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Miquel Martín-Casals (ed.)

Children in Tort Law
Part I: Children as Tortfeasors

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Children in Tort Law
Part I: Children as Tortfeasors

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Preface

This book is the first result of a research project funded by the European Science Foundation and undertaken by the University of Bonn (Germany), the Scuola Superiore Sant'Anna (Pisa), the European Centre of Tort and Insurance Law (ECTIL) (Vienna) and the Observatory of European and Comparative Private Law of the University of Girona (OECPL) (Spain) and conducted under the coordination of these two latter institutions.

The background of this study was the fact that, although in many areas of law national legislators have developed rules dealing with children along very similar lines, in the area of tort law these rules are still very diverse from country to country. However, the need to honour the general principle of protection of children, generally acknowledged by international instruments and national provisions, and the necessity of striking a fair balance between this need of protection and the need to protect victims from harm caused by children is a common goal in all the legal systems analysed in this book.

The book includes country reports from Austria, Belgium, the Czech Republic, England and Wales, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain and Sweden and concludes with a Comparative report. As is well known, a comparative perspective has proven very productive in Europe over the last decades, not only for the benefits that the comparative method can bring to the national legislatures in their need to adapt the rules to the advance of society, but also for the tools that it provides for a better understanding of the different European legal cultures, including our own.

I would like to thank all contributors for tackling the difficult task of providing all essential information following a questionnaire that, for the fact that is common, may pose questions which at times have no easy answers from the point of view of the corresponding national legal system. Furthermore, I would like to thank the European Centre of Tort and Insurance Law, especially Julia Dörfel, Denis Kelliher, Christa Kissling, Simone Sartor, Donna Stockenhuber and Nora Wallner since, without their valuable assistance in producing this publication, this book would not have been possible. I owe thanks to Gerhard Wagner and to Giovanni Comandé for having contributed to obtaining and carrying out this project and to the European Science Foundation for placing their trust in us. Last but not least I am very indebted to Helmut Koziol, director of ECTIL, not only for his tireless efforts towards a better understanding among Europeans in this area of law, but mainly for enjoying his support and the privilege of his friendship over almost a decade.

Girona, January 2006 Miquel Martín-Casals

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13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

Country Reports

Children as Tortfeasors under Austrian Law

Susanna Hirsch

I. Short Introduction

According to § 153 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) persons over fourteen years of age are presumed to have sufficient powers of discernment to be fully responsible for their tortious behaviour. Persons under fourteen years of age are, on the other hand, rebuttably presumed not to be responsible. Nevertheless, in the individual case even the latter may have enough judgement to be held responsible for their actions and, therefore, liability based on fault could be established. 1

However, the liability of tortfeasors under fourteen years of age is, on the one hand, subsidiary to the liability of the parents or other persons who have a duty to supervise the minor (§ 1310 ABGB). The primary liability of the parents is established if they neglected their duty of supervision (§ 1309 ABGB). Thus the minor can only be sued if these persons did not neglect their duty of care or if they are indeed liable but unable to indemnify the victim. 2

On the other hand, even if the plaintiff is unable to obtain reparation of the damage by the primarily liable persons, the minor is not always obliged to compensate for the entire loss: The judge is allowed to impose liability on the minor for the whole of the damage or for an equitable part thereof. In determining liability and its extent, the judge has to consider the weight of three criteria: Fault is only one aspect to be taken into account when deciding liability of minors. The other two aspects are the plaintiff's lenient behaviour in refraining from defending himself and the pecuniary circumstances of the two parties. These three criteria have to be considered on an equal standing. Thus, even if the minor acted without subjective fault, he must indemnify the victim if the judge, in considering the financial situation, ascertains that it is much easier for the tortfeasor than for the victim to bear the whole loss or part of the loss. 3

As to contributory negligence, according to § 1304 ABGB, damages have to be partitioned in case the victim also, and not only the wrongdoer, acted negligently. If the victim is a person under fourteen years of age, the above mentioned rules on establishing a minor's liability have to be applied analogously. 4

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

5 In the Austrian legal system, persons over fourteen years of age are presumed to have sufficient powers of discernment to be fully responsible for their tortious behaviour (§ 153 ABGB).[1]

6 "Minors", i.e. persons under fourteen, are, on the other hand, rebuttably presumed not to be responsible, since they regularly lack discernment. Thus the injured party has to prove the minor's fault and therefore his discernment in the particular case. There is no fixed minimum age for children to be liable. Also "children", i.e. persons under seven, can possibly be held liable.[2]

7 Even if the minor acted with fault, the judge is allowed to impose liability only for an equitable part of the damage (§ 1310 ABGB).[3] The reasons for reducing compensation may be twofold: On the one hand, the mental capacities of the minor are not as developed as those of an adult and his discernment may be very slight.[4] Thus, the courts generally judge the fault of minors in a more lenient way than the fault of adults under the same circumstances.[5]

8 On the other hand, according to § 1310 ABGB, the pecuniary circumstances of both the plaintiff and the defendant have to be considered when establishing liability and deciding on the amount of the compensation. Thus the unfavourable pecuniary circumstances of the minor may speak for reducing the compensation.

9 However, it is important to emphasise that the liability of minors is subsidiary to the liability of their parents or other persons who are liable if they neglect their duty of supervision (§ 1309 ABGB). Only if it is impossible to identify one or more liable supervisors or if those supervisors are not able to compensate the damage, can the minor himself be sued.

[1] Thus the burden of proof that her mental capacities are inferior to the capacities of a person who has reached majority rests with the person over fourteen years of age.

[2] *Oberster Gerichtshof* (Austrian Supreme Court, OGH) in: *Entscheidungen des österreichischen Obersten Gerichtshofs in Zivil- und Justizverwaltungssachen* (SZ) 9/257.

[3] H. Koziol, *Österreichisches Haftpflichtrecht* II (2nd edn. 1984), 312.

[4] E. Bucher, Verschuldensfähigkeit und Verschulden in: *Pedrazzini-Festschrift* (1990), 288 et seq.

[5] [1976] *Zeitschrift für Verkehrsrecht* (ZVR), nos. 9, 73 and 140; [1982] ZVR, nos. 104, 132 and 342; [1988] ZVR, no. 39.

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

In the Austrian legal system minors are presumed not to be responsible. But this does not mean that responsibility under Austrian law rigidly depends on the attainment of the age of fourteen. If the tortfeasor is younger than fourteen, liability is based on his individual capacity to act reasonably. His fault, and therefore his capacity to act reasonably in the particular case, has to be proved by the injured party. Also persons under seven can possibly be held responsible. However, the fault of the minor is only one of three aspects to be taken into account when deciding liability (§ 1310 ABGB). The other two aspects are the plaintiff's lenient behaviour in refraining from defending himself and the pecuniary circumstances of the two parties. 10

Moreover, it should not be left out of consideration that the judge can oblige the minor to compensate the entire damage or only an equitable part of it, even if the minor acted with fault. 11

3. a) What is the exact significance of the term "capacity to act reasonably"?

The Austrian Civil Code does not employ the term "capacity to act reasonably". In legal doctrine two abilities are distinguished that could be summarised under this term: 12

- the ability to realise the wrongfulness of one's behaviour (discernment) and
- the ability to adjust one's behaviour according to this realisation.

b) Does the child have to realise the particular danger in the individual case (concrete danger), or is it sufficient that he understands that his action can in some way be dangerous (abstract danger)?

Fault refers to wrongful behaviour. Wrongfulness can be the result of the violation of a *Schutzgesetz* (protective law) which forbids abstractly dangerous behaviour by formulating imperative rules (§ 1311 sent. 2 case 2 ABGB). In this case, fault is established with respect to the violation of the imperative rules.[6] It is therefore sufficient that the child realises the abstract danger. 13

However, the legal system cannot always provide an imperative rule. But it does recognise protected positions by assigning rights or assets and thereby prohibiting the creation of concrete dangers to those rights. Wrongfulness is therefore based on the interference with a protected position by violating an objective duty of care. Fault has to be established with respect to the occurrence of damage. In this case, the predictability of the particular damage is decisive.[7] However, it is sufficient that fault concerns the endangerment or the 14

[6] Cf. H. Koziol, *Haftpflichtrecht* I (3rd edn. 1997), no. 5/31.
[7] R. Reischauer in: P. Rummel, *Kommentar zum ABGB* (2nd edn. 1992), no. 4.

infringement of a legally protected position; it need not necessarily relate to the details and the consequences thereof.[8]

c) Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

15 In the Austrian legal system, fault is based on the personal accusation of "defective will". Therefore the courts must not apply abstract yardsticks to certain age groups and thus automatically impute discernment if it can be assumed.[9] A subjective standard has to be applied.[10] It has to be determined whether the individual tortfeasor was able to realise the wrongfulness of his behaviour and to adjust his conduct according to this realisation.[11] Therefore the judge does not only have to take into account the minor's age but also the stage of his mental development and the way of his behaviour.[12] However, regarding the degree of attention and diligence an objective standard is applied (§§ 1294, 1297 ABGB). According to § 1299 ABGB an objective standard is also applicable when establishing the fault of experts.

16 In general, responsibility is all the more likely to be established the closer the tortfeasor is to reaching the age of fourteen.[13] If the tortfeasor is younger than seven years old, the establishment of fault is very exceptional. Still, according to the circumstances of the individual case, children under seven can also be held liable if they have enough discernment.

17 Further tendencies can be seen when examining judicial practice regarding various groups of similarly damaging acts:

i) Road traffic

- The minor as a pedestrian:

18 The decisions regarding road accidents with minors are legion.[14] The courts consider that a normally developed minor has the necessary discernment to take part in road traffic as a pedestrian on his own if he is approximately seven years old or older and if the traffic situation is not especially complicated.[15]

[8] See for example [1971] *Juristische Blätter* (JBl), 312.
[9] R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 4.
[10] H. Koziol, Liability Based on Fault: Subjective or Objective Yardstick?, [1998] *Maastricht Journal of European and Comparative Law* (MJ) 5, 111 et seq.; H. Koziol, Characteristic Features of Austrian Tort Law in: H. Hausmanninger/H. Koziol/A. Rabello/I. Gilead (eds.), *Developments in Austrian and Israeli Private Law* (1999), 172 et seq.
[11] R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 4; [1974] ZVR, no. 39.
[12] Still certain tendencies concerning the responsibility of normally developed minors are recognisable when looking at the practice of the courts.
[13] R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 4.
[14] However, most decisions concern contributory negligence of minors who have been injured (§ 1304 ABGB in conjunction with § 1310 ABGB analogously).
[15] OGH 30 March 1978, 2 Ob 15/78.

Special importance is attached to whether the child already attends primary school or not. If the minor has been attending school for at least some months,[16] this implies a certain knowledge and experience regarding road traffic, as pupils are taught how to behave correctly in traffic and, in general, they have become familiar with everyday traffic situations because of their daily journey to school. Thus, a six-years-old normally developed child, who attended kindergarten but had not yet attended school, was not considered capable of generally recognising if his behaviour in traffic was forbidden or not, let alone of always acting according to the instructions given by parents or other tutors. This is held to be even more true in a complex traffic situation.[17] 19

However, according to § 1310 ABGB, the circumstances of the individual case are always decisive: Thus a child who is well instructed in how to behave correctly in road traffic can be held liable, unlike a minor whose education has been neglected in this respect.[18] 20

Neither was an eight-year-old child who was not acquainted with taking part in road traffic on his own as a consequence of his special personality traits and his retarded development considered to have the necessary capacity to act reasonably.[19] 21

On the other hand, the Austrian Supreme Court (*Oberster Gerichtshof*, OGH) held that a child of nine years of age who attended a special school for pupils with a low IQ, who are not able to meet the demands of a normal school, could be expected to have enough knowledge of the necessary precautionary measures when crossing a heavily frequented street.[20] 22

- Riding a bike:

§ 65 *Straßenverkehrsordnung* (Road Traffic Regulations, StVO)[21] allows minors of at least twelve years of age to ride a bike without being supervised. If the child has completed the tenth year of his life and it can be presumed that he has the necessary physical and mental aptitude as well as knowledge of the regulations concerning traffic, he can obtain a permission to ride a bike without being supervised. 23

[16] In Austria pupils generally start school at the age of six.
[17] OGH in: *Ehe- und familienrechtliche Entscheidungen* (EFSlg) 36.170; EFSlg 48.638.
[18] OGH 14 October 1980, 2 Ob 115/80; [1981] ZVR, no. 168.
[19] OGH 27 January 1972, 2 Ob 243/71.
[20] EFSlg 36.174.
[21] § 65 StVO: Use of a bicycle:
(1) The rider of a bicycle (cyclist) has to be at least twelve years old; children under twelve years of age are allowed to ride a bicycle only under the supervision of a person who has completed the sixteenth year of her life or with an official authorisation. (…)
(2) The authorities must give the permission under sec. 1 on application of the minor's legal representative if the child has completed the tenth year of his life and it can be presumed that he has the necessary physical and mental aptitude as well as knowledge of the regulations concerning traffic.

24 According to the courts, from § 65 StVO it emerges that the legislator thinks a twelve- or, under certain circumstances, even a ten-year-old minor capable of riding a bicycle without being accompanied by a supervisor. However, this admission does not imply that children of this age are responsible to the same extent as adults: If the minor is held liable, it is the established practice of the courts that the fault of minors has generally to be judged in a more lenient way than the fault of an adult.[22]

- Minors "driving" cars:

25 A 13-year-old bright and quick-witted boy, who worked as a temporary helper for a petrol station and thus had a good knowledge of the use and the dangers of cars, caused injury to a person by starting a car and letting it leap forwards. He was held to have acted with fault.[23]

ii) Playing with fire

26 According to the courts,[24] the considerations concerning road traffic cannot be directly applied to cases regarding playing with fire, since children are, in general, more familiar with everyday traffic situations because of their daily journey to school.[25]

27 The OGH attaches special importance to whether the minor who played with fire was in an inflammable environment (wood, barn), where he could have realised the danger for objects and for persons, or if the environment was not evidently inflammable. Thus the Supreme Court held that a six-and-a-half-year-old was not able to realise that a burning match, when thrown on a parked car, could cause a fire in the engine block.[26] Neither was a minor of eight considered to be able to realise that kindling an easily inflammable liquid in a bucket far away from any burnable object could cause danger for persons.[27]

28 In an evidently inflammable environment the courts establish fault more easily. However, a mere five-year-old, who caused a fire in a barn, was considered to lack the necessary discernment to realise the danger in playing with matches.[28] This was also held for a boy of the age of six.[29]

iii) Personal injury by throwing or shooting

29 A seven and a half-year-old normally developed child who attended the second year of primary school was considered to have the necessary discernment

[22] [1979] ZVR, no. 32.
[23] [1976] ZVR, no. 14.
[24] EFSlg 27.189.
[25] R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 4.
[26] [1982] *Österreichische Richterzeitung* (RZ), 67.
[27] EFSlg 31.516.
[28] SZ 47/43.
[29] [1989] *Versicherungsrundschau* (VR), 170.

to realise that the throwing of a hard object in the direction of someone's face from a distance of only two to three metres was not only a dangerous act but could lead to major injuries.[30]

Also a boy of the age of eight who threw a stick of sixty centimetres in length towards another minor from a distance of five metres was held culpable. He was normally developed and conveyed the impression of being able to realise that his behaviour could injure the victim.[31] 30

On the other hand, a boy of almost ten who filled a rifle with chalky dust and shot in the direction of another person was not considered to act with fault. The OGH considered that the boy could not be expected to realise that already relatively small quantities of chalky dust can cause cauterisations merely by being brought into contact with the eyes.[32] 31

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy?

The "capacity to act reasonably" under Austrian law is understood as a factual ability. This ability cannot be influenced by a liability insurance policy. 32

However, the fact that the minor is covered by liability insurance is not only significant when establishing liability in equity (see infra nos. 58 et seq.) but is also significant in assessing compensation for culpable behaviour. If the minor is liable because his fault in the particular case has been proved by the plaintiff, the judge can reduce damages considering the minor's unfavourable pecuniary circumstances. A liability insurance covering the child can prevent the reduction of damages, since it improves the tortfeasor's capacity to bear the damage (see infra nos. 48 and 78).[33] 33

Moreover, it is to be presumed that, although without a legal basis, liability insurance is often taken into account by the courts when establishing liability, especially in assessing tort responsibility.[34] 34

5. What is the standard of care applicable to children?

Solely objective factors are decisive in determining unlawfulness: A general standard must be applied in answering the question of which conduct is wrongful and, therefore, the standard of care applicable to children is the same as that applicable to adults. Only fault has to be judged when considering the 35

[30] EFSlg 48.640.
[31] [1961] JBl, 282.
[32] [1970] *Evidenzblatt der Rechtsmittelentscheidungen* (EvBl; part of *Österreichische Juristenzeitung*, ÖJZ), no. 377.
[33] H. Koziol (supra fn. 3), 313.
[34] H. Koziol (supra fn. 6), no. 1/8.

individual abilities. But even regarding the degree of attention and diligence, an objective standard is applied (§§ 1294, 1297 ABGB). The ordinary degree of attention and diligence of children of the particular age is required.

6. Are children held to a higher standard of care if they engage in "adult activities"?

36 As mentioned before, in establishing wrongfulness an objective standard of care always has to be applied. Therefore, children are held to the same objective standard of care as adults.

37 As to fault, a subjective yardstick has to be employed and, therefore, under Austrian law children are generally not held to a higher standard if they engage in "adult activities".

38 However, it has to be mentioned that, according to § 1299 ABGB, an objective standard is applicable when establishing the fault of experts, who have to guarantee the necessary diligence and the necessary (not just ordinary) knowledge. An expert under § 1299 ABGB is anyone who carries out a profession that demands special abilities such as a lawyer, an architect, an alpine guide etc.[35] Thus § 1299 ABGB will generally be inapplicable to tortious activities of minors.

39 Moreover, it is important to stress that the requirement of responsibility and therefore of the capacity to act reasonably is not removed by § 1299 ABGB.[36]

40 However, the minor's *Einlassungsverschulden* (fault of venture)[37] has to be considered: In Austria it is generally acknowledged that a person who lets herself in for a situation she cannot master acts negligently if she realised the dangerousness of the situation. Thus, the absence of care at a time prior to the damaging act is taken into account when establishing fault. If, therefore, the minor had the necessary capacity to realise the dangerousness of the situation, but still involved himself in it, he can be held culpable if he lacked the necessary skills.

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

41 Under Austrian law, the liability of a minor may be established even if the wrongdoer lacks the capacity to act reasonably. Liability is then not based on

[35] Also the negligence of car drivers is measured by an objective standard. Cf. [1966] ZVR, no. 115.
[36] Cf. R. Reischauer in: P. Rummel (supra fn. 7), § 1299 no. 7.
[37] Also the term "*Übernahmeverschulden*" is employed in this respect.

fault but results from the consideration of the plaintiff's and the defendant's pecuniary circumstances (§ 1310 ABGB).[38] However, the tortfeasor's greater financial capacity to bear the damage only replaces fault but not wrongfulness as an element establishing liability. Thus the violation of an objective duty of care is required.

Whether or not this way of establishing liability is to be qualified as based on equity is controversial in doctrine since firstly, the judge has to found his decision on the consideration of the wrongfulness of the tortfeasor's behaviour and the pecuniary circumstances and secondly, under Austrian law, elements other than fault[39] are also recognised when establishing liability. 42

Moreover, it has to be stressed that the consideration of the pecuniary circumstances is not to be understood as subsidiary,[40] but rather on an equal standing with the two other elements of § 1310 ABGB: the fault of the tortfeasor and the plaintiff's lenient behaviour in refraining from defending himself.[41] The judge has to weigh the intensity of all three aspects when imposing compensation. 43

8. a) Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard?

The defendant's and the plaintiff's pecuniary circumstances both have to be taken into account if the minor acted wrongfully but is not held to be responsible and would thus not be liable according to the rules on liability based on fault; on the other hand, they also have to be considered if the minor has the necessary capacity to act reasonably and acted with fault. It therefore has to be stressed that the consideration of the pecuniary circumstances is not to be understood as subsidiary to the element of fault in § 1310 ABGB.[42] 44

Taking into account the parties' financial positions can thereby influence the determination of compensation in two ways: 45

[38] § 1310 ABGB is, aside from § 1306a ABGB (responsibility in case of necessity), the sole provision that takes into account the pecuniary circumstances for the establishment of liability and the determination of the extent of the damages. For the relevance of the pecuniary circumstances see W. Wilburg, *Die Elemente des Schadensrechts* (1941), 23 et seq. and 81 et seq.; F. Bydlinski, *System und Prinzipien des Privatrechts* (1996), 218 et seq.

[39] Cf. W. Wilburg (supra fn. 38), 23.

[40] Former court practice decided differently, (see, for example, SZ 45/69; [1976] ZVR, no. 14). It held that § 1310 third case ABGB had to be considered only subsidiarily, i.e. if the other cases of § 1310 do not justify the establishment of liability. This was concluded from the word "finally" in § 1310 ABGB.

[41] Cf. R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 10; SZ 45/69; EFSlg 48.636.

[42] Cf. R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 10.

46 On the one hand, the tortfeasor's higher capacity to bear the loss can justify the establishment of liability if the minor acted merely wrongfully or the imposition of higher partial damages if the minor acted with fault.[43]

47 On the other hand, the tortfeasor's unfavourable pecuniary circumstances can justify a reduction of the compensation even if the minor acted with fault.[44]

48 Since liability insurance covering the tortfeasor improves his capacity to bear the damage, the fact of the child being covered by liability insurance can also prevent the reduction of damages (see infra nos. 78 et seq.).[45]

b) What are the factors of equity?

i) Intensity of violation of legal duty (negligence, gross negligence, intention)

49 Under Austrian law neither the intensity of wrongfulness nor the intensity of fault are considered to be factors of equity. However, the intensity of the violation of a legal duty is of general importance when establishing liability and when determining the extent of compensation. Since the following are general rules they are also applicable when determining the liability of minors.

50 Intensity of wrongfulness: Since wrongfulness is only one element establishing liability, part of the doctrine[46] holds that the intensity of wrongfulness, and thus its importance as an element establishing liability, can vary. Its weight would depend especially on the value of the asset endangered, the degree of endangerment, the interests pursued by the acting person, and the degree of the neglect of the objective duty of care. A high intensity of wrongfulness could justify liability even if the degree of another element of tort (e.g. adequacy) is only very low. Further, the weight of wrongfulness can influence liability if the latter is not based on fault but mainly on wrongfulness or when considering contributory negligence.

51 Intensity of fault: Similarly it is held[47] that the degree of fault may influence the establishment of damages. A higher intensity of fault could make up for the slighter intensity of other factors establishing liability. In particular the boarderline of adequacy has to be extended if the tortfeasor acted with intent.

52 Moreover the intensity of fault is decisive when determining the extent of compensation. According to § 1324 ABGB, the injurer only has to indemnify

[43] Cf. R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 10.
[44] H. Koziol (supra fn. 3), 312 et seq.
[45] H. Koziol (supra fn. 3), 313.
[46] This idea has above all been developed by W. Wilburg (supra fn. 38), 48 and 242 et seq.; H. Koziol (supra fn. 6), nos. 4/18, 8/16, 12/16; R. Reischauer in: P. Rummel (supra fn. 7), § 1304 no. 5; M. Karollus, *Schutzgesetzverletzung* (1992), 212 et seq.
[47] W. Wilburg (supra fn. 38), 26 et seq. and 242 et seq.; see also H. Koziol (supra fn. 6), no. 5/5 and 8/16.

the actual loss if he acted with slight negligence.[48] The assessment of the damage has to be carried out in an objective-abstract way.[49]

Only if the tortfeasor acted with gross negligence or intent will he also be liable for lost profit. The entire subjective-concrete loss of the plaintiff has to be calculated using the *Differenzmethode*: The injured party's hypothetical wealth that would exist if the damaging act had not occurred is compared to the plaintiff's actual wealth.[50] 53

The degree of fault is also important when establishing compensation for immaterial damage. Immaterial damage, in general, only has to be indemnified in money if the defendant behaved with gross negligence or intent (§§ 1323, 1324 ABGB). However, in the case of personal injury, the tortfeasor has to compensate for pain and suffering even if he only acted with slight negligence (§ 1325 ABGB), since the right encroached upon is of very high rank and there is objective evidence about the seriousness of harm.[51] 54

ii) Wealth of child and victim

"Liability in equity" in the ABGB is based on the consideration of the tortfeasor's and the victim's economic circumstances. The idea that a loss affects a rich person less severely than a poor one makes it seem more reasonable for the wealthy person to bear the damage.[52] Although the ABGB refers to the parties' assets, according to the prevailing opinion,[53] the greater capacity to bear the loss is decisive. Thus earnings have also to be taken into consideration.[54] The parents' assets are not to be taken account of. 55

When considering the plaintiff's and the defendant's financial circumstances, the moment of the end of the hearings of the first instance is decisive.[55] This is inferred from § 406 Code of Civil Procedure (*Zivilprozessordnung*, ZPO). 56

[48] Thus, the ABGB recognises alongside compensation, the primary principle of tort law, also the ideas of sanction and prevention. (See H. Koziol (supra fn. 6), no. 1/16 and W. Wilburg (supra fn. 38), 50 et seq.).

[49] Prevailing opinion, cf. F. Bydlinski, *Probleme der Schadensverursachung* (1964), 28.

[50] However, the compensation of the objective-abstract damage is considered the minimum that the plaintiff can claim, even if the subjective-concrete loss is inferior to it. This results from the idea of legal continuity and from the idea that a victim injured by grossly negligent behaviour shall be able to claim what the tortfeasor would have had to compensate anyway when acting with slight negligence (H. Koziol (supra fn. 6), no. 2/76).

[51] H. Koziol (supra fn. 6), no. 2/4. On the other hand, if property is damaged, sentimental value has only to be compensated if the tortfeasor acted with special forms of intent (§ 1331 ABGB).

[52] W. Wilburg (supra fn. 38), 23.

[53] R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 9; H. Koziol (supra fn. 6), no. 7/1; A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts* II/2 (2nd edn. 1928), 679; [1974] EvBl, no. 249.

[54] K. Wolff in: H. Klang, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* VI (2nd edn. 1951), § 1306a, 72.

[55] A. Ehrenzweig (supra fn. 53), 680; F. Kerschner, Freiwillige Haftpflichtversicherung als „Vermögen" iS des § 1310 ABGB?, [1979] ÖJZ, 289; SZ 60/180; SZ 68/110.

57 However, the "financial means" *in se* are of little importance in practice, since the pecuniary circumstances of minor tortfeasors are usually rather modest.[56] Minors are, on the other hand, often covered by liability insurance. This fact has given rise to a Supreme Court practice which considers liability insurance covering the minor a part of his assets.

iii) The fact of the child carrying liability insurance

58 When deciding "in equity", the courts attribute significant importance to insurance coverage – both when establishing the child's liability in equity and when assessing compensation for culpable behaviour. This is objected to in parts of the doctrine, which point out that the function of liability insurance is to cover an existing liability and not inversely to cause or extend liability.

- Court practice:

59 The Supreme Court's practice has developed gradually: The first decision in point[57] dates back to 1969 and concerns the reduction of damages for reasons of equity. In this case the OGH denied a reduction in equity[58] because the impecunious tortfeasor was covered by liability insurance. The minor's prospective claim against the insurance company was qualified as being part of the minor's assets.

60 In a subsequent decision[59] the OGH, obiter, repeated that optional liability insurance is to be qualified as financial means according to § 1310 ABGB. It, however, declared that the sole fact that the tortfeasor was covered by liability insurance does not justify the establishment of liability but can only influence the assessment of the compensation. Accordingly, liability of the child arises only if factors other than the insurance coverage support the imposition of liability. In this decision, the Austrian Supreme Court followed the German court practice[60] concerning § 829 *Bürgerliches Gesetzbuch* (German Civil Code, BGB),[61] which resembles § 1310 ABGB.[62] Moreover, the OGH held the opinion that the tortfeasor's insurance coverage would not exclude a solely partial compensation, although the plaintiff's claim was fully covered by the guarantee fund.

61 In the following[63] the OGH, however, changed this restrictive opinion, explicitly dissenting from its previous decision: In this case the court established the minor's liability although the tortfeasor was not culpable, and the injured had

[56] Cf. e.g. [1974] EvBl, no. 234.
[57] [1969] JBl, 503 et seq.
[58] The minor tortfeasor was impecunious.
[59] SZ 45/69.
[60] *Bundesgerichtshof* (German Supreme Court, BGH), 18.12.1976, [1976] *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (BGHZ), 279 (286); cf. J. Oechsler in: J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, vol. II (13th edn. 1998), § 829 no. 49.
[61] § 829 BGB speaks of "circumstances, particularly financial circumstances".
[62] F. Kerschner, [1979] ÖJZ, 282 et seq.
[63] SZ 47/43.

not refrained from defending himself in order to protect the minor. Liability was solely based on the violation of an objective duty of care and the defendant's insurance coverage. The court reasoned that when establishing liability according to § 1310 ABGB, the judge should not only consider the parties' financial means but rather their "capacity to bear the damage". Since liability insurance increases the tortfeasor's capacity to bear the damage, an impecunious minor could also be held liable as far as the damages do not go beyond the amount of the insurance fund.[64] To the extent that this amount is not exceeded, compensation is generally to be adjudged for the whole damage. Finally the OGH repeated that a minor's prospective claim against the insurance company was to be qualified as an asset in the sense of § 1310 ABGB. This opinion has become established practice.[65]

- Doctrine:

The judicial practice that establishes liability up to the amount of the guarantee fund of insurance coverage is approved by Pfersmann,[66] who heavily criticised the prior decision[67] in which the OGH acknowledged only a limited influence of the minor's liability insurance on liability. 62

The practice of the courts, however, does not meet with general approval. Albert Ehrenzweig[68] reproves the logical error in considering liability insurance when establishing liability. The function of liability insurance was to cover an existing liability and not inversely to cause or extend liability. This error which lies in the fact of circular reasoning was known in logic as *hysteron proteron*, a subcategory of the *petitio principii*. 63

Kerschner[69] also objects to the established practice of the courts and defines the requirements of a repercussion of insurance coverage on liability as follows: On the one hand, tort law must demand the consideration of liability insurance. On the other hand, insurance law must permit the repercussion. Only if both criteria are met, would such a repercussion be possible. 64

According to Kerschner, the first requirement is met: In compliance with the *telos* of § 1310 third case ABGB, the judge has to consider the tortfeasor's capacity to bear the damage. § 1310 would also, therefore, require a consideration of the fact of a third party covering the loss instead of the tortfeasor himself. 65

[64] If, however, the minor acted with fault, the OGH also imposes damages that exceed the insurance fund, even if the tortfeasor is impecunious (see [1977] RZ, 87).
[65] See, for example, [1975] ZVR, no. 196; [1977] RZ, 87; [1979] VR, 67; SZ 52/168; [1981] ZVR, no. 168.
[66] H. Pfersmann, Bemerkenswertes aus der SZ 45, [1975] ÖJZ, 256.
[67] SZ 45/69.
[68] A. Ehrenzweig, [1953] *Versicherungsrecht* (VersR), 80 however regarding the influence of insurance coverage on adjusting compensation for pain and suffering.
[69] F. Kerschner, [1979] ÖJZ, 282 et seq.

66 Concerning the second issue, Kerschner underlines the importance of taking into account the terms of the individual policy contract. The judge would have to establish, by interpretation, whether damages that result from the fact of being insured, or that are increased due to this fact, are intended to be covered. If this is true, according to Kerschner, liability insurance has to be considered as financial means when establishing liability under § 1310 ABGB. If, on the other hand, the insurance contract does not cover such claims, Kerschner[70] states that one would commit the error of circular reasoning when approving the repercussion of insurance on liability.

67 Apart from this logical argument, Kerschner, in his critique, emphasises the interference of such a practice with private autonomy. A repercussion contrary to the intention of the contracting parties would be incomprehensible, since it would interfere with the policy contract drawn up, imposing duties on the insurance companies which they never assumed and, thereby, changing the contract goods.

68 However, since an explicit provision for whether claims resulting merely from insurance coverage shall be covered or not is hardly ever made in the contract, the question arises how far liability insurance coverage (generally) reaches. When interpreting the policies, § 149 Law on Insurance Contracts (*Versicherungsvertragsgesetz*, VVG) is decisive on the one hand. On the other hand, § 914 ABGB, which contains general rules on interpreting declarations *inter vivos*, provides that the hypothetical intentions of the parties have to be examined when it comes to completive interpretation.

69 § 149 VVG contains the legal definition of liability insurance:

> "Liability insurance engages the insurer to refund the insured the expenditure which the latter has made to a third party because of his responsibility for a fact that has occurred during the insurance period."

70 According to Kerschner, this provision is based on the separation of liability and insurance because it requires the insured's own personal responsibility for insurance coverage. Since in the cases under consideration the minor would not be liable at all, or only to a smaller extent without insurance coverage, he holds that the damages allowed by the courts in case of liability insurance coverage do not originate in "his responsibility".[71] Therefore, according to Kerschner, § 149 VVG does not allow the consideration of liability insurance. Even if § 149 VVG were not explicitly included in the wording of the contract, it would still be of great importance in its function as a complementary dispositive law.

[70] Referring to A. Ehrenzweig, [1953] VersR, 80.

[71] See also P. Hanau, Rückwirkungen der Haftpflichtversicherung auf die Haftung, [1969] VersR, 293 et seq.

Further, Kerschner points out that the parties' interests also suggest a separation of liability and insurance: First of all, the insurance companies are obviously interested in keeping their risk of performance low. Moreover, they need to keep the premiums down in order to encourage the conclusion of optional insurance contracts. However, the obligation to perform in every case of a non-responsible minor violating an objective duty of care would necessarily lead to a premium increase which may discourage people from taking out insurance policies. 71

Kerschner also holds that the interests of the policy holder speak in favour of a repercussion of insurance coverage on liability: Nobody would like to pay a premium in order to be subject to more or higher damages claims. Nor would one be delighted by the inevitable increase of the insurance rates. 72

Thus, Kerschner concludes – according to the general rules on interpretation – that the parties' interests clearly speak against the consideration of potential insurance coverage when establishing liability or assessing compensation. He, therefore, infers that the practice of the courts was untenable. Moreover Kerschner stresses that the result of not taking into account the fact of the minor tortfeasor being covered by liability insurance would not lead to major inequities, because the most important cases, i.e. cases with personal injury, are only a matter of ascertaining which insurance, namely liability insurance or social insurance, has to reimburse the treatment costs. However, rejecting the repercussion of insurance coverage on liability worsens the position of the injured party when compensation for pain and suffering or annuities are concerned and in cases of property damage. 73

The only possible point of reference remaining in order to establish liability would thus be the mere fact of the tortfeasor being insured, since this fact would really be independent from liability. But Kerschner points out that, apart from the difficulties in assessing this state numerically, the mere fact of being insured would not represent an asset. 74

Finally, Kerschner discusses the question of whether a limitation of liability insurance, to claims arising irrespective of the insurance, was to be qualified as a contract with an onus on a third party and therefore offending public policy. Since taking out a liability insurance policy for minors is not mandatory in Austria, the entire definition of the contract and all its contents are at the discretion of the parties, as long as the contract does not disadvantage the victim in comparison with the situation without a policy contract.[72] Kerschner points out that this is not the case and thus no objections are raised. 75

[72] Kerschner emphasises that liability insurance on the contrary even leads to an improvement of the victim's position. If an impecunious tortfeasor has to compensate the injured according to § 1310 case 1 or 2 ABGB, a further guarantee fund exists that would not exist without the insurance coverage. Therefore no objections can be made against a policy contract designed that way. See F. Kerschner, [1979] ÖJZ, 285.

76 Posch also criticises the Supreme Court's practice of establishing liability in equity because of insurance coverage since this would mean an intensification of the consideration of social aspects at the expense of logical consequence.[73] He points out that this practice, however, was to be understood only as one element of a ubiquitous tendency in tort law, namely to shift the negative consequences of the damage as far as possible from the individual to the collective, usually personified by an insurance corporation.[74]

77 Koziol, too, has criticised the judicial practice: Liability insurance could not justify liability because of the so-called *Trennungsprinzip* (principle of separation). According to this principle, the insurers' obligation to perform follows the victim's claim against the insured and not inversely.[75]

78 Koziol, however, emphasises that the fact that the tortfeasor is covered by liability insurance can still affect liability under certain circumstances: If the minor or mentally disabled tortfeasor does not lack the necessary discernment and his liability can therefore be established, his unfavourable economic circumstances could justify a reduction or even denial of compensation. In such a case the insurance coverage would prevent the reduction of the damages since it increases the tortfeasor's capacity to bear the damage.[76]

79 Koziol's view is thus intermediary between the judicial practice and Kerschner's critique: That the minor is covered by liability insurance cannot justify the establishment of liability; it can, however, prevent the reduction of compensation due to the tortfeasor's impecuniosity if other legal reasons would justify liability.

- Is there a difference between compulsory and optional liability insurance?

80 In Austria, obligatory liability insurance is considered an exception from the general system of insurance law. The VVG contains special provisions on mandatory insurance only in the §§ 158b–158i. Of special importance is § 158c VVG: Even if the insurer is free from his obligations towards the insured, his obligation is still valid towards the victim within the mandatory minimum amount of insurance.[77] This shows that by prescribing obligatory insurance the legislator also intends to protect the victim.

81 In the court practice and in doctrine, the question whether compulsory liability insurance influences liability is scarcely dealt with.

82 Kerschner not only objects to the consideration of optional[78] but also of compulsory liability insurance even if he acknowledges that providing for compul-

[73] W. Holzer/W. Posch/B. Schilcher, Was kommt nach dem Sozialschaden?, [1978] *Das Recht der Arbeit* (DRdA), 232 et seq.
[74] W. Holzer/W. Posch/B. Schilcher, [1978] DRdA, 210.
[75] J. Oechsler in: Staudinger (supra fn. 60), § 829 no. 52.
[76] H. Koziol (supra fn. 6), no. 7/1, fn. 2.
[77] Cf. M. Schauer, *Das österreichische Versicherungsvertragsrecht* (3rd edn. 1995), 412.
[78] In cases where claims based only on liability insurance are not included in the policy contract.

sory liability insurance also or first and foremost serves to protect the victim. He stresses, however, that liability in equity would thus no longer be the exception but rather the rule which would be contrary to the intention of the law.[79]

iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

- Practice of the courts:

83 According to the practice of the courts,[80] the fact that the victim is insured by a private insurance company (e.g. fire insurance, full-coverage collision insurance) or the social security system (e.g. health and accident insurance) is to be taken into account when deciding "in equity" as the judge has to consider the financial situation of both parties:[81] The determining criterion for establishing compensation is the relative economic position of the malefactor vis-à-vis the plaintiff. Since it is taken into account that compensation does not burden the tortfeasor economically as far as a liability insurer has to reimburse him, it must not be disregarded that, likewise, a damage indemnified by an insurance company does not burden the victim economically. The indemnification of the victim by his insurer would therefore equate the victim's and the (insured) tortfeasor's economic position as, according to the OGH, the insurance claim is to be qualified as part of the victim's financial means. Thus, the fact that the plaintiff is insured is considered to reduce compensation, and, as a consequence, the victim's insurer's recourse basis is limited. When assessing the damages, the relative proportion of the damage to the sum of the insurance funds is decisive.[82] This ratio is then multiplied with the tortfeasor's insurance fund. Only the thus reduced damages claim devolves to the plaintiff's insurer according to § 67 VVG or § 332 *Allgemeines Sozialversicherungsgesetz* (Austrian General Social Insurance Act, ASVG) (assignment by law).[83]

84 If, however, the tortfeasor acted with fault, the OGH still takes into account the insurance coverage of both parties as all criteria in § 1310 ABGB have to be considered, but the Supreme Court emphasises that the defendant's fault is to be given more weight: In such a case it would be inappropriate to take into account the tortfeasor's liability insurance only according to the proportion of the insurance funds.[84]

85 Sometimes insurance benefits (e.g. benefits from an accident insurance) also serve to cover disadvantages that have no connection with the damages claims

[79] F. Kerschner, [1979] ÖJZ, 288.
[80] This was established first in SZ 52/16, explicitly disapproving the previous decision OGH 1 September 1977, 7 Ob 45/77.
[81] Cf. R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 9.
[82] Cf. [1982] JBl, 149 et seq.
[83] [1989] VersR, 427.
[84] OGH 4 October 2000, 9 Ob 181/00h.

raised against the tortfeasor. In such a case[85] the OGH considered a reduction of compensation inequitable because of such insurance payments.

- Doctrine:

86 Kerschner pronounces himself in favour of a consideration of the injured's insurance, since such insurance payments generally have to be effected irrespectively of the liability of a tortfeasor. And he stresses that the *Prinzip der versagten Vorteilsausgleichung* (principle of denied consideration of benefits) of insurance payments could thus be ignored[86] when deciding in equity.[87]

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

87 The liability of minors is always subsidiary to the liability of their parents or other persons who are liable if they neglected their duty of supervision (§ 1309 ABGB).

88 Only if it is impossible to identify one or more liable supervisors, if those supervisors are not able to compensate the damage, or if they are of unknown abode can the minor himself be sued according to § 1310 ABGB.[88] Thus, whether the injured party can obtain damages according to § 1309 ABGB is a preliminary question for the decision according to § 1310 ABGB.[89] The impossibility of receiving compensation from the supervisor has to be proved by the claimant.[90]

89 Regarding the supervisor's financial ability to compensate the damage, a (futile) attempt to enforce the damages claim[91] on the negligent and thus liable guardian is required if it is doubtful whether damages can be collected from him.[92] If, on the other hand, the injured party is able to prove that the compensation cannot be obtained from the negligent supervisor (e.g. proof of insolvency),[93] a lawsuit against the latter is not required. The decisive moment for judging this question is the end of the hearings of the first instance (§ 406 ZPO).

[85] SZ 69/156.
[86] Being dogmatically exact, this does not lead to a "consideration of benefits" in the original sense, since the compensation is not reduced to the full extent of the insurance benefits. The latter influence the amount of damages only indirectly by being considered an asset according to § 1310 ABGB.
[87] F. Kerschner, [1979] ÖJZ, 288.
[88] K. Wolff in: H. Klang (supra fn. 54), 78; F. Harrer in: M. Schwimann, *Praxiskommentar zum ABGB* VII (2nd edn. 1997), § 1310 no. 3; R. Reischauer in: P. Rummel (supra fn. 7), § 1310 nos. 2 and 11.
[89] [1969] JBl, 503 et seq.; [1984] ZVR, no. 323.
[90] [1969] JBl, 503 et seq.; [1984] ZVR, no. 323.
[91] SZ 20/241.
[92] R. Reischauer in: P. Rummel (supra fn. 7), § 1310 no. 11; SZ 20/241.
[93] EFSlg 33.756; [1984] ZVR, no. 323.

However, if liability or the possibility to collect the damages is uncertain, it is considered admissible to consolidate the actions against the supervisor and the minor.[94] In case it turns out that the supervisor is impecunious and thus at the moment not able to compensate the damage, the OGH holds the minor tortfeasor and the supervisor jointly and severally liable.[95] This is considered an exception from the general rule in judicial practice[96] and in doctrine,[97] according to which the minor and the supervisor cannot be held jointly and severally liable with a view to §§ 1309 and 1310 ABGB. 90

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

Under the various provisions of strict liability based on a source of special danger, in general, the "keeper" (*Halter*) of the dangerous object is held liable. There is no legal definition of the notion "keeper" but, generally speaking, a keeper is considered to be a person who is in control of the risk and who benefits from the source of danger.[98] This does not necessarily have to be the owner of the dangerous object.[99] 91

Since strict liability is not based on some personal reproach, minors can be held liable as keepers of dangerous things just like adults.[100] 92

However, the decisive and controversial question is how a minor can obtain the legal status of a keeper (e.g. of an animal[101] or of a motor vehicle). Since the Austrian legal literature in point is rather scant and often refers to the more extensive German doctrine,[102] some German contributions to the discussion shall also be considered in this report. Thus, examining the legal literature in point, three opinions can be distinguished: Besides the complete irrelevance of 93

[94] R. Reischauer in: P. Rummel (supra fn. 7), no. 11; [1971] EvBl, no. 74.
[95] SZ 68/110.
[96] [1971] EvBl, no. 74; [1992] ZVR, no. 151.
[97] F. Harrer in: M. Schwimann (supra fn. 88), § 1310 no. 5.
[98] See B.A. Koch/H. Koziol, Austria, in: B.A. Koch/H. Koziol, *Unification of Tort Law: Strict Liability* (2002), 23 nos. 64 et seq.
[99] B.A. Koch/H. Koziol (supra fn. 98), no. 63.
[100] See already *Sammlung von Zivilrechtlichen Entscheidungen des k.k. Obersten Gerichtshofes* (GlUNF), no. 6444.
[101] Liability for animals holds an intermediate position between liability based on fault and strict liability, as it is not based on fault but, contrary to strict liability, requires the violation of an objective duty of care. However, since liability for animals is – apart from the violation of an objective duty – based on the idea that animals are a special source of danger because of their unpredictable behaviour, in this context also becoming a keeper of an animal shall be dealt with.
[102] The latter can also be taken into account in Austria, because of a certain similarity of the relevant provisions in Austria and Germany.

minor age, an application of the rules on the capacity to contract on the one hand and of those on tort responsibility on the other hand is considered.

a) Irrelevance of minor age

94 Especially in the earlier legal literature,[103] it is held that a minor would be generally able to establish the legal status of a keeper on his own and without the knowledge of his legal representative – independently of his capacity to contract and his tort responsibility. This opinion is premised on the rule that strict liability is not based on any personally imputable act.[104] From this it derives that also in becoming a keeper, solely objective circumstances, i.e. the creation of a factual condition, have to be considered.[105] However, this opinion is heavily objected to in the more recent doctrine[106] for good reason.

95 Starting out from an analysis of the characteristic features of strict liability, it is pointed out that the elements establishing the legal status of a keeper were twofold.

96 Strict liability was on the one hand based on the idea, that the person who promotes her interests in a risky way and benefits from the dangerous object, should also be liable for the damage caused by its use. If this were the only reason for strict liability, Canaris stresses, neither the rules on the capacity to contract nor those on responsibility would be applicable; also, an incapable and an irresponsible person would enjoy the benefits arising from the use of a dangerous object.[107]

97 However, especially Canaris[108] and Borgelt[109] in Germany and Koziol[110] in Austria point out a second characteristic of strict liability: Strict liability regards special sources of danger, and the creation and exploitation of the source of danger is based on the private initiative and decision to use this dangerous object. It was this decision that would justify imputing the risk to the keeper. Thus, large parts of the more recent doctrine agree that in establishing the legal status of a keeper a subjective element, i.e. the imputation to the will, was also decisive. Therefore a basic legal principle had also to be applied: in Austria and in Germany persons who are not able to assess the consequences of

[103] J. Staudinger-Engelmann, *BGB* II (9th edn. 1929), § 833, nos. 5e, 9a and preliminary remark 3 of § 827; Planck, BGB (4th edn. 1928), § 833, no. 3d.
[104] R. Borgelt, *Das Kind im Deliktsrecht* (1995), 87.
[105] Cf. P. Hofmann, Minderjährigkeit und Halterhaftung, [1964] *Neue juristische Wochenschrift* (NJW), 229.
[106] Cf. P. Hofmann, [1964] NJW, 228 et seq.; C.W. Canaris, Geschäfts- und Verschuldensfähigkeit bei der Haftung aus „culpa in contrahendo“, Gefährdung und Aufopferung, [1964] NJW, 1987 et seq.; H. Koziol (supra fn. 6), no. 6/19; R. Borgelt (supra fn. 104), 84 et seq.; Ch. Eberl-Borges, Die Tierhalterhaftung des Diebes, des Erben und des Minderjährigen, [1996] VersR, 1070 et seq.
[107] C.W. Canaris, [1964] NJW, 1990.
[108] C.W. Canaris, [1964] NJW, 1987 et seq.
[109] R. Borgelt (supra fn. 104), 87.
[110] H. Koziol (supra fn. 6), no. 6/19.

their acts because of their minority are specially protected by law (cf. § 21 ABGB). Thus, the ABGB provides for the irrelevance of such acts.

It is, however, controversial, whether the provisions on the capacity to contract or those on delictual responsibility should be applied. 98

b) Direct application of the rules on the capacity to contract (*Geschäftsfähigkeit*)

In the Austrian legal system, persons under seven years of age (*Kinder*) are incapable of contracting (§§ 151 sec. 1, 865 ABGB).[111] Legal transactions must be conducted for them by their legal representative.[112] 99

Minors between seven and fourteen years of age (*unmündige Minderjährige*) have a limited capacity to contract. According to § 865 ABGB they can enter into legal transactions that are exclusively to their advantage. Thus, the minor can accept a gift, but only if it does not entail an economic burden.[113] If he concludes a contract which obliges him in any way, the contract becomes null and void if the minor's legal representative does not agree to it within a reasonable period of time (§§ 151 sec. 1, § 865 ABGB). Until then the legal transaction rests in pending voidness.[114] 100

These rules are in general also applicable to persons between the ages of fourteen and eighteen (*mündige Minderjährige*); however, their capacity to contract goes further. In particular, they can dispose of their own earned income and of those things which were given to them to dispose of freely, but only to the extent that the provision for their necessities of life is not threatened (§§ 152, 151 sec. 2 ABGB).[115] 101

On completion of the eighteenth year of her life a person of sound mind is by law considered fully capable to contract.[116] 102

However, obtaining the status of a keeper depends neither on a legal transaction nor a similar act. The keeper must not necessarily be the owner of a dangerous object and the validity of any transaction on which the acquisition of the dangerous object may be based is not decisive. Hence, the provisions on the capacity to contract cannot be directly employed.[117] 103

[111] However, according to § 151 sec. 3 ABGB, they can accomplish those legal transactions which are considered "affairs of daily life of trivial importance".
[112] H. Koziol/R. Welser, *Bürgerliches Recht* I (12th edn. 2002), 51.
[113] The objects in question (e.g. animal, motor vehicle), of which the legal status of a keeper can be established, usually entail economic burdens.
[114] H. Koziol/R. Welser (supra fn. 112), 51.
[115] H. Koziol/R. Welser (supra fn. 112), 51.
[116] Majority has been lowered in Austria from 19 to 18 years with the *Kindschaftsrechts-Änderungsgesetz* 2001 (Act on the Alteration of Filiation Law, KindRÄG).
[117] Cf. P. Hofmann, [1964] NJW, 229; C.W. Canaris, [1964] NJW, 1991; R. Borgelt (supra fn. 104), 87; Ch. Eberl-Borges, [1996] VersR, 1070 and 1074.

c) Direct application of the rules on delictual responsibility

104 On the other hand, the provisions on delictual responsibility (see above under nos. 1 et seq. and nos. 5 et seq.) regard the establishment of fault. However, becoming the keeper of a dangerous object requires neither wrongfulness nor fault and is a licit act. A direct application of the rules on tort responsibility is not possible either.[118]

d) Analogy

105 Thus, there is an unintended incompleteness within positive law, a "gap", which is to be filled by analogy.[119] In the Austrian and German doctrine and in the courts' practice, an analogy to the rules on the capacity to contract or to the provisions on responsibility is considered.

i) Analogy to the rules on the capacity to contract

106 Canaris in Germany, in particular, supports an analogous application of the rules on the capacity to contract.[120] He stresses that the reason for the stricter rules for minors in fault-based tort law is that liability based on fault always presupposes a violation of a law or an interference with a protected position. Herein he realises a certain warning, which was apt to deter also minors from tortious acts. Strict liability, on the other hand, was based on the establishment of the status of a keeper, which was a licit act. Afterwards, it was not even necessary that the keeper created the damage himself. Canaris emphasises that it is rather the assessment of the risks that are connected to the participation in the life of trade and circulation that is of importance in becoming a keeper. This would show similarities to the question of the capacity to contract.

107 In this respect, Canaris also points out that strict liability compared to liability based on fault was much riskier for the keeper, since he could be held liable if he acted without fault and even if a third person, who used the dangerous object, caused the damage (perhaps also without fault). Therefore, the stronger protection of the minor by the rules on the capacity to contract was necessary and more apt.[121]

108 This argument is of much greater importance in the Austrian legal system which generally establishes fault according to a subjective yardstick.[122] Thus the difference between liability based on fault and strict liability is even greater than in Germany where an objective yardstick is generally applied when establishing fault.[123]

[118] Ch. Eberl-Borges, [1996] VersR, 1074; R. Borgelt (supra fn. 104), 88; C.W. Canaris, [1964] NJW, 1990.
[119] P. Hofmann, [1964] NJW, 232; Ch. Eberl-Borges, [1996] VersR, 1070;
[120] C.W. Canaris, [1964] NJW, 1990 et seq.
[121] C.W. Canaris, [1964] NJW, 1991.
[122] For the details see no. 15.
[123] Cf. e.g. E. Deutsch/H.-J. Ahrens, *Deliktsrecht* (4th edn. 2002), no. 123.

Moreover, Canaris emphasises that insurability of the risk was also a basic element of strict liability. However, a person who was incapable of contracting could not provide for insurance coverage on her own.[124] 109

Another advantage of the rules on the capacity to contract is seen in the rigidly fixed age limits since the latter are considered to promote legal certainty.[125] 110

Concerning the solution of a further problem, Canaris also considers the application of the rules on the capacity to contract more useful: It is commonly held that the legal status of a keeper can also be established by the legal representative of the minor or by the legal representative's consent to the minor creating a source of danger. This activity on behalf of another person would fit in with the system of the capacity to contract, but it was extraneous among the rules on responsibility.[126] 111

However, Canaris also remarks that the rules on the pending voidness and the requirement of an agreement by the legal representative do not really fit when establishing the status of a keeper. These rules were geared to legal transactions but not to facts as the incorporation of an object in someone's sphere of use and control. He therefore suggests the following modification: replacing the requirement of the legal representative's agreement by that of mere knowledge. Canaris points out that if the latter has taken notice he may take the necessary precautionary measures and for instance take out an insurance policy, or he can remove the dangerous object from the minor's sphere.[127] 112

However, another problem arises: In Austria, the legal representative's agreement to a transaction takes effect *ex tunc*, since until then the legal transaction rested in pending voidness. If, however, the representative's knowledge is decisive, an effectiveness *ex nunc* seems more appropriate, since there is no agreement that aims at the validity of a legal transaction concluded in the past. Otherwise, the minor would obtain the legal status of a keeper retroactively. 113

A further uncertainty arises from the fact that, in Austria, persons over fourteen years of age are capable of contracting insofar as they can dispose of their own earned income and of those things which were given to them to dispose of freely (as far as the provision for their necessities of life is not threatened). However, this provision is also geared to legal transactions and does not suit the establishment of the status of a keeper. In establishing the status of a keeper, the affordability of the costs of a transaction is not decisive. 114

Since these provisions on the limited capacity to contract do not seem adequate, the application of the rules on the capacity to contract would entail that, 115

[124] C.W. Canaris, [1964] NJW, 1991.
[125] C.W. Canaris, [1964] NJW, 1990.
[126] C.W. Canaris, [1964] NJW, 1991.
[127] C.W. Canaris, [1964] NJW, 1991.

in Austria, minors could not become keepers on their own until they have attained the eighteenth year of their life.

116 However, the higher age limits of the rules on the capacity to contract in comparison with the rules on tort responsibility are often justified by the complexity of business life and the difficulty to assess the consequences of legal transactions. In the law of strict liability this strong protection would, however, entail inadequate results: Thus, a person of seventeen years of age could not become the keeper of a moped without his legal representative's knowledge, although he could validly acquire it with his own earned income and with things given to him to dispose of freely.

ii) Analogy to the rules on tort responsibility

117 In Austria, Koziol in particular favours an analogous application of the rules on tort responsibility.[128] Since the imputation of a risk was concerned – and not legal transactions – the rules on delictual responsibility were more adequate. Concerning persons under fourteen years of age an analogous application of § 1310 ABGB and thus also of liability in equity was possible.

118 In Germany Hofmann[129] and Borgelt[130] in particular hold this opinion. Hofmann notices the similarity of the circumstances and states that if a minor behaves in a way that involves the risk of liability, his discernment was decisive. This rule obtained by induction was applicable also to the behaviour on which the establishment of the status of a keeper and thus strict liability were based.[131]

119 The supporters of an analogous application of the provisions on delictual responsibility agree in general that the minor's status of a keeper could also be established by the help of the legal representative. This activity on behalf of another person was truly extraneous to the system of liability based on fault, which founds liability on the tortfeasor's own culpable behaviour.[132]

120 However, on the one hand, the establishment of the legal status of a keeper is also not a question of legal authority to represent.

121 On the other hand, since becoming a keeper is not based on the minor's culpable behaviour but on the assessment of the risks of a licit act, the imputation of the behaviour of the legal representative does not seem incompatible.

122 Hofmann holds that the establishment of the legal status of a keeper was a matter of the establishment of a factual relation between the minor and the

[128] H. Koziol (supra fn. 6), no. 6/19.
[129] P. Hofmann, [1964] NJW, 228 et seq.
[130] R. Borgelt (supra fn. 104), 87 et seq.
[131] P. Hofmann, [1964] NJW, 233.
[132] Vicarious liability is not considered as liability based on fault in the strict sense.

dangerous object, and that the legal representative was authorised to carry out such acts because of his legal position.[133]

Referring to Canaris,[134] Borgelt deals with the question of insurability and emphasises that the necessity of insurance coverage was indeed an argument in favour of the application of the rules on the capacity to contract. However, in many important cases insurance coverage was not common at all. Thus in keeping animals (apart from big dogs or riding horses) taking out a special insurance policy was the exception.[135] 123

On the other hand, in Austria, liability arising out of keeping pets[136] is included in the comprehensive householder's insurance which is usually taken out by the minor's parents (see below nos. 138 et seq.). 124

The argument that rigidly fixed age limits are necessary in order to promote legal certainty is true for legal transactions. Examining the minor's mental capacities in every individual case would burden business life too heavily with uncertainties. In tort law, however, in general nobody exposes himself to damage relying on the tortfeasor's potential liability.[137] 125

iii) In particular

- Motor vehicles

If a minor is the keeper of a car, he can be held liable under the Statute on liability for keeping railways and motor vehicles (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG).[138] The EKHG is applied if a person is killed, suffers injuries to her body or health, and if an object is damaged due to an accident during the operation of a railway or a motor vehicle (cf. § 1 EKHG). 126

The unauthorised driver:

According to § 6 EKHG, the so-called "unauthorised driver" (*Schwarzfahrer*) can be held liable instead of the keeper. He is liable in the same way as a keeper and his liability is thus a case of strict liability.[139] § 6 EKHG defines the "unauthorised driver" as someone who utilises a means of transport without the keeper's consent.[140] Utilisation is understood as the assumption of the use of the vehicle with the intention to exercise power over it. This intention is interpreted as the wish to employ the vehicle in one's own interest.[141] A minor 127

[133] P. Hofmann, [1964] NJW, 233.
[134] See no. 109.
[135] R. Borgelt (supra fn. 104), 87.
[136] There are disparities among policies offered with respect to insurance coverage for keeping dogs.
[137] Cf. in a different context H. Koziol (supra fn. 6), no. 5/36.
[138] [1960] ZVR, no. 305.
[139] M. Schauer in: M. Schwimann, ABGB VIII (2nd edn. 1997), § 6 EKHG no. 9.
[140] M. Schauer in: M. Schwimann (supra fn. 139), § 6 EKHG no. 3.
[141] M. Schauer in: M. Schwimann (supra fn. 139), § 6 EKHG no. 5.

who lacks delictual responsibility is not considered able to form this intention validly.[142]

128 However, since also here the use of a source of danger is based on the private initiative and decision, here, too, the requirement of discernment regarding the risks of the dangerous object seems appropriate. Thus, Koziol holds that also in this regard the rules on delictual responsibility should be applied analogously. Applying these rules, a fifteen-year-old minor could be held liable according to § 6 EKHG if he uses a truck without being authorised.[143] If the unauthorised driver is younger than fourteen years of age, an analogous application of § 1310 ABGB and thus also of liability in equity is considered.[144]

Liability of the keeper in the case of an unauthorised ride:

129 § 6 sec. 1 sent. 2 EKHG maintains the liability of the keeper if he rendered possible the unauthorised use of the vehicle by fault. Rendering possible the utilisation of the vehicle is understood as the creation of opportune conditions.[145] Even if the keeper's fault in rendering possible the unauthorised drive is decisive, this is not considered a fact to alter the classification of the case as being one of strict liability. Regarding minors, the rules on delictual responsibility are unanimously held applicable when establishing the fault in rendering possible the unauthorised use of the vehicle.[146]

- Animals

130 According to § 1320 sent. 2 ABGB, the keeper of an animal can be held liable for damage caused by the animal if he is not able to prove that he has provided for its necessary custody or surveillance. Thus, the keeper of an animal cannot plead that he was impeded without fault on his part from providing the necessary custody.[147] Liability for animals holds, therefore, an intermediate position between liability based on fault and strict liability since it is on the one hand not based on fault but, contrary to strict liability, requires the violation of an objective duty of care.[148]

- Defective Structures

131 According to § 1319 ABGB, the keeper of a building is liable for any harm caused by its collapse, or if parts of it fall off. This rule also applies to other defective structures on land, as long as their collapse might bring about certain risks (especially due to the height of the edifice). However, the possessor can avoid liability by proving that he has observed all due care as reasonable under the circumstances in order to prevent any harm. Since this is determined ac-

[142] P. Apathy, EKHG (1992), § 6 EKHG no. 7.
[143] H. Koziol (supra fn. 6), no. 6/19.
[144] H. Koziol (supra fn. 6), no. 6/19.
[145] M. Schauer in: M. Schwimann (supra fn. 139), § 6 EKHG no. 11.
[146] P. Apathy (supra fn. 142), § 6 EKHG no. 13; H. Koziol (supra fn. 3), 539.
[147] Cf. A. Ehrenzweig (supra fn. 53), 675; H. Koziol (supra fn. 3), 406; [1982] JBl, 152.
[148] B.A. Koch/H. Koziol (supra fn. 98), nos. 6 et seq.

cording to objective standards, liability for defective structures does not depend on personal fault.[149] Similar to § 1320 (see supra no. 130) it is thus intermediate between liability based on fault and strict liability.

