

## Regulation of Liability for Damage in the New Czech Civil Code

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### I Introduction

The provisions on liability for damage are systematically arranged at the end of Act No. 89/2012 Coll., the Civil Code ('NCC'), namely in s 2894 ff., and besides the general provisions on damages the legislation consists of some cases of liability for damage that were regulated in other laws until 2013, in particular product liability set forth in Act No. 59/1998 Coll., or compensation for damage caused by unfair competition, which was subject to the legislation of the Commercial Code.

This approach is the result of the opinion that legislation of liability for damage in the Czech civil law should be reduced to only one basic law and only very specific areas should be subject to special laws.

The most fundamental exception is Act No. 260/2006 Coll., the Labour Code, which is the basic legislation for labour law and which establishes separate legal regulations whose origination dates back to 1965 when the first socialist Labour Code was adopted. Another exception is the regulation of state liability laid down in Act No. 82/1998 Coll., on Liability for Damage Based either on Maladministration or on Illegal Decisions ('State Liability Act'),<sup>1</sup> which remained outside of the regime of the new Civil Code due to the historical tradition of human rights protection. The State Liability Act is directly derived from the Czech constitution as a result of the democratic movement of 1968 and, under this notion, its subordination to the general regulation of liability would be rather problematic.

It is not the purpose of this article to present the new regulations in detail but to present a general overview and provide for basic information about damages for a person who will deal with Czech NCC.

This article will deal with the most important issues relating to damages which are subject to more or less fundamental changes, namely (i) prevention, (ii) basis of liability and the current approach to contractual and non-contractual liability, (iii) causation, (iv) fault, (v) scope and means of compensation for damage and finally with (vi) satisfaction for non-pecuniary damage.

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\* Jiří Hrádek is a researcher at the Centre of Comparative Law at the Faculty of Law of Charles University and an attorney at the Law office of Schönherr in Prague.

<sup>1</sup> Zákon č. 82/1998 Sb., o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem a o změně zákona České národní rady č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád).

## II Concept of Prevention

The NCC considers prevention as one of the topical concepts which play a fundamental role in the law of damages. The regulations of the NCC are based on the principle of *neminem laedere*, expressing the duty to prevent damage as its main principle.<sup>2</sup>

It broadly takes over the approach of s 415 of former Civil Code when it states that, if required by the circumstances of the case or the habits of private life, everyone is obliged to behave so as to avoid unreasonable harm to the freedom, life, health and property of another. In contrast to the former law, however, it also explicitly sets out the information duty of the wrongdoer and the duty to act for the protection of a third party, which is directly inspired by Art. 4:103 of the Principles of European Tort Law (PETL).

Under this notion, prevention duties to prevent damage are differentiated between cases of impending damage and cases of specific prevention defined by law.

As regards the impending duty, s 2901 of the NCC<sup>3</sup> provides that anyone who creates a dangerous situation or who has control over it, or if justified by the nature of the relationship between people, is obliged to intervene to protect another. However, this rather traditional approach requiring protection of third parties against risk resulting from the wrongdoer's sphere is amended by a duty to act actively in general. The same obligation relates specifically to a person who can, based on their capabilities and opportunities, easily prevent harm, the impending severity of which clearly outweighs what is needed to act.

The provision on active behaviour towards third party interests is a revolutionary regulation, even though the case law already tried in the past to shift the borders for active protection in this direction using the interpretation of s 415 of the former Civil Code. However, the current wording sets forth explicit rules.

Despite this surprising duty, we cannot qualify such a rule as unlimited or opening the flood-gates. Academia understands this duty as one which clearly prefers the helper's own interests above any risk and only in such a case it does it impose the duty to act actively. This might be a situation when a person walking around a house sees a fire just starting and may easily call the fire brigade, i.e. it is possible to protect third party interests without putting his own security, health and life in danger.

