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The Reform of Belgian Tort Law: Overview, Methodology, and Why it Succeeded

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Abstract: Following a period of more than two hundred years, a new tort law has come into force in Belgium as part of the introduction of a new Belgian Civil Code. This reform, set forth in book 6 'Tort Law' of the new Civil Code, replaces the Articles 1382 to 1386 of the 1804 *Code Napoléon*, which continued to govern tort law in Belgium until recently. This contribution examines this reform. Following an explanation of the rationale behind the recodification, an overview of the potential reasons for the reform's conclusion is provided. These may include the presence of sufficient political will, the methodology employed in the reform process, and the reform's objectives. This is followed by an overview of the new Belgian tort law, focusing on its key innovations and identifying the most notable changes from a comparative perspective.

Résumé: Après plus de deux cents ans, un nouveau droit de la responsabilité civile extracontractuelle est entré en vigueur en Belgique dans le cadre de l'introduction d'un nouveau Code civil belge. Cette réforme, insérée dans le livre 6 « La responsabilité extracontractuelle » du nouveau Code civil, remplace les articles 1382 à 1386 du Code Napoléon de 1804, qui régissaient jusqu'à récemment le droit de la responsabilité extracontractuelle en Belgique. Cette contribution examine cette réforme. Après une explication des motifs de la recodification, une vue d'ensemble des raisons potentielles de la réussite de la réforme est fournie. Celles-ci peuvent inclure la présence d'une volonté politique suffisante, la méthodologie adoptée dans le processus de la réforme et les objectifs de la réforme. La dernière partie présente un aperçu du nouveau droit de la responsabilité extracontractuelle, qui met l'accent sur ses principales innovations et identifie les changements remarquables d'une perspective de droit comparé.

Zusammenfassung: Nach einem Zeitraum von mehr als zweihundert Jahren ist in Belgien im Rahmen der Einführung eines neuen belgischen Zivilgesetzbuches ein neues Deliktsrecht in Kraft getreten. Diese Reform, die in Buch 6 „Deliktsrecht" des neuen Zivilgesetzbuches niedergelegt ist, ersetzt die Artikel 1382 bis 1386 des Code Napoléon von 1804, die bis vor kurzem das Deliktsrecht in Belgien regelten. Der vorliegende Beitrag befasst sich mit dieser Reform. Nach einer Erläuterung der Beweggründe für die Neukodifizierung wird ein Überblick über die möglichen Gründe für den Abschluss der Reform gegeben. Dazu gehören das Vorhandensein eines ausreichenden politischen Willens, die im Reformprozess angewandte Methodik und die Ziele der Reform. Es folgt ein Überblick über das neue belgische Deliktsrecht, wobei der Schwerpunkt auf den wichtigsten Neuerungen liegt und die bemerkenswertesten Änderungen aus einer vergleichenden Perspektive dargestellt werden.

Keywords: tort law, law of delict, extra-contractual liability, liability law, civil law, Civil code, Belgian law, Code civil of 1804, comparative law

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1. Tort law – law of delict, or extracontractual liability[1] – has always been one of the major areas of comparative law as it has attracted much interest from comparative law scholars.[2] Today, a new player joins this comparative landscape. Indeed, since 1 January 2025, a new tort law has been in force in Belgium.[3] This reform brings Belgian tort law out of the shadow of Napoleon. As part of the introduction of a new Belgian Civil Code, book 6 'Tort Law' replaces the almost legendary Articles 1382 to 1386 of the *Code Napoléon* of 1804[4], which until very recently, were shared by both France and Belgium as the tort law provisions of their civil codes.

What follows is an overview of the reform. Following an explanation of the rationale behind the reform (section 1), an overview is given of the possible reasons why the reform was able to reach its conclusion (section 2). These may include the presence of sufficient political support, the methodology adopted in the reform process, and the reform's objectives. Section 3 presents an overview of the new Belgian tort law, focusing on its key innovations and identifying the most notable changes from a comparative law perspective.

1. Rationale For the Reform

2. For several decades, a wind of reform has been blowing through the European continent. Indeed, alongside the enactment of the Dutch Civil Code in 1992, the revision of the German Civil Code in 2002 and the reform of the law of obligations in France of 2016, civil codes were reformed or adopted in Lithuania (2000), Romania (2011), the Czech Republic (2012) and Hungary (2014). Private law is also evolving beyond the European continent. On 1 January 2021, for instance, a new Civil Code of the People's Republic of China came into force. On 13 August 2024, a new Civil Code was adopted by the National Assembly of Suriname.

In Belgium, however, no winds of reform have blown into the law of obligations for more than 200 years. Since its inception, the Belgian law of obligations was governed by the *Code civil*, promulgated by Napoleon on 21 March 1804, which Belgium inherited upon its

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1 In this contribution, the notions of 'law of torts' and 'tort law' also covers the notion of 'extra-contractual liability' in continental civil law systems. The same is true for 'tort' and 'delict'. On this terminology, see C. VON BAR, *The Common European Law of Torts,* vol. 1 (Oxford: Clarendon Press 1998) pp 2-6.

2 K. ZWEIGERT & H. KÖTZ (transl. T. WEIR), *An Introduction to Comparative Law* (3rd edn, Oxford: Clarendon Press 1998) p 596.

3 On the refrom, see H. BOCKEN, 'Het ontwerp van de Commissie tot herziening van het aansprakelijkheidsrecht. Een overzicht in context', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, p 11-30; V. SCHOLLAERT, 'Het nieuwe buitencontractueel aansprakelijkheidsrecht. Een verkennende analyse', *NjW* (*Nieuw juridisch Weekblad*) 2023, p 374-381; G. JOCQUÉ, 'Het nieuwe Belgische buitencontractueel aansprakelijkheidsrecht', *WPNR* (*Weekblad voor Privaatrecht, Notariaat en Registratie*) 2024, pp 549-555; P. COLSON & F. GEORGE (eds), *Le nouveau livre 6 du Code civil* (Liège: Anthemis 2024) 476 p.; C. DE KONINCK, *Het nieuwe buitencontractuele aansprakelijkheidsrecht. Een eerste commentaar op grond van de parlementaire stukken* (Antwerp: Intersentia 2024) 286 p.; B. DUBUISSON (ed), *Le nouveau livre 6 du Code civil portant réforme du droit de la responsabilité civile extracontractuelle* in CUP vol. 229 (Liège: Anthemis 2024) 270 p.; G. JOCQUE, *Het buitencontractuele aansprakelijkheidsrecht. Van oud naar nieuw* (Bruges: die Keure 2024) 207 p.; T. MALENGREAU (ed), *Le droit de la responsabilité civile extracontractuelle réformé* (Brussels: Larcier 2024) 377 p.; I. SAMOY & G. JOCQUE, 'Het nieuwe buitencontractuele aansprakelijkheidsrecht in Boek 6 BW', *RW* (*Rechtskundig Weekblad*) 2024-25, p 682ff (part 1) and p 722ff (part 2); B. DUBUISSON, 'Le livre 6 du Code civil portant réforme de la responsabilité extracontractuelle. La fin d'un long héritage (1804-2024)', *JT* (*Journal des tribunaux*) 2025, p 1ff. For a comparative perspective, see J.S. BORGHETTI, 'Le soleil se lève au nord : ou comment la réforme belge de la responsabilité extracontractuelle fait pâlir le projet français', *D. (Recueil Dalloz*) 2024, p 643ff; J. KNETSCH, 'Le Projet de réforme du droit de la responsabilité civile en France et en Belgique. Le droit français a-t-il encore quelque chose à dire?' in Th. Vansweevelt & B. Weyts (eds), *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht* (Antwerp: Intersentia 2022) p 271ff; see also B. Dubuisson (ed), *La réforme du droit de la responsabilité en France et en Belgique. Regards croisés et aspects de droit comparé*, 574 p.

4 See Act 7 February 2024 containing book 6 'Tort law' of the Civil Code, Belgian Official Gazette 1 July 2024, p 79,393.

independence in 1830. Therefore, Belgium's private law has long been referred to as 'Napoleon's most loyal subject'.[5] While many jurisdictions undertook a recodification of the *Code civil*, that same Code remained largely in force in Belgium until the 21st century. This does not mean, however, that the Code remained unchanged throughout that time.[6] Significant sections of it, particularly within family and succession law, were revised over the years. Similarly, adjustments were made on the law of co-property, housing and commercial lease contracts, prescription rules, and movable securities. The core sections on property, obligations, contracts, and specific contracts, however, remained largely untouched since 1804. This is also true for the section on tort law. All this time, the Belgian legislature had barely dared to touch this Napoleonic legacy—until recently, when the largest recodification of private law in Belgian history began.[7] The objective of this recodification process is not the reform of tort law only; rather, it aspires a reform of the entire field of private law, which should finally find its place in a new Civil Code.

The impetus for this recodification project can be attributed to three key factors: a new worldview (1.1), the downfall of the Civil Code as cornerstone of private law (1.2), and the growing gap between the text of the Code and the law in action (1.3).

1.1. A New Spirit of the Times

3. A first reason for the reform lies in the realisation that the worldview underlying the *Code civil* of 1804 was no longer aligned with modern times.[8] Where the Code was once built around the individual and their property, the 21st century has called for a recalibration in various areas. Today, for example, there is a heightened emphasis on the protection of weaker parties and a new balance between individual and collective interests is sought. In property law, for instance, in light of scarce open space, there has been a call for expanding instruments for multiple land uses, including stacking volumes above and below ground—a concept inconceivable to the 1804 legislator, given the construction techniques of that era.[9]

Similarly, in the field of tort law, it became evident that statutory provisions were no longer aligned with the contemporary spirit of times. With regard to the liability for minors, for instance, the statutory text holds the child's father and mother liable (Art. 1384, para. 2). However, this is clearly no longer adapted to the family structures that have changed since 1804. A similar argument can be made with regard to the liability of legal persons: whereas the statutory provisions of 1804 were silent on this subject and exclusively considered the liability of natural

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5 S. VAN LOOCK, 'The Reform of the French Law of Obligations: How Long Will the Belgians Remain Napoleon's Most Loyal Subjects?' in S. Stijns & S. Jansen (eds), *The French Contract Law Reform: a Source of Inspiration?* (Antwerp: Intersentia 2006) p 7ff, based on the expression used by D. HEIRBAUT, 'Napoleons trouwste onderdanen, of waarom de Code civil na tweehonderd jaar nog steeds overeind staat in België' in D. Heirbout & G. Martyn (eds), *Napoleons nalatenschap: Tweehonderd jaar Burgerlijk Wetboek in België* (Mechelen: Kluwer 2005) p 77ff.

6 For an overview of interventions by the legislature in the field of private law since 1804 until shortly before the recodification initiatives, see D. HEIRBAUT & M.E. STORME, 'Private law codifications in Belgium' in J.C. Rivera (ed), *The Scope and Structure of Civil Codes* (Springer 2013) pp 67-81.

7 See D. HEIRBAUT, 'Blitzkrieg Codification: The 2020 Belgian Civil Code' in M. Graziadei & L. Zhang (eds), *The Making of the Civil Codes: A Twenty-First Century Perspective* (Springer 2022, vol. 104) pp 127-148. More recently, see S. DE REY, 'De hercodificatie van het privaatrecht in België: overzicht, werkwijze en krachtlijnen', *MvV (Maandblad voor Vermogensrecht)* 2024(6), p 189-201.

8 See E. DIRIX, 'De hercodificatie van het burgerlijk recht in België', *WPNR (Weekblad voor Privaatrecht, Notariaat en Registratie)* 2021(7338), p 636, at 638.

9 V. SAGAERT, 'Volume-eigendom. Een verkenning van de verticale begrenzing van onroerende eigendom', *TPR (Tijdschrift voor privaatrecht)* 2009, pp 21-102.

persons, the liability of legal persons, as important participants in a modern economy, has become indispensable in the present era.[10]

1.2. The Downfall of the Code as Cornerstone of Private Law

4. A second driving force behind the reform was the observation that the *Code civil* of 1804 was no longer fulfilling its role as a systematic and rational presentation of private law, readily accessible to all. It was no longer a comprehensive codification and was increasingly perceived to be losing its central position in the ordering of private law. This phenomenon was not exclusive to the Belgian context; rather, it is a common occurrence affecting all outdated legislation.[11] For example, in his inaugural lecture delivered on 20 January 1949 in Leuven on the occasion of his honorary doctorate, E.M. Meijers drew a comparison between the growing number of specific pieces of legislation and the growing body of case law in the Netherlands, likening them to vines wrapping around the trunk of a large tree. He cautioned that 'in the end, the entanglement becomes so strong, that it kills the tree'[12]. This observation also applied to Belgium's Civil Code.[13] The proliferation of specific legislation and the enormous body of case law developed since 1804, which increasingly undermined the authority of the code as the cornerstone of private law, was already criticised by W. Van Gerven in 1991 as the 'compartmentalization' of private law[14]—a phenomenon that has only worsened since then[15]. In terms of tort law, consider, for instance, the regulation of product liability and the liability of motor vehicle drivers to vulnerable road users, or the regulation of compensation for work-place and medical accidents, which are not covered by the *Code civil* of 1804, but found in separate, stand-alone legislation.