- Plants

In the governing provisions on strict liability[150] for the operating of plants, the term 'holder' is used for the possible defendant. However, this term widely corresponds to the term 'keeper'. 132

- Product liability

The Product Liability Act (*Produkthaftungsgesetz*, PHG) provides for no-fault liability of the producer of goods that are put into circulation. 133

- Vicarious liability

Vicarious liability in torts is provided for under § 1315 ABGB: A person who appoints an unfit helper or who knowingly appoints a dangerous helper for the care of his own affairs is liable for any damage caused by the helpers acting in such capacity. 134

Unfit helper: Fault in selecting the helper is not required. Therefore minors can also be held liable if they have enough discernment to realise that they are appointing the helper[151] or if the helper has been appointed by the legal representative.[152] 135

Dangerous helper: The criterion of knowledge of the principal does not relate to the damage, but to the dangerousness of the helper. Therefore fault is no requirement under that provision. However, since knowledge of the dangerousness is decisive, the capacity to act reasonably is required in this regard.[153] This could be based on an analogy to § 1310, first case ABGB.[154] 136

If the legal representative of the minor knowingly appointed the dangerous helper, this knowledge cannot be imputed to the minor. An imputation would be imaginable only by analogy to § 1315 ABGB. But this provision is not applicable in the relation between minor and legal representative,[155] since the minor does not appoint the legal representative for the care of his affairs. 137

[149] B.A. Koch/H. Koziol (supra fn. 98), nos. 6 et seq.; H. Koziol (supra fn. 3), 400 et seq.; A. Ehrenzweig (supra fn. 53), 682; K. Wolff in: H. Klang (supra fn. 54), § 1319, 108 et seq.

[150] E.g. *Forstgesetz* (Forestry Act, ForstG) 1975, *Reichshaftpflichtgesetz* (Reich Liability Act, RHPflG) 1943.

[151] K. Wolff in: H. Klang (supra fn. 54), §1315, 97.

[152] R. Reischauer in: P. Rummel (supra fn. 7), §1315 no. 2.

[153] K. Wolff in: H. Klang (supra fn. 54), § 1315, 93; H. Koziol (supra fn. 3), 355.

[154] R. Reischauer in: P. Rummel (supra fn. 7), § 1315 no. 13, however refers to the contractual capacity.

[155] M. Wilburg, Haftung für Gehilfen, [1930] *Zentralblatt für die juristische Praxis* (ZBl), 726; H. Koziol (supra fn. 3), 353.

D. Insurance Matters by Prof. Dr. Felix Wieser

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

138 In Austria, policies such as "family liability insurance" do not exist. But so-called "private liability insurances" are an integral part of comprehensive homeowners' insurance policies. The scope of basic coverage is almost uniform in all these policies and, as regards the insured, it provides cover for the policyholder, his/her spouse sharing the household and minors of the policyholder or of such spouse (including grandchildren, adopted children, foster children, stepchildren). The geographical scope of cover where damage may occur comprises all of Europe and the countries surrounding the Mediterranean.

139 The risk insured against is very broad. It extends to the tortious liability of the insured, as a private individual, arising out of the perils of everyday life excluding commercial and professional activities. Liability arising out of keeping pets is included but there are disparities among the policies offered with respect to coverage for keeping dogs.

140 The sums insured have increased significantly over the years. The standard sum insured under most policies in the market is about € 145,000 (ATS 2 million). Higher sums can be agreed upon individually but usually do not exceed about € 730,000 (ATS 10 million).

141 The standard coverage is subject to some exclusions which may arise in respect of losses caused by minors. The most important exclusions for which no coverage is available are: damage to movables which the policyholder has borrowed, rented, leased or taken into custody; damage to movables which are damaged while in use, in transit or under any direct activity; damage to those parts of immovables which are subject to direct work, use or any other direct activity; liability related to the keeping or use of automobiles, aircraft or watercraft; damage to property owned by the policyholder or his relatives (relatives are defined rather broadly) as well as damage caused intentionally by the insured.

142 This standard coverage can be extended by endorsements modifying some of these exclusions, namely the exclusion in respect of damage to movables which are damaged while in use, in transit or under direct activity as well as damage to property owned by relatives of the policyholder; and by including a clause which gives cover for damage to rented dwellings and furniture therein.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

143 There are no efforts on the part of the insurance industry to risk-rate premiums on the basis of an individual loss record. Premium calculation in comprehensive homeowners' insurance is usually based mainly on different features in respect of property insurance (construction of building, geographical area, sum insured), rather than exposure with regard to liability insurance. There seems to be a tacit understanding that risk-rating dependent on the number, sex, age and claim record of the children would cause undue hardship for families. Any move in this direction would face very bad publicity. After all, payments from liability insurance account for only 20% to 25% (no accurate numbers for the whole industry are available) of all claims in comprehensive homeowners' insurance and only part of these payments are due to tortious behaviour of children. General terms and conditions in Austria usually provide for a right of termination after any claim (plurality of claims is not a prerequisite) and this applies to liability insurance too.

12. a) How many per cent of families are covered by family liability insurance?

144 Available statistics do not reveal exactly how many households with children have taken out home insurance and what proportion of children in Austria are covered by liability insurance. This is because home insurance policies do not indicate whether households have descendants, or if they do, how many and of what age. Furthermore, individuals may have more than one home, i.e. a main residence, permanently occupied by at least one person, and a second residence, e.g. a summer-house or townhouse. If people with two homes take out homeowners' insurance for both, which makes sense to protect the insured property against damage from fire, burglary, burst water pipes, storm or broken glass, they will then have double liability cover, since the standard policy covers damage throughout Europe without any geographical limitation to a specific property. The number of cases of double insurance is also not statistically recorded and no accurate figures can be given. The following can be said: At the end of 2001 there were 3,772,500 dwellings in Austria.[156] For this number of dwellings there were, on the 31 December 2001, 3,087,441 home insurance policies.[157] Thus at the end of 2001 about 82% of all dwellings had home insurance with liability cover. It is also known that 3,312,500 of all dwellings are main residences, of these around 2,490,100 are households without children and some 822,400 are households with children (under 15

[156] Extrapolation from the number of dwellings on the basis of the count of houses and dwellings 1991, *Wohnbautätigkeit* 2001 in *Statistische Nachricht* XII (2002), 956 et seq.

[157] Austrian Association of Insurance Companies, *Statistics of Claims 2001* (2002).

years old).[158] The number of home insurances attributable to households with children is not known on the grounds given above. However, the following additional considerations lead us to assume that the proportion of children covered by liability insurance is more than 82% of all children in Austria. Main residences have a higher proportion of home insurance policies than do second homes, and children live in main residences (dwellings where at least one person lives permanently). A higher proportion of people with a child take out home insurance than of people without children, since the birth of a child means an extension of the household, and hence more thought being given to insurance protection, with a changed attitude and a greater desire to provide for the future. This effect is stronger when the household contains more than one child. On the other hand, households without insurance are over-represented by young single people and the elderly on low incomes, both of which groups rarely have children. It therefore seems realistic to assume that the proportion of Austrian children covered by liability insurance cannot be less than 90%.

b) Does the liability insurance cover extend to intentional torts committed by the child?

145 No, there is a general exclusion in respect of damage caused by intentional torts. This exclusion applies to damage caused by children too.

13. a) Are parents under a duty to take out liability insurance for their child?

146 No. Parents are under no legal duty to take out liability insurance. So far no public discussion has taken place about this issue and no political party has demanded such insurance.

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered.

147 No, there is no such policy in Austria.

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up damage claim brought by the victim against the parents?

148 According to § 67 sec. 1 VVG, the right of recourse of the insurer is based on a *cessio legis*. Thus a recourse of the insurer against the child would have to rest on a claim of the parents against their child which the insurer would be subrogated to. Under Austrian law, a child may become liable only if the victim of the tortious conduct of the child cannot obtain compensation from the person who had the duty to supervise the child (liability of a minor is subsid-

[158] *Dwellings, Results of the Microcensus* (Wohnungen 2002, Ergebnisse der Wohnungserhebungen im Mikrozensus September 2002) (2003), 54.

iary to the liability of the supervisor, e.g. the liability of the parents). Therefore no incident of joint and several liability of parents and their child is legally possible which would give the parents a right of contribution or a right of recourse. Hence, if the insurer has to pay because of the liability of the parents, the child cannot be liable for one and the same loss and there cannot be any claim of the parents against their child which could be transferred to the insurer. For this reason, it is inconceivable that the insurer who had to pay because of the parents' liability has a right of recourse against the child.

Moreover § 67 sec. 2 VVG provides that the right of recourse is excluded for claims against members of the family living in the same household. 149

b) Does the social insurance law provide a limit on the right of recourse of the insurance company against the child or his parents or legal guardian?

Social insurance law does not provide a limit on the right of recourse against the child or his parents or legal guardian. We can, however, observe some reluctance on the part of social security agencies to take recourse in cases other than traffic accidents. 150

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

According to § 1310 ABGB, the judge always has to consider the parties' financial capacity to bear the damage when establishing the liability of a minor. Thus even if the minor acted with fault, his unfavourable pecuniary circumstances can justify an adjustment of the compensation. However, if the other two criteria of § 1310 ABGB heavily imply liability, the judge can award (partial) damages even if the tortfeasor is impecunious. The pecuniary circumstances are only one criterion that has to be considered on an equal standing with the two other criteria of § 1310 ABGB. Thus § 1310 ABGB provides a certain reduction of the compensation but the tort liabilities can still exceed the financial means of the tortfeasor. 151

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

Beyond § 1310 ABGB there is a general discussion on the problem of ruinous tort liability not only regarding the liability of minors. 152

In Germany part of the doctrine[159] regards excessive tort liability as being incompatible with the guarantees of human dignity and personal liberty of art. 1, 153

[159] For Germany: C.W. Canaris, Verstöße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadenersatzrecht, [1987] *Juristenzeitung* (JZ), 995 and 1001 et seq.

2 sec. 1 *Grundgesetz* (German Constitution, GG). It is held that the fundamental rights in conjunction with the constitutional prohibition of disproportion provide protection from excessive tort liability.

154 In particular, F. Bydlinski[160] and Koziol[161] hold that these considerations are also applicable to the Austrian legal system: The constitutional prohibition of disproportion is acknowledged also in Austria[162] and can thus be taken into account when concretising omnibus clauses, such as § 1295 sec. 2 ABGB which concerns the abuse of title.[163]

155 However, it is also held that it was not necessary to refer to constitutional principles in order to protect the tortfeasor: The clause on abuse of title would at any rate also be applicable to cases of extreme disproportion between the benefit to the claimant and the negative consequences for the defendant.[164]

156 When weighing the parties' interests, the pecuniary circumstances, in particular, are considered decisive.[165] If the injured party was unable to get along without the compensation, damages had to be awarded to the full extent.[166] If, on the other hand, the victim could satisfy his needs without receiving damages, it is held that the amount of compensation had to be reduced, if the tort liabilities would be ruinous for the tortfeasor.[167]

17. Does the domestic bankruptcy law or the law concerning the execution of money judgments allow individuals to obtain a discharge of debts which they are unable to pay off?

157 In the Austrian legal system, the discharge of debts of individuals has been facilitated with the novel of the bankruptcy law 1993 (*Konkursordnungsnovelle* 1993). The discharge can be obtained in four ways, which correspond to consecutive stages of the legal proceedings.[168]

158 Primarily, the Bankruptcy Law (*Konkursordnung*, KO) aims at an out-of-court settlement (§ 183 sec. 2 KO).

[160] F. Bydlinski (supra fn. 38), 226.
[161] H. Koziol (supra fn. 6), no. 7/7.
[162] See for example M. Stelzer, Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit (1991), 169 et seq.
[163] F. Bydlinski, Möglichkeiten und Grenzen der Präzisierung aktueller Generalklauseln, *Wieacker-FS* (1990), 204 et seq.; H. Koziol (supra fn. 6), no. 7/7.
[164] Cf. Mader, *Rechtsmißbrauch und unzulässige Rechtsausübung* (1994), 224 et seq.; see also H. Koziol (supra fn. 6), no. 7/7.
[165] H. Koziol (supra fn. 6), no. 7/8.
[166] H. Koziol (supra fn. 6), no. 7/8; cf. also C.W. Canaris, [1987] JZ 995, 1002.
[167] H. Koziol (supra fn. 6), no. 7/8; cf. also C.W. Canaris, [1987] JZ 995, 1002.
[168] A. Konecny, Restschuldbefreiung bei insolventen natürlichen Personen, [1994] *Österreichisches Bankarchiv* (ÖBA), 911 et seq.

If a settlement out of court cannot be obtained, the bankruptcy law provides for compulsory settlement. While entrepreneurs have to offer to pay at least 20 percent of their debts within two years, other individuals have the alternative to offer a settlement of at least 30 percent within a longer period of a maximum of five years (§ 141 sec. 3 KO). The advantage of compulsory settlement for the debtor consists firstly in the possibility to obtain a discharge of his debts within a rather short period of time and secondly in potentially keeping parts of his property. 159

If compulsory settlement fails, the bankrupt loses his property, after the realisation of which a 'payments schedule' (*Zahlungsplan*) can be stipulated with the creditors (§§ 193–198 KO). The payments schedule is a type of compulsory settlement with some particular features: Apart from the mandatory realisation of the bankrupt's property there is no minimum quota provided and the period of payment can extend to seven years. 160

If there is no payments schedule agreed upon, the bankrupt can obtain a discharge of his debts in the so-called 'skimming off procedure' (*Abschöpfungsverfahren*). The debtor loses his property and additionally the attachable part of his income is assigned to a trustee in order to satisfy the creditors. The discharge of debts can be obtained if the bankrupt effects appropriate payments within a certain period of time or if it is implied by reasons of equity (§§ 199–216 KO). 161

Moreover, the Austrian Execution Law (*Exekutionsordnung*, EO) provides an exemption from execution corresponding to the minimum subsistence level (§ 291a EO in conjunction with § 293 ASVG). However, this exemption does not result in a discharge of debts. 162

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

Bankruptcy law, when providing discharge of debts, does not formulate special rules for debts concerning tortious liability, not even if liability is based on intentional behaviour. 163

III. Liability of Parents

General overview of the persons charged with the duty to supervise:

The duty to supervise can, on the one hand, be provided by law, e.g. family law or statutes on public law such as the statute on school instruction (*Schulunterrichtsgesetz*, SchUG). By operation of law, primarily the parents in a legal sense are entrusted with the custody of the minor and thus have the duty to supervise the child (§ 144 ABGB in connection with § 146 ABGB).[169] On the 164

[169] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 2.

other hand, the duty to supervise can also be established by contract, e.g. a contract between the parents and a kindergarten or a childminder.

165 However, the duty to supervise in the interest of the child has to be distinguished from the duty to supervise with respect to third parties. The duty to supervise with respect to third parties is remarkable, as well for the parents as for other persons assuming supervision: the legal provisions in general only regulate the duty to supervise with a view to the child; also the person entrusted by contract obliges herself only to the other contracting party, e.g. the parents, but not to third parties. The duty to supervise with respect to third parties, however, becomes more understandable, when considering it as a sort of *Verkehrssicherungspflicht* (legal duty to maintain safety). According to the rules on *Verkehrssicherungspflichten*, somebody who controls a source of danger in his sphere of influence also has the duty to prevent the impairment of others:[170] Since the behaviour of children is not sufficiently controlled by reason, they have to be considered a source of danger;[171] furthermore, the fact that children are within the parents' or another person's sphere of influence gives the latter the possibility to control the danger.[172] Regarding persons who are not obliged to take care of the child by law, the duty to prevent the impairment of others is based on the assumption of the activity to look after the child[173] (see infra nos. 210 et seq.). It furthermore has to be emphasised that the duty to supervise in the interest of the child and the duty to supervise with respect to third persons do not coincide. There may, e.g., exist a duty to keep the child from injuring himself without there being third persons or someone's objects endangered and thus without there being a legal duty to maintain safety (*Verkehrssicherungspflicht*). On the other hand, it is possible that the child endangers third persons (e.g. by throwing stones) without endangering himself. In the following only the duty to supervise with respect to third parties will be discussed.

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

166 In the Austrian legal system the liability of the parents or of other persons who have a duty to supervise minors is not vicarious and, therefore, not strict but based on fault. Liability is only established if these persons culpably neglected

[170] H. Koziol (supra fn. 3), 310.

[171] Similarly also animals are considered a source of danger because of the incalculability of their behaviour.

[172] H. Koziol/K. Vogel, Liability for Damage Caused by Others under Austrian Law, in: J. Spier (ed.), *Liability for Damage Caused by Others* (2003), no. 15; H. Koziol (supra fn. 3), 310; contrary R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 2.

[173] The reason for this independent, original liability is seen in the fact that a person assumes the factual control of the source of danger and that moreover the public relies on her taking all necessary measures (see H. Koziol (supra fn. 3), 66). A further reason is that in many cases assuming the control over the minor leads to the fact that the person primarily charged with the duty or another helper will not supervise the child. Thus a danger is created (K. Larenz/C.W. Canaris, *Lehrbuch des Schuldrechts* II/2 (13th edn. 1994), § 76 III, 3b).

their duty of supervision (§ 1309 ABGB).[174] Liability is based on the culpable violation of a *Verkehrssicherungspflicht*.

In this respect, it has to be stressed that in Austria fault is based on the personal accusation of "defective will".[175] Therefore the individual abilities have to be considered. Regarding the degree of attention and diligence, however, an objective standard is to be applied (§§ 1294, 1297 ABGB). 167

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

The ABGB does not contain a special provision regarding the burden of proof in the respect of parental liability. Thus, the general rules regarding the onus of proof are applicable: Every party has to assert and to demonstrate the requirements of a provision to her advantage.[176] In the field of tort law, consequently, the plaintiff has to demonstrate the presence of all elements establishing liability.[177] 168

Regarding fault, § 1296 ABGB presumes that the damage was caused without someone's fault. Thus, the burden of proof rests with the injured party. However, since the existence of fault is a question of legal judgement, the victim only has to prove the factual circumstances, on which to base this judgement. Moreover, § 1297 ABGB facilitates the difficult proof of fault by providing for a partial shift of the onus of proof: The regulation presumes that every person of sound mind has the necessary abilities to observe the degree of diligence and attention that can be exercised when possessing common abilities. The necessary degree of diligence and attention is thus determined in an objective way, and it is incumbent on the defendant to prove that he lacks the average abilities.[178] 169

Also the degree of fault (slight negligence, gross negligence, intent) is a question of legal judgement. The plaintiff has to demonstrate the facts on which to base this judgement. 170

[174] H. Koziol (supra fn. 3), 309 et seq. However, the supervisor can be held liable according to the rules for vicarious liability for damage caused by his helpers.
[175] Cf. H. Koziol, [1998] MJ 5, 111 et seq.; H. Koziol (supra fn. 10), 172 et seq.
[176] W. Rechberger, *ZPO Kommentar* (2nd edn. 2000), Vor § 266 ZPO no. 11; W. Rechberger/D. Simotta, *Grundriss des österreichischen Zivilprozessrechts* (6th edn. 2003), no. 585; H. Koziol (supra fn. 6), no. 16/6.
[177] For further information cf. H. Koziol (supra fn. 6), no. 16.
[178] H. Koziol (supra fn. 6), no. 16/15.

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

171 § 1309 ABGB in its wording does not distinguish the duty to supervise of parents and that of other persons. As expounded above, the duty to supervise can be provided by law, especially by the provisions of the ABGB on custody. Persons who have the right and duty of custody are subject to the duty to supervise the child.

172 By operation of law, primarily the parents in a legal sense[179] are entrusted with custody and thus have the duty to supervise the child (§ 144 ABGB in connection with § 146 ABGB).[180] According to § 144 ABGB, care is one element of custody and § 146 ABGB names direct supervision as a part of care. However, as such, the duty to supervise would exist only with regard to the child and not to third persons. Thus, the prevailing opinion understand § 146 ABGB as signifying simply that the same person who is entrusted with the care of the child is also obliged to supervise the child with regard to third persons (See also supra no. 1).[181]

173 If one parent is not able to exercise custody or if custody was withdrawn from him, the right and duty of custody remains with the other parent alone (§ 145 sec. 1 ABGB). If both parents are not able to exercise custody or if it was withdrawn from both of them, the court has to decide, on whether to entrust the grandparent(s) or foster parent(s) with the custody of the child. The decision has to be made in consideration of the child's welfare.[182] Also in these cases, the person who is entrusted with custody is subject to the duty to supervise the child.[183]

174 Regarding persons who have not been entrusted with custody but just live together with the child, their duty to supervise cannot be based on legal provisions in family law. However, in all likelihood, they will often have the duty to supervise the child because of the "assumption of the activity" to look after the child (see infra nos. 210 et seq.).

[179] Adoptive parents are in this respect parents in a legal sense.
[180] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 2.
[181] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 2.
[182] For further details on the allocation of custody see infra nos. 175 et seq.
[183] H. Koziol/R. Welser (supra fn. 112), 488.

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) divorce; c) separation of married parents.

a) Children of unmarried parents

According to § 166 ABGB the custody of a child born out of wedlock is the right and duty of the mother alone.[184] However, the mother may let the father participate in her rights and duties of custody (§ 137a ABGB analogously). If both parents live in the same household, they may agree upon being entrusted with the custody of the child together. The court has to consent to this agreement if it is beneficial to the child's welfare (§ 167 sec. 1 ABGB).[185] 175

If one parent later on ends the joint household, the rules regarding divorce have to be applied accordingly (§ 167 sec. 1 ABGB) (see infra nos. 177 et seq.[186]). 176

b) Divorce

According to former law, in the case of the parents' divorce, custody of the child was peremptorily entrusted to one parent alone, unless the parents – as an exception – kept living in the same household. The Act on the Alteration of Filiation Law (*Kindschaftsrechts-Änderungsgesetz 2001*, KindRÄG) changed this controversial regulation and provides for joint custody, as long as the parents agree on it.[187] In case of divorce, dissolution or nullification of marriage both parents remain entrusted with custody, provided that they present in court an agreement that lays down with which parent the child principally shall stay. In this respect, it is also possible to confine the other parent's custody to certain matters. However, the couple can also agree upon exclusive custody of the parent, with whom the child shall principally stay. The court has to approve these agreements if they correspond to the child's welfare (§ 177 ABGB).[188] 177

If, yet, within a reasonable period of time, no agreement that corresponds to the child's welfare can be reached, the court has to decide *ex officio*, which parent shall be entrusted exclusive custody (§ 177a sec. 1 ABGB). The same is true if one parent later on sues for the revocation of joint custody (§ 177a sec. 2 ABGB). This is possible at any time without giving reasons.[189] 178

[184] If the mother is not able to exercise custody or if it was withdrawn from her, the court can entrust the father, the grandparent(s) or the foster parent(s) of the child with custody (§ 145 ABGB).
[185] H. Koziol/R. Welser (supra fn. 112), 498 et seq.
[186] H. Koziol/R. Welser (supra fn. 112), 499.
[187] H. Koziol/R. Welser (supra fn. 112), 496.
[188] H. Koziol/R. Welser (supra fn. 112), 496.
[189] H. Koziol/R. Welser (supra fn. 112), 497.

c) Separation of married parents:

179 §§ 177, 177a ABGB are applicable also if married parents are separated, i.e. if they live apart not only temporarily. However, in this case, the court may decide on custody only on the petition of a parent (§ 177b ABGB).[190]

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

180 In general, there is no such duty. The duty to supervise is in this case not provided by family law. However, since the duty to supervise is qualified as a kind of *Verkehrssicherungspflicht*, it can also be based on the "assumption of an activity" (see infra nos. 210 et seq.). This is the case if the parent agrees to look after the child or kidnaps it.

6. Which elements of a tort must the child have realised for the parents to be liable for it?

181 It is of no relevance whether the child's act constitutes an actionable tort.[191] The minor must have caused the damage but it is neither necessary that he acted wrongfully nor that he acted with fault.

182 Certainly, in most cases the child's behaviour will be wrongful, i.e. an objective duty of care will be violated. In this respect, it has to be stressed that in Austria the *Verhaltensunrechtslehre* (theory of unlawfulness of conduct) is dominant. According to this doctrine, unlawfulness depends on the violation of a *Verhaltensgebot*, i.e. of a duty of care. The judgement of unlawfulness always relates to human behaviour itself and not to the detrimental result. The *Erfolgsunrechtslehre*[192] (theory of unlawfulness established by the result) is thus rejected under Austrian law.[193] It is, therefore, conceivable that the parents culpably neglected their duty of supervision without the child acting wrongfully in the sense of the *Verhaltensunrechtslehre*. Thus, for example, someone, who leaves an epileptic child unsupervised prior to a fit announcing itself, can be held liable if the minor in consequence destroys objects in a shop or injures a person. Equally, a negligent supervisor could be held liable for damage caused by a mentally disabled person whose movements are only uncontrolled reflexes.[194]

[190] H. Koziol/R. Welser (supra fn. 112), 497.
[191] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 3.
[192] The *Erfolgsunrechtslehre* takes the view that unlawfulness depends solely on the harmful result, i.e. the mere violation of protected interests determines unlawfulness.
[193] H. Koziol (supra fn. 6), nos. 4/2 et seq.; H. Koziol, Wrongfulness under Austrian Law, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998), 13 et seq.
[194] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 3.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

183 When determining the required objective duty of care, the judge has to consider what extent of supervision is necessary and what can reasonably[195] be expected from a supervisor in the individual case. Regarding reasonableness, objective and subjective reasonableness have to be distinguished.[196] Only objective reasonableness regards wrongfulness, whereas subjective reasonableness[197] is to be taken into consideration when establishing fault.[198]

184 The required extent of supervision has to be judged from an *ex ante* perspective adopting the point of view of a competent spectator.[199]

185 Decisive circumstances for assessing the duty to supervise are in particular:

a) The factual situation:

186 On the one hand, the value of the endangered goods and the seriousness of the impending injury is to be taken into consideration.[200] Furthermore, the dangerousness of the concrete situation is a very important criterion. The more likely a damage is, the more extensive is the duty to supervise.[201] Thus, it has to be considered whether other persons or objects belonging to them are around. When the child is playing with dangerous objects such as bow and arrow[202] or an air rifle[203] and thereby endangers other persons or objects, the requirements regarding the duty of care are very high. When judging the dangerousness of objects, particularly of toys, not only their nature, but also the state of development of the child has to be considered (see infra no. 187).[204]

[195] The reasonableness of the behaviour which is necessary to avoid the endangerment is always to be considered when establishing duties of care (H. Koziol (supra fn. 6), no. 4/32).

[196] Cf. R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4; K. Scholz, *Der Begriff der Zumutbarkeit im Deliktsrecht* (1996), 26 et seq.

[197] Subjective reasonableness concerns circumstances which only regard the person of the tortfeasor (K. Scholz (supra fn. 196), 28).

[198] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4.

[199] K. Harrer in: M. Schwimann (supra fn. 88), § 1309 no. 10; H. Koziol (supra fn. 6), no. 4/30.

[200] H. Koziol (supra fn. 6), no. 4/29.

[201] H. Koziol (supra fn. 6), no. 4/30; H. Koziol/St. Frotz, Die schadenersatzrechtlichen Folgen der Verletzung von Aufsichtspflichten durch Lehrer, [1979] *Recht der Schule* (RdS), 97; K. Larenz/C.W. Canaris (supra fn. 173), § 76 III, 4b.

[202] [1967] JBl, 431.

[203] [1938] RZ, 55.

[204] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4; [1968] EvBl, no. 379.

b) Circumstances in the person of the child:

187 Circumstances in the person of the child are very relevant criteria.[205] In this respect, especially the minor's age and the stage of his mental development must be taken into account.[206] As the child gets older, supervision can and has to decrease, since guarding a child at every step can even retard the minor in his development.[207] Less gifted and mentally disabled children necessitate a higher extent of supervision.

188 Furthermore, the child's character is to be taken into account.[208] A disobedient child, who is prone to acting in a dangerous manner, according to life experience has to be supervised more intensively than an obedient child.[209] Also certain penchants of children such as a penchant for playing with fire or for dangerous games can justify higher requirements regarding the duty of supervision.[210]

c) Circumstances in the person of the parent:

189 Circumstances in the person of the parent are especially important when judging what extent of supervision is reasonable. Regarding objective reasonableness, the living conditions of the parents, especially their professional duties and their economic circumstances, have to be considered.[211]

190 If both parents are working, a constant supervision of the child can in general not be demanded.[212] The same is true if the parent who is not at work is occupied with housekeeping and the guarding of further children.[213] Thus, also the number of children to be looked after is a criterion that has to be taken into account when assessing objective reasonableness.[214] Whether one can rely on the other parent supervising the child, depends on the circumstances of the individual case, in particular, on whether the other parent has enough time to exercise this duty.[215]

191 On the other hand, disabilities of the supervisor do not influence the objective duty of care. They are, however, decisive when establishing fault.

[205] Also these criteria mainly determine the dangerousness of the situation.
[206] H. Koziol (supra fn. 3), 310.
[207] See [1978] EvBl, no. 52; [1984] ZVR, no. 324; R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4.
[208] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4.
[209] See e.g. SZ 34/137.
[210] K. Harrer in: M. Schwimann (supra fn. 88), § 1309 no. 8.
[211] Cf. e.g. [1976] ZVR, no. 292; [1978] EvBl, no. 52 (regarding work in an inn).
[212] SZ 34/137.
[213] A mother of five children does not violate her duty to supervise if she prohibits her four-year-old daughter to leave the playground behind the house and in the meantime does her housework, looks after the twins of half a year of age and therefore does not look after the daughter for one and a half hours ([1965] ZVR, no. 8). Neither does a mother of five children, who is a farmer, violate her duty of care, if she prohibits her eleven-year-old daughter to ride her bicycle in the street but does not supervise her beyond that ([1976] ZVR, no. 292).
[214] [1976] ZVR, no. 292.
[215] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4.

Single cases: According to the courts' practice, the required extent of supervision must not be carried too far.[216] Guarding a five-year-old or elder child at every step is in general not required.[217] Playing in the open without being supervised is considered customary when living in the country.[218] The same is true for town children outside the streets (yards, parks etc.).[219] The required extent of supervision increases only if according to the concrete circumstances it has to be reckoned with the possibility of the minor injuring somebody or somebody's goods. 192

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

a) School:

During the time the child is attending school, § 51 sec. 1 and 3 SchUG provides the teachers' duty to supervise the minor (see infra no. 222). The parents' duty is thus much reduced to a very restricted organisational duty. In exceptional cases they could be held liable for *culpa in eligendo, in instruendo* or *in vigilando* (see infra nos. 215 et seq.).[220] 193

b) Work:

According to the Statute on the Employment of Children and Adolescents (*Kinder- und Jugendbeschäftigungsgesetz*, KJBG) children up to the completion of the fifteenth year of their life must in general not be called on for work (§ 5 in connection with § 2 sec. 1 subpara. 1 KJBG). § 5a KJBG, on the other hand, provides certain exceptions from this general rule for children over twelve years of age. The KJBG, however, contains no provisions on the supervision of the employed children. According to the rules on the establishment of *Verkehrssicherungspflichten* it has to be examined whether the employer has assumed the control over the minor. This will regularly be the case. 194

However, this does not mean that the persons primarily charged with the duty to maintain safety, i.e. usually the parents, are totally discharged (see infra no. 215). The parents can be held liable for *culpa in eligendo, in instruendo* or *in vigilando*. 195

[216] EFSlg 27.187.
[217] [1978] EvBl, no. 52.
[218] [1978] EvBl, no. 52.
[219] R. Reischauer in: P. Rummel (supra fn. 7), § 1309 no. 4.
[220] The parents cannot be held liable according to § 1315 ABGB because, according to the prevailing opinion, § 1315 ABGB presupposes the authority to instruct (Cf. e.g. H. Koziol (supra fn. 3), 353). The teacher however works independently from instructions of the parents.

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

196 Regarding whole-day schools, § 55a sec. 2 SchUG in connection with § 51 sec. 3 SchUG provides that the educator has the duty to supervise the pupils that are looked after. The parents' duty to supervise is thus much reduced to a very restricted organisational duty. In exceptional cases they could be held liable for *culpa in eligendo, in instruendo* or *in vigilando* (see infra no. 215).

10. What is the relation between the damage claim against the parents and the damage claim against the child?

197 The claim against the minor tortfeasor according to § 1310 ABGB is subsidiary to the claim against the parents or other persons who neglected their duty of supervision (§ 1309 ABGB) (see also no. 87). Only if no supervisor can be held liable, if the supervisor is liable but not able to compensate the damage, or if he is of unknown abode, can the minor himself be sued.[221]

198 However, if liability or the possibility to collect the damages are uncertain, it is considered admissible to consolidate the actions against the supervisor and the minor.[222] If it turns out that, on the one hand, the supervisor is liable but impecunious and therefore at the moment not able to compensate the damage, but that, on the other hand, the child's liability according to § 1310 ABGB can be established, the minor tortfeasor and the supervisor can be held liable jointly and severally.[223] This is considered an exception from the general rule in judicial practice[224] and in doctrine[225] according to which the minor and the supervisor cannot be held jointly and severally liable which is derived from the subsidiarity of §§ 1309–1310 ABGB.[226]

11. Is there any possibility either for the child or the parents to have recourse against each other?

199 If the injured party has been compensated by the supervisor according to § 1309 ABGB, the latter cannot have recourse against the minor. It is the legislative intent that the minor shall be only held liable for the damage caused by himself if the requirements of § 1310 ABGB (and thus also the requirement of subsidiarity) are given. The benefit of subsidiary liability would be removed if the supervisor was admitted recourse against the tortfeasor.[227] A further argu-

[221] K. Wolff in: H. Klang (supra fn. 54), 78; F. Harrer in: M. Schwimann (supra fn. 88), § 1310 ABGB no. 3; R. Reischauer in: P. Rummel (supra fn. 7), § 1310 nos. 2 and 11.
[222] Mainly in order to prevent extinctive prescription. R. Reischauer in: P. Rummel (supra fn. 7), no. 11; [1971] EvBl, no. 74.
[223] SZ 68/110.
[224] [1971] EvBl, no. 74; [1992] ZVR, no. 151.
[225] F. Harrer in: M. Schwimann (supra fn. 88), § 1310 no. 5.
[226] See also supra no. 90.
[227] H. Koziol (supra fn. 3), 310 et seq.

ment against a recourse of the supervisor is the fact that it was his task to prevent the minor from damaging actions.[228]

200 If, on the other hand, the minor indemnified the injured party because the liable supervisors were of unknown abode or at the time unable to compensate the damage, he can have recourse against the supervisor(s). This emerges from the *telos* of the provision of § 1310 ABGB, which burdens the minor with bearing the loss only if the damages cannot be gained from the supervisor.

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

201 If a child has no parents in the legal sense (or if both the parents are not able to exercise custody or if it was withdrawn from them), the court considering the child's welfare has to decide whether and which grandparents or foster parents can be entrusted with custody (§ 145 ABGB).[229]

202 By operation of the law, i.e. without special appointment, the *Jugendwohlfahrtsträger* (youth welfare institution) is entrusted with the custody of children who are found within the national territory of Austria and whose parents are unknown (§ 211 ABGB). This is true until the courts take a differing decision. The competent youth welfare institution is the member state, in whose "district" the minor has his usual residence (§ 215a ABGB).[230]

203 Where neither parents nor grand- or foster parents can be entrusted with custody, and the youth welfare institution is also not competent in accordance with § 211 ABGB, the court, considering the child's welfare, has to entrust another suitable person with custody (§ 187 ABGB). In particular relatives, moreover intimate acquaintances of the child or other particularly suitable persons are to be taken into consideration (see § 213 ABGB). A particularly suitable person can refuse being entrusted only if entrusting her would be unreasonable (§ 189 sec. 2 ABGB).[231]

204 If neither relatives nor intimate acquaintances of the child or other particularly suitable persons can be found, the youth welfare institution is to be entrusted with the custody (§ 213 ABGB).[232]

[228] H. Koziol (supra fn. 3), 311. However, if a responsible child aged more than 14 years culpably caused damage and if the supervisor can be held jointly and severally liable, the latter has the right of recourse, since the tortfeasor himself could also be held liable. See H. Koziol (supra fn. 3), 311.

[229] H. Koziol/R. Welser (supra fn. 112), 508.

[230] H. Koziol/R. Welser (supra fn. 112), 508 et seq.

[231] H. Koziol/R. Welser (supra fn. 112), 509 et seq.

[232] H. Koziol/R. Welser (supra fn. 112), 510.

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

a) Apprenticeship:

205 As the age of school entrance in Austria is 6 years[233] – in exceptional cases 5 years[234] – and compulsory school attendance takes 9 years[235] apprentices are always older than 14 years. Thus, § 1309 ABGB is not applicable.[236] If a person older than fourteen years of age causes damage he is fully responsible for it himself (§ 153 ABGB).

206 However, even if the child has reached the age of fourteen, a duty to supervise can exist.[237] The Statute on Vocational Training (*Berufsausbildungsgesetz*, BAG), which regulates the training of apprentices, provides in § 9 sec. 3 that the master has to direct the apprentice to an orderly accomplishment of his tasks and a responsible behaviour, and that he has to give the apprentice a good example in this respect. From this, certain duties, of the master, to supervise are deduced.[238] However, neither legal literature nor the courts delimit these duties exactly. In accordance with German doctrine, it is to be presumed that the duty to supervise the apprentice only concerns those activities which the apprentice fulfils in connection with the operational procedure.[239]

b) Work:

207 See supra no. 194.

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or another institution?

c) Boarding school:

208 As to whole-day schools the SchUG is applicable. According to § 55a sec. 2 SchUG and § 51 sec. 3 SchUG the educator has the duty to supervise the pupils that are looked after in the whole-day school.

d) Children's home:

209 According to the Statute on Youth Welfare (*Jugendwohlfahrtsgesetz*) a child may be raised in a children's home if the youth welfare institution has been

[233] See § 2 Statute on Compulsory School Attendance (*Schulpflichtgesetz*).
[234] See § 7 *Schulpflichtgesetz*.
[235] See § 3 *Schulpflichtgesetz*.
[236] H. Koziol (supra fn. 3), 310.
[237] H. Koziol (supra fn. 3), 310.
[238] OGH 4 Ob 35/81; J. Berger/G. Fida/W. Gruber, *Berufsausbildungsgesetz* (2000), § 9 no. 31. Moreover, provisions regarding the training in the individual professions partly lay down which activities necessitate supervision.
[239] H.-J. Albilt, *Haften Eltern für ihre Kinder?* (1987), 25; in 4 Ob 35/81 the OGH decided that it is not part of the master's duty to supervise to keep the apprentice from criminal behaviour.

entrusted with custody (see § 28 sec. 1 *Jugendwohlfahrtsgesetz*).[240] The youth welfare institution thus has to provide supervision of the child.

4. a) May a duty to supervise be established by means of private contract?

In Austria, the duty to supervise can also be established by means of a private contract. The person assuming supervision can then be held liable according to § 1309 ABGB by every injured third party.[241] This is remarkable, since by contract she is only bound to the person primarily charged with the duty to supervise. Liability with regard to third parties, however, becomes more comprehensible, on considering that the duty to supervise children is a *Verkehrssicherungspflicht* (see also supra no. 165). 210

According to the prevailing opinion,[242] if a helper has assumed the exercise of the *Verkehrssicherungspflicht*, this duty is incumbent (also) on the helper himself. The *Verkehrssicherungspflicht* is in this case based on the "assumption of an activity". However, this does not mean that the person primarily charged with the duty to maintain safety is totally discharged (see infra no. 215). 211

The reason for this independent, original liability based on the assumption of an activity (*Übernahmehaftung*) by a person is that she assumes the factual control of the source of danger and that moreover the public relies on her taking all necessary measures.[243] A further reason for *Übernahmehaftung* is that in many cases assuming the control over the minor leads to the fact that the person primarily charged with the duty or another helper will not supervise the child. Thus a danger is created.[244] 212

These criteria are important for defining "assumption" in the sense of the *Übernahmehaftung*. They are relevant not only when supervision is taken on by means of contract but also when supervision is assumed as a favour or if a child is arbitrarily and on one's own initiative carried away from somebody else's sphere of supervision and thereby brought into one's sphere of control. Also kidnapping a child would justify the duty to supervise. 213

On the other hand, temporarily guarding a child, who is not supervised and needs to be guarded, would not justify the establishment of liability based on 214

[240] This is the case if neither relatives nor intimate acquaintances of the child or other particularly suitable persons can be found who could be entrusted with custody (§ 213 ABGB) (see supra no. 204).

[241] H. Koziol (supra fn. 3), 310.

[242] Cf. for Austria H. Koziol (supra fn. 3), 66; R. Welser in: R. Sprung/B. König (eds.), *Das österreichische Schirecht* (1977), 401; [1981] ZVR, no. 14; for Germany K. Larenz/C.W. Canaris (supra fn. 173), § 76 III.

[243] H. Koziol (supra fn. 3), 66.

[244] K. Larenz/C.W. Canaris (supra fn. 173), § 76 III, 3b. The aspect of concurrence of benefit and risk is not decisive in this context, but may be of a certain importance in those cases, in which the person assuming supervision acts professionally (K. Larenz/C.W. Canaris (supra fn. 173), § 76 III, 3b).

assumption, as long as nobody is kept from supervising the child.[245] In this case no danger is created which would justify a *Verkehrssicherungspflicht*. Neither is it the intention of the person temporarily factually guarding the child to assume the complete control of the child.

b) If so, does such contract reduce in any way the duty of the person primarily charged with the duty to supervise?

215 Another important question in this respect is what are the consequences of entrusting a helper on the duty to supervise of the person primarily charged with it. It is generally held that a person charged with a *Verkehrssicherungspflicht* cannot transfer this duty onto somebody else and thereby completely exonerate herself.[246] To solve this problem it is rather necessary to differentiate: The person primarily charged can fulfil his duty to maintain safety by entrusting a helper with the exercise of it. However, she thereby cannot acquit herself of all duty but can still be held liable for *culpa in eligendo, in instruendo* or *in vigilando*.[247] Regarding the selection of the helper, a reliable person physically and intellectually suitable has to be chosen.[248] The duty to instruct comprises giving information on the supervision to be held and on special circumstances such as dangerous penchants of the child.[249] As far as possible, the helper shall also be controlled. In particular, it has to be checked whether the person entrusted has become active and in case of inactivity the necessary measures have to be taken.[250]

216 Thus, the duty to supervise of the person primarily charged with it is temporarily reduced to a duty of organisation.[251]

217 Moreover, also the rules on vicarious liability are applicable.[252] Regarding vicarious liability the ABGB sharply distinguishes between the area of contract law[253] and the area of tort law.

218 Vicarious liability in tort law is provided for by § 1315 ABGB.[254] According to this paragraph, someone who employs an unfit person for the conduct of his

[245] This valuation of the legislator emerges also from § 1312 ABGB concerning *negotiorum gestio* in case of emergency.

[246] H. Koziol (supra fn. 3), 65.

[247] Regarding another duty to maintain safety see e.g. [1975] ZVR, no. 159.

[248] Cf. for Germany D.W. Belling/Ch. Eberl-Borges in: J. Staudinger (supra fn. 60), § 832 no. 117; this is true also in the Austrian law system.

[249] Cf. for Germany D.W. Belling/Ch. Eberl-Borges in: J. Staudinger (supra fn. 60), § 832 no. 117; this is true also in the Austrian law system.

[250] Cf. H. Koziol (supra fn. 3), 65.

[251] D.W. Belling/Ch. Eberl-Borges in: J. Staudinger (supra fn. 60), § 832 no. 120.

[252] H. Koziol (supra fn. 3), 309; K. Wolff in: H. Klang (supra fn. 54), 77.

[253] Vicarious liability in the area of contract law is provided by § 1313a ABGB. For further information see H. Koziol/K. Vogel (supra fn. 172).

[254] The opinion partly held that the person charged with a *Verkehrssicherungspflicht* can be held liable for a helper's behaviour just like for his own thus has to be rejected (for Germany see especially Ch. von Bar, *Verkehrspflichten* (1980), 269 et seq.). Only § 1313a ABGB provides such an extensive liability for helpers. This paragraph is, however, inapplicable since there exists no special intensified relationship (such as a contract) between the person originally charged with the duty to supervise and the injured party.

own affairs, or who knowingly uses a dangerous person for it, is strictly liable for any damage caused by such persons acting in such capacity to third persons (*Haftung für Besorgungsgehilfen*).

The first alternative mentioned in § 1315 ABGB, the "unfit helper" deals with the case of the helper who is habitually not fit for the work he is appointed for, this work being beyond his capacities. The lack of aptitude creates a special source of danger which is activated by the person primarily charged with the duty to supervise who therefore has to bear the risk. She cannot defend herself by affirming not to have known about the helpers lack of aptitude or even by proving that she could not possibly have known about it.[255] 219

Vicarious liability for a "dangerous helper", on the other hand, depends on the knowledge about the dangerousness. It has to be stressed that neither in this case is liability based on fault, since the requirement of knowledge does not relate to the damage, but to the dangerousness of the helper.[256] However, it is hard to imagine cases in which the dangerousness of the helper manifests itself by the child causing damage.[257] 220

The person primarily charged with the duty to supervise can be only held liable for damage caused by helpers that are bound to her instructions. 221

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

The legal principles concerning the duty to supervise children in schools are a matter of public law in Austria. § 51 sec. 1 and 3 SchUG provides that teachers have the duty to supervise pupils during the classes, but also – according to their work schedule – 15 minutes before the start of the lessons, during the breaks and right after the end of the classes while the pupils are leaving school. A duty to supervise exists also at all school events inside and outside of the school building, as far as this is necessary according to the age and the mental development of the pupils. School events include, in particular, excursions, hiking days, skiing courses and sports weeks organised by the school. 222

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

For damage caused by pupils due to insufficient supervision by the teacher, the federation as the legal entity maintaining the school can also be held liable. 223

[255] For further information see H. Koziol (supra fn. 3), 356 et seq.
[256] H. Koziol (supra fn. 3), 354 et seq.
[257] This could be the case if the dangerousness consists in instrumentalising others for causing damage.

a) Liability according to the AHG

224 If a pupil, due to insufficient supervision, has caused damage to a third person (or to himself), the provisions of the Official Liability Act (*Amtshaftungsgesetz*, AHG) are applicable. According to § 1 sec. 1 AHG the federation, the member states, the "districts", the local communities, other public corporations and the social insurance institutions (short: legal entities) are to be held liable for damage which their organs caused wrongfully and with fault in implementation of legislation. The formulation "in implementation of legislation" signifies that the AHG is concerned only with damage in the field of public administration and not in the field of private economic administration[258]. The school and educational system is part of the public administration.[259] Therefore the requirements for applying the AHG are met.

225 The injured party is entitled to a damages claim against the legal entity whose organ has inflicted the damage.[260] An organ in this respect can be appointed under public law or engaged by contract, it can be employed permanently or just temporarily (§ 1 sec. 2 AHG).[261]

226 However, which legal entity can be held liable for the damage does not depend on the organisational affiliation of the organ. According to the prevailing opinion, it is decisive whose functions the organ is exercising (theory of function).[262] As, according to art. 14 sec. 1 *Bundesverfassungsgesetz* (Austrian Constitution, B-VG),[263] the legislation and implementation of school and education matters lies within the competence of the federation, every teacher is exercising functions of the federation within the scope of education. Thus, he is to be considered an organ of the federation within the scope of the AHG.[264] This is true irrespective of his organisational position as a federal teacher or a teacher of a *Land*[265] or a teacher in a private school with public authority.[266]

227 Therefore, if a pupil has caused damage due to insufficient supervision by his teacher, the injured party can claim compensation from the federation. Contrary to the general provisions of the ABGB, the organ (the teacher) himself cannot be sued by the victim (§ 1 sec. 1 AHG).

[258] I.e. if the state does not act with *imperium* but uses the legal forms also available to its legal subjects. (R. Walter/H. Mayer, *Bundesverfassungsrecht* (9th edn. 2000), no. 560).
[259] H. Koziol/St. Frotz, [1979] RdS, 98; W. Schragel, *Amtshaftungsgesetzkommentar* (3rd edn. 2003), no. 78.
[260] H. Koziol/St. Frotz, [1979] RdS, 98.
[261] H. Koziol/St. Frotz, [1979] RdS, 98.
[262] See e.g. R. Walter/H. Mayer (supra fn. 258), no. 1285; H. Koziol (supra fn. 3), 380; W. Schragel (supra fn. 259), nos. 51 et seq.; H. Koziol/St. Frotz, [1979] RdS, 98.
[263] Austria is a federal state composed of nine autonomous member states. The Constitution in its artt. 10–15 contains the so-called *Kompetenzverteilung* (distribution of competence), which regulates the separation of legislative and executive powers between the *Bund* (federation) and the *Länder* (member states).
[264] [1978] EvBl, no. 101; OGH 1 Ob 76/98b.
[265] I.e. a member state.
[266] [1978] EvBl, no. 101; W. Schragel (supra fn. 259), no. 114.

228 Moreover it has to be stressed that according to § 1 sec. 1 AHG, liability is based on a wrongful and culpable behaviour of the organ. However, "fault" in this respect is not to be understood literally. In this context, "fault" signifies objective carelessness.[267] Thus, the federation can also be held liable if the teacher is not responsible because, for example, of a mental disorder.[268]

229 According to § 1 sec. 3 AHG, the legal entity, whom the negligent organ is assigned to organisationally, can be held liable jointly with the legal entity liable according to sec. 1. If the organisational legal entity has effected damages payments based on § 1 sec. 3 AHG, it has a right of recourse against the legal entity liable according to sec. 1.

b) Special rules regarding personal injury of pupils:

230 Personal injury sustained by pupils at school is in Austria covered by legal accident insurance – just like personal injury suffered by employees at work. The General Social Insurance Act (*Allgemeines Sozialversicherungsgesetz*, ASVG) therefore applies the term "occupational accidents" also to accidents at school. "Occupational accidents" in this context are accidents which happen in a local, temporal and causal relation with school instruction; furthermore, accidents while participating at school events and on the way to the centre of education are included (see § 175 ASVG). Regarding "occupational accidents", the ASVG contains a particularity as to tort law: The so-called "employer's privilege concerning liability" (*Dienstgeberhaftpflichtprivileg*) releases employers, supervisors in business, but also the operators of institutions where pupils are trained (§ 335 sec. 3 ASVG)[269] from any liability concerning negligently caused "occupational accidents" (§ 333 ASVG). This exemption from liability according to court practice comprises claims for damages for pain and suffering also.[270] Merely in cases of intent can the persons who benefit from the "employer's privilege concerning liability" be held liable by the person who has been personally injured; however, the damages claims are set off against the benefits from the social insurance (§ 333 sec. 2 ASVG).[271]

231 This particularity can be explained by the basic concept of personal accident insurance, the payment of the entire cost of this insurance by the employers, and the endeavour to keep actions for damages between employees/pupils and employers/operators of institutions where pupils are trained as few as possible.[272]

[267] H. Koziol/St. Frotz, [1979] RdS, 98; H. Koziol (supra fn. 3), 380.
[268] H. Koziol (supra fn. 3), 380.
[269] § 335 sec. 3 ASVG provides that the "operator of an institution where pupils are trained" is treated like an employer regarding liability.
[270] *Sammlung sozialversicherungsrechtlicher Entscheidungen* (compilation of decisions on social security law, SV-Slg) 26.167.
[271] Th. Tomandl, *Grundriss des österreichischen Sozialrechts* (5th edn. 2002), nos. 300 et seq.
[272] Th. Tomandl (supra fn. 271), no. 300.

232 In the case of personal injury of pupils because of the teacher violating his duty to supervise, the pupil would principally be entitled to a damages claim against the federation according to § 1 sec. 1 AHG (see supra nos. 224 et seq.). This raises the question whether the federation in this context enjoys the employer's privilege as an "operator of an institution where pupils are trained" (§ 335 sec. 3 ASVG). Concurrently it is held that the maintainer of a school can be subsumed under this term.[273] However, because of the functional definition of "organ" in the AHG, the federation could be held liable according to the AHG also if she is not the maintainer of the school (see supra no. 226). Also in this case, according to the prevailing opinion, the federation is to be considered an "operator of an institution where pupils are trained".[274]

233 Since the federation is not a natural person, § 335 sec. 1 ASVG regarding legal persons also has to be considered.[275] § 335 sec. 1 ASVG provides that legal persons enjoy "employers' privilege" if a member of their executive body caused the damage. However, employer's privilege concerning liability is also applied if the federation is held liable not because of the damaging behaviour of her executive body but according to the AHG.[276]

c) Vicarious liability according to the ABGB

234 Regarding private schools the further question has to be raised, whether the maintainers of private schools themselves can be held liable according to the rules on vicarious liability. According to § 1 sec. 1 AHG, an organ in the sense of the AHG cannot be held liable itself. Thus, it has to be clarified whether the maintainer of a private school is to be considered an organ in this sense. Although § 1 sec. 2 AHG states that organs are natural persons, the prevailing opinion holds that also legal persons, who are assigned the fulfilment of public functions with *imperium*, can be considered organs – contrary to the wording of the AHG.[277]

d) Damage caused to the legal entity – Liability according to the OrgHG

235 If an organ in implementation of legislation wrongfully and culpably causes damage to the legal entity it belongs to, it is not the AHG but the Liability of Public Organs Act (*Organhaftpflichtgesetz*, OrgHG) which has to be applied.

[273] H. Koziol, Kommentar zu OGH 1 Ob 45/83, 25 January 1984, [1985] *Zeitschrift für Arbeitsrecht und Sozialrecht* (ZAS), 216 et seq.; SZ 61/62; Th. Tomandl (supra fn. 271), no. 300.

[274] H. Koziol, [1985] ZAS, 216 et seq.; SZ 61/62. Earlier the OGH, however, focused a decision on the teacher being a "supervisor in business" and held that the federation out of this reason enjoyed the "employer's privilege concerning liability" in the scope of official liability (OGH 1 Ob 45/83; W. Schragel, (supra fn. 259), 78). The OGH thus considered official liability the fulfilment of somebody else's liability and not an original liability based on the imputation of the organ's behaviour (contrary H. Koziol, [1985] ZAS, 216 et seq.).

[275] Also § 335 sec. 3 ASVG explicitly refers to sec. 1.

[276] SZ 61/62.

[277] W. Schragel (supra fn. 259), no. 28; P. Mader in: M. Schwimann (supra fn. 139), § 1 AHG no. 6.

Thus, this statute is relevant if a teacher neglected the supervision of a pupil, who therefore damaged the equipment of the school.[278]

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

If the injured party has been compensated by the federation, the latter has a right of recourse against the teacher who neglected his duty to supervise. However, contrary to the general rules of the ABGB, recourse is only possible if the tortfeasor acted intentionally or with gross negligence (§ 3 AHG). In case of slight negligence the legal entity entertains no right of recourse against its organ. 236

If the teacher acted in accordance with a special instruction of a superior, the federation can only take recourse if the teacher complied with the instruction of a superior who was obviously incompetent or if he violated provisions of penal law by complying with the instruction (§ 4 AHG). 237

8. Same question with respect to private schools: May the school entertain a recourse action against the teacher who has failed to supervise?

Since within the scope of education every teacher is exercising functions of the federation, according to the AHG the federation is to be held liable if the teacher of a private school[279] failed to supervise (see supra nos. 224 et seq.).[280] Also if according to § 1 sec. 3 AHG, the legal entity, whom the negligent organ is assigned to organisationally, has been held liable, this organisational legal entity entertains a right of recourse only against the federation. 238

The federation can then have redress against the organ if it acted intentionally or with gross negligence (§ 3 AHG). 239

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

The criteria for assessing the extent of the teacher's duty to supervise are similar to the criteria relevant when determining the parents' duty of care (see supra nos. 183 et seq.). In particular the factual situation and circumstances in the person of the child and circumstances regarding the teacher are to be taken into account. The judge has to consider what extent of supervision is necessary and what can reasonably be expected from a teacher in the individual case. 240

[278] H. Koziol/St. Frotz, [1979] RdS, 98.
[279] With public authority.
[280] [1978] EvBl, no. 101.

241 Of special importance in this respect is the writ on supervision (*Aufsichtserlaß*) of the Minister for Education and Cultural Affairs[281] from the year 1997. Regarding the person of the pupil the *Aufsichtserlaß* stresses that handicapped or disturbed pupils necessitate a higher intensity of supervision. Also the pupils' knowledge of dangers and their being used to the surroundings has to be considered. Furthermore, the *Aufsichtserlaß* provides that the teacher has to decide according to the individual circumstances whether pupils of the ninth or a higher level of education[282] still need to be supervised. Moreover the writ states that the sole fact that the pupils have attained the age of majority does not discharge the teacher from his duty to supervise.[283]

242 The factual situation has also to be taken into account. The more dangerous the situation and the more serious the impending injury are,[284] the higher the required extent of supervision.

243 Finally it also has to be considered what can reasonably be expected from a diligent teacher in the specific situation. In this respect the writ on supervision stresses that the ratio of the number of teachers and the number of pupils is a relevant criterion.[285] If the group to be supervised is very small, the required extent of supervision of the individual pupil will be higher than in a large group.[286] Furthermore, very little experience on the part of the teacher with the class in question necessitates a more intense supervision.[287]

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other. May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

244 Personal injury sustained by pupils at school is in Austria covered by legal accident insurance. The provisions on the benefits to be rendered by the social security institution, however, do not take into consideration whether third persons could be held liable for the personal injury insured against.[288] Therefore the question of whether the tortfeasor is released from liability because of the injured party received benefits from social insurance and thus did not sustain

[281] *Aufsichtserlaß des Bundesministers für Unterricht und kulturelle Angelegenheiten vom 20.8.1997*, URL: http://www.vdloe.vienna.at/Texte/Recht/E_Aufsic.htm, 13.6.2003.
[282] I.e. of 14 years of age or older.
[283] 1.1 *Aufsichtserlaß* (supra fn. 281).
[284] H. Koziol (supra fn. 6), nos. 4/29 et seq.; H. Koziol/St. Frotz, [1979] RdS, 97.
[285] 1.1 *Aufsichtserlaß* (supra fn. 281).
[286] H. Koziol/St. Frotz, [1979] RdS, 97.
[287] 1.1 *Aufsichtserlaß* (supra fn. 281).
[288] Th. Tomandl (supra fn. 271), no. 299; W. Holzer, The Impact of Social Security Law on Tort Law in Austria in: U. Magnus (ed.), *The Impact of Social Security Law on Tort Law* (2003), no. 2.

loss has to be raised.[289] The prevailing opinion answers this problem of the so-called "deduction of benefits" (*Vorteilsanrechnung*) according to the purpose of the contribution:[290] As far as the insurance benefits received are not supposed to exonerate the tortfeasor, but only to serve the injured, they are not to be deducted from the damages. If, on the other hand, the tortfeasor himself provided for the insurance coverage of the injured, the benefits have to be taken into account.[291]

Accordingly, in general the ASVG assumes the continuation of the injured's damages claim against the tortfeasor; the insurance benefit is not deducted. § 332 ASVG therefore provides that the damages claim of the injured is devolved upon the social insurance institution by legal cession.[292] 245

However, regarding those persons who fall within the ambit of "employer's privilege concerning liability", § 333 ASVG provides that they are released from any liability concerning negligently caused "occupational accidents" (see supra nos. 230 et seq.).[293] In this respect, amongst other things, the idea of the employers paying for the insurance coverage of the injured is decisive. Thus the purpose of the contribution is also to release the tortfeasor. The legislator, however, did not want to release the tortfeasor in the case of intent or gross negligence also. Thus the ASVG grants the social security institution an original claim for compensation of the rendered benefits against the tortfeasor who acted with gross negligence or intent.[294] This claim is not based on a legal cession but represents an original, proper entitlement. It does not depend on the amount of damages the person enjoying the "employer's privilege concerning liability" would have to pay according to the general rules of tort law. The social security agency can claim compensation for all benefits rendered in this insurance case; contributory negligence of the injured is not to be taken into account (§ 334 sec. 3 ASVG).[295] In the case of gross negligence, the social security agency can renounce its claims entirely or in part if the economic circumstances of the defendant should justify this (§ 334 sec. 5 ASVG).[296] 246

a) Claim against the teacher

The teacher is considered a "supervisor in business" in relation to his pupils and therefore belongs to the persons enjoying the "employer's privilege concerning liability".[297] Thus, theoretically the social security institution would be entitled to a damages claim against him according to § 334 sec. 1 ASVG in the 247

[289] Or a smaller loss.
[290] See H. Koziol (supra fn. 6), no. 10/38.
[291] H. Koziol (supra fn. 6), no. 10/38.
[292] W. Holzer (supra fn. 288), no. 13; H. Koziol (supra fn. 6), no. 13/21.
[293] W. Holzer (supra fn. 288), no. 14.
[294] W. Holzer (supra fn. 288), no. 15.
[295] W. Holzer (supra fn. 288), no. 15.
[296] Th. Tomandl (supra fn. 271), no. 301; W. Holzer (supra fn. 288), no. 15.
[297] [1985] JBl, 111.

case of gross negligence or intent. However, since the teacher is an organ in the sense of § 1 sec. 2 AHG, he cannot be held personally liable.

b) Claim against the federation

248 Rather, the claim is to be directed against the federation according to § 1 sec. 1 AHG. The federation belongs to the persons enjoying the "employer's privilege concerning liability" as an "operator of an institution where pupils are trained" (see supra no. 232). According to the prevailing opinion, this is the case even if she is not the maintainer of the school.[298] Thus, a claim of the social security agency against the federation for compensation is determined by § 334 ASVG. In the case of slight negligence, the federation cannot be held liable at all.[299]

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

249 The damages claim against the minor tortfeasor according to § 1310 ABGB is subsidiary to the claim against the teacher who neglected his duty to supervise (§ 1309 ABGB) or rather against the federation (§ 1 sec. 1 AHG), whom the teacher's behaviour is imputed to. The teacher himself cannot be held liable by the injured for neglecting his duty to supervise (§ 1 sec. 1 AHG).

