



Non-Contractual Liability: Modernising and “Re-Dogmatising” Legal Reasons and Reasoning

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I. State of the (National) Law

Even within civil law systems (e.g. Germany)

- responses to emerging liability risks have been shaped by the **judicial development** of uncoded duties of care, while



- **legislative intervention** has remained selective and largely confined to specific strict liability regimes.

Over time, this **fragmented pattern** has undermined the systemic coherence of liability law and rendered contemporary tort doctrine increasingly fragile.



II. Traditional Doctrinal Approaches

- Tort law predominantly relies on **conservative doctrinal concepts** closely aligned with written law.

- Jurisprudence — including comparative scholarship — has primarily focused on the fundamental principles and core structures¹ of tort law as a “**lowest common denominator**”.



- Early **attempts at structural reform**, notably through broader Europeanisation,² did not fully materialize.



Digital Transformation – increasing liability risks in an era of digital **complexity** and **opacity**^{3a}

Diversity & Individualisation



- coherent justification of liability in light of social **differences** and individual **needs**



Sustainable Development

- reconfiguration of (**long-term**) risks, (**cumulative**) harm, and (**social**) responsibility^{3b,d}

III. New Challenges

← practical / legal →

Interdisciplinarity – increasing **responsiveness** of private law reasoning to non-legal normative considerations^{3b}



“**Intradisciplinarity**” – growing **permeability** of the traditional divide between private law and public law^{3c}

Internationalisation – gradual **emancipation** of private law reasoning from national legal frameworks^{3d}



V. (European) Example

Recent initiatives under EU law have renewed the calls for **cross-jurisdictional harmonisation**:

→ The revised **EU Product Liability Directive** 2024/2853 and its ongoing **transposition** into national legal systems entails considerable difficulties, including:⁵

Art. 7: new notion of defectiveness (“safety [that a person is entitled to expect or] that is required under Union or national law”)
= close regulatory nexus with public safety law, e.g. AI Act
↯ frictions with the concept of private-law autonomy

Art. 9: disclosure of evidence

- ↯ largely foreign to continental civil procedure law

Art. 10: burden of proof

- = **presumptions** of defectiveness and/or causation
- ↯ tensions with the traditional evidentiary terminology
- = a lowering of the standard of proof based on probability (particularly in cases of “technical or scientific complexity”)
- ↯ so far rejected in some legal systems, such as Germany

IV. Open Tasks

In response to these developments, two major challenges arise:



- 1) reconceptualising the **material scope of protection** and clarifying the **attribution of remote damage**
- 2) developing **procedural and evidentiary responses** to complex and opaque real-world scenarios

→ The **sectoral doctrinal concepts and criteria** of non-contractual liability have yet to be **integrated into a coherent framework**.⁴

~ **reshaping legal reasoning through systematic doctrinal reconstruction**

VI. Conclusion & Outlook

The current transformation of liability law calls for a **systematic doctrinal reconstruction capable of integrating complexity, diversity, and both regulatory and societal pressures without abandoning the autonomy of private law**.



References

- ¹ N. Jansen The Structure of Liability Law (2003).
- ² Zimmermann (Ed.) Core Structures of European Liability Law (2003); Wurmnest Basic Principles of European Liability Law (2003); Brueggemeier Liability Law (2006).
- ³ ^a Thoene Autonomous Systems and Tortious Liability, 2020. ^b Schirmer Sustainable Private Law (2023); Mittwoch Sustainability and Corporate Law (2022). ^c Hellgardt Regulation and Private Law (2016); Croon-Gestefeld Common Interests in Private Law (2022). ^d Huebner Corporate Liability for Human Rights Violations (2022).
- ⁴ On state and evolution of German & European tort law, cf. Spickhoff VersR 2025, 905.
- ⁵ On the German draft bill, see Wagner VersR 2025, 129; Wendehorst EuZW 2024, 876. For an account of current product liability doctrine, see Voigt Product Liability (2026).