

# Workshop Liability & Insurance I

## Ius Commune Conference 2014

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**Friday, 28 November (09.00 – 12.30)**

**Building: St Leonard's Hall**

**Room: Nelson**

### Participants

**Theme: The Law of Damages 2.0**

#### *A. Introduction*

The law of damages is traditionally the field of law that simply sanctions a wrongful act by means of financial compensation. The whole concept of what 'damage' really is, has however been left open for a wide variety of interpretations in the past (A). Furthermore, the question how damage should be 'repaired' is answered insufficiently in many cases (B). Last, it is unclear what the aim of law of damages is or what its aim should be (C). New insights from *e.g.* social sciences and law and economics, make clear that this sphere of law might need some reconsideration. Assuming that we need a reviewed law of damages, the Ius Commune Workshop on Liability and Insurance 2014 focusses on the question what such 'Law of Damages 2.0' could and should look like. In the following, the subject is shortly introduced.

#### *B. The concept of 'damage'*

In principle 'damage' is a legal concept that could change under the influence of societal, cultural or legal developments, and new insights from *e.g.* social and behavioral sciences. As an example, the concept of non-pecuniary damage changed over time. From the idea that this loss is not a legally relevant loss to the idea that compensation should be granted because of a psychical injury or even because of the infringement of a personality right. This development raises the question, what the range of non-pecuniary damage really is.

Next to that, the concept of 'damage' could change because of the development of a new concept of damage on the level of Human Right law, *e.g.* compensation for non-pecuniary damage because of exceeding the reasonable time limit for legal decision making. Should and, if so, how could we make our national systems more responsive to new legal institutions and their concept of 'damage'? Examples can, however, also be found in the sphere of pure economic loss. In some countries compensation for pure economic loss can be awarded, whilst in others damages can only be awarded in specific situations. How could this difference be justified? And should the arguments pro and against be reconsidered in the light of insight from *e.g.* social sciences?

More fundamentally it could be questioned, whether the losses that we traditionally consider to be damage, are indeed losses from the plaintiff's perspective. What do victims need to be or feel repaired? What is in fact their loss and how could that loss be repaired? The question regarding victims' needs is closely linked to that of the concept of reparation (B) and the goal(s) of the law of damages (C).

#### *C. Reparation of damage*

Financial compensation is most commonly regarded to be the way to compensate people for sustained damage, at least in personal injury cases. However, new research also shows that a plaintiff could be

worse off by using the tort law system to recover the damage from *e.g.* the tortfeasor. For example, it has been shown that a (legal) procedure negatively influences an injured victim's convalesce, *e.g.* because of stress and the length of that procedure. If reparation of damage is considered to be the goal of the law of damages – or even of tort law – how should this system be changed in the light of new insights from *e.g.* social science or epidemiology? Should we distance ourselves from the idea that damages should be assessed on the basis of the 'real' or 'concrete' damage? Should procedural law step in to make the system more 'recovery-friendly'? And, if so, how should that system step in? Or should a first party insurance or no fault system be introduced? Last, should we broaden our perspective from financial compensation to compensation 'in fact', *e.g.* by introducing new types of remedies?

#### *D. Goal(s) of the law of damages*

Additionally, it is unclear what goal the law of damages aims at. Should the damage be repaired (in fact) or compensated? Or should we take another step by arguing that the law of damages should be adapted to prevent future wrongs, *e.g.* by introducing the concept of punitive damages? Or, and in how far, should the idea of enforcement of law or vindication of rights be incorporated in our system of law of damages?

#### *To conclude*

The idea of 'damage', financial compensation and the goal(s) of the law of damages are under discussion. Several factors and circumstances force us to rethink this sphere of law, not only from the perspective of black letter law but also because of new insights from *e.g.* social science or psychology with regard to victim's needs and experiences with the tort law system. The main question is therefore: What should the 'Law of Damages 2.0' (from a broad perspective) look like?

<b>Chair:</b>	<b>Elsbeth Reid</b> (University of Edinburgh)
09.30 – 09.40	<i>Opening remarks</i>
09.40 – 10.00	<b>Emanuel van Dongen</b> (UU) <i>The Law of Damages 2.0. What are damages?</i>
10.00 – 10.30	<b>Albert Verheij</b> (RUG) <i>Violated trust as compensable head of damage</i>
10.30 – 10.55	Discussions on both papers
10.55 – 11.25	Coffee break
11.25 – 11.45	<b>Siewert Lindenbergh</b> (EUR) <i>Damage and remedy; loss and repair?</i>
11.45 – 12.05	<b>Andrea Zwart-Hink</b> (VU) <i>Compelled apologies as a legal remedy</i>
12.05 – 12.30	Discussions on both papers