As regards the information duty, s 2902 of the NCC<sup>4</sup> sets forth that whoever breaches a legal obligation or who may and must know that they are in breach shall, without undue delay, notify the person who may suffer such harm and warn them about the possible consequences. If the

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<sup>2</sup> S 2900 NCC: If required by the circumstances of the case or the habits of private life, everyone is obliged to behave so as to avoid unreasonable harm to the freedom, life, health or property of another.

<sup>3</sup> S 2901 NCC: If required by the circumstances of the case or the habits of private life, anyone has the obligation to act to protect another who creates a dangerous situation or who has control over it, or if it is justified by the nature of the relationship between the parties. The same duty pertains to a person who can, according to his capabilities and the ability to easily avert harm that he knows or should know that the impending severity clearly exceeds what is needed to make the action.

<sup>4</sup> S 2902 NCC: Who breaches a legal obligation or who may and has to know that he breaches it, shall without undue delay notify the person who may suffer such harm and warn him about the possible consequences. If the notification

notification obligation is met, the injured party has no right to compensation for the injury, which could have been prevented after the notification.

The breach of the duty to notify has always been considered as breach of prevention duty. However, it is new that failure to do so results in the loss of title to compensation. As a result, the wrongdoer no longer needs to prove all the conditions of contributory negligence on the part of the injured party, but only the fact that the intervention did not occur. The procedural position of the primary wrongdoer has therefore been significantly strengthened as regards their allegation that they did not cause the whole damage incurred.

### III Basis of Liability

#### 1 Overview

Unlike the former Civil Code, which was based on a general clause on damages, which was inspired by the French and Austrian systems of compensation for damage, the NCC establishes a new basis of liability based on differentiation between contractual and non-contractual damages. Moreover, the NCC establishes as a new concept pre-contractual liability, which reflects breach of duties of parties in negotiation about their future contractual relationship (s 1728–1730 of the NCC).

Nevertheless, the most fundamental change consists in the division between contractual and non-contractual damages which is directly inspired by s 823 of the German BGB. This regulation brings not only the establishment of several new facts to establish liability for damage, but also compensability in the event of breach of the relative and absolute rights of the injured party.

Basically, the difference between the two types of liability is that while tortious liability is based on fault, liability for breach of contract is qualified as strict liability, where the potential wrongdoer can exempt themselves if they prove that they were temporarily or permanently prevented from the fulfilment of their obligation under the contract by an extraordinary unpredictable burden that occurred independently of their will. The inspiration for such a type of liability results from former Czech Commercial Code and Convention on the international sale of goods.

Tortious liability for fault is supplemented by additional strict liabilities which (as with contractual liability) are subject to special defences. The basic difference in both cases is that strict liability only arises in enumerative cases referred to in the NCC or in special laws.

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obligation is met, the injured party has no right to compensation for the injury, which could have been prevented after the notification.

## 2 Liability in Delict

Provisions for non-contractual liability are laid down in s 2904, 2909 and 2910 of the NCC. They establish liability for an accident, liability for breach of good manners and liability for breach of law.

The provisions of s 2904 of the NCC,<sup>5</sup> which establish liability for a coincidence, are very specific, as Czech civil law traditionally follows the principle of *casum sentit dominus*. A coincidence means a circumstance in which no one is responsible, as the damage occurred on the basis of force majeure, i.e. circumstances which could not be foreseen and that could not be avoided. In contrast, a mixed coincidence which is subject to s 2904 (*casus mixtus*) is a culpable act and is based on the fact that the wrongdoer breached their legal obligation by means of a culpable act or omission and, in causation, damage occurred. Under this new provision harm caused by coincidence shall be compensated by the person who initiated the coincidence, in particular by breach of a command or damage to a facility that should have prevented the harm.

Another case of liability that is not fundamentally different from the current concept is the liability for breach of good manners set forth under s 2909 of the NCC.<sup>6</sup> Pursuant to s 2909, a wrongdoer who causes damage to the victim by wilful breach of good manners is obliged to compensate the victim, unless they were acting in the exercise of a right, in which case they are obliged to compensate the damage only if they intended to damage another.