5. However, unlike in 1804, the codification of all private law in a single Code is a difficult ideal to pursue in the 21st century. Indeed, today this ideal is challenged by the increased complexity of the law and our multilayered legal order—which in Belgium is further complicated by the complex structure of competences within the federal state, with the regulation of some aspects of private law falling between the powers of the different federal entities. Although the codification ideal of 1804 may no longer seem feasible today, a codification which regulates a large part of private law in a code, modifies existing law to some extent, and creates a new framework for further legal development, making the law more comprehensible for professionals, can still be still be pursued today.[16]

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[10] On this issue, from a comparative perspective, see C. VON BAR, *The Common European Law of Torts,* vol. 1, para. 12.

[11] See also H. KÖTZ, 'Taking civil codes less seriously', *The Modern Law Review* 1987, pp 1-15.

[12] E.M. MEIJERS, 'Voor- en nadelen van het samenstellen van een Nieuw Burgerlijk Wetboek', *VPO* I (1954) p 175.

[13] F. PEERAER & I. SAMOY, 'The Belgian Civil Code: How to Restore its Central Position in Modern Private Law?', 24. *ERPL* 2016(3-4), pp 601-617.

[14] W. VAN GERVEN, 'Verkokering van het privaatrecht', *TPR (Tijdschrift voor privaatrecht)* 1991, pp 1021-1023.

[15] On this evolution under Belgian law, see, for instance, A. VAN OEVELEN, 'Het burgerlijk recht buiten het Burgerlijk Wetboek' in D. Heirbaut & G. Martyn (eds), *Napoleons nalatenschap. Tweehonderd jaar Burgerlijk Wetboek in België* (Mechelen: Kluwer 2005) p 235ff; see also the farewell lecture on the occasion of the emeritate of the same author at the University of Antwerp, titled 'Vormt het contractuele verbintenissenrecht nog het gemene recht?', *RW (Rechtskundig Weekblad)* 2017-18(41), p 1603ff.

[16] D. HEIRBAUT, 'Na onze nieuwe wetboeken: tijd voor een nieuw codificatieconcept', *TPR Tijdschrift voor privaatrecht)* 2024 (Privaatrecht Plenis Coloribus - Liber Amicorum Matthias Storme), p (397) at 403.

1.3. The Growing Gap Between the Text of the Code and the Law in Action

6. One of the most significant reasons for the reform was found in the realisation that the gap between the text of the Civil Code and the law as applied by the courts had become nearly untenable. Indeed, for those seeking justice, it had become impossible to assess their legal position without taking into account the numerous developments that had unfolded in case law and legal scholarship since 1804. It is due to the influence of case law that the Civil Code has been able to withstand the test of time, surviving for over two centuries of social evolution.

7. Perhaps even more than in other areas of law, this phenomenon was particularly evident in the field of tort law. As is known, the legislator of 1804 consolidated the entire law of torts into five general provisions only (Arts. 1382-1386). Over the course of two centuries, the Belgian legislature has only added one further provision, dealing with the liability for those suffering from mental illness (Art. 1386*bis*). After more than 200 years in service, the general and flexible character of these provisions were still of great importance. Case law, and that of the *Cour de cassation* in particular, has tangibly translated these general provisions into concrete rules in an effort to mitigate the consequences of the fact that the *Code civil* of 1804 was extremely sparse in provisions on tort law, which, moreover, proved to have become increasingly incomplete over time. Indeed, in 1804, it was not possible to foresee that, following industrialisation, technical and technological developments that have led to an increased complexity of our society, this area of law would become a fundamental element of modern private law, even giving rise to climate litigation cases in the 21st century.[17]

For instance, in the absence of any concretisation by the legislature, case law has been required to translate the generally worded Articles 1382 and 1383 *Code civil* of 1804—referred to as one of the most general tort provisions ever drafted[18]—into concrete rules to determine when there is fault, what damage is compensable, and from what point it can be established that there is causation leading to liability. In the absence of a statutory provision, case law established rules on damages, such as on the extent and form of damages, leading, for instance, to case law accepting that these very generally formulated provisions also allow, in the case of moral harm, for the enforcement of an apology by the tortfeasor[19]. The lack of response by the text of the *Code civil* of 1804 has also compelled case law to address controversial issues, such as the questions of concurrence between contractual and tortious claims.[20]

8. This process of judicial lawmaking, although vital in civil law jurisdictions as well, is not without its shortcomings. The development of the law through case law is gradual, the solutions

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[17] See the condemnation of the Belgian Federal State, the Flemish Region and the Brussels-Capital Region by Cour d'appel de Bruxelles 2nd ch. (F) 30 november 2023, 2021/AR/1589, 2022/AR/737 and 2022/AR/891, *JLMB (Revue de Jurisprudence de Liège, Mons et Bruxelles)* 2024, p 356 = *TMR (Tijdschrift voor milieurecht)* 2024, p 54.

[18] C. VAN DAM, *European Tort Law* (Oxford: OUP 2013) p 56.

[19] See Cass. (1st ch.) 26 November 2021, *X.Y./ÉTAT BELGE*, ECLI:BE:CASS:2021:ARR.20211126.1F.5, *JT (Journal des Tribunaux)* 2022, p 206, note P. WERY = *RGAR* (*Revue générale des assurances et des responsabilités*) 2022, no. 15858, note J. VAN DE VOORDE = *TBBR/RGDC* (*Tijdschrift voor Belgisch Burgerlijk Recht/Revue Générale de Droit Civil)*, p 424, note S. DE REY. For a summary in English, see S. DE REY, 'Apologies as a Private Law Remedy: Emerging on the European Continent, and Beyond?', 31. *ERPL* 2023(5), pp 1013-1023, followed by 10 country reports on this matter.

[20] On this question from a comparative perspective, see R. DE GRAAFF, 'Concurrent claims in contract and tort: a comparative perspective', *ERPL* 2017, pp 701-726; M. MARTIN-CASALS (ed), *The Borderlines of Tort: Interactions with Contract Law* (Cambridge: Intersentia 2019) 846 p.

it produces are often fragmented and unstable, and the process has been called into question due to its perceived lack of democratic legitimacy.[21]

Moreover, in certain instances, the wording of the *Code civil* of 1804 was so definitive that there was no room for evolution by case law, necessitating legislative intervention. In this respect, one can consider remedies that fit more closely into the preventive function of tort law. In a 21st-century society where sustainability is becoming an increasingly prominent concern, it may be possible to consider remedies that focus on prevention rather than cure, even within the context of tort law. Similarly, remedies that extend beyond compensation for damage, such as disgorgement of profits, appear to be gaining traction in legal discourse, particularly in the context of infringements of personality rights or violations of data protection rights. However, it has proven challenging to integrate such remedies into the existing legal framework of the *Code civil* of 1804, which was basically aimed at compensation for damage only.

9. In conclusion, the *Code civil* of 1804, in terms of content, structure, and language, was no longer suitable for modern times. While the general wording and flexibility of the Code civil – thanks to the genius of its drafters – were initially considered its greatest strengths, allowing for significant judicial development, the text had ultimately been eroded by the substantial body of case law. This erosion, in turn, jeopardised legal certainty, clarity, and predictability.

2. Why the Reform Succeeded

10. Despite the fact that comparative examples on the European continent indicate that tort law reform is a complex and challenging process, in Belgium, a new law of torts has been in force since 1 January 2025. The reasons for this 'success' are complex, but I believe at least three factors may explain why this reform came to a successful end: the political determination to reform (2.1), the methodology adopted (2.2), and the choices regarding the objectives of the reform (2.3).

2.1. The Reform of Tort Law as Part of a new Belgian Civil Code

11. The reform of Belgian tort law is not a standalone initiative; rather, it is part of a comprehensive reform of private law in general. This initiative, which reflects political determination for reform, is a first explanation why the reform of Belgian tort law has come to a successful end. Indeed, historically, political determination has often been the decisive factor in the success of large (re)codification projects. For instance, the success of *Code Napoleon* was largely attributed to Napoleon himself.[22] This still seems to be true in contemporary societies[23]: although the drafting of texts for recodification is not infrequently outsourced by politicians to experts, the success of recodification often remains dependent on the political agenda.

2.1.1. A new Civil Code for Belgium

12. A notable impetus for the Belgian recodification project was found in the reform of the law of obligations in France, which revised the provisions on the general regime of obligations and

[21] See, for instance, R. KRUITHOF, 'Naar een *Gouvernement des juges* in het Belgisch verbintenissenrecht?' in *Hulde aan prof. R. Kruithof* (Antwerp/Brussels: Maklu/Bruylant 1992) p 79ff.

[22] D. HEIRBAUT, 'Factors ensuring the success or failure of draft codifications: Some European experience', in *Towards a Chinese Civil Code* (Leiden: Brill Nijhoff 2012) p 63.

[23] This is, for instance, also true for the Chinese Civil Code, see L. CHEN, 'Continuity and change: some reflections on the Chinese Civil Code', 29. *Asia Pacific Law Review*(2) 2021, pp 287-305.

general contract law in 2016.[24] Consequently, the Napoleonic provisions on the law of obligations remained applicable solely in Belgium and Luxembourg. Subsequently, calls for reform in Belgium have become increasingly insistent.[25] In light of the successful French reform, the feasibility of revising the monumental Code of 1804—referred to as the civil constitution of French legal tradition, the grammar of French law[26]—was no longer perceived as implausible. However, in contrast to the French legislature, which opted for a reform of the law of obligations by amending the existing *Code civil*, the call to modernise the law of obligations in Belgium became the driving force behind the reform of the entire body of private law[27], which would now find its place in a brand new Civil Code.

13. Koen Geens, an emeritus professor at the University of Leuven, is the architect of the plan titled 'The Leap to Tomorrow's Law'[28]. During his term as Minister of Justice (2014-2020), he advanced the proposal to recodify fundamental legislation and remained dedicated to the project even after his term as Member of Parliament. By ministerial decree, several commissions were established to modernise the Civil Code, coordinated by professors Patrick Wéry (UCLouvain) and Eric Dirix (KU Leuven)[29], with the latter having passed away far too soon from us and having been succeeded as co-coordinator by professor Vincent Sagaert (KU Leuven) for that reason[30]. Each commission was tasked with preparing a draft of one of the books of this new Civil Code, but an overarching drafting commission (as there was for the German BGB[31]), has not been established. In order to facilitate the immediate drafting of bilingual texts—an essential sensitivity in Belgium—these reform commissions were composed of professors from different universities and regions, co-chaired by a professor from both the Dutch-speaking and French-speaking sides of the country. In the end, this new Civil Code was to contain ten books in total[32]:

Book 1. General Provisions
Book 2. Persons, Family, and Family Property Law
Book 3. Property Law
Book 4. Inheritances, Gifts, and Wills
Book 5. Obligations
Book 6. Tort Law
Book 7. Specific Contracts

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[24] See Ordonnance no. 2016-131 of 10 February 2016 'portant réforme du droit des contrats, du régime général et de la preuve des obligations', *JORF* 11 February 2016, text no. 26, endorsed and limited repaired by Loi no. 2018-287 of 20 April 2018 ratifiant l'ordonnance n° 2016-131, *JORF* 21 April 2018, tekst no. 1.

[25] For the law of obligations, S. STIJNS and B. DUBUISSON set the tone with their inaugural address on the occasion of their Francqui Chair 2015-16, titled 'Faut-il réformer le Code civil ? Réponses et méthodologie pour le droit des obligations contractuelles et extracontractuelles', published in *JT (Journal des Tribunaux)* 2016, p 305ff (S. Stijns on contractual obligations) and p 673ff (B. Dubuisson on tortious liability).

[26] See B. FAUVARQUE-COSSON, 'Faut-il un Code civil européen?', *RTD civ*. 2002, p 464.

[27] See, for instance, E. DIRIX en P. WERY, 'Pour une modernisation du Code civil', *JT (Journal des Tribunaux)* 2015, p 625ff; E. DIRIX en P. WERY, 'Tijd voor een hercodificatie van het Burgerlijk Wetboek', *RW* (*Rechtskundig Weekblad*) 2015-16, p 2.

[28] K. GEENS, De sprong naar het recht voor morgen. Hercodificatie van de basiswetgeving, 2016, p 27ff.

[29] Ministerial Decree 30 September 2017 establishing the Civil Code Reform Commission, Belgian Official Gazette 9 October 2017, p 91,600, establishing the Commissions for the Reform of the Law of Obligations, Proporty Law, Law of Evidence, Tort Law, Loan Contracts and Personal Security Law respectively.

[30] Ministerial Decree 14 May 2024 amending the Ministerial Decree of 30 September 2017 establishing the Civil Code Reform Commission, Belgian Official Gazette 28 May 2024, p 65,589.

[31] B. DÖLEMEYER, 'Kodifikation und Gesetzgebung des allgemeinen Privatrechts. Deutschland. Kodifikationsbewegung' in H. Coing (ed), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, III/2 (München: Beck 1982) p (1421) at 1583, 1586-1588.

[32] See Art. 2 Act 13 April 2019, as amended by Art. 61 Act 13 April 2019, Belgian Official Gazette 14 May 2019, p 46,353.

Book 8. Evidence
Book 9. Securities
Book 10. Prescription.

