wedding contract creates the mutual *duty of cohabitation* (Art. 1672 Civil Code), including having a *regular sexual life*, which is now impossible. The wedding creates also the *duty of fidelity* (Art. 1672 CC). Moreover, at the time of the accident, the wife could still have been a mother biologically, which means that another "right" was affected (Art. 68 of the Constitution: protection of motherhood). In short, the Court considered that there is a *right to marital sexual life* according to the norms of family law and the general personality right (Art. 70 CC), and ordered the insurance company to pay compensation for non-pecuniary damage of the "injured" woman.

[87] See, e.g., Supreme Court of Justice, 13 January 1994, [CJ (STJ), I, 2000]; Supreme Court of Justice 23 April 1998, CJ (STJ); Lisbon's Court of Appeal, 17 March 1992, CJ, II, 167; and Supreme Court of Justice, 20 January 1994. In the doctrine, J. França Pitão, *União de Facto no Direito Português* (2000), 30, argues against this conservative jurisprudence. It is also interesting to observe that the new Civil Code of Macao (that was created under the Portuguese sovereignty) attributes a right to be compensated for non-material damage also to the *partner* (in a *de facto* marriage).

[88] Moreover, sociological empirical data show that *common law marriage* is becoming more frequent. Most of the births occur within a marriage (76.2%); however births outside marriage are increasing steadily. They represented 23.8% in 2001. Of those, 17.8% of the parents live together, and 6% do not. Single parent families represent 12% of the total of families with children. Source: Ministério da Justiça – Gabinete de Política Legislativa e Planeamento, *Estatísticas da Justiça (Justice Statistics) Portugal 2000*, 19. See also www.ine.pt.

[89] See A. Pereira (supra fn. 86), 345.

In the second case (Supreme Court of Justice decision of 25 November 1998)[90] a child was severely injured. The parents claimed compensation for their own non-pecuniary damage. The Supreme Court awarded them compensation, arguing that there is a family law relationship of parental power, which includes "the right to see the young child grow up healthy." 86

According to the *Principles*, one would probably achieve the same result in the second case; the first case however is more dubious. 87

*(v) Paragraph (2) and (3)*

Paragraph (2) of Art. 10:301 provides criteria for the assessment of non-pecuniary damage. Similar criteria are to be found in Art. 496 (3) and Art. 494: "degree of fault, the economic situation of both the defendant and the victim and other circumstances of the case." 88

Paragraph (3) prescribes that "in assessing damages (…) similar sums should be awarded for objectively similar losses." This derives from the principle of equality (Art. 13 of the Portuguese Constitution) and case law normally justifies the amount awarded by reference to previous case law. There is still no system of *barêmes* in Portugal, but a significant part of the doctrine defends such solution.[91] 89

**d) Ad hoc Reduction**

The Portuguese legislator introduced in 1967 the limitation of compensation in cases of mere fault (Art. 494): "Where liability is based on mere fault, compensation may be fixed equitably to an amount *lower* than that corresponding to the damage caused, provided that the degree of fault of the wrongdoer, the financial situation of the wrongdoer and of the injured party as well as the other circumstances of the case so justify." A similar rule is to be found, among other legal systems, in Swiss law or in the very recent Art. 944 of the Brazilian Civil Code (which entered into force in 2003).[92] In case of negligence, the court might decide the defendant is not liable for full compensation. The degree of fault, the economic situation of both the defendant and the victim and other circumstances of the case are the criteria the court shall take into consideration. Pointed out as a "spectacular turning point" in the Portuguese Civil Code, the idea to shape compensation according to the degree of fault in case 90

[90] *Boletim do Ministério da Justiça* 481, 470.

[91] See J. Dias, *Dano Corporal – Quadro Epistemológico e Aspectos Ressarcitórios* (2001) and J. Dinis, Dano Corporal em Acidentes de Viação, [2001] CJ (STJ), 5–12.

[92] See A. Pereira, Brazil, in: H. Koziol/B.C. Steininger (supra fn. 23), 458. A. Tunc, *La Responsabilité Civile* (1981), 73: "la diminution des dommages-intérêts quand la partie responsible est un individu et non une organisation est tout-à-fait courante dans nombreux pays socialistes, y compris la Chine, ainsi qu'au Portugal. Elle est couramment acceptée pour les dommages causes par un malade mental, et elle est maintenant prise sérieusement en consideration ou meme partiellement introduite en Allemagne, aux Pays-Bas et en Scandinavie." In fact the new Dutch Civil Code (BW, *Burgerlijk Wetboek*) introduced in Art. 6:109 such a provision (see E. Hondius/C. van Dam, Niederlande, in: C. von Bar (ed.), *Deliktsrecht in Europa* (1994), 20.)

of non-intentional fault was warmly welcomed by private lawyers. Before the Code, supplementary statutes imposed that solution, but it was not a general rule. Still, the provision should not be seen as an automatic right of the defendant. Full compensation is the scope of liability, according to Art. 562 CC. Deviations of that basic rule in the law of damages must be applied with reserve and must be justified. The prevailing opinion in Portugal undermined the field of application of the moderation "clause", discarding the same solution in contractual liability[93] and in cases of strict liability[94]."

## C. Conclusion

91 There are some important differences in structure and in dogmatic background between the *Principles* and the CC, of which one can point out the following: (1) The CC adopts the principle of fault, the *Principles* offer the same dogmatic level to fault, strict liability and liability for others. (2) The definition of wrongfulness and the protection of pure economic interests and contractual relationships is broader in the *Principles* than in the Portuguese CC. (3) The regime on enterprise liability and (4) the chapter on causation of the *Principles* are very innovative. (5) Concerning remedies, the *Principles* provide compensation for non-pecuniary damage for anyone having a "close relationship" with the injured, which is opposed to the enumeration of *relatives* and (6) the *Principles* provide compensation of non-pecuniary damage suffered by persons having a close relationship with a victim suffering a very serious *non-fatal* injury.

92 In general, the practical results are frequently similar but, perhaps, the regime provided in the CC is stricter and is possibly more efficient in "keeping the floodgates shut."

[93] See A. Pinto Monteiro (supra fn. 78), 95, fn. 182. See also STJ [2003] CJ-STJ, 17 June 2003: the Court did not apply Art. 494 CPC, not because there was contractual liability, but because the agent had acted with gross negligence.

[94] Accepting it instead J. Antunes Varela, Rasgos inovadores do código civil português de 1966, [1972] *Boletim da Faculdade de Direito* (BFD), 100–104. See: J. Sinde Monteiro/M. Veloso (supra fn. 55).