The third case of liability for delict is based on s 2910 of the NCC,<sup>7</sup> which sets forth liability for breach of a legal duty. The duty to provide compensation for breach of legal obligations under the law is, as in the former Civil Code (s 420 para 1 and 3), associated with the culpable breach of that duty. Nevertheless, the main difference is in the relevance of the rights which became subject to the breach.

The NCC newly includes a differentiation of cases where a violation of legal obligations affects absolute rights and cases where another law is subject to interference. If absolute rights are breached, the law requires a culpable breach of legal duties by the wrongdoer. If a relative right of the injured party is harmed, the injured party has a claim if this happened due to a culpable breach of a legal duty which was laid down in order to protect such a right (*Schutznorm*).

This distinction, which is directly inspired by s 823 of the German BGB and art. 6:163 of the Dutch Civil Code, has been justified by the nature of the rights in question: absolute law, whether personal or property rights, affects everybody and therefore does not require any further condition to become a subject of compensation. By contrast, due to the nature of relative

<sup>5</sup> S 2904 NCC: Damage caused by an accident shall be compensated by the person who gave the incentive to the accident, in particular by breaching a command or damaging equipment which should prevent accidental harm.

<sup>6</sup> S 2909 NCC: A wrongdoer who causes damage to the injured party by an intentional breach of good morals is obliged to compensate it. If he exercises his rights, the wrongdoer is obliged to compensate the damage only if he purposefully intended to cause damage.

<sup>7</sup> S 2910 NCC: A wrongdoer who breaches an obligation under fault set by law and thus interferes with an absolute right of the injured party shall compensate what he has caused by so doing. The duty to provide compensation also arises towards a wrongdoer who interferes with another right of the injured party by breaching a legally stipulated duty set by law for the protection of such right.

rights, only a limited number of rights-holders will be affected and, therefore, any breach must be understood as qualified.

### 3 Liability in Contract

Liability in contract must be divided between cases specifically regulated under particular types of contracts, such as liability under purchase agreements etc., and a general provision stipulated in the Part on obligations in delict, in particular under s 2913 of the NCC.<sup>8</sup>

Pursuant to the general provision, if a contractually obligated party incurs damage due to breach of contract, the victim is entitled to compensation regardless of the fault of the wrongdoer and the liable party can exempt itself from liability only if they prove an extraordinary unpredictable burden that occurred independently of their will.

As regards the strict liability approach, the new codex is based on the former concept of s 373 of the Commercial Code, which also did not require fault for liability in a contractual relationship. Even though such an approach is understandable in contractual relationships where the parties are closely connected and should pay respect to the interests of the other party, it is true that the former regulations predominantly applied only to entrepreneurs, whereas the NCC shall apply to all civil law relationships. As such, for a number of people the new type of liability will present not only fundamental but also a very risky change.

Moreover, according to the provision of s 2913 of the NCC, the right to compensation also arises to the person in whose interest the agreed obligations obviously should have served. This provision is a reaction to the decision of the Czech Supreme Court under which a contracting party is not liable only *vis a vis* the other contracting party but also with regard to each person who incurs damage. However, the conclusion derived from the case law is so broad that the legislator laid down liability based on the interest approach.

As a result, when concluding a contract, in relation to third parties the wrongdoer must now at least take into account the possibility that the other party is interested in the protection of a third party or that the fulfilment should have served the interests of the third party. However, the scope of the protection of third party's interests is especially disputable. It is namely the fact that contracts on public infrastructure might particularly be deemed to be in favour of third parties and, thus, any third party using motorways, for example, will be entitled to compensation under s 2913.

In cases where damage is caused to a third party while fulfilling contractual obligations and the above conditions are not met, the question of whether the wrongdoer is obliged to compensate shall be considered pursuant to the provisions on tort liability.

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<sup>8</sup> S 2913 NCC: (1) If any party breaches an obligation under a contract, it shall compensate the damage caused as a result thereof to the other party or even to a person whose interests the fulfilment of the obligation should have apparently served. (2) Anyone can exempt himself from the duty to compensate if he proves that he was prevented from fulfilling the contractual duty temporarily or permanently by an extraordinary unforeseeable and unavoidable obstacle that occurred independently of his will. An obstacle that occurred from the wrongdoer's personal circumstances or that occurred when the wrongdoer was in delay with the fulfilment of his contractual obligation as well as an obstacle that the wrongdoer was obliged to overcome under the agreement shall not exempt him from liability.