2.1.2. Insertion of book 6 'Tort Law' in the Civil Code

14. Initially, these books were designated merely as placeholders, with their titles serving as the sole indication of their content. Immediately following its initial publication, only book 8, which pertains to evidence, was incorporated into the new code.[33] The remaining books are being incorporated into the code gradually, with each book being added individually. The Civil Code is therefore a work in progress, with new books being added to the code as it moves forward.

Today, more than six of the ten books entered already into force. A year after the entry into force of book 8 'Evidence' (on 1 November 2020)[34], the legislature proceeded with the introduction of book 3 'Property Law' which came into effect as of 1 September 2021.[35] This book is the culmination of the efforts of the commission chaired by professors Vincent Sagaert (KU Leuven) and Pascale Lecocq (ULiège). As of 1 July 2022, book 2, title 3 on 'Family Property Law', and book 4 on 'Inheritances, Gifts, and Wills' have also come into effect.[36] These areas, which were already the subject of significant reform in 2017 and 2018 under the previous Civil Code[37], have been codified in the new code with a new numbering system and a few minor amendments under the chairmanship of professor Hélène Casman (VUB).

15. Subsequently, a new era began for the law of obligations. In conjunction with the implementation of book 1, entitled 'General Provisions'[38], book 5, comprising the subject of 'Obligations'[39], came into effect on 1 January 2023. Book 5 is the result of the efforts of the commission for the reform of the law of obligations, which was chaired by professors Sophie Stijns (KU Leuven) and Patrick Wéry (UCLouvain). The content may initially appear somewhat surprising. Book 5 establishes the general regime of obligations and obligations arising from legal acts (such as contracts), while excluding the domain of tort law. Initially, the intention was to include the law of torts within the book on obligations, as is the case in other jurisdictions. However, in light of the rather mixed reception of the initial draft texts on tort liability, it was decided to include these provisions in a separate book, prepared by a separate commission, chaired by professors Bernard Dubuisson (UCLouvain) and Hubert Bocken (UGent)[40], the latter, at a later stage, being replaced by professor Geert Jocqué (KU Leuven)[41]. On 1 February

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33 Act 13 April 2019 introducing a Civil Code and inserting book 8 'Evidence' into it, Belgian Official Gazette 14 May 2019, p 46,353.

34 Art. 75, para 1 Act 13 April 2019, Belgian Official Gazette 14 May 2019, p 46,353.

35 Act 4 February 2020 containing book 3 'Property Law' of the Civil Code, Belgian Official Gazette 17 March 2020, p 15,753, for entry into force: see Art. 39.

36 Act 19 January 2022 containing book 2, title 3, 'Family Property Law' and book 4 'Inheritances, Gifts, and Wills' of the Civil Code, Belgian Official Gazette 14 March 2022, p 19,772, for entry into force: see Art. 66.

37 See Act 31 July 2017 amending the Civil Code as regards inheritances and gifts and amending various other provisions on the subject, Belgian Official Gazette 1 September 2017, p 81,578 and Act 22 July 2018 amending the Civil Code and various other provisions as regards matrimonial property law and amending the Act 31 July 2017, Belgian Official Gazette 27 July 2018, p 59,435.

38 Act 28 April 2022 containing book 1 'General Provisions' of the Civil Code, Belgian Official Gazette 1 July 2022, p 54,079, for entry into force: see Art. 5.

39 Act 28 April 2022 containing book 5 'Obligations' of the Civil Code, Belgian Official Gazette 1 July 2022, p 54,082, for entry into force: see Art. 65.

40 Ministerial Decree 30 September 2017, Belgian Official Gazette 9 October 2017, p 91,600.

41 Ministerial Decree 14 September 2023, Belgian Official Gazette 12 oktober 2023, p 92,229.

2024 that separate book was passed by Parliament[42], thereby also bringing book 6 on tort liability into safe harbour. Book 6 entered into force on 1 January 2025.[43]

2.1.3. Insertion of Pending Books?

16. In the meantime, the reform efforts are ongoing. On 24 September 2024, a proposal for book 9 on 'Securities', particularly for title 1 on 'Personal Securities', was submitted to Parliament.[44] This proposal, developed under the chairmanship of professor Vincent Sagaert (KU Leuven), primarily addresses suretyship, but also provides a legal framework for other forms of personal securities, such as joint and several liabilities for security purposes and guarantees. While awaiting parliamentary review, work continues on the other titles of book 9, specifically on pledges (title 2), mortgages (title 3), retention of title (title 4), the right of retention (title 5), and preferences (title 6).

The commission for the reform of the specific contracts, chaired by professors Paul-Alain Foriers (ULB) and Bernard Tilleman (KU Leuven)[45], has also concluded its work. This resulted in the submission of a draft for book 7 'Specific Contracts'.[46] In a manner similar to the approach taken by the French government, the Belgian Minister of Justice at the time opted to modernise the law of obligations as a preliminary step, with the objective of subsequently aligning the specific contracts with the new law of obligations.[47] The proposal for book 7 is comprised of seven titles: title 1 ('Status and Definitions'), title 2 ('Sale and Exchange Contracts'), title 3 ('Lase and Commodates Contracts'), title 4 ('Service Contracts', which consolidates provisions for, among others, construction, deposit, and mandate contracts), title 5 ('Loan of Fungible Goods'), title 6 ('Aleatory Contracts'), and title 7 ('Contracts Related to Disputes', including settlement agreements).

17. With the draft texts for the forthcoming book 7 and book 9, title 1 now on the table, the new Belgian Civil Code is taking shape with greater definitiveness. Having initiated the process in 2015 with the establishment of the first reform commissions, the legislature has already adopted more than six out of ten books in less than a decade. As of today, this can be summarised as follows:

Belgian Civil Code	Effective Date
Book 1. General Provisions	1 January 2023
Book 2. Persons, Family, and Family Property Law	1 July 2022 (title 3)
Book 3. Property Law	1 September 2021
Book 4. Inheritances, Gifts, and Wills	1 July 2022
Book 5. Obligations	1 January 2023

[42] Bill 1 February 2024 containing book 6 'Tort law' of the Civil Code, Doc.Parl. Chamber 2023-24, no. 55-3213/013.

[43] Act 7 February 2024 containing book 6 'Tort law' of the Civil Code, Belgian Official Gazette 1 July 2024, p 79,393.

[44] Bill 24 September 2024 containing titel 1 'Personal Securities' of book 9 'Securities' the Civil Code, Doc.Parl. Chamber 2024, no. 56- 0261/001.

[45] Ministerial Decree 15 June 2021 establishing Commissions for the Reform of Contract Law and Prescription Law, Belgian Official Gazette 2 July 2021, p 67,329.

[46] Bill 16 April 2024 containing book 7 'Specific Contracts' the Civil Code, Doc.Parl. Chamber 2024, no. 55-3973/001.

[47] However, this could also have gone together, as provisons on specific contracts often have a spill-over effect on the general law of obligations, see R. SCHULZE, 'Changes in the Law of Obligations in Europe' in R. Schulze & F. Zoll (eds), *The Law of Obligations in Europe. A New Wave of Codifications* (München: Sellier 2013) p 6. See also M.E. STORME, 'Dwingend recht in vele tinten', *TPR* (*Tijdschrift voor Privaatrecht*) 2023, p 5.

Book 6. Tort Law	1 January 2025
Book 7. Specific Contracts	Bill pending
Book 8. Evidence	1 November 2020
Book 9. Securities	Bill for title 1 pending
Book 10. Prescription	No draft yet.

2.2. Methodology of the Reform

18. A second explanation for the 'success' of the Belgian reform of tort law can be found in the methodology adopted during the reform. In contrast to the French legislator, which opted for a reform of the law of obligations in 2016 by amending the existing *Code civil* of 1804—and has since encountered difficulties in reforming other areas of private law, such as tort law[48] and specific contracts[49], which remain stagnant— the Belgian legislature opted for the introduction of an entirely new Civil Code. The Civil Code, comprising ten books prepared by a different reform commissions, is being introduced in stages, with each book being introduced individually (see para. 2.1). In summary, this can be described as the 'construction method': the books are being inserted into the code gradually, with each book being added individually one after the other. Hence, after the entry into force of the first book being inserted, it became evident that this was a point of no return. Consequently, the necessity arose for the subsequent books to be inserted as well. This may explain why Belgium, faster than France, managed to reform other sections of private law: it is not desirable to have two Civil Codes coexisting for a long time, with some branches of law already reformed in a new Code, and other branches of law left without reform in the old Code. It follows that this 'construction method' proved to be a factor exerting pressure to proceed with the reform, which was harder to stop than if the reform of the various branches of law had taken place by amending the provisions of the existing *Code civil* of 1804.

While commentators have noted that this step-by-step implementation of the new Code lacks elegance, it offers the advantage of avoiding delays by pursuing 'an unattainable ideal'[50]. Additionally, the phased introduction of the various books of the new Civil Code makes the largest recodification of private law in Belgian history somewhat more manageable for legal practitioners. Nonetheless, it is impossible to ignore the inherent limitations of this 'construction method'. This refers particularly to its consequences for the temporal application of private law. Unlike in other jurisdictions, such as the Netherlands, where a general transition law was adopted to govern the entire implementation of the new Code, Belgium's legislature has opted for specific transitional provisions for each book of the new Code, with different criteria depending on the book entering into force. Despite these challenges, what remains fascinating is

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[48] See Proposition de loi of 29 July 2020, Sénat sess. extraord. 2019-2020, text no. 678, which lapsed in application of art. 28-2 French Senate regulations.

[49] See *Avant-projet de réforme du droit des contrats spéciaux* (Commission présidée par le prof. Ph. Stoffel-Munck), after public consultation officially submitted to the Minister of Justice on 11 April 2023, available for consultation on www.textes.justice.gouv.fr/art_pix/avant_projet_commente_ juillet 2022.pdf. A projet de loi 'de simplification de la vie économique' was submitted on 24 April 2024, allowing the government to modernise, supplement, simplify, clarify and harmonise by ordinance, within a period of two years from the publication of the Act, the law on specific contracts in the French Code civil (see art. 11), see Sénat sess. extraord. 2023-24, text no. 550. But two amendments (see nos. COM-296 and COM-323, each of 24 May 2024), adopted at first reading, excluded that possibility, reasoning that such reform is preferably done through parliamentary means.

[50] D. HEIRBAUT & M. VAN DER HAEGEN, 'De sprong van Geens: het grootste codificatieplan uit de Belgische geschiedenis in context', *RW* (*Rechtskundig Weekblad*) 2017-18, p 1411. See also more sharply worded by D. HEIRBAUT: 'the process of making the new condification is somewhat chatoric, which may actually be one of the main reasons making them possible' (*ZEuP* 2018, p 406).

how legal practice has managed to absorb this new Code at such a rapid pace—referred to as *Blitzkrieg codification*[51]—, with relatively few issues.

19. A further peculiarity of the methodology adopted in the reform was the organisation of public consultations on the draft texts. In a manner analogous to the French approach during the 2016 reform of the law if obligations, the draft texts of several books were subjected to public consultation. This was also the case for the draft text of the new tort law. The Ministry of Justice made the draft text, prepared by the Commission of experts, available online, thereby enabling interested parties to submit comments. Such comprehensive consultation on draft legislation constituted a pioneering endeavour in Belgium, facilitating valuable amendments and revisions to the texts and aiming to foster additional support among the intended addressees of the reform. This proved pivotal for the draft texts of tort law, as these draft texts received a mixed reception during this public consultation. The bar association offered criticism, asserting that the reform was insufficiently victim-friendly[52]; the insurance sector, on the other hand, expressed concern that the insurer would be required to intervene with undue frequency. The public consultation enabled these criticisms to be taken into account when reworking the texts submitted to Parliament.

Furthermore, during the parliamentary discussion, a number of experts, in addition to those who had prepared the reform, were heard together with representatives of various stakeholders, including representatives of the bar association and the umbrella association of insurance companies.[53] These hearings, in which further criticisms and concerns were raised, resulted in the introduction of 87 amendments, a significant number of which were adopted.

2.3. Objectives of the Reform

20. A third explanation for the successful conclusion of the Belgian tort law reform may be found in the choices made in the objectives of the reform. By opting for *evolution* rather than *revolution*, the drafters aimed to foster support among the reform's intended addressees. Indeed, the reform does not represent a radical departure from the preceding legal framework; rather, it represents a progression in the evolution of legal doctrine, building upon the work of the courts and legal scholars since 1804. Accordingly, the overarching objective of the recodification was to codify case law and solutions found in legal scholarship, make precise adjustments, and supplement or refine where necessary, based on solutions drawn from foreign codifications (such as the Dutch Civil Code, German BGB, and Swiss Civil Code) and harmonisation projects[54] (such as the DCFR, and PETL[55]), while respecting the Belgian legal tradition. As has been

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[51] See D. HEIRBAUT, in M. Graziadei & L. Zhang (eds), *The Making of the Civil Codes: A Twenty-First Century Perspective*, pp 127-148.

[52] See the open letter published in *JT* (*Journal des Tribunaux*) 2019, p 682.

[53] For an overview, see the first reading report on behalf of the Committee of Justice, Doc.Parl. Chamber 2023-24, no. 55-3213/007, pp 50-110.