250 Only if it is impossible to identify one or more liable supervisors or if they are not liable or not able to compensate the damage could the minor himself be sued.[300] However, since the federation can be held liable, this is very unlikely to happen.

251 If, on the other hand, the child who caused the damage is more than 14 years of age, he is fully responsible. He thus can be held liable for the damage he culpably caused. Liability of the guardian who culpably neglected his duty to supervise cannot be based on § 1309 ABGB, as this paragraph concerns minors only. However, it can be based on the general rules on *Verkehrssicherungspflichten*. Thus, joint and several liability of a person who has reached majority and his supervisor is possible.[301]

12. Is there any possibility either for the child or the teacher to have recourse against each other?

252 If the teacher had to reimburse the federation according to § 3 AHG, he cannot have recourse against the minor tortfeasor. It is the legislative intent that the

[298] H. Koziol, [1985] ZAS, 216 et seq.; SZ 61/62.
[299] H. Koziol, [1985] ZAS, 216 et seq.
[300] K. Wolff in: H. Klang (supra fn. 54), 78; F. Harrer in: M. Schwimann (supra fn. 88), § 1310 no. 3; R. Reischauer in: P. Rummel (supra fn. 7), § 1310 nos. 2 and 11.
[301] H. Koziol (supra fn. 3), 310 et seq.

minor shall be only held liable for the damage caused by himself if the requirements of § 1310 ABGB (and thus also the requirement of subsidiarity) are met. The benefit of subsidiary liability would be removed if the teacher was entitled to recourse against the tortfeasor.[302] A further argument against recourse by the teacher is that it was his task to prevent the minor from acting damagingly.[303]

253 Neither is the federation entitled to a recourse against the child if she had to bear the loss, because the teacher did not act with intent or gross negligence (§ 3 sec. 1 AHG) or because the court reduced the reimbursement of the teacher out of reasons of equity (§ 3 sec. 2 AHG). The distribution of the loss between the teacher and the federation by the AHG must not affect the liability of the child.

254 Neither can the minor be sued because the federation cannot obtain reimbursement as the teacher cannot be held liable or because the teacher is not able to compensate the damage or is of unknown abode; the federation's official liability is an original liability based on the imputation of the organ's behaviour and not the fulfilment of the teacher's liability.[304]

255 If, on the other hand, the minor indemnified the injured party because the liable supervisors were of unknown abode or unable to compensate the damage, he can have recourse against the supervisor(s). However, regarding the teacher, this is not very likely to happen since the teacher's behaviour is imputed to the federation who is in general able to compensate the damage.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

256 During the time the child is attending school, § 51 sec. 1 and 3 SchUG provides for the teachers' duty to supervise the minor (see supra no. 222). The parental duty is thus reduced to an organisational duty. In exceptional cases (that are rather hard to imagine) they could thus be held liable for *culpa in eligendo, in instruendo*[305] or *in vigilando* (see supra no. 215). The parents cannot be held liable according to § 1315 ABGB because, according to the prevailing opinion,[306] § 1315 ABGB presupposes the authority to instruct. The teacher however works independently from instructions of the parents.

[302] H. Koziol (supra fn. 3), 310 et seq.

[303] H. Koziol (supra fn. 3), 311. However, if a responsible child aged more than 14 years culpably caused a damage and if the supervisor can be held liable jointly and severally, the latter has the right of recourse, since the child himself is responsible (see also H. Koziol (supra fn. 3), 311).

[304] Cf. H. Koziol, [1985] ZAS, 216 et seq.

[305] The parents would for example have to instruct the teacher about dangerous qualities of the child such as a penchant for stealing, for incendiarism et cetera.

[306] H. Koziol (supra fn. 3), 353; R. Welser (supra fn. 242), 394; [1968] JBl, 473.

Children as Tortfeasors under Belgian Law

Pieter De Tavernier

I. Short Introduction

The starting point of our tort law is that, as a rule, damage is for the account of the victim: loss lies where it falls.[1] Certain rules of law provide for an exception to this principle, by channelling the obligation to compensate for damage to a third party. In such cases, certain points of reference need to be present (and proven) that justify the channelling in accordance with the legal norm.[2] 1

First and foremost, there are rules of law that channel the obligation to pay damages to a third party whose unlawful act or omission has caused the damage. Here, not only the fault of the minor himself needs to be investigated, but also that of any other person whose behaviour is causally connected with the damage that the minor has done. The fundamental norms of this liability based on fault are artt. 1382 and 1383 of the Belgian Civil Code.[3] It is traditionally assumed that the notion of guilt contains two distinguishable elements, namely a subjective element, i.e. the accountability requirement, and an objective element, i.e. the unlawfulness requirement.[4] Accountability refers to freedom 2

[1] H. Bocken, La responsabilité sans faute en droit belge in: *In memoriam Jean Limpens* (1987), 85, no. 1; L. Cornelis, Beginselen van het Belgische buitencontractuele aansprakelijkheidsrecht. De onrechtmatige daad in: *Reeks Aansprakelijkheidsrecht* no. 7 (1989), 9, no. 5; R. Kruithof, De buitencontractuele aansprakelijkheid van en voor geesteszieken in: *Hulde aan Prof. Dr. R. Kruithof. Naar een "gouvernement des juges" in het Belgische verbintenissenrecht en andere opstellen* (1992), 1; T. Vansweevelt, Onderzoek naar de grondslag en de begrenzing van de aansprakelijkheid voor dieren, [1985–86] *Rechtskundig Weekblad* (R.W.), 2189; W. Van Gerven, De invloed van de verzekering op het verbintenissenrecht, [1962–63] R.W., 777.

[2] See L. Cornelis (supra fn. 1), 9, no. 5.

[3] F. Swennen, *Geestesgestoorden in het Burgerlijk Recht* (2000), 360, no. 456; W. Van Gerven/S. Covemaeker, *Verbintenissenrecht* (2001), 196.

[4] R.O. Dalcq, Traité de la responsabilité civile I. Les causes de la responsabilité in: *Les Novelles, Droit civil* V/1 (1967), I, 728–729, nos. 2300–2301; L. Cornelis (supra fn. 1), nos. 13, 21 and 28; B. Dubuisson, Autonomie et irresponsabilité du mineur in: *Documents du Centre de droit des obligations* (1997), 3, no. 5; F. Swennen (supra fn. 3), 360, no. 456; H. Vandenberghe/M. Van Quickenborne/P. Hamelink, Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad (1964–1978), [1980] *Tijdschrift voor Privaatrecht* (T.P.R.), (1146) 1170–1171, no. 23; H. Vandenberghe, De grondslag van de contractuele en extra-contractuele aansprakelijkheid voor eigen daad, [1984] T.P.R., 127; H. Vandenberghe/M. Van Quickenborne/K. Geelen/S. De Coster, Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad (1979–1984),

of choice, and to the lucidity of the person who has caused the damage and has performed the unlawful act consciously and freely.[5] An act of omission is unlawful if it entails a denial of a specific legal norm or if it violates the general duty of care,[6] on the understanding that there may be a ground of justification that takes away the unlawful nature of the act.[7]

3 *Second*, besides liability based on fault in cases where the damage is caused by minors, the legislator has provided for a channelling of the obligation to compensate for damage whereby the person held liable – the minor or the person responsible for the minor – is not required to pay for the damaging behaviour, but for the damage caused by persons or things with which he maintains a special relationship. The principal reason for such qualitative liabilities, encompassed in artt. 1384–1386 of the Belgian Civil Code, lies in part in the fact that, in the case of liability, the onus of proof of damage caused by minors lies entirely with the victim. The associated risk of proof was found by the legislator to be too great for the victim in some cases. For this reason, he introduced the notion of qualitative liabilities.[8] Depending on the intensity of the liability, it specifically concerns rebuttable presumptions of liability or objective liability.[9] In the case of rebuttable presumptions of liability, the onus of proof in relation to the fault and the causal relationship between this fault and the damage done is transferred to the victim of the potentially liable person, insofar as the victim, besides the proof of the damage, also delivers proof of a number of (legal and/or jurisprudential) conditions of liability.

4 The rebuttable presumptions of liability are encompassed in art. 1384, paragraph 2 and 4, Civil Code and may be summarised as follows. Under art. 1384, paragraph 2, Civil Code, parents are liable for damage caused by their minor children. Besides the proof of damage, the existence of this presumption depends on the proof of the following conditions of liability: (1) an intervention on the part of a minor child; (2) the fault or at least the objectively unlawful act by the minor child; (3) a causal relationship between the fault of the minor child and the damage done; (4) the victim must be a "third person"; and (5) the person held liable must have been acting in the capacity of "parent" of

[1987] T.P.R., (1255) 1263, no. 1; H. Vandenberghe/M. Van Quickenborne/L. Wynant, Overzicht van rechtspraak. Aansprakelijkheid en onrechtmatige daad (1985–1993), [1995] T.P.R., (1115) 1125, no. 2 and 1219, no. 31; W. Van Gerven/S. Covemaeker (supra fn. 3), 237. Furthermore: W. Van Gerven/J. Lever/P. Larouche, Tort law in: *The Common Law of Europe Casebook Series* (2000), 301, 352–353.

[5] *Cour de Cassation* (Cass.) 3 october 1994, [1994] *Arresten van het Hof van Cassatie* (Arr. Cass.), (807) 808; H. Vandenberghe/M. Van Quickenborne/L. Wynant/M. De Baene, Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad (1994–1999), [2000] T.P.R., (1551) 1561, no. 4.

[6] H. Vandenberghe/M. Van Quickenborne/L. Wynant/M. De Baene, [2000] T.P.R., (1551) 1563, no. 5; W. Van Gerven/S. Covemaeker (supra fn. 3), 238–239.

[7] L. Cornelis (supra fn. 1), 27–34, nos. 18–20; W. Van Gerven/S. Covemaeker (supra fn. 3), 238–239.

[8] L. Cornelis, De objectieve aansprakelijkheid voor motorrijtuigen, [1998–99] R.W., 523, no. 5.

[9] F. Swennen (supra fn. 3), 374, no. 472.

the minor child under consideration.[10] On the basis of art. 1384, paragraph 4, Civil Code, teachers and craftsmen are accountable for damage caused by their pupils or apprentices during the period that the latter are under the supervision of the former. Proof of this presumption depends on proof of the following juristic facts: (1) an intervention on the part of a pupil or an apprentice; (2) the fault or, at the least, objectively unlawful act by the pupil or apprentice; (3) a causal relationship between the fault or the objectively unlawful act by the pupil or, as the case may be, the apprentice and the damage done; (4) the victim must be a third party and (5) the person held liable must be the "teacher" of the pupil or, as the case may be, the apprentice under consideration.[11]

Technically speaking, it is only a small step from presumed liability to objective liability. It suffices to rule out the possibility of any counter-proof.[12] In the absence of possible counter-proof, the issue of qualitative liability is narrowed to the question of whether the victim (who bears the onus of proof in this respect) is able to demonstrate that the various (legal and/or jurisprudential) conditions of liability are fulfilled. If he succeeds, then a legal obligation to pay damages rests on the accused.[13] Thus, on the basis of art. 1384, paragraph 1, Civil Code, an objective liability rests on the keeper of a defective thing who causes damage to a third party. Apart from the proof of damage, proof of this qualitative liability depends on proof of the following juristic facts: (1) the damage is caused by the thing in the sense of art. 1384, paragraph 1, Civil Code; (2) the object is faulty; (3) a causal relationship between the faulty object and the damage done; (4) the victim must be a third-party, direct victim; (5) the person held liable has the capacity of the "keeper" of the faulty object under consideration.[14] According to art. 1385 Civil Code, both the owner of an animal and the non-owner who uses an animal can be held liable for any damage caused by that animal, irrespective of whether the animal is in his care or has escaped from it. For the application of this article, the victim must be able to prove the following juristic facts: (1) intervention on the part of the animal; (2) a causal relationship between the intervention by the intended animal and the damage done; (3) the victim must be a third-party, direct victim; (4) the person who is held to account must be the owner or custodian of the animal (if the intervention by the animal occurred while it was in his custody).[15]

5

[10] L. Cornelis (supra fn. 1), 304, no. 175.
[11] L. Cornelis (supra fn. 1), 333, no. 198; R.O. Dalcq (supra fn. 4), 547 et seq., nos. 1681 et seq.; W. Van Gerven/S. Covemaeker (supra fn. 3), 251.
[12] L. Cornelis, [1998–99] R.W., 523, no. 6.
[13] L. Cornelis, *Algemene theorie van de verbintenis* (2000), 231, no. 193; L. Cornelis, [1998–99] R.W., 523, no. 6.
[14] See L. Cornelis (supra fn. 1), 458–459, no. 280.
[15] L. Cornelis (supra fn. 1), 590, no. 361; B. Weyts, De toepassingsvoorwaarden van art. 1385 *Burgerlijk Wetboek* (B.W.) en de bewaring van een ontsnapt of verdwaald dier (comment on Vredegerecht (Vred.) Wolver-tem 13 februari 1997), [1998–99] R.W., 928.

II. Liability of the Child

A. Liability for Wrongful Acts

Excursus: Outline of the Belgian system of the personal liability of the child

a) The accountability of the minor (in general)

i) Unaccountability due to age

6 Under Belgian law, the unlawful act must be imputable to the underage perpetrator. In other words, it must be attributable to the fault of the minor.[16] With regard to the accountability of infantes, the *Court of Cassation* and indeed lower courts have hitherto ruled in this sense.[17]

ii) Unaccountability due to mental state

7 In principle, minors may be considered not to be accountable for their own acts or omissions, not only due to age, but also on grounds of their mental state.[18] However, deviations from this principle of non-accountability of the mentally ill minor are possible on the basis of equity considerations.

b) A more detailed look at the accountability requirement

8 In order that an act – or omission – could be imputable to a minor, it must have been committed out of the minor's conscious or free will.[19]

i) Conscious will

9 The minor must be aware of the materiality of the act committed.[20] This capacity is referred to as the capacity to distinguish. This presupposes that the minor is, on the one hand, able to understand the nature and the (material)

[16] L. Cornelis (supra fn. 1), 21–22, no. 14; B. Dubuisson (supra fn. 4), 3, no. 5; M. Faure/R. Van den Bergh, Efficiënties van het foutcriterium in het Belgisch aansprakelijkheidsrecht, [1987–88] R.W., (1105) 1109; H. Vandenberghe et al., [1980] T.P.R., (1146) 1170, no. 23; H. Vandenberghe et al., [1995] T.P.R., (1115) 1219, no. 31; H. Vandenberghe et al., [2000] T.P.R., (1551) 1688, no. 36; W. Van Gerven/S. Covemaeker (supra fn. 3), 241.

[17] Cass. 16 februari 1984, [1983–84] Arr. Cass., (744) 750 and [1984], I, 684; Cass. 3 mei 1978, [1978] Arr. Cass., (1037) 1039 and [1978] Pas., I, 1012 and [1978–79] R.W., 1855; Cass. 30 mei 1969, [1969] Arr. Cass., (943) 946, [1969] *Pasicrisie* (Pas.), I, 879 and [1970] Revue générale des assurances et des responsabilités (R.G.A.R.), no. 8416, obs. M. Grossmann; *Hof van Beroep te Luik* (Luik) 24 maart 1986, [1986] *Jurisprudence de Liège* (J.L.), 537; Brussel 21 maart 1984, [1985] R.G.A.R., no. 10978; *Rechtbank van Eerste Aanleg*, *Burgerlijke Kamer* (Rb.) Mechelen 27 april 1987, [1988–89] R.W., 25.

[18] Comp. Cass. 29 november 1984, [1985] Arr. Cass., 446 and [1985] Pas., I, 399: "Overwegende dat de daad van een persoon, die op het ogenblik van de uitvoering in een ernstige staat van geestesstoornis verkeert die hem tot het controleren van zijn daden ongeschikt maakt, hem niet kan worden aangerekend als een fout waarvoor hij derhalve *contractueel* aansprakelijk zou zijn"; L. Cornelis (supra fn. 1), 23–24, no. 16.

[19] Cass. 10 april 1970, [1970] Arr. Cass., 729 and [1970] Pas., (682) 683: "consciemment et librement"; H. Vandenberghe et al., [2000] T.P.R., 1561, no. 4; F. Swennen (supra fn. 3), 364, no. 460.

[20] F. Swennen (supra fn. 3), 95–96, no. 115 and 364–365, no. 461.

consequences of his acts[21] and possesses the competence to realise that the act is unlawful.[22]

The minor must understand the nature of his behaviour.[23] The risks involved in this behaviour must, within reason, be clear to him.[24] 10

The minor must also be able to understand the (material) consequences of his acts (or omissions).[25] 11

Understanding the notion of an unlawful act or omission implies that a minor must be able to distinguish between "good" and "evil".[26] The minor must be able to judge whether his behaviour complies with the general duty of care.[27] This in turn requires a degree of insight and intellectual capacity,[28] more specifically in order to be able to discern analogies, relationships and causes, and thus the capacity to generalise.[29] 12

ii) Free will

The unlawful act must also have originated in the free will of the minor.[30] In other words, the notion of accountability encompasses that the minor must be 13

[21] Bergen 11 mei 1976, [1977] R.G.A.R., no. 9783; Luik 19 juni 1973, [1973] R.G.A.R., no. 9096; J.-L. Fagnart, *Examen de la jurisprudence concernant la responsabilité civile (1968–1975)* (1976), 41, no. 39; R. Vandeputte, Het aquiliaans foutbegrip, in: *Reeks aansprakelijkheidsrecht no. 2* (1988), 34, no. 1.

[22] R.O. Dalcq (supra fn. 4), 730, nos. 2304–2305; F. Swennen (supra fn. 3), 365, no. 461.

[23] Antwerpen 2 april 1998, [1999] *Intercontact (N)*, 125: bomb alert; F. Swennen (supra fn. 3), 365, no. 461; H. Vandenberghe et al., [2000] T.P.R., 1689–1690, no. 36.

[24] Bergen 29 februari 1988, [1990] R.G.A.R., no. 11636; Rb. Leuven 21 september 1994, [1996] R.G.A.R., no. 12696 and [1995–96] R.W., 1314; Rb. Nijvel 20 maart 1985, [1987] *Tijdschrift voor Belgisch Burgerlijk Recht* (T.B.B.R.), 86; H. Vandenberghe et al., [2000] T.P.R., 1689–90, no. 36.

[25] Comp. Cass. 16 februari 1984, [1984] Pas., I, 684; Cass. 3 mei 1978, [1978] Pas., I, 1012; Cass. 30 mei 1969, [1969] Pas., I, (879) 882 and [1970] R.G.A.R., no. 8416, noot M. Grossmann; F. Swennen (supra fn. 3), no. 461.

[26] See Cass. 24 oktober 1974, [1975] Arr. Cass., (259) 260; Luik 24 maart 1986, [1986] (J.L.), 537; Rb. Turnhout 27 juli 1916, decision *a quo* of Brussel 30 mei 1917, [1917] Pas., II, (297), 298: "la notion du bien en du mal"; H. De Page, *Traité élémentaire de droit civil belge II. Les incapables. Les obligations (Première partie)* (1964), II, no. 914; R.O. Dalcq (supra fn. 4.), 730, no. 2304: "la notion du bien et du mal"; R. Kruithof (supra fn. 1), 126, no. 4; F. Swennen (supra fn. 3), 365, no. 461.

[27] Cass. 16 februari 1984, [1984] Pas., I, 684; Cass. 30 mei 1969, [1969] Pas., I, 879 and [1970] *Revue critique de jurisprudence belge* (R.C.J.B.), 36; Brussel 21 maart 1984, [1985] R.G.A.R., no. 10978; Rb. Mechelen 27 april 1987, [1988–89] R.W., 25; P.H.M. Rambach, *Die deliktische Haftung Minderjähriger und ihrer Eltern im französischen, belgischen und deutschen Deliktsrecht* (1994), 41.

[28] Répertoire pratique du droit belge, v Responsabilité, no. 76.

[29] M. Grossman, comment on Cass. 30 mei 1969, [1970] R.G.A.R., no. 8416, 2verso.

[30] Cass. 10 april 1970, [1970] Arr. Cass., 729 and [1970] Pas., I, (682) 683: "La transgression matérielle d'une disposition légale ou réglementaire constitue en soi une faute qui entraine la responsabilité (…) civile de l'auteur, à condition que cette transgression soit commise *librement* et consciemment par l'intervention de l'homme"; L. Cornelis (supra fn. 1), 27, no. 18; F. Swennen (supra fn. 3), 365, no. 462; H. Vandenberghe et al., [1995] T.P.R., nos. 2 and 31; S. Stijns/H. Vandenberghe (eds.), *Verbintenissenrecht* (2001), 80, no. 3; vgl. R.O. Dalcq (supra fn. 4), 173, no. 287. Comp. R.O. Dalcq (supra fn. 4), 173, no. 287.

able to understand not only what level of care is expected from him, but also the extent to which his behaviour satisfies this expectation. He must also be able to conform to this knowledge.[31] Accountability is thus an issue of knowing and wanting,[32] or knowledge and ability.[33]

iii) Criteria for assessing the accountability of a minor

14 The accountability of the minor is assessed in concrete terms, i.e. taking into account the personal characteristics and possibilities of the minor by whose fault the damage has been caused.[34] To this end, the judge will test the behaviour of the minor against four criteria: the age of the minor; the physical and intellectual capacity of the minor in relation to the act that has caused the damage; the environment or social context from which the minor hails and the danger that exists in a concrete situation.

15 Which role does the age of the minor play in assessing his accountability? Vis-à-vis the mentally disturbed minor, the age of the actor would appear to be an irrelevancy. Under this assumption, the judge should be able to base the assessment on the actual existence of the mental disturbance at the moment of the unlawful act or omission. However, in the legal regimes examined, it appears that age often does play an important, though not always decisive, role in the assessment of the accountability of mentally fit minors.[35]

16 The assessment of the accountability of a minor at the moment that the damage is caused is left to the discretion of the judge, irrespective of the child's age.[36] Pursuant to a majority of legal doctrine, most courts and tribunals have traditionally applied the presumption that a child should be considered accountable from a fixed age, more specifically from the age of seven.[37] This explains why, often, the judge contents himself with determining a specific age under seven years and subsequently, without further comment or examination, concludes that a child is either accountable or not, depending on whether it has reached the age of seven.[38] On the evidence of more recent rulings, the age threshold would appear to have become more variable, whereby children un-

[31] F. Swennen (supra fn. 3), 367, no. 463.

[32] Cass. 3 oktober 1994, [1994] Arr. Cass., 807, [1994] *Bulletin des Arrêts de la Cour de cassation* (Bull.), 788, [1995] *Revue de jurisprudence de Liège, Mons et Bruxelles* (J.L.M.B.), 616, [1995] *Journal des tribunaux* (J.T.), 26, [1994] Pas., I, 788, concl. J. Leclercq, [1997] *Tijdschrift voor Bestuurswetenschappen en Publiek Recht*, 709 and [1996–97] R.W., 1227, noot; Cass. 22 september 1988, [1988–89] Arr. Cass., 94: "willens en wetens"; F. Swennen (supra fn. 3), 367, no. 463; H. Vandenberghe et al., [1995] T.P.R., no. 2.; S. Stijns/H. Vandenberghe (supra fn. 30), 81, no. 3.

[33] F. Swennen (supra fn. 3), 367, no. 463; P.H.M. Rambach (supra fn. 27), 112.

[34] R. Cornelis (supra fn. 1), 23, no. 15.

[35] See B. Dubuisson (supra fn. 4), 4, no. 6.

[36] B. Dubuisson, (supra fn. 4), 4, no. 6.

[37] P.H.M. Rambach (supra fn. 27), 114, 117.

[38] Gent 20 november 1964, [1964–65] R.W., 1592; Brussel 3 oktober 1972, [1973] Pas., II, 21; Rb. Antwerpen 4 oktober 1973, [1974] *Tijdschrift voor Verzekeringen* (De Verz.), 345; Rb. Hasselt. 3 maart 1972, [1974] R.G.A.R., no. 9300.

der the age of six are considered capable of guilt, while those aged 10 or over are regarded as accountable.[39] For minors in between these two thresholds, there is some legal insecurity.[40] Vis-à-vis this category of minors, the judge must rely on his personal assessment of the child's awareness and capacities at the moment the damage was caused. In such cases, the judge must, unwillingly, venture into the realm of developmental psychology.[41]

c) The unlawfulness of the minor's behaviour

As we have previously pointed out, the minor's act or omission is unlawful if, in itself, it either encompasses a denial of a specific rule of law (this may be a stipulation that imposes or forbids a certain behaviour or it may be a legal provision that determines the boundaries and assertion of certain subjective rights) or the general duty of care. I shall restrict myself to the denial of the general duty of care. 17

For assessing whether the minor has flouted the general duty of care, his behaviour is compared with that of a "person who exhibits normal prudence and care in similar circumstances".[42] The duty of care is an abstract, objective norm.[43] Personal, internal characteristics of the actor must be disregarded.[44] The intellectual, mental, and physical capacities of the actor are irrelevant to the assessment of whether or not he has committed an unlawful act. Likewise, the personal capacities of the actor should not be taken into account.[45] Although testing against the general duty of care happens *in abstracto*, this rule does need correcting to some degree. Comparison of the behaviour of the actor with that of the *bonus pater familias* is after all only possible if the person who exhibits normal care and caution is placed in exactly the same circumstances as the person who has committed the unlawful act that has 18

[39] J.-L. Fagnart, La responsabilité civile. Chronique de jurisprudence 1985–1995, in: *Les dossiers du Journal des Tribunaux no. 11* (1997), 50, no. 42; B. Dubuisson (supra fn. 4), 4, no. 6.

[40] J.-L. Fagnart, (supra fn. 4), 50, no. 42.

[41] B. Dubuisson (supra fn. 4), 4, no. 6.

[42] Cass. 26 juni 1998, [1998] Arr. Cass., 343; Cass. 8 december 1994, [1994] Arr. Cass., 1074, [1994] Bull., 1063, [1995] J.L.M.B., 387, obs. D. Philippe, [1995] J.T., 497, obs. R.O.D., [1995] R. Cass., 171, obs. A. Van Oevelen, [1995–96] R.W., 180, obs. A. Van Oevelen, [1995] *Verkeersrecht*, 108; Antwerpen 3 februari 1999, [1999] *Verkeersrecht*, 328; Rb. Brussel 12 januari 1996, [1996] T.B.B.R., 349; H. De Page (supra fn. 26), no. 941; B. Dubuisson (supra fn. 4), 8, no. 10; M. Faure/R. Van den Bergh, Efficiënties van het foutcriterium in het Belgisch aansprakelijkheidsrecht, [1987–88] R.W., (1105) 1109. H. Vandenberghe et al., [2000] T.P.R., 1592, no. 12; W. Van Gerven/S. Covemaeker (supra fn. 3), 239.

[43] L. Cornelis (supra fn. 1), 35, no. 21; M. Faure/R. Van den Bergh, [1987–88] R.W., 1109; H. Vandenberghe et al., [2000] T.P.R., 1607, no. 16, 592, no. 12.

[44] H. Vandenberghe et al., [2000] T.P.R., 1608, no. 16; M. Faure/R. Van den Bergh, [1987–88] R.W., 1109; W. Van Gerven/S. Covemaeker (supra fn. 3), 240.

[45] L. Cornelis (supra fn. 1), 35, no. 21; R.O. Dalcq (supra fn. 4), no. 262; J.-L. Fagnart, Chronique de jurisprudence. La responsabilité civile (1968–1975), [1976] J.T., (569) 586; R. Vandeputte (supra fn. 21), 16. Furthermore: L. Limpens/R. Kruithof/A. Meinertzhagen-Limpens, Liability for one's own act in: *International Encyclopedia of Comparative Law IX*, *Torts* (1974), chapter 2, 17, no. 25.

caused the damage. This is referred to as the concretisation of the notion of fault.[46]

19 The question arises whether the age of the minor should be disregarded in the assessment against the general duty of care.[47] I feel it should not. After all, the assessment *in abstracto* of the behaviour of the minor entails that no account should be taken of intellectual or psychological factors, as these will inevitably lead the judge to consider the *forum internum* of the individual, but that is not to say that the internal circumstances of the minor, insofar as they are objectifiable, cannot be taken into account.[48]

20 It is sometimes argued in legal doctrine that it makes little sense to take into account the precise age of minors, as, on the basis of the double assessment of the damaging behaviour on the part of the minor (subjective and objective element), minors who lack the capacity to distinguish (*infantes*) cannot, in any case, be held accountable under Belgian law. Why, then, should the judge take into consideration the minor's age when assessing whether he has complied with the general duty of care? I feel this argument is unconvincing. *First and foremost*, discounting the minor's age allows the judge to interpret the notion of care appropriately for minors who have reached the "years of discretion". *Second*, it appears that in practice, when testing the minor's behaviour against the care criterion, many judges take into account the age of the minor.[49] This should not come as a surprise, as comparing the behaviour of minors, including minors who have acquired the capacity to distinguish, with that of adults is often an artificial endeavour. This is certainly the case in situations of play.[50]

21 In recent case law, one discerns a distinction according to the nature of the act that has caused damage. If the damage is a consequence of a dangerous activity or an act, so that the minor has exhibited an aggressive or asocial attitude, the behaviour of the minor is compared to that of an adult.[51] If, however, the

[46] R.O. Dalcq (supra fn. 4), 166, nos. 262–264 and 183 et seq., nos. 314 et seq.; H. Vandenberghe/M. Van Quickenborne/L. Wynant, Overzicht van rechtspraak. Aansprakelijkheid uit onrechtmatige daad (1985–1993), [1995] T.P.R., (1115) 1204–1209, nos. 26–26; H. Vandenberghe et al., [2000] T.P.R., 1607, no. 16.

[47] See B. Dubuisson (supra fn. 4), 8–11, nos. 10–11.

[48] B. Dubuisson, (supra fn. 4), 10, no. 11.

[49] D. Deli, De aansprakelijkheid van de ouders voor verkeersovertredingen van hun minderjarige kinderen en de verplichting tot "dubbele voorzichtigheid" van de bestuurder t.a.v. kinderen in het verkeer (comment on Brussel 2 april 1987), [1989] T.B.B.R., 352, no. 2; H. Vandenberghe et al., [1995] T.P.R., 381, no. 121.

[50] Gent 22 november 1994, [1996] R.G.A.R., no. 12681; Luik 27 oktober 1993, [1994] J.L.M.B., 1361, obs. A. Gosselin; Brussel 20 februari 1989, [1991] R.G.A.R., no. 11782; Rb. Luik 23 april 1993, [1994] R.G.A.R., no. 12370; B. Dubuisson (supra fn. 4), 9, no. 10; Vred. Hamme 24 februari 1987, [1992] *Tijdschrift van de Vrede- en Politierechters* (T. Vred.), 129.

[51] See for example Antwerpen 2 april 1998, [1999] *Intercontact (N)*, 125; Gent 6 september 1995, [1998] *Intercontact (N)*, 90, [1998] *Journal du droit des jeunes* (J. dr. jeun.), afl. 179, 39, noot en [1997–98] R.W., 1387; Bergen 12 juni 1995, [1997] R.G.A.R., no. 12732; Bergen 28 juni 1994, [1995] R.G.A.R., no. 12540 en [1996] J.L.M.B., 91, obs. D.-M. Philippe; Antwerpen 23 maart 1994, [1996] R.G.A.R., no. 12659; Bergen 29 september 1993, [1996] J. dr. jeun., afl.

damage has occurred within the context of a normal activity or is due to inattention, then jurisprudence tends to compare the behaviour of the minor with that of a child of the same age.[52]

End of Excursus

1. Is there a fixed minimum age for children to be liable?

22 There is no fixed minimum age for children to be liable. Nevertheless, age often does play an important, though not always decisive role in the assessment of the accountability of children. The assessment of the accountability of a minor at the moment that the damage is caused is left to the discretion of the judge, irrespective of the child's age. Pursuant to a majority of legal doctrine, most courts and tribunals have traditionnally applied that a child should be considered accountable from a fixed age, more specifically from the age of seven. On the evidence of more recent rulings, the age treshold would appear to have become more variable, whereby children under the age of six are considered capable of guilt, while those aged 10 or over are regarded as accountable. For minors between these two tresholds, there is some legal insecurity.

2. Is there a specific window within the life of a child during which the liability of the child depends on his capacity to act reasonably or any similar standard?

23 There is no such specific window. As already stated, the liability of the child does not depend on the attainment of a specific age. If the tortfeasor is a child, the liability is based on his individual capacity, i.e. his conscious and free will at the moment of the damage. Even a child younger than six years can be held liable, if it is proved that that child had a conscious and free will at the moment he caused the damage.

160, 482, obs.; Bergen 9 juni 1993, [1993] J.T., 688; Rb. Brussel 30 juni 1998, [1999] De Verz., 107, obs. C. Bellemans; Jeugdrb. Brussel 18 december 1997, [1998] J. dr. jeun., afl. 174, obs. V. Macq; Rb. Brussel 1 maart 1993, [1993] J. dr. jeun., afl. 129, 24, [1993] J.T., 580, [1995] R.G.A.R., no. 12446; Rb. Brugge 10 september 1990, [1993–94] R.W., 651; Vred. Schaarbeek 5 juni 1996, [1999] *Intercontact (N)*, 129.

[52] See for example Antwerpen 8 oktober 1990, [1992] R.G.A.R., no. 12048; Brussel 18 mei 1990, [1992] R.G.A.R., no. 11992; Gent 21 juni 1994, [1995–96] R.W., 1055 and [1996] J. dr. jeun., afl. 155, 235, obs. J. Jacqmain; Brussel 20 februari 1989, [1991] R.G.A.R., no. 11782; B. Dubuisson (supra fn. 4), 10, no. 11.

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

24 In Belgium, the "capacity to act reasonably" must be understood as follows: the act – or omission – of the child must have been committed out of the minor's conscious and free will. On the one hand, the minor must be aware of the materiality of the act committed (conscious will). This capacity is referred to as the capacity to distinguish. The minor must understand the nature and the (material) consequences of his acts and must possess the competence to realise that the act is unlawful. On the other hand, the unlawful act of the child must also have originated in the free will of the child. So, the minor must not only understand what level of care is expected from him, but also be able to conform to this knowledge. Capacity is thus an issue of knowing and wanting, or knowledge and ability.

25 It is not sufficient that the child understands that his action can in some way be dangerous (abstract danger). The minor has to realise the particular danger in the individual case (concrete danger).

26 The capacity of the child is not measured by an objective standard referring to an ordinary child of the same age. In Belgium, the accountability of capacity of the child is assessed in concrete terms, i.e. taking into account the personal characteristics and possibilities of the child by whose fault the damage has been caused.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

27 There is no evidence that the accountability or capacity issue is or was influenced by the existence of an insurance coverage. There are no indications of the opposite either. However, the fact that the minor is covered by liability insurance is significant when establishing liability in equity (cf. infra question no. 8. b)).

5. What is the standard of care appliable to children?

28 For assessing whether the minor has flouted the general duty of care, his behaviour is compared with that of a "person who exhibits normal prudence and care in similar circumstances". The duty of care is an abstract, objective norm. The intellectual, mental and physical capacities of the minor tortfeasor are ir-

relevant to the assessment of whether or not he has committed an unlawful act. This rule does need correcting to some degree. Comparison of the behaviour of the child with that of the *bonus pater familias* is after all only possible if the person who exhibits normal care and caution is placed in exactly the same circumstances as the minor child who has committed the unlawful act that has caused the damage.

It has been argued that the age of the minor should be disregarded in the assessment against the general duty of care. I do not agree with this point of view. The comparison of the behaviour of the child with that of the *bonus pater familias* entails that no account should be taken of the intellectual or psychological factors of the child, but it is not to say that the internal circumstances of the minor, insofar as they are objectifiable, cannot be taken into account. 29

6. Are children held to a higher standard of care if they engage in "adult activities"?

In recent Belgian case law, one discerns a distinction according to the nature of the act that has caused the damage. If the damage is a consequence of a dangerous activity or an act, so that the minor has exhibited an aggressive or asocial attitude, the behaviour of the minor is compared to that of an adult. If, however, the damage has occurred within the context of a normal activity or is due to inattention, then jurisprudence tends to compare the behaviour or the minor with that of a child of the same age. 30

B. Liability in Equity

Excursus: Outline of the Belgian system

In certain circumstances, the legislator has deemed it necessary to allow an unaccountable persons to be held (partially or fully) liable for damage he has caused.[53] Under Belgian law, however, this option was provided for persons who are unaccountable on grounds of their mental state, and not for children who are unaccountable because of their age (*infantes*).[54] This rule lies embedded in art. 1386bis of the Belgian Civil Code. On the basis of this article, in cases where damage to another person caused by a minor who is in a state of insanity, serious mental disturbance or mental impairment, so that he is unfit to control his acts, the judge can sentence him to partial or full repayment of the amount that would have applied had he had full control over his actions. In such cases, the judge rules in equity, taking into account the circumstances and the situation of the parties involved.[55] 31

[53] Vred. La Louvière 28 april 1937, [1937] T. Vred., (460) 462; R. Kruithof (supra fn. 1), 139, no. 20; F. Swennen (supra fn. 3), 417, no. 510.

[54] See M. Faure/R. Van den Bergh, [1987–88] R.W., 1115, no. 21.

[55] See about this article M. Faure/R. Van den Bergh, [1987–88] R.W., 1115–1116, nos. 22–24; R. Kruithof (supra fn. 1), 137–158, nos. 19–43; F. Swennen (supra fn. 3), 417–444, nos. 510–541.

32 We are concerned here with a guiltless liability of the minor on grounds of equity considerations,[56] so that the victim is offered a palliative on the fact that those who are unaccountable because of their mental state cannot be held liable on the basis of their own fault (art. 1382–1383 Civil Code). Importantly, the legislator was not willing to change the starting points of general tort law. Art. 1386bis constitutes an exception to this non-accountability.[57] The article of law was introduced in order to improve the circumstances of the victim, not those of the mentally disturbed person.[58]

33 Art. 1386bis of the Civil Code is only applicable to minors who are in a state of insanity or serious mental illness or impairment, which makes them incapable of controlling their actions. The article is, *de lege lata*, not applicable to children who are unaccountable merely because of their age (*infantes*).[59] Thus, in respect of their personal accountability, *infantes* under Belgian law enjoy greater protection than minors who are merely unaccountable on the basis of mental instability.[60]

34 For the victim, the claim on grounds of art. 1386bis of the Civil Code is not subsidiary to a claim he might have against a jointly accountable person besides the mentally ill minor.[61] The circumstance whereby the victim has a claim against a person who is jointly accountable with the mentally ill minor can however be taken into consideration by the judge in order not to or only partially accept the obligation of compensation on grounds of equity.[62]

35 In his assessment of whether the obligation to compensate for damage applies to the mentally ill minor, and, if it does, whether it concerns full or partial

[56] R.O. Dalcq (supra fn. 4), no. 2326; H. De Page (supra fn. 26), 885–886, no. 916A; R. Kruithof (supra fn. 1), nos. 19–20; F. Swennen (supra fn. 3), no. 511. Furthermore: H. Stoll, Consequences of liability: remedies in: *International Encyclopedia of Comparative Law* IX (1971), Chapter 8, no. 167.

[57] J. Limpens/R. Kruithof/A. Meinertzhagen-Limpens (supra fn. 45), 102, no. 223: "As in the case of infants, most of the countries which have made lunatics liable in equity, have introduced this kind of liability *as an exception* to a general rule that lunatics are immune from action"; F. Swennen (supra fn. 3), 418, no. 511.

[58] R.O. Dalcq (supra fn. 4), 666, no. 2326; H. De Page (supra fn. 26), 887, no. 916B, 2; J. Ronse, Schade en schadeloosstelling (onrechtmatige daad), [1957] *Algemene Praktische Rechtsverzameling*, 502, no. 720; D. Simoens, *Buitencontractuele aansprakelijkheid II. Schade en schadeloosstelling* XI (1999), 117, no. 63; F. Swennen (supra fn. 3), 418–419, no. 511.

[59] R. Kruithof (supra fn. 1), 146, no. 27. See also: D. Simoens (supra fn. 58), 117, no. 63; F. Swennen (supra fn. 3), 428, no. 518.

[60] B. Dubuisson (supra fn. 4), 14, no. 14.

[61] Bergen 23 maart 1976 in: T. Vansweevelt, *Buitencontractueel aansprakelijkheidsrecht in 175 uitspraken en documenten* (1994), nos. 86 and 88; Rb. Namen 18 januari 1990, [1992] R.G.A.R., no. 11975; Rb. Kortrijk 5 mei 1939, [1939–40] R.W., 269 and [1940] R.G.A.R., no. 3328; L. Cornelis (supra fn. 1), no. 16; R. Kruithof (supra fn. 1), no. 35; F. Glansdorff, comment on Rb. Charleroi 8 februari 1972, [1974] R.G.A.R., no. 9338, 4verso; F. Glansdorff, La responsabilité contractuelle des malades mentaux et des autres personnes atteintes d'un trouble physique ou mental (comment on Cass. 29 november 1984), [1987] R.C.J.B., (222) 234, no. 12; F. Swennen (supra fn. 3), 434, no. 528; H. Vandenberghe et al., [1980] T.P.R., no. 30.

[62] F. Swennen (supra fn. 3), 435, no. 528.

compensation, the judge will take into account the circumstances and situation of the parties.[63] The intended circumstances may relate to three aspects.

A *first* series of circumstances are the offender-related elements. When determining appropriate damages, the judge may take into account the degree of 'guilt' of the person who is held to account, i.e. the extent to which the act can be ascribed to a conscious or free will. After all, the ascertainment of unaccountability of the minor does not necessarily mean that conscious and/or free will is altogether absent. Thus, the judge can take this into consideration in his judgement.[64] The guilt of the underage offender can only be taken into account in the decision on compensation for the damage caused. In other words, the judge may not take account of limited guilt when assessing the magnitude of the damage suffered by the victim. 36

In the *second* place, the judge may take into consideration act-related elements. In respect of the minor, the judge can take into account the nature and the gravity of the unlawful act committed by the minor.[65] In relation to the victim, the judge can allow his equity assessment to depend on the gravity of the damage suffered by the victim.[66] Likewise, the fault of the victim may be taken into account in order to refuse obligation of compensation for damage by the minor or to order only partial compensation.[67] Finally, the judge may rule that the obligation for the minor to pay damages is inequitable if the victim has also filed a claim against a jointly liable person.[68] 37

Thirdly, the judge may allow the scope of the obligation to pay damages to depend upon the financial circumstances of the two parties involved.[69] In the case of the person who is held accountable, this concerns his spending power.[70] The coverage of damage under a liability insurance is considered expressly as a wealth component that justifies an obligation to pay full damages,[71] unless other elements justify moderation.[72] Still, the absence of an insurance 38

[63] Cass. 18 oktober 1990, [1990–91] Arr. Cass., 193, [1991] J.L.M.B., 758, obs. D.-M. Philippe, [1991] J.T., 190; [1991] Pas., I, 171 and [1992] R.G.A.R., no. 12026; Rb. Namen 18 januari 1990, [1992] R.G.A.R., no. 11975 and [1990] J.T., 197; H. Vandenberghe et al., [1995] T.P.R., 1222, no. 33.

[64] R. Kruithof (supra fn. 1), 40. Case law: Brussel 8 juni 1988, [1988] J.L.M.B., 1558, 1561, obs. D.-M. Philippe, La responsabilité du fait d'un enfant dément. Contra: J. Ronse, [1957] A.P.R., 730.

[65] F. Swennen (supra fn. 3), 437, no. 533.

[66] F. Swennen, (supra fn. 3), 437, no. 533.

[67] F. Swennen, (supra fn. 3), 437, no. 533.

[68] F. Swennen, (supra fn. 3), 437, no. 533.

[69] H. De Page (supra fn. 26), 885, no. 916A and 888, no. 916C; R. Kruithof (supra fn. 1), 155, no. 39; F. Swennen (supra fn. 3), 438, no. 534.

[70] F. Swennen, (supra fn. 3), 439, no. 534.

[71] See Cass. 24 juni 1965, [1965] Pas., I, 1160; Antwerpen 30 oktober 1986, [1986–87] R.W., 2162; H. Bocken, Van fout naar risico. Een overzicht van de objectieve aansprakelijkheidsregelingen naar Belgisch recht, [1984] T.P.R., (329) 343; M. Faure/R. Van den Bergh, [1987–88] R.W., 1116, no. 22; F. Swennen (supra fn. 3), 439, no. 534. H. Vandenberghe et al., [1980] T.P.R., 1179, no. 30.

[72] F. Swennen, (supra fn. 3), 439, no. 534.

does not stand in the way of an obligation of partial[73] or even full[74] compensation if the spending power of the accused so allows. Certainly in the case of diminished spending power of the person held liable, the judge may take into consideration the wealth of the victim. Not only his wealth, but also the existence of damage claims are important in this respect. The judge may, for example, take into consideration the circumstance that the victim has (accident) insurance.

End of Excursus

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent to adults?

39 In Belgium, only children who are unaccountable on grounds of their mental state can be held liable in equity. This option was not provided for children who have no capacity because of their age (*infantes*). The rule of liability in equity of minors who have no capacity on grounds of their mental state, is embedded in art. 1386bis of the Belgian Civil Code. On the basis of this article, in cases where damage to another person is caused by a minor who is in a state of insanity, serious mental disturbance or mental impairment, so that he is unfit to control his acts, the judge can sentence him to partial or full repayment of the amount that would have applied had he had full control of his actions. In such cases, the judge rules in equity, taking into account the circumstances and the situation of the parties involved.

8. a) Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standars and/or if it is fully liable under the standard?

40 In art. 1386bis of the Belgian Civil Code, we are concerned with a guiltless liability of the minor on grounds of equity reasons. The victim is offered a remedy as the minor tortfeasor who is not capable because of his mental state, cannot be held liable on the basis of his own fault (artt. 1382–1383 of the Civil Code). Importantly, the Belgian legislator, when adding art. 1386bis to the Belgian Civil Code, was not willing to change the starting points of general tort law. Art. 1386bis Civil Code is not to be considered as a reduction clause in order to improve the circumstances of the minor child who is mentally disturbed, but has to be seen as an exception to the non-capacity of the mentally disturbed child in order to improve the circumstances of the victim.

[73] Brussel 8 juni 1988, [1988] J.L.M.B., 1558, 1560, noot D.-M. Philippe, La responsabilité du fait d'un enfant dément.

[74] Rb. Tongeren 15 mei 1995, [1996–97] R.W., (362) 364.

b) What are the factors of equity? i) Intensity of violation of legal duty (negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

i) Intensity of violation of legal duty

Firstly, the judge may take into account the degree of "guilt" of the minor who is held to account, i.e. the extent to which the act can be described to be a conscious or free will. Indeed, the ascertainment of incapacity of the minor does not necessarily mean that conscious and/or free will is altogether absent. The 'guilt' of the minor tortfeasor can only be taken into account in the decision on compensation for the damage caused. The judge may not take limited 'guilt' into account when assessing the magnitude of the damage suffered by the victim. 41

Secondly, the judge may take into account the nature and the gravity of the unlawful act committed by the minor. The judge can also allow his equity assessment to depend on the gravity of the damage suffered by the victim. Likewise, the fault of the victim may be taken into account in order to refuse an obligation of compensation for damage by the minor or to order only partial compensation. Finally, the judge may rule that the obligation for the minor to pay damages is inequitable if the victim has also filed a claim against a jointly liable person. 42

ii) Wealth of child and victim

The judge may allow the scope of the obligation to pay damages to depend upon the financial circumstances of the parties involved. In the case of the person who is held accountable, this concerns his spending power. The coverage of damage under a liability insurance is considered expressly as a wealth component that justifies an obligation to pay full damages, unless other elements justify moderation. Still, the absence of a liability insurance does not stand in the way of an obligation of partial or even full compensation if the spending power of the accused so allows. Certainly, in the case of diminished spending power of the person held liable, the judge may take into consideration the wealth of the victim. Not only his wealth, but also the existence of damage claims are important in this respect. The judge may, for example, take into consideration whether the victim has (accident) insurance. 43

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

Cf. supra no. 34. 44

45 For the victim, the claim on grounds of art. 1386bis Civil Code is not subsidiary to a claim he might have against a jointly liable person besides the mentally ill minor tortfeasor. The circumstance whereby the victim has a claim against a person who is jointly liable with the mentally ill child can, however, be taken into consideration by the judge in order not to or only partially accept the obligation of compensation on grounds of equity.

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: may a child be a keeper of a dangerous thing, like a dog, a car or a plant?

a) The child as the guardian of a thing

46 The relevant question that arises here is the following: can a minor who, on the ground of age or mental state, is ruled to be unaccountable be identified as the guardian of a thing in the sense of art. 1384 of the Civil Code?

47 "Custody" is a legal notion. This implies that what counts for the application of art. 1384, paragraph 1, Civil Code is the capacity of the guardian rather than his actual behaviour.[75] The notion of "guardian" is, however, defined factually,[76] unlike the notion of ownership. On the one hand, this means that the minor who holds a certain legal title of a thing is not automatically its guardian.[77] On the other, it implies that the legal incapacity of the minor cannot justify the conclusion that he is not a guardian.[78] Keeping something is thus a juristic fact, not a juristic act. Neither the intention nor the will to act as a "guardian" needs to be established in the person of the minor guardian in order that he should acquire the status of guardian in the sense of art. 1384, paragraph 1, Civil Code.[79]

48 For the capacity of "guardian" in the sense of art. 1384, paragraph 1, Civil Code, it is necessary and, at the same time, sufficient that a person is able to use, benefit from or keep a thing for his own account, with the power to supervise, guard and lead it.[80] It is essential to the capacity of guardian that the mi-

[75] F. Swennen (supra fn. 3), 383, no. 480.

[76] L. Cornelis, *De buitencontractuele aansprakelijkheid voor schade veroorzaakt door zaken. Rechtsvergelijkend onderzoek: België, Frankrijk, Nederland, Bondsrepubliek Duitsland en Engeland* (1982), 234, no. 245; F. Swennen (supra fn. 3), 383, no. 480.

[77] R.O. Dalcq, La notion de garde dans la responsabilité in: *Liber Amicorum Frédéric Dumon* (1983), 75, no. 3.

[78] F. Swennen (supra fn. 3), 383, no. 480.

[79] L. Cornelis (supra fn. 1), 319, no. 24.

[80] Cass. 24 januari 1991, [1991] Pas., I, (500) 502 and [1992] *Rechtspraak van de Haven van Antwerpen* (R.H.A.), (167) 170; Cass. 29 oktober 1987, [1988] Pas., I, 251 and [1989] R.G.A.R., no. 11542; Cass. 4 april 1986, [1985–86] Arr. Cass., (1050) 1051, [1987] J.T., 195, [1986] Pas., I, 948, [1987] R.G.A.R., no. 11275 and [1986–87] R.W., 1819; Cass. 11 oktober 1985, [1986] Pas., I, 149; Cass. 18 april 1975, [1975] Pas., I, 828; Cass. 15 december 1967, [1968] Pas., I, 515; H. Bocken, [1984] T.P.R., 383, no. 70; L. Cornelis (supra fn. 1), 459, no. 281; L. Cornelis, Extra-contractuele aansprakelijkheid voor zaken. Het gebrek van de zaak en de causaliteitsbeoordeling, [1984] T.P.R., 319, no. 24; B. Dubuisson, Développement récents concernant les responsabilités du fait des choses (choses, animaux, bâtiments), [1997] R.G.A.R., no. 12746, 4recto, no. 16; J.-L. Fagnart (supra fn. 39), 78.

nor who is held liable should have the possibility of supervising, guarding and leading the thing. This implies on the one hand that the control need not have been exerted in practice. The mere possibility suffices.[81] On the other, the existence of this possibility does not depend on the appropriateness of implementing it properly. In this sense, the unaccountability of the minor cannot justify the conclusion that he was unable to supervise, guide or lead the thing. The opposite reasoning would, after all, lead to a situation where the actual behaviour of the person who is held liable would, via a loophole, lead us back to objective liability, while this is incompatible with the nature of this liability.[82] The judge can take into consideration the tender age or the state of mind of the minor when assessing whether or not he was able to exert control. However, once it has been established that this possibility existed, it is irrelevant whether or not it was implemented.[83]

In order to be considered a "keeper" in the sense of art. 1384, paragraph 1, Civil Code, the thing must be kept for own account.[84] It is conceivable that a minor uses, keeps or benefits from a defective thing on behalf of someone else, with the possibility to supervise, lead and guard it. An example that springs to mind is a situation where a minor is appointed to use a thing on behalf of his employer-appointer. It should however be emphasised that the existence of a relationship of subordination does not automatically preclude that the minor, in carrying out his task, has used the thing for his own account.[85] In other words, the relationship of subordination and the keeping of a thing are, in principle, not mutually exclusive.[86] 49

b) The child as the owner or keeper of an animal

The abovementioned principles can, *mutatis mutandis*, be applied to a situation where a minor, as the owner or keeper of an animal, is held liable on 50

[81] L. Cornelis (supra fn. 1), 464, no. 283.

[82] F. Swennen (supra fn. 3), 383, no. 480.

[83] B. Dubuisson, Développements récents concernant les responsabilités du fait des choses (choses, animaux, bâtiments) in: *Droit de la responsabilité* (1996), (273) 291; F. Swennen (supra fn. 3), 384, no. 480.

[84] Cass. 24 januari 1991, [1990–91] Arr. Cass., (562) 564, [1991] Bull., 500 and [1992] R.H.A., 167; Cass. 26 juni 1980, [1980] Pas., I, (1338) 1340; Cass. 16 december 1966, [1967] Arr. Cass., (492) 494 and [1967] Pas., I, (489) 491; Cass. 15 juni 1961, [1961] Pas., I, 1126; L. Cornelis (supra fn. 76), 206–207; L. Cornelis (supra fn. 1), 461, no. 282; R.O. Dalcq (supra fn. 4), 655, no. 2076; B. Dubuisson (supra fn. 83), 4recto, no. 16 and 4verso, no. 19; R. Kruithof, La garde en commun d'une chose affectée d'un vice (comment on Cass. 15 september 1983), [1985] R.C.J.B., (581) 591–592, no. 6; H. Vandenberghe et al., [1995] T.P.R., 1298, no. 68.

[85] Cass. 5 november 1981, [1981–82] Arr. Cass., 320, [1982] Pas., I, 316, concl. Proc. Gen. F. Dumon, [1982] R.G.A.R., no. 10526, concl. Proc. Gen. F. Dumon and [1983–84] R.W., 2909, noot. See also: H. Vandenberghe et al., [1995] T.P.R., 1298, no. 68; H. Vandenberghe et al., [1987] T.P.R., 1382, no. 68. Furthermore: S. Stijns/H. Vandenberghe (eds.), *Verbintenissenrecht* (2001), 97, no. 29; F. Swennen (supra fn. 3), 413–414, no. 507.

[86] R. Bützler/L. Cornelis, De opvattingen van F. Dumon in verband met de buitencontrac-tuele aansprakelijkheid voor zaken in: *Liber Amicorum Frédéric Dumon* (1983), 71; L. Cornelis (supra fn. 1), 462, no. 282; R.O. Dalcq (supra fn. 77), 77; H. Vandenberghe et al., [1987] T.P.R., 1383, no. 68: H. Vandenberghe et al., [1995] T.P.R., 1299, no. 69.

grounds of art. 1385 Civil Code. This article stipulates that "for damage caused by an animal, the owner of the animal or, insofar as he is using it, the keeper of the animal, is liable for any damage caused by the animal, irrespective of whether it was in his care or was lost or had escaped". Starting from the principle that the objective liability under art. 1385 of the Civil Code is the minor's capacity as owner or keeper of the animal rather than the child's actual behaviour, the unaccountability of the minor represents no impediment to considering him as the owner or keeper of the animal in the sense intended in the aforementioned article.[87] It thus suffices, as far as keeping is concerned, that the minor should have complete mastery over the animal, which implies that he possesses the non-subordinate power, without interference on the part of the owner, to lead and supervise the animal, and that he has the same power as the owner to use the animal.[88] It is not necessary that the underage keeper exercises this complete mastery for own account.[89]

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy; e.g. part of a household contents or occupier's liability insurance?

51 In Belgium, the coverage of the liability for damage caused by minor children is done through a *family liability insurance*. Sometimes, family liability insurances are a complementary option of a *wider coverage framework*, e.g. a Global Home and Insurance Policy. As in many other countries, children, in principle, do not insure themselves, i.e., they are not policyholders. There is *no compulsory liability insurance* in Belgium, despite several initiatives to make family liability insurance policies legally compulsory. However, on the basis of the Royal Decree of 12 January 1984, family liability insurance policies must answer to a number of *legal minimum requirements*. The minimum requirements concern the scope of persons who are covered by the liability insurance policy, the minimum geographical coverage, the extent of the coverage and the possible exclusions restrictively summed up by the Royal Decree of 12 January 1984.

[87] L. Cornelis (supra fn. 1), 625–626, no. 385.

[88] Cass. 18 november 1993, [1993] Arr. Cass., (966) 967, [1993] Pas., I, 970 and [1995] T.B.B.R., 91, obs. A. Nuyts; Cass. 16 oktober 1986, [1986–87] Arr. Cass., (205) 207, [1987] Pas., I, 189 and [1987–88] R.W., (126) 127; Cass. 18 november 1983, [1983–84,] Arr. Cass., (327) 329 and [1984] Pas., I, 307; Cass. 5 november 1981, [1981–82] Arr. Cass., (328) 330, [1982] Pas., I, 316, [1985] R.C.J.B., 207, obs. Meinertzhagen-Limpens and [1983–84] R.W., kol. 2909–2910; Cass. 20 april 1979, [1978–79] Arr. Cass., (993) 995 and [1979] Pas., II, 989; Cass. 30 april 1975, [1975] Arr. Cass., (948) 950 and [1975] Pas., I, 857; L. Cornelis (supra fn. 1), 604, no. 370; G. De Pauw, Begrip "bewaarder van het dier" (comment on Gent 11 april 1988), [1990] T.B.B.R., 150, no. 5; S. Covemaeker, Wie is "bewaarder' van een dier bij medische behandeling: de eigenaar of de dierenarts?" (comment on Brussel 11 april 1997 en Rb. Nijvel 5 december 1997), [1999] T.B.B.R., 647, no. 4; W. Van Gerven/S. Covemaeker (supra fn. 3), 265.

[89] Cass. 18 nobember 1993, [1994] J.T., 231 and [1995–96] R.W., 268; B. Dubuisson (supra fn. 83), 3recto, no. 48; W. Van Gerven/S. Covemaeker (supra fn. 3), 265.

On the basis of art. 1 of the Royal Decree of 12 January 1984, family liability insurance policies must cover the tortious liability, incurred in private life (i.e. excluding commercial and professional activities), of the following persons: the policyholder; his or her spouse sharing the household; other persons sharing the household of the policyholder; children living outside the household for study reasons; minors staying in a foster home; domestic personnel and home help and persons supervising the children and the animals of the policyholder. Family insurance policies do not only cover the personal liability of the above enumerated persons, both on the basis of their personal fault (art. 1382–1383 Civil Code) and on the basis of equity (art. 1386bis Civil Code) or on the basis of art. 1384, paragraph 1, Civil Code (liability for defective goods), but also the vicarious liability of the parents (or even the children) on the basis of art. 1384, paragraph 2 et seq., Civil Code. 52

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/of bonus malus-systems or by reserving termination rights in case of repeated accidents?

In Belgium, family liability insurers do not make efforts to risk rate premiums or to introduce *bonus malus*-schemes. Premiums of family liability insurance policies are determined according to average costs provided by statistics. Changes of premiums, upwards or downwards, of current family liability insurance contracts are regulated by art. 12 of the Royal Decree of 22 February 1991 concerning the control of insurance companies. On the basis of this article, policyholders must be informed about the tariff increase or tariff reduction *at least four months before the annual date of expiration of the insurance contract* (art. 30 of the Law of 25 June 1992 determines that family liability insurances have a duration of one year), unless the policyholder is allowed, at the time of a later notification of the tariff change, the right to resign the contract within a term of at least three months, counted from the day of that notification. Of course, several accidents caused by a minor child can be a reason for the insurance company not to renew the policy. As already mentioned, each of the contracting parties can resign the contract by means of registered mail addressed to the other party *at least three months before the date of expiration of the contract*. 53

Some insurance companies offer reductions of premiums to (1) *senior* or (2) *single* policyholders. The reason for this kind of reduction is obvious, i.e. the absence of minor children, an important source of damages. In order to obtain those reductions, the policyholder must make a statement in which he confirms that all conditions, put forward by the insurer, are fulfilled. The policyholder also has to inform the insurer when (one of) those conditions are no more fulfilled. 54

12. a) How many per cent of families are covered by one or another form of family liability insurance?

55 Family liability insurance is fairly widespread in Belgium. Although precise figures are not available, around 80% of Belgian households have liability insurance coverage.

b) Does the liability insurance cover extend to intentional torts committed by the child?

56 If the policyholder, i.e. the parent, has caused the damage intentionally, the insurer must not make it good. Art. 8, 1 of the Law of 25 June 1992 on the Terrestrial Insurance Contract (*B.S.* 20 August 1992) stipulates that the insurer cannot be obliged to cover the liability for damage intentionally caused. If this is also the case when the person who has caused the damage is a minor child, is not so clear.

57 Art. 6, 6 of the Royal Decree of 12 December 1984, stipulates: "Damage resulting from the personal tortious liability of the insured person who has reached the age of discretion and who causes damage resulting from causes of gross negligence which are explicitely and limitatively enumerated in the general conditions of the contract, are excluded from coverage." Art. 6, 6 only concerns damage caused by *gross negligence*. Damage *intentionally* caused is not mentioned in the article. Does this mean that the general exclusion of coverage for damage intentionally caused also applies to damage caused intentionally by the children of the insured? This question must be answered in a subtle way. *Firstly*, some of the existent family liability insurance policies continue to cover the liability intentionally caused by minors *younger than sixteen year* (P&V, Ethias, KBC, Nateus and ING). Indeed, before the adaptation of the above mentioned art. 6, 6 of the Law of 25 June 1992 on the Terrestrial Insurance Contract, art. 6, 6 stipulated that only "the personal tortious liability of the insured person older than sixteen years and who has caused the damage intentionally or as a result of the use of narcotics or a state of drunkenness or alcohol-intoxication", can be excluded from coverage. *A contrario*, damage intentionally caused by minors younger than sixteen years, was covered at that time. Another existing family liability policy covers damage intentionally caused by a minor child in the same way as damage caused by gross negligence, so that damage intentionally caused is covered insofar as the minor has not yet reached the age of discretion at the time of the damage (De Federale Verzekering). *Secondly*, the exclusion for intentional damage does not apply to an insured person who does not act intentionally *himself* but who is liable to the victim (e.g. a parent who cannot produce the counter-proof of good education and decent supervision) by virtue of his or her liability for the acts of a third person who has acted intentionally.

58 On 16 November 2000, the *Uitvoerend bureau van de afdeling Ongevallen Gemeen Recht van de Beroepsvereniging der Verzekeringsondernemingen*

(The Executive Department of the Section for Common Accidents of the Professional Association of Insurance Companies) stated that damage intentionally caused by minors *younger than fourteen years* should be covered, following the age limit as provided in the actual version of art. 29bis, paragraph 1 of the 30 March 1994 Law on Motor Vehicle Insurance. As a consequence, art. 8 of the Law of 25 June 1992 on the Terrestrial Insurance Contract should be applied less strictly (see Jaarverslag Ombudsman Belgische Beroepsvereniging der Verzekeringsondernemingen 2000, 5–6).

13. a) Are the parents under a duty to take out a liability insurance for their child?

In Belgium, as in many other European countries, liability insurance of the parents for the damage caused by their children is not compulsory. However, the topic has been often discussed, not only by legal scholarship, but also in parliament. Both in 1977 and 1995, bills were introduced in parliament in favour of compulsory family liability insurance. 59

Further, parents cannot be held liable (on the basis of art. 1382 Civil Code) by the injured party for *omitting to conclude a contract of liability insurance* on behalf of and for the benefit of their child. 60

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

No. 61

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up a damage claim brought by the victim against the parents?

Art. 41 of the Law of 25 June 1992 on the Terrestrial Insurance Contract, stipulates: "*De verzekeraar die de schadevergoeding betaald heeft, treedt ten belope van het bedrag van die vergoeding in de rechten en rechtsvorderingen van de verzekerde of de begunstigde tegen de aansprakelijke derden* (The insurer, who has paid compensation, is surrogated to all rights and claims of the policyholder, up to this amount, against the third party who has caused the damage which incurred the insurer's liability)". The insurer may thus act on behalf of the insured against a third party co-responsible for the compensated damages. However, this right of recourse against a child is limited. *In the first place*, children who have not reached the years of discretion (*infantes*) are not liable, so there is no room for recourse. Secondly, art. 41, 4 of the Law of 25 June 1992 on the Terrestrial Insurance Contract, stipulates that the recourse can only be exercised against the descendants in case of "*kwaad opzet* (malevolence)". There is discussion about the notion of "*kwaad opzet*". Some authors believe that the insurer can only recover his subrogatory action in the case of 62

malevolence of the child *towards the insured* (e.g. a parent of the child). As a consequence, when the parents insurance company has paid out compensation for damage caused by the child *to a third party* (which is the most usual situation), following proceedings initiated on the basis of art. 1384, paragraph 2, Civil Code, the insurer may not, after compensation, exercise a subrogatory action against the child. I do not agree with this theory. Indeed, this theory leads to the conclusion that there will never be malevolence by the person of the minor tortfeasor, because in cases of family liability insurances, malevolence is usually committed against a third party and not against an ascendant. Let's hope that the exact meaning of the notion of "malevolence" will soon be clarified by the Belgian *Cour de Cassation*.

b) Does the law of social security provide a limit on the right of recourse of the insurance company against the child or his parents or legal guardian?

63 As far as I know, the law of social security does not provide specific limits on the right of recourse against the children, their parents or their legal guardians.

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

64 In Belgium, there is no rule aimed at reducing compensation due by the child with regard to his status as minor. Liability law makes no distinction between liable persons from the pecuniary point of view when the amount of damages allocated to the victim is set. The only exception to this principle of full compensation of the victim is provided in art. 1386bis Civil Code. As already mentioned above (cf. supra nos. 31 et seq.), where damage to another person is caused by a minor who is in a state of insanity, serious mental disturbance or mental impairment, so that he is unfit to control his acts, the judge can sentence him to partial or full compensation of the amount that would have applied had he had full control over his actions. In such cases, the judge rules in equity, taking into account the circumstances and the situation of the parties involved. Once more, it must be emphasized that the rule of art. 1386bis Civil Code was introduced to improve the circumstances of the victim, not those of the mentally disturbed minor tortfeasor.

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

65 No. In practice, however, the obligation to compensate for damage caused by a minor, is channelled to the parents (art. 1384, paragraph 2 and 5, Civil Code), the teacher (art. 1384, paragraph 4, Civil Code), the school (art. 1382–1383 Civil Code *c.q.* art. 1384, paragraph 3, Civil Code).

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

66 The treatment of individuals' and families' excessive debt has been the subject of original provisions inserted in the *Code of Civil Procedure* (artt. 1675/2 et seq.) in a chapter named "*Collectieve schuldenregeling* (Collective Debts Settlement)". This regulation has been introduced in the Belgian legislation in order to provide answers for *"een persoon met woonplaats in België, die geen koopman is …en niet in staat is om, op duurzame wijze, zijn opeisbare of nog te vervallen schulden te betalen en voor zover hij niet kennelijk zijn onvermogen heeft bewerkstelligd* (each person, who is domiciled in Belgium, who is not a merchant, who is permanently incapable of paying off his outstanding and ensuing debts, and who obviously has not realized his own insolvency)". The new legislation was intended to open new options to debtors who have fallen into an incurable financial situation.

67 The key person in the procedure of collective debts settlement is the so-called "debts mediator". In a first phase, the debts mediator will attempt to develop a *"minnelijke aanzuiveringsregeling* (friendly recovery of debts plan)". In the event of a failure of such an out-of-court phase, the "debts mediator" will transfer the dossier to the tribunal for a judicial recovery of debts settlement (*"gerechtelijke aanzuiveringsregeling*").

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating for the consequences of intentional acts?

68 The recovery of debts settlements can include various measures. A distinction has to be made between a recovery of debts plan *with* or *without* cancellation of *capital*. In case of a recovery of debts plan without cancellation of capital, the judge could entail a postponement of the payment or a complete or partial reduction of interest rates. Under very strict conditions, the judge can also decide to cancel the debts *including the capital*. However, the judge cannot proceed to such a settlement in cases of *"schulden die een schadevergoeding inhouden voor het herstel van een lichamelijke schade veroorzaakt door een onrechtmatige daad* (debts that represent the compensation of physical damage caused by a tortious act)".

III. Liability of Parents

Excursus: Outline of the Belgian System

69 Art. 1384, paragraph 2, Civil Code stipulates that a father and mother are liable for any damage caused by their minor children. Art. 1384, paragraph 5, Civil Code states that this liability ends if the parents can prove that they were unable to prevent the act that gave rise to the liability.

70 Once the victim has proven the conditions of application of art. 1384, paragraph 2, Civil Code, there rests on the parents a rebuttable presumption of liability. Because of the legally permissible counter-evidence, the legislator can derive from the conditions of application that have been proven by the victim and that gave rise to this presumption that the parents have made an error that is causally related with the damage, so that the minor child was able to cause the damage. In other words, the parents are then liable for the fault.[90] The onus of proof lies with the parents. In comparison to the fault liability on grounds of art. 1382 of the Civil Code, it appears in the application of art. 1384, paragraph 2, Civil Code that the onus of proof with regard to the fault by the person who is held liable as well as the causal relationship is thus transferred from the victim to the liable parent.[91]

71 The legislator introduced the presumption of liability, and thus the transfer of the onus of proof from the victim to the parents, in order to increase the victim's chances of receiving compensation.[92] This regulation meets one of the objectives of tort law, i.e. the aim of compensation for the victim.

72 It is both sufficient and necessary for the application of art. 1384 of the Civil Code that the parentage of the child is established by law.[93] On grounds of art. 1384, paragraph 2, Civil Code no qualitative liability is borne by persons who are not the father or mother of the child,[94] even if these persons are entrusted with the child's supervision or certain aspects of parental authority.

73 The above principle implies *in the first place* that *each* mother or father can be held liable for damage caused by their minor child whose parentage is beyond doubt in accordance with the legal provisions.[95] Consequently, the adoptive father or mother of a child may, on the strength of art. 1384, paragraph 2, Civil Code be held liable.[96] Second, the above principle implies that only they who

[90] L. Cornelis (supra fn. 1), nos. 173–174, 189 and 205; R. De Corte, *Overzicht van het Burgerlijk Recht* (2001), 544, no. 1545; H. De Page (supra fn. 26), 892, no. 918B and 990, no. 972A; F. Swennen (supra fn. 3), 375, no. 473.

[91] Luik 28 februari 2002, [2003] R.G.A.R., no. 13669, 1recto; L. Cornelis, [1998–99] R.W., 523, no. 5; R. De Corte (supra fn. 90), 544, no. 1545.

[92] L. Cornelis (supra fn. 1), 302, no. 174; F. Swennen (supra fn. 3), 375, no. 473; J.-P. Le Gall, Liability for persons under supervision in: *International Encyclopedia of Comparative Law IX, Torts* (1975), Chapter 2, nos. 18 and 87 et seq.

[93] Brussel 13 maart 1985, not published, quoted by L. Cornelis (supra fn. 1), 312, no. 183; B. Dubuisson (supra fn. 4), 29, no. 33.

[94] P. De Tavernier, Naar een objectieve aansprakelijkheid van de ouders voor de onrecht-matige daden van hun minderjarige kinderen?, [1999–2000] R.W., 275, no. 12.

[95] About the filiation between the child and his parents, see J. Gerlo, *Handboek voor Familierecht 1, Personen- en Familierecht* (2000), 13 et seq.; A. Heyvaert, *Het personen- en gezinsrecht ont(k)leed, Theorieën over personen- en gezinsrecht rond een syllabus van de Belgische techniek* (2002), 203 et seq.; P. Senaeve, *Compendium* (2000), 291 et seq.

[96] L. Cornelis (supra fn. 1), 312, no. 183; R. De Corte (supra fn. 90), 545, no. 1546; comp. P. Hamelink, Over de ouderlijke aansprakelijkheid, [1978] De Verz., 312, no. 8A and H. De Page (supra fn. 26), 991, no. 973A.

by law are the mother or father can, on grounds of art. 1384, paragraph 2, Civil Code be held liable.

Thus, in principle, no qualitative liability rests on the grandparents,[97] except if they are legally the adoptive father or mother of the child. Likewise, brothers and sisters,[98] stepmothers and stepfathers,[99] and uncles or aunts[100] of the minor child cannot be held liable, unless they are also considered by law to be the adoptive father or mother.[101] No qualitative liability rests on persons with whom the actual father or mother legally cohabits, but whom cannot by law be considered to be the father or mother of the minor child. The tutor or co-tutor of the child cannot be held qualitatively liable either.[102] Nor can a custodian. Art. 1384, paragraph 2, Civil Code does not apply either to a natural person other than the parent to whom the child has been entrusted,[103] e.g. a minder or a foster family.[104] The same holds vis-à-vis legal persons who have been entrusted with looking after the minor[105] or an institution that provides care for the child consequent to a court ruling. All the abovementioned persons can, of course, be held to account on grounds of a proven personal fault,[106] e.g. a proven supervisory fault[107], or on grounds of another qualitative liability than that intended in art. 1384, paragraph 2, Civil Code.[108] 74

De lege lata, the parents need not exercise parental authority, nor need they be burdened with any other statutory or contractual obligation vis-à-vis their minor child, in order that art. 1384, paragraph 2, Civil Code be applicable to 75

[97] Vredegerecht Veurne 12 mei 1989, [1989] *Verkeersrecht. Jurisprudentie*, no. 90/96; L. Cornelis (supra fn. 1), 313, no. 183; R. Kruithof, Aansprakelijkheid voor andermans daad: kritische bedenkingen bij enkele ontwikkelingen in: *Hulde aan Prof. Dr. R. Kruithof. Naar een "gouvernement des juges" in het Belgische verbintenissenrecht en andere opstellen* (1992), 94, no. 13; H. Vandenberghe et al., [1995] T.P.R., 1373, no. 115.

[98] Vred. Borgerhout 1 september 1976, [1976–77] R.W., (2668) kol. 2670; M. Bax, Aansprakelijkheid van de ouders voor de door hun inwonende minderjarige kinderen aan derde ten onrechte berokkende schade (art. 1384, tweede en vijfde lid, B.W.) – Aansprakelijke personen en grondslag (comment on Vred. Borgerhout 1 september 1976), [1976–77] R.W., kol. 2673; L. Cornelis (supra fn. 1), 313, no. 183; R. Kruithof (supra fn. 97), 94, no. 13.

[99] Luik 15 januari 1969, [1969–70] J.L., (105) 106, 2e kol.; L. Cornelis (supra fn. 1), 313, no. 183; R. Kruithof (supra fn. 97), 94, no. 13.

[100] Rb. Luik 8 november 1966, [1967] Pas., III, (54) 56; L. Cornelis (supra fn. 1), 313, no. 183; R. Kruithof (supra fn. 97), 9, no. 13.

[101] J. Gerlo, *Handboek voor Familierecht* (2000), 129, no. 297. About the adoption by a stepparent, see P. Senaeve (supra fn. 95), 355, nos. 918–919.

[102] Rb. Antwerpen 7 juni 1935, [1936] R.G.A.R., no. 2095; Pol. Luik 6 mei 1981, [1982] J.L., 158; R.O. Dalcq (supra fn. 4), 521, no. 1591; H. De Page (supra fn. 26), 991, no. 973A; R. Pirson/A. De Villé, *Traité de la responsabilité civile extra-contractuelle* (1935), 181, no. 75; H. Vandenberghe et al., [1995] T.P.R., 1373, no. 115.

[103] R. De Corte (supra fn. 90), 536, no. 1548.

[104] Brussel 31 maart 1961, [1962] J.T., (80) 81. About the notion of foster parent, see P. Senaeve (supra fn. 95), 468, nos. 1309–1310.

[105] P. De Tavernier, [1999–2000] R.W., 275, no. 14.

[106] P. De Tavernier, ibid., 276, no. 18; concerning the personal liability of the tutor, see R. Pirson/A. De Villé (supra fn. 102), 182, no. 76.

[107] Ph. Le Tourneau/L. Cadiet, *Droit de la responsabilité* (1998), 838, no. 3395.

[108] Ph. Le Tourneau/L. Cadiet, (supra fn. 107), 838, no. 3395.

them.[109] In this respect, the Belgian regulation differs quite clearly from that in France, where art. 1384, paragraph 4, Civil Code stipulates that the mother and the father are liable, insofar as they exercise parental authority.[110]

76 *First and foremost*, the parents can rebut the presumption of liability by demonstrating that they were incapable of fault as they were unaccountable at the time when the damage was caused. The proof of absence of a conscious or free will, which leads to unaccountability releases the parents of liability, as was the case in relation to their liability on grounds of an own proven fault (Artt. 1382–1383 Civil Code).[111]

77 *Second*, the father and the mother can be released from their obligation to pay compensation for the damage if they are able to prove that they have not committed a wrongful act or, in other words, that they have not neglected the general duty of care.[112]

78 Testing of the behaviour of the parents against the general duty of care happens *in abstracto*.[113] Thus, the parents must prove that they have behaved as a *bonus pater familias*, i.e. that they have acted as a normal prudent parent in similar circumstances.[114]

79 According to a constant jurisprudence and legal doctrine, proper parental care entails that the parents raised their children adequately and that they exercised adequate supervision.[115] Proof of a decent education and proper supervision are sufficient to rebut the presumption of liability under art. 1384, paragraph 2, Civil Code. In other words, the parents are not expected to provide evidence of the absence of any fault. The burden of providing such negative proof was found to be excessive.[116]

80 In the assessment of the degree of care that parents should exhibit vis-à-vis their minor children, one must take into account all circumstances of the case.

[109] Cass. 30 mei 1984, [1983–84] Arr. Cass., (1286) 1288; Luik 6 februari 1995, [1996] J. dr. jeun., afl. 153, 134; L. Cornelis (supra fn. 1), 313, no. 183; F. Swennen (supra fn. 3), 377, no. 475.

[110] See G. Viney/P. Jourdain, *Traité de droit civil, Les conditions de la responsabilité* (2nd edn. 1998), 986, no. 875.

[111] L. Cornelis (supra fn. 1), 316, no. 185; R.O. Dalcq (supra fn. 4), no. 2317.

[112] L. Cornelis (supra fn. 1), 316, no. 185, 341, no. 204.

[113] L. Cornelis (supra fn. 1), 316, no. 185; H. Vandenberghe et al., [2000] T.P.R., 1810, no. 110.

[114] P.H.M. Rambach (supra fn. 27), 68.

[115] Rb. Ieper 16 februari 1988, [1989–90] R.W., (755) 756; N. Denoël, La responsabilité du fait des personnes que l'on doit surveiller in: J.-L. Fagnart (ed.), *Responsabilités. Traité théorique et pratique* (Titel IV, Boek 41) (1999), 28, no. 76.

[116] R.O. Dalcq (supra fn. 4), 530, no. 1624; N. Denoël (supra fn. 115), 28, no. 75; P. Hamelink, [1978] De Verz., 357, no. 18C.

1. With regard to the duty to provide an education

If parents want to avoid liability, they must prove that they have raised the child properly.[117] 81

The parents must provide the judge with all the factual elements that indicate that a proper education was provided.[118] 82

The minor's unlawful act in itself is not considered as evidence that the parents have failed to raise the child properly. For example, the fact that a child has broken the Road Code does not necessarily imply that the parents have failed to make the child aware of these rules.[119] 83

The above does not mean that the gravity of the unlawful act cannot play a part in the assessment of the education that the parents have provided for the child.[120] In the case of serious faults or offences by a minor, the judge will most likely exhibit much greater circumspection in accepting the counter-proof of a decent education than in cases involving much less significant damage. The more extreme the act of the minor, the more difficult it is for the parents to provide evidence of a decent education. 84

Which criteria does the judge have at his disposal to assess whether or not the parents of a minor have raised the child decently? 85

a) the age of the minor

b) the personality of the minor

c) separation or legal divorce of the parents

Separation or legal divorce of the parents is in itself not sufficient proof of a shortcoming in the education of the child.[121] After all, art. 374, paragraph 4, Civil Code states that if parental authority is awarded by a judge to one of the parents, the other parent retains the right to supervise the education of the child. Moreover, it should be emphasised that a shortcoming in the education of a child can date back to the period that the parents were living and raising the child together, or indeed the shortcoming may even be a consequence of a dispute between the parents.[122] 86

[117] P. De Tavernier, [1999–2000] R.W., 282, no. 51; H. Vandenberghe et al., [2000] T.P.R., 1813, no. 112; H. Vandenberghe et al., [1995] T.P.R., 1387, no. 126; H. Vandenberghe et al., [1987] T.P.R., 1468–1473, no. 126.

[118] B. Dubuisson (supra fn. 4), 38, no. 42.

[119] P. Hamelink, [1978] De Verz., 370, no. 24A.

[120] Luik 25 februari 1969, [1972] R.G.A.R., no. 8790, obs. M. Grossmann; D.-M. Philippe, Le renversement de la présomption de faute des parents dans la surveillance et l'éducation de leur enfant (comment on Brussel 10 december 1987), [1988] J.L.M.B., (157) 159.

[121] See Brussel 10 december 1987, [1988] J.L.M.B., 155 and [1989] R.G.A.R., no. 11546; P. De Tavernier, [1999–2000] R.W., 283, no. 58; D.-M. Philippe, [1988] J.L.M.B., (157) 158.

[122] P. De Tavernier, [1999–2000] R.W., 283; H. Vandenberghe et al., [2000] T.P.R., 1816, no. 112.

d) the educational situation of the minor

87 Evidence of good school results is inadequate to prove that the child has received a proper education.[123] The relationship between the child's diligence at school and his/her education would appear to be more self-evident.[124]

e) the prevailing opinions with regard to the raising of a child

88 The care that parents exhibit in the raising of their minor child is often tested against opinions that are generally held on this issue. This implies *first and foremost* that the parents' own conviction that the educational method that they apply to their minor child is appropriate is not always sufficient to rebut the presumption of fault in the child's education. After all, some parents are far less ambitious in the raising of their children than other more prudent and forward-looking parents in similar conditions.[125] *Second*, the question arises what should be understood under the notion of the prevailing opinion on the raising of children. As far as we have been able to ascertain on the basis of case law and legal doctrine, there appears to be a reasonable consensus of opinion that the education of a minor child should contain the following elements, despite the fact that individual magistrates will undoubtedly have divergent personal opinions on their exact content:

89 The parents must instil upon their child the moral values of living in a community.[126] Parents must, for example, teach their children to respect the physical integrity of others and the property of others.

90 The parents must also make their children aware of the fact that there are certain rules to respect. For example, much emphasis is laid in case law on the care that parents should take to familiarise their children with the traffic regulations.[127]

91 The parents must point out to their children the danger of certain things or situations. Children must, for example, be made aware of the danger of firearms. Parents who have failed to instil upon their sixteen-year-old child that handling firearms in the presence of third parties is particularly dangerous are seen to have neglected their duty to raise their children properly.[128]

[123] Brussel 18 februari 1992, [1993] R.G.A.R., no. 12232; Luik 20 december 1990, [1994] R.G.A.R., no. 12249.
[124] Antwerpen 4 maart 1999, A.R. J. 160/98, not published.
[125] See Brussel 4 juni 1996, [1997] De Verz., (300) 304; Brussel 21 februari 1995, [1986] R.G.A.R., no. 11080; Rb. Nijvel 9 januari 1997, [1997] J.T., 241; H. Vandenberghe et al., [1995] T.P.R., 1391, no. 126; see also R. Pirson/A. De Villé (supra fn. 102), 197, no. 85.
[126] Brussel 2 april 1999, [1999] J.L.M.B., (1434) 1438.
[127] Gent 23 januari 1997, [1997] *Tijdschrift voor Aansprakelijkheid en Verzekering in het Wegverkeer*, (135) 137, noot. Furthermore: H. Vandenberghe et al., [2000] T.P.R., 1815, no. 112.
[128] Rb. Turnhout 27 april 1995, [1995–96] *Turnhouts Rechtsleven*, (99) 100.

f) The institutionalisation of a minor

92 The mere existence of measures to put children in care does not release parents from their duty to prove that they have raised their child properly. The actual circumstances associated with the placement of the child can however impact on the assessment of the manner in which the parents have raised their child. In one instance, the judge decided that there was no educational fault on the part of the parents of an institutionalised minor son because the educators at the institution had failed to treat the child appropriately, while the parents had provided their child with appropriate affection, education and schooling. Moreover, the parents successfully demonstrated that they had cooperated with the measures imposed.[129] Furthermore, the possibility to exercise the duty of education efficiently was restricted by the placement of the child. In some respects, this had become altogether impossible. These are circumstances that a judge must take into consideration.[130]

2. With regard to the duty of supervision

93 Again, with regard to the duty of supervision, the judge must take into account all circumstances as they presented themselves at the time that the damage was caused.[131]

94 In the assessment of counter-evidence of proper supervision, a distinction needs to be made between the material and the moral impossibility of supervising the child.

a) The material impossibility of supervision

95 The parental duty of supervision may be significantly influenced by the fact that:

- the parents are not living together, e.g. because they have separated or are legally divorced;[132]
- the minor child was under the supervision of another person than the parents at the time of the wrongful act;[133]
- the minor, for whichever reason, no longer lives with his or her parents, e.g. because he/she has been institutionalised.[134]

96 However, such circumstances do not provide sufficient proof that the parents have properly supervised their minor child. The claim of absence of a supervi-

[129] Brussel 21 februari 1985, [1986] R.G.A.R., no. 11081, observation; see also Jeugdrechtbank Brussel 4 november 1987, [1987] J. dr. jeun., afl. 10, noot F.G.
[130] Vred. Sint-Joost-Ten-Node 10 december 1985, [1989] T. Vred., 27.
[131] L. Cornelis (supra fn. 1), 319, no. 187.
[132] P. De Tavernier, [1999–2000] R.W., 283, no. 58.
[133] H. Vandenberghe et al., [2000] T.P.R., 1818–1819, no. 113.
[134] Brussel 20 januari 1994, [1994] J. dr. jeun., afl. 133, 62; J.-L. Fagnart (supra fn. 39), 67, no. 55.

sory fault must, after all, be assessed on the basis of all factual circumstances, rather than in a general manner.[135] Thus, the judge may rule that the parents have not provided proof of proper supervision on the basis of the argument that they insufficiently supervised whether the actual supervisor performed his task adequately[136] or that the task was entrusted to an unsuitable person.

97 First I consider the hypothesis i) that the parents, for whichever reason, are no longer living together. Subsequently, I deal with the situation where the ii) minor is under the supervision of another (natural or legal) person at the time of the wrongful act. Finally, I discuss the case where the iii) parents were not supervising their minor child at the time of the wrongful act, even if they were in a situation where they could have.

i) The parents of the minor are no longer cohabiting

98 If the parents of the child are no longer cohabiting, this is undoubtedly a circumstance that should be taken into account by the judge in assessing the counter-proof of proper supervision that is to be delivered by the parent with whom the child is no longer living.[137] In this respect, I refer to the judgment by the Court of Appeal in Mons of 1 March 1995 in which the court recognises that the duty of supervision of a father can only be fulfilled from a distance and to a very limited extent in a situation where the father has been divorced from his wife for over three years and where he has only limited right of access to the child. Even if he was aware of the fact that his minor son regularly drove the car of his grandmother without having reached the legal age or possessing a driving licence, his parental liability is limited, because he was not in a situation to effectively supervise and pressure the child so that he might put an end to this behaviour.[138]

99 The proof of the actual separation or divorce is in itself not sufficient to demonstrate that the parent with whom the minor child is living has properly supervised the child. There are various hypotheses whereby a minor is no longer living with his parents and yet the parents have an obligation of supervision.

- First hypothesis: joint exercise of parental authority

100 In principle, parents who are not cohabiting still exercise joint parental authority over the minor child.[139] Thus, if the parents are not cohabiting and the basic system of joint parental authority is applied, the parents must come to an arrangement with regard to what is referred to in the law as "the organisation of the residence of the child".[140] All possible formulas may be considered, rang-

[135] R. Pirson/A. De Villé (supra fn. 102), 197, no. 85; P. De Tavernier, [1999–2000] R.W., 284; H. Vandenberghe et al., [2000] T.P.R., 1819, no. 113.
[136] L. Cornelis (supra fn. 1), 319, no. 187.
[137] N. Denoël (supra fn. 115), 31, no. 91.
[138] Corr. Bergen 1 maart 1995, [1996] De Verz., (335), 336–337, obs. M. Lambert.
[139] N. Denoël (supra fn. 115), 31, no. 91; comp. L. Cornelis (supra fn. 1), 319, no. 187.
[140] P. Senaeve, *Compendium* (2000), 411, no. 1092.

ing from alternating residence to a system whereby the child always stays with one of the parents, except during alternate weekends and for half of the holiday periods (or less), when it stays with the other parent. Under such a residence arrangement, each of the parents' right to personal contact is realised.[141] It speaks for itself that the father or the mother with whom the child is not staying at the moment of the unlawful act will, in view of the above arrangement, generally experience no difficulty in proving that he/she did not fail in his/her obligation to supervise the minor, unless the actual circumstances suggest that the minor child was nevertheless under the material supervision of that parent at the time of the unlawful act.

- Second hypothesis: parental authority exercised by one of the parents

If one of the non-cohabiting parents wishes to diverge from the principle of joint exercise of parental authority, he or she may bring a case before the court. If (and only if) the court accepts that the parents cannot agree on one or more important aspects of the child's education, the judge may award parental authority to one of the parents.[142] If the judge decides to award exclusive parental authority to one of the parents, he must also decide how the parent who is not charged with exercising parental authority should maintain personal contact with the child, even if it is, by definition, the other parent who has the right to raise the child or keep the child in his/her custody.[143] In this hypothesis, too, it is not impossible for the parent who has been discharged from parental authority to be guilty of a supervisory fault, e.g. during periods when he/she is exercising his/her right to personal contact with the child. 101

- Third hypothesis: the possibility to impose combined systems

The arrangement regarding the exercising of parental authority is not an all-or-nothing regime: the judge can work out an à-la-carte solution with regard to the parental authority over the minor child that lies in between the two extremes of joint parental authority and exclusive parental authority.[144] 102

Depending on the choice made by the judge, arrangements will need to be made in relation to personal contact and, as the case may be, the child's residence.[145] If such a system of authority over the minor child is chosen, it again depends on the actual circumstances of the wrongful act who is liable for a supervisory fault. 103

ii) The minor is under the material supervision of a third party

The circumstance whereby the minor is under the supervision of a third party, be it a natural person or a legal person, does not imply that the parents cannot 104

[141] P. Senaeve, (supra fn. 140), 411, no. 1092.
[142] Art. 374, second paragraph and art. 376, third paragraph B.W.; P. Senaeve, ibid., 412, no. 195.
[143] P. Senaeve, (supra fn. 140), 413–414, no. 1101.
[144] P. Senaeve, (supra fn. 140), 413, nos. 1099–1100.
[145] P. Senaeve, (supra fn. 140), 413, nos. 1099–1100.

be held liable for a supervisory fault.[146] In this context, a distinction can be made between the hypothesis whereby the minor child is under the supervision of someone who is supervising the child on the basis of a contract or a decision by the court and the hypothesis whereby there is no question of this type of supervision (i.e. the situation of an occasional supervisor).

- First hypothesis: supervision by a third party under the terms of a contract or a court ruling

iii) Supervision under the terms of a contract

105 In principle, the parents can rebut the presumption of supervisory fault by demonstrating that, at the time of the wrongful act, their child was at school,[147] under the supervision of a babysitter, participating in a youth activity or staying at an institution. However, it may still transpire from the actual situation that the parents are liable for a fault in relation to this supervision on the child.[148] I do not agree with the jurisprudence that rules in absolute terms that parents provide counter-evidence on the basis of the mere fact that their child has been institutionalised, that it is the subject of rehabilitation measures, etc.[149]

106 Material possibility to supervise: The contractual transfer of supervision over the minor child to a third party does not exclude that parents can, under certain conditions, retain a material possibility to supervise their child. It is conceivable, for example, that the child's teacher is, at the same time, its parent. This example is by no means far-fetched, as it is increasingly common for parents to be called on by their child's school to provide supervision during certain activities (e.g. during swimming classes). Other examples that spring to mind are situations where parents personally participate in an activity organised by a youth organisation or sports club of which their minor child is a member (e.g. parents cooking during a youth camp).

107 A parental fault in relation to supervision: The contractual transfer of supervision over the minor child to a third party does not exclude the possibility that the parents may be liable for a fault in relation to this supervision.[150] Consider, for example, the contractual transfer of the obligation of supervision to a school, a babysitter, a youth organisation, etc. The parents may be liable for a fault in relation to supervision if they fail to check adequately whether the su-

[146] L. Cornelis (supra fn. 1), 319, no. 186.
[147] Cass. 21 december 1989, [1990] Pas., I, (501), 502, [1990] J. dr. jeun., afl. 10, 37, noot D.-M. Philippe, [1990–91] R.W., (538) 539 and [1990] J.L.M.B., (1228) 1229; N. Denoël (supra fn. 115), 30, no. 83.
[148] L. Cornelis (supra fn. 1), 319, no. 187; N. Denoël (supra fn. 115), 31, no. 91.
[149] See however in this sense: Luik 28 april 1983, [1983] J.L., 285: placement dans différents homes privés ou établissements de l'Etat; Brussel 5 april 1979, [1979] Pas., II, 90: placement dans un établissement d'observation et d'éducation; Jeugdrb. Brussel 3 juni 1980, [1981] J.T., 305.
[150] See L. Cornelis (supra fn. 1), 319, no. 187.

pervisor fulfils his supervisory role satisfactorily,[151] if they entrust supervision to someone who is unsuitable for this role,[152] or if they have failed to provide adequate information to the actual supervisor about the personal characteristics and nature of the minor child.[153]

iv) Supervision by a third party pursuant to a court ruling

The parents can, in principle, easily rebut the presumption of supervisory fault by proving that their minor child was, pursuant to a court ruling, staying at an institution at the time of the wrongful act.[154] 108

Again, this proof is not to be considered absolute in the assessment of the supervisory obligation that rests on the parents. The judge must, for example, ascertain whether or not a minor child who has been placed in an institution was "on weekend leave" or "on holiday" with his family at the time of the wrongful act. During such periods of leave or holidays, one cannot speak of a material impossibility to supervise the minor child (or at least to a lesser extent).[155] 109

v) Supervision over the minor child is materially possible, but is not adequately exercised

The parents are liable for a supervisory fault if they fail to supervise the child in situations where they were not unable to do so.[156] 110

b) The moral impossibility to supervise the child

As the minor child approaches the age of majority and is able to act more independently, the need for constant supervision over its actions gradually declines. In the assessment of the supervisory obligation of the parents, consideration must be given to social reality and the "inevitabilities of modern times".[157] The flexible interpretation of the supervisory obligation with regard to adolescents has to do with the principle that the duty of proper supervision must be assessed reasonably. 111

[151] L. Cornelis (supra fn. 1), 319, no. 187.

[152] L. Cornelis, (supra fn. 1), 319, no. 187; N. Denoël (supra fn. 115), 30, no. 83; P. Hamelink, [1978] De Verz., 363, no. 20.

[153] See also L. Cornelis, (supra fn. 1), 319–320, no. 187.

[154] Brussel 20 januari 1994, [1994] J. dr. jeun., afl. 133, (62) 63; Rb. Brussel 7 januari 1991, [1991] J.T., 587; Rb. Leuven 2 september 1987, [1987] Pas., III, (101) 103, obs. A.K.; Rb. Antwerpen 23 februari 1984, [1986] R.G.A.R., no. 11007; J.-L. Fagnart (supra fn. 39), 67, no. 55.

[155] See and compare for example Brussel 21 februari 1985, [1986] R.G.A.R., no. 11081; Vred. Fosses-la-Ville 4 september 1991, [1992] Journ. dr. jeun., afl. 117, 31; N. Denoël (supra fn. 115), 33, no. 98.

[156] Brussel 15 januari 1988, [1989] R.G.A.R., no. 11541, 2recto; B. Dubuisson (supra fn. 4), 37, no. 41.

[157] Brussel 23 mei 1991, [1991] Pas., II, (158) 161; Luik 12 januari 1982, [1982] J.L., (333) 334; Rb. Namen 30 juni 1995, [1995] De Verz., (638) 639, obs. M. Lambert; Rb. Ieper 16 februari 1988, [1989–90] R.W., (755) 756; Corr. Tongeren 25 november 1987, [1989–90] R.W., 755, noot; L. Cornelis (supra fn. 1), 319, no. 187; N. Denoël (supra fn. 115), 34, no. 103.

112 Again, one must guard against generalisations. To the extent that a minor child, though almost of age, on grounds of other circumstances (e.g. innate aggressive drive) represents a danger of damage to third parties and if the parents fail to reasonably foresee this danger, it will most likely be much harder to convince the judge that the requirement of proper supervision has been fulfilled.

End of Excursus

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child ans thus on the fault of the parents?

113 Cf. supra nos. 67 et seq.

114 Art. 1384, paragraph 2, Civil Code stipulates that the father and the mother are liable for the damage caused by their minor children. Art. 1384, paragraph 5, Civil Code states that this liability ends if the parents can prove that they were unable to prevent the act that gave rise to that liability.

115 Once the victim has proven the conditions of application of art. 1384, paragraph 2, Civil Code, there rests on the parents a rebuttable presumption of liability. Because of the legally permissible counter-evidence, the legislator derives from the conditions of application that have been proven by the victim and which gave rise to this presumption, that the parents have made a fault that is causally related with the damage, so that the minor child was able to cause the damage. This means that the father and the mother, in Belgian law, are not strictly liable for the tort of their minor children. The liability, embedded in art. 1384, paragraph 2 and 5, Civil Code, is a liability based on fault.[158] However, the onus of proof lies with the father and the mother. In comparison to the fault liability on grounds of art. 1382 Civil Code, it appears in the application of art. 1384, paragraph 2, Civil Code that the onus of proof with regard to the fault by the person who is held liable as well as the causal relationship is thus transferred from the victim to the liable father or mother.[159]

2. If the parental liability is based on their own fault: is the burden of proof on the victim or is there a rebuttable presumption of fault?

116 Once the victim has proven the conditions of application of art. 1384, paragraph 2 and 5, Civil Code, a presumption arises that the parents have made a fault that is causally related with the damage caused by their minor child. The father and the mother can rebut this presumption of liability in three ways:

[158] L. Cornelis (supra fn. 1), nos. 173–174, 189 and 205; R. De Corte, *Overzicht van het Burgerlijk Recht* (2001), 544, no. 1545; H. De Page (supra fn. 26), 892, no. 918B and 990, no. 972A; F. Swennen (supra fn. 3), 375, no. 473.

[159] Luik 28 februari 2002, [2003] R.G.A.R., no. 13669, p. 1recto; L. Cornelis, [1998–99] R.W., 523, no. 5; R. De Corte (supra fn. 90), 544, no. 1545.

first and foremost, the parents can rebut the presumption of liability by demonstrating that they where incapable of fault as they were unaccountable at the time that the damage was caused (cf. supra no. 76). *Secondly*, the father and the mother can be released from their obligation to pay compensation for the damage if they are able to prove that they have not committed a wrongful act or, in other words, that they have not neglected the general duty of care (cf. supra no. 77). Thirdly, the parents are not liable by demonstrating the absence of causal link between their presumed educational and supervisory fault.[160]

3. Who is subject of the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

Cf. supra nos. 72–74. 117

Only they who by law are the mother or father can, on grounds of art. 1384, paragraph 2, Civil Code, be held liable for the damage caused by their minor children. 118

Consequently, no qualitative liability, in principle, rests on the grandparents, except if they are legally the adoptive father or mother of the child. Likewise, brothers and sisters, stepmothers and stepfathers, and uncles or aunts of the minor child cannot be held liable, unless they are also considered by law to be the adoptive father or mother. No qualitative liability rests on persons with whom the actual father or mother legally cohabits, but whom cannot by law be considered to be the father or mother of the minor child. The tutor or co-tutor of the child cannot be held qualitatively liable either. Nor can a custodian. Art. 1384, paragraph 2, Civil Code does not apply either to a natural person other than the parent to whom the child has been entrusted, e.g. a minder or a foster family. The same holds vis-à-vis legal persons who have been entrusted with looking after the minor or an institution that provides care for the child in consequence of a court ruling. All the abovementioned persons can, of course, be held to account on grounds of a proven personal fault, e.g. a proven supervisory fault, or on grounds of another qualitative liability than that intended in art. 1384, paragraph 2, Civil Code. 119

4. If custody determines the duty to supervise: what are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

Cf. supra no. 75. 120

De lege lata, the father and the mother need not exercise parental authority, nor need they be burdened with any other statutory or contractual obligation vis-à-vis their minor child, in order that art. 1384, paragraph 2 and 5, Civil 121

[160] L. Cornelis (supra fn. 1), 318, no. 186.

Code be applicable to them. In this respect, the Belgian regulation differs quite clearly from that in France, where art. 1384, paragraph 4, Civil Code stipulates that the mother and the father are liable, insofar as they exercise parental authority. As far as custody does not determine the application of the presumption of liability, embedded in art. 1384, paragraph 2 and 5, Civil Code, neither the circumstance that parents are unmarried, nor the fact that they are separated or divorced, can prevent the application of the presumption of liability. However, the circumstance that parents are separated or divorced, can (but not automatically) influence the assessment of the judge whether or not the parents have raised decently and supervised adequately their minor child.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

122 It has already been mentioned that, in Belgian law, the custody of the child is not a condition for the application of art. 1384, paragraph 2 and 5, Civil Code (cf. supra no. 126). A parent, who is not awarded the custody of the child, can be held liable for the damage, caused by his minor child, if he/she has, *by the law*, the quality of father or mother of the child. Moreover, the fact that a child is no longer cohabiting with his father and/or mother, does not discharge the parents of their liability based on art. 1384, paragraph 2 and 5, Civil Code, as the Belgian legislator decided in 1977 to do away with the condition of cohabitation.

123 However, the circumstance that the parents of the child are no longer cohabiting is undoubtedly a circumstance that should be taken into account by the judge in assessing the counter-proof of proper supervision that is to be delivered by the parent with whom the child is no longer living (cf. supra nos. 101–106).

6. Which element of a tort must the child have realised for the parents to be liable for it?

124 A distinction must be drawn between non-imputable children and imputable children. According to a constant jurisprudence and legal doctrine, parental liability for the acts of children who have no tortious capacity on grounds of their age (*infantes*) or on grounds of their mental state, requires them to have behaved in such a way that would have made them liable in tort if they had had tortious capacity. It suffices that the *infans* or the child who is non-imputable because of his mental state, has committed an objective unwrongful act (*objectief onrechtmatige daad*). By contrast, when the child has tortious capacity, fault on his or her part is a condition for the liability of the parents.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

The claim of absence of a supervisory fault must, after all, be assessed on the basis of all factual circumstances, rather than in a general manner. 125

With regard to the circumstances of the child, the most important circumstance is age. The older the child becomes, the less supervision is required. 126

With regard to the circumstances of the parents, the parental duty of supervision may be significantly influenced by the fact that the minor child was under the supervision of another person than the parents at the time of the wrongful act. That circumstance does not imply that the parents cannot be held liable for a supervisory fault. See, for more details, supra nos. 107 et seq. 127

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

The liability of the parents is based on a double presumption of fault: a fault of not having met their duty to supervise their child *or* a fault of not having educated him or her properly (cf. supra no. 79). The parents can be released from their obligation to pay compensation for the damage if they have raised their child adequately *and* that they exercised proper supervision (cf. supra no. 79). 128

With regard to the duty of *supervision*, the parents can rebut the presumption of supervisory fault by demonstrating that, at the time of the wrongful act, their child was at school or at work. However, it may still transpire from the actual situation that the parent is at fault in relation to this supervision of the child. I do not agree with some jurisprudence that rules in absolute terms that parents provide counter-evidence on the basis of the mere fact that their child has been at school at the time the damage occurred (cf. supra no. 109). As in some other countries, the parental obligation of supervising their child is reduced to an "organisational duty", which prevents the parents from being totally discharged. This "organisational duty" means that the contractual transfer of supervision over the minor child to a third party does not exclude the possibility that the parents may be liable for a fault in relation to this supervision. So, the parents may be liable for a fault in relation to supervision if they have failed to provide adequate information to the school about the personal characteristics and nature (for example a child with an aggressive character) of the minor child. 129

Moreover, the contractual transfer of supervision over the minor child to a third party, for example a school, does not exclude that parents can, under certain conditions, retain a *material* possibility to supervise their child. It is con- 130

ceivable that the child's teacher is, at the same time, its parent. This example is by no means far-fetched, as it is increasingly common for parents to be called on by their child's school to provide supervision during certain activities (e.g. during swimming classes) (cf. supra no. 110).

131 When it appears from the actual situation that the parents have not committed a fault in relation to the supervision of the child, and thus have rebutted the presumption of supervisory fault, the discharge of the parents may be prevented by taking account that they also have to prove the absence of an *educational* fault.

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

132 The boarding institution has the duty to supervise the child and the parent's duty to supervise is transformed to a quite restricted organisational duty, i.e. into a duty to properly select, instruct and control the third party, as well as to stay informed about the child's conduct. When it appears from the actual situation that the parents have not committed a fault in relation to the supervision of the child (organisational fault), and thus have rebutted the presumption of supervisory fault, the discharge of the parents may be prevented by taking into account that they also have to prove the absence of an educational fault.

10. What is the relation between the damage claim against the parents and the damage claim against the child?

133 The party who suffered damage may try to hold different persons liable for the same damage based on various liability regulations. For example, the possibility muyst be considered that – due to their wrongful act based on art. 1382 Civil Code – different persons have jeopardised their liability for one's own act. According to the equivalence theory, each liable person is obliged – in principle – to compensate the complete damage of the victim in spite of his/her (possibly limited) contribution to the damage. In reality, all offenders will therefore be tried *in solidum*, enabling the person who suffered the damage to claim the full amount of the damages from only one of the condemned persons. The latter can exercise his right to subrogation for each of their respective contributions against the other condemned parties. Through the system, the insolvency risk of the liable party is put with the other accused individuals and not with the victim.

134 The answer to the question of the relation between the damage claim against the parents and the damage claim against the child depends on whether the minor child is imputable or not.

135 When the minor is not imputable, the minor will not be held liable, unless liability in equity, on grounds of art. 1386bis Civil Code, is established.

When the minor is imputable, liability of the minor himself is admitted. In this case, if the parents do not provide evidence of a decent education and a proper supervision, *in solidum* liability is established between the minor and the parents. 136

11. Is there any possibility either for the child or the parents to have recourse against each other?

Minors who are not imputable because of their age (*infantes*), cannot be held liable. Therefore, there is no place for recourse. 137

When the child is not imputable, on grounds of their *mental state*, he can be held liable in equity (art. 1386bis Civil Code). Since that liability in equity is not subsidiary to the liability of the parents (cf. supra no. 34), the possibility of recourse is possible. In practice, however, the judge will take in consideration the fact that the victim has a claim against the parents in order to reject that the minor has to pay compensation, so that there is no more question of recourse against him. 138

In case of minors who are imputable, the recourse either of the parents against the child and vice-versa, will be allowed according to general rules of *in solidum* liability. However, this possibility of recourse of the parents against the child is more a theoretical possibility than a practical one. 139

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

In a decision of 19 June 1997, the *Cour de Cassation* made clear that art. 1384, paragraph 1, Civil Code does not create a general regime of liability for others.[161] Even though it is established that the same provision creates a general regime of liability for things, the following paragraphs of art. 1384 Civil Code contain an exhaustive enumeration of the persons from whom one is answerable. Liability for others is perceived as a derogation from the individualistic approach of the Civil Code, so that it should be confined to the specific cases listed in art. 1384 Civil Code. The Belgian *Cour de Cassation* did not follow the Blieck-decision of the French *Cour de Cassation* of 29 March 1991, which recognised the existence of a general regime of liability for others. 140

The decision of the Belgian *Cour de Cassation* of 19 June 1997 means that persons who cannot be considered as parents, masters, school teachers or craftsmen, in the sense of art. 1384 Civil Code, can only be held liable on the basis of a proven fault (artt. 1382–1383 Civil Code). 141

[161] Cass. 19 June 1997, [1997] Arr. Cass., 670, [1997] J. dr. jeun., 400, obs. T. Papart, [1997] J.T., 582, advice J. Piret and [1998] R. Cass., 369, obs. A. Van Oevelen.

142 In my analysis of the liability of parents, I have already mentioned that no vicarious liability, on grounds of art. 1384, paragraph 2, Civil Code, rests on grandparents, brothers and sisters, etc. unless they are also considered by law to be the adoptive father or mother of the minor (cf. supra no. 74). Neither the tutor nor co-tutor of the child can be held vicariously liable. Nor can a custodian, a minder, a foster family, a legal person who has been entrusted with looking after the minor or an institution that provides care for the child in consequence of a court ruling. All these persons can, as already said, be held to account on grounds of a proven personal fault, e.g. a proven supervisory fault, or on grounds of another qualitative liability than that intended in art. 1384, paragraph 2 Civil Code.

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise of simply working there?

143 When a child can be considered as an apprentice, a rebuttable presumption of liability lies on the craftsman of the minor apprentice, for the time that the apprentice is under the supervision of the craftsman. The legal basis for this liability is art. 1384, paragraph 4, Civil Code. In order to be considered as a craftsman, monitoring must be the essential element of the contract between him and his apprentice.

144 When a child has the quality of *préposé*, an objective liability lies on the master of the minor child. The legal basis for this liability is art. 1384, paragraph 3, Civil Code. This relationship assumes the possibility of the liable master to exercise authority and supervision on the acts of the minor *préposé*. The judge must therefore judge the possibility of exercising authority and supervision regardless of whether this possibility was actually used in a concrete case.

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institutions?

145 Various situations are to be distinguished.

a) The personal liability of the natural person charged with the supervision of the child

146 In the first place, the liability of a natural person charged with the supervision of the child is to be determined. The answer to the question of the liability regime of natural persons charged with the supervision of the child depends on the qualification of the staff member of the home, the school or any other institution as an agent or as an employee.

i) First hypothesis: the supervisor is an agent of a legal person under public law

147 If a wrongful act has been committed by a staff member/agent (i.e. a staff member of a legal person under public law, such as for example a community education authority), when executing the public tasks and functions he/she is entrusted with, the victim can hold both the staff member/agent and the legal person governed by public law directly liable for the compensation of the damage suffered. The staff member is personally responsible for each wrongful act, including a (most) minor wrongful act. Moreover, the fault of the staff member, who acted as an agent of a legal person governed by public law, is directly imputed to the governing authority, without affecting his/her own personal liability. In other words, an action can be entered against the autority as well as against the individual staff member/agent, if all necessary components of civil liability have been met.

ii) Second hypothesis: the supervisor is an employee

148 If a wrongful act has been committed by a supervisor who has the quality of employee (i.e. a staff member hired by labour contract, such as for example supervisors working in the context of subsidised private education), the supervisor is in principle also personally liable for the damage he/she caused when executing the labour contract. However, this personal liability is restricted, on grounds of art. 18 Labour Contracts Act, to the damage resulting from fraud, serious fault or frequent minor fault. Consequently, the victim can only hold the staff member/employee personally responsible in these three cases. Contrary to the situation of supervisors working in institutions of public law, the personal fault of the staff member/employee does not directly jeopardise the personal liability of his/her employer. Nevertheless, the aggrieved party will be able to stand up against the latter on the basis of his/her strict (objective) liability for the fault of his/her employee, on the ground of art. 1384, paragraph 3, Civil Code.

149 It is clear that the legal status of supervisors with the quality of staff member/agent and the legal status of supervisors qualified as staff member/employees, is different on two levels. In the first place, supervisors/agents can be held liable for each wrongful act, including a (most) minor wrongful act, while supervisors/employees can only be held liable for their fraud, serious fault or frequent minor fault. In the second place, there is a difference regarding the accountability of the fault of the supervisor to the institution where he is executing his task of supervision over the minor child(ren) (cf. infra questions 7 and 8). This different treatment of staff members has surprised many people, since the functions they carry out hardly differ. This existing inequality, condemned by several decisions of the Arbitragehof, has been corrected by an Act of 10 February 2003. Regarding the personal liability of staff members employed by a legal person governed by public law, art. 2 of this Act states: "*Ingeval personeelsleden in dienst van openbare rechtspersonen, wier toestand statutair geregeld is, bij de uitoefening van hun dienst schade berokkenen aan*

de openbare rechtspersoon of aan derden, zijn zij enkel aansprakelijk voor hun bedrog en zware schuld. Voor hun lichte schuld zijn zij enkel aansprakelijk indien die bij hen eerder gewoonlijk dan toevallig voorkomt (Staff members employed by institutions governed by public law, and who have the quality of civil agent, and who cause damage to the public institution or to a third party when executing the functions they are entrusted with, can only be held liable for fraud, serious fault or frequent minor fault)".

b) The liability of the institution who is responsible for the natural person charged with the supervision of the child

i) First hypothesis: the supervisor is an agent of a legal person under public law

150 As already mentioned, if a wrongful act is committed by a staff member/agent, i.e. a staff member of a legal person under public law, when executing the public tasks and functions he/she is entrusted with, the victim can directly hold liable the legal person governed by public law for the compensation of the damage suffered.

151 In order to be able to attribute the wrongful act of a staff member/agent directly to the public authority, there must be a causal link between the fault of the agent and the damage and the agent may not have exceeded his (awarded) responsibilities. In other words, the direct liability of the authorities based on art. 1382 Civil Code results from the attribution of the capacity of 'agent' to a staff member, rendering it possible to directly attribute the acts committed by this member to the legal person under public law, employing the governing body. The agent must have acted effectively in this way, i.e. having had the authority to act on behalf of the legal person, in a way that also third parties could be convinced that the agent acted as a representative of the authorities. The causal link between the wrongful act and the function requires more than the fact that the fault would be made during and by executing one's function. Consequently, this condition is judged more strictly than the required link with one's function in connection with the strict liability of the employer for his staff member/employee's fault (art. 1384, paragraph 3, Civil Code). There is no doubt that for criminal acts only the staff member/agent itself can be held liable in the criminal and civil sense, since these kinds of acts can never be considered as being a part of the service, even though they were made while exercising one's function.

ii) Second hypothesis: the supervisor is an employee

152 As already stated, contrary to the situation of supervisors working in institutions of public law, the personal fault of the staff member/employee does not directly jeopardise the personal liability of his/her employer. Nevertheless, the aggrieved party will be able to stand up against the latter on the basis of his/her strict (objective) liability for the fault of his/her employee, on the ground of article 1384, paragraph 3, Civil Code.

153 In order to be able to jeopardise the strict liability of the employer, the aggrieved party must deliver proof of the causality between the fault committed and the damage caused on the one hand, and, on the other, must prove that all application conditions of this specific liability ground have been met. From art. 1384, paragraph 3, Civil Code, the following essential application conditions can be derived:

- a relation of appointment of subordination;
- a fault (wrongful act) committed by the employee;
- the fault was committed during the exercise of his/her function;
- damage suffered by a third party.

154 The concept "in function" is interpreted flexibly so that it is sufficient that the relevant wrongful act was committed during office and can be related in any way, even indirectly or occasionally, to the function. The relation to the exercise of the function required in this context is therefore interpreted much more flexibly than the relation to the function within the framework of the public service. Case law does assume – however – that the employer may be relieved of his objective liability if the employee abuses his function, provided that the fault was committed outside the function for a purpose other than executing the assigned tasks and without the employer's consent.

155 This existing inequality between the accountability of the fault of the staff member/agent to the legal person under public law law (artt. 1382–1383 Civil Code) and the accountability of the fault of the staff member/employee to the legal person under private law (art. 1384, paragraph 3, Civil Code), has also been condemned by the Arbitragehof, and has consequently been been corrected by an Act of 10 February 2003. Regarding the accountablity of the fault of staff members/agents employed by a legal person governed by public law, art. 3 of this Act states: "*Openbare rechtspersonen zijn aansprakelijk voor de schade die hun personeelsleden aan derden berokkenen bij de uitoefening van hun dienst, op de wijze waarop aanstellers aansprakelijk zijn voor de schade veroorzaakt door hun aangestelden, en dit ook wanneer de toestand van deze personeelsleden statutair is geregeld of zij gehandeld hebben in de uitoefening van de openbare macht*." Freely translated, art. 3 of the Act of 10 February 2003 means that legal persons under public law are liable for damage caused by their staff members to third parties when executing the functions the latter have been entrusted with, in the same way as legal persons under private law are liable, on grounds of art. 1384, paragraph 3, Civil Code, for damage caused by their staff members/employees.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

156 Contracts where parents establish duties to supervise their children upon others are valid. For example, a contract between the parents and a baby-sitter can

be considered. But the existence of a contract of supervision does not automatically mean that the parents are exempted from liability for the acts of their children during the time that the child is supervised by a third party, for example by a baby-sitter. Indeed, it may still transpire from the actual situation that the parent is liable for a fault in relation to this supervision of the child. See, for more details, supra nos. 109 et seq.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

157 Cf. supra nos. 146 et seq.

6. Who is liable for accidents caused by pupils in public and private schools: the teacher, the school, the education authority or the state?

158 Various aspects of liability for accidents caused by pupils have already been dealt with (cf. supra question nos. 146 et seq.). One type of liability, however, has not yet been examined, namely the presumption of (individual) liability of the teacher for the wrongful acts committed by the pupils under their supervision (*surveillance*). Art. 1384, paragraph 4, Civil Code stipulates the rule that teachers are liable for the damage caused by their pupils during the time they are under their supervision. This presumption of liability, which is a rebuttable presumption (art. 1384, paragraph 5, Civil Code) is based on the idea that the teacher has neglected his/her duty to supervise his/her pupils enough or totally, so that he/she could not prevent the pupil from causing damage. Consequently, the teacher will be able to escape his/her liability by proving that he/she did supervise sufficiently and carefully or that the damaging act of the pupil was sudden and totally unpredictable, so that even an attentive supervision could not have prevented the damaging act.

7. In public schools: given that the state is liable for the failure to supervise, may the state entertain a right to recourse against the teacher of the school?

159 The Belgian law admits the right of recourse against the teacher employed by a public school (being a civil servant). But this recourse is not admitted in every case. As a consequence of art. 2 of the Act of 10 February 2003, the right of recourse against a teacher in the public education system, is restricted to where he or she has committed fraud or made a serious or habitual (frequent) minor fault.

8. Same question with respect to private schools: may the school entertain a recourse action against the teacher who has failed to supervise?

160 Again, the right of recourse against the teacher is possible and restricted to the case where the teacher has committed fraud or made a serious or habitual minor fault.

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

161 For assessing whether the teacher has flouted the general duty of care, his behaviour is compared with that of a "person who exhibits normal prudence and care in similar circumstances". The duty of care is an abstract, objective norm. Although the fault is principally judged *in abstracto*, the judgement is rendered more concrete by the circumstances in which the damage was caused. One of these circumstances is the professional activity of the person whose acts are judged, i.e. "being a specialist" in a certain field. In principle, the acts of a teacher presuppose specific skills and will therefore be compared with the behaviour of a regular teacher acting carefully and reasonably. It must be stressed that the appreciation of the fault-concept is practically the same for the contractual liability as for civil liability for a wrongful act. The judgement *in abstracto* of the act will be rendered *in concreto* afterwards by considering the time and the place in which it took place. In assessing the extent of the teacher's duty to supervise, the following criteria are relevant: the number of pupils under the supervision of the teacher, the sort of activity that was performed when the damage occurred, the connection between the act and the school programme considering the (non-)compulsory nature of the out-of-school or after-school event, the extent of risk of an activity requiring suitable precautionary measures and the sudden unexpected nature of the wrongful act because of which the damage is no longer predictable or foreseeable.

162 With regard to the circumstances in the person of the child, the age of the pupil(s) related to the activity of that time, is emphasised as being an important criterion. Other conditions of the child, such as a handicap, a known tendency to aggressive behaviour or to disobeing orders, or a specific type of disturbance which requires a higher degree of supervision, may also be relevant.

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social benefits on the other. May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

163 As far as I know, the damage covered by the Social Security benefits may be recovered by the social security insurance carrier, who may recoup from the tortfeasor ultimately bearing responsibility for the loss. However, the social insurance carrier may only recoup from the teacher (in public and in private schools) in case of fraud, serious fault or frequent minor fault committed by the teacher.

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

164 The claims against the child and the claims against the teacher, school or other institution, are independent of one another. Attention must be paid to whether the minor pupil was imputable or not. In Belgium, the child will not be liable if he is not imputable. If he is imputable, he will be liable *in solidum* with the teacher of the educational institution (in the case of private schools) or with the state (in the case of public schools). The parents may also be held liable *in solidum* with the child, when they are not able to prove that they raised their children adequately and that they exercised adequate supervision (cf. supra no. 142).

12. Is there any possibility for the child or the teacher to have recourse against each other?

165 The right of recourse of the teacher against the child depends on whether the minor was imputable or not. In the case of non-imputable minors, no right of recourse is accepted, unless liability on grounds of art. 1386bis Civil Code (liability in equity) is established. In the case of minor pupils who have tortious capacity, the teacher has the possibility of recourse against the child according to the general rules of obligations *in solidum*.

166 If a child has paid compensation for the damage caused, he has a right or recourse against the teacher according to the general rules of obligations *in solidum*. This recourse is very unlikely to take place in practice, since the victim will normally seek compensation from the teacher (private schools), the state (public schools) or the parents.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

167 Since the *Court de Cassation* decision of 28 September 1989, the conjunction of the liability of the parents and the teacher has been accepted. Despite the fact that the parents are – in principle – not able to supervise their child at school and although the parental liability, on the grounds of art. 1384, paragraph 2, Civil Code, is based on either a fault in the education or a fault in supervision, it is accepted that parents (too) can be held liable for the damage caused by their minor child supervised by the teacher. As a matter of fact, the behaviour of the child can be attributed to negligence in the education by the parents rather than a lack of supervision. Since it involves a refutable presumption, the parents can escape their liability by proving that they have carried out their education duty conscientiously.

When both the teacher and the parents are held liable for the damage caused by the minor pupil, each of these parties is obliged, according to the equivalence theory, to compensate the complete damage of the victim in spite of his/their (possibly limited) contribution to the damage. In reality, all offenders will therefore be tried *in solidum*, enabling the person who suffered the damage to claim the full amount of the damages from only one of the condemned persons (the teacher *or* the parents). Then, the right to subrogation can be exercised by, as the case may be, the teacher or the parents for their respective contributions against the other condemned parties. Through this system, the insolvency risk of the liable party is put with the other accused individuals and not with the victim. 168

Children as Tortfeasors under Czech Law

Jiří Hrádek

I. Short Introduction

The main source of the civil law legislation, the current Act No. 40/1964 Coll., *občanský zákoník* (Civil Code, OZ), was approved in 1964, but in 1991 was changed in a fundamental way. The so-called "Big Amendment" – Act No. 509/1991 Coll., changed substantial parts of the old law. Some provisions were abolished completely because of their narrow connection to the old system, while some provisions were changed to mirror the contemporary situation. Regarding the provisions concerning damages, the situation is a bit different, as many provisions remained without amendments and only a few sections establishing factual basis connected to the old system were abolished. For example, liability for acting against the rules of socialist coexistence was abolished in 1991. 1

Also the rules concerning liability of minors remained the same. The main provision of the system of minors' liability for tort, based on sec. 422 of the Civil Code, remained in the current Civil Code from the former regulation; however, it shall be submitted that the provision is precise enough and provides sufficient legal certainty to all participants of private law relationships. 2

The concept of liability in Czech civil law includes absolute and relative rights. Sec. 420 of the Civil Code provides that every person is liable for damage which he/she caused by breaching a legal obligation. This means that under this condition, the distinction between damages based on breach of contract and liability based on delicts cannot be determined. 3

The general provision in the Civil Code is based on sec. 420[1] and the regulation also includes the general clause defining the conditions for liability of legal and natural persons in tort. Different from some legal orders, the Czech Civil Code and its law of tort does not use the particular facts of a case to de- 4

[1] The civil law theory requires the following elements: breach of a legal duty or an event qualified by the law, damage and causation between the breach and its consequently inflicted harm. In most cases of liability, fault is required, either in the form of negligence or intention.

termine liability.[2] For both parties, it is very important that the Czech Civil Code regulates fault as a presumed fact. The defendant-wrongdoer has to prove that he did not act with fault. However, the theory concludes that in this case only a conscious negligence could be presumed.[3]

5 Minors can be held liable in the same way as other, if fault can be determined. However, it can be very complicated to find a condition of capacity for liability, because in Czech tort law there is no fixed border between capacity and incapacity based on a limit determined by age. To decide if the minor has capacity as specified in the definition in sec. 422 of the Civil Code, all the necessary conditions required must be fulfilled. Under this provision a minor or a person suffering from a mental disorder is liable for damage he/she caused if he/she is capable of controlling his/her own conduct and judging its consequences, while anyone who has a duty to exercise supervision over the person shall be jointly and severally liable with him/her. These principles contained in the definition are the minimal requirements for the sufficient development of the personality of the minor. Both the mental (judging consequences) and the volitional component (controlling his/her own conduct) of conduct must be fulfilled in the individual case. However, this provision attaches no importance to the age of the minor. The main role belongs to the character of the individual.

6 From the above-mentioned provisions, it can be determined that it is insufficient for a minor to fulfil only one part, i.e. only one component of the capacity of conduct. To establish liability, both of these elements are required. The legislator chose such a provision to regulate the liability issue of minors, although neighbouring countries of the Czech Republic have a different system commonly based on the fixed age limitation. The Austrian ABGB or the German BGB with a similar system are both examples that can be cited.

7 The minor, who has a limited capacity for liability, and the person with the duty of supervision are jointly and severally liable if the latter cannot bring evidence as to the sufficient exercise of this duty. If the current capacity of the minor does not fulfil the legal conditions, the provision of sec. 422 of the Civil Code provides that anyone who has infringed his/her obligation of supervision over the minor has to be held liable. The position of the injured party is consequently even further improved due to the theory of presumed fault. The reversal of the burden of proof ensures that the wrongdoer carries the burden and must prove that the exercised supervision was proper. If he fails to refute the alleged facts, he loses his defence and must be held liable.

[2] It follows the Austrian tradition which determines the general conditions for liability through a general clause.

[3] This rule is set out in the general clause for liability in sec. 420 (3) of the Civil Code and presents a reversal of the burden of proof for the benefit of the injured party.

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

Before describing conditions under which a minor can be held liable, in other words the description of the capacity for delicts, it is necessary to specify the concept of minor under Czech law because of its significant impact on the determination of delictual liability. 8

A person of up to eighteen years of age shall be considered a minor; however, the age limitation is not absolutely rigid for the consideration of his legal capacity and Czech law acknowledges one important exception to this rule. There is a possibility for people older than sixteen years to acquire unlimited legal capacity after they get married. As a result of this legal act (with or without an official permission issued by a court), the minor acquires full legal capacity and even if the marriage should be later declared void this person cannot lose his capacity (sec. 8 (1, 2) of the Civil Code). This consideration has an enormous impact on the capacity for delicts and the whole branch of law concerning liability. 9

The definition of capacity for delicts is set out in sec. 422 of the Civil Code. In accordance with this provision "a minor or a person suffering from a mental disorder shall be liable for damage he caused if he is capable of controlling his own conduct and judging its consequences. Jointly and severally liable with him shall be anyone who has a duty to exercise supervision over such a person". This section determines the legal elements of liability for delicts and each minor must fulfil both parts of the required capacity to be considered as a person able to be liable. Otherwise, this capacity must be rejected. If the minor has all appropriate abilities required under sec. 422 of the Civil Code the legal terminology uses the concept of "limited capacity for delicts"[4] because the unlimited capacity for delicts shall be used only in cases where the Civil Code acknowledges full legal capacity. However, this determination presents an unimportant description of the facts and has been used primarily in theory whereas in practice this distinction is used in a very limited way. 10

The second part of sec. 422 regulates a negative capacity for delicts: "If a person who, due to his age or a mental disorder, is incapable of controlling his own conduct or judging its consequences causes damage, liability for such damage shall be born by the person whose duty it was to exercise supervision over him." 11

[4] M. Knappová/J. Švestka, *Občanské právo hmotné (Civil law)* vol. II (2nd edn. 1998), 404.

12 Thus the provisions of the Czech law concerning the capacity for delicts have no fixed boundary between capacity and incapacity based on a limit set by age. It shall be determined in each particular case if the wrongdoer, in our situation a minor, possesses the capacity to control his conduct and to judge its consequences, i.e. the situation of limited capability. However, it is not the minor, but the injured person, who bears this burden of proof.[5] Where the minor does not possess all required abilities and the law rejects consequently his liability for delicts, liability shall be limited to the person with the duty of supervision not being able to show sufficient care. In answer to the second question, the specific window within the life of a child is his minority as defined above, i.e. under usual circumstances up to the age of eighteen years.

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

13 As mentioned under the first question (nos. 8 et seq.), there is neither a fixed boundary in Czech law between capacity and incapacity which would be based on a limit set by age, nor a provision for determining the sufficient capacity of the minor for controlling his own conduct and judging its consequences in relation to the age of the minor. For this reason, the extent of the capacity for delicts depends largely upon the extent of the ability of the minor in a particular case, i.e. the capacity to consider the wrongfulness of the conduct and the voluntary capacity to control it.

14 This individual determination in each case provides a larger playing field for particular assessments and grants an increased protection to minors. Both of these elements of the capacity for delicts, i.e. the mental and the volitional component, must be interpreted and separated, and each condition must be fulfilled completely and contemporarily with the other component. If one component is missing, the capacity for delicts of the minor cannot be established. The court concluded in case no. R 44/1974 that a minor should be jointly and severally liable for an explosion and the following damage caused by diverse chemical substances supplied by him because, considering his age and long experience in usage of these substances, he had to know that his actions could present a real danger for other minors. He was considered liable notwithstanding that he was himself still a minor.[6]

[5] As to the evidence issue see: J. Macur, *Důkazní břemeno v civilním soudním řízení*, Universitatis Masarykianae Brunensis (MU).

[6] R 44/1974, published in Law Reports and Opinions Collection (*Sbírka soudních rozhodnutí a stanovisek*).

It is disputable to what extent objective criteria shall be considered in reaching a decision. The legal theory considers this aspect insufficiently and not clearly. In Švestka's opinion,[7] the capacity for delicts of an individual must always be evaluated in a particular case, in relation to the exercised wrongful conduct, independently of age or mental disorder. It therefore must be determined if the minor had the capacity to control his conduct and to judge its consequences. The same opinion is maintained by Bičovský and Holub in their book[8] on liability in the Czech Republic. They hold the view that the capacity of minors shall always be considered from the individual point of view of the minor. To decide whether the minor was capable or not, an expert must be appointed. It can be concluded from these two opinions that the main criteria for determination of the capacity for delicts shall not be objective standards referring to an average child, but the capacity of the individual child to act reasonably. 15

To protect the injured party from a very complicated situation caused by the determination of the capacity for delicts based only on individual criteria, Czech law provides for a reversal of the burden of proof in favour of the injured, i.e. it is the person subject to the duty of supervision who has to provide evidence of the sufficient fulfilment of his duty, or that he has not breached his duty. According to these provisions there are some important aspects to this legislation. Firstly, the supervisory persons are subject to the requirement of sufficient fulfilment of their duty of supervision under threat of liability for wrongs of another. Secondly, the legal position of the injured party should be modified to enable him to obtain damages more easily. The next point concerns the system of presumed fault in Czech delict law, which also improves the position of the injured. The minor wrongdoer has to prove that he did not act with fault. However, the theory concludes and the jurisprudence agrees that in this case only a conscious negligence could be presumed. 16

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

Insurance does not play an important role in the Czech Republic in determining capacity for delicts. Consequently, there are no specific provisions that set out a relationship between the conduct of a minor and insurance which influences damages. It shall therefore be of no importance if the minor is protected from the consequences of his conduct by liability insurance. The criteria for the determination of his capacity for delicts are determined, and the majority opinion of legal theory agrees that there are no other conditions for being considered liable other than those included in the legal definition. 17

[7] M. Knappová/J. Švestka (supra fn. 4), 403 et seq.

[8] J. Bičovský/M. Holub, *Odpovědnost za škodu v právu občanském, pracovním, obchodním a správním (Liability for damage in civil, labour, commercial and administrative law)* (2003), 46 et seq.

18 However, there is a discretionary power of a judge to reduce damages in favour of the wrongdoer. This provision is set out in sec. 450 of the Civil Code and under this rule the judge shall consider the proprietary situation of both parties to find out if reasons which merit special consideration exist. When such a situation allows the reduction in favour of the defendant-wrongdoer, the judge shall reduce damages. Reducing compensation, however, is not a duty of the court and it can be classified therefore as discretionary. Still, the examination of the property owned by both parties is obligatory.

19 This discretionary power may of course include all cases where one or both parties are insured. The reason for such an application of the reduction in accordance with sec. 450 of the Civil Code is that the appropriate liability insurance adds to the property owned by a certain person and it is able to affect it substantially. According to the theory,[9] the judge shall examine all possible reasons, ranging from the impact of the damage to its social effect. It is therefore possible that if a minor with capacity for delicts is covered by insurance, his financial situation is assured and, consequently, the application of the reduction, in his favour, may be refused. However, the insurance has no impact on the capacity for delicts.

5. What is the standard of care applicable to children?

20 It was stated under the previous questions that all considerations regarding the capacity for delicts take into account the individual abilities of minors in a particular case. This means that remaining elements of the expected conduct should correspond with the general scope.

21 If we consider the extent of expected care in accordance with provisions of Czech law we would find that no real difference between minors and adults has been made. A general provision, which confirms the above, is in sec. 415 of the Civil Code. Under this law "everybody is obliged to behave in such a way that no damage to health, property, nature and the environment occurs". This section provides a legal principle of prevention of impending damage which is a general rule for each provision which provides for damages under the Civil Code and does not constitute any differentiation between diverse persons. Additionally to that, sec. 422 of the Civil Code relating to the minor's liability must be applied. This connection between the general rule and a special provision does not change the identical approaches to the issues of the conduct of minors. Should a minor possess the capacity to control his own conduct and judge the resulting consequences he shall be considered subject to sec. 420 of the Civil Code and will be held liable under the general provisions. The reason for refusing all exclusions may be found in the fact that the minor must have a limited capacity in a particular case to be held liable.

[9] M. Pokorný/J. Salač, *Občanský zákoník – Komentář (Civil Code – Commentary)* (7th edn. 2002), 534.

Therefore, the conclusion to the question must be that there is no difference between minors and adults relating to the standard of care. Everybody has to maintain the standard as set out in sec. 415 of the Civil Code which bans conduct that would cause damage to property, health or the environment. Each action in contravention of this rule has to be considered under the general damages provisions. 22

6. Are children held to a higher standard of care if they engage in "adult activities"?

Adult activities present no reason for exclusion from the system of equal judgement of conduct based on sec. 420 in connection with sec. 422, of the Civil Code. Because no special provisions are set out in relation to extraordinary conduct of minors, no difference between minors and adults may be made. 23

It is disputable if a special provision relating to conduct of a minor should be established *de lege ferenda*. This legislation could stipulate a lower standard of care in negligence actions against minors or determine other possible reactions. The reason for focusing on this particular group of persons can be justified by the fact that the minor does not have far-reaching knowledge or experience. That means that a standard of care in negligence actions equally applied to everybody could have a harsh impact. However, this argument was not accepted by the theory, because the evaluation of the mental capacity of the minor ensures that no inadequate damages will be awarded. That is why the general condition in sec. 415 of the Civil Code has to be applied also in determining the liability of minors. This requires that conduct incurs no damage to property, environment or health. Together with this provision, which specifies a general requirement for conduct, a general clause, in sec. 420 of the Civil Code, is used for liability based on fault. 24

It is necessary in this legislation to have regard to all the circumstances. The most dangerous activities, or in other words, activities which an incapable child should not be permitted to do, can be carried out usually only after a person has reached a certain age and it must be assumed that older persons have (or should have) enough experience and are sufficiently mentally developed for carrying out any adult activity. Accepting this fact, the idea of a lower standard of care in negligence actions for minors must be rejected. 25

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

The complete regulation of liability of children is set out in Czech law by the provisions of the Civil Code. Under sec. 422 of the Civil Code a minor or a 26

person suffering from a mental disorder shall be held liable for damage if he is capable of controlling his own conduct and judging its consequences, in other words he has limited capacity for delicts. Where incapacity for such conduct exists, it is still possible to find a person, particularly a person with the duty of supervision over a minor, who shall be jointly and severally liable due to his breach of duty. However, when this person is able to prove sufficient performance of his duty he shall be exculpated. In the end, no person will be held liable and the injured party shall bear his damage himself.

27 The legal theory does not often consider the issue of what criteria should be used in deciding on the capacity of a minor for delict; however, it must be concluded from the available literature that the abilities of the minor should be evaluated in relation to the particular case (see no. 13). When the minor fulfils both of the required elements of the developed personality, i.e. that his decision-making and volitional capacity have been sufficiently developed so that his capacity for delicts is established, he must be personally held liable for his own conduct. Otherwise the Czech legislator tries to find a severally and jointly liable person (under sec. 422 of the Civil Code, the person with the duty of supervision) and tries to ensure legal certainty for the injured party. If neither the above variations apply, it is the injured person who has to bear the burden of the damage that has arisen. The possibility of this dangerous and unintended situation arising shall be reduced by the existence of a reversal of the burden of proof on a person with the duty of supervision who has to show that the duty was not breached.

28 Because of this regulation in modern law, no place for evaluation based on objective criteria such as age or general conduct of other children may be found. In addition, the possibility of using the legal concept of liability in equity is set at nought. On consideration of the Czech regulation regarding the liability of children it must be concluded that no provisions allow for the use of liability in equity, a legal concept completely foreign to the Czech legal theory. Each issue must be evaluated using the valid legislation and this means that the child can be held liable where he or she has full capacity, although because of his age this capacity is what is termed a limited capacity for delicts. Awarding damages, without full capacity, is by virtue of this legislation impossible. If a child acts below the normal standard of care, it means, consequently, that there is a breach of the general duty of care because Czech law does not recognize any exceptions from this general standard, as already mentioned above. The child must therefore be subject to payment of compensation.

8. Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard? What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

29 The Czech Civil Code contains a reduction clause in sec. 450 which has already been mentioned several times and which relates to damages arising from contract as well as from delict. This provision allows the court to make a decision to award lower compensation for damage. This section should be applied for the benefit of the wrongdoer only after fulfilment of all conditions.

30 The discretionary power of the court shall be applied under the following conditions: The main condition for the application of the reduction clause is the existence of reasons which merit special consideration and, in addition, the wrongdoer, must not have acted intentionally. The wrongdoer may therefore act only in negligence, but this is without effect if the negligence can be qualified as being either conscious or unwilful.

31 There are also some cases which add specificity to this rather uncertain rule. For example, in ruling R 50/1991, regarding the application of the reduction clause, the wrongdoer intended to cause a battery; however, due to his negligence he caused damage to health. In the court's opinion, the use of the discretionary power was only fully excluded for the intentionally caused damage. In respect of the remaining harm, the possibility of a reduction in damages should remain. In addition, pursuant to theory's opinion, some cases give reasons for special attention, as for instance a case of damage caused by drunkenness or intoxication, but still in negligence.[10]

32 Following that, the court should examine the particular circumstances of the case as well as consider the property owned and personal situation of the injured and, equally, of the wrongdoer. These duties of the court have a declaratory nature only so other criteria and facts may be taken into account. These conditions should ensure a far-reaching equity because the court is obliged to carry out a general investigation of the property owned by both parties. It is without doubt that the most important fact for the purposes of the examination must be the property owned. It cannot be the only point of view used for the examination; however, it is disputable what shall be understood by the concept set out in this provision and what "the property owned" exactly means. In general, this provision presents a wide concept and that is why the interpretation should allow the examination to apply to all property-related elements, i.e. the

[10] M. Pokorný/J. Salač (supra fn. 9), 534.

pure property owned, the existence of optional liability insurance,[11] and other similar factors.

33 As already mentioned, the court is obliged to examine all aspects of the reduction for the benefit of the wrongdoer. However, the injured party must also be protected and that is why an equal examination of the injured party's circumstances must be carried out. It can be interpreted from the language of the provision that all aspects of both parties' circumstances must be evaluated equally when having regard to a possible reduction in the damages to be awarded.

34 A provision relating to the contributory fault and therefore less important for the reduction of damages can be found under sec. 441 of the Civil Code. However, this section serves a similar function as that of the reduction clause and therefore warrants mention. Under this rule, the injured party has to carry, proportionally, his share of the damages if the harm was partially caused by his negligence or intentional action.

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

35 No liability in equity has been known in the Czech legal system. By virtue of this fact, no provision can use the right of priority.

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

36 Strict liability is regulated mostly in the Civil Code. However, besides this basic Code some cases exist in which particular special Acts function as amendments to the Civil Code legislation.[12]

37 The provisions relating to strict liability are located in sec. 420a–437 (save for the sec. 422–424) of the Civil Code. These are cases which do not need fault to be established in order to protect the injured party. For fulfilment of the facts of a particular case just three conditions must be given: an event causing damage, damage and the causation between the incident and the caused harm. The wrongful and qualified event that results in the harm presents a sufficient reason for liability and therefore no fault of the liable person is required. It is also not necessary for the wrongdoer to possess a capacity for delicts because it has no importance in the establishment of strict liability and consequently for the assessment of damages. Because no fault shall be required, the wrongdoer

[11] Czech law does not know any type of compulsory liability insurance which would be required from children.

[12] The Nuclear Energy Act (No. 18/1997 Coll.), the Roads Act (No. 13/1997 Coll.), the Hunting Act (No. 23/1962 Coll.), the Media Act (No. 62/1999 Coll.), the Product Liability Act (No. 59/1998 Coll.), the State Liability Act (No. 82/1998 Coll.), etc.

cannot avail of the right of exoneration as opposed to the comparable situation where liability is based on fault. In some cases, however, the legislator allows for the wrongdoer to exempt himself if specific legal conditions are met.[13]

For a long time the issue has been discussed in Czech legal theory[14] of whether the Civil Code contains a general provision for strict liability, in sec. 420a of the Civil Code, which should have a subsidiary effect on all cases regulated in Czech law, i.e. not only for provisions of the Civil Code but also for other statutes. The experts maintain both views; however, according to the majority opinion, there is no general clause for strict liability, in contradiction to liability based on fault.[15] 38

There are many provisions regulating cases of strict liability but no special rules relating to minors, i.e. everybody shall be considered equally. As a typical example of strict liability, the regulation of liability for damage caused by the operation of a means of transport, set out in sec. 427–431 of the Civil Code, is often mentioned. The Czech Civil Code determines that operators shall be liable for any damage caused by the special nature of the means of transport. The condition for application of this provision therefore is that the liable person must be qualified as an operator; and this person shall be understood to be a person who has a permanent possibility of legal and actual disposition of the means of transport. Generally the owner, who under sec. 123 of the Civil Code is entitled to hold the object of his ownership, to make use of it, to enjoy its benefits and profits and to dispose of it falls within this definition; however, the owner and the operator may be different persons. It is also possible that a minor is an owner of the means of transport (e.g. a motorbike but also car, plane and other means of transport) and must therefore be subject to the liability provisions of the Civil Code.[16] 39

The operator cannot exempt himself if the damage was caused by circumstances which originated from his operation. This provision is not a typical rule based on strict liability because the operator has a minimal chance to benefit from the possibility to exempt himself. He shall be exempted from the strict liability if he proves that the damage could not have been prevented, even where every effort is exercised. The operator shall be liable for damage he caused to a person's health and property, but also for any loss resulting from misappropriation or loss of an individual's property if during the incident that person was deprived of his ability to take care of his/her property. All situations during which the individual was not able to take care of his property, e.g. incidents, shocks, or medical treatment, are understood as constituting damage. 40

[13] Sec. 420a, 421, 427 et seq., 432 et seq. of the Civil Code.

[14] J. Macur, *Odpovědnost a zavinění v občanském právu (Liability and Fault in Civil Law)*; J. Švestka, *Odpovědnost za škodu podle občanského zákoníku (Liability for Damage pursuant to Civil Code)*, Academia; M. Knappová, *Povinnost a odpovědnost v občanském právu (Obligation and Liability in Civil Law)*, Academia.

[15] M. Pokorný/J. Salač (supra fn. 9), 474.

[16] Law Reports and Opinions Collection R 3/1984.

41 Under sec. 430 of the Civil Code a person using a means of transport without the knowledge or against the will of the operator shall be liable instead of the operator. If, however, the operator enabled such usage he shall be held liable pursuant to the provisions of sec. 438 of the Civil Code, which provides for the contributory fault of the operator, together with the other person(s). If there is no fault on the part of the operator he shall be exempted and the other person alone will bear all the consequences.

42 As already mentioned, the minor can be held liable if he fulfils the conditions of the definition set out in the first section: that he is an operator. From this moment he is subject to the liability provisions of the Civil Code and other private legal acts relating to strict liability and to damage caused by the operation of a means of transport. The minor can be held liable for two reasons. Firstly, as a result of his status as an operator of a means of transport and, secondly, deriving from the first reason in accordance with sec. 430 of the Civil Code,[17] if, due to his negligence, he shall be contributorily at fault. This rule can also be applied otherwise. If the minor is not an operator but he uses the means of transport without knowledge of the operator or against his will, he should fulfil the conditions for usage as described in sec. 430 of the Civil Code. Because this section provides for strict liability, no capacity for delicts of the minor shall be required.

43 Unlike a car, plane or a motorbike, an animal is not a source causing events which result in strict liability. If the minor was the owner of an animal and this animal caused damage, the owner would be held liable; however, liability would not arise under strict liability provisions but, rather, in liability based on fault, in particular pursuant to sec. 415 and 420 et seq. of the Civil Code in connection with the provisions providing for the protection of minors in sec. 422 of the Civil Code.

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or does the liability cover part of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

44 For the purpose of this question we have in February 2004 examined the insurance policies of four major Czech Insurance companies: Česká pojišťovna,[18]

[17] Law Reports and Opinions Collection R 3/1984.

[18] *Česká pojišťovna's* liability insurance for individuals has been divided into the following types: Liability insurance for damage caused by an activity in typical civilian life; Liability insurance for damage of the individual as an owner, holder, tenant or manager of immovables; Insurance of an owner of immovables against damage during demolition or construction; Liability insurance for damage resulting from employment; and finally insurance for damage caused while exercising hunting rights.

Kooperativa, Allianz[19] and Česká podnikatelská pojišťovna.[20] It was a big surprise to discover that Kooperativa does not offer any family liability insurance; the only policy available is insurance for damage caused to the employer. The other companies have diverse programmes of liability insurance which differentiate between the many types of liabilities that occur. Therefore, all of the possible insurance policies differ from each other in their scope.

Liability insurance represents a certain part of the insurance programme of the insurance company, and each type of insurance represents an independent possibility to conclude an agreement concerning the particular danger and damage resulting therefrom. It must be said that the most usual insurance policy concerns liability insurance for damage caused by an activity in typical civilian life. It includes all damage which the insurance holder causes a third-party while carrying out the usual various activities of a typical life, e.g. in connection with the management of the household, playing sports, etc. However, the extent of this type of insurance also depends on the insurance company's policy. Česká pojišťovna offers the broadest package in this type of insurance and it shall be described. 45

The liability insurance covers all events of damage both in the Czech Republic and abroad and it covers all members of the insurance holder's family who live with the holder in a common household. Therefore, the husband/wife and all children up to the age of 25 years shall be covered by the insurance. The insurance shall also relate to the auxiliaries of the insurance holder in the common household, including persons having a contractual obligation to take care of a flat or a pet. The insurance covers all damage which occurs during common household activities, while playing sports, and damage caused by small pets, by legally possessed weapons, and engineless vessels. Damage to health is covered up to the value of CZK 2,000,000 (€ 67,000), damage to property to the value of CZK 1,000,000 (€ 34,000) and monetary damage to the value of CZK 500,000 (€ 16,600). The insurance holder pays CZK 372 (€ 12) per year. 46

[19] The following insurance of *Allianz* is available: Liability insurance for damage caused by an activity in typical civilian life; Liability insurance for damage resulting from ownership, management, lease or tenure of immovables; Liability insurance for damage resulting from ownership or care of an animal; and insurance concerning the obligation to recover medical costs to the Health Insurance Company.

[20] *Česká podnikatelská pojišťovna* offers the following types of liability insurance: Liability insurance for damage caused by an activity in typical civilian life; Liability insurance for damage of the individual as an owner, holder, tenant or manager of immovables; Liability insurance for damage of an owner or custodian of an animal; Liability insurance for damage resulting from employment; Liability insurance for damage caused while exercising hunting rights; insurance for damage of an owner or operator of a vessel and finally insurance for damage caused by an owner of a gravestone and grave accessories.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age, criminal history of children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

47 Every person may conclude a contract for types of liability insurance as mentioned in the first part. However, because the child is covered by the family insurance policy there is no need to have a special insurance contract.

48 The question of whether the insurance company offers any risk-rate premiums must be answered in the negative. There are bonuses in other kinds of insurances but not in liability insurance.

12. a) How many per cent of families are covered by one or another form of family liability insurance?

49 There are no official statistics concerning the number of insurance holders.[21] But it is possible that about 20–40 per cent of families obtain such insurance.

b) Does the liability insurance extend to intentional torts committed by the child?

50 The extent of the liability insurance coverage depends on whether the child had limited capacity for delicts or not. If not, as a consequence, it is not possible to hold the child as being at fault. Where the child has limited capacity for delicts, the insurance does not cover intentionally caused damage, either to the insurance holder or to the other persons covered by this type of insurance policy.

13. a) Are the parents under a private law duty to take out liability insurance for their child?

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

51 Both questions must be answered in the negative; there is no obligation in such matters.

[21] In seeking to determine the number of families with liability insurance we contacted the Ministry of Finance of the Czech Republic, but no answer was available as no research on this has been carried out in the Czech Republic.

14. a) Do private insurance carriers enjoy rights of recourse against the child in case they pay up a damage claim brought by the victim against the parents?

Claims for damage against the parents and claims for damage against the child who is subject to a limited liability are equal, because, pursuant to sec. 422 of the Civil Code, all persons shall be jointly and severally liable. Therefore, if the victim brought an action against the parents, the child would automatically become another party in the liability relationship. 52

As the insurance company enjoys the right to request recourse due to legal cession pursuant to sec. 33 of the Act No. 37/2004 Coll., on Insurance Contract, it is entitled to take all the steps that a victim can take. By virtue of this fact, recourse against the child could be requested. However, this section provides further that such a cession does not take place *inter alia* with regard to people living with the insured in a common household or dependent on his/her maintenance, unless they acted intentionally. 53

b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

The law of social security creates no limit on the right of recourse of the insurance carriers; however, sec. 450 of the Civil Code does possibly limit the right of recourse of the insurance carrier. 54

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

A reduction clause based on the provision of sec. 450 of the Civil Code exists in the Czech law of delict but this has already been mentioned under nos. 17 et seq. and 29 et seq. The view of the court considers that an award of damages could constitute a breach of equity where the compensation would cause far-reaching negative consequences to the wrongdoer that were not comparable to the harm caused by him. However, the reduction of damages must also not be unlimited in order that the wrongdoer would be required pay at least some compensation. Otherwise the equity would be breached on the side of the injured party and this would be unacceptable. 55

As always, this limitation is possible only in particular cases because this provision does not allow for general application except for reasons which merit special consideration and as a "last chance" for the wrongdoer. The legislator did not want to give priority to any group of persons and consequently, this section shall be applied to both minors and adults. To what extent and in which cases the reduction will be applied depends on the decision of the court. Therefore it is possible that the clause will be used when the awarded damages go beyond subjective financial limits either of the minor or other persons jointly and severally liable with him. 56

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

57 There is no substantial debate in the Czech Republic about the extent of the liability of minors because the contemporary legislation based on sec. 422 and 450 of the Civil Code allows a far-reaching protection of the financial and proprietary state of the individual.

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

58 Debts in connection with this question are regulated by two kinds of proceedings: bankruptcy proceedings and execution proceedings. The bankruptcy procedure is constituted by the *zákon o konkurzu a vyrovnání*[22] (Bankruptcy and Composition Act, ZKV), with the other situation deal *občanský soudní řád* (Civil Procedure Code, OSŘ) and *zákon o soudních exekutorech a exekutorské činnosti – exekuční řád* (Execution Procedure Act).[23]

59 The Bankruptcy and Composition Act determines, as its name already suggests, the consequences of the ordered bankruptcy or composition, i.e. the settlement of the proprietary relationships of a debtor who is insolvent. This happens if the debtor has two or more creditors and is unable to meet his obligations as they fall due over a long period or if such person is overburdened with debts. This arises if the debtor has two or more creditors and if his due obligations exceed the value of his property (see sec. 1 (1–3) of the ZKV). Only the second definition of insolvency relates exclusively to entrepreneurs and legal entities.

60 The court may order a reduction of obligations of a certain individual person together with the permission of the composition. It means in effect that as soon as the debtor fulfils his obligation in time and in full as ordered by the judgment, the remaining parts of the debt, which were excluded from the performance, shall be cancelled.[24]

61 The Civil Procedure Code contains all possible kinds of execution proceedings. If the debt consists of money, only the execution types maintained under sec. 258 of the Civil Procedure Code may be used. The types are listed as follows: Assignment of wages,[25] order of receivable,[26] judicial sale of personal

[22] Act No. 328/1991 Coll., *zákon o konkurzu a vyrovnání* (Bankruptcy and Composition Act, ZKV).

[23] Act No. 99/1963 Coll., *Občanský soudní řád* (Civil Procedure Code, OSŘ), Act No. 120/2001 Coll, *o soudních exekutorech a exekutorské činnosti – exekuční řád* (Execution Procedure Act).

[24] Sec. 63 (1) of the ZKV.

[25] The government shall set the legal minimum wage by way of a directive. For various social reasons wages may not be reduced below this limit. The remaining pay, however, shall consequently be divided into three parts whereby two-thirds may be used for assignment of wages or in other words for repayment of the debt. These rules are set forth under sec. 276 et seq. of the Civil Procedure Code.

property,[27] sale of business and creation of judicial lien with respect to real property. Only the most effective method should be used for the execution and this is further limited by the regulation based on the Civil Procedure Code which requires that no results with effects other than justice for the debtor should arise. The Execution Procedure Act sets out in sec. 58 et seq. similar rules concerning the kinds of execution proceedings and also many other rules are jointly regulated within the Civil Procedure Code for the purpose of the Execution Procedure Act. However, the private executor is not limited by the principle of the most effective method of execution.

The execution may, on motion pursuant to sec. 266 of the Civil Procedure Code and sec. 54 of the Execution Procedure Act, be postponed by the court if the liable party got into the situation without fault on his part, if realization of the debt would cause very negative consequences to his family, and if the party entitled to settlement is not especially damaged by the postponement. 62

Although many provisions of the Civil Procedure Code and Execution Procedure Act have regard to execution, there are no special provisions relating to minors which should be taken into consideration if rights arising from debts are realized. There is also no possibility to request the reduction or cancellation of debts for reasons based on personal impossibility. Duly established and existing obligations shall be therefore fulfilled in full. Execution proceedings do not know such a reduction, even if they allow a temporary exemption of certain parts of the debtor's property from the execution. 63

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

Having regard to the above, this question must be answered in the negative, except for the composition. With regard to the discharge of debts in the approved composition, however, the literature and/or case law have not dealt with this issue or such opinion has not been published yet. 64

[26] In this case, sec. 303 et seq. of the Civil Procedure Code provides that all payments from insurance for reconstruction or rebuilding of a destroyed house or payments from social security are excluded because these amounts should improve the situation of the wrongdoer and their usage for repayments cannot be justified. Also receivables of some persons are excluded but this legislation is too specific and cannot be generalised.

[27] All objects are excluded under sec. 321 et seq. of the Civil Procedure Code which the debtor or a member of his family needs for his personal use. Secondly, things whose execution would breach ethics are also exempted from the realization of rights arising from the debtor.

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

65 The liability of the person with the duty of supervision is regulated under sec. 422 of the Civil Code. In accordance with this provision anybody who breaches his duty to supervise shall consequently be held liable. Due to this legislation, two situations may arise. Firstly, two parties, the minor and his supervisors, can be held liable if the minor has a limited capacity for delicts, and the person(s) with the duty to supervise the minor breached his obligation. Secondly, if the minor possesses no capacity, the supervisor alone shall be held liable.

66 This person with a legal duty of supervision may, however, by evidence of acting with due and reasonable care of the minor, exculpate himself from liability for damage. The supervisor bears the burden of proof so that the exemption becomes in most cases less possible or completely impossible. Another point is the definition of due and reasonable care, which is not specified under any legal definition. The position of the legislator has been replaced by the case law which has already decided in many cases on the sufficient level of such care.[28] Judgment no. R 4/1970[29] is an example from the case law of where the requested care was defined with regard to the appropriate provision of the new Civil Code approved in 1964. Under this case law the sufficient supervision of a minor cannot be understood as "permanent twenty-four hour supervision but only in terms of the particular age, character or normal conduct of the individuals requiring care".[30]

67 However, the supervisor is considered liable only if he cannot prove that he did not neglect his duty to properly supervise his charge. Formerly, there was a dispute within the legal theory whether this liability of parents or other persons who fulfil legal specific conditions should be considered as a case of strict liability or of liability based on fault. Some experts maintained the opinion that, rather than the presumption of fault, the presumption of wrongfulness should be stated under this provision.[31] The fact that no special section concerning the presumption of fault is necessary because a general clause already exists under sec. 420 of the Civil Code was presented as the main argument.

[28] Law Reports and Opinions Collection R 4/1970; R 44/1974; R 27/1977.

[29] Law Reports and Opinions Collection R 4/1970.

[30] In this case a minor played together with his friends after school beside a main street and caused a road traffic accident. In the opinion of the court his parents breached their legal duty to supervise him because they were not aware of the activity of their child at that time. The court reasoned, in its judgement, that each parent has a legal obligation to be aware of all activities of their child.

[31] J. Fiala, *Důkaz zavinění v občanském soudním řízení (Evidence of Fault in Civil Proceedings)*, 130.

Eliáš[32] agreed with this opinion; however, he stated that such a person could not exculpate himself even if he could prove that he was not responsible for damage due to his fault, but only if he would prove that he did not neglect his duty to supervise. It expresses, in other words, a negative request for evidence of a proper and sufficient supervision and this provision must therefore be considered as a case of strict liability. At present, the theory maintains the majority opinion that sec. 422 of the Civil Code establishes a case of liability based on fault whereby the fault of the supervisor shall be presumed. However, the person may exculpate himself by showing evidence that he did not breach his duty of proper and sufficient supervision. The legal position of the injured party improves due to this presumption because a reversal of the burden of proof is also applied.[33]

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

The Czech Civil Code stipulates that it would be too severe if the injured party had to prove the breach of duties by the supervisor to establish the liability of these persons. Therefore, a rule that the supervisor alone should provide evidence of sufficient and proper fulfilment of his obligation is set forth. That case shall be considered as a reversal of the burden of proof for the benefit of the injured and as the rebuttable presumption of fault. 68

The judicature also confirmed this opinion and decided many cases respecting this issue even before the essential amendment of the Code in the beginning of 1990; with no changes and amendments concerning this part of the Civil Code made, this case law has confirmed the existence of the reversal up to now.[34] 69

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

In interpreting the concept of the person having the duty to supervise pursuant to sec. 422 of the Civil Code, the persons coming within the definition may not be limited to parents, i.e. the original holder of the parental duty. The reason can be found in the description of the persons as "supervisory persons" which already shows the intention of the legislator not to limit the number of possible liable persons by a certain kind of relationship. By virtue of this fact persons other than the parents shall also be subject to the duty of supervision over the minor, as prescribed by statute, court decision, or other fact (e.g. a contract). 70

[32] J. Eliáš, *Společensko-ekonomické základy občanského práva (Social and Economical Grounds of Civil Law)*, 205.
[33] J. Švestka (supra fn. 14), 233.
[34] NS ČSR 1 Cz 61/86; NS ČR Cdo 1333/2001.

- Parents and their partners

71 Firstly, the parents of the minor can be included among supervisory persons;[35] in other words, they are the original holders of the parental care and also subject to the duty to supervise. Basically, this duty is shared between both of the parents irrespective of the family status, i.e. there are no legal consequences whether the parents are married or not. In the framework of their duties to provide proper education and care for the child, they shall namely be liable for all activities of their child. The parents shall, however, be liable to the extent to which their parental care exists. If the parental care was limited or completely taken away by court decision, the possible liability could be found only in part in this new situation.[36]

72 It is disputable to which extent the cohabiting partner[37] should be held liable. The case law[38] has already confirmed that the husband of a mother who is not the father of the children should be liable by way of sec. 33 of the *zákon o rodině* (Family Act, ZOR). It is declared in this provision that the cohabiting partner must participate in the education of the children as soon as he lives together with the child and the child's parent in the common household and silently or expressly recognises his duty of proper care and therefore also of supervision. However, it should be reasonable that a cohabiting partner should be held liable also, although not married, if he lived together with the parent and the child in a common household and silently or expressly recognised his parental duty. Due to his consent to the obligation, he would fulfil the same conditions as a husband; however, his family state would be different.

- Other subjects with a duty to supervise

73 The Family Act regulates that, in addition, persons other than the parents shall become, under specified circumstances, subject to the duty to supervise. The first group of such persons are individuals who come within the ambit of sec. 45 of the Family Act (*jiná fyzická osoba než rodiče*). In accordance with this section, where a child's interest so requires, the court may award custody of a child to an individual other than the child's parent, if that person guarantees the child's proper upbringing and agrees to take the child into his/her custody. When ruling on the award of custody of a child to an individual, the court is obliged to determine the scope of this person's rights and duties towards the child because its parents are still subject to a parental duty, albeit restricted. Therefore, the individual becomes subject to the duty to supervise only to the extent set by the court.

74 Also included under persons with a duty to supervise are adoptive parents (*adoptivní rodiče*) of the child. The adoption shall be considered either as pre-adoptive care in accordance with sec. 69 of the Family Act or as full adoption

[35] Sec. 31 (2) of the Act no. 94/1963 Coll., *zákon o rodině* (Family Act).
[36] Sec. 34 of the Family Act.
[37] Sec. 33 of the Family Act.
[38] Law Reports and Opinions Collection R 27/77.

under sec. 63 et seq.[39] However, such classification has no impact on the liability of those parents, because a certain parent with duty to supervise shall be found in each situation. Natural parents have this duty from the birth of the child and adoptive parents acquire this by way of court decision.

The next group of possibly liable persons would be foster parents (*pěstouni*) as defined under sec. 45a et seq. of the Family Act. Foster parents are people who want to take care of one or more children; however, no family relationship shall result. 75

Should the parents of the child die or should their care over the child be limited, then consequently a guardian (*poručník*), defined under sec. 78 et seq. of the Family Act, would be appointed. He must also be considered as subject to the duty of supervision. The reason is that his obligations shall not only be the representation and administration of the assets owned by the minor independently of his parents but will also include, even limited, the educational care of the child. 76

- Legal entities

The duty of supervision shall not be carried out only by individuals but can also be carried out by legal entities which have the legal duty to take care of the minor and to supervise his behaviour. Legal entities subject to the liability are usually schools, boarding schools, psychiatric reformatories for delinquent juveniles, penitentiaries for juvenile delinquents,[40] social care homes, hospitals and other institutions concerned with the care of minors, and their duty is based in statutes, court decisions or other facts such as contracts which cause the transfer of the duty. However, their liability shall be time-constrained because, in contrast to individuals who are original holders of the duty, when legal entities acquire their obligations, included in the obligations are conditions in relation to the length of time the duty shall exist. 77

In accordance with sec. 422 (3) of the Civil Code an employee shall not be personally liable but rather the legal entity (employer) shall be held liable, in particular for the employee's negligence. The employee shall be liable only to the extent provided by the provisions of labour law set out in the Labour Code and the extent is very limited.[41] 78

[39] Pre-adoptive care consists of a three-month period that the child shall spend together with his possible future parents, or in other words, with his future family, and this term is defined as a probationary period. Also the other kind of adoption, the full one, shall be divided into two types. Firstly, the most usual type is so-called irrevocable adoption, in which case the new parents are recorded instead of natural parents in the register, or, secondly, revocable adoption, which can be later reversed by a court decision if necessary. The family relationship between the child and his natural parents will be therefore rebuilt.

[40] Sec. 84, 86 of Act no. 140/1961 Coll, *trestní zákon* (Criminal Code).

[41] The maximum amount may not exceed an amount equal to four and a half times the average monthly earnings of the employee, unless the damage is caused by drunkenness or while under the influence of other addictive substances. In that event, this limit shall not be applied and the member must compensate the actual damage in full.

79 It is disputable, if due to a breach of duty to supervise by a teacher, a liability under the *zákon o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem* (State Liability Act)[42] may be established. Such efforts must be, all things considered, rejected. The first reason is that the Czech Civil Code has already created special cases of liability in relation to the legal entities under sec. 422 (3) of the Civil Code that are not based on fault and which should be separated from the cases of strict liability based on the State Liability Act. These provisions exist concurrently to each other and this is confirmed by the State Liability Act. A special statute in relation to the general provision of the Civil Code created the liability of the state and it limits its extent to harm caused by state bodies, bodies of self-government, or by individuals or legal persons carrying out public government as a transferred power. This damage should be caused either by a wrong decision or by maladministration. By virtue of this fact, liability of a school or other supervisory person must be refused because of impossibility to fulfil these legal conditions.

80 To answer the question properly, both persons who are parents of the child shall be considered as holders of the duty of supervision under Czech law. It has no real importance whether they got married or not and also the extent of their care is not unchangeable. Also the cohabiting partner of a parent may become subject to this duty of care if he/she impliedly or expressly acknowledges his/her obligation. In special situations, regardless of the reason, it may happen that a child needs help. In such cases various persons shall be appointed to help resolve the situation. They can be listed as follows: an individual other than the child's parent, adoptive parents, guardians and foster parents.

81 However, not only individuals but also legal entities such as schools or other various institutions (e.g. boarding houses) may be considered as supervisory persons if the entity acquired the duty to supervise over a minor, either by statute, court decision or contract.

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

82 As already mentioned, it is of no real importance if the natural parents of the child are married or not. Their status does not influence the parental duty and, pursuant to the provisions of the Family Act, each of them shall be considered as subject to the duty to supervise. However, the Family Act acknowledges in some cases the need to appoint a guardian. Pursuant to sec. 78 et seq. of the Family Act, only if the parents die or their parental duty to care is limited shall a custodian consequently be appointed.

[42] Act no. 82/1998 Coll., *zákon o odpovìdnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem* (State Liability Act).

Where the parents are separated and live apart, they continue to remain subject to the parental duty. However, it must be acknowledged that a situation may arise where the parent who lives together with the child would be held liable to a greater extent than the other. The reason is that this person possesses a greater possibility to influence the behaviour of the minor and to educate him. However, the other parent shall also be held liable, even if but to a limited extent, because he must maintain his role as an educator and supervisor. The particular situation of each child and his parents must be therefore respected prior to all theoretical considerations. Due to the failure of the statute to regulate this situation, both parents shall in principle be held liable. 83

A slightly different situation arises if the child was entrusted to the care of one parent by a court decision as a consequence of the divorce procedure. The other parent shall continue to be considered as a holder of the parental duty of care unless otherwise decided, however, his care must be understood as limited. As a result, where a child is liable, only the parent who lives together with the child in a common household and has therefore a real possibility to influence the education and the behaviour of the child would probably be held liable.[43] However, it is also impossible here to draw a general rule because of the variety of personal situations. 84

The financial situation involved, in the above two situations, will affect the overall outcome. In the case of marriage the communal property of the spouses shall be established under Czech law. If damages or other obligations were therefore to be paid, the communal property would be used, regardless of whether the parents lived in a common household or not. After the effective decision on divorce, such a property unit does not exist and each party must pay his obligation on his own. 85

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

Because the parent does not live together with the child and has, by reason of court decision, only a limited, or no real/actual, possibility to take care of the child or to influence his education, his liability must be consequently limited. However, as long as the parent retains some part of his obligation he must be considered as responsible for the necessary care and all consequences attached. 86

6. Which elements of a tort must the child have realized for the parents to be liable for it?

When we consider the liability of a child and consequently his parents as supervisors, basically all elements which the law requires for the establishment of the claim to damages against another must be fulfilled. The limits for the 87

[43] J. Bičovský/M. Holub (supra fn. 8), 69.

acknowledgement of a child as subject to tort law are determined by sec. 422 of the Civil Code and states that if the child was capable of controlling his own conduct and judging its consequences, he should be liable. However, should not the minor fulfil these basic conditions establishing his limited capacity for delicts but at the same time breached his legal duty with damage as a result of his behaviour, a sufficient reason would exist for being his supervisors held liable.

88 The same applies to cases of strict liability. Due to its nature, it shall be enough if only three of the elements are fulfilled. In particular, the law requires a qualified event, damage based on this event, and causality between this event and the harm.

89 As a result, both in the case of liability of a minor based on fault and strict liability, it is sufficient for the supervisor's liability if damage was caused by the child. The parents as supervisor will be then held liable in accordance with conditions specified under sec. 422 (3) of the Civil Code unless they exculpate themselves by proving a proper supervision.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

90 The criteria for assessing the extent and the intensity of the duty to supervise are diverse; however, there is a main principle laid down by the legislator in sec. 422 (1) of the Civil Code. The minor should under this provision be capable of controlling his own conduct and judging its consequences. This rule sets sufficient intellectual (i.e. the ability to distinguish unwilful activity and judge its consequences) and volitional conditions (ability of his will to decide whether the presumed activity shall be accomplished or if it shall be left out) for the determination of a developed personality. It has the consequence that the minor will also be held liable when he did not take into account possible results of an activity although his intellectual ability made it possible. In assessing the duty to supervise, subjective criteria of the individual should therefore always be taken into account. This presents the main point of view for the determination of whether the minor shall be subject to supervision and, if so, to what extent.

91 If we want to set a precise criterion for the assessment of the duty to supervise, we have to combine criteria relating to the subjective character of the individual with other, mostly external, elements. The immediate environment of the minor will play the main role; however, his personal character cannot be disregarded either. However, whether his parents are working or what their characters are should not be decisive for the issue of assessing the duty to supervise. The reason is that his parents are the original holders of the parental duty of

care and they should act properly and sufficiently under all circumstances. With parents who are employed, it means that they must always choose between different possibilities. They can either charge another person with their duty to supervise for the time of their employment, regardless of whether the person is an individual (an au-pair) or a legal entity (school or another institution), or they can leave the child alone if he showed sufficient abilities (for a short-time supervision, e.g. a babysitter, see no. 110). The criteria for such a decision must be the capacity of the child to act reasonably. However, this decision must be made by the particular holder of the duty of care because usually only this person(s) would be held liable if the child caused damage.

92 A case which shows this theoretical construction of the legal provisions is a situation where a child has to cross a busy street on his way to school. If the child was still a minor, e.g. a six-year old boy, whose capacity to act reasonably does not allow him to undertake this journey without supervision, and he was left alone by his parents to go and, consequently, causes an accident, a fault on the part of his parents shall exist. Additionally, the fault is presumed under the Czech law of tort. On the other hand, if the minor was sixteen years of age, his parents will submit that his capacity (in regard to the particular case) allows crossing the street without supervision. If an accident happened, the fault of the parents would be presumed; however, their exculpation would be easier because of the high probability of having acted properly.

93 Another example of the necessity to take account of the conditions of the environment is offered by case law.[44] In the case no. 1 Cz 27/83 the Supreme Court ruled that if the parents did not properly instruct the child on the principles of road traffic safety a strong presumption must exist that they breached their duty of care and supervision. Road traffic presents such a danger that parents should protect their incapable child from its consequences. In the case no. 25 Cdo 1333/2001 the Supreme Court decided that a fact that the parents had not discovered a functional gun of their sun and they were unable to predict that he would hurt another person reveals that they did not have sufficient control over their child's behaviour and they failed to perform the proper supervision over him. The fact that they were at work at the accident's time did not allow their exculpation. It stated "sufficient and proper supervision does not mean only direct prevention of a person from a wrongful activity or the prohibition thereof, when such activity threatens to happen or has already happened. It also means a complete approach by the parents to the education of the minor and their influence on him which should provide that all wrongful elements of his behaviour will be restrained."

[44] NS ČSR 1 Cz 27/83; NS ČR 25 Cdo 1333/2001.

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

94 When the child is present at school or at work organised by the school as part of the approved education (for more see nos. 103 et seq.), this legal entity shall, consequently, take over the liability for his behaviour. It means, as a result, that the duty of parents shall be restricted during this time and also that their duty to care will be limited. However, the legal entity shall acquire this duty due to transmission pursuant to statute, court decision or other relevant fact; in other words, by means which reflect the common interest. Although a public interest in the transfer mirroring the statute exists, the parents may recall their consent at any time and they shall again become the sole holder of the duties. However, as long as they do not recall these duties, they are free of all liabilities during the attendance at school, including breaks and excursions.

95 The Supreme Court[45] decided that an organisation (in modern terms a legal entity) operating a nursery should be liable for all damage caused by the child during his stay and, therefore, during the time when the organisation must be held liable for the behaviour of the child. This ruling confirmed the above, i.e. the fact that a legal entity must be held liable for its breach of legal duty if the child causes damage during a period of time spent under the control of this entity. The duty to supervise was transferred to the legal entity in the same manner as to an individual. By virtue of this fact, the presumption of fault shall also be applied to these cases.

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

96 If the child lives in an institution such as a boarding school (see nos. 77 et seq.), a person other than his parents acquires the duty to supervise and his parents, consequently, lose that duty, or it is greatly limited. This occurs where schools or similar institutions take over the supervision for a certain period of time, either only for education purposes or also for accommodation purposes etc. Breaks, excursions and, in the case of boarding houses, also the time when the minor stays at a certain place with the knowledge of the supervisor, shall also be understood as coming within the meaning of education.

97 The liability of parents may also be established if the child is living in a boarding school, separated from his parents. Due to the parental duty to care, it should be noted that parents may request that their child be allowed to deviate from set programmes. However, with this request the transfer of duties will be automatically ended and the boarding school cannot be held liable for events arising in the future.

[45] NS ČSR 1 Cz 61/86.

In summary, the parents shall be held liable only if, upon their request, the child departs from following a usual programme and due to this action they again acquire the duties which they had transferred to the school. 98

10. What is the relation between the damage claim against the parents and the damage claim against the child?

The damage claim against the parents (or other supervisors) and the parallel claim against the child are equal. This principle can be found in sec. 422 (1) of the Civil Code under which children with capacity for delicts and their supervisors who cannot exculpate themselves shall be held jointly and severally liable. The injured person is by virtue of this fact entitled to claim damages against both parties equally. 99

11. Is there any possibility either for the child or the parents to have recourse against each other?

Under sec. 422 (1) of the Civil Code, the supervisor and the minor shall be held jointly and severally liable. The possibility to have recourse against the other party in Czech law is based on the provisions of sec. 439 of the Civil Code governing this issue. Under this law "somebody who is jointly and severally liable with another person is entitled to settle his payments to the injured party in connection with the damage caused by him or her." If therefore the injured party asked the parents to fulfil the entire damages, they have, consequently, a claim against the child which is equal to the part caused by the child. 100

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

If the child has no parents, a statute, in particular the Family Act, stipulates who shall become the parents' successor and simultaneously the holder of the parental duty to take care of and supervise the child. According to sec. 78 of the Family Act, where the parents have died or have no or limited legal capacity, or where this capacity was limited or completely deprived due to a decision of the court, the court shall first appoint a guardian. In the event that no one is appointed as a guardian this position shall be carried out by the public body for social protection of children. Additionally, adoption, either irrevocable or revocable, or placement in the custody of new foster parents or of an individual pursuant to sec. 45 of the Family Act (see nos. 73 et seq.) are possible. All these persons can become subject to the duty to supervise. 101

Therefore, although a child may have no parents, the following persons may be subject to the duty to supervise: adoptive parents, foster parents, an individual pursuant to sec. 45 of the Family Act, and a guardian. A guardian does not need to be an individual; legal entities may also undertake this duty. 102

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

103 When we talk about a minor being employed, there are two categories that arise, regardless of whether the child is working in a private or public business enterprise. Firstly, the minor can participate in a work training programme that is a usual part of his or her education. Therefore this work experience represents an inseparable part of the education system of the school and, therefore, it shall be understood as an extension of the regular classes. The second category represents work which is performed for the purpose of acquiring financial means, e.g. various summer jobs, part-time jobs, and also full-time jobs.

104 If the minor's work falls under the first category, then, consequently, his or her performance and participation is understood as the usual participation involved in attending a lesson and the provision of sec. 422 (3) of the Civil Code shall be applied. By virtue of this, the duty to supervise is transferred from the original holder to the school or institution for the period of the lessons. This school or institution shall then be held liable for breach of this duty.

105 Also in the second case legislation is necessary for the transfer of the duty to supervise, however, the legislation does not lay down any such obligation. Provided that there is no one, this transfer must be done by court decisions or by contract. However, the same effect would result if legislation set a different age for having full legal capacity than the age of 18 which is set in the Czech Civil Code.

106 Such a different age limit is stipulated by the provisions of Act no. 65/1965 Coll, *zákoník práce* (Labour Code, ZP) which sets the relevant age at 15 years. Although there is no express reference to legal capacity for delicts, it may be derived from the circumstances that the minor (in the concept of the Civil Code) shall have full legal capacity, and as a consequence the minor must also bear the full capacity for delicts under the Labour Code. In several places the language of the Labour Code tacitly confirms this.[46]

107 However, this legislation offers no solution to the liability matters of supervisory persons as understood under the Civil Code, because the Labour Code is a rather autonomous legislation. In the case of a minor who is older than fifteen years, full capacity for labour relations arises, and not the previously mentioned legal capacity, which would be the concept of the Civil Code, and which has the main influence on the concept of the capacity for delicts as set out in sec. 422 of the Civil Code. Therefore, the result of this duplicative legislation must be that the minor's primary supervisor, usually the parents, shall

[46] The one difference is the liability of the employee for entrusted objects and entrusted values under which the employee shall be personally held liable to his employer for objects entrusted to him. In that case the age limit of 18 years set out in the Civil Code shall remain.

be considered as the possibly liable parties together with the minor, because no legal transfer of duty to supervise is required by law.

An examination of the definition of damage in the Labour Code confirms this. The main requirement is that "the damage shall arise as a direct consequence of a breach of the employee's legal duties while performing the work established by the employment relationship or that the damage was caused in direct connection therewith" (sec. 172 of the Labour Code). The minor shall be considered as a person with full legal capacity for such damage: however, the minor does not need to have full capacity for behaviour not related to his employment relations. Therefore, if the damage is not in connection with the wrongdoer's work, the persons who are potentially liable should not change. 108

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

When the child lives in a children's home, a boarding school, or other institution, the minor is in fact in the position of having been removed from the authority of the recent supervisors. It is the duty of the supervisors to take care of the child, but as a consequence of the child having been removed they are unable to carry out their duties. In such a case it is important to establish whether the institution has acquired the duty by statute, court decision or some other way, which would constitute such an obligation. As *zákon o předškolním, základním, středním, vyšším odborném a jiném vzdìlávání – školský zákon* (School Act, ŠZ)[47] sets out in sec. 29 inter alia the duty to ensure the security and protection of children, the liability of the boarding school or other institution shall be established for the period of the minor's stay. 109

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

The transfer of the duty to supervise by means of private contract is possible pursuant to provisions of the Czech legislation. That is, the minor's liability falls under private law and, by virtue of this fact, the principle set out in the Czech constitution shall be applied: what is not prohibited, shall be allowed (sec. 2 (3) of *Listiny základních práv a svobod* (Charter of Fundamental Rights and Freedoms, LZPS)). 110

Therefore, a typical private law contract may be concluded between the parents and a subject. A person who voluntarily agrees to the transfer of the duty to supervise replaces, in accordance with the conditions concluded in the contract, the recent supervisor(s) and it is irrelevant whether this person is an indi- 111

[47] Act no. 561/2004 Coll., *zákon o předškolním, základním, středním, vyšším odborném a jiném vzdìlávání – školský zákon* (School Act).

vidual or a legal entity. A typical example might be the transfer of the duty from parents to a boarding school for a certain period of time.

112 Otherwise, if the parents need only temporary supervision over the child and they hire a babysitter for a short-time period, e.g. an evening, the transfer of the entire parental duty to care must be denied, because the purpose of such service is to temporarily guard the child and not to assume complete control. That is also the reason why the babysitter shall be held liable only to the contractor and the liability towards third-parties remains with the original holder of the duty. But, this holder shall be entitled to take recourse against the hired provider of the service.

113 However, as already mentioned, it is not important whether the person is an individual or a legal entity. Therefore, many agencies offer professional supervision, and the same conditions shall be applied to this situation as to the individual.

114 If the supervision, either long-term or short-term, is carried out by an agency, the employees or other staff shall not be liable personally, but only under the conditions set out in sec. 422 (3) of the Civil Code, i.e. that this individual shall be held liable to the extent regulated by the Labour Code, and the employer is entitled to have recourse against them.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

115 The legal principles concerning schools on the duty to supervise pupils applied in the Czech Republic are primarily based on the provisions of School Act and further on the general provisions sec. 415 of the Civil Code, which deals with impending damage, and the provision of sec. 422 which sets out the principles of supervisory persons' liability. Taking into account these principles, the Czech Ministry of Education issued Decree no. 1/2001 *pracovní řád pro zamìstnance škol a školských zařízení* (on working rules for school employees) that specifies employment-based duties of teachers and other school staff, in particular the duty to supervise pupils.

116 Pursuant to art. 14 of the Decree, the director of a school shall decide on the organization of the proper supervision of pupils; teachers and other school staff shall then, under their employment relationship and in accordance with the director's decision, supervise children during their school classes, breaks and even at school events in the course of and after the completion of the education process. The supervisory persons' duty begins 15 minutes before the morning and afternoon classes and finishes when pupils leave the school. The director has, however, discretion to regulate this supervision.

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

117 The liability consists of the personal liability of the legal entity, and the school shall be expressly considered as such an entity.[48] The School Act recognizes many types of schools; however, the principle of the liability is set out for all types of schools, regardless of their founder or other elements.[49]

118 Besides the wrongdoer, whoever fails to carry out his/her duty to supervise properly is always liable for accidents caused by pupils at public or private schools. If the damage is caused while the minor is attending a lesson (school event), the school shall be held liable under sec. 422 (3) of the Civil Code due to the fact that its employees did not perform sufficient and proper supervision. The employees of this legal entity would be liable under the provisions of, and to the extent limited by, the Labour Code. The legal entity may exculpate itself if it can prove that it did not breach its duty to supervise. However, unless otherwise demonstrated, the person shall be held liable.

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

119 The State, instead of the school, is not liable for breaches of duty to supervise, because the School Act acknowledges the fact that the school or other institution listed in the Act are direct subjects of the liability, regardless of their founder.

120 For this purpose, recourse is available where the school is liable because the general rule concerning the liability of legal entities is applicable.[50] This rule entitles the legal person to obtain recourse from employees who have breached their duty arising from the legal relationship between the employer and employee. The Civil Code uses the term "employee" as an expression for the relationship between the legal entity and the subordinate person. Even though this term tends towards the opinion that the relationship between the employer and the employee should be based on provisions of the Labour Code, the scope of employment relationships must be understood in a wider manner and shall include all dependent working relationships. Therefore, in

[48] Sec. 8 of the School Act sets out that the schools can be established either as "educational legal entity", "institution receiving contribution from the public Budget" pursuant to Act no. 250/2000 Coll. or legal entities established in accordance with special laws, e.g. Commercial Code. The certain type depends on the nature of the founder. However, all types of schools are deemed to be legal entities with their own liability.

[49] The structure of the Act includes schools and educational establishments, i.e. in particular nurseries, basic schools, secondary schools, conservatoires, basic art schools, language schools, specific colleges for lower degree as well as educational establishments as boarding schools, canteens etc. All schools and educational establishments must be registered with "school register" maintained by the Ministry of Education.

[50] Sec. 420 (2) and 422 (3) of the Civil Code.

accordance with this, the legal entity has a possible recourse against its employee.

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

121 Also, where a school was founded by a registered church, religious institution, natural person or a legal entity the criteria concerning the liability of legal entities based on sec. 422 (3) of the Civil Code shall be applied to these also because the School Act does not differentiate the founder of schools and schools institutions in respect to their possible liability. This means, therefore, that a certain legal entity shall always be held liable, and consequently it is then entitled to seek recourse from an employee who has breached his or her duty in the contractual relationship.

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

122 The criteria for assessing the intensity and extent of the teacher's duty to supervise cannot be specified in general, and, to the extent possible, then only in a very complicated way. The teacher must always, in accordance with sec. 422 (1) of the Civil Code, perform sufficient and proper supervision which is, however, influenced by particular situations. This general duty is set out also in Working rules for teachers and other school staff laid down by Decree of the Ministry of Education no. 1/2001.

123 The judicature has already applied this principle in many cases. Decision no. R 4/1970, in which the Supreme Court defined the concept of sufficient supervision, highlights this. Sufficient supervision does not refer to "permanent twenty-four hour supervision, but only to the particular age, character or normal conduct of the individuals relating care". Therefore, in assessing personal character, only subjective criteria of the minor shall be taken into account. The teacher shall, by virtue of this rule, take into account all circumstances of the usual situation and always endeavour for the best-case scenario, or in other words the most sufficient and proper supervision. Therefore, the extent and intensity of supervision must be adapted to any situation that arises.

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other. May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

124 The relationship between claims for damage against schools sounding in tort on the one hand and social security benefits on the other hand depends on the particular types of harm caused.

a) Property damage

If property damage has occurred, the provision concerning damages would determine that this "damage shall be made good in money, but if the injured party so demands and if it is possible and expedient, the damage shall be made good by restoration of the property to its prior condition".[51] In the case of material damage, only the social benefits that can be acquired by the injured party besides the claim for damages are possible. That is, the purpose of social security benefits is to help a person who needs, in a particular situation, a particular kind of aid and therefore all benefits provided must be proved in detail. 125

If the injured party receives benefit, there must be a public interest in the aid. Should this benefit be limited, it could be understood as being unjust and, consequently, no concurrence between the property damage and the social benefits shall exist. 126

b) Payment for pain suffered and for the aggravation of the social position

Compensation for pain suffered and for the aggravation of the social position shall be determined pursuant to a regulation issued by the Ministry of Health in agreement with the Ministry of Labour and Social Affairs in accordance with sec. 444 (2) of the Civil Code. Such compensation must be understood as a personal performance given to a certain person for his benefit; the compensation for pain suffered compensates the injured party for pain endured during or after an accident, the medical treatment or the elimination of the consequences of the accident,[52] and by compensating for the social incapacitation that the damage has caused including the fact that the injured person's future life will be more complicated, especially concerning the choice of occupation, living partner or similar fundamental limitations of activities and behaviour. 127

Because both cases of compensation shall be paid in a lump sum, i.e. an exact sum will always be known, and this compensation shall be for the specific purpose of damages, the collision between this payment and social system benefits should be minimized to extreme cases. The compensation shall have redressed the pain suffered or the aggravation of social position and it would be immoral to limit the amount of money which shall be paid as compensation. 128

c) Loss of earnings

If injury to a person's health occurs, loss of earnings shall also be compensated by way of recurring monetary payments. The calculation shall be based on the average earnings of the injured person prior to the injury. Additionally, the Civil Code differentiates between two groups of damage: the loss incurred for 129

[51] Sec. 442 et seq. of the Civil Code.
[52] M. Pokorný/J. Salač (supra fn. 9), 522.

the period of the injured person's inability to work (sick leave) and the loss after the end of such a period.

130 In both cases the difference between the average earnings prior to the injury and after it shall be compensated by the wrongdoer unless health insurance benefits or disability or partial disability pension is received. This compensation for loss of earnings collides therefore with the benefits of health insurance or with the social security system. If the loss has already been compensated by payments from the insurance system, the injured party is unable to claim for compensation to be paid by the wrongdoer.[53]

d) Death of the injured person

131 If the injury is fatal, a cash annuity shall cover the cost of supporting the surviving dependants[54] whose support was provided for by, or was the responsibility of, the deceased.[55] However, even here one can find the boundaries of social security. Namely, the compensation for the cost of support shall be paid to the surviving dependants, unless such costs are covered by pension benefits paid for this purpose.

132 In the event of death, the appropriate funeral costs shall also be compensated, where these were not covered by a funeral benefit[56] provided under the *zákon o státní sociální podpoře* (State Social Support Act).[57]

e) Costs of medical treatment

133 The last sum paid to the injured party, even if the injury was fatal, is the cost related to medical treatment. The legislation does not mention any concurrence between the compensation of costs related to medical treatment and the social security benefits; however, this does not mean that one does not exist. Expenses under this concept include the costs of diet, prostheses, rehabilitation, hospital visitation costs incurred by close relatives etc. and these are mostly covered in full by the person's health insurance. Only the expenses (damage) which the health insurance company does not cover shall be compensated.

134 Therefore, the following principles shall be applied: If property damage occurs, in most cases no concurrence between the social system benefits and the

[53] Sec. 447 of the Civil Code.

[54] "Surviving dependants" is not identical to the deceased person's heirs. It includes the persons who lived with the deceased person in a common household and were dependent on the deceased person for their care and who took care of the common household due to this person (the deceased) living there.
However, the rule requiring that the support was constantly provided and not only occasional shall be applied.

[55] Sec. 448 of the Civil Code.

[56] Sec. 449 (2) of the Civil Code.

[57] Act No. 117/1995 Coll., *o státní sociální podpoře* (State Social Support Act).

paid damages shall arise. However, compensation for property damage as a part of damage to health, i.e. loss of earnings, funeral costs and costs of supporting the surviving dependants shall be provided to the injured party unless these costs are covered by benefits from health or pension insurance or by benefits of the social security system. This shall also be applied to the costs related to medical treatment which are not covered by the usual payments of the health insurance company. In contrast, immaterial damage shall always be paid in full, regardless of the various benefits.

135 If there is a concurrence between the damages and the social security benefits and if the benefits have already been performed, the performer of the sum of the benefits would have a certain claim against the wrongdoer. Such a provision is set out in sec. 55 of Act no. 48/1997, *o veřejném zdravotním pojištìní* (Public Health Insurance), which states that the appropriate health insurance company is entitled to take recourse against a third-party if this company has paid sickness benefit, for care covered by the public health insurance, as a result of the wrongful activity of such persons. By virtue of this fact, the performer, i.e. the public health insurance company, may seek recourse from the wrongdoer if the costs paid to the insurer are in direct connection with the wrongful behaviour of the wrongdoer. The principle that the wrongdoer shall be held liable only to the extent of his or her fault[58] shall be applied here. However, this rule is not based on the provisions of the Civil Code, which is not applicable to this relationship, but on sec. 55 of the Public Health Insurance Act.

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

136 The relation between a claim of the injured party against a minor and a claim for damages against the minor's supervisor must be understood as equal. It is irrelevant whether the person who breached the duty to perform sufficient and proper supervision is the original holder of the parental duty, i.e. that this duty is established by virtue of the relationship between the supervisor and the minor, or if this person is a derived holder of the duty. The liability of the supervisor shall be understood as joint and several liability, and therefore it shall play no role in determining who will be held liable for the claim. Pursuant to sec. 438 of the Civil Code, the injured party shall be entitled to claim damages against all liable parties. He may also claim full damages from only one party and this person is obliged to pay the award of damages in full; however, after its performance the requested party can claim settlement from other liable persons.

[58] 25 Cdo 1113/2002.

12. Is there any possibility either for the child or the teacher to have recourse against each other?

137 In respect of a possible recourse of the school or the child against the other party, sec. 439 of the Civil Code, which regulates the system of recourse in the case of multiple tortfeasors, shall be applied. Under this provision "any person who is jointly and severally liable with others for damage shall settle with these persons in proportion to their share of the blame for the damage that occurred." It shall always be proved in the particular case to which extent the behaviour of the wrongdoer caused the damage; in other words, how big the fault of each party is concerning the particular damage. Whether the person is the minor or the supervisor is irrelevant.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

138 The parents of any child are the original holders of the duty to provide parental care, which is very closely connected to the duty to supervise the child, and they always remain the original holders unless their position is changed by court decision as to the extent of the care. As a consequence this means that the original duty to supervise is in a subsidiary position to the duty acquired by other persons. It shall be understood in such a situation that if no other person shall perform this obligation the original holder shall always be subject to it.

139 The supervision based on parental care shall therefore, in a particular case, be carried out unless otherwise determined. This original duty to supervise exists concurrently with the duty borne by the school or other institution. In that respect the School Act sets out in sec. 22 (3) some basic duties in respect to the school, as for instance duty to ensure proper attendance of the child to school or to inform the school about health conditions of the child. The result is that the duties of both holders border on each other and, consequently, recourse of the parents against the school and *vice versa* is excluded. Moreover, liability of teachers to the injured party does not exist if the teacher has not acted intentionally.

Children as Tortfeasors under the Law of England and Wales

Ken Oliphant

I. Short Introduction

1. Factual Basis, UNICEF

Under English law, a person attains the age of majority ("full age") on reaching the age of 18, and the words "minor" and "infant" in a statute or instrument are presumed to refer to a person aged under 18 unless the contrary is indicated.[1] However, there is a confusing lack of consistency in the statutory use of the word "child"[2] which, depending on its context, may mean (*inter alia*) "under the age of 18",[3] "under the age of 14",[4] or "not over compulsory school age".[5] It may also be noted that the expression "young person" is sometimes used to refer to a person who is no longer a "child" but has not yet attained the age of majority.[6] For the sake of clarity, I shall use "child" to refer to a person under the age of 18 in the absence of any indication to the contrary. 1

English law invests children with various of the rights, responsibilities and other incidents of adulthood at different stages of their development, frequently on their attainment of a fixed age. Hence, a child of five may lawfully be given intoxicating liquor to drink in a private place,[7] but not until he is 18 can he purchase or consume it in licensed premises.[8] At 16, children can lawfully consent to sex,[9] and may purchase a cigarette to smoke afterwards.[10] At 17, 2

[1] Family Law Reform Act 1969, sec. 1. For general accounts of the law as it affects children in England and Wales, see A. Bainham, *Children: The Modern Law* (3rd edn. 2005) and J. Fionda (ed.), *Legal Concepts of Childhood* (2001).
[2] Even within the same statute: see, e.g., Children and Young Persons Act 1969, sec. 70.
[3] Children and Young Persons Act 1969, sec. 70; Education Act 1996, sec. 548(7).
[4] Children and Young Persons Act 1933, sec. 107; Children and Young Persons Act 1969, sec. 70.
[5] Children and Young Persons Act 1933, sec. 30(1). School is compulsory until the age of 16 (or the end of the school year after reaching 16 years of age): Education Act 1996, sec. 8.
[6] See, e.g., Children and Young Persons Act 1933, sec. 107.
[7] Children and Young Persons Act 1933, sec. 5 (read with Confiscation of Alcohol (Young Persons) Act 1997, sec. 1).
[8] Licensing Act 1964, sec. 169C and 169E.
[9] Sexual Offences Act 1956, sec. 14(2) (girls) and 15(2) (boys).
[10] Children and Young Persons Act 1933, sec. 7.

they are old enough to drive a motorcar on the roads[11] but not yet to view certain films in the cinema.[12] There is no fixed minimum age of civil responsibility, but contracts are unenforceable against minors save in certain circumstances.[13] The minimum age of criminal responsibility is 10.[14] Although there was formerly a rebuttable presumption that a child in the age range 10–13 was *doli incapax*, and proof of a "mischievous discretion" was required before he could be convicted of a criminal offence, this principle was abolished by statute in 1998.[15] "Children" (aged 10–13) and "young persons" (aged 14–17) are usually tried in separate Youth Courts[16] and, if convicted, should be given a custodial sentence only in exceptional circumstances.[17] If a custodial sentence is necessary, this normally takes the form of a period of detention and training in a young offender institution or other secure accommodation, followed by a period of supervision by a probation officer, a social worker or a member of a youth offender team.[18] A range of other sentencing options is also available in respect of young offenders,[19] and there are certain other respects in which the treatment of children by the criminal justice system differs from that of adults.[20]

3 It is impossible to quantify fully the harm that children cause to others but a number of data sources combine to provide a partial picture. The youth justice statistics, which record "disposals"[21] resulting from offences committed

[11] Road Traffic Act 1988, sec. 101.

[12] The British Board of Film Classification, an independent body set up by the film industry, gives films an "18" rating if they are suitable only for adults. In practice, these ratings have always been accepted by local authorities, who have responsibility for licensing film exhibitions under Cinemas Act 1985, sec. 1 and 3(10). The Board's ratings now have statutory force under Licensing Act 2003, sec. 20.

[13] After the abrogation of the Infants Relief Act 1874, sec. 1 by the Minors' Contracts Act 1987, whether a contract is enforceable against a child has again become a matter of common law. In broad terms, children are bound by contracts for "necessaries" and by beneficial contracts of employment. For consideration of the common law principles, see H. Beale (ed.), *Chitty on Contracts* (28th edn. 1999), vol. 1, § 8-002 et seq., and M. Furmston (ed.), *The Law of Contract* (2nd edn. 2003), § 4.2 et seq.

[14] Children and Young Persons Act 1933, sec. 50 (as amended).

[15] Crime and Disorder Act 1998, sec. 34.

[16] Children and Young Persons Act 1933, sec. 45; Criminal Justice Act 1991, sec. 68. Exceptionally, a child or young person may stand trial in an adult court, e.g., when charged with homicide.

[17] Powers of Criminal Courts (Sentencing) Act 2000, sec. 89–91. A conviction for murder, however, always entails a life sentence – even if the offender was under 18 at the time of the offence: sec. 90.

[18] Powers of Criminal Courts (Sentencing) Act 2000, sec. 100–107.

[19] See, e.g., Powers of Criminal Courts (Sentencing) Act 2000, sec. 16 (referral to youth offender panels), sec. 63 (supervision orders), and sec. 73 (reparation orders). Cf. sec. 46 (community service orders only available where offender is aged 16 or over).

[20] See, e.g., Crime and Disorder Act 1998, sec. 65 (police reprimands and warnings); Children and Young Persons Act 1969, sec. 23, as amended (children and young persons to be remanded to local authority accommodation, not police custody). Note in particular the role of the "appropriate adult" at various stages of the procedure: see, e.g., *Code of Practice on the Detention, Treatment and Questioning of Persons by Police Officers*, §§ 11.15–17 (issued under Police and Criminal Evidence Act 1984, sec. 66).

[21] This does not include, for example, recorded crimes where the perpetrator could not be traced.

by young offenders, registered in 2002/03 a total of 34,896 offences of violence against the person, as well as (*inter alia*) 27,516 offences of criminal damage, 1,467 offences of arson, and 122 cases of death or injury by reckless driving.[22] Department for Transport statistics record the number of road accidents (excluding damage-only accidents) by driver age. Of 390,273 motor vehicle accidents in 2002, 3,076 involved a driver under the age of 17 and 25,118 a driver aged 17–19.[23] Further official research has been conducted into the causes of accidents involving "young drivers",[24] though this category includes all those aged 17–25 and not just minors. Members of this group are about 2.5 times more likely to be involved in an accident than older drivers.[25] The study found that loss of control on bends and accidents in the hours of darkness were particular problems for those in the youngest age-band (drivers aged 17–19).[26] The official statistics do not record the number of vehicle accidents caused by child pedestrians or cyclists, but recent government-sponsored research into adolescent road-user behaviour recognises the impact that this can have on accident rates, identifying three different classes of unsafe behaviour: unsafe road-crossing practices, dangerous playing in the road, and the failure to take planned protective measures (e.g. wearing reflective clothing and using lights when cycling after dark).[27] Of course, the aim of the research was to find ways of encouraging children to take responsibility for their own safety,[28] rather than to stop them injuring others.

It has often been noted that representations of children in political discourse and the media can swing abruptly between the extremes of idealisation and demonisation, producing a "good child/bad child dichotomy".[29] In writings about the tort system, the child is often portrayed as the innocent victim of risky adult behaviours against which he or she requires protection,[30] but contemporary debates about crime and public order have focussed on the perceived problem of "bad" children. Recent government initiatives to tackle "anti-social

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[22] Youth Justice Board, *Youth Justice: Annual Statistics 2002/03*, 5. These may be compared with the total numbers of recorded crimes in these categories: 991,800 offences of violence against the person, 1,109,370 offences of criminal damage, 53,200 offences of arson, and 413 offences of causing death by dangerous driving (no figures available for non-fatal injuries). See J. Simmons/T. Dodd (eds.), *Crime in England and Wales 2002/03*, *Home Office Statistical Bulletin* (2003).

[23] *Road Casualties Great Britain: 2002 – Annual Report*, Department of Transport website (www.dft.gov.uk), table 37a.

[24] D. Clarke/P. Ward/W. Truman, *In-depth accident causation study of young drivers* (2002) (prepared for Road Safety Division, Department for Transport).

[25] D. Clarke/P. Ward/W. Truman (supra fn. 24), 1.

[26] D. Clarke/P. Ward/W. Truman (supra fn. 24).

[27] M. Elliott/C. Baughan, *Adolescent road user behaviour: A survey of 11–16 year olds* (2003) (prepared for Road Safety Division, Department for Transport).

[28] D. Clarke/P. Ward/W. Truman (supra fn. 24), 1.

[29] J. Fionda, Legal Concepts of Childhood: An Introduction in: J. Fionda (supra fn. 1), 4.

[30] See, e.g., the chapter on "Children" in the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Chairman: Lord Pearson), Cmnd 7054-1 (1978), which is concerned only with compensating injured children and not at all with their liability for injuring others.

behaviour" have explicitly targeted disruptive children, "youth nuisance" (including "youths [who] hang around street corners intimidating the elderly") and "dysfunctional families".[31] Central to the government's strategy has been an effort to make parents take responsibility for their children's behaviour, for example, by "parenting orders" imposed after the child is convicted of a criminal offence or made subject to an anti-social behaviour order, and in certain other defined circumstances.[32] A more recent innovation has been the introduction of "parenting contracts" by which parents agree voluntarily to co-operate with their child's school or Local Education Authority, or a Youth Offender Team, (e.g. by attending parenting classes) in return for support in improving their child's behaviour.[33] Parenting contracts do not create obligations whose breach is actionable in contract or tort.[34]

5 Since 1973,[35] the criminal courts have been able to make a "compensation order" against any person (including a child) who is convicted of a criminal offence. The order may require him "a) to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence; or b) to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road."[36] If the court does not exercise this power, it must give reasons for its failure to do so.[37] The amount of compensation is at the court's discretion,[38] but it must have regard to the offender's means,[39] and a magistrate's court may not award more than £ 5,000 by way of compensation in respect of any offence.[40] If the victim brings civil proceedings in respect of the same injury, he is entitled to recover only the amount by which the damages exceed the sum he gets under the compensation order.[41] Where the convicted person is under the age of 16, the court must make the compensation order against his parent, unless the latter cannot be found or making the order would be unreasonable.[42] The amount of compensation is to

[31] See, especially, Home Office, *Respect and Responsibility – Taking a Stand Against Anti-Social Behaviour* (2003), Cm 5778. The quotation about youths hanging around street corners comes from the Home Secretary's Ministerial Foreword (p. 3).
[32] Crime and Disorder Act 1998, sec. 8 (as amended); Anti-Social Behaviour Act 2003, sec. 20.
[33] Anti-Social Behaviour Act 2003, sec. 19 and 25.
[34] Anti-Social Behaviour Act 2003, sec. 19(8) and 25(7).
[35] Powers of Criminal Courts Act 1973, sec. 35 (now superseded).
[36] Power of Criminal Courts (Sentencing) Act 2000, sec. 130(1). Sec. 130(6) further limits the availability of compensation orders in respect of "injury, loss or damage … which was due to an accident arising out of the presence of a motor vehicle on a road", e.g. where covered by the offender's insurance.
[37] Sec. 130(3).
[38] Sec. 130(4): "of such amount as the court considers appropriate".
[39] Sec. 130(11).
[40] Sec. 131.
[41] Sec. 134.
[42] Sec. 137(1). Where the convicted person is 16 or 17, the court has the power (but not a duty) to make such an order: sec. 137(3). I use "parent" here and in what follows as convenient shorthand for the statutory expression "parent or guardian".

be fixed having regard to the parent's financial circumstances.[43] It has been judicially observed that:[44]

> "There is specifically no requirement in the statute that the parent should be at fault; nor is there any requirement for any causal connection between the parent's conduct and the child's criminal offence. The policy … is to achieve the recovery of fines, costs and compensation orders imposed on children and young persons in order to protect the public purse and/or … the person in favour of whom the compensation order has been made. It is in the public interest that the financial penalty should be recovered from the parent unless there are special circumstances which make that result inappropriate."

Nevertheless, there appears to be a reluctance to order compensation from parents who have done their best to bring their children up well and keep them out of trouble; such circumstances may render the making of the order "unreasonable".[45] In 2002/03, 3,627 compensation orders were made in respect of offences committed by children.[46] The awards often fall far short of what would be regarded as proper compensation in civil proceedings, in which the defendant's means are of course irrelevant.[47]

6 The latest official population estimates[48] record the population of the United Kingdom as 59,232,000 and the percentage of those in the 0–4 and 5–15 age bands as, respectively, 5.8% and 14.1%.

7 The United Kingdom (UK) is a signatory of the United Nations Conventions on the Rights of the Child, which it ratified in 1991 (effective 1992). There has been a UNICEF National Committee in the UK since 1956.[49]

2. *General Outline of the System*

8 The English law of tort has not traditionally been much concerned with the liability of children, or that of parents for the acts of their children. None of the

[43] Sec. 138.

[44] *R (on the Application of M) v Inner London Crown Court* [2003] *England & Wales High Court* (EWHC) 301; [2004] 1 *Butterworths Family Court Reports* (FCR) 178, at [78] per Henriques J.

[45] *R v JJB* [2004] *Court of Appeal, Criminal Division* (EWCA Crim) 14. See also *TA v DPP* [1997] 1 C*riminal Appeal Reports (Sentencing)* (Cr App R (S)) 1 (not reasonable to make order against parent when child was living in local authority accommodation at the relevant time and parent had no control over her at all).

[46] Youth Justice Board, *Youth Justice: Annual Statistics 2002/03*, 53. The statistics do not record how many of these were to be paid by a parent. Cf. the very much greater number of offences recorded in the statistics: see no. 3, above. Where the police decide only to caution the offender, no question of a compensation order arises at all, though the offer of compensation may be relevant to the decision not to prosecute (see O'Doherty, Compensation and Young Offenders, [1997] *Criminal Law Review* (Crim LR), 282).

[47] See, e.g., *Attorney-General's Reference (No. 3 of 1993)* (1994) 98 Cr App R 84 (parents ordered to pay £ 500 after 15-year-old son's rape of 15-year-old girl; the offence's aggravating features and traumatic effect on the victim warranted the imposition of a custodial sentence).

[48] http://www.statistics.gov.uk/STATBASE/Expodata/Spreadsheets/D7946.xls (accessed 5 April 2004).

[49] Information from www.unicef.org.

leading practitioners' works or textbooks devotes more than a few paragraphs to the topic.[50] When a Royal Commission – inquiring into civil liability and compensation for personal injury – devoted a chapter to children,[51] it was concerned only with the child as victim, not the child as tortfeasor. This neglect reflects a paucity of caselaw authorities, itself no doubt a reflection of the perception that children who cause injury are unlikely to be insured or have sufficient resources to make legal proceedings worthwhile (though whether the perception that children are unlikely to be insured is accurate may perhaps be doubted[52]). Unquestionably, the absence of any Code provision dealing with the liability of children, and of parents for their children's acts, has also played a part. The neglect is perhaps best illustrated by the observation that it is only in the last seven or eight years that an appellate court has had to rule on the standard of care owed by a child in English law.[53]

9 In truth, child tortfeasors are not seen as posing any particular problems for English tort law. Their liability, and that of their parents for their acts, is assessed according to general principles. In the following paragraphs, I have endeavoured to extrapolate from general principle to provide answers to the questions, and to cite what few caselaw authorities there are, but many of the issues simply have not arisen – and sometimes could not arise – in English law, so my answers must of necessity be somewhat tentative in places.

II. Liability of the Child

A. Liability for Wrongful Acts[54]

1. Is there a fixed minimum age for children to be liable?

10 There is no fixed minimum age which must be attained before a child can be held liable in the English law of tort,[55] though a minor[56] must have a "litigation

[50] See, e.g., A. Dugdale (ed.), *Clerk & Lindsell on Torts* (18th edn. 2000), §§ 4.55–60; A. Grubb (ed.), *The Law of Tort* (2002), §§ 2.39–42; and W.V.H. Rogers, *Winfield & Jolowicz on the Law of Tort* (16th edn. 2002), §§ 24.16–18. The topic has, however, received extensive analysis elsewhere in the common law world: see, e.g., F.H. Bohlen, Liability in Tort of Infants and Insane Persons, 23 (1924) *Michigan Law Review* (Mich.L.Rev.) 9, B. Dunlop, Torts Relating to Infants, 5 (1966) *Western Law Review* (West.L.Rev.) 116, and Law Reform Commission (Ireland), *Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors* (1985), LRC 17.

[51] Royal Commission on Civil Liability and Compensation (Chairman: Lord Pearson), *Report* (1978), Cmnd 7054-1, ch. 27 (as noted above, fn. 30).

[52] See infra no. 19.

[53] See infra no. 14.

[54] See, generally, A. Dugdale (supra fn. 50), §§ 4.56–59; A. Grubb (supra fn. 50), §§ 2.39–41; W.V.H. Rogers (supra fn. 50), §§ 24.16–17; and R. Bagshaw, Children Through Tort in: J. Fionda (supra fn. 1), 127–9.

[55] Cf. the contrary approach adopted by most courts in the United States: see W.P. Keeton (ed.), *Prosser and Keeton on Torts* (5th edn. 1984), 180.

[56] I.e. a person under the age of 18: Family Law Act 1969, sec. 1.

friend" to conduct proceedings on his behalf.[57] The question is simply whether the defendant, whatever his age, has satisfied the requirements of the tort in question. The child's capacity may, however, be relevant in determining whether those requirements are in fact satisfied (see below). The only significant limitation which warrants attention here is that which prevents a child from being sued in tort so as indirectly to enforce a contract which is not enforceable against him by reason of his minority,[58] though the tort claim may be found good if the injury is caused by an act which is independent of the contract.[59] Whether the contract is enforceable against the child is a matter of common law.[60]

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

There is no specific window within the life of a child during which his liability depends on his capacity to act reasonably or on any similar condition. But, as already noted, the child's capacity may be relevant in determining whether he has satisfied the requirements of the tort in question. It may therefore be necessary to show that the child had the capacity to intend or foresee the consequences of his actions and to inquire into the standard of care expected of him. It may also be the case that the child's age is material in considering other requirements of specific tortious liabilities, for example, whether the child is an "occupier" for the purposes of the Occupiers' Liability Acts of 1957 and 1984,[61] or the "keeper" of an animal (Animals Act 1971),[62] or the "producer" of a product (Consumer Protection Act 1987).[63] Furthermore, in the various forms of trespass that survive in the modern law (trespass to the person, trespass to goods and trespass to land), the defendant's act must be shown to be voluntary,[64] which seems to require a certain capacity for voluntary action that may not be present in a very small child.[65] 11

[57] Civil Procedure Rules 1998, rule 21.2.2.
[58] *Jennings v Rundall* (1799) 8 *Durnford & East's Term Reports, King's Bench* (Term Rep) 335.
[59] *Burnard v Haggis* (1863) 14 *Common Bench Reports, New Series* (CB (NS)) 45. The scope of the rule and the exception are considered in A. Dugdale (supra fn. 50), § 4–57; A. Grubb (supra fn. 50), § 2.40; and W.V.H. Rogers (supra fn. 50), § 24.17.
[60] See supra no. 2.
[61] Cf. the "control" test established by *Wheat v E Lacon & Co Ltd* [1966] *Appeal Cases* (AC) 552.
[62] See infra no. 18.
[63] See infra no. 18.
[64] *Smith v Stone* (1647) Style's King's Bench Reports (Style) 65 82 *English Reports* (ER) 533; *Public Transport Commission v Perry* (1977) 137 *Commonwealth Law Reports* (CLR) 107.
[65] *Tillander v Gosselin* [1967] 1 *The Ontario Reports* (OR) 203, Ontario High Court (three-year-old boy). The issue seems not to have been raised in any decided English case. See further Law Reform Commission (Ireland) (supra fn. 50), 2–3.

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

12 English law has not developed a concept of "capacity to act reasonably", although (as already noted) a child's capacity may be relevant in determining whether the requirements of the tort are satisfied. The failure to do so may be attributed to the lack of litigation against children generally, and especially very small children, and the lack of any principle of strict parental liability for torts committed by their children.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

13 Whether or not the child is covered by a (family) liability insurance policy is strictly of no significance in determining the child's liabilities.[66] But there is no doubt scope for this consideration to exert influence covertly on decisions whether the child owes a duty of care and, if so, whether there is a breach of that duty.

5. What is the standard of care applicable to children?

14 The standard of care applicable to children is that of an ordinarily prudent and reasonable child of the defendant's age.[67] This consideration may be material in assessing whether or not the claimant's injury was foreseeable as a "real risk" of the defendant's conduct[68] and also (it would seem) in determining what precautions the defendant could reasonably have been expected to take against the risk of injury.[69] In the leading case, *Mullin v Richards*,[70] two fif-

[66] For a general statement that the proven or likely existence of liability insurance can have no effect on the court's decision as to liability, see *Hunt v Severs* [1994] 2 AC 350, 363 per Lord Bridge. Lord Denning's well-known statement to the contrary in *Nettleship v Weston* [1971] 2 *Queens's Bench* (QB) 691, 699–700 cannot be accepted as correct in strict law, though (as noted in the text) it may well be that insurance considerations exert a covert influence on judicial determinations of liability issues.

[67] *Mullin v Richards* [1998] 1 *Weekly Law Reports* (WLR) 1304. See also *Staley v Suffolk County Council*, 26 November 1985, unreported. In *Gorely v Codd* [1967] 1 WLR 19, another negligent shooting case, Nield J found liable a 16-year-old defendant with learning difficulties without considering what standard of care was appropriate.

[68] See supra fn. 67.

[69] Cf. *Goldman v Hargrave* [1967] 1 AC 645 (adult's physical capacity to be taken into account).

[70] [1998] 1 WLR 1304.

teen-year-old schoolgirls were "fencing" each other with plastic rulers. One of the rulers snapped, causing a fragment of plastic to enter one of the girl's right eye, resulting in a permanent loss of all useful sight from the eye. The girl brought proceedings for negligence against both the local education authority and her classmate. At first instance, the judge rejected the claim against the authority, as no breach of duty was proven, but found that both schoolgirls had been guilty of negligence of which the plaintiff's injury was the foreseeable result. He made an award of damages against the defendant schoolgirl, subject to a deduction of 50% in respect of the plaintiff's contributory negligence. On appeal, the defendant schoolgirl contended that the trial judge had erred when considering foreseeability in failing to take account of her age. The Court of Appeal ruled that it was necessary to adapt the standard of care to reflect the fact that the defendant was a fifteen-year-old schoolgirl, not an adult, though the test nevertheless remained objective. The question therefore was whether an ordinarily prudent and reasonable fifteen-year-old schoolgirl in the defendant's situation would have realised that her actions were such as to give rise to a risk of injury. On the facts, the Court ruled that there was no basis for attributing to the girls the foresight of any significant risk of the likelihood of injury, the girls having frequently seen such play-fencing engaged in by others and never having been warned against it or told of any injuries occasioned by it. The defendant's appeal therefore succeeded and judgment was entered in her favour.

15

In opting for the standard of the ordinarily prudent and reasonable child of the defendant's age, the Court drew support from the decision of the High Court of Australia in *McHale v Watson*,[71] though Hutchison LJ questioned whether Owen J may not have gone too far in that case in saying that "the standard by which his [sc. the defendant's] conduct is to be measured is … that reasonably to be expected of a child of the same age, intelligence and experience."[72] It was the word "intelligence" in this context that Hutchison LJ expressly questioned,[73] but there must also be some doubt as to the relevance of the child's *experience*, a lack of experience not generally being a factor that the court may properly take into account.[74] It may be noted that Kitto J in the Australian decision clearly differed from his colleague on this matter, stating that "it is no answer for him [sc. a child], any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or *inexperienced*."[75]

[71] (1966) 115 CLR 199.
[72] (1966) 115 CLR 199, 234.
[73] [1998] 1 WLR 1304, 1308.
[74] See *Nettleship v Weston* [1971] 2 QB 691.
[75] (1966) 115 CLR 199, 213–4 (emphasis added).

6. Are children held to a higher standard of care if they engage in "adult activities"?

16 There is no formal rule whereby children are held to a higher standard of care if they engage in "adult activities".[76] However, the care demanded of a child is effectively the same as that demanded of an adult in certain circumstances where the child engages in an adult activity. A seventeen-year-old motorist undoubtedly owes the same duty of care as an adult motorist[77] and it has been submitted that even a child of under 17, who is unable to drive lawfully on a public road by reason of his age, may properly be held to the same standard if it chooses to drive (whether on a public road or not) and has sufficient understanding of the need for care.[78] It should be noted that standard of care remains that of an ordinarily prudent and reasonable child of the defendant's age; it is simply that the steps necessary to discharge the duty are the same as those required of an adult. A different result may well be warranted where the child is impelled to undertake an adult activity by force of circumstance – for example, where a child is left in a parked car whose handbrake fails, causing it to roll downhill, and the child attempts unsuccessfully to steer the car around a hazard before bringing it to a stop.

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

8. Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard? What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

[76] The contrary approach has been adopted by courts in the United States: see W.P. Keeton (ed.) (supra fn. 55), 181–2. For a review of American and other common law authorities, see Law Reform Commission (Ireland) (supra fn. 50), 14–27. After considering the arguments for and against an adult activities rule, the Commission concluded that it was inherently uncertain and liable to cause injustice, and recommended against its adoption in Ireland (58).

[77] See *Tauranga Electric-Power Board v Karora Kohu* [1939] *New Zealand Law Reports* (NZLR) 1040 (New Zealand Court of Appeal): seventeen-year-old cyclist.

[78] A. Mullis/K. Oliphant, *Torts* (3rd edn. 2003), 122 (example of a 15-year-old tearaway who hotrods a motorcar and drives away). See also *McEllistrum v Etches* (1956) 6 *Dominion Law Reports* (DLR) (2d) 1 and *McErlean v Sarel* (1987) 61 OR (2d) 396 (both Ontario Court of Appeal).

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

As English law does not recognise a concept of tortious capacity, there is no need for an English equivalent of the Germanic *Billigkeitshaftung* whereby an injured person, who would otherwise go uncompensated, may recover *some* compensation from a child who lacks tortious capacity.[79] Perhaps the only comparable provision in English law is that a court may, at its discretion, order restitution of property transferred to a minor under a contract which is unenforceable against him.[80] 17

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

A child's strict liability is determined by the same criteria as apply to an adult. The Animals Act 1971 expressly contemplates that a child may be the "keeper" of a dangerous animal,[81] and it is quite possible to imagine that a child may be the "producer" of a defective product for the purposes of the Consumer Protection Act 1987 (giving effect to EC Directive 85/374 on product liability), for example, where it "manufactures" a household item in handicraft class at school or "abstracts" something from the ground whilst digging in the garden or on the beach.[82] It also appears that a child may be strictly liable under the rule in *Rylands v Fletcher*[83] for harm caused by the escape of a dangerous thing it has brought onto land applied to a non-natural use.[84] It is at least arguable, however, that a child's lack of capacity may prevent it from satisfying the formal requirements for the tort in question. The strict liability under the Animals Act, for instance, is imposed on the "keeper" of a dangerous animal, the keeper being (for most purposes) any person who "owns the animal or has it in his possession".[85] It is submitted that whether or not a child has a particular animal in its possession depends upon its capacity to possess, and that a very young child might lack this capacity. Similar considerations may arise in determining whether a child has applied land to a non-natural use. It is also conceivable that these issues might arise under the Consumer Protection Act (e.g. does a very young child "produce" a poisonous mushroom by pulling it from the ground?) but the scope of the child's liability is significantly restricted by the defence that the defendant did not supply the product in the course of busi- 18

[79] Cf. § 829 *Bürgerliches Gesetzbuch* (German Civil Code, BGB), § 1310 *Allgemeines Bürgerliches Gesetzbuch* (Austrian Civil Code, ABGB).
[80] Minors' Contracts Act 1987, sec. 3.
[81] Sec. 2(2)(c), referring to a child keeper who is under the age of 16.
[82] Sec. 1(2).
[83] (1868) *Law Reports* (LR) 3 *House of Lords* (HL) 330.
[84] See also A. Grubb (supra fn. 50), § 2.39.
[85] Sec. 6(3)(a).

ness or with a view to profit.[86] In principle, however, a child could be liable under the Act for injury caused by a defective product that it has sold (for example) at the village fête.

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

19 It is not normal in the United Kingdom to take out a family liability insurance policy, but family members (including children) may be covered by a variety of other policies.[87] The Road Traffic Act[88] requires all motorists to be insured against their liability for injuries to others (including passengers) and damage to other people's property resulting from use of a vehicle on a road or other public place. Whether a particular policy covers use of the vehicle by the policy-holder's child depends on its terms: cover may be limited to specified drivers or may extend to any qualified person driving with the policy-holder's permission, possibly with a specified minimum age. It is standard for such policies to cover not only the liability of the driver but also that of any passenger who causes an accident. So far as other statutory provisions are concerned, it may also be noted that liability insurance is a precondition for the grant of a licence for a dangerous wild animal or a riding establishment, and would cover liabilities incurred by a child who keeps a dangerous animal[89] or receives paid-for riding lessons.[90] So far as non-compulsory liability insurance is concerned, the most common examples are the liability insurance components of household and holiday insurance policies. Of the two basic forms of household insurance, buildings insurance covers the insured's liabilities as owner of the home, while contents insurance covers those he incurs in his capacity as occupier. Buildings insurance is generally required as a condition of a mortgage or home loan but, from the point of view of liability insurance, is less practically important. Most household liabilities are incurred on the basis of occupiers' liability, which is usually covered by contents insurance to a maximum of £1–2 million plus costs. Contents insurance also usually covers the liabilities incurred by the insured and members of his family in day-to-day life (e.g. for road accidents they cause as pedestrians), and their liability as tenants

[86] Sec. 4(1)(c).

[87] General information is available on the web-site of the Association of British Insurers (www.abi.org.uk).

[88] Road Traffic Act 1988, sec. 143.

[89] Under Dangerous Wild Animals Act 1976, sec. 1(6)(iv) the licence-holder (who must be an adult) must insure himself and any other person who is entitled to keep the animal (i.e. to have it in his possession: sec. 7(1)) against liability for any damage which it may cause. Damage includes the death of, or injury to, any person (sec. 7(4)).

[90] Under Riding Establishments Act 1964, sec. 1(4A) the licence-holder must be insured against liabilities arising out of the hire or use of his horses by those hiring a horse or receiving paid riding instruction.

for damage to the building. However, liability for causing death or injury to a family member is typically excluded. Holiday insurance covers legal liability for injuring others or damaging their property, usually up to a maximum of £ 1–2 million.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

Premiums for household insurance are calculated primarily by reference to 20
factors which determine the insurer's potential liabilities under the first-party components of the policy, for example, the property's type and location, the level of security, and the value of its contents. These appear to be more weighty than factors relevant to the insurer's potential exposure under the third-party components of the policy, for example, the number of family members residing in the property, though this will normally have some effect on the level of premium quoted. It is immaterial how many of the permanent residents are children. While the first-party components of household insurance policies are normally subject to an agreed excess or deductible, this does not apply to the third-party components. No-claims bonuses are affected by *all* claims made under the policy, not just those in respect of liabilities to others, far less those specifically relating to liabilities incurred by the insured's children. Of course, the insurer may always cancel the policy in accordance with its terms (e.g. seven day's notice and a refund of the unused part of the premium) but I cannot imagine that repeated liabilities incurred by the insured's children would be a significant cause of insurers' exercising this power.

12. a) How many per cent of families are covered by one or another form of family liability insurance?

According to the National Statistics' Family Expenditure Survey, 61% of 21
households purchased buildings insurance, and 75% contents insurance, in 2001. The average household expenditure was £ 168 on buildings insurance and £ 144 on contents insurance.[91]

b) Does the liability insurance cover extend to intentional torts committed by the child?

No, intentional torts would fall under the normal exclusion applying to delib- 22
erate or criminal acts by the insured or his family.

[91] Association of British Insurers, *Insurance Facts and Figures 2001 – A Commentary* (2003), 27.

13. a) Are the parents under a duty to take out a liability insurance for their child?

23 Parents have no duty to take out liability insurance for their child, though the child might itself have an obligation to acquire liability insurance – for example, in the case of a 17-year-old motorcar owner.

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

24 No.

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up a damage claim brought by the victim against the parents?

25 Where the policy covers the liability of the child as well as the parents, as in the case of the typical household contents policy, the insurer clearly cannot seek financial contribution from the child after paying out on a claim brought against the parents. Where the policy covers only the parents, it would appear open to the insurer to seek contribution from the child if the latter was jointly liable for the damage in question. However, I do not know of any English cases where contribution has been sought in such circumstances.

b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

26 No.

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

27 Ignoring the law of bankruptcy, there is no mechanism in English law by which tort liabilities may be limited or reduced on the basis that they exceed the defendant's financial means, whether the defendant is an adult or a child.

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

28 To my knowledge, there has been no discussion of the "problem" of a minor's excessive tort liability in English law. The liability of children is simply not seen as problematic.

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

English bankruptcy law does allow individuals to obtain a discharge of debts which they are unable to pay off – but at the cost of having their estate vest in their trustee in bankruptcy, with consequent restrictions on their disposal of their property.[92] The law concerning the enforcement of money judgements[93] does not provide for the discharge of such debts by means other than bankruptcy. 29

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

The discharge of debts in bankruptcy does extend to judgment debts in tort, even if designed to compensate for the consequences of intentional acts. 30

III. Liability of Parents[94]

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

Parents are not as a general rule strictly liable for torts committed by their children. However, liability without fault may arise in accordance with general principle where the parent directs, authorises or ratifies the child's act or where the parent is the child's employer and the child commits a tort in the course of that employment.[95] Additionally, the head of a household is strictly liable for harm done by an animal of which a household member under the age of 16 is the owner or keeper.[96] Outside these exceptional cases, parental liability can arise only on the basis of personal fault, that is, for breach of the parent's duty to take reasonable care in the supervision of the child.[97] In principle, the extent of the supervision required of the parent will vary according to the child's age and mental capacity, and there may come a point where the parent 31

[92] See generally Insolvency Act 1986.
[93] See generally Rules of the Supreme Court, Order 45.
[94] See, for this and the following section, A. Dugdale (supra fn. 50), § 4.60; A. Grubb (supra fn. 50), § 2.42; W.V.H. Rogers (supra fn. 50), § 24.18; and R. Bagshaw, Children Through Tort, in: J. Fionda (supra fn. 1), 130-2.
[95] Law Reform Commission (Ireland) (supra fn. 50), 27–32.
[96] Animals Act 1971, sec. 2.
[97] See, e.g., *Newton v Edgerley* [1959] 1 WLR 1031 (father's failure to instruct son in use of gun when other children were around). Cf. *Donaldson v Niven* [1952] 2 *All England Law Reports* (All ER) 691 (father forbidding use of rifle outside house; no negligence) and *Gorely v Codd* [1967] 1 WLR 19 (father giving 16-year-old son adequate instruction in use of gun; not necessary for him to supervise its use).

need not supervise in person and can reasonably rely upon the child taking appropriate precautions him or herself.[98]

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

32 In accordance with general tort law, the burden of proving breach of the parent's duty of care is on the victim (i.e. the claimant).

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

33 The duty to take reasonable care in the supervision of a child may be imposed not only on parents in the strict legal sense but also on those acting *in loco parentis*, for example, school teachers or the child's education authority.[99] Anyone who assumes responsibility for looking after a child owes the same duty for as long as responsibility is assumed. Whether the parent's duty arises by virtue of an assumption of responsibility on a specific occasion or by virtue of a blood tie, custody or some similar criterion has not been tested in English law.

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

34 As already noted, it has not yet been determined whether custody itself gives rise to a duty to supervise, or whether it is only an assumption of responsibility on a specific occasion that can have this effect, and it cannot be predicted with confidence how the courts will treat cases of injury caused by the children of unmarried, separated or divorced parents. It is thus not particularly relevant to consider the principles of family law on the basis of which custody is allocated.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

35 It has not been determined in English law whether, in the absence of any assumption of responsibility on a specific occasion, a parent who is not awarded the custody of the child and who does not live together with the child is subject to the duty to supervise.

[98] See, e.g., *Gorely v Codd* [1967] 1 WLR 19, above. See also *North v Wood* [1914] 1 *King's Bench* (KB) 629 (father not liable for injury done by his 17-year-old daughter's dog, which he knew to be savage but allowed her to keep, as she was old enough to be regarded as its keeper). Cf. Animals Act 1971, sec. 2, above.

[99] *Carmarthenshire County Council v Lewis* [1955] AC 549.

6. Which elements of a tort must the child have realized for the parents to be liable for it?

In English law the question is whether the parent, not the child, has committed a tort, which (if we are talking about negligence) requires the breach of the parent's duty to take reasonable care in the supervision of the child and injury consequent on that breach. It is not necessary for the child personally to have done anything that satisfies the elements – or any of the elements – of the tort. 36

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

In the absence of contrary agreement, the standard of care in English law always remains the same, viz. the standard of a reasonable person. What is required of the reasonable person of course varies according to the precise circumstances, including the intensity of the danger. If a child is or ought to be known to be unruly or accident-prone, that may increase the foreseeability of injury and make it necessary to take special precautions that would not be necessary in the case of an average child. The child's age may also be relevant here. In principle, the parents' working situation should be taken into account in an appropriate case in determining the content of the duty to supervise, though the sheer variety of cases that can be imagined makes it impossible to say very much for certain. If one parent is working and the other remains at home with the child, responsibility obviously falls upon the latter whilst the former is at work. But that should not preclude recognition of a concurrent duty, albeit of a different practical content, on the working parent who may be required to act, for example, if the parent remaining at home with the child should (to the other's actual or imputed knowledge) suddenly be rendered incapable of fulfilling the responsibility. It is possible to imagine analogous scenarios where both parents are at work (e.g. where the child-minder is suddenly rendered incapable). 37

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

If the child is at school or at work, the parents' duty (assuming it exists) is likely to have limited practical content. In practice, it will be very seldom that the parents have to do anything at all by way of supervising their child whilst at school or work. But they may be required to keep the child away from school or work in certain exceptional circumstances, for example, where the child is suffering from a serious and highly-infectious disease. 38

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

39 In considering the above issue, it makes no principled difference whether the child is at a day-school or a boarding school, though it is perhaps less likely that the parents would have actual or imputed knowledge of circumstances requiring them to act in the case of the latter. It is also possible that the steps they could reasonably be expected to take even if they knew, or ought to know, of a risk to third parties might be more limited in the case of a child attending a boarding school.

10. What is the relation between the damage claim against the parents and the damage claim against the child?

40 The parents and the child may be jointly liable as several tortfeasors responsible for the same damage. The claim against the parents is distinct from that against the child, and the failure of one does not preclude pursuit of the other. The claims may be brought separately, though it is more likely that they will be brought and heard together.

11. Is there any possibility either for the child or the parents to have recourse against each other?

41 In English law, there is generally nothing to stop a child suing either or both its parents or *vice versa*. Such actions might well be contemplated where there is liability insurance cover. By way of exception to the general rule, a child cannot sue its mother in respect of congenital disability – unless the claim relates to the mother's driving of a motor vehicle (where liability insurance cover is compulsory).[100] There are no restrictions on the child's ability to sue its father in respect of congenital disability.

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

42 In all these cases, the duty to supervise the child is owed by the person or persons assuming responsibility for doing so. It is quite possible that the duty could be owed by the child's employer or by the owner of the children's home,

[100] Civil Liability (Congenital Disabilities) Act 1976, sec. 2.

boarding school or other institution where the child is living. The duty might also be owed by staff members entrusted with the supervision of the child.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

43 It is perfectly possible that a duty to supervise might be assumed by means of private contract. It should be noted, however, that the only liability to the victim of the child's actions that is likely to arise is in tort as contractual liability depends on privity of contract – or at least an intention to benefit a specific third party.[101] The existence of such a contract does not affect the victim's rights against any other person with a duty to supervise, though the latter could seek contribution from the person assuming such a duty by contract. Of course, this assumption of responsibility could have the effect of terminating the responsibility of the person previously charged with that duty.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

44 It is difficult to be precise here, because so many factual variations can be imagined. It is clear that schools (or the public authorities which control them) have a duty to supervise their pupils, and may be liable both for accidents caused by the pupil's youth and inexperience[102] and for the pupil's intentional wrongdoing.[103] Such liabilities are governed by the ordinary principles of (private) tort law, not by public administrative law. The school's responsibility may normally be expected to extend for the duration of the school day, though it may last longer if (say) a very young child is not picked up from school on time.[104] No doubt, also, the responsibility will extend for the duration of any school trip which the pupil goes on. In one recent case, where the claim related to the bullying of one pupil by another, it was judicially accepted that a school may owe a duty of care even in respect of events that occur outside school, though the court emphasised that those occasions where liability would arise would be "few and far between".[105] It must be remembered that the duty is only one of reasonable care. It is not every accident on school

[101] See Contracts (Rights of Third Parties) Act 1999.

[102] See, e.g., *Carmarthenshire County Council v Lewis* [1955] AC 549 (driver injured after swerving to avoid a young child who had strayed from the playground of the defendant's school).

[103] *Jackson v London County Council* (1912) 28 *Times Law Reports* (TLR) 359 (builders' rubble used as projectile). Cf. *Ricketts v Erith Borough Council* [1943] 2 All ER 629 and *Rich v London County Council* [1953] 1 WLR 895 (supervision found to be adequate on the facts of both cases).

[104] Cf. *Barnes v Hampshire County Council* [1969] 1 WLR 1563 (liability to the child). Older children may need less supervision at the end of the school-day, or none at all: see *Wilson v The Governors of the Sacred Heart* [1998] *Personal Injury Quantum Reports* (PIQR) P145.

[105] *Bradford-Smart v West Sussex County Council* [2002] 1 FCR 425 (no breach of duty on the facts).

grounds during school hours that gives rise to a liability in damages,[106] and it is certainly not conclusive of fault that the accident happens in the presence of a teacher.[107] Neither do pupils have to be supervised for every moment of the school day[108] or put into metaphorical straight jackets.[109]

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

45 Where a pupil causes an accident in a state-run school, liability may be affixed on the teacher who should have intervened (if this can be established) and/or the local education authority. The latter's liability may be either personal or vicarious (or both). It is hard to imagine circumstances in which central government could be held responsible. Where the accident occurs in a private school, the teacher may again be held liable if in breach of his duty of care, and the school (assuming it has legal personality) or its owners may be vicariously liable for the teacher's tort. The school or its owners may also be personally liable for breach of their own duty of care.

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

46 Where a local education authority is found vicariously liable for an accident in one of its schools which could and should have been prevented by a member of staff, it has in theory a right of indemnity against its employee[110] though it would be almost inconceivable that this would be exercised as it would inevitably result in workplace unrest and union protests. Where the authority has a personal liability, it may also (in theory) seek contribution from whoever else is tortiously liable for the same damage, but it would again be almost inconceivable that it would seek to exercise such right against one of its own teachers.

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

47 The same applies in respect of private schools, though it is perhaps more likely that the school would pursue its remedies against the teacher who failed to supervise. I know of no instance where this has happened, however.

[106] See, e.g., *Ricketts v Erith Borough Council* [1943] 2 All ER 629 and *Rich v London County Council* [1953] 1 WLR 895.

[107] Cf. *Mullin v Richards* [1998] 1 WLR 1304.

[108] *Wilson v The Governors of the Sacred Heart Roman Catholic School* [1998] PIQR P145 (not necessary to have a duty teacher supervise students' passage from school buildings to school gate after class).

[109] *Rich v London County Council* [1953] 1 WLR 895, 905 per Morris LJ.

[110] This is a matter of the general law of vicarious liability: *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

The teacher's duty to supervise is simply one aspect of his duty of care and the only safe guidance is that he must exercise such care as is reasonable in the circumstances. 48

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other? May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

It is a general principle of tort law that the full value of specified social security benefits received as the result of a tortious injury, within a specified period of such injury, should be deducted from the damages recovered from the tortfeasor and repaid to the state.[111] Damages claims against teachers, schools, local education authorities, etc., are treated no differently in this regard. 49

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

The teacher or institution and the child may be jointly liable as several tortfeasors responsible for the same damage. The damages claim of the victim against the child is strictly quite separate from his claim against the teacher or the institution, and failure in one does not preclude the other, but such claims are normally brought and heard together.[112] 50

12. Is there any possibility either for the child or the teacher to have recourse against each other?

It is a general principle of English tort law that one tortfeasor may seek contribution from another tortfeasor who is responsible for the same damage, either by way of separate proceedings or by joining the latter as co-defendant to the claimant's action. It is therefore possible that a teacher or school or education authority might seek contribution from the child who caused the accident or *vice versa*, but I know of no instances of this occurring in practice. 51

[111] Social Security (Recovery of Benefits) Act 1997.
[112] See, e.g., *Mullin v Richards* [1998] 1 WLR 1304, discussed in supra no. 14.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

52 The same principles apply where both teacher (or school or education authority) and parents are in breach of their duty to supervise. It is quite possible for either teacher or parents to have recourse against the other.

Children as Tortfeasors under French Law

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I. Short Introduction

Should a casual observer be content with reading the Napoleonic Code, five articles contained in the Civil Code under the section "delicts and quasi-delicts", numbered 1382 to 1386, cover the French legal system on civil liability. Inherited from a doctrinal tradition dating to Roman law and the famous Lex Aquilia, the five "cornerstones" were based on a decree in line with post-revolutionary ideas, and so the 1804 Code therefore instigated a system based on the freedom of the people and the necessity to set limits to this freedom including the duty to respect one's neighbour and the sacred right of property. Added to this are some provisions, which, although not conservative, are at least specific to the social and family hierarchy of the time. 1

Three types of liability emerge from reading the original Code: personal liability (artt. 1382 and 1383) based on fault, vicarious liability (art. 1384) and liability for damaged caused by things in one's charge (artt. 1385 and 1386). Some recent laws have added some special cases of liability. 2

Personal liability falls within the purview of art. 1382, as does the whole French system. Based on the rule of *neminem laedere*, art. 1382 states the principle of fault liability in such general terms that once the proof of fault, damages, and relationship of cause and effect linking them can be established, the tortfeasor may be rendered liable. French law has therefore made a clean sweep of the historical classifying of torts to come up with one of the most open clauses in Europe today. No limitation with regard to the act causing the damage (unlawfulness or imputability) nor to compensable damages (existence of legally protected interests, unfairness of damage or individual rights specifically defended) can restrict the scope of this legislation which, despite repeated criticism, has proven to be remarkably flexible and thus has escaped any legislative modification over the last two centuries. This provision is followed by art. 1383, which endeavours to impose on the tort of negligence the same obligation to pay damages as that of malicious acts whereby any negligence, even minimal, generally results in compensation. 3

4 As opposed to the previous two articles, vicarious liability has resulted in art. 1384 being slightly re-worded which has not basically modified the content. Consequently, although parents, masters and teachers are respectively liable for actions of their child, servant or pupil as provided in the initial wording, legal theory backed up by case law has substantially modified the system. A first shift enabled the switch from a liability based on specific cases to a general principle of vicarious liability. Then came a second shift in line with new orientations taken by French law as a whole that resulted in the decline of subjective liability based on tort in favour of a so-called "ipso iure" liability (*responsabilité de plein droit* i.e. strict liability) and even in some extreme cases, a no-fault liability based on an idea of risk or guarantee increasingly linked to insurance law.

5 As for liability for damage caused by things in one's charge, initially it only consisted of rules covering liability for damage caused by animals (art. 1385) or buildings (art. 1386). But once again legal theory, rapidly validated by case law, resulted in a general principle with regard to things under one's responsibility based on the introductory lines of art. 1384. For each type of liability, there is a tendency in the general law towards the atypical nature of torts.

6 Special rules have subsequently been added (concerning road accidents or defective products, for instance) which are mainly subject to special or hybrid provisions, which are not necessarily covered by codification within the section governing torts.

7 In a coherent but somewhat succinct vision of French law, it should be noted that by the term "civil liability" it is usual to include both liability in contract and liability in tort although some writers prefer to restrict this generic term to the case of non-contractual liability. Nevertheless, although this is linguistically correct, French law does not allow an accumulative effect of different types of liabilities.

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

8 French law does not recognize any subtlety of this type.[1] The mere fact of being a minor is important, given that the age taken is that on the day of the

[1] As opposed to criminal law which has a wide diversity of provisions and measures based on the age of the offender. Therefore, minors aged up to 13 years are not criminally liable if they commit an offence i.e. not subject to penal sanctions. However, the juvenile court might order educational measures. The minor aged 13 to 16 years is legally under-age enabling him to have a reduced sentence and the minor aged 16 to 18 years can, depending on the case, receive the same leniency. When brought before the court, minors appear in a special court in respect of their age and type of offence (petty offence, misdemeanour or crime). When minors under 16

wrongful act[2] even if the tortfeasor has reached full age on the date of the court appearance.

It should be noted that in France, since 1974, majority is fixed at 18 years for both men and women unless the minor has requested to be regarded as of full age. The minor may automatically acquire adult status following marriage or be granted adult status by the guardianship judge in a non-contentious procedure. Although granting majority has given rise to substantial disputes[3] among writers on liability law, the solution is henceforth provided by art. 482 of the *Code civil* (Civil Code, C. civ.), which states that the parents "are not legally liable, in their capacity as father or mother, for damage that (the child) might cause to another person on reaching majority". 9

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

For a long time, French law remained attached to the notion of imputability, which was one of the components of the subjective civil tort. To be at fault, one obviously had to be at the origin of a wrongful act but also be capable of understanding. In the same way as persons of unsound mind, children were thus exonerated from all responsibility in that their ability to understand the act was not proven. Consequently, young children were presumed to be incapable of understanding and could not be responsible on their own account[4] nor in their capacity as keeper.[5] When, in 1968, French legislation stated that the insane would become liable, the temptation was great to adopt the same reasoning with regard to children and consider them as liable in the same way as those unaware of their actions. After a period of resistance,[6] the step was finally taken in 1984 in several judgements given by the *Assemblée Plénière* (Plenary Assembly) of the Court of cassation.[7] Among these judgements, the Djouab affair[8] (in which a 9½ year-old child deliberately set fire to a lorry and 10

years of age commit petty offences and misdemeanours of class 5, they appear before the juvenile court. Minors of aged 16 to 18 years appear in the juvenile court when they commit petty offences or misdemeanours of class 5. The same juvenile court also judges crimes committed by minors aged 16 years. Minors aged 16 to 18 years are judged by the Minors Assize Court when they have committed crimes. These courts are composed of judges specialised in juvenile delinquency. In this respect, refer to the order of 2 February 1945 on juvenile delinquency.

2 *Cour de cassation 2e Chambre civile* (Cass. Civ. 2ème), 25 octobre 1989 in *Bulletin des arrêts de la Cour de cassation. Chambres civiles* (Bull. Civ.) II, no. 194, 98; [1989] *La Semaine juridique édition générale* (JCP), IV, 413.

3 Refer to: J. Julien, *La responsabilité civile du fait d'autrui. Ruptures et continuité* (2001), 128.

4 *Cour de cassation, chambre sociale* (Cass. Soc.), 25 juillet 1952 in [1954] *Dalloz* (D.) 310, note R. Savatier.

5 Cass. Civ. 2ème, 14 mars 1963 in [1963] D., 500; [1963] *La gazette du palais* (Gaz. Pal.) 2, 11.

6 Cass. Civ. 2ème, 7 décembre 1977 in [1980] JCP II, 19339, obs. J. Wilbault; [1978] D. *Informations rapides* (IR), 205, obs. C. Larroumet; [1978] *Revue trimestrielle de droit civil* (RTD civ.), 653, obs. G. Durry.

7 Cass. Ass. Plen., 9 mai 1984 in [1984] JCP II, 20255, note Dejean de la Bâtie and 20256, note P. Jourdain and 20291, rapport Fédou; [1984] D., 525, note F. Chabas; [1984] RTD civ., 508, obs.

8 Arrêt Djouab, Ass. Plen., 9 mai 1984, prec.

buildings) sanctioned the minor's personal liability, independently of any issue of imputability. Furthermore, in order not to incur criticism of a solution distorted by its criminal law provisions (which required understanding and intention so that the minor could be educated and assisted) a few months later, the Court of Cassation ruled clearly on the meaning of civil liability of the *infans*, independently of any capacity to understand.[9]

11 Consequently, it is usually taught in France that imputability has been abandoned and is no longer a component of civil tort applied to minors.[10] The answers given to the following questions shall therefore only indicate the channels used *before* abandoning imputability, but which are today obsolete.

3. a) What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or also the ability to adjust behaviour according to this realization?

12 At the time when French law required a moral imputability, the exact meaning of "capacity to act reasonably" was unknown and varied according to the writers and the jurisdictions. Traditional writers such as Pothier associated the notion with that of reason: someone who had not yet acquired or who had lost the use of reason could not be declared liable. Others interpreted this as awareness whereby one had to be "aware of one's acts" to be responsible for them. Gradually, there was a shift in the law governing liability of the insane in the same way as that of children and the notion of understanding appeared but no legal definition ensued.

13 According to lower court jurisdictions, it meant the child had a sufficiently developed intellect to understand "the fault committed"[11] or "the consequences of his act",[12] whereas for the Court of Cassation, it was the "ability of the child to think and judge […] so that he was fully aware of any danger incurred in playing with a bow and arrow"[13] or "the ability to understand the consequences of the wrongful acts he commits".[14]

14 According to the writers, the capacity to act reasonably implied "sufficient development of intellectual faculties of the person to be able to understand the

[9] Cass. Civ. 2ème, 12 décembre 1984 in Bull. Civ., II, no. 193; [1985] Gaz. Pal., 2, panor., 235, obs. F. Chabas; [1986] RTD civ., 119, obs. J. Huet; Cass. Civ. 2ème, 28 février 1996 in [1996] D., 602, note Duquesne; [1997] D. Somm. 28, obs. D. Mazeaud; [1997] Gaz. Pal. 1, 86, note Jacques; [1996] JCP, I, 3985, no. 14, obs. Viney; [1996] RTD civ., 628, obs. Jourdain.

[10] Even though, sometimes the Cour de cassation still wonders if the child's age "*enables him to understand the foreseeable danger he exposed his friends to*". Cass. Civ. 2ème, 8 juillet 1992: pourvoi no. 91-13.769 Lexilaser.

[11] *Cour d'appel* (CA) Bordeaux, 23 janvier 1905 in [1905] *Recueil Sirey* (S), 188.

[12] CA Bordeaux, 31 mars 1852 in [1854] *Recueil périodique et critique mensuel Dalloz Dalloz Périodique* (D.P.) 5, 656.

[13] Cass. Civ. 2ème, 8 février 1962 in Bull. Civ. II, no. 180, 125.

[14] Cass. Civ. 2ème, 6 juillet 1978 in [1979] D. IR, 64; Bull. Civ., II, no. 179; [1979] RTD civ., 387, obs. G. Durry.

nature and scope of his action",[15] which is basically in line with the "rationalists" school of thought.

Therefore it would seem that the capacity to understand refers primarily to understanding the risks incurred rather than adapting one's behaviour to existing danger. For instance, the person capable of understanding knows that playing with a bow and arrow is a dangerous activity in itself but would not necessarily adapt his actions and behaviour to avoid an accident. 15

There is a fine line between the child understanding his action (capacity to understand) and adapting his action (capacity to act reasonably). A remark on terminology arising from translation problems is necessary: 16

Moral imputability only concerns the issue of the child's understanding. The capacity to understand is linked to the personal psychological development of the minor and should be understood as "a mental capacity to judge things clearly and properly".[16] It is therefore the ability to differentiate between what is right and wrong and who is right or wrong. Until 1984, this issue of understanding was the only element to guide the judges in characterising moral imputability of the wrongful act. 17

On the other hand, the "ability to act reasonably", i.e. to adapt one's behaviour to situations and dangers which occur, is not dependent on moral choice nor is it linked to the ability to understand. Both can be assessed independently and according to different criteria. The reasonable nature of the child's behaviour is assessed in relation to normal behaviour of a "reasonable person" and in line with acceptable conduct.[17] The latter is used as an element of comparison to deduce imprudence or negligence but is not actually related to understanding.[18] 18

b) Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that he understands that his action can in some way be dangerous (abstract danger)?

It would seem that this issue has not been discussed at length and the solution varies according to the decisions and jurisdictions. However, one could conclude that, in the majority of cases, magistrates have recognised an abstract vision of danger whereby the child simply understands that his action might have dangerous repercussions. 19

[15] P. Jourdain, *Recherche sur l'imputabilité en matière de responsabilité civile et pénale* (1982), 317, no. 285.
[16] Le Robert, *Dictionnaire de la langue française*, V Discernement.
[17] G. Viney/P. Jourdain, *Les conditions de la responsabilité*, *Traité de droit civil sous la direction de J. Ghestin* (2nd edn. 1998), no. 464, 352.
[18] On the standard of care applicable to children, see no. 26.

20 For example, one case resulted in non-liability of an 11-year old playing with a bow and arrow as "the mental capacities of an 11-year old to reflect and judge are not sufficiently developed for him to be fully aware of all the dangers in playing with a bow and arrow".[19] Along the same lines, the Court of Cassation judged that "because at just 8 years old, the child had not understood that by lighting some hay, a gust of wind could spread the fire to the buildings".[20] In the same way, a judgement considered that "a 14 ½ year-old should be aware of the danger of using an air gun".[21]

21 Consequently, it is more a question of being aware of the general, theoretical danger of the child's action. Nevertheless, it should be noted that this abstract assessment of danger occurred more frequently when the judges had to rule on the liability of a child as keeper of a thing rather than personal liability.

c) Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

22 This assessment of the capacity to act reasonably was, at the time it was still current, simple a *de facto* question of not just citing the minor's age to conclude on his lack of understanding. On the contrary, the Court of Cassation ensured that the lower courts proceeded with a thorough examination of the child's ability to act reasonably case-by-case.[22] Therefore, no objective standard linked to the child's age was officially recognised to reflect what could have been the "reasonable child" standard. Furthermore, this avoided confusion between "capacity to understand" – which, although often linked to the age of the child, cannot be inferred – and the "capacity to act reasonably" – which, on the other hand, could have inferred from the child's age a certain standard of behaviour.

23 However, many rulings took as a basis to render or not render the child liable an improbable reference frame linked to age. Consequently, one ruling cited "unawareness and inadvertence specific to this age"[23] (13) or the fact that a child of 4 ½ was "too young to properly understand".[24]

24 Although the capacity to understand is an ability to think and judge specific to each child, irrespective of their age, it would nevertheless appear that age was used as a factor for the magistrates to asses the maturity of the child but not to limit their judgement. It is regrettable that no ruling criticised the lack of a child's capacity to understand despite his mature age, thus demonstrating the distinction between age and reason. Nevertheless, one judgement "proved"

[19] Cass. Civ. 2ème, 8 février 1962 in Bull. Civ. II, no. 180, 125.
[20] Cass. Civ. 3ème 30 octobre 1969 in Bull. Civ. III; no. 694, 523.
[21] *Tribunal de grande instance* (TGI) St Etienne, 15 mai 1974 in [1976] Gaz. Pal., somm., 109.
[22] M.-C. Lebreton, *L'enfant et la responsabilité civile* (1999), 269, note 47.
[23] *Tribunal pour enfants* Grenoble, 9 mars 1942 in [1942] JCP, II, 1873, note R. Rodière.
[24] Cass. Civ. 2ème, 23 novembre 1972 in Bull. Civ. II, 245.

that a minor did understand his actions despite his young age: this concerned a 6 year-old who, playing on a bicycle in a square, injured a person sitting on a bench. Despite his young age (which if judged according to an objective standard would have exonerated him from liability) the judges concluded that the child had the capacity to understand due to his "sensible attitude".[25]

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

Although the fact of having insurance does have an influence, it is still not admitted. No legal or case law provision actually encourages taking into account its existence and the rules applicable to the tort *lato sensu* are strictly identical whether the offender is insured or not. 25

However, it is widely acknowledged by most writers.[26] 26

5. What is the standard of care applicable to children?

As we have seen, the child's liability is no longer based on a subjective fault, since dispensing with moral imputability for the fault (and thus assessment of the capacity to understand). It can be deduced that the child's liability is henceforth based on an objective fault, i.e. an objective failure to comply with a standard of care and this standard should be determined. However, it would seem that the Court of Cassation has gone even further and has established, not a liability for failure to observe reasonable care, but a strict liability without fault as it was judged "sufficient that the child committed an act which was the exact cause of the damages invoked by the victim".[27] If we apply a restrictive reading of reasons for the decision, we can only conclude henceforth that just the "causal behaviour"[28] is sufficient to render the child liable, regardless of any failure to observe a standard of care. The damage caused by the child would be regarded as damage caused by inanimate objects. 27

But despite this judgement, the wording of which was used in subsequent decisions, it does not seem that the Court of Cassation wanted to go this far and draw radical consequences from such a theory. Indeed, most decisions which followed would infer that despite a different wording, it is still the wrongful act that the court sanctions.[29] The French solution, despite an ambiguous and unfortunate wording is still attached to the notion of failure to observe the standard and consequently a standard of behaviour. 28

[25] CA Paris, 6 juin 1959 in [1959] D., somm., 76.
[26] See G. Viney, Le 'wrongfulness' en droit français in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998), 6.
[27] *Cour de cassation, Assemblée Plénière* (Cass. Ass. Plen.), 9 mai 1984, arrêt Fullenwarth, prec.
[28] F. Alt-Maes, *Les droits reconnus à la victime d'un mineur et leurs limites, Droit de l'enfance et de la famille* (1993), 182 et seq.
[29] See G. Viney/P. Jourdain (supra fn. 17), 998.

29 What is this standard of behaviour? French law would seem to differentiate between intentional and inadvertent torts:

30 In terms of intentional fault, the rule is to judge the intention of the tortfeasor in the particular case. In this situation, judges take into account intrinsic and extrinsic elements of the personality of the tortfeasor which explains why still today the age of the child is used to assess the existence of such a fault, independently of the capacity to understand. (The child could have wanted to throw a stone at a friend's face without envisaging the serious consequences of his act.)

31 On the other hand, in terms of negligent fault, the action is judged according to an objective standard i.e. in comparison with what an individual of average intelligence would have done in a similar situation. Given that the minors do not, theoretically, have any standard of behaviour adapted to their maturity or age, this solution applied to the child is harsh as it boils down to "applying" the model of the reasonable man to a minor incapable of understanding. However, this statement should be qualified, as the type of reference chosen to judge the fault with regard to a standard tends to be less abstract and less general that the identikit of the average man might first suggest. The specific characteristics of the person (age,[30] profession, physical strength, aptitudes …) are increasingly taken into account to define the standard of behaviour applicable to the tortfeasor. This considerably reduces the risk of blindly applying a standard of adult behaviour to children and which leads certain writers[31] to conclude that there is less a difference of nature than degree between judging according to an objective standard and judging subjectively the wrongful act.

6. Are children held to a higher standard of care if they engage in "adult activities"?

32 The activities in which children engage basically change nothing with regard to their liability or to the fact that officially every standard of behaviour has disappeared. Application of specific rules linked to the type of activities can however be considered.

33 Taking the hypothesis of damage caused by a minor driving a motorised vehicle,[32] specific provisions of law no. 85-677 of 5 July 1985 relating to road ac-

[30] Cass. Civ. 2ème, 7 mars 1989 in Bull. Civ. I, no. 116, 75; [1990] JCP II, 21403, note N. Dejean de la Bâtie – Cass. Civ. 2ème, 4 juillet 1990 in Bull. Civ. II, no. 167, 84; [1990] *Responsabilité civile et assurance* (Resp. civ. et assur.), comm. 363; [1991] RTD civ., 123, obs. P. Jourdain.

[31] See F. Terré/Y. Lequette/P. Simler, *Droit civil, Les obligations* (8th edn. 2002), no. 729.

[32] According to art. R 211-2 Code de la route, a minor over 14 may drive a moped, provided he holds a licence certifying his awareness of safety rules (brevet de sécurité routière). According to art. R 221-20 of the same code, minors over 16 may drive tractors and other agriculture engines. Likewise, art. R 211-3 Code de la route allows minors over 16 to drive cars in the company of a registered adult person (usually the parents), provided they passed the exam certifying their familiarity with the road traffic code and after 20 hours of driving lessons.

cidents shall automatically apply. The specific provisions of this law apply whether the child is an authorised driver of the vehicle or not, and includes possible theft of the vehicle by the minor.

34 The child who causes damage by using a firearm is covered by householder family liability insurance taken out by his parents. This cover applies even if the child stole the weapon. However, the wording of the different insurance policies should be checked here in that some householder liability insurance policies exclude cover by the insurance company for damages "due to the use of a firearm or air gun without authorised ownership".[33] However, it would seem that the Court of Cassation has judged this restricted cover only applies to the policyholder and not to the damage caused by his children.

35 The child causing damage within the scope of a salaried activity is covered by a specific provision for vicarious liability. In fact, if the child has a salaried activity, any damage he may cause to third parties within the scope of this activity falls under art. 1384 subs. 5[34] which raises the general principle of vicarious liability of employees. Consequently, the employer is responsible for his underage employee. Liability is to be assumed by the employee. The victim has to prove a wrongful act by the minor in order to render the employer liable. In fact, the employer is only liable if the action of the employee, who caused the damages, is such as to render the employee personally liable on the basis of art. 1382 of the Civil Code. Nevertheless, the employer does have the possibility of recourse against his employee and may directly attack the child on the basis of art. 1382 or the child's parents on the basis of art. 1384 subs. 4. If the minor employee causes damages outside the working capacity determined by his employer, the latter is no longer liable but the parents of the underage employee will be liable on the basis of art. 1384 of the Civil Code. It is important to note that actions on the basis of art. 1384 subs. 4 and subs. 5 are alternative. The victim may choose one or the other as a basis to seek damages.

36 The underage apprentice is also treated in the same way as if he were an employee with a so-called "adult" job. Specific provisions for vicarious liability cover any wrongful acts committed by the minor within the scope of this apprenticeship. In fact, by virtue of Art. 1384, subs. 6[35] of the Civil Code, the master is responsible for his apprentice. Liability of masters was traditionally based on liability of parents for their child but this was before the change introduced by the Bertrand decision.[36] Liability of masters was based on pre-

[33] *Le monde*, 22 avril, citing Cass. civ. 1re 23 mai 2000 *GMF contre Mme B*.

[34] Article 1384 para. 5 provides: "Masters and employers [are liable], for the damage caused by their servants and employees in the functions for which they have been employed."

[35] Article 1384 para. 6 provides: "Teachers and craftsmen [are liable], for the damage caused by their pupils and apprentices during the time when they are under their supervision."

[36] Bertrand, Cass. Civ. 2e, 19 février 1997 in Bull. civ., II, no. 56; [1997] D., 265, note Jourdain; [1997] D., somm., 290 obs. D. Mazeaud; [1997] JCP II, 22848, concl. Kessous, note Viney; [1997] Resp. civ. et assur., chron., 9 par Leduc; [1997] Gaz. Pal., 2, 572, note Chabas; [1997] *Droit de la famille* (Dr. Fam), no. 83 note Murat; *Petites Affiches* 29 octobre 1997 note Galliou-Scanvion.

sumed fault but they could be exonerated by providing proof of absence of inadequate supervision. With the ratification of parents' no-fault liability and changes in apprenticeship practices in our society, this raises the issue of the relevance of this assimilation. Indeed, for some writers, assimilating the craftsman's liability to that of the parents makes it "extremely probable that henceforth the contractor employing apprentices will be declared automatically responsible for damage caused by these apprentices".[37] The only possibilities for exemption will be as those for parents: force majeure or contributory negligence. However, this solution raises the problem of the child's full age. Indeed, although the system of strict liability of the parents ends when the child reaches the age of majority or adulthood status, the craftsman cannot claim this limit. The craftsman's liability is based on the apprenticeship relationship and it is currently quite usual to have apprentices of full age in that, as Mrs Peyer-Royere remarks,[38] art. L. 115-1 of the *Code du travail* (Employment Code, C. trav.) enables an apprenticeship to be the means to gain "a professional qualification resulting in one or more engineering diplomas or an approved higher education". The writer adds that the age limit for completing an apprenticeship has been extended to 25 years old on the day of completion.[39] Consequently, maintaining strict liability of the craftsmen with regard to their apprentices does not really seem to be in line with changes in the apprenticeship system. This is why, in the absence of any established precedents in this area, it is possible to envisage an assimilation of this specific type of liability with that of the masters with regard to their charges.[40] There are close similarities between the apprenticeship relationship and that of superiors to subordinates in the craftsman-apprentice relationship. Consequently, as professors Viney and Jourdain remarked: "It is quite possible that eventually this special case of liability will be merged into that covering liability of masters".[41] Only a clear stance on this matter taken by the Court of Cassation or an intervention by the legislature would enable us to be proven right on this point.

37 Lastly, within the scope of these so-called "adult" activities is the question of liability of the minor bound by a contract. By virtue of art. 389-3 of the Civil Code, the minor may only perform acts authorised by the law or what is customary. In this specific framework he acts in an independent contractual capacity. A baby-sitting contract could be a good example of a typical act which custom authorises the minor to do alone without representation or assistance from his legal guardian. What liability rules apply to damages caused by the minor within the framework of this contract? We feel it is possible to conclude that the victim could use two alternative bases. In fact, the victim may try to render the minor contractually liable by taking proceedings against him on the

[37] On this point, see G. Viney/P. Jourdain (supra fn. 17), no. 893, 1014.
[38] C. Meyer-Royere, La responsabilité des craftsmans du fait de leur apprentis: une évolution dans la logique des choses, *Petites Affiches* 8 et 9 mai 2000, 5 et seq., 9 et seq.
[39] Art. L. 117-3 Code du travail.
[40] See C. Meyer-Royere (supra fn. 38), 5 et seq., 9 et seq.
[41] G. Viney/P. Jourdain (supra fn. 17), no. 893, 1014.

basis of art. 1147 of the Civil Code.[42] It would then be up to the victim to establish proof of a failure by the minor to respect his contractual obligations[43] in order to render him liable. The standard applicable here is that applied to major contracting parties. Nevertheless, the victim using this as a basis might come up against insolvency of the minor. Another option is however possible. By virtue of art. 1384 subs. 4 of the Civil Code, the parents remain fully liable for their minor's actions even if the wrongful act results from the child failing to respect a contractual obligation. Consequently, the victim may envisage directly suing the parents of the child on the basis of art. 1384 subs. 4 in order to render them fully liable. Taking this option, the victim is certain of compensation if the householder liability insurance taken out by the parents of the child covers this type of wrongful act.

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent to adults?

There is a difference depending on whether the child uses an object or not. 38

For the child using an object, for instance a stick, the Court of Cassation has established that: "Given that a child has the use and control of an object, the lower court magistrates were not to try and determine, in spite of the very young age of this minor whether the child had the ability to understand".[44] 39

In the case of the liable child not handling an object, the courts do not have to check whether a minor is able to understand the consequences of his action to characterise a fault committed by him (to a third party).[45] 40

French civil liability only recognises as a condition: fault, damage and the causation between fault and damage. If all three elements are present, the person is liable. This has at least the merit of being simple. 41

The problem concerning equity is that this theoretically harsh rule is biased by the prospect of compensation. Indeed, the child's solvency is evaluated via the 42

[42] The parents will intervene to represent the child, without being parties to the case: art. 389-3 of the Civil Code.

[43] Under an "obligation de moyens" or "obligation de résultat", with the necessity to prove negligence in the first case but not in the latter.

[44] Gabillet, Cass. Ass. Plén. 9 mai 1984, préc. Child as a keeper of a thing: Cass. Civ. 2ème, 17 octobre 1990 in Bull. civ. II, no. 204 – Cass. Civ. 2ème, 30 janvier 1991 in Bull. Civ. II, no. 41 – Cass. Civ. 2ème, 24 mai 1991 in Bull. Civ. II, no. 159. The one who has the power of direction and control of the thing is the keeper, even though he is unable to exert those powers properly (insanity). Cass. Civ. 2ème, 30 juin 1966 in Bull. civ. II, no. 720. The child without discernment on that point is classed as an insane person, and is therefore considered as the keeper of the thing.

[45] Cass. Civ. 2ème, 12 décembre 1984, préc.

parents or their insurance. This separation of liability and compensation may seem surprising.

8. Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard? What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact that the child has liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

43 Economic equity exists semi-officially in the form of damages and compensation.[46] However, as it is an issue of civil liability the judge may be acknowledged as having a certain adjusting authority in increasing or decreasing the amount when evaluating behaviour and damage. In order to answer this question, different rulings would have to be analysed.

44 The attitude of the child is fundamental. This is paradoxical as we assume there was no intention. The accidental, involuntary nature of the fault is decisive. In fact, it must be determined whether the child wanted to commit the fault. Fault is a guilty attitude, the intention to commit the act but not to want the damaging consequences. Intention is negligent behaviour with the purpose of damage. This is the framework of definitions under criminal law. "Intention" is a will towards achieving a result.[47]

45 The lack of physical strength is a factor which attenuates or rules out liability of the young child.[48]

46 As is also absence of warning the young victim.[49]

47 In defining aggravation, the judges take into account a particularly aggressive attitude.[50]

[46] Starting in the 19th century already, the courts always had a tendency to adjust compensation for the sake of fairness, taking into account the damage suffered and the financial resources of the tortfeasor. See CA, Nancy, 9 décembre 1876 in [1879] D., 2, 47, based on a concept of proportionality, based on art. 208 of the Civil Code. See artt. 208, 214, 371-2 563, 573, 586, 610, 648, 730-3, 730-4, etc. of the Civil Code; article L123-6 C. prop. Intel.

[47] See Cass. Civ. 1ère, 27 mai 2003 in Bull. Civ. I, pourvoi no. 01-10478.

[48] Cass. Civ. 1ère, 18 février 1986 in Bull. Civ. I, no. 32.

[49] Cass. Civ. 2ème, 4 juillet 1990 in Bull. Civ. II, no. 167.

[50] CA Versailles, 13 mars 1998 in *Juris-Data* no. 1998-041879: Damage to a young pupil due to the agressive behaviour of her 11 year-old mate, who was frightening her, and running after her, liability of the school teacher and of the State was established; CA Toulouse, 3 mars 1986 in *Juris-Data* no. 1986-043638: Fault of a 14 year-old child who has thrown one of his mates through a pane of glass; CA Nîmes 2 octobre 1996 in *Juris-Data* no. 1996-030236: No fault in the case of a child who negligently threw a tennis ball in the eye of another. The Court of Appeal held that the child "*behaved normally, without any aggresion*".

The fact that the child contributes to his own damage may be significant.[51] 48

Theoretically, the fact that the parents or legal guardians are insured is not mentioned even if everyone knows this will be taken into account.[52] To assess the amount of compensation paid out by the insurance company, it should be noted that the judges "use as a reference a normal cover stipulated in a policy of the same type".[53] 49

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

The place of equity in French law is subject to caution and a number of legal theories, which we shall not review in detail here.[54] An *equity* system does not yet exist under French law but we can mention the prospect of an equity ideal in the list of rules on civil liability and its objectives. Compensation "at any cost" which has flourished over the last few years as the right of victims to receive compensation, illustrates this trend.[55] 50

With regard to the subject at hand, this actually means determining whether the fact that someone is liable for the child's actions is taken into account or if the fact that the child is insured by his parents intervenes in determining compensation. 51

As for the second notion, it would seem evident that the factor intervenes but in no way is this a rule of law.[56] With the first notion, we are tempted to see a 52

[51] Cass. Civ. 2ème, 28 février 1996 in [1996] D., *Jurisprudence* (Jur.), 602 et seq., note Duquesne: An 8 year-old girl was scalded because she ran into another child holding a pan of boiling water. The Cour de cassation held on the ground of art. 1382 that the fault of the child lacking discernment was established against her. Contributory negligence, and the fact that the tortfeasor child was covered by the insurance subscibed by his father, may explain the harshness of this decision.

[52] CA Pau, 10 février 1983 in *Juris-Data* no. 1983-041262: A 6-year-old-girl injured with a penknife the little girl of the neighbour of her aunt. The aunt's liability was established and so was the fault of the little girl.

[53] M.-H. Malleville, [2002] *Revue générale du droit des assurances* (RGDA), no. 1, 184–185, espec. 185, about: Cass. Civ. 1ère, 14 novembre 2001, "Mutuelle du Mans c/Macif". This case raised the problem of compensation of damages caused by a minor child who disobeyed his father and borrowed a motorcycle. The insurance company sought to escape the payment of compensation stating that the insurance policy was only covering cases where the damages were caused without the parents' knowledge. The Cour de cassation refused this argumentation.

[54] See F. Lafay, *Le pouvoir modérateur du juge* (Thèse Lyon 3, 2004), no. 20 et seq.

[55] As André Tunc would say: "Do lawyers have a good reason to oppose the masses who ask for compensation for the victims of a falling tree, even though the tree fell down because of a storm", [1975] D., Chron. no. 83, no. 9. The author linked the logic of compensation to fairness, and today the storm is getting embodied.

[56] It may be described as a deep pocket syndrome. For example, the French national railway company (SNCF) never benefits from exoneration, whatever the victim's behaviour. See S. Hocquet-Berg, Gardien cherche force majeure désespérément, *Responsabilité civile et assurances* (RCA) juin 2003, 6–8, espec. 6; P. Jourdain, Force majeure: la difficile exonération de la SNCF, prise en sa qualité de gardien de la chose, qui invoque une cause étrangère (fait de la victime ou fait du tiers), [2001] RTD civ., 374–376.

sanction of the equity by the return to a notion abandoned since the Bertrand decision but taken up again in a recent ruling: fault due to upbringing. This lead to a father being held responsible for the alcoholic state of his child who became a casual car-thief.[57] Shared responsibility as indicated in artt. 1384 and 1385 of the Civil Code "gives reason to conclude in a partial liability of the guardian within certain limits whereby, although the victim cannot be accused specifically of something, one is entitled to consider that the attitude of the guardian is not clearly established to be so incorrect for it to be fair for him to bear all the responsibility".[58]

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

53 French law has no difficulty in extending strict liability of "adults" to younger subjects. But, what applies to a personal act is also applicable to the guardian. However, one of the issues in liability for damage for things in one's charge is specifically in our law the definition of what "custody" means. Since the Franck case[59] which did not entirely put an end to this debate,[60] it is taught that custody consists of "power to use, direct and control something completely independently".

54 This requirement of independence leads us to consider that when the child uses something belonging to his parents, only the latter possess a real power of direction over the thing and remain therefore the "custodians" in the strictest sense of the term.[61] Furthermore, when the thing or animal causing the damage has been made available to the child by a person in charge of looking after it, it is considered that the latter maintains the quality of keeper of the thing, which caused the damage.[62]

55 On the other hand, when the thing belongs to the child, case law readily recognises that the latter is exercising independent power over the thing and may therefore be classified as "keeper".[63] The solution is identical for an abandoned thing.[64] A commonly discussed and undoubtedly questionable phenom-

[57] CA Nancy, 10 septembre 1996 in *Juris-Data* no. 1996-049122.
[58] G. Durry, [1969] RTD civ., no. 11, 340 (observations).
[59] Ch. Réunies, 2 déc. 1941, *Recueil Critique de jurisprudence et de législation Dalloz* (DC.), 1942, 25, note G. Ripert; S., 1941.1.217, note H. Mazeaud; [1942] JCP II, 1766, note Mihura.
[60] For an exhaustive view, refer to: G. Viney/P. Jourdain (supra fn. 17), 644 et seq.
[61] See for instance, Cass. Civ., 15 janvier 1948 in [1948] D., 485, note G. Ripert*;* [1949] JCP II, 4649, note R. Savatier.
[62] Cass. Civ. 2ème, 5 mai 1978 in [1979] JCP II, 19066, 2ème esp., note F. Chabas, obs. A. Lavagne; [1979] *Revue trimestelle de droit sanitaire et social* (Rev. trim. dr. sanit. et soc.), 270.
[63] See Cass. Civ. 2ème, 14 mai 1963 in [1963] D., 500*;* [1963] Gaz. Pal. 2, 117 Cass. Civ. 2ème, 6 janv. 1993 in Bull. Civ., II, no. 5.
[64] Cass. Civ. 2ème, 30 janvier 1991 in Bull. Civ., II, no. 41.

enon is the absence of the child's (particularly a young child's) ability to understand, which no longer impinges on his capacity as keeper. However, if previously the inability to understand prevented the independent exercise of control over the thing, case law considered that the notion of independence did not refer to the intellectual capacity to correctly use the thing but only to the possibility of exercising a non-subordinate power over it. In the matter in question, the child was 3 years old, fell from a swing when the wooden seat broke and in his fall injured his playmate with the stick he was holding. The Court of Cassation considered that "acknowledging that the child had the use and control of the stick, the Court of Appeal did not have to determine, despite the young age, whether the child had the capacity to understand".[65] Since this decision, the solution seems henceforth acquired and several rulings[66] have confirmed the liability of the minor with no capacity to understand on the basis of art. 1384, subs. 1.

Custody of a thing or an animal by a child generally leads to accumulation of the child's liability and liability due to things or animals.[67] There are three different situations according to whom is the owner of the thing with which the child caused the damage: 56

a) Either the thing or animal, cause of the damage, belonged to the parents

In this case, the victim may invoke … 57

i) art. 1384 subs. 1 (damage caused by inanimate objects) or art. 1385 (damage caused by animals)[68] directly against the parents in their capacity as guardians, or

ii) art. 1384 subs. 4 concerning liability of parents with regard to their children, or

iii) *both bases* simultaneously (damage caused by inanimate objects/animals and children). It would seem that the judge may only reject one of the two with regard to the liability system invoked if the conditions of eligibility are not present but, under no circumstances can he reject one based on non-cumulative actions.[69]

b) Either the thing or animal belonged to a third party

The victim may then sue: 58

[65] Arrêt Gabillet, Ass. Plen., 9 mai 1984, prec.
[66] See for instance, Cass. Civ. 2ème, 17 octobre 1990 in Bull. Civ. II, no. 204; *Juris-Data* no. 1990-702745.
[67] G. Viney/P. Jourdain (supra fn. 17), 1010.
[68] Cass. Civ. 15 juin 1948, préc.
[69] G. Viney/P. Jourdain (supra fn. 17), no. 713, 680.

i) the third party on the basis of art. 1384, subs. 1 (damage caused by inanimate objects) or art. 1385 (damage caused by animals) in his capacity as keeper, or

ii) invoke art. 1384, subs. 4 to claim parents' liability for their child, or

iii) combine these two actions. There again, accumulating these two complementary actions is permitted which would enable a conviction jointly and severally if the judge considers the damages were due to the thing or the animal and the child's fault.

c) Either the thing or the animal belonged to the child itself

59 In this case, the victim can choose between:

i) action brought against the child himself in his capacity as keeper (art. 1384, subs. 1), or

ii) action brought against the parents for their child's act (art. 1384, subs. 4), or

iii) combine these two actions. The victim may thus obtain a conviction with joint and several liability. This concerns the parents in their capacity and the child as keeper.

iv) It should be noted that case law has gone even further in enabling successive accumulation of one action based on art. 1384, subs. 1 (damage caused by inanimate objects) and one action based on art. 1384 (damage caused by children) both directed solely against the parents. The latter are in this case liable for their underage keepers under the purview of art. 1384, subs. 4, whereby associating these two actions and bases has the considerable advantage for the victim of not having to provide proof of the child's fault to render the parents liable.[70]

60 With regard to the child owner of a car or motorcycle, which French lawyers prefer to call a "motorised ground vehicle" since the 1985 law, rules on liability have given rise to special provisions. The minor enjoys a specific protection in his capacity as plaintiff but not as tortfeasor. He is consequently subject to general law with particular provisions.

[70] Cass. Civ. 2ème, 10 février 1966 in [1966] D., 333, concl. Schmelck; [1968] JCP II, 15506, note A. Plancqueel – Cass. Civ. 2ème, 8 avril 1976 in [1976] D., IR, 211; [1976] JCP IV, 180 – Cass. Civ. 2ème, 24 mai 1991 in Bull. Civ., II, no. 159.

D. Insurance Matters

11. a) Are children covered by family liability insurance policies?

The purpose of householder insurance is to cover liabilities incurred in private life by persons for whom he is liable under civil law. The objective is to primarily cover the liability of parents with regard to their children[71] who are not insured individually but included in the parents' insurance policy. 61

This insurance requires that the aforementioned children be subject to parental authority of both or one parent and does not differentiate between the type of relationship. The main condition is that of minority, although some policies additionally require the children to live at the domicile of the policyholder. Furthermore, for damages to be covered they must be suffered by a "third party", a notion generally understood to mean any person not having the capacity of the insured; damages must be the result of an action exercised in private life. 62

Consequently, the householder insurance policy covers the liability of the policyholder's children, by application of artt. 1382 to 1386 and thus covers personal liability of the child and his liability as keeper of an animal or thing. 63

Do these policies cover the risk of liability only or is the liability cover part and parcel of a comprehensive insurance policy, e.g. part of a household contents or occupier's liability insurance?

In practice, most parents are covered by insurance, often without being aware of the fact. Householder civil liability insurance is very often included in the "householder fully comprehensive insurance policy" which tenants and house owners usually have. Proof of this insurance is usually required by mortgage companies providing a loan and also by landlords when a tenant rents a property. Most households are therefore insured but this householder insurance is part of a bigger policy. 64

b) Whatever kind of insurance is available – are efforts made on the part of the insurance industry to risk-rate premiums e.g. by making the level of the premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or claims/no-claims rating or by reserving termination rights in case of repeated accidents?

As opposed to automobile insurance which is subject to a claims/no claims index, liability insurance premiums are not subject to increases/decreases according to the number of claims or persons covered. It is customary to deter- 65

[71] Juris-classeur Responsabilité civile et assurances, fasc. 580: assurances terrestres – activités diverses – assurance responsabilité civile chef de famille, no. 4.

mine the premium for householder civil liability insurance according to average costs provided by statistics and not on a case-by-case basis.[72]

12. a) How many per cent of families are covered by one or another form of family liability insurance?

66 It should be noted that most parents often possess such insurance without knowing it, as it is often included in comprehensive policies. The "householder fully comprehensive policy" thus covers the children within the scope of protection accorded to descendants of the head of the household. Furthermore, schools require schoolchildren to have civil liability cover, specifically with regard to extracurricular activities: travel, field trips, excursions etc.

67 To quote some figures in this area, civil liability insurance in 2002 represented 6% of the revenue of insurance companies in terms of property and liability; householder comprehensive insurance represented 14%.[73] This means premiums amounting to € 2.2 billion and € 5.1 billion respectively. For information, automobile insurance represents 44.8% of this revenue, i.e. € 16 billion. Insurance companies have paid out in services and compensation € 2.1 billion in civil liability settlements and € 13.8 billion for automobile claims.[74]

b) Does the liability insurance cover extend to intentional torts committed by the child?

68 The issue of intentional torts requires some additional explanation. Over the years, insurers and case law have tried to reduce the scope of householder liability policies just to accidental damage.[75] However, since 1991, the Court of Cassation systematically cancels clauses excluding cover for damages caused intentionally by persons under the responsibility of the policyholder.[76] Nevertheless, this was not a case of infringing the contractual freedom of the parties and in this respect it was up to them to determine the nature and extent of cover even though the insurance company may not "refuse cover according to distinctions based on the nature or gravity of the tort of the person under the policyholder's responsibility".[77]

69 Does this mean that this type of policy covers any intentional tort? Certainly not. Art. L 113-1 of the *Code des Assurances* (Insurance Code, C. assur.) spe-

[72] Y. Lambert-Faivre, *Droit des assurances* (11th edn. 2001), no. 445, 317.
[73] Source: Fédération Française des Sociétés d'Assurance: www.ffsa.fr, *Cahier statistique pour l'année 2002*.
[74] See supra fn. 73.
[75] Cass. Civ. 1ère, 3 juin 1986 in *Juris-Data* no. 001065.
[76] Cass. Civ. 1ère, 12 mars 1991 in [1991] JCP, II, no. 21732, note J. Bigot; [1991] *Revue générale des assurances terrestres Revue Générale des Assurances Terrestres* (RGAT), 633, note R. Bout.
[77] Cass. Civ. 1ère, 24 mars 1992 in [1992] RGAT, 347, note J. Kullmann.

cifically excludes cover by the insurer of an intentional tort.[78] There are two different cases:[79]

In the event of a tort by the policyholder, the insurer can be exempted from the cover if the damages were caused voluntarily. The policyholder might be one of the parents, responsible for a personal fault on the basis of art. 1382 of the Civil Code, or else the child himself, also personally liable. 70

In the event of a fault by a person under the policyholder's responsibility, the insurer cannot be exempted from the cover as insurance was for third-person and not personal insurance. In this respect, if a child commits a wrongful act on purpose, the parents could be covered anyway. In this case the tortfeasor is not insured but those civilly liable for him are. 71

13. a) Are the parents under a private law obliged to take out liability insurance for their child?

A law dated 10 August 1943 required parents to insure against accidents of their children at school or on the way to school. As no decree was passed, the law was never enforced.[80] Consequently, parents are not legally bound to insure their children. However, it is obvious that this approach is increasingly recommended. French legal doctrine is overwhelmingly in favour of compulsory insurance for the householder,[81] but has had little impact. Some writers also call for a legislative reform that would not be to incur the liability of insurance but to simply replace parent liability with a system of insurance law.[82] 72

Nevertheless, it should be noted that in a memorandum dated 21 September 1999, the Minister of Education stated that for certain events (outings beyond usual hours, lunch break or overnight stays) insurance was compulsory.[83] Apart from the fact that this was a simple interpretation of the law, this solution unfortunately remains an isolated one. 73

[78] Not only must intention relate to the action that caused the damage, but also to the damage itself: Cass. Civ. 1e, 6 décembre 1994 in [1995] Resp. civ. et assur., comm. no. 63.

[79] J.-C. Saint-Pau/F. Gonthier, *L'enfant et l'assureur. Droit et patrimoine* (2000), no. 87, 57–58.

[80] *Accidents à l'école, responsabilité et assurances*, Centre de Documentation et de d'Information sur l'Assurance, Fiche C123, octobre 2001, published by the Fédération Française des Sociétés d'Assurances, 3.

[81] See for instance, F. Leduc, La responsabilité des père et mère: changement de nature: 10 ans de jurisprudence commentée, [1998] Resp. civ. et assur., hors série déc. 1998, chron. no. 92 et F. Alt-Maes, La garde, fondement de la responsabilité du fait des mineurs, [1998] JCP I, 154.

[82] See for instance G. Viney, chron., [1985] JCP I, 3189, no. 22 et seq.; F. Terré/Y. Lequette/P. Simler (supra fn. 31), 704.

[83] *Accidents à l'école, responsabilité et assurances*, Centre de Documentation et de d'Information sur l'Assurance, Fiche C123, octobre 2001, published by the Fédération Française des Sociétés d'Assurances, 3.

b) Does the government do anything to encourage families to take out insurance coverage, e.g. by requiring families in the course of admission of children to state school to establish that they are covered?

74 Educational facilities generally require parents to take out insurance to cover extracurricular risks concerning their children and this rule applies to both private and public schools. Indeed according to *Ministère de l'Éducation nationale* (Education Ministery) directives the directors of educational facilities are bound to check (usually at the very beginning of the school year) that pupils are covered by such an insurance policy by requesting them to provide the school with an insurance certificate.

14. a) Do private insurance companies enjoy rights of recourse against the child in the event they pay up a damage claim brought by the victim against the parents?

75 Theoretically, the insurer can use several subrogatory recourses: art. 121-12, subs. 1 of the Insurance Code states "the insurer who has paid compensation is subrogated to all rights of the policyholder, up to this amount, against the third party who has caused the damage which incurred the insurer's liability". The insurer may thus act on behalf of the insured against a third party co-responsible for the compensated damages. Although the right of recourse exists in substantive law, in practice it can rarely be applied against a child.[84] French law raises two obstacles to these actions: firstly, a contractual immunity as an insured person and, secondly, a legal immunity as descendants or ascendants:

76 Firstly, there can be no recourse against the policyholder himself as art. L. 121-12 of the Insurance Code provides for subrogation "to all rights of the policyholder and actions against a third party". However, insurance policies often grant the capacity of insured to the children of the policyholder following a stipulation for third-party insurance for the child (this is generally the case for householder comprehensive policies or householder liability insurance). In this case, the child is no longer a third party with regard to the policy; he is personally insured in the same way as the parent policyholder. The insurer cannot take action against the child, nor against the parents as they are contractually covered.

77 Furthermore, recourse can only be exercised in accordance with art. L 121-12, subs. 3 "by waiver of previous provisions […] against the children, descendants, […] and generally any person usually resident at the home of the insured, except in the case of malevolence committed by one of these persons". This interdiction of subrogatory recourse between ascendants and descendants, which has been termed as "public order",[85] concerns children who are

[84] J. Saint-Pau/F. Gonthier (supra fn. 81), 60 et seq.
[85] J. Saint-Pau/F. Gonthier (supra fn. 81), 60 et seq.

directly related or who usually live in the policyholder's home.[86] Should the parents' insurance company have paid out compensation caused by the child to a third party, following proceedings initiated on the basis of art. 1384, subs. 4 of the Civil Code, the insurer may not, after compensation, exercise a subrogatory action against the child. Legal immunity stated in art. 121-12, subs. 3 of the Insurance Code prohibits him from doing so.

78 However, there is an exception to this immunity as it can be lifted in the event of "malevolence committed by one of the persons" benefiting from immunity. The notion of malevolence requires some explanation. Following a period where the Court of Cassation considered that malevolence and intentional tort were the same,[87] it then decided in a spectacular reversal of case law that the insurer only recovered his subrogatory action in the case of malevolence of the child towards the insured (hypothetically, and in this case, the father of the child).[88] Since this 1987 ruling, if a child attacks one of the members of the family who is insured (the status of the insured might be different from that of the victim), once the compensation has been paid, the insurer could then sue the child who may not invoke his capacity as insured to counter the action.[89] Consequently, the child will be personally liable on his personal estate with regard to the insurance.[90]

79 Thus, with the existence of a householder liability insurance containing insurance of the policyholder's child, let us imagine a child (perpetrator = insured) attacking (intentional act and damages) one of his pals (victim = contractual third party):

80 Either the courts declare the parents liable on the basis of vicarious liability: in this case, the policy comes into effect and the insurer must compensate the victim in accordance with risks covered. He may not cite art. L 113-1 of the Insurance Code to waiver the cover as the intentional tort is not committed by the policyholder himself but someone for whom he is liable. In this case, no recourse is possible for the insurer as the child's malevolence was not against the insured but someone not included in the policy. This is the most usual situation.

81 Either the courts declare the child liable on the basis of art. 1382 of the Civil Code: in this case, the insurer can waive the cover as the tort was intentional (art. L 113-1 of the Insurance Code) and the question of subrogatory action

[86] For instance step-parents after a divorce. See civ. 1e, 2 juillet 1991, Bull. civ. I, no. 224; [1991] Resp. civ et assur., comm. 400 et Chron. 27 Groutel; [1991] D., IR 203; [1991] RGAT, 587 note Maurice.

[87] Cass. Civ. 1ère, 5 janvier 1970 in [1970] JCP II, no. 16265, note R. Lindon.

[88] Cass. Ass. Plen., 13 novembre 1987 in [1988] Gaz. Pal., 1, 120, note H. Margeat et J. Landel, stemming from Cass. Civ. 1ère, 6 mars 1985 in [1986] D., jur., 29, note crit. C.-J. Berr and H. Groutel.

[89] Refer to art L. 113-1 Insurance Code. On intentional fault, see no. 11.

[90] Refer to J. Saint-Pau/F. Gonthier (supra fn. 81), 61.

does not arise. Nevertheless, as strict liability of parents is henceforth incurred except for a force majeure, this situation is a textbook case.

b) Does the law of social security provide a limit on the right of recourse of the insurance company against the child or his parents or legal guardian?

82 Theoretically, there is no limit to this right of recourse provided by social security law, the only restraint being provided by insurance law itself. Children and parents remain protected by immunity, including with regard to social security.

83 It should be specified that the Social Security retains the right of recourse against the insurer[91] even if it has lost against the insured or persons for whom he is liable. The moral or emotional reasons which lead to waiver of the subrogation are invalid when the action is directed against the insurer itself. In this respect, the Court of Cassation established its case law in favour of the Social Security in a noteworthy ruling in 1983[92] and then confirmed this in another matter in 1992.[93]

E. Scope of Liability/Damages

15) Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

84 Officially, there is no rule aimed at reducing compensation due by the child with regard to his status as minor? Liability law makes no distinction between liable parties from the strict pecuniary point of view when the amount of damages allocated to the victim is set.

85 However, with regard to the principle of compensation, the *Conseil Constitutionnel* (Constitutional Court) asserted that it was for parliament, "where applicable, to arrange an appropriate specific system of compensation which reconciles the interests at hand".[94] Despite the temptation to interpret in this a restriction of the principle of complete compensation for the damage incurred,

[91] Concerning traffic accidents, an important Protocol was signed on 24 May 1983 in order to simplify the subrogative recourses from Social Security against Insurers ("*Protocole d'accords concernant le recouvrement des créances des organismes de protection sociale auprès des entrepises d'assurances à la suite d'accidents causés par des véhicules terrestres à moteur et par des bicyclettes*": H. Margeat/J. Landel, Le protocole assureurs-organismes sociaux du 24 mai 1983, *no. spécial de droit social*, supplément au no. 4 d'avril 1984.

[92] Ass. Plen., 3 juin 1983 in [1983] D. II, 557, Conclusions Cabannes; [1984] R.G.A.T., 241; Y. Lambert-Faivre, De la dégradation juridique des concepts de "responsable" et de "victime" à propos des arrêts de l'Assemblée Plénière du 3 juin 1983, [1984] D., Chr., 51.

[93] Civ. 2ème, 8 janvier 1992 in [1992] RCA, no. 96; [1992] RTD civ., 574, obs. P. Jourdain.

[94] *Conseil Constitutionel* (Cons. Constit.), décembre 82–177 du 22 octobre 1982: Rec., 61; *Journal officiel* (JO) 23 octobre 82, 3710; [1983] Gaz. Pal. 1, 60, note F. Chabas; [1983] D., 189, note F. Luchaire; [1983] *Droit Social* (Dr. Soc.), 177, note R. Savatier; [1983] *Revue de Droit Public* (RDP), 360, note L. Favoreu.

a more cautious interpretation is advisable. A later ruling handed down by the Constitutional Court[95] clearly stated that liability on the basis of Art. 1382 of the Civil Code had acquired constitutional value. This statute postulated a principle of complete compensation whereas some writers[96] now believe that it is no longer possible to make an exception to the principle of complete compensation. The status of the under-age child should not therefore make it possible to lower the amount of damages strictly from a legal point of view. This does not in any way hamper the court's freedom of assessment in light of the circumstances of the case.[97]

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

The liability of a child for his/her personal actions is generally biased by the joint proceedings instigated by the victim against both the child and his parents[98] or the institution in charge of the minor. The child's insolvency or the excessive weight of his compensation debt is therefore more of a theoretical than practical issue which has not to date caused any legal controversies. 86

However, excesses in recognising children liable are frequently stigmatised by case law commentators and other doctrinal writers. There have been many arguments against the Bertrand decision[99] and its foreseeable excesses in a similar vein as the arguments which censured the major turnarounds in 1984.[100] From now on, less than liability regulations themselves, which have now been confirmed by the Court of Cassation on several occasions, the issue of assurance *lato sensu* holds the main ground in thoughts about French legal doctrine.[101] 87

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

Neither bankruptcy *per se* nor treatment of individuals' and families' excessive debt has been the subject of original provisions inserted in the *Code de la consommation* (Consumer code, C. Consom.) since 1989[102] and with many re- 88

[95] Cons. Constit., décembre, no. 99-419 in DC, 9 novembre 1999: JO 16 novembre 99; [2000] JCP I, 280, no. 1, obs. G. Viney.

[96] G. Viney/P. Jourdain, *Les effets de la responsabilité. Traité de droit civil sous la direction de J. Ghestin*, *tome 3, LGDJ* (2nd edn. 2001), 566.

[97] For fairness exercised by judges see no. 42.

[98] See no. 123.

[99] On Bertrand case, see nos. 93 and 112.

[100] See nos. 2 and 52.

[101] Regarding Insurance matters, see no. 60.

[102] Loi no. 89-1010 du 31 décembre 1989 relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles, JO 2 décembre 1990, 18; see also: P.-L. Chatain, La loi no. 89-1010 du 31 décembre 1989 relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles, [1990] D., *Actualités législatives* (Actu. Lég.), Comm. Leg., 43.

forms thereafter.[103] Devised to provide answers for families with the largest debts, the procedure for dealing with excessive debts may be applied to all "natural persons of good faith who are clearly incapable of discharging all non-professional debts outstanding and ensuing".[104]

89 The debtor meeting this definition may refer the matter alone to the *Commission régionale de surendettement* (regional excessive debt commission),[105] which will attempt in a preliminary reconciliation phase to develop a "contractual recovery plan"[106] with the approval of both the debtor and his creditors. In the event of failure during the out-of-court phase, the commission will issue recommendations which the courts will render executable after verification and in the absence of any dispute from the parties.[107]

90 The said recommendations actually include various measures prescribed by the commission which, depending on the gravity of the situation, could entail a partial postponement of the payment due date, rescheduling the debt, a reduction in interest rates, a moratorium or even partial or total cancellation of the debts.[108] Proposed solutions must, irrespective of the measures proposed, ensure a "living minimum"[109] which is tantamount to the minimum resources required to cover routine necessities.

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

91 Law on individual's excessive debt admittedly stipulates a cancellation or reduction in debts although this rule is not absolute. Some debts are subject to stronger protection and can incur none of the rearrangements made available to conventional debts. This is the case for food debts, those demanded by the tax authorities and those demanded by Social Security organisations.

92 Any other debt, given the lack of any legal provision, may be considered as falling within the purview of the commission's recommendations or may be modified within the framework of contractual receivership proceedings. This will therefore apply to criminal and quasi-criminal debts.[110]

[103] Loi no. 95-125 du 8 février 1995, JO 9 février, 2175 and Loi d'orientation no. 98-657 du 29 juill. 1998 relative à la lutte contre les exclusions, JO 31 juill. 98, 11679.
[104] Art. L 331-2 du *Code de la consommation* (Consumer Code, C. consom.).
[105] Art. L 331-3 du C. consom.
[106] Art. L 331-6 du C. consom.
[107] Art. L 332-1 du C. consom.
[108] Art. L 331-7 et L 331-8 du C. consom.
[109] Art. L 331-2 du C. consom.
[110] P.-L. Chatain/F. Ferriere, Le nouveau régime du traitement du surendettement après la loi d'orientation no. 98-657 du 29 juill. 1998 relative à la lutte contre les exclusions, [1999] Rec. D., Chron., 287.

The distinction in compensation debts between debts arising from deliberate acts and those arising from involuntary acts will therefore not apply, as each type of debt is subject to the same proceedings. 93

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

Parents' liability arising from acts committed by their child is based on art. 1384, subs. 4 of the Civil Code, which states that: "for as long as the mother and father exercise parental authority, they shall be jointly and severally liable for the damage caused by their underage child who lives with them". 94

In 1804, when the Civil Code was adopted, the purpose of this article was to sanction a wrongful act. The purpose of provisions regulating liability in general was to sanction the tortfeasor. Parents were liable for acts committed by their children because they were liable for inadequate supervision or upbringing of their child.[111] Parents could be exempted from liability by providing proof that they had not committed any wrongful act. 95

The spirit behind current provisions stems in part from the idea of compensation of the victim of damage. The aim is more to compensate the victim than to sanction the perpetrator of the damage. 96

Parental liability as a result of acts by their child has developed accordingly: 97

The Bertrand decision handed down by the civil chamber of the Court of Cassation laid the foundations of a new development.[112] The decision states the principle of strict liability of the parents for their child: "only *force majeure* or contributory negligence may exempt the father from strict liability incurred as the result of damage caused by his underage son who lives with him". 98

Parental liability therefore ceases to be based on the notion of a wrongful act; parents may no longer seek exemption by proving they had not perpetrated any wrongful act. This notion of strict liability implies that a parent can now seek exemption only by proving force majeure which prevented him from acting to avoid an act caused by the child which led to damage or contributory negligence.[113] 99

[111] Refer to G. Raymond, *Le risque civil de l'éducation de l'enfant. Drôle(s) de droit(s). Mélanges en l'honneur d'Élie Alfandari* (2000), 437.

[112] Arrêt Bertrand, Cass. Civ. 2e, 19 février 1997 in Bull. civ., II, no. 56; [1997] D., 265, note Jourdain; [1997] D., somm., 290 obs. D. Mazeaud; [1997] JCP II, 22848, concl. Kessous, note Viney; [1997] Resp. civ. et assur., chron., 9 par Leduc; [1997] Gaz. Pal., 2, 572, note Chabas; [1997] Dr. Fam, no. 83 note Murat, (1re espèce); *Petites Affiches* 29 octobre 1997, note Galliou-Scanvion.

[113] Thid party contributory negligence, the third ground for exoneration of liability, was set aside from the rules concerning parental liability for the wrongul acts of their minor children.

100 An instance of justification was attempted to be identified in the notion of risk for Mr Jourdain as "the risk justifies this liability; it is the source of compensation for the victim and lays the foundation for further liability which occurs directly for the liable party independently of any event which caused the perpetrator's liability; it is because the activity of the under-age child as a result of his fragility and/or lack of experience exposes third parties to objective risks that it is considered fair to incur the parents' liability".[114]

101 Mr Pohé[115] sought a legal basis for full parental liability as a result of an under-age child's acts through an *a contrario* interpretation of art. 482 of the Civil Code. Art. 482 of the Civil Code states that: "an emancipated minor ceases to be under the authority of his father and/or mother. Parents are not subject to strict liability as a result of solely their capacity as mother or father for the damage the child may cause to others after being emancipated". The *a contrario* interpretation of subs. 2 of this article allows us to conclude that parental liability for damage caused by an under-age child prior to emancipation entails strict liability.

2. If parental liability is based on their own fault is the burden of proof on the victim or is there a rebuttable presumption of fault?

102 The liability of the parents is incurred strictly and automatically and is not based on a wrongful act perpetrated by the said parents but on the existence of an act committed by the child, which results in damage.

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense, b) persons who have the right of custody; c) persons just living together with the child?

103 Art. 1384, subs. 4 of the Civil Code stipulates that "insofar as the mother and father exercise parental authority, they are jointly liability for the damage caused by their underage child living with them". Three conditions must be met to incur the liability of parents as a result of their child: the child must be a minor; the parents must exercise parental authority over the child, and the child must live with the parents. As the minority of the child does not raise any difficulty, the second and third conditions are of more interest to us in this instance.

104 Parents exercising parental authority over the child who lives with them are therefore strictly liable. These provisions apply without raising problems insofar as there is no division between the parents. Law no. 2002-305 dated 4 March 2002 concerning parental authority recently amended art. 1384, subs. 4

[114] P. Jourdain sous Ass. Plen. 13 décembre 2002, [2003] D., jur., 234. See also G. Raymond (supra fn. 113), 447: "Parental liability is inherent in the parental office; by giving birth to children we take risks, among those is the one resulting in these children causing damages."

[115] Jurisclasseur Responsabilité civile et assurance, Fasc. 141 no. 11.

of the Civil Code. The new wording replaces the terms "the mother and father, insofar as they exercise custody rights" with "the mother and father, insofar as they exercise parental authority". The reference to custodial rights in establishing parental liability was removed.[116] Such a legislative amendment was expected[117] insofar as reference to custodial rights was one of the remnants of the original Civil Code and had been replaced elsewhere by the notion of parental authority.[118]

105 Art. 1384, subs. 4 does, however, set a second condition to incur a parent's liability; the child must live with his parents. The legal requirement does pose problems when applied in case law. Initially, parental liability as a result of an act by an underage child was based on the presumption of wrongful act by the parents as a result of lack of supervision or education, which could rightly be applied to parents only insofar as they materially lived with the child.[119] On 19 February 1997, the second civil chamber of the Court of Cassation handed down a decision which considerably modified how case law applies the condition of "cohabitation". The Samda decision[120] states that "the exercise of right of contact and housing does not halt cohabitation with a minor and his parents who exercise custody rights over him". The first step was taken; cohabitation with the child, the foundation of strict parental liability, is no longer understood as being material cohabitation with the child.[121] The new construct was completed by a decision handed down by the second civil chamber of the Court of Cassation dated 20 January 2000.[122] In its findings the Court of Cassation defined the concept of cohabitation and asserted that it was "the result

[116] Using the notion of custody was justified when the fault in the education of the child was the ground for parental liability. Indeed, custody implies the power of controlling the acts of the child. Since the principle being applied now is the one of strict liability, and since the fault of the parents does not need to be established, there is no reason anymore to refer to custody.

[117] For instance refer to G. Viney/P. Jourdain (supra fn. 98), 986 et seq.

[118] Loi no. 87-570 du 20 juillet 1987 sur l'exercice de l'autorité parentale et loi no. 93-22 du 8 janvier 1993 relative à l'état civil, à la famille et aux droits de l'enfant et instaurant le juge aux affaires familiales. On the point of devolution of parental authority see no. 106.

[119] According to E. Blanc cohabitation with the child is "*an essential condition, a governing idea*" of the parental liability system; as a consequence judges had to duly control its effectiveness, before holding the parents' liable. E. Blanc, *La responsabilité des parents du fait de leurs enfants mineurs* (1952), 109 et 115. Contra see G. Viney: cohabitation must be understood not as a prerequisite condition to parental liability but as an exoneration tool enabling parents to escape from liability, G. Viney/P. Jourdain (supra fn. 17), no. 876, 992.

[120] Arrêt Samda, Cass. Civ. 2e 19 février 1997 in Bull. civ. II, no. 55; [1997] Gaz. Pal., 2, 575, note Chabas; [1997] Dr. Fam, no. 97, note Murat; [1997] RTD civ., 67 obs Jour dain; *Petites Affiches* 29 décembre 1997, note Dagorne-Labbe; *Petites Affiches* 14 janvier 1998 note Dumont; [1997] Gaz. Pal., 1 doctr 658 étude Galliou-Scanvion.

[121] Yet, this solution must be qualified; indeed, in this case the mother was exclusively entitled with parental authority, the father was not. Therefore it was impossible to hold him liable since he did not have any custody right regarding the child, and since this is a prerequisite to hold parents liable.

[122] Cass. Civ 2e 20 janvier 2000 in Bull. civ., II, no. 14; [2000] D., somm., 469, obs. D. Mazeaud; [2000] JCP II, 10374, note Gouttenoire-Cornut; [2000] JCP I, 241, obs. Viney; [2000] Resp. civ. et assur., no. 146, note Groutel; [2004] 4/38 RJPF, 21 note Chabas; *Petites Affiches* 9 novembre 2000 note Dagorne–Labbe (1re esp); [2000] RTD civ., 340, note Jourdain.

of legal residence by the child at the domicile of his/her parents or of one of them". This solution, which has subsequently been confirmed by the Court of Cassation[123] completes the "dematerialisation" process concerning the concept of cohabitation.[124] Judicial cohabitation, which is abstract in the sense that legal residence of the child is determined by a decision handed down by the courts, has replaced material, concrete cohabitation with the child's parent. The courts have removed any substantiation from the concept of cohabitation to avoid the application of a condition that only a parliamentary intervention could completely dispel, and which had become difficult to reconcile with the existence of strict parental liability (as defined as such by the Bertrand decision).[125] Consequently, the fact that a child is merely entrusted to a third party by his parents does not in any way change the rule of strict parental liability.[126] Should the child live for a while with his grandparents[127] or any other member of the family, with a family friend or reside as a boarder in a boarding school,[128] the child's parents remain strictly liable for his acts. If no decision from the courts has occurred to amend the child's legal residence, both his parent's remain strictly liable. Such a solution does, however, prompt totally iniquitous consequences when the child's parents are separated or divorced. Under such circumstances, only the parent to whom the courts have awarded the child's legal residence will be strictly liable for the child's acts. The parent exercising parental authority who has only right of contact and housing shall be liable only on the basis of the wrongful act. This solution has been criticised. If legal residence of the child should be interpreted as "the place where the child lives as stipulated by law or by a legal decision",[129] there is no obstacle to making the exercise of right of contact and housing fall within this category. After a separation or divorce, the child's legal residence as well as rights

[123] See for instance, Cass crim 29 octobre 2002, Bull crim no. 197; [2003] D., jur., 2112, that held: "Cohabitation of the child with his/her parents is the result of the legal residence of the child at the domicile of his parent or of one of them, it does not end in cases where the child is, according to a private contract, entrusted with a holiday's camp, that is not in charge of organising the way of life of the child on a permanent basis." The case was concerned with damages caused by the criminal behaviour of 16 year-old minors, during their stay in a holiday camp located more that 1000 km from the parental home.

[124] See for instance, F. Chabas, [2000] 4/38 RJPF, 21.

[125] See G. Viney/P. Jourdain (supra fn. 17), no. 876, 992.

[126] Cass. Crim 10 octobre 1972 in [1973] D., 75 note J.L: "to entrust temporarily the child with a third party does not affect the custody right of the parents regarding the child, nor the presumption of liablility that lies upon them."

[127] Nevertheless, prior solutions to the Samda case had held that strict parental liability could not be sought where cohabitation with the child ceased for "*a legitimate reason*", as was the case where the child was on holidays with his grandmother (Cass. Civ. 2e 24 avril 1989 in [1990] D., 519 note Dagorne-Labbe) or where the child was entrusted with a boarding school when the damage occurred (Cass. Civ. 2e 2 juillet 1991 in Bull. civ., II, no. 224). The formulation of the judgment of the Court of Cassation leads us to conclude the likelihood of the relinquishment of this jurisprudence by its second civil chamber.

[128] For instance Cass. Civ. 2e, 16 novembre 2000 in [2001] JCP I, 340, no. 18 obs. Viney; [2001] RTD civ., 603, obs. Jourdain, The Court of Cassation held: "*the fact that the child is at school, even in a boarding school, does not put an end to cohabition with his/her parents*".

[129] A. Gouttenoire-Cornut, note sous Cass. Civ. 2e 20 janvier 2000 et Cass. Civ. 2e 9 mars 2000, [2000] JCP II, 10374, 1609.

of contact and housing awarded to the other parent is clearly established by the judge.[130] The cohabitation condition posed by art. 1384 subs. 4 of the Civil Code is therefore understood in the sense of legal cohabitation established by decision of the courts.

106 Consequently, in the event that the child was entrusted to the Child Protection Sevices as a result of a court decision and then placed in a home or with foster parents, the condition of cohabitation required to incur strict parental liability is no longer met.[131] Under such circumstances, only proceedings based on the general principle of vicarious liability hinged upon art. 1384, subs. 1 of the Civil Code, against the home or foster parents will enable the victim to cite strict liability.[132] The Blieck decision,[133] a decision which lays down the principles in this matter, does set a general principle of vicarious liability insofar as a person[134] accepts the burden of organising and constantly monitoring the lifestyle of another person. In agreeing to receive the child, the institution or foster parents agree to monitor the lifestyle of the child with whom they have been entrusted. The court decision endows this award of the child with a permanent nature which is required by Blieck jurisprudence. The decision handed down by the judge with authority over the organisation of the child's life will establish under these conditions who is strictly liable for the child's acts: the parents or the institution.[135]

[130] This solution would be compatible with the logic of compensation, and would allow the implementation of the notion of cohabitation to find consistency. Moreover, it would strengthen the double-parenting after divorce, introduced by art. 373-2 of the Civil Code. It would match the potential increase of problems linked with shared-residence of the child after parental separation. Indeed, with both parents entitled to joint exercise of parental authority, strict liability will lie upon the parent who was actually living with the child when the damage occured. This solution is also compatible with the principle of liability in solidum.

[131] To sue the parents under art. 1384 al. 4 would be impossible, but they can be made liable for fault.

[132] Cass. Ass. Plen. 29 mars 1991 in Bull. Civ., 1991 no. 1; [1991] D., 324 note Larroumet; [1991] JCP II, 21673, concl., Dontenwille, note Chabas; *Répertoire du Notariat Defrénois* 1991, 729, obs. Aubert; [1991] RTD Civ., 312 obs. Hauser; [1991] RTD civ., 541 obs. Jourdain; G. Viney, [1991] D., chron., 157.

[133] This case concerned a group (*association*) looking after mentally disabled persons.

[134] This led the courts to hold the institution strictly liable, even thougt the child was exerting his right of contact and therefore was living at his/her parents's home when the damage occurred. In two cases of 6 June 2002, the Court of Cassation held that "*an association entitled by a legal decision to organise and control, on a permanent basis, the life of a minor child, shall according to [art. 1384 para. 1], be strictly liable for damages caused by this child, even though the child is living with his/her parents, since no legal decision came to put an end to this educational task*".

[135] Artt. 376 to 377-3 of the Civil Code. Parental authority can be delegated on a voluntary basis and organised by parents, or be imposed on them by decision of the *juge aux affaires familiales*, in cases of obvious neglect of the child.

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce. Parental authority, not custody, is henceforth the decisive factor in applying parental liability.

107 Art. 371-1 of the Civil Code states that:

> "parental authority is a set of rights and obligations whose end purpose is the protection of the interest of the child."
>
> "parental authority belongs to the mother and father until the child comes of age or is emancipated in order to protect the safety, health and morals of the child, ensure the child's education and development with due respect to his person."
>
> "parents shall include the child in decisions concerning him in accordance with his age and degree of maturity."

108 The rules of devolution concerning the exercise of parental authority are laid down by art. 372 of the Civil Code.

109 The principle is that of joint exercise of parental authority. The Civil Code raises only two exceptions to this principle. In the event that filiation of a child is established with regard to his second parent more than one year after the child's birth or when filiation is established with regard to the second parent by decision of the Court, then the parent who has acknowledged the child first will remain the only parent to exercise parental authority over the child.

110 Irrespective of whether the parents live together and are married, live together or are separated (art. 373-2, subs. 1 states that "the separation of the parents has no influence over the devolution rules concerning the exercise of parental authority"), except for the two exceptions in which only one of the parents exercises parental authority, parental authority is exercised jointly, with parental liability being joint and several.

111 Only the hypotheses of delegation[136] or withdrawal of parental authority[137] may amend the initial devolution stipulated by the Civil Code.

[136] Artt. 378 to 381 of the Civil Code. Withdrawal of parental authority can be ordered by the criminal judge against the parent who has been convicted as author, co-author or party of a crime committed against the child or by the child (art. 378). Withdrawal can also be ordered by the civil judge, without any criminal conviction, against the parent who puts the child's health, security or morality in danger, or who obviously neglects the child entrusted with social service, for more than a two-year period (art. 378-1).

[137] Arrêt Samda, Cass. Civ. 2e 19 février 1997, préc.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

112 The parent awarded parental authority over the child but who, after separation, exercises only right of contact and housing shall not be strictly liable for acts perpetrated by his child which lead to damage, even though the child was materially living with him/her at the time the act was committed.[138] Strict liability is incurred only by the parent to whom have been awarded the child's legal residence.[139] The parent awarded right of contact and housing over the child is only liable on the basis of a personal wrongful act[140] and not on the basis of an alleged inadequate supervision or upbringing.

6. Which elements of a tort must the child have realized for the parents to be liable for it?

113 Substantive law has been determined absolutely, on this point, since the famous Fullenwarth, Derguini, Lemaire and Gabillet decisions handed down by the Plenary Assembly of the Court of Cassation on 9 May 1984.[141] Liability law was originally intended to regulate human behaviour. It sanctioned tortious behaviour of the perpetrator. According to vicarious liability law, parental authority could be incurred only on the basis of tortious behaviour by the parents' under-age child.[142] These four decisions resulted in a spectacular turnabout in case law.

114 The Fullenwarth decision set out the principle of liability without tort of the parents. In this case, the court decided that for the presumed liability to be attributed to the parents as a result of their child's actions, it was enough that "(s)he had perpetrated an act which was the direct cause of damage cited by the victim". The mere action resulting in damage by the child was sufficient to incur the child's parents' liability. The courts pursued this reasoning to its logical conclusion in the Derguini, Lemaire and Gabillet decisions, in which the courts had consequently not attempted to establish whether the child at the origin of the damage was endowed with discernment. In the Gabillet decision, a three year-old child was deemed the custodian of the stick with which the damage had been caused, despite the child's lack of discernment which was not a matter of any doubt given the child's young age.

115 These decisions were the first to herald a development which would conclude in 1997 with the solution adopted in the Bertrand[143] decision: acknowledgement of strict liability of the parents for their under-age child.

[138] Cass. Civ. 2e 20 janvier 2000, préc.
[139] For instance refer to de F. Chabas, [2000] 4/38 RJPF, 22.
[140] Cass. Ass. Plen., 9 mai 1984, préc.
[141] The Court of Cassation hold that the "father's liability implies that the proof of fault can be established, at least the illegal nature of the act", Cass. Civ. 2e 16 juillet 1969 in [1970] RTD civ., 575, no. 7 obs. G. Durry.
[142] Arrêt Bertrand, Cass. Civ. 2e, 19 février 1997, préc.
[143] Arrêt Bertrand, Cass. Civ. 2e, 19 février 1997, préc.

116 The opportunity was taken to re-assert the principle of parental liability without tort by the child in a decision handed down by the second civil chamber of the Court of Cassation on 2 December 1998.[144] In this case, damage (objects placed in a display case were broken) had been caused by the unexplained collapse of an adolescent who was "walking normally in an aisle" in the store accompanied by her mother. The fall of a person could not be deemed a wrongful act as such; Lebreton[145] quite rightly noted that had the mother of the adolescent been the perpetrator of the damage in question, her liability would not have been incurred on the basis of art. 1382 [146] nor of art. 1383 of the Civil Code.

117 The above jurisprudence was confirmed unequivocally by a decision handed down by the second civil chamber of the Court of Cassation on 10 May 2001.[147] The Court decided that "the strict liability incurred by the father and the mother as a result of damage caused by their under-age child who was living with them was not subordinate to the existence of a wrongful act by the child". The tortious nature of the action which resulted in damage was therefore no longer necessary to incur the parents' liability. This position has recently been endorsed by two decisions handed down by the Plenary Assembly of the Court of Cassation on 13 December 2002.[148] The Plenary Assembly decided that "for strict liability of the mother and father exercising parental authority over a minor living with them to be established, it is sufficient that the damage cited by the victim is caused by the child's non-tortious action itself and that only an external cause or contributory negligence can exempt the mother and father from such liability". These two decisions should be considered from another aspect; they extend the application of this solution to the general principle of vicarious liability. The Plenary Assembly handed down these decisions under the auspices of art. 1384, subs. 1, 4 and 7 of the Civil Code.

118 This jurisprudence now seems to be a long-term fixture. It was only very recently that the second civil chamber of the Court of Cassation handed down a ruling on 3 July 2003[149] that quashed a decision from a Tribunal[150] which had precluded the liability of a child's parents on the grounds that "no wrongful act which could incur the (child's) liability based on art. 1382 of the Civil

[144] Cass. Civ. 2ème, 2 décembre 1998 in Bull. Civ., II, no. 292.
[145] See M.-C. Lebretion, La responsabilité parentale: l'abandon d'un système de responsabilité classique pour un système d'indemnisation, [2002–3] *Revue de la recherche juridique – Droit prospectif* (RRJ), 1281.
[146] Ground for personal liability.
[147] Cass. Civ. 2ème, 10 mai 2001 in [2001] D., jur., 2851, rapp. P. Guerder, note O. Tournafond; [2001] JCP II, 10613, note Mouly; [2001] RTD civ., 602 note P. Jourdain; [2002] D., somm. Obs. Mazeaud; [2002] JCP I, 124 obs. Viney.
[148] Cass. Ass. Plén 13 décembre 2002 in Dr. Fam. février 2003, no. 23, 31 note J. Julien; Droit et Patrimoine février 2003 obs. F. Chabas; [2003] JCP II, 10010 note A. Hervio-Lelong; [2003] D., jur., 231 note P. Jourdain.
[149] Cass. Civ. 2ème 3 juillet 2003, legifrance.gouv.fr.
[150] Tribunal d'instance de Charleville-Mézière, unreported.

Code" could be upheld. In its ruling, in principle, once again it was asserted that the liability of the parents incurred on the basis of art. 1384, subs. 4, of the Civil Code "is not subordinate to the existence of a wrongful act by the child".

For some writers, the contours of the new liability law have been completed to leave behind the era of liability and commence a new era of guarantees.[151] The aim is no longer to add one liability to another, but to compensate the damage incurred by the victim without making it necessary to establish the existence of a wrongful act. 119

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

The duty of supervision and upbringing is no longer applied with regard to parental liability as a result of the acts of their under-age child. The parent exercising parental authority and awarded legal residence of the child is deemed liable for any and all damage caused by the under-age child. The presence or absence of a wrongful act by this parent is not taken into account. The only possible grounds for exempting the parent are contributory negligence or *force majeure*, but this has not ever been upheld, to date. 120

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

Parental liability is incurred automatically, irrespective of the location of the child at the time at which damage is caused. Only a court decision may terminate the child's cohabitation with his parents (which is now understood as judicial cohabitation, not substantial cohabitation). Consequently, the fact that the child is at school or at work, or that s/he has been entrusted to a third-party by *de facto* means or as a result of a contract, does not exempt parents from their liability.[152] In the specific instance of damage caused by a child whilst at school, the liability of the schoolteacher[153] (which is automatically replaced by the State's liability) will supplement the strict liability incurred by the child's parents.[154] In contrast, the principle whereby it is impossible to compound the liability of the parents and the employer of the child was raised by the Court of 121

[151] See J. Julien, note sous Ass. Plen. 13 décembre 2002 in Dr. Fam. février 2003, no. 23, 32. See also M.-C. Lebreton (supra fn. 147), 1269–1285.

[152] Concerning the notion of cohabitation of the child with his/her parents see no. 102.

[153] Art. 1384 para. 5 of the Civil Code.

[154] Cass. Civ. 2e, 4 juin 1997 in Bull. Civ., II, no. 168; [1997] D., IR, 159*; Petites Affiches* 28 octobre 1997, 29 note Galliou-Scanvion. This judgement rejected the claim against the decision of the Court of Appeal which held the parents and the State liable in solidum for damage caused by a 7 year-old child in the school playground.

Cassation in a decision handed down on 18 March 1981.[155] The arbitrariness of difference in system has been criticised by legal doctrine with a preference for either the solution entailing the combination of both systems,[156] or one which precludes any combination.[157]

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

122 Before the Samda decision, dated 19 February 1997,[158] jurisprudence had stipulated that "the legal presumption of the liability of the mother and father (ended) with cohabitation if there was a legitimate cause for such termination".[159] The first civil chamber of the Court of Cassation stated in a decision dated 2 July 1991[160] that it ruled that the fact that a child was a boarder at secondary school would legitimately terminate cohabitation with the parents.

123 Following the Samda decision and clarifications provided by the decision of the second civil chamber of the Court of Cassation dated 20 January 2000,[161] the notion of cohabitation now used is that of judicial cohabitation by the child and his parents which may be equated with the concept of legal residence of the child. Consequently, only a legal decision may amend residence. The fact that the child is a boarder at the time at which the damage occurs has no effect on the strict liability incurred by the parents. Jurisprudence subsequently determined the specifics of this situation in a decision dated 29 March 2001:[162] the second civil chamber of the Court of Cassation decided that "the presence of an under-age child in a school, even as a boarder, does not abolish the child's cohabitation with his parents". Consequently, parents remain strictly liable for the actions committed by their child even when the child is boarding. The parents' liability is added to the school's liability which was the most likely liable on the grounds of art. 1384, subs. 1 (general presumption of vicarious liability).

[155] Cass. Civ. 2e 18 mars 1981 in Bull. Civ., II, no. 69; [1981] D., IR, 319 note Larroumet. The Court of Cassation held that the "*different grounds for liability for someone else's acts are alternatives, not cumulative*".

[156] See for instance, G. Viney/P. Jourdain (supra fn. 17), no. 891, 1010.

[157] See for instance, P. Le Tourneau/L. Cadiet, *Droit de la responsabilité et des contrats*, *Dalloz Action* (2002/2003), no. 7450, 1332. Authors are critical of the decisions that admitted the cumulative liability of the State and the parents, where the damage was caused by a child attending school.

[158] Arrêt Samda, Cass. Civ. 2e 19 février 1997, préc.

[159] Cass. Civ. 2e 24 avril 1989 in [1990] D., 519 note Dagorne-Labbe. The case was about a child who was looked after by his grandmother during holidays. The Court of Cassation held that cohabitation for this reason had ceased for a "*legitimate reason*".

[160] Cass. Civ. 1re 2 juillet 1991 in Bull. Civ., I, no. 224; [1991] RTD Civ., 759 obs. Jourdain.

[161] Cass. Civ. 2e 20 janvier 2000, préc.

[162] Cass. Civ. 2e 29 mars 2001 in [2001] D., IR, 1285.

10. What is the relation between the damage claim against the parents and the damage claim against the child?

124 The victim of damage caused by a child may instigate proceedings on the basis either of art. 1382 of the Civil Code directly with regard to the child and incurring the child's personal liability or of art. 1384, subs. 4, against the child's parents by incurring strict liability of the parents as a result of the act committed by their under-age child. The two types of proceedings are completely separate. The choice of one or other of the proceedings is of interest only with regard to compensation guarantees offered to the victim.

125 Guarantees against the personal actions of a child provided by an insurance policy taken out by the child's parents can be possible only if the parents have specifically stipulated them on behalf of their child in the policy.[163] The beneficiary of such provisions is therefore included in the original contract and has his personal actions guaranteed by the policyholder's insurance, unless the said person perpetrates an intentional act.[164] It does, however, appear that this third-party provision in favour of the policy-holder's children is "very frequently included in policies known as "householders" fully comprehensive policies', the provision of which for tenants is compulsory and which the owner, as a "sound head of family" normally takes out".[165]

126 Given the compensatory considerations, it is preferable by far for the victim of damage caused by the child to instigate proceedings on the basis of art. 1384, subs. 4, so as to incur the strict liability of the child's parents, who will have few possibilities to obtain exemption (contributory negligence and *force majeure*). The parents become the guarantors[166] of the acts of their under-age child. Furthermore, a child's intentional wrongful act will be guaranteed if proceedings are instigated against his parents who have taken out the insurance policy.[167]

[163] Insurance policy contracted for the benefit of another is a mechanism allowed by art. 112 para. 2 of the Insurance Code that provides: "Insurance policy can also be contracted for the benefit of anyone else. This provision is valid as an insurance for the benefit of the subscriber as well as a stipulation for another, it does not matter that the beneficiary is known or unknown". For more details see Y. Lambert-Faivre, *Droit des assurances* (11th edn. 2001), nos. 198 et seq., 172 et seq.

[164] Cass. Civ. 1[e] 15 décembre 1998 in [1999] RGDA, 293. The Court of Cassation held that a guarantee for the beneficiary of an insurance for others policy (child of the subscriber who has reached the age of majority) can be refused, even thougt the guarantee is asked for by the subscriber (the mother) in cases of intentional fault of the beneficiary (intentional destruction of a stolen car). We have to mention here that the suit was introduced against a child having reached the age of majority, who was still dependent for tax purposes on the family household.

[165] J.-C. Saint-Pau/F. Gonthier, *L'enfant et l'assureur*, *Droit et patrimoine* (2000), no. 87, 57.

[166] For instance refer to J. Julien, note sous Ass. Plen. 13 décembre 2002 in Dr. Fam. février 2003, no. 23, 32.

[167] Art. 121-2 of the Insurance Code provides: "The insurer guarantees the loss and damages caused by the person whom the subscriber is liable for on the ground of art. 1384 of the Civil Code, whatever the nature or the severity of the fault committed by these persons."

127 Legal proceedings based on art. 1382 or art. 1384, subs. 4, do, however, remain legally independent. Proceedings instigated on the basis of art. 1382 directly against the child do not make it possible to incur the liability of the parents automatically as a result of the acts of their child.

11. Is there any possibility either for the child or the parents to have recourse against each other?

128 With regard to subrogatory recourse instigated directly by the parents against their child, such an approach seems conceivable only in the event that the parent has not taken out householder liability insurance or that the act committed by the child is excluded from the insurer's guarantees. Suffice to say that such hypotheses occur only exceptionally. The Court of Cassation has never had to rule on a case of this type.

129 Very recently, this specific instance was, however, referred to the Rouen Court of Appeal.[168] The Rouen Children's Tribunal[169] had found against a mother and her son (who had become an adult during the case) jointly and severally to pay the sum of FRF 10,000 as damages to the victim of the son's criminal acts. The facts brought forward in the case would indicate that the mother paid the sum directly to the victim, which confirms the absence of any insurance guarantee in this case.

130 Six months after the sentence handed down by the Children's Tribunal, the mother instigated recourse proceedings against her son. The court of first instance found in favour of her request, a decision which was upheld by the court of appeal. The court of appeal based its ruling on art. 1251, section 3, of the Civil Code which authorises full subrogatory recourse by persons sentenced jointly and severally to pay a debt,[170] as was the case in this instance. We, however, believe that the fact that the child had become an adult was a decisive factor in the case. Such recourse against an under-age child would be hard to conceive under the French legal system, given that the child is legally represented by his parents.[171]

131 Such recourse remains, however, exceptional. Most parents are covered by householder comprehensive liability insurance, which prevents the exercise of

[168] Rouen 7 mai 2003, [2003] Resp. civ et assur., octobre 2003, no. 10, 12 note Ch. Radé. This author insists that it is "very exceptional that a parent uses his/her right of recourse against his/her child, and that steps of the procedure go so far".

[169] Judgement of the 28 April 1999, unreported.

[170] Cass. Civ. 1re 23 octobre 1984 in Bull. Civ., I, no. 276, concerning enforcement of article 1251 3 regarding liability.

[171] This situation implies the nomination of an *administrateur ad hoc* by the juges des tutelles, or the judge in charge of the case (art. 389-3 para 2 of the Civil Code). The *administrateur ad hoc* temporarily represents the child, where the child's interests are conflicting with those of his natural legal representative i.e. his parents.

recourse proceedings by the insurer against parents related in direct line to the guaranteed person.[172]

There is a further limit which appears clearly in the very motivation behind this decision. The court of appeal states that "with regard to a sentence issued jointly and severally, the person held liable as a result of a strict liability system who can evidence having directly compensated the victim, such as the case at hand, has grounds to take advantage of art. 1251 subs. 3, of the Civil Code to instigate subrogatory recourse proceedings against the perpetrator who is liable on the ground of an established wrongfull act, which was the case of Mr. H…". Direct subrogatory recourse by the parents against their child therefore seems possible in theory only in the event of wrongful act by the child, i.e. in the event that the child could have his personal liability incurred on the basis of art. 1382 of the Civil Code. Subrogatory recourse therefore has no grounds to be applied as the sole result of the fact that parental liability could not be incurred based on Art. 1384, subs. 4, which considerably limits the scope of such subrogatory recourse. The child's discernment is admittedly not vital to consider the child's liable act under the terms of art. 1382,[173] although the scope of art. 1382 is far more restricted than art. 1384, subs. 4. 132

It would, however, seem rather difficult to believe that, excluding the very specific hypothesis of the facts of the matter at hand (i.e. criminal acts committed by a mature adolescent which were noted and sanctioned by a criminal judge) and in the absence of householder comprehensive liability insurance taken out by the parents, civil courts would have allowed the possibility of such recourse exercised by the parents against their now adult child. This case is currently the only one to the best of our knowledge which accepted direct subrogatory recourse by the parents against their child. 133

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

The institution exercising the duty of control and supervision over the child is liable for the child under art. 1384, subs. 1, of the Civil Code, insofar as the institution in question is endowed with authority over the child and exercises the obligation of cohabitation (otherwise the parents would still be liable). 134

For example, an orphan child is the responsibility of the departmental services of the *Aide Sociale à l'Enfance* (Child Welfare Services). Under the terms of 135

[172] About right of recourse see no. 74.

[173] Cass. Ass. plén. 9 mai 1984, préc., Lemaire and Derguini cases. Ch. Radé, observations on CA Rouen 7 mai 2003, [2003] Resp. civ et assur., octobre 2003, no. 10, 13. The author exposes that this solution may be risky in the sense that it allows parents who are strictly liable to sue "the tortfeasor child even though he's lacking discernment when the damage occurred".

art. 1384, subs. 1 of the Civil Code, a child placed under the responsibility of this entity makes the said service liable on the same grounds as the parents of an under-age child. Although a child may be placed temporarily under the responsibility of his grandmother for a weekend, the department still retains custody and is thus liable for damage caused by the child.[174]

136 The departmental services of the *Aide Sociale à l'Enfance* (ASE) and their insurer must therefore compensate the damage caused by the minor.[175]

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

137 The Civil Code sets things down clearly in such cases. According to art. 1384, subs. 6: "School teachers and craftsmen (are liable), for the damage caused by their pupils and apprentices during the time that they are under their supervision".

138 The craftsman is required to monitor and supervise. The Court of Cassation reconciled parental liability with the liability of the craftsman when the apprentice is boarded and fed by the supervisor and is therefore included as "one of the family".[176] However, this reconciliation has not yet led to strict liability; the craftsman is still liable only on the grounds of presumed lack of supervision.[177]

139 It should be noted that in the event of an accident, legislation concerning industrial accidents applies.[178]

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

140 According to Guy Raymond,[179] the institution must have accepted responsibility for the child on a permanent basis and must act as the organiser and supervisor of the minor's lifestyle. This is neither more nor less than the transposition of conditions applicable to parents because there are no specific statutes concerning these institutions.[180]

[174] CA Rennes, 14 octobre 1998 in *Juris-Data* no. 1998-055083.
[175] Cass. Civ. 1ère, 22 novembre 1994 in Bull. Civ., I, no. 335, 241.
[176] J. Carbonnier, *Droit civil, Les obligations*, t.4, § 238.
[177] P. Kayser, Le sentiment de justice et le développement de la responsabilité civile en France, [2000] 2 RRJ, 445 et seq., espec. 461.
[178] Y. Buttner, La réparation des accidents causés par les élèves en milieu scolaire: le partage de responsabilités entre les parents et le personnel chargé de la supervision, [2000] 4 RRJ, 1783 et seq.
[179] G. Raymond (supra fn. 113), 437 et seq., espec. 444 et 445.
[180] On that point see: Cass. Civ. 2ème, 6 juin 2002 in Bull. Civ. II, no. 120, 96.

A combination of liability lines is conceivable; parents may be declared liable insofar as they retain the characteristics stipulated by art. 1384, as only *force majeure* or contributory negligence can exempt parents from liability. 141

Such liability may, however, not be incurred if the courts have placed the child under the responsibility of a specific institution (for instance an order of the guardianship judge or a decision handed down by a judge of the family division giving the residence of the child to a third party). In such cases, the court's decision entails a transfer of liability of the mother and father to the person with whom the child's legal residence has been established. The magistrate's decision applies to the parents. 142

Thus, if a child commits a wrongful act – even when merely visiting his parents – although s/he was legally the responsibility of an institution, the institution will be liable,[181] unless the parents encouraged the child to commit a criminal act, in which case their liability is incurred under the terms of personal liability. 143

Victims may therefore instigate proceedings against the institution and will be able to choose depending on the type of organisation and authority which established the placement of the child. Although the child may be entrusted to a third party as a result of the 1945 decree or to the *Protection judiciaire de la jeunesse* (Judiciary Youth protection, PJJ), the liability of the State (strict liability based on the risk, such as firearms) will be attempted to be established before the administrative courts.[182] If the child is entrusted to an artificial person or a natural person subject to private law, the victim must instigate proceedings before civil courts. As the current trend is to entrust minors to associations, civil courts are increasingly requested to rule on such recourse.[183] 144

If the child is placed under the responsibility of the PJJ which then places the child with an association, the victim has a choice between suit before either civil Courts or administrative Courts.[184] 145

[181] Two recent decisons confirmed this point: Cass. Civ. 2ème, 6 juin 2002, in Bull. Civ. II, no. 120, 98. See also: Cass. Civ. 2ème, 24 avril 1989 in Bull. Civ. 1989 II, no. 99, 48.

[182] For a recent solution on that point: *Cour Administrative d'Appel* (CAA) Bordeaux, 2 février 1998 in [1998] JCP II, 10041; esp.: *Conseil d'Etat* (CE) 14 juin 1978, Min. de la justice c/ Mutuelle générale française Accident in [1978] D., 686, note Moderne; 14 juin 1978, Min. de la justice c/SOCOFA: eod. loc. Illustrates the risk theory of M. Moderne; Martaguet/Robert, La responsabilité des établissements de rééducation, [1966] D., Chron. 17.

[183] See for instance, Cass. Civ. 2ème, 20 janvier 2000 in Bull. Civ. II, no. 15, 10: "The person or organisation with whom the judge entrusts the child suffering harm on the ground of article 375 and following of the Civil Code, and who is in charge of organising and controling the way of life of the child, is liable for damages that the child may cause, including those caused to the other foster children"; on the judiciary competence see: Cass. Civ. 2ème, 9 décembre 1999 in Bull. Civ. 1999 II, no. 189, 130.

[184] Tribunal de Conflits, 17 décembre 2001 in: *Revue d'Actualité et de Jurisprudence Sociale* (RAJS), mars 2003, 57.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

146 A contract cannot impose a duty although a legal decision to place the child can, such as a guardianship judge decision, a ruling from *Juge aux affaires familiales* (judge of the family division, JAF), a measure to ensure child protection or a decision taken as per the decree dated 2 February 1945 concerning children (see above, nos. 141–144).

147 The hypothesis of a contract may be considered, however, in the case of babysitting. Some writers, struck by the "Bertrand" decision, have mentioned this possibility.[185] The victim could attempt to establish the parents' liability based either on art. 1384, subs. 4, or on art. 1384, subs. 5 of the Civil Code.[186] The victim could also attempt to establish the babysitter's liability according to art. 1384, subs. 1, according to Jean-Marc Lhuillier and "a particular interpretation of jurisprudence".[187] However, with regard to a contract between the babysitter and the parents, the babysitter's liability may be incurred for failure to honour the contractual obligation of safety. This obligation will, depending on the child's age, be taken as an obligation of results or as an obligation of means with the burden of proof of a wrongful act not required in the former.[188]

148 The Court of Cassation accepted the possibility of a wrongful act by a child, notwithstanding the age of the child in question,[189] to exempt the babysitter's liability.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

149 Based on case law, parents remain liable except in the case of wrongful act by the institution or schoolteacher.[190] The duty of supervision exists during school time and extra-curricular activities. However, this obligation varies according to "common sense". A wrongful act by the schoolteacher applies, depending on the case, when supervision was proved to be insufficient[191] but does not apply when the wrongful act was particularly sudden and when supervision by itself could not have prevented it.[192]

[185] C. Rade, Le renouveau de la responsabilité du fait d'autrui (apologie de l'arrêt Bertrand), Cass. Civ. 2ème, 19 février 1997 in [1997] D., Chron. 279.

[186] J.-M. Lhuillier, La responsabilité de la *baby-sitter*, ou la "nuit juridique", in: *Drôles de droits, Mélanges en l'honneur d'Elie Alfandari* (2000), 377 et seq., espec. 379–382.

[187] J.-M. Lhuillier (supra fn. 187), 382 and 383.

[188] See infra.

[189] Cass. Civ. 2ème, 28 février 1996 in [1996] JCP I, doct. 3985, note Viney. The basis of liability was in this case Art. 1383 of the Civil Code.

[190] Cass. Civ. 2ème, 21 juin 2001 in *Juris-Data* no. 2001-010299. Liability of parents was established for damage caused by their daughter in the school playgroud.

[191] For example, letting a child leave a cooking lesson with a knife: Cass. Civ. 2ème, 7 juin 1990, Etat français c. M. P., no. 89-14-118 cited by Y. Buttner (supra fn. 181).

[192] For example, where a child suddenly throws a snowball: CA Aix-en-Provence, 7 juin 1990, *Némésis no. 00520*.

In this instance, an exception is made to the law of separation between civil and administrative authorities:[193] the civil judge alone has jurisdiction to handle disputes arising from damage caused by children placed under the supervision of a teacher in a private or public establishment.[194] 150

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

The principle, according to a ruling from the *Conseil d'État* (Council of State), is as follows: 151

> "The law dated 5 April 1937 (art. L. 911-4 of the *Code de l'éducation*, (Education Code, C. éduc)) established the State's liability before civil courts for all cases in which damage caused by a pupil originates in the wrongful act by a member of the teaching staff (whoever s/he may be).[195] The only exception to this rule is the case where damage incurred must be considered independent of the staff member's actions i.e. whether the injury stems from damage relating to a public work or where it may be attributed to a lack of organisation in the public services".[196]

The authority of the civil courts was accepted by the Court of Cassation in a ruling from its *Chambre Mixte* (Joint Chamber).[197] 152

The person executing the obligation of supervision is liable. According to the law,[198] teaching staff members in private establishments under an association contract with the State are deemed national education teachers. Jurisprudence has a fairly broad definition of what constitutes a schoolteacher but rejected the inclusion of directors of holiday camps, staff in supervised education facilities[199] and welfare services for children.[200] However, to be liable for children placed under one's supervision, one has to have effective supervision of pupils at the time that damage is caused.[201] 153

The State is liable by delegation (resulting from the fact that the teaching staff member works for the national education authority). 154

[193] Loi des 16 et 24 août 1790.
[194] Y. Buttner (supra fn. 181). Loi du 5 avril 1937 in Code de l'éducation art. L. 911-4.
[195] Who may be employed by the town hall: Cass. Civ. 2e, 13 décembre 2001 in Bull. Civ. II, no. 189; RCA mars 2002, 7 no. 91.
[196] CE 25 mars 1983, Héritiers de J. Bacou in [1984] JCP II, 20287, note Mirieu de Labarre.
[197] Ch. mixte 23 avril 1976 in [1977] D., 21, note Martin.
[198] Article 10 of the 22 april 1960 Decree.
[199] T.C., 25 mars 1968, *Aurenge case* in [1968] D., 534, concl. Dutheillet de Lamotte. Refusal for the civil servants of the supervised education service depending on the Justice Department (C. éduc., Art. L. 911-4).
[200] Cass. Civ. 2ème, 3 mars 1977 in [1977] D., 501, note Larroumet.
[201] Cass. Civ. 2ème, 4 février 1981 in [1981] Gaz. Pal 2, pan. 206.

155 In the total absence of supervision, for example, the State's liability may be established, on the grounds of poor organisation of the service in question, before the administrative courts.

156 If damage has been caused because of a lack of maintenance in the service, the local authority which owns the structure is liable.

157 According to the law dated 5 April 1937 and its second article, a school declared liable for damage arising within its premises may not establish the liability of the State insofar as no specific schoolteacher has been held liable.[202] A schoolteacher must therefore be identified. The schoolteacher "at fault" must be established to incur the State's liability.[203]

158 However, the parents' fault may also be established in the event of failure of parental upbringing which is shown up by the child's behaviour, for example when the child is particularly violent.[204] This constitutes a highly practical means of identifying a solvent debtor when the liability of the schoolteacher or of the State cannot be established. When two children suddenly jostle another child in a school playground, the liability of the teacher cannot be established as a result of the suddenness of the action; the parents' liability is incurred because "only *force majeure* or contributory negligence can exempt parents from liability".[205] On 4 June 1997, the Court of Cassation accepted this split in liability between the parents and the State,[206] as the parents could be exempted only by citing *force majeure*. This is a sort of return towards the inadequate upbringing.

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

159 This is entirely possible. The institution may seek redress from the teacher if the person in question has committed a lack of supervision which must be proved.[207] The teacher will then be liable on the grounds of art. 1384, subs. 1, of the Civil Code. Otherwise, the State or the State and the parents must share the burden of compensation.

[202] CA Nîmes, 2 octobre 1996 in *Juris-Data* no. 1996-030236.

[203] Cass. Civ. 2ème, 17 juillet 1991 in Bull. Civ. II, no. 232 or for example: The school teacher's liability and therefore the liability of the State is established where the school teacher was unable to keep the pupils quiet while changing classroom: Cass. Civ. 2e, 5 décembre 1979 in Bull. civ. II, no. 281.

[204] TGI Chalon-sur-Saône, 29 avril 1986, *Némésis no. 00530.*

[205] TGI Bourg-en-Bresse, 27 novembre 1997, Monnet-Colmiche c. Préfet de l'Ain, *Lettre d'information juridique*, no. 28 octobre 1998, 7; Cass. Crim., 25 septembre 2002, préc.

[206] Cass. Civ. 2ème, 4 juin 1997, Préfet de l'Isère, no. 95-16-490: a child was injured while the supervisor was chatting with some other pupils' parents.

[207] Cass. Civ. 2e, 16 mars 1994 in [1994] JCP II, 22336 (2nd esp.), note Merger et Feddal.

8. Same question with respect to private schools: May the school entertain a recourse action against the teacher who has failed to supervise?

Private schools are assimilated with public schools when they are regulated by association contracts with the State. This is the case of the vast majority.[208] As per a decree dated 22 April 1960, the 1937 law is applicable and such schools are entitled to its provisions to establish the State's liability in their stead. 160

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

We believe that two criteria can be used: age and activity. 161

The children's age is the main criterion used to establish the extent of the duty of supervision. For very young children (in nursery schools), the duty of supervision required of the schoolteacher is very strictly defined.[209] There is a form of presumption of liability for the teacher. For older children, wrongful act must be proved, for example failure to comply with the duty to supervise which is less strictly applied. Children enjoy more autonomy in such circumstances. 162

With regard to activity, casuistry has grown around the degree of freedom allowed to the child. Wrongful behaviour could thus include a teacher who knowingly leaves unsupervised all his pupils whose average age was 15,[210] a school teacher who after classes allowed his pupils to use a stairwell leading to the playground without supervision,[211] or a school teacher who poorly grasped the difficulties which could occur during a kayak training course.[212] Common sense predominates in establishing the wrongful act which can be cited against a schoolteacher. However, some decisions may be surprising, such as the ruling by the Versailles Court of Appeal on 13 March 1998[213] in which a young girl suffered a fractured hip following her frightened reaction to another child who ran after her kicking her. For the court, the schoolteacher was not at fault because "a playground is a place for relaxation for children thanks to the freedom of movement granted to them".[214] 163

[208] Cass. Civ. 2e, 5 décembre 1979, préc.; Cass. Civ. 2ème, 24 avril 1981 in [1981] Gaz. Pal. 2, 665, note Viatte.
[209] Cass. Civ. 1ère, 13 janvier 1982, Nieuwixkel c/Epoux Vigneulle et autres in [1982] D., IR, 367.
[210] Cass. Civ. 1re, 20 décembre 1982 in [1982] Bull. Civ. I, no. 369; [1983] RTD Civ., 544, obs. Durry.
[211] Cass. Civ. 2e, 8 juilliet 1998 in [1998] Bull. Civ. II, no. 241.
[212] Cass. Civ. 2e, 20 novembre 1996 in [1996] Bull. Civ. II, no. 257; *Rapport annuel de la Cour de cassation* (R.), 336; [1998] D. Somm. 38, obs. F. Lagarde.
[213] CA Versailles, 13 mars 1998 in *Juris-Data* no. 1998-041879.
[214] CA Versailles, 13 mars 1998 in *Juris-Data* no. 1998-041879.

10. What is the relationship between damages claims against teachers, schools, school boards, public authorities sounding in tort on the one hand and social security benefits on the other. May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school boards and the state?

164 When a child is injured during a school activity, parents can establish the State's liability as seen above.

165 The prefect is thus liable in the State's stead.[215]

166 The *Préfet* (Prefect) may have recourse against the teacher exercising the duty of supervision and may establish the teacher's liability only on the ground of personal fault. Examples of such actions are rare.

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

167 Previously, the problem did not occur, as the child could be declared irresponsible or the parents or institution were liable in his stead as per the law depending on the child's age.

168 Jurisprudence did not allow, for example, a driver to instigate "ricochet" proceedings against the parents or child if the State was declared liable.[216] Where applicable, the party's criminal liability could be established in the event of a crime or offence with the age of the child the decisive factor to refer to the matter to the appropriate court.

169 However, the existence of discernment in the child is no longer vital since 1984 to establish the child's liability.[217]

170 To establish the liability of the child is to establish the liability of the parents and their insurer. In a joint attempt to establish the liability of the teaching institution, there are also grounds for establishing whether liability will be shared or is exclusively exercised by the parents or the State (organisation).

171 Although, in the past, the State was easely held liable, excluding the parents' liability for damage caused by the child at school, since the Bertrand decision there has been a sharing of liability, as the court of appeal decision had been quashed by the Cour de cassation for having excluded from liability the father of the child who caused the damage and his insurer.

[215] See Cass. Civ. 2ème, 13 décembre 2001 in RCA mars 2002, 7–8.
[216] P. Robert, Accident de la circulation lié à un défaut de supervision scolaire: recours contre l'Etat devant le juge civil, [1991] JCP I., 3514, esp. no. 23.
[217] About discernment of the tortfeasor child see no. 9.

12. Is there any possibility either for the child or the teacher to have recourse against each other?

The provision according to which the State's liability is replaced by the liability of members of public school teaching staff who in turn can never be arraigned before the civil courts by the victim or his counsel is wide-sweeping enough not to exclude the hypothesis of an injury of any kind caused by the teacher himself to the child.[218] 172

The teacher's liability, if it can be established, also makes it possible to replace the teacher's liability with the State's liability.[219] 173

To the best of our knowledge, we do not believe that the State has already taken action against a child in the case of shared liability. 174

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

Rarely does the parents' duty to supervise overlap with the school's. We can first review the general field of sole liability in this area followed by the rare cases of joint and several liability. 175

i) Cases of sole liability:

As the law has stipulated several and varied fields within each of the subs. of art. 1384 of the Civil Code, the most appropriate form of liability will be applied to each case. 176

The criterion of liability is based on cohabitation. This ground for liability ends only in the event of *force majeure* or contributory negligence.[220] Cohabitation with parents could, however, terminate on legitimate grounds.[221] It would appear that the second civil chamber of the Court of Cassation has abandoned this criterion and accepts that cohabitation by the child and parents can only be changed as a result of a court decision (a decision to place the child elsewhere). This means the duty to supervise the child does not presume liability of the person not bound by the duty to cohabit, especially if the distance involved is of several hundred kilometres. 177

[218] Cass. Civ. 2e, 3 octobre 1984 in [1984] Bull. Civ. II, no. 141.

[219] *Tribunal Correctionnel* (T.Corr.) Paris, 4 novembre 2003, *Le Monde*, 6 novembre 2003, "L'enseignante poursuivie pour homicide involontaire relaxée". The teacher was not convicted at criminal law but was nevertheless liable at civil law for the death of a 2 year-old child.

[220] Principle illustrated by Cass. Civ. 2ème, 15 mars 2001, no. 99-14838, unreported.

[221] Cass. Crim., 27 novembre 1991 in [1992] JCP IV, 807. Cass. Civ. 1ère, 2 juillet 1991 in [1991] RTD Civ., 759, obs. P. Jourdain; being on holidays with grandparents: Cass. Civ. 2ème, 24 avril 1989 in [1990] D., 519, note Y. Dagorne-Labbé of being fostered by decision of justice: Cass. Crim., 2 juin 1993, *lexilaser-cassation, pourvoi no. 91-82.057.*

178 However, as indicated by Georges-Michel Faure:[222] "To effect a replacement of parental liability, only supervision of the child needs to be cited, not the child's education. If such is the case, the parents remain liable as a result of the poor upbringing provided and not the supervision they may, hypothetically, apply."[223]

179 In contrast, to establish the wrongful act of a guardian and exclude the parents' liability, Claire Nerinck states for the case of a child who runs away an unpublished ruling from the second civil chamber of the Court of cassation: "given that the decision states that although they could note the irregular absence of two minors and consider the danger of running away both for (the minors) themselves and for third parties, the persons in charge of the hostel refrained from informing the families and the Police services deprived them of any possibility of preventing (wrongful) acts from being perpetrated, from such observations and declarations the court of appeal deduced that the occurrence of the damage had a direct relationship with the omission by the educational staff at the association."[224]

180 Thus, when a child who has been placed with a guardian runs away and, why not, commits an act, the "guardian" must immediately inform the parents and instigate a search for the child. Any other attitude is deemed wrongful.

181 The parents therefore retain the possibility of recourse against third parties to whom they have entrusted their child, as per Artt. 1382 and 1383 of the Civil Code.[225] It is for them to provide the proof of the lack of supervision which must be distinct from any wrongful act in upbringing.[226]

182 As stated by Georges-Michel Faure, parents "if not insured[227], finally have the possibility of action against their child.[228] Recourse proceedings are more the-

[222] G.-M. Faure, Dossier: Le droit et l'enfant, "Jeux d'ombre et de lumière sur la responsabilité des parents, pour une relecture des alinéas 4 et 7 de l'article 1384 du code civil", *Petites Affiches no. 53, du 3 mai 1995.*

[223] Ibid: Cass. Civ. 2ème, 4 juin 1980 in [1981] JCP II, 19599, note C. Feddal. Nevertheless, where the fault is a serious one, it is the sign of an education deficiency that prevents parents from being exonerated from liability (Cass. Crim., 13 juin 1991, lexilaser-cassation, pourvoi no. 90-84.242).

[224] Cass. Civ. 2ème, 13 novembre 1991, Inédit, cited by C. Nerinck, La fugue, aspects juridiques, *Petites Affiches* no. 11, 24 janvier 1996.

[225] G. Viney/P. Jourdain (supra fn. 17), no. 888, 983 cited by G.-M. Faure, Jeux d'ombre et de lumière sur la responsabilité des parents, pour une relecture des alinéas 4 et 7 de l'article 1384 du Code civil, Dossier: Le droit et l'enfant, *Petites Affiches*, no. 53, du 3 mai 1995.

[226] Tribunals are quite harsh on the point of admitting the existence of such a fault: Cass. Civ. 2e, 9 novembre 1971 in [1972] D., 75 et Cass. Civ. 2ème, 29 avril 1976 in [1976] JCP II, 18793, obs. N. Dejean de la Batie. With the Bertrand case, the education fault was relinquished. Nevertheless sometimes judges seem to revive it. For example CA Nancy, 10 septembre 1996 in *Juris-Data* no. 1996-049122 where a 17-year-old child alcoholic who had stolen a car revealed the fault of his father in respect of his education.

[227] Some academics would like to see this parental liability insurance policy becoming mandatory, see for example G. Viney/P. Jourdain (supra fn. 17), no. 892; B. Pull, Vers une réforme de la responsabilité des père et mère du fait de leurs enfants, [1988] D., chr. 1985.

[228] On the grounds of Artt. 1382, 1383 and 1384, para 1er.

oretical than practical and are morally and legally acceptable only when parents have not really committed any omission in upbringing and supervision."[229]

ii) Cases of joint and several liability:

Shared liability is not frequent in this matter, either by parents and the teaching organisation or by the child and organisation. 183

However, we note one example of the duty to supervise by the parents, of a third party to whom one of the children was entrusted and of the *Direction Départementale de l'Intervention Sociale et Sanitaire* (Departmental Authority of Health and Social Action, DDISS) to which another child was entrusted. In this instance, two young girls aged 7 and 14 were playing together with matches in the home of the older girl's mother. The younger girl had been placed by the DDISS with her grandmother. She set her friend's mother's apartment alight while the grandmother and owner of the apartment (the older girl's mother) were chatting. The negligence of the grandmother, a third party, was upheld, as was the liability of the DDISS and of the mother of the 14 year-old girl.[230] 184

As the parents' liability is no longer excluded since the Bertrand decision, shared liability might become more frequent. 185

[229] *A contrario*, this action cannot be admitted where there was obviously negligent conduct on the part of the parents.

[230] CA Rennes, 14 octobre 1998, préc.

Children as Tortfeasors under German Law

Gerhard Wagner

I. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

Children under the age of seven are not liable in tort at all, § 828 subs. 1 *Bürgerliches Gesetzbuch* (Civil Code, BGB).[1] This minimum age is raised to ten years if the damage was sustained in an accident involving a motor vehicle, a track railway, or a cable railway, § 828 subs. 2 cl. 1 BGB, unless the child caused the injury intentionally, § 828 subs. 2 cl. 2 BGB.[2] 1

2. Is there a specific window within the life of a child during which the liability of the child depends on his capacity to act reasonable or any similar standard?

The liability of a child older than seven years but younger than the age of majority, i.e. eighteen years, depends on his capacity. According to § 828 subs. 3 BGB, the child is not liable in tort if he did not have the ability to reason necessary to understand his responsibilities.[3] With respect to traffic accidents, the relevant window is the age between ten and eighteen years. 2

[1] § 828 BGB: „(1) Wer nicht das siebente Lebensjahr vollendet hat, ist für einen Schaden, den er einem anderen zufügt, nicht verantwortlich."

[2] § 828 BGB: „(2) Wer das siebente, aber nicht das zehnte Lebensjahr vollendet hat, ist für einen Schaden, den er bei einem Unfall mit einem Kraftfahrzeug, einer Schienenbahn oder einer Schwebebahn einem anderen zufügt, nicht verantwortlich. Dies gilt nicht, wenn er die Verletzung vorsätzlich herbeigeführt hat."

[3] § 828 BGB: „(3) Wer das achtzehnte Lebensjahr noch nicht vollendet hat, ist, sofern seine Verantwortlichkeit nicht nach den Absätzen 1 oder 2 ausgeschlossen ist, für den Schaden, den er einem anderen zufügt, nicht verantwortlich, wenn er bei der Begehung der schädigenden Handlung nicht die zur Erkenntnis der Verantwortlichkeit erforderliche Einsicht hat."

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that he understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

3 The German law of torts distinguishes between the capacity to act reasonably, measured against the subjective standard of § 828 subs. 3 BGB, and the negligence of the conduct, measured against the objective duty to take care, § 276 subs. 2 BGB.[4]

a) Capacity to act reasonably

4 A child older than seven years but not of full age, and a child older than ten years if the damage was sustained in a traffic accident, is referred to in the following as a minor. A minor has the relevant discretion, if he had – at the time the tort was committed – the ability to reason necessary to understand his responsibilities, § 828 subs. 3 BGB. Capacity to act reasonably does not coincide with the understanding of one's legal responsibilities, but is merely the ability to develop this actual understanding.[5] The capacity to act reasonably in the sense of § 828 subs. 3 BGB is therefore usually described as intellectual maturity. A subjective standard applies: A minor has the capacity to act reasonably if his intellectual maturity allows him to understand that he acted unlawfully and that this unlawful conduct may result in civil liability.[6] This capacity cannot be presumed or based on general considerations but has to be proved in every individual case involving a minor.[7]

5 § 3 cl. 1 of the *Jugendgerichtsgesetz* (Juvenile Offenders Act, JGG) mandates that a minor is criminally responsible only if he is capable of understanding that he acted unlawfully *and* of behaving accordingly.[8] § 828 subs. 3 BGB,

[4] § 276 BGB: „(2) Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt außer Acht lässt."

[5] K. Goecke, *Die unbegrenzte Haftung Minderjähriger im Deliktsrecht* (1997), 28.

[6] With a rather restrictive application to the lack of capacity: *Reichsgericht* (RG) (8.12.1902), *Entscheidungen des deutschen Reichsgerichts in Zivilsachen* (RGZ) 53, 157, 158; *Bundesgerichtshof* (BGH) (17.5.1957), *Entscheidungen des deutschen Bundesgerichtshofs in Zivilsachen* (BGHZ), [1957] *Versicherungsrecht* (VersR), 415; BGH denied capacity in only one case: BGH (28.4.1959), [1957] VersR, 732; and when children were not used to that sort of activities: RG (10.5.1932), RGZ 156, 193; RG (9.11.1932), [1933] *Höchstrichterliche Rechtsprechung* (HRR), no. 1081; *Oberlandesgericht* (OLG) Hamm (13.10.1953), [1954] VersR, 418; OLG Neustadt (17.12.1954), [1955] VersR, 178; OLG Koblenz (11.1.1989), [1989] VersR, 485.

[7] G. Wagner in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (4th edn. 2004), § 828, no. 10; OLG Köln (13.8.2002), [2002] *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* (NJW-RR), 1677.

[8] § 3 Code of *Jugendgerichtsgesetz* (Juvenile Court Procedure): „Ein Jugendlicher ist strafrechtlich verantwortlich, wenn er zur Zeit der Tat nach seiner sittlichen und geistigen Entwicklung reif genug ist, das Unrecht der Tat einzusehen und nach dieser Einsicht zu handeln. Zur Erziehung eines Jugendlichen, der mangels Reife strafrechtlich nicht verantwortlich ist, kann der Richter dieselben Maßnahmen anordnen wie der Familien- oder Vormundschaftsrichter."

however, does not mention the child's ability to adjust his conduct in accordance with his understanding of his legal obligations. While some commentators have tried to transfer the learning of the criminal law into the framework of the law of delict,[9] the courts have stood firm by the traditional view in not requiring the minor's capacity to behave reasonably.[10] Even if the minor is not in full command of his conduct due to infantile curiosity or playfulness, he may still have the relevant capacity in the sense of § 828 subs. 3 BGB. However, the minor's inability to control his behaviour may be taken into account within the framework of the duty of care, when determining whether the minor acted negligently in the sense of § 276 subs. 2 BGB. Negligence does not only ask for the capacity to reason but also for the ability to behave accordingly.[11] In this context, an objective standard applies which can be adjusted to the abilities typical of a minor of the respective age.[12] Particular shortcomings of the individual tortfeasor do not work as a defence against liability.

b) The meaning of "understanding one's responsibility"

Among legal commentators there is some argument whether § 828 subs. 3 BGB requires the minor to have the capacity to grasp the particular danger present in the individual case (concrete danger)[13] or whether it is sufficient that he is able to understand that his conduct can in some way be dangerous (abstract danger).[14] Although this discussion has drawn considerable attention, 6

[9] H. Dölle/H. Reichel, Empfiehlt es sich, im Zusammenhang mit der kommenden Strafrechtsreform die Vorschriften des bürgerlichen Rechtes über Schuldfähigkeit, Schuld und Ausschluß der Rechtswidrigkeit zu ändern? in: *Verhandlungen des 34. DJT, Bd. I* (1926), 98, 118 et seq., 136, 168; J. Goldschmidt in: *Verhandlungen des 34. DJT, Bd. II* (1927), 420, 454; H.C. Nipperdey, *Grundfragen der Reform des Schadensersatzrechts* (1940), 34 et seq.; L. Kuhlen, Strafrechtliche Grenzen der zivilrechtlichen Deliktshaftung Minderjähriger?, [1990] *Juristenzeitung* (JZ), 273, 276 et seq.; E. Scheffen, Reformvorschläge zur Haftung von Kindern und Jugendlichen in: *Festschrift Steffen* (1995), 387, 391 et seq.; cf. G. Geilen, Beschränkte Deliktsfähigkeit, Verschulden und Billigkeitshaftung (§ 829 BGB), [1965] *Zeitschrift für das gesamte Familienrecht* (FamRZ), 401 et seq.; E. Waibel, *Die Verschuldensfähigkeit des Minderjährigen im Zivilrecht* (1970), 172 et seq., 182; R. Borgelt, *Das Kind im Deliktsrecht: Zur Bedeutung der individuellen Reife für die persönliche Haftung und Mitverschuldung* (1995), 130 et seq.; E. Mezger, Haftet ein zurechnungsfähiger Jugendlicher nach § 829 BGB, wenn ihn wegen der typischen Eigenarten seiner Altersgruppe kein Verschulden trifft?, [1954] *Monatsschrift des deutschen Rechts* (MDR), 597, 598.

[10] BGH (10.3.1970), [1970] JZ, 616; BGH (28.2.1984), [1984] NJW, 1958; BGH (20.1.1987), [1987] VersR, 762, 763; concurring E. Deutsch, *Allgemeines Haftungsrecht* (2nd edn. 1996), no. 459; E. Deutsch, Zurechnungsfähigkeit und Verschulden. Ein Beitrag zum Anwendungsbereich des § 829 BGB, [1964] JZ, 86; G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 no. 7; H. Thomas in: Palandt, *