## IV Causation

Causation, as one of the basic assumptions of liability, is not described in the NCC, with two exceptions. As such, it can be assumed that both the doctrine and case law will continue to apply the current concept of causation, which is based predominantly on the theory of adequacy. The theory of adequacy uses the criterion that damage is considered to be a result of wrongful activity if, besides being the condition of the damage, the wrongful act or wrongful event is, due to its general nature, or, according to the usual course of events and experience, a common cause of the damage. For the theory of adequacy, therefore, a cause of a wrongful result is only such a wrongful act or event which would have been objectively foreseeable to an average person, that is, also to the person to whom the relevant cause is attributable.

As regards explicitly stipulated cases of causation, these relate to alternative and partial causation.

The first exception to the explicitly stipulated causation rule is the instance of alternative causation, which at the same time changes the long-term rule on standard of proof. Under s 2915 of the NCC,<sup>9</sup> if more than one person commits a separate unlawful act, each of which could cause a harmful result with probability approaching certainty, and it cannot be determined which person caused the damage, each of them shall be found liable for full damage. Moreover their liability is joint and several.

With this particular provision on causation, the legislator not only confirms the previous opinion in the legal theory that cases of alternative causes shall be considered under cases of joint and several liability, but also strengthens the position of the injured party by weakening the current rule of proof of certainty.

Another exception contained in s 2915 of the NCC<sup>10</sup> is based on the fact that, if the particular share of the wrongdoer cannot be decided, the court shall take into account the probability of the cause being attributable to them. This shall be regarded as a case of partial causation and again is a revolutionary approach directly inspired by PETL.

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<sup>9</sup> S 2915 (1) NCC: If multiple wrongdoers are obliged to provide compensation, they shall compensate the damage jointly and severally. If any of the wrongdoers is obliged under law to provide compensation only to a certain amount, he shall be obliged with the other wrongdoers jointly and severally in this scope. This applies also if multiple persons commit independent illegal acts, any of which could have caused the wrong result with a probability reaching certainty and it cannot be determined which person caused it.

<sup>10</sup> S 2915 (2) NCC: If there are circumstances meriting special consideration, the court may decide that the wrongdoer shall compensate the damage pursuant to his share in the wrongful result. If the share cannot be determined exactly, the probability shall be taken into account. This decision cannot be made if any wrongdoer took part knowingly in the activity of another wrongdoer or if he incited or supported him or if damage can be attributed to each of the wrongdoers even though they acted independently of each other. The same applies if the wrongdoer shall compensate damage caused by the helper and the duty to compensate also arose to the helper.

## V Fault

The regulation of tortious liability is based on the principle that anybody who is at fault for breaching their legal duty shall be obliged to compensate for damage. If the injured party proves other conditions for the establishment of the wrongdoer's liability, the fault of the wrongdoer shall be presumed, even if only in the form of negligence.<sup>11</sup>

The definition of fault is not explicitly provided; however, the NCC qualifies negligence as violation of the required standard of care, which is stipulated in s 2912 of the NCC.<sup>12</sup> The rebuttable presumption of fault is formed in such a way that a person is considered negligent if they act carelessly and without the knowledge and skills typically expected of a person of average abilities. If a certain person shows special knowledge, skills or accuracy, the person is consequently at fault if they do not make use of such qualities.

Under this notion, negligence is established on an objective standard of behaviour that is required by the average reasonable person in the position of the wrongdoer. The provision in question is a key rule for the application of fault within the duty to compensate for damage which arose as a consequence of the wrongdoer's behaviour in contradiction to the law.

However, at the same time, the NCC establishes a clear division between fault and wrongfulness, as an inevitable condition for negligence is the breach of legal duty, similarly to the regulations in Germany and Austria.