[54] See D. HEIRBAUT, 'From France to eclectism: the role of foreign law and legal history in the drafting of the "new" Belgian civil code' in N. Jansen & S. Meier (eds), *Iurium itinera: historische Rechtsvergleichung und vergleichende Rechtsgeschichte: Reinhard Zimmermann zum 70. Geburtstag am 10. Oktober 2022* (Tübingen: Mohr Siebeck 2022), pp 101-119. The lack of consideration of the PETL or foreign codifications in the French reform project has been criticised, see e.g. C. CORGAS, 'L'influence réduite des principes européens ou d'autres droits nationaux dans la réforme française: un regret parmi d'autres' in B. Dubuisson (ed), *La réforme du droit de la responsabilité en France et en Belgique. Regards croisés et aspects de droit comparé* (Brussels: Bruylant 2020) pp 93-102.

[55] Although the question already arises as to whether these principles are in need of revision too, see B.A. KOCH, 'Re-Drafting the Principles of European Tort Law' in A. Janssen, M. Lehmann & R. Schulze (eds), *The Future of European Private Law* (Baden-Baden: Nomos/Hart 2023) pp 509-522.

observed by foreign commentators, the re-codification of Belgian private law is therefore situated between two poles: 'innovation and tradition'[56], or continuity and change.

The recodification of Belgian tort law seems to boil down to the following three overarching objectives: restoring legal certainty (2.3.1), enhancing accessibility (2.3.2), and modernisation and innovation (2.3.3).

2.3.1 Restoring Legal Certainty

21. The first objective of the Belgian tort law reform was to restore legal certainty by aligning the text of the Code with the law in action. This goal is shared by all recent reforms in Western Europe.[57] It requires anchoring the law as developed through case law and legal scholarship in the Code. For the Belgian tort law reform this is particularly evident, since the *Code civil* regulated the law of torts with six provisions only. In the new Civil Code, however, the matter is now addressed in forty articles (Arts. 6.1 to 6.40 of the Civil Code), supplemented by 15 additional legal provisions that transfer product liability from a separate piece of legislation to the Civil Code (see Arts. 6.41 to 6.55 of the Civil Code).

22. In order to achieve this objective, it was necessary for the legislature to *codify* legal principles and doctrines that were put forward in case law and legal doctrine since 1804. In this context, one can consider the confirmation of fault as the foundation for personal misconduct (Art. 6.5), the equal treatment of natural persons and legal persons (Art. 6.4), and the possibility of state liability (Arts. 6.14, § 2 and 6.15, para. 2). With regard to the rules on damages, examples include the codification of the principle of full compensation (Art. 6.30), the assessment of damages *in concreto* (Art. 6.30), the various modes of compensation (Art. 6.31), the moment of the assessment of damages (Art. 6.32), and the freedom of disposition of compensation (Art. 6.39).

23. The objective to restore legal certainty also requires that where the law does not provide a clear solution, the legislator should *resolve uncertainties*. However, some questions were not yet ripe for codification.

For instance, the question of compensation for environmental damage and the mechanisms for organising this compensation, although emerging as an increasingly important issue, were not yet deemed to be sufficiently developed for codification. The complexity of the problem, including 'the selection of appropriate legal instruments', has resulted in the postponement of the debate.[58] In preparation of this, a Commission of experts was established and tasked with 'the elaboration of a proposal for the regulation of liability for damage to collective environmental interests, including ecological damage to unappropriated environmental resources, the climate, and other components of the ecosystem'[59]. In a more general sense, there has been criticism that the reform does not adequately address the ecological challenges of our time.[60]

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[56] J. KLEINSCHMIDT, 'Innovation und Tradition in der Reform des belgischen Vertragsrechts', *ZEuP* 2022, p 884ff.

[57] See, for instance, R. SCHULZE, in R. Schulze & F. Zoll (eds), *The Law of Obligations in Europe. A New Wave of Codifications* (München: Sellier 2013), p 3, at 4. For the reform of the French law of obligations, see O. DESHAYES, Th. GENICON & Y.-M. LAITHIER, *Réforme du droit des contrats, du régime général et de la preuve des obligations* (Paris: LexisNexis 2016) p 4-5. For the reform of Dutch law, see W.H.M. REEHUIS, 'De wil van de wetgever: over het gezag van de wettekst en parlementaire geschiedenis' in *Rechtsvinding onder het NBW. Een Groningse kijk op het nieuwe vermogensrecht* (Deventer: Kluwer 1992) p 57.

[58] Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 15.

[59] Ministerial Decree 14 May 2024, Belgian Official Gazette 2 July 2021, p 65,591.

[60] See, for instance, L. CORNELIS, 'Rechtspraak en nieuw BW', *RW* (*Rechtskundig Weekblad*) 2020-21, p 1437-1438; L. CORNELIS & R. FELTKAMP, 'Vrijheid, blijheid en na ons de zondvloed: kunnen we echt niet beter',

This criticism has been addressed to some extent, albeit in a rather implicit manner, within the context of some new statutory provisions. It is reflected, for instance, in Article 1.3, paragraph 4 of the Civil Code, which, in defining public policy (*ordre public/openbare orde*), now includes environmental considerations: 'A rule of public order is one that affects the essential interests of the State or the community, or that defines the legal foundations upon which society is based, such as economic order, moral order, social order, or environmental order'.

Another area of development that could necessitate a reassessment of tort law, is the phenomenon of artificial intelligence (AI).[61] Although this may eventually demand a re-evaluation of our tort law legislation, the Belgian legislature did not accord it a significant degree of attention during its reform. More so, the strict liability for defective objects is limited to tangible goods (Art. 6.16), which raises the question of whether this liability also extends to damage caused by AI systems. It is evident that such cases of liability may not yet have reached a point of crystallisation. This, in conjunction with the legislative actions of the European Union[62], may have prompted the Belgian legislator to refrain from allocating any specific legislative provisions to this matter. Nevertheless, should this prove necessary, the structure of book 6 'Tort Law' allows for an addition of a liability regime for damage caused by AI systems in Chapter 7, which is dedicated to specific liability regimes.

Until now, Chapter 7 deals only with product liability (Arts. 6.41 to 6.55), implementing the provisions of European origin, which where, prior to the reform, contained in a separate, stand-alone legislative piece.[63] However, the transposition of this legislation to the Civil Code is constrained to recodification and does not yet encompass the new Product Liability Directive (EU) 2024/2853.[64] Consequently, a reform of the these provisions is already required before the transposition deadline of this directive, which is 9 December 2026.

2.3.2 Enhancing Accessibility

24. The second objective of the reform is aimed at to enhancing the accessibility of tort law. This is most evident in the more transparent structure of the new Code. In addition, the articles in the Code are numbered by book, following the Dutch example, rather than continuous (as in the French model). To further enhance accessibility, each provision is accompanied by a heading, following the example of the German BGB, and various soft law instruments, such as the Draft Common Frame of Reference (DCFR) and the Principles of European Tort Law (PETL). Enhancing accessibility requires the legislator also to use more modern terminology. For instance, within the reform of tort law the traditional term 'good housefather' (*bonus pater familias*) has been replaced by the gender-neutral expression 'prudent and reasonable person'[65].

Accessibility was also sought by transferring specific liability regimes, found in standalone legislative pieces, to the Civil Code. In book 6 'Tort Law', chapter 7, entitled 'Specific Liability Regimes', has been designated for this purpose. However, in this exercise, the

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DJK (*De Juristenkrant*) 28 April 2021, p 16. For a more comprehensive critique from a sustainability perspective from the same authors, see www.lawbackontrack.org/publications/het.

61 On this question, see, for instance, R. GELLERT & A. JANSSEN, 'The Impact of Artificial Intelligence on European Tort Law: Taking Stock of an Ongoing Process' in A. Janssen, M. Lehmann & R. Schulze (eds), *The Future of European Private Law* (Baden-Baden: Nomos/Hart 2023) pp 169-194; O. DHEU & J. DE BRUYNE, 'Artificial Intelligence and Tort Law: A 'Multi-faceted' Reality', 31. *ERPL* 2023(2/3), pp 261-298.

62 See Proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence, COM(2022) 496 final.

63 Act 25 February 1991, Belgian Official Gazette 22 March 1991, p 5884.

64 Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, OJ L 2024/2853, 18 November 2024.

65 For instance, within the Civil Code, in Art. 1.10 on Abuse of Rights, in Art. 3.138 on Usufruct, in Art. 5.72 on Obligations of Means, in Art. 5.73 on Good Faith, and in Art. 6.6, § 2 on Fault.

legislator demonstrated a rather modest approach, having laid down only one specific liability regime thus far: that of product liability (see Arts. 6.41 to 6.55). Regrettably, other specific liability regimes were not transferred to the Civil Code. However, the structure of chapter 7 allows the inclusion of additional specific liability regimes in the future. One such regime, specifically that for liability for damage to collective environmental interests, is currently under construction (see *supra* no. 23).

25. The principle of enhancing accessibility also has substantive implications. It calls for the *clarification* and *rationalisation* of complex doctrines where possible. Clarification is pursued by providing definitions of several concepts, such as that of fault (Art. 6.6, § 1) – with criteria to assess the general standard of care (Art. 6.6, § 2) –, of principals (*commettans/aanstellers*) in the context of their strict liability for auxiliaries (*préposés/aangestelden*) (Art. 6.14, § 1, para 2), and of custodians in the context of their strict liability for defective objects (Art. 6.16, para 2) and for animals (Art. 6.17, para 2). Today, the Code also provides definitions of causation (Art. 6.18, § 1), damage (Art. 6.24) and the purposes and modes of compensation (Art. 6.31).

Besides clarifying, this objective also commands *simplification* wherever possible. Examples in this regard are the rationalised regime in case of a plurality of liable parties (Art. 6.19), which today gives rise to *in solidum* liability— the distinction made in the past between common faults (which used to give rise to joint and several liability) and concurrent faults (which used to give rise to *in solidum* liability) is no longer made—, and recourse claims between liable parties (Art. 6.21).

2.3.3 Modernisation and Innovation

26. The third objective aims to modernise and innovate the law of torts, ensuring it aligns with contemporary society. The majority of the innovations introduced by the recodification are geared toward achieving this objective. Comparative law played a significant role in shaping these reforms.

Under the law of torts, as developed under the *Code civil* of 1804, Belgium is traditionally regarded as a jurisdiction with a victim-friendly stance.[66] This perspective remains largely unchanged in the reform.[67] Therefore, the reform does not introduce a requirement of relativity or *Schutznorm* (such as provided for under Art. 6:163 Dutch Civil Code or § 823, para. 2 German BGB). Instead, the objective of modernisation is to establish a *new equilibrium* between the protection of the victim's interests and those of the tortfeasor, and therefore between the individual and the community. For instance, while the victim-friendly nature of causality rules is retained, Article 6.18, § 2 now moderates the extreme results that the *condicio sine qua non*-test and the doctrine of the equivalence of conditions could produce under the previous legal framework: 'There is no liability (…) if the link between the fact giving rise to liability and the damage is so remote that it would be manifestly unreasonable to attribute the damage to the

[66] This is also recognised by the legislature, see Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 5. See also M. KRUITHOF, *Tort Law in Belgium* in International Encyclopaedia of Laws Tort Law (Alphen aan den Rijn: Kluwer Law International 2018) pp 34, 42, and 102.

[67] Also observed in comparative analyses, see, for instance, J.S. BORGHETTI, 'Le soleil se lève au nord : ou comment la réforme belge de la responsabilité extracontractuelle fait pâlir le projet français', *D. (Recueil Dalloz*) 2024, p 643ff; J. KNETSCH, 'Le Projet de réforme du droit de la responsabilité civile en France et en Belgique. Le droit français a-t-il encore quelque chose à dire?' in Th. Vansweevelt & B. Weyts (eds), *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht* (Antwerp: Intersentia 2022) p 271ff; see also B. Dubuisson (ed), *La réforme du droit de la responsabilité en France et en Belgique. Regards croisés et aspects de droit comparé* (Brussels: Bruylant 2020) 574 p.

person held liable'[68]. In other areas, it is precisely the rights of victims that are reinforced, for example, through the introduction of a claim for disgorgement of profits for violations of personality rights (Art. 6.31, § 3), and stronger protection of harm to psychical or psychological integrity[69], for instance, by providing for a possibility to claim additional compensation for new damage or aggravation of such injury (Art. 6.37).

27. Other aspects of modernisation involve adapting tort law to the *contemporary social context*. This includes, for example, regulating the liability of legal entities (Arts. 6.4 and 6.15, § 1) and of the state (Arts. 6.14, § 2 and 6.15, § 2), as well as adapting parental liability to modern family structures (Art. 6.12) and reformulating the liability of educational institutions (Art. 6.13). The reform is also correct to acknowledge the close relationship between tort law and insurance law. Indeed, unlike a century ago, the defendant will now often be backed by a liability insurer. The availability of liability insurance has boosted the function of tort law as a compensation system, virtually at the same time as national legislators began to set up social security systems.[70] This 'working in tandem'[71], which emerged after 1804, has now been acknowledged in the Code on several occasions[72], albeit remaining quite modest. Another innovation that is consistent with the aspiration of modernisation, is the introduction of other than purely compensatory remedies (see *infra* nos. 43-44), such as preventive remedies (Art. 6.40), and 'restitutionary damages' aimed at disgorgement of illegitimate profits (Art. 6.31, § 3).

