

# Giving judges the **power to reduce damages** provides a **safety valve** for an expanding law of delict



## Problem statement

Delictual liability is expanding, *e.g.* due to an increase in objective grounds of liability. Generally, such delictual liability leads to full compensation of the victim. Yet, certain tortfeasors cannot bear the burden of full compensation. General statutory reduction clauses can allow judges to nuance the principle of full compensation and avoid disproportionate outcomes for tortfeasors. Where some legislators have implemented this concept in their law of delict,

others are reluctant to do so. Their reluctance is mainly based on a fear of legal uncertainty. Although there have been debates on a reduction of damages in several countries, there is a lack of structural theoretical insight on the topic. That lack of knowledge seems to foster the fear of legal uncertainty of some legislators.

## Research goal and methodology

- Research goal: to provide a theoretical foundation for the debate on general statutory reduction clauses
- How? A review of the existing body of literature and comparative research on Dutch and Swiss reduction clauses
- Why? To balance arguments, give insight into the risks of judicial reduction powers and safeguard against abuse and legal uncertainty

## Key literature

- P. Abas, *Rechterlijke matiging van schulden* (Deventer: Kluwer 2014);
- J.M.M. Maeijer, *Matiging van schadevergoeding* (Utrecht/Nijmegen: Dekker & Van De Vegt 1962);
- J. Spier (ed.), *The Limits of Liability* (Den Haag: Kluwer Law International 1996);
- T. Finke, *Die Minderung der Schadensersatzpflicht in Europa* (Göttingen: Universitätsverlag Göttingen 2006).

## Research results

The arguments on judicial reduction can be situated on three levels:

- (1) the foundations of legal systems
- (2) the coherence of legal systems
- (3) the practical application of rules to a case.

When weighing the arguments against and in favour of reduction, the conclusion is that a judicial reduction of damages should be possible if the systems provide sufficient safeguards against abuse and legal uncertainty. The figure below provides a summarised visualisation of this conclusion.

### Practical application of rules to a case

1. Avoid bankruptcy and downwards spiral into poverty
2. Avoid disproportionate outcomes often based on coincidental damage

1. Lack of protection of victims
2. Disincentive for insurance (speculation on reduction)

### Coherence of legal systems

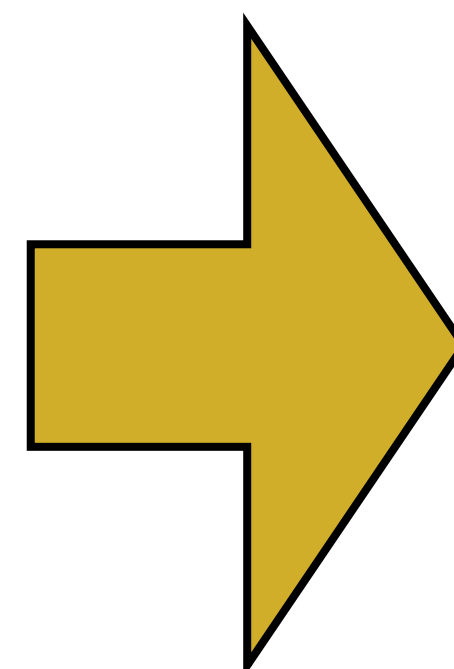
1. Avoid compartmentalisation
2. Coherence with criminal law
3. Transparency: avoid indirect reduction of damages

1. *Ad hoc* reduction and cap on liability
2. Conflict with goals OF insolvency law
3. Lack of transparency due to additional judicial margin of appreciation

### Foundations of legal systems

1. Fundamental principles (*e.g.* fairness,)
2. Fundamental rights (*e.g.* constitutional *Übermaßverbot*, equality between tortfeasors)

1. Natural law requiring full compensation
2. Fundamental rights (*e.g.* equality between victims)



### Material safeguards

1. Only in exceptional circumstances
2. Balancing of interests of both parties
3. Financial capacity as starting point for reduction, but not the only criterion
4. Excluded in case of mandatory (and customary?) insurance

### Procedural safeguards

1. Not possible in a situation of (imminent) insolvency
2. Duly motivated application by judges
3. Burden of proof on the person invoking a reduction of damages

Questions?  
Let's get in touch !



Lukas Van Roy



lukas.vanroy@kuleuven.be

KU LEUVEN