## VI Compensation for Damage – Scope and Means

Compensation for damage is based on the concept that proprietary damage shall be compensated, whereas non-material harm shall be subject to compensation only in special cases determined by law. This dualistic approach is also strongly reflected in the terminology used when s 2894 (1) of the NCC<sup>13</sup> provides for a legal definition of damage while non-pecuniary harm qualifies as a 'rest-clause'.

Under this rule, damage shall mean harm to the assets of the injured party whilst any other harm is dedicated to non-pecuniary damage which is subject to specific provisions on compensation of damage to health (pain and suffering, worsening of social position and other harm), interference with natural human rights etc.

<sup>11</sup> S 2911 NCC: If a wrongdoer causes damage to the injured by breaching a legal obligation, it shall be deemed that he caused damage with fault.

<sup>12</sup> S 2912 NCC: (1) If the wrongdoer does not act in a way that could be reasonably expected from a person of average abilities in private relationships, it shall be deemed that he acted negligently. (2) If the wrongdoer demonstrates specific knowledge, ability or diligence or if he commits to perform an activity for which a specific knowledge, ability or diligence is required, and he does not make use of this specific knowledge, ability or diligence, it shall be deemed that he acted negligently.

<sup>13</sup> S 2984 (1) NCC: Obligation to compensate loss to somebody always includes the obligation to compensate damage to assets (damage).

As regards the scope and manner of compensation, the NCC is based on the approach that restitution in kind must take precedence over monetary compensation.<sup>14</sup> If restitution in kind is not possible or if requested by the injured party, the wrongdoer shall be obliged to provide damages in money. Hence, if restitution in kind is possible, the type of compensation for damages shall depend on the will of the victim and the court cannot consider whether the chosen method of compensation is ‘useful’ or ‘usual’ as it currently can.

Damages are recoverable also in cases of non-material harm and include negative results of all interferences with personality rights.<sup>15</sup> The reimbursement of costs of reasonable and useful medical treatment, costs of burial, lost earnings and pension, and compensation for the maintenance of survivors shall be provided from the proprietary elements of the damage to health. Explicit mention is also made to the duty to compensate a third party by repeated payments for work of the injured party in the household or enterprise or for harm caused to the liberty of the injured party.

Like the past Civil Code, the NCC enables in s 2953<sup>16</sup> the discretionary power of the court to limit damages to be awarded. However, there is considerable modification as regards the possibility to exercise this right. The moderation right comes into consideration only when the wrongdoer is an individual and does not cause the damage intentionally. Judicial consideration of any reasonable reduction of the damages must take into account whether there are exceptional circumstances justifying such a solution, in terms of how the damage occurred and the personal and financial circumstances of the wrongdoer and the injured party. The possibility to reduce damages is, however, excluded in the case of individuals if it was caused by a breach of professional care of a party who claimed special knowledge or ability as a member of a particular profession.

In contrast to the recent legislation of damages, the general ban on the waiver of rights that may arise in the future will no longer be contained in the NCC, so parties can exclude liability by mutual arrangement. This presents a significant change, as the past case law strictly denied any similar possibility in civil law relationships and commercial law enabled explicitly such a waiver in 2012. Nevertheless, as regards liability for intentional or grossly negligent damage or damage to natural human rights, these cannot be waived before their establishment.<sup>17</sup>

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<sup>14</sup> S 2951 (1) NCC: The damage shall be compensated by restoring to the previous condition. If this is not reasonably feasible or if requested by the injured party, the damage shall be compensated in money.

<sup>15</sup> S 2951 (2) NCC: Immaterial loss shall be redressed by a reasonable satisfaction. Such satisfaction shall be provided in money, unless the actual and sufficient redress of the loss caused is provided for in another manner.

<sup>16</sup> S 2953 NCC: (1) The court adequately reduces the compensation for damage on grounds deserving special merit. In such case, the court shall take into account, in particular, how the damage occurred, the personal status and property of the person who caused the damage and is liable for it and to the injured party's situation. The compensation may not be reduced if the damage was caused intentionally. (2) Paragraph 1 shall not apply if the damage has been caused by a breach of due care by a person claiming professional performance as a member of a specific profession or occupation.

<sup>17</sup> S 2898 NCC: An arrangement shall be disregarded that in prior precludes or limits the obligation to compensate for damage caused by a person to his natural rights or caused intentionally or through gross negligence. Disregarded shall be also an arrangement that in prior precludes or limits the right of the weaker party for compensation for any loss. In these cases, the right to compensation cannot be validly waived.

## VII Satisfaction for Non-pecuniary Damage

Damages for non-material harm shall also be recoverable, but only in special cases. Compensation for non-material harm must be granted especially in cases of interference with the personality rights of an individual or a legal entity (in this regard it follows the regulation in s 11ff of the former Civil Code) and if it is justified by the special circumstances under which the wrongdoer caused damage by an illegal act.

The NCC sets a basic provision that non-material harm shall be compensated by provision of satisfaction. Monetary satisfaction may be provided if no other method of satisfaction ensures that the harm incurred will be actually or sufficiently made good.

The manner and extent of the reasonable satisfaction must be determined in such a way that circumstances, which merit special consideration, are compensated. This term encompasses causing harm through the use of deceit, threats, abuse of the victim's dependence on the wrongdoer and public attacks, as well as discrimination with regard to gender, health, ethnic origin, belief or other similarly serious reasons. Also relevant to the determination of the satisfaction shall be whether the victim reasonably fears death or serious injury as a result of threats attributable to the wrongdoer.

These provisions are new and correspond with the case law of both the Supreme and Constitutional Courts, which in the past specified only the above-mentioned circumstances establishing the seriousness of any breach of personality rights.

Like the past Civil Code, the NCC also contains explicit provisions on compensation of harm to health and life. However, there will no longer be a stipulated denomination of the damage incurred to the injured party's health under which the amount of compensation for aggravation of social position as a result of damage to health was determined on the basis of the total valuation of harm (in points pursuant to Decree No. 440/2001 Coll.)<sup>18</sup> provided by a doctor. This regulation also contains specific rules on reasonable increases in the compensation awarded based on personal reasons. The court will now be forced to set the damages awarded according to its own estimation, taking all personal and factual circumstances into account.

The reasonableness of the change in the legislation is currently a topic of heated debate as the previous regulations had many positives. In order to overcome the lack of a uniform approach to damage to health, the Supreme Court's working group established joint and objective criteria to tackle the lack of factual guidelines. These criteria refer to the WHO classification of illness and bodily harm, which provide a detailed determination of wrongful results. In this way, despite the wish of the legislator, the case law returned to a very similar system to that which was cancelled by the adoption of the NCC.

<sup>18</sup> The compensation for pain and suffering and aggravation of social position was based on a classification system for each injury on a point-scale basis. The injuries were considered on an objective basis and are assigned a point on the scale, where every point was equivalent to CZK 120 (EUR 4.00). The judge applied this scheme to the particular case (the value is determined by a doctor). In exceptional cases, special circumstances can be taken into account, whereupon the judge may use his discretionary power to increase the amount of compensation payable.

## VIII Conclusion

The NCC is a code which brings the Czech legislation in civil law matters back to modern European regulations. Even though one can find discrepancies and mistakes, the fact that the part on damages was inspired by the regulation of BGB, ABGB and PETL enables the argumentation to be used in the doctrine in the countries in question.

For the time being, however, the biggest role will be played by the Czech Supreme Court, which will interpret the new rules and apply or deny the former case-law relating to the former Civil Code. A crucial duty also relates to the scope of damages or satisfaction of non-pecuniary damage, which changes fundamentally, and where the Supreme Court must build up indisputable limits and principles of the amounts awarded.

The doctrine must also point out unclear rules or obsolete opinions. One of them is the causation issue, which may take over the *conditio sine qua non* approach or stay with the theory of adequacy or the general system of division between cases of damages based on fault and regardless of fault, which must be duly split and differentiated due to the substantial divergences of both liability schemes.