28. The reform also modernises by occasionally diverging from established doctrines. **T**he legislator's willingness to overturn case law is perhaps most evident in the domain of the *concurrence between contractual and tortious claims*.

This question is particularly relevant in Belgian law because of its broad concept of damage, resulting in almost any contractual damage also qualifying as recoverable harm under tort. As evidenced by the comprehensive commentary in the Explanatory Memorandum, the concurrence issue is of significant complexity and sensitivity. During the reform process, the matter was the subject of extensive debate among legal scholars.[73] At one juncture, it appeared

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[68] For a comparative analyses with Art. 6:98 Dutch Civil Code, see R. RIJNHOUT, 'Causaliteit en medeaansprakelijkheid: een reflectie op het Nederlandse aansprakelijkheids- en schadevergoedingsrecht en het Belgische ontwerp', *TPR* (*Tijdschrift voor Privaatrecht*) 2021, p (323) at 355-358.

[69] This has also been noted in comparative analyses, see J. KNETSCH, in Th. Vansweevelt & B. Weyts (eds), *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht*, p 271, para. 32; J.S. BORGHETTI, *D.* 2024, p 643, para. 16.

[70] C. VAN DAM, *European Tort Law*, pp 221-222. However, it has been argued more than once that the influence of insurance has thus perverted the tort law requirements, see B.S. MARKESINIS, 'La perversion des notions de la responsabilité délictuelle par la pratique de l'assurance', *RIDC* 1983, pp 301-317. See also, Lord DENNING, *The Discipline of Law* (London: Butterworths 1979) p 280; C. VON BAR, 'Das "Trennungsprinzip" und die Geschichte des Wandels der Haftpflichtversicherung', 181. *AcP* 1981, p 326.

[71] G. WAGNER, 'Comparative Tort Law' in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford: OUP 2019) p (994) at 1023. On this interaction, see I. EBERT, 'Tort law and insurance' in M. Bussani & A.J. Sebok (eds), *Comparative Tort Law. Global Perspectives* in Research Handbooks, Comparative Law series (Edward Elgar 2021) pp 133-139.

[72] See, for example, Art. 6.10, para. 3: 'When the liability of the minor is covered by a contract of insurance, the court cannot decide that no damages are due nor limit the damages to an amount less than that for which the contract of insurance provides coverage'. A same provision is enacted for the liability of persons with a mental disorder (Art. 6.11). Hence, where liability insurance, initially, was aimed at protecting the victim againt the tortfeasor's insolvency, it becomes now a measure of the damages awarded.

[73] See, for instance, A. FOURREZ & S. LARIELLE, 'Les relations entre responsabilité contractuelle et extracontractuelle dans le projet belge' in B. Dubuisson (ed), *La réforme du droit de la responsabilité en France et en Belgique. Regards croisés et aspects de droit comparé* (Brussels: Bruylant 2020) pp 153-172; H. BOCKEN, 'Samenloop in het ontwerp buitencontractuele aansprakelijkheid', *TPR* (*Tijdschrift voor Privaatrecht*) 2021, p 151ff; J. VANANROYE & O. ROODHOOFT, 'Toerekening aan rechtspersonen en aansprakelijkheid van uitvoeringsagenten in het ontwerp buitencontractuele aansprakelijkheid', *TPR*

that the ultimate disposition of the reform of tort law was contingent upon the resolution of this matter. However, following the consideration of multiple draft versions and proposed alternatives[74], the legislator ultimately reached the following conclusion: in contrast to the approach taken by the *Cour de cassation*, which has since its ruling of 7 December 1973[75] adhered to a 'prohibition of concurrence', according to which contracting parties, in principle, can only be held liable on a contractual basis[76], Article 6.3, § 1 represents a reversal of this principle. In the absence of a stipulation to the contrary in the contract or any statutory provision to the contrary, the aggrieved party is at liberty to elect whether to base their claim on a breach of contract or on tort. Despite the absence of explicit mention in the text, it is evident from the legislative trajectory that an aggrieved party opting for tort liability must demonstrate the fulfilment of all the requisite conditions for such liability. In this instance, it is not possible to consider, as in French law[77], that any breach of contract automatically constitutes an extra-contractual fault.[78] However, in the event that the aggrieved contracting party elects to pursue a claim in tort because the conditions of tort are met, the party in breach may then raise defences derived from the contract itself, from provisions on specifics contracts (such as on sales, lease, etc.), or from the specific prescription periods applicable to the contract. This 'correction' preserves the contractual economy and the risk-allocation reflected in the contract.[79] An exception on this correction is made for claims seeking compensation for physical or psychological harm or for intentional wrongdoing, where 'full' concurrence is possible without the contracting party being able to invoke this defences.

This solution also extends to the auxiliaries of the party in breach (Art. 6.3, § 2). In contrast to previous case law, which granted the aggrieved party, in principle, no recourse against the auxiliary of the party in breach (the so-called 'quasi-immunity' of auxiliaries), the

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(*Tijdschrift voor Privaatrecht*) 2021, p 177ff; J. VANANROYE & O. ROODHOOFT, 'Aansprakelijkheid van uitvoeringsagenten in het wetsvoorstel buitencontractuele aansprakelijkheid' in *Tendensen in het bedrijfsrecht* (Brussels: Larcier Intersentia 2023) p 157; I. SAMOY & S. VAN EEKERT, 'De terechte afschaffing van het samenloopverbod en de leer van de quasi-immuniteit van de hulppersoon: ander en beter', *RW* (*Rechtskundig Weekblad*) 2023-24, p 437; I. CLAEYS & C. DESMET, 'Rechtstreekse aansprakelijkheid van de hulppersoon via de rechtstreekse vordering?', *RW* (*Rechtskundig Weekblad*) 2023-24, p 796; P. THIRIAR, 'Afschaffing van het samenloopverbod en leer van de quasi-immuniteit van de hulppersoon: gooi het kind niet met het badwater weg', *DJK* (*De Juristenkrant*) 2023, issue 480, p 8; A. KEUKELEIRE, 'De uitvoeringsagent: niet zo immuun voor het nieuwe aansprakelijkheidsrecht', *DJK* (*De Juristenkrant*) 2023, issue 480, p 9; A. CATALDO, 'Le concours des responsabilités entre cocontractans' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil* (Liège: Anthemis 2024) pp 393-420.

74 See Amendements nos. 10 to 15, 43, 44 and 67, Doc.Parl. Chamber 2022-23, no. 55-3213.

75 *Arr.Cass*. 1974, p 395 = *Pas*. 1974, p 376.

76 The underlying idea is that contracting parties thereby implicitly express their desire to exclude the application of tortious liability, see e.g. Cass. 27 November 2006, *Gaselwest/ING Insurance, H.E., D.S.*, C.05.0310.N, *Arr.Cass*. 2006, p 2427 = *Pas*. 2006, p 2485. Indeed, it is precisely because patrimonial interests are the main concern of contract law that tort law must pull back, as its cumulative application would undermine the risk-allocation agreed upon by the parties or provided by the default rules of contract law. For more details on the solution adopted by case law under the *Code civil* of 1804, see M. KRUITHOF, *Tort Law in Belgium*, para. 48-52.

77 See, for instance, Cass.fr. (ass. plén.) 6 Octobre 2006, *Rev.trim.dr.civ*. 2007, p 61, note P. DEMUNIER; Cass. fr. (ass. plén.) 13 January 2020, *D*. 2020, p 416, note J.-S. BORGHETTI.

78 B. DUBUISSON, *JT* (*Journal des tribunaux*) 2025, p (1) para. 5.

79 This correction is necessary to not undermine the risk-allocation mutually agreed upon by the contracting parties through an extra-contractual claim. This danger may either be avoided by excluding pure economic loss from the scope of liability in negligence—or by a refusal to apply tort law cumulatively to harm suffered within contractual relations (see G. WAGNER, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, p (994) at 1007). In a system such as the new Belgian tort law, which allows both concurrence between contractual and extra-contractual claims and compensation for purely economic loss, it is therefore necessary to allow the liable party to invoke the defences he derives from the contract against an extra-contractual claim.

new legislation permits such a claim, but the auxiliary may then invoke the same defences as their principal (derived from the contract between the principal and the aggrieved party), as well as any defences derived from their contract with the principal (the contract between the principal and the auxiliary). The rationale underlying this solution can be traced back to two fundamental tenets. Firstly, it is predicated on the expectation that the aggrieved party, as a contracting party, can anticipate that his co-contractor, the principal, will engage auxiliaries for the performance of the contract. Consequently, it is deemed reasonable for the aggrieved party to have no greater claims against these auxiliary persons than against the principal. Secondly, it is founded on the idea that the auxiliary anticipates that his contract with the principal will serve as the foundation and measure for the extent of his liability, reason why he is allowed to invoke against the aggrieved party the defences derived from the contract between the principal and the auxiliary. However, the legality of this 'defence' remains controversial. Specifically, the ambiguity of the contract between the principal and the auxiliary poses a significant question: if this contract excludes tort liability, can the auxiliary successfully invoke this 'defence' against the aggrieved party, co-contractor of the principal, if the aggrieved party brings a tortious claim against the auxiliary? While Article 6.3, § 2 appears to allow this kind of 'defence', as the auxiliary can invoke all defences derived from his contract with the principal against the aggrieved party who sues him extra-contractually, there is a prevailing controversy in literature regarding this possibility. Several authors have expressed policy opposition against it[80], although the legal basis for such a refusal remains unclear, especially given the very general nature of Article 6.3, § 2, referring to 'the defences the auxiliary can invoke against his co-contractor'.

In any case, this Copernican shift marks a departure from decades of legal precedent. It aligns more closely with the Dutch and German models.[81] The sensitivity of this issue in Belgium is evident from the critical voices that continue to be heard even after the reform was passed.[82]

3. New Belgian Tort Law in a Nutshell

29. The new Belgian tort law is found in book 6 'Tort Law' of the Belgian Civil Code. The scope of book 6 is, however, not limited to extracontractual claims. Indeed, as far as contractual liability is concerned, the legislator makes a cross-reference to the application of book 6 in Article 5.237, the latter being found in book 5 'Obligations'. It follows that the provisions of book 6 also apply to claims based on contractual liability. This means, for example, that the provisions on causation, damage, consequences of liability, etc. from book 6, also apply to

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[80] See, for instance, I. CLAEYS & C. DESMET, 'De rechtstreekse buitencontractuele aansprakelijkheid van hulppersonen krachtens artikel 6.3 BW' (*Rechtskundig Weekblad*) 2023-24, p 1648; I. SAMOY & G. JOCQUÉ, *RW* (*Rechtskundig Weekblad*) 2024-25, p (682) para. 28. Without such a restriction, see B. DUBUISSON, *JT* (*Journal des tribunaux*) 2025, p (1) paras. 10-11.

[81] For a comparative analyses, see R. DE GRAAFF, *Concurrence in European Private Law* (Den Haag: Eleven International Publishing 2020) p 37ff; M. Martin-Casals (ed), *The Borderlines of Tort: Interactions with Contract Law* (Cambridge: Intersentia 2019) 846 p. For a Dutch perspective on the Belgian reform, see M. WISSINK, 'Samenloop: principiële keuzes en praktische uitwerkingen', *TPR* (*Tijdschrift voor Privaatrecht*) 2021, pp 215-231.

[82] See F. GEORGE, 'Le sort de l'auxiliaire' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil* (Liège: Anthemis 2024) pp (422) at 455-456; F. GEORGE, 'Le concours de responsabilités et le sort de l'auxiliaire dans le nouveau livre 6 du Code civil' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé,* p 329ff; A. RIGOLET, 'Les responsabilités contractuelle et extracontractuelle à l'ère du concours. L'art délicat du « en même temps »' in B. Dubuisson (ed), *Le nouveau livre 6 du Code civil portant réforme du droit de la responsabilité civile extracontractuelle* in CUP vol. 229 (Liège: Anthemis 2024) p (8) at 54. See also *De Tijd*, 14 februari 2024, 'Bestuurders en werknemers sneller aansprakelijk voor persoonlijke fouten'; A. KEUKELEIRE, 'Nieuw regime voor de uitvoeringsagent: een rechtszekere quasi-aansprakelijkheid?', Corporate Finance Lab blog.

claims based on contractual liability. Book 6, therefore, encompasses a field of enquiry that extends beyond the confines of tort law.

On the other hand, book 6 does not provide a comprehensive framework for all cases of non-contractual liability. Indeed, the Civil Code also addresses cases of non-contractual liability that are not covered in book 6 'Tort Law'. One may cite, for instance, the liability for nuisance caused by neighbours (Art. 3.101), liability for *culpa in contrahendo* (Art. 5.17), and third party complicity in another's breach of contract (Art. 5.111). Besides, apart from the rules on product liability (see Arts. 6.41 to 6.55), specific liability regimes, such as these on liability of motor vehicle drivers to vulnerable road users, compensation for work-place and medical accidents, are not found in book 6 of the Civil Code, but are still found in separate, stand-alone legislation (see *supra* no. 24).

30. Book 6 'Tort Law' is structured as follows: following an introductory chapter, Chapters 2 to 4 address, respectively, the facts generating liability, causation, and damage. Chapter 5 discusses the consequences of liability, Chapter 6 deals with orders or prohibitions, and Chapter 7 focuses on specific liability regimes. Within book 6, the Belgian legislature decided to treat specific liability regimes separately from the 'general rules' of liability.[83] Although the Commission preparing the reform initially proposed creating a specific regime for liability related to 'hazardous activities', it encountered significant resistance, and Chapter 7 now only includes a single section on product liability, which implements the provisions of European origin. While these do not warrant special comment here[84], the introductory provisions (3.1), the facts generating liability (3.2), causation (3.3), damage (3.4), and the consequences of liability (3.5) merit a short presentation.

3.1. Introductory Provisions

31. The first chapter of book 6 includes four introductory provisions. Article 6.1 asserts that the provisions in this book are, in principle, of supplementary nature. This reflects the current stance of the Belgian *Cour de cassation,* but contrasts with the French Court's position, which considers tort liability to be a matter of public policy. Consequently, Belgian legislation permits the discharge or limitation of liability based on tort, provided that the requisite conditions for a valid exemption clause are met (see Art. 5.89).[85]

Only one provision of book 6 is explicitly designated as being not of supplementary nature: according to Article 6.37, injured parties who have been compensated for injury resulting from harm to their physical or psychological integrity may seek additional damages for new injury or aggravation of the injury resulting from the same harm but which has not yet been taken into account and of which they could not reasonably have been aware at the time of the court's decision or out-of-court settlement. It is not possible to deviate from this rule: 'The renunciation of that right is without effect' (Art. 6.37, para. 2). Apart from that, the largely non-

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[83] This choice was also proposed in France, but has been criticized, see e.g. J.-S. BORGHETTI, 'L'avant-projet de réforme de la responsabilité civile. Commentaire des principales dispositions', *D. (Recueil Dalloz*) 2016, p 1442, para. 59.

[84] However, this recodification does not yet encompass the new Product Liability Directive (Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, OJ L 2024/2853, 18 November 2024). Consequently, a reform of the new provisions is already required before the transposition deadline of this directive, which is 9 December 2026 (see *supra* no. 23).

[85] Under which, clauses exempting the party in breach from his intentional fault, or from his fault when it causes harm to the life or physical integrity of another person, are void. The same applies to faults by auxiliary persons.

mandatory view of tort liability is further reflected in Article 6.2, which stipulates that the application of a provision from book 6 does not preclude, unless otherwise specified by law or contract, the application of other provisions.

32. Article 6.3 addresses the concurrence of contractual and extracontractual claims. Its length and the extensive commentary it has received in the Explanatory Memorandum underscore the controversial nature of this issue in Belgian law. The solution, which assumes a Copernican revolution (see *supra* no. 28), takes the opposite approach to French law, by allowing an option between the two types of liability, aligning with most continental jurisdictions. From a comparative perspective, this stance is understandable, as the arguments traditionally advanced in France to justify the rule of non-cumulation have been criticised.[86] Yet, even after the Belgian reform, this paradigm shift continues to generate controversy in legal scholarship (see *supra* no. 28).

Article 6.4 concludes the introductory provisions by establishing a principle of equal treatment between natural persons and legal persons.[87] Moreover, although this does not receive a specific provision, the new rules generally apply to public legal entities as they did before, since Belgian law does not have an autonomous administrative liability system.[88]

3.2. Facts Generating Liability

33. For liability to attach under Belgian tort law, three constituent elements are required: the person claiming compensation has to have suffered (1) damage that was (2) caused by (3) a fact generating liability. Regarding the facts generating tortious liability, the Code addresses 1° liability for one's own acts (3.2.1), 2° liability for another's act (3.2.2), and 3° liability for goods and animals (3.2.3).

3.2.1. Liability for Personal Misconduct

34. First, concerning personal liability, the Code restates the underlying principle of the former Articles 1382 and 1383, but with a new formulation: 'Any person is liable for the damage they cause to others through their fault' (Art. 6.5).[89] Fault is then defined as 'a breach of a statutory rule imposing or prohibiting specific behaviour or of the general standard of care that applies in social relations' (Art. 6.6, § 1).[90] Contrary to the Dutch and German law[91], Belgian law has

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86 J.S. BORGHETTI, *D.* 2024, p 643, para. 16.

87 Comp. Art. VI.–1:103(b) DCFR. On the liability of legal persons and the choices made in the reform, see, in particular, J. DELVOIE, 'Aansprakelijkheid van rechtspersonen in het ontwerp buitencontractuele aansprakelijkheid', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, p 47-64.

88 This follows also from Articles 6.14, § 2, and 6.15, which extend the rules of strict liability to public legal entities.

89 On the concept of fault after the reform, see B. GOFFAUX & G. MASCHIET, 'Le point sur la faute extracontractuelle au régard de la réforme' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 13-50; F. AUVRAY, 'La faute comme fait générateur de responsabilité : que nous apporte le livre 6 ?' in B. Dubuisson (ed), *Le nouveau livre 6 du Code civil portant réforme du droit de la responsabilité civile extracontractuelle*, pp 56-98; N. SCHMITZ, 'La responsabilité du fait personnel dans le nouveau livre 6 du Code civil : l'audace de la tradition' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé* (Brussels: Larcier 2024) p 19ff.

90 For a comparative perspective on this double definition of fault, see C. VAN DAM, *European Tort Law* (Oxford: OUP 2013) pp 293-295.

91 See Art. 6:162, para. 2 Dutch Civil Code and § 823 German BGB.

not shifted from a two-tier to a three-tier system by incorporating the infringement of a subjective right as a third fault category.[92]

It is Article 6.6, § 2 that clarifies the scope of the general standard of care by stating that it 'requires behaviour consistent with that of a prudent and reasonable person placed in the same circumstances'.[93] The benchmark is the conduct of a fictitious reference person; however, that reasonable person must be put into the shoes of the tortfeasor in the particular historical situation *ex ante*. It follows that, as before, Belgian tort law, like most continental legal systems, provides for an open category of 'tort': rather than a system with a variety of individual wrongs, tortious liability for personal misconduct is based on a general clause.[94] In sharp contrast to the plurality of the common law, Article 6.6, § 2, paragraph 2, now provides for a list of factors to assess the general standard of care: 1° the reasonably foreseeable consequences of the behaviour; 2° the proportionality between the risk that the damage would occur, its nature, and extent, and the efforts and measures necessary to avoid it[95]; 3° the state of the art in technology and scientific knowledge; 4° the rules of the art and good professional practices; and 5° the principles of good administration and organisation.[96] The list of circumstances is neither exhaustive nor binding. This effort to better delineate the contours of the general standard of care, without confining it to a rigid definition, reflects a commendable intention to assist the courts and improve legal predictability.

Article 6.6, defining the fault as a breach of a statutory rule imposing or prohibiting specific behaviour or of the general standard of care, enshrines an objective conception of fault. This marks a shift in Belgian tort law. Indeed, wrongfulness (as *objective* element) was not sufficient to establish a 'fault' under former Articles 1382 and 1383. As opposed to French law, which considers a fault to consist only of an objectively wrongful act, Belgian law required the wrong to be attributable or imputable to the free will of the person who has committed it, for him to be liable. The second, *subjective* element of a fault was therefore culpability.[97] Despite the absence of this subjective element in the definition of fault under Article 6.6, its continued relevance is not negated. Indeed, in the new framework, this element will be addressed in a

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92 Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 43: 'In this case, the material component of the fault is the failure to comply with the obligation to abstain from the exercise of subjective rights that are opposable to third parties. This failure can be considered a violation of a standard of conduct that imposes a defined behavior. Therefore, the fault in this case is the violation of a norm that imposes a well-defined conduct.'

93 Comp. Art. VI.–3:102(b) DCFR.

94 On this schism, see R. DWORKIN, 'The Model of Rules', 35. *University of Chicago LR* 1967, p 14 ff. For a comparative overview, see M. BUSSANI, A.J. SEBOK & M. INFANTINO, *Common Law and Civil Law Perspectives on Tort Law* (Oxford: OUP 2022) pp 9-18.

95 This criterion is relatively novel in the context of Belgian liability law, and could be regarded as a derivative of the famous formula of the American judge Learned Hand who defined negligence as the failure to take precautions that would have cost less than the harm caused, multiplied by the probability of such harm actually occuring: Learned Hand J, in *United States v Caroll Towing Co*., 159 F.2d 169, 173 (1947): 'Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: ie whether B [is less than] PL.'

96 Interesting is a comparison with the criteria retained in Art. 4:102(1) PETL: 'The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods'.

97 See M. KRUITHOF, *Tort Law in Belgium,* para. 60. On this choice in the reform, see, in particular, G. JOCQUÉ, 'Foutaansprakelijkheid: algemene begineslen – aansprakelijkheid minderjarigen en geesteszieken, *TPR* (*Tijdschrift voor Privaatrecht*) 2019, p 31-46; F. AUVRAY, 'Bedenkingen omtrent het foutbegrip in het hervormingsproject', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, p 87-114. For a comparative overview, see G. WAGNER, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law,* pp (994) at 1014-1015; E. TJONG TJIN TAI, *Tort Law. A Comparative Introduction* (Edward Elgar 2022) para. 8.1.

divergent manner. First, the subjective element will resurface in cases pertaining to the exclusion of liability. It follows that there shall be no liability when there is force majeure (Art. 6.7), defined as the 'impossibility of complying with the applicable rule of conduct'. Other causes for exclusion of liability for fault are provided for under Article 6.8: error in fact or in law, physical or psychological constraint, state of necessity, lawful authority or order, self-defence, and the consent of the victim provided that the harm involves interests that the person may legally dispose of.[98] Second, the reform tempers the absence of a subjective element in de definition of fault for persons lacking discernment, by stipulating that minors under twelve cannot be held liable (Art. 6.11), and that the court may equitably moderate the liability of older minors and those with mental disabilities, considering, where applicable, the existence of insurance (Arts. 6.12 and 6.13).

3.2.2. Liability for the Conduct of Others

35. Secondly, with regard to liability for the conduct of others, the reform remains faithful to the cases of liability contained in the Civil Code of 1804.[99] The list is still exhaustive (see Arts. 6.12 to 6.15). However, article 6.12 now provides that parents, adoptive parents, tutors and foster parents, provided that they have authority over the person of a minor under the age of sixteen, are liable without fault for damage caused to third parties by the minor's fault or any other fact giving rise to liability. For minors under sixteen, this liability is strict. For minors aged sixteen or older, this liability can be countered by proving a lack of fault on the part of those who have authority over the minor.[100]

36. A new liability category is created for those legally, judicially, administratively, or contractually responsible for globally and sustainably organising and supervising others' lifestyles, such as youth institutions, retirement homes, prisons, etc.[101] Indeed, persons who based on a statutory or regulatory provision, a judicial or administrative decision, or a contract are tasked with organising and monitoring the lifestyle of other persons in a global and sustainable manner are liable for injury caused by these persons to third parties by their faults or other facts leading to liability while under the supervision of the former; however, they are not liable if they prove that the injury is not caused by a fault in the supervision on their part (Art. 6.13, para 1). Additionally, the teacher's liability under former Article 1384, paragraph 4, is eliminated, but a new liability is imposed on educational institutions for damage caused by their students to third

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98 Comp. Art. 7:101 PETL. For an analyses, see O. EVRARD & M. MOULIN, 'Les causes d'exclusion de la responsabilité pour faute' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 345-393.

99 On the liability for the conducts of others after the reform, see, in particular, TH. VANSWEEVELT, 'De buitencontractuele aansprakelijkheid voor minderjarigen, rechtssubjecten onder toezicht, zaken en dieren: een blik op een mogelijke toekomst', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, p 65-86; A. PÜTZ, 'La responsabiité des titulaires de l'autorité sur la personne des mineurs' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 51-78; TH. MALENGREAU, 'Les responsabilités complexes dans le nouveau livre 6 du Code civil' in B. Dubuisson (ed), *Le nouveau livre 6 du Code civil portant réforme du droit de la responsabilité civile extracontractuelle*, pp 100-140; M.-H. DE CALLATAŸ & R. DEUTSCH, 'Les responsabilités du fait d'autrui et des choses : de réels changements sans grands bouleversements' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé*, p 63ff. For a Dutch perspective on the reform, see T. HARTLIEF, 'Aansprakelijkheid voor personen en zaken in de hervorming van het aansprakelijkheidsrecht', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, p 115-150.

100 On the bounds between negligence and strict liability from a comparative perspective, see F. WERRO & E. BÜYUKSAGIS, 'The bounds between negligence and strict liability' in M. Bussani & A.J. Sebok (eds), *Comparative Tort Law. Global Perspectives* in Research Handbooks, Comparative Law series (Edward Elgar 2021) p 186ff.

101 Comp. Art. VI.–3:104(b) DCFR. On this innovation, see E. GILLARD, 'La responsabilité des personnes chargées de la surveillance d'autri' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 79-100.

parties (Art. 6.13, para. 2). Also this liability is based on a rebuttable presumption of fault, meaning that the onus is on the accused institution to prove that the damage was not caused by a fault in supervision.

Article 6.14, § 1, confirms the rule of former Article 1384, paragraph 3: principals (*commettants/aanstellers*) face liability for the damage caused to third parties by their auxiliaries (*préposés/aangestelden*) during and as a result of the performance of their duties, as a result of their fault or any other fact leading to liability. This is a form of strict liability. For auxiliaries who are not subordinate within a legal person, Article 6.15 states that legal persons are liable for damage caused to third parties by their governing bodies or members thereof during and as a result of the performance of their duties. This form of liability, applicable to both private and public legal persons, is thus treated as a form of liability for others.[102] This in contrast to the earlier so-called 'organ theory', developed by the courts, which equates the error of the organ with that of the legal entity itself.[103]

3.2.3. Liability for Objects and Animals

37. Thirdly, and finally, liability may also exist for defective objects or animals.[104] Here, the reform abandons the strict liability for damage caused by building collapse (former Art. 1386). This case of liability is now covered by the general provision on liability for the damage caused by defective objects, enacted in Article 6.16. Inspired by the definition on product liability from European origin, an objective is defective when, 'because of one of its characteristics, it does not provide the safety which a person is entitled to expect under the given circumstances' (Art. 6.16, para. 3). Liability for damage caused by an animal is also confirmed (Art. 6.17). Historically, its origins lie in the area of liability for wild animals, kept in ancient Rome to supply the popular animal shows in circuses.[105] Although such animal shows have now gone, strict liability for animals has been retained in the modern world[106], also in the Belgian reform. For both objects and animals, liability rests with the custodian, defined as the person who has non-subordinate power of direction and control over the object resp. animal, with ownership presuming custodianship (Arts. 6.16, para. 2 and 6.17, para. 2). Both cases involve strict liability.

3.3. Causation

38. It has been observed that the Belgian reform[107], compared to the French reform project, presents the most significant originality in its approach to causation.[108] From just one word in

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[102] This solution has been inspired by Art. VI.–3:201(2) DCFR. See Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, pp 73-74.

[103] See C. VON BAR, *The Common European Law of Torts,* vol. 1, para. 12.

[104] See M. THIRY, 'La responsabilité du fait des choses au sens large' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 101-133.

[105] R. ZIMMERMANN, The Law of Obligations: Roman Foundations of the Civilian Tradition (Clarendon Press 1996) p 1105.

[106] For a comparative overview, see G. WAGNER, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, p (994) at 1018; E. TJONG TJIN TAI, *Tort Law. A Comparative Introduction*, para. 15.1.

[107] On causation, see H. BOCKEN, 'Het oorzakelijk verband in het ontwerp van de Commissie tot hervorming van het aansprakelijkheidsrecht', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, pp 233-268; M. KRUITHOF, 'Een kritische analyse van het concept causaliteit in het ontwerp van de Commissie tot hervorming van het aansprakelijkheidsrecht', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, pp 269-322; V. DE WULF, 'Le lien de causalité' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 259-316; C. JOISTEN, 'La causalité: *quid novi sub sole?'* in B. Dubuisson (ed), *Le nouveau livre 6 du Code civil portant réforme du droit de la responsabilité civile extracontractuelle*, pp 142-208; A. DURIAU, 'Le lien causal dans le livre 6 du Code civil' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé*, p 111ff .

[108] J.S. BORGHETTI, *D.* 2024, p 643, para. 25.

old article 1382, the legislature now devotes six provisions to it (Arts. 6.18 to 6.23). As a starting point, the Belgian legislator enshrines the principle of *condicio sine qua non* and the principle of the equivalence of conditions (Art. 6.18, § 1).[109] However, this starting point is immediately tempered by two 'corrections'.[110]

First, a correction was necessary with respect to this *condicio sine qua non*-test. The correction relates to concurrence of facts occurring simultaneously, which each in themselves are sufficient to cause the same damage. Under such circumstances, the application of the *condicio sine qua non*-test would result in the determination of no liability, as for each fact other simultaneous facts are sufficient to establish the condition for the damage.[111] Therefore, if a fact leading to liability is not a necessary condition for the damage for the sole reason that one or more other simultaneous facts, together or separately, are a sufficient condition for the damage, it is nonetheless also considered as a cause (Art. 6.18, § 1, para. 1). This 'logical' correction, inspired by the USA *Restatement of Torts*[112], should prevent that the application of the *condicio sine qua non*-test would lead to no liability.

Second, a correction was necessary to address the principle of the equivalence of conditions. The doctrine of equivalence asserts that all necessary conditions are equivalent and must be treated equally.[113] Consequently, no distinction is made between direct and indirect causes. However, with the objective of preventing an infinite sequence of causal facts, the legislature has introduced a correction to the principle. Indeed, under Article 6.18, § 2, liability is excluded where 'the link between the fact leading to liability and the damage is so remote that it would be manifestly unreasonable to impute the damage to the person whose liability is invoked. In this assessment, particular consideration is given to the improbability of the damage in light of the normal consequences of the fact leading to liability and the circumstance that this fact has not significantly contributed to the occurrence of the damage'.[114] This correction, which is new to Belgian law, represents a departure from previous legal standards by allowing for a distinction between factual causation and legal causation.

39. There are also cases of *causal uncertainty*. First, Article 6.22 addresses the issue of uncertainty regarding the causal nature of fault. To remedy this, case law had developed under the former legal framework the doctrine of loss of chance, which recognises a separate form of damage to address cases where the causal nature of the fault in relation to the damage is uncertain. This doctrine does not provide compensation for the damages actually suffered by the injured party (in the absence of causal certainty), but rather for the loss of a chance, which is considered as a separate form of damage (and does have a certain causal relation with the fault). With the rule in Article 6.22, it is no longer necessary to employ the doctrine that establishes a separate form of damage. Instead, the resolution of this issue is sought in the concept of 'proportional liability'. This approach provides compensation for the damage suffered by the injured party, albeit exclusively for the proportion of the actual damage that is commensurate with the probability that the fault caused the damage. In the spirit of the legislator, compared to

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[109] For a comparative overiew on the different approaches on causation, see M. INFANTINO & E. ZERVOGIANNI, 'The European Ways to Causation' in M. Infantino & E. Zervogianni (eds), *Causation in European Tort Law* (Cambridge: CUP 2017) pp 85-128; E. TJONG TJIN TAI, *Tort Law. A Comparative Introduction*, para. 9.3.

[110] See I. SAMOY & G. JOCQUÉ, *RW (Rechtskundig weekblad*) 2024-25, p (722) para. 72.

[111] On this question, see e.g. C. VAN DAM, *European Tort Law* (Oxford: OUP 2013) pp 330-331.

[112] See § 26 'Factual cause' and § 27 'Multiple sufficient causes' in *Restatement of Torts* (Third) (ALI, *Restatement of Torts third:* Phys. & Emot. Harm, 2011). See Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 90.

[113] See M. KRUITHOF, *Tort Law in Belgium*, para. 205ff.

[114] Comp. Art. 6:98 Dutch Civil Code.

the former solution, 'this does not alter the ultimate outcome'.[115] However, in other legal systems that have been acquainted with the distinction between proportional liability and the doctrine of loss of chance for a considerable time, there appears to be a discourse regarding the question of whether the two doctrines are indeed interchangeable.[116]

Second, Article 6.23 deals with uncertainty regarding the identity of the liable party, introducing 'alternative causation'. It imposes proportional liability on each potential responsible party according to the probability that their conduct caused the damage.[117] This is an innovation for the Belgian legal tradition, fulfilling a gap in previous tort law.[118]

3.4. Damage

40. Article 6.24, paragraph 1, defines damage as 'the economic and non-economic consequences of harm to a legally protected personal interest'.[119] Hence, this provision has an open scope of protected interests.[120] It follows that there is no such provision as, for example, under German law, that limits the scope of negligence liability to the infringement of such protected interests specifically enumerated by the Code (e.g. § 823, Abs. 1 BGB). Because of its broad concept of damage, Belgian tort law allows claims for economic losses and contains, unlike

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[115] See Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 9. On this belgian solution, see C. JOISTEN, 'La responsabilité proportionnelle « à la belge »' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 317-344.

[116] See, for instance, under Dutch law, answering the question in the negative:: J.S. KORTMANN, 'Meervoudige causaliteit: over alternativiteit bij daders én benadeelden' in C.J.M. Klaassen & J.S. Kortmann, *Causaliteitsperikelen*, preadvies VASR (Deventer: Wolters Kluwer 2012) p 31ff; T.F.E. TJONG TJIN TAI, 'Schade, causaliteit en schadebegroting', *WPNR* (*Weekblad voor Privaatrecht, Notariaat en Registratie*) 2016/7108, pp 383-387; T.F.E. TJONG TJIN TAI, 'Schadebegroting, verlies van een kans en proportionele aansprakelijkheid', *NJB* (*Nederlands Juristenblad*) 2016, issue 31, pp 2239-244. See, however, answering the question in the affirmative: C.H. VAN DIJK, 'Proportionele aansprakelijkheid versus kansschade: gelijke monniken' in F.T. Oldenhuis & H. Vorsselman (eds), *Causaliteit in letselschadezaken* (Den Haag: Boom Juridische Uitgevers 2014); B.J. VAN VELTHOVEN, 'Verlies van een kans en proportionele aansprakelijkheid: verschillende figuren voor verschillende gevallen?', *NTBR* (*Nederlands Tijdschrift voor Burgerlijk Recht*) 2018/11, issue 3; A.J. VAN, 'Kansschade of proportionele aansprakelijkheid?', *TVP* (*Tijdschrift voor Vergoeding Personenschade*) 2021, pp 45-54.

[117] Comp. Art. 3:103 PETL. See, however, Art. VI.–4:103 DCFR (which does not impose proportional liability, but full liability of each of the actors in terms of solidary liability).

[118] This is rightly identified as a break with French law: J.S. BORGHETTI, *D.* 2024, p 643, para. 26.

[119] On this definition, see B. FOSSEPREZ, 'Le dommage' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 135-162; V. SCHOLLAERT, 'Het tweeledige schadebegrip in het wetsvoorstel houdende boek 6 'Buitencontractuele aansprakelijkheid' van het Burgerlijk Wetboek', *TBBR/RGDC* (*Tijdschrift voor Belgisch Burgerlijk Recht/Revue Générale de Droit Civil belge*) 2023, pp 377-385; P. COLSON, 'Le dommage au sein du nouveau livre 6 du Code civil: entre fausse révolution, révolution avortée et véritable (r)évolution' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé*, p 213ff.

[120] For a comparative overview, see, for instance, D. HOWARTH, 'The General Conditions of Unlawfulness' in A. Hartkamp, M. Hesselink, E. Hondius, C. Mak & E. du Perron (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) p 845 ff; C. VAN DAM, *European Tort Law*, pp 167-170. However, a deeper survey of the systems reveals that, in fact, the differences between the general clause and the protected interest approach are much smaller than at first appearance, see M. BUSSANI & V.V. PALMER, 'The Liability Regimes of Europe—Their Façades and Interiors' in M. Bussani & V.V. Palmer (eds), *Pure Economic Loss in Europe* (Cambridge: CUP 2003) p 120 ff.

other jurisdictions[121], no rule that would exclude compensation for pure economic loss.[122] Indeed, under Belgian tort law a tortfeasor is liable even if his negligence affects nothing but the plaintiff's future income or business prospects.[123]

However, harm is only considered as damage if the injured interest is 'personal' to the claimant. In case of injury to a public interest, the harm is considered, in principle, not to be suffered by any individual person.[124] As a result, tort law has not been a very efficient instrument to protect public or collective interests in Belgium. Hence, cases on environmental and climate protection gave rise to considerable tensions. Case law, which interprets the concept of 'personal interest' in a broad manner, appears to evolve rapidly, particularly in environmental cases where public authorities and, to a lesser extent, environmental associations bring claims for the reparation of ecological damage.[125] This is why the Commission for the reform of tort law had proposed to include a special provision stating that harm to a collective interest is compensable within the cases and under the conditions determined by law. However, this provision was not adopted during the parliamentary discussions.[126] The Minister of Justice subsequently committed to the formation of a special *ad hoc* commission tasked with the development of a detailed proposal on this matter (see *supra* no. 23).

41. Although Belgian tort law thus assumes a very broad concept of damage, it follows from the reform that not every type of damage is on equal footing: in particular, since the reform, Belgian tort law gives broader protection to the harm to physical or psychological integrity.[127] This is reflected, for instance, in the fact that 'full' concurrence of contractual and tortious claims is allowed for compensation for such injury (Art. 6.3, see *supra* no. 28), and in the possibility to claim additional compensation for aggravation of such injury, irrespective of whether this injury is already taken into account in a court decision or out-of-court settlement (Art. 6.37)—a provision that is not of supplementary nature (see *supra* no. 31); thus, it cannot be waived, even in the context of a settlement agreement.

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[121] M. BUSSANI & V.V. PALMER (eds), *Pure Economic Loss in Europe* (Cambridge: CUP 2003) 640 p, see also V.V. PALMER, 'A comparative-law sketch of pure economic loss' in in M. Bussani & A.J. Sebok (eds), *Comparative Tort Law. Global Perspectives* in Research Handbooks, Comparative Law series (Edward Elgar 2021) pp 284-304.

[122] This was also true under the *Code civil* of 1804, see M. KRUITHOF, *Tort Law in Belgium,* para. 58.

[123] Therefore, the following observation on French law could also apply to Belgian law '[l]e problème du dommage économique pur est difficile à traiter pour un juriste français, car celui-ci, a priori, ne connaît ni le problème, ni même l'expression!' (C. LAPOYADE-DESCHAMPS, 'La réparation due préjudice économique pur en droit francais', in E.K. Banakas (eds), *Civil Liability for Pure Economic Loss* (Kluwer Law International 1996) p 89).

[124] For a discussion on the implications, see CH. DEVILLERS, 'La réparation des dommages résultant d'une atteinte à un intérêt collectif : quels apports du nouveau livre 6 du Code civil ?' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 163-182.

[125] See, for instance, on this evolution under Belgian tort law: CH. DEVILLERS, 'La réparation du préjudice écologique : de l'évolution à la révolution ?' in B. Dubuisson (ed), *La réparation du dommage* (Liège: Anthemis 2022) p 217-252.

[126] See Amendement no. 60, Doc.Parl. Chamber 2023-24, no. 55-3213/005, p 8.

[127] This has also been observed in comparative analyses, see J. KNETSCH, in Th. Vansweevelt & B. Weyts (eds), *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht*, p 271, para. 32; J.S. BORGHETTI, *D.* 2024, p 643, para. 16. On the compensation for this type of injury after the reform, see P. COLSON, 'Le sort des victimes d'une atteinte à l'intégrité physique ou psychique dans le nouveau livre 6 du Code civil' in B. Dubuisson (ed), *Le nouveau livre 6 du Code civil portant réforme du droit de la responsabilité civile extracontractuelle,* pp 210-259; N. ESTIENNE, 'La réparation du dommage corporel dans le livre 6 du Code civil : consolidation de nombreux acquis et quelques nouveautés' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé,* p 259ff.

42. Other provisions on damage address the requirement of certainty of the damage (which may be future; Art. 6.25), the distinction between patrimonial and non-patrimonial damage (Art. 6.26)[128] – the latter, in the case of legal persons, only compensable provided that it is compatible with the legal person's nature – , rebound damage (i.e., damage suffered by a person as a result of harm previously inflicted to the interest of another person with whom the first person has a legal or sufficiently close emotional connection; Art. 6.27), and, finally, predispositions or the victim's pre-existing condition (Art. 6.29: the victim who has a predisposition to suffer the injury is entitled to full compensation for the injury even if this predisposition is one of its causes; the victim who, prior to the fact leading to liability, was in a proven pre-existing state that had already resulted in harmful consequences is only entitled to compensation for the new injury caused by this same fact or for the aggravation of the existing injury).

3.5. Consequences of Liability and Remedies

43. A well-established consequence of liability under Belgian tort law, is the principle of *full compensation*, now enshrined in Article 6.30.[129] However, the Code distinguishes between patrimonial and non-patrimonial damage, stating that compensation of the latter 'aims to provide injured parties with fair and adequate compensation for this damage' (Art. 6.31, § 1). This implicitly acknowledges that for this type of harm, full compensation is somewhat of an 'aspirational ideal'. This is further reflected in Article 6.36, which allows the courts to assess the damage approximately when its exact extent cannot be determined or when a precise assessment would incur excessive costs (para. 2), and authorises the courts to award damages in equity when the extent of the damage extent cannot be ascertained in any other way (para. 3).

Further, the Code confirms that the damage is determined as close as possible to the time of actual compensation (Art. 6.32), that the elements of damage must be individually identified (Art. 6.36, para. 1), and that the injured parties are free to dispose of the damages received as they wish (Art. 6.39). Furthermore, it provides useful clarifications on the choice between lump-sum, capitalisation, and annuity for compensating future injury resulting from harm to physical or psychic psychological (Art. 6.34: to protect the victim, the court may impose an annuity, even if it is not requested, when compelling reasons related to the protection of the victim justify it), and allows for additional damages for new or aggravated damage arising from such harm (Art. 6.37). Additionally, the reform contains provisions on the possibility and conditions of non-monetary relief, i.e. compensating the damage by a non-monetary measure (Arts. 6.31, § 2, and 6.33)[130], and on the consideration of benefits or advantages received by the injured party due to the fact leading to liability (Art. 6.35). A provision also addresses how to assess the damages for damage to goods, clarifying the relationship between damages for repair and for replacement (Art. 6.38): 'In case of damage to a good, the victim has the right to compensation for the expenses of its repair. If these expenses exceed the costs of replacing the good with one of the same characteristics, the compensation is limited to the amount of the latter. The victim is also entitled to compensation for any potential decrease in value of the good after its repair. In case of destruction of the good or when its repair is not possible, the victim is entitled to compensation for the expenses necessary to replace the good with one of the same characteristics that fulfils the same functions'.

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[128] Inspired by Art. VI.–2:101 DCFR. See Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 137.

[129] On the choices made in the reform regarding the concept of damage and the consequences of liability, see, in particular, G. JOCQUÉ, 'Schade en gevolgen van aansprakelijkheid', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, pp 379-408. For a Dutch perspective on the reform, see S. LINDENBERGH, 'Een nieuw Belgisch schadevergoedingsrecht vanuit Nederlands perspectief', *TPR* (*Tijdschrift voor Privaatrecht*) 2019, pp 409-424.

[130] On this remedy, see S. DE REY & L. CHEN, 'Non-monetary relief for breach of contract: a European perspective on Chinese contract law, 29.2 *Asia Pacific Law Review* 2021, pp 325-345.

44. While the *goals of tort law* did not attract much interest for a long time, recent decades saw a vivid discussion within legal scholarship. The positions in the debate reflect both a split between systems, or legal families, and a split between methodological approaches.[131] One view is that of the compensation theory of tort law, which is closely associated with the tradition of civil law systems. This theory perceives the provision of compensation to victims of wrongful behaviour to be the primary goal of tort law. An alternative view, more prevalent in the common law world, posits that tort law is not solely concerned with providing redress for losses; rather, it is also, or perhaps primarily, oriented towards the prevention of harm. In this regard, the Belgian legislator, when reforming tort law, drew closer to other legal systems and made room, to a certain extent, for other than the purely compensatory function.[132]

For instance, in cases of lucrative faults, Article 6.31, § 3, allows the courts to grant the plaintiff an additional indemnity equal to part or all of the net profit gained by the liable party when personality rights or reputation has been intentionally violated to obtain profit.[133] Although the new Code does not provide for punitive damages or civil fines, this new remedy does indicate that there is room for more than just compensation of damage under the new Belgian tort law.[134] This form of 'restitutionary damages' is not presented as a departure from the principle of full compensation. In the spirit legislature, this does not constitute a private punishment but compensation that can be cumulated with the damages awarded to compensate for non-patrimonial damage.[135] Some authors have expressed regret that these illegitimate profits are awarded to the victim rather than a compensation fund[136]; however, this is undoubtedly a condition for the effectiveness of the mechanism put in place[137]. Also, questions can be raised regarding the scope of this new remedy, which can only be applied in cases involving violations of personality rights or harm to honour or reputation. It is possible that, in the long term, the judiciary may be required to determine whether it is consistent with the constitutional principle of non-discrimination and equal treatment that this option is not available in other cases. For instance, in a situation where a tenant profits from unauthorised subleasing by renting out the property, it would be necessary to establish whether there is a legitimate aim that can justify this differential treatment in a pertinent and proportionate manner.

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131 See G. WAGNER, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law,* p (994) at 996.

132 For a comparative perspective, see PH. PIERRE, 'La fonction normative de la responsabilité dans les projets français et belge' in B. Dubuisson (ed), *La réforme du droit de la responsabilité en France et en Belgique. Regards croisés et aspects de droit comparé,* pp 111-124.

133 For a Dutch perspective on this new provision, see M. VAN KOGELENBERG, 'Winstafdracht na wanprestatie in (hervormd) Belgisch en Nederlands recht: een verkenning van de mogelijkheid tot verzelfstandiging' in S. De Rey (ed), *Het nieuwe Belgische verbintenissenrecht vanuit Nederlands perspectief* (Leuven/Zutphen: LeA Uitgevers/Paris Uitgeverij 2024) pp 279-300.

134 Already advocated such a remedy under former Belgian tort law, see M. KRUITHOF, 'Disgorgement of Profits in Belgian Private Law' in E. Hondius & A. Janssen (eds), *Disgorgement of Profits. Gain-Based Remedies throughout the World* (Cham: Springer 2015) pp 89–120. See also T. GLADINEZ, *Voordeelafdracht in het privaatrecht* (Bruges: die Keure 2020) 696 p.

135 Explanatory Memorandum of book 6, Doc.Parl. Chamber 2022-23, no. 55-3213/001, p 148. Also under the former tort law, 'Occasionally, one can find court decisions awarding relatively high moral damages to such a victim, not so much as a reaction to the seriousness of the wrong committed but rather to tackle the profits the wrongdoer has realized by negating the exclusive right of the injured party. Even though these judgments are formally based on reasons invoking civil liability and valuing moral damages, one could also recognize in these decisions a form of disgorgement as a remedy based on the bad faith infringed of a subjective (personality) right' (M. KRUITHOF, *Tort Law in Belgium*, para. 287).

136 P. COLSON, 'Les conséquences de la responsabilité' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil,* p 201.

137 B. DUBUISSON, *JT* 2025, p (1) para. 68.

Besides, the Code now also provides for a more preventive function of tort law.[138] This is found in Article 6.40: 'In case of an established or a seriously imminent breach of a statutory provision imposing specific behaviour, the court, upon request of a party demonstrating that it will suffer damage to one of its goods or harm to its psychological integrity as a result, may issue an injunction or an interdiction aimed at enforcing this statutory provision'. This provision may be invoked in instances where the occurrence of damage has not yet materialised. In scenarios where damage has already occurred, Article 6.28 offers an articulation of the preventive function: 'The expenses of urgent and reasonable measures taken by the injured party to prevent the imminent occurrence of injury or the aggravation of injury are borne by the liable party or the party who would be liable if the jury occurred even when such expenses were incurred without success. The court may issue an injunction or interdiction against the liable party to prevent the aggravation of the injury that could result from the repetition or continuation of the harmful fact.'

It remains to be seen how the judiciary will welcome these new functions of tort law and how these new avenues will contribute to the construction of a law of torts fit for the 21st century and beyond.

4. Concluding Remarks

45. Since 1 January 2025, a new tort law has been in force in Belgium as part of the introduction of a new Belgian Civil Code. This development has resulted in the replacement of the long-standing Articles 1382 to 1386*bis* of the Code civil of 1804 with Book 6, entitled 'Tort Law'. The reasons for the successful implementation of the reform are multifaceted, yet straightforward in their efficacy: the presence of sufficient political will, the methodology employed during the reform process, and the objectives of the reform. The reform signifies a substantial shift in the comparative landscape, positioning Belgian tort law as a new player in the field, emerging from the shadow of Napoleon.

From a purely statutory perspective, the distinctiveness of the new Belgian tort law is evident in the number of novel provisions: whereas tort law was formerly governed by a mere six articles, the new Belgian tort law is now under the jurisdiction of forty articles (Arts. 6.1 to 6.40, with an additional fifteen articles addressing product liability (Arts. 6.41 to 6.55). However, this distinctiveness of Belgian tort law is also evident at its substantive level. While the new liability law does not aspire to a radical departure from the past and therefore codifies significant solutions and rules that had been developed through case law and legal scholarship over de past two hundred years, the legislative process has also demonstrated willingness to overturn long-established judicial solutions, such as on the concurrence between contractual and tortious claims. In doing so, the legislator demonstrated a notable openness to solutions inspired by foreign codifications (e.g., French, Dutch, and German law) and international harmonisation projects, such as the Draft Common Frame of Reference (DCFR) and the Principles of European Tort Law (PETL). Through this cross-fertilization, the new Belgian tort law exhibits a distinctive character that, while remaining firmly rooted in the Romanistic legal tradition, also exhibits a marked independence in its development.

This phenomenon invites reflection on the role and limits of legislative comparative law. In light of a political climate that become more and more unfavourable towards idealistic

[138] See N. SCHMITZ & E. VANSTECHELMAN, 'Le fonction préventive de la responsabilité civile dans le nouveau livre 6 du Code civil : une consécration contrastée' in P. Colson & F. George (eds), *Le nouveau livre 6 du Code civil*, pp 227-258; T. DERVAL & C.-E. LAMBERT, 'L'ordre et l'interdiciton préventis du dommage (art. 6.40 C. civ.)' in T. Malengreau (ed), *Le droit de la responsabilité civile extracontractuelle réformé*, p 295ff.

unification or codification projects at EU level[139], it is worthwhile to examine the extent to which sets of rules, such as the Principles of European Tort Law, result in convergence through national reforms and the development of persistent forces through divergent national solutions.[140] The addition of Belgian tort law to the map of comparative tort law expands the comparative law landscape, thereby providing a novel set of tort provisions for comparison and inspiration.

[139] On this, see U. MAGNUS, 'EU Private Law: A Zeitgeist-Idea From the Past' in A. Jansen, M. Lehmann & R. Schulze (eds), *The Future of European Private Law* (Baden-Baden: Nomos/Hart 2023) p 89ff.

[140] On the question whether, and under which conditions, competition betweel legal systems is a better alternative than uniformisation of the law, see M.E. STORME, 'Competition between Legal Systems in European Private Law: Towards a European Competition Law for Legal Systems?' in A. Jansen, M. Lehmann & R. Schulze (eds), *The Future of European Private Law* (Baden-Baden: Nomos/Hart 2023) p 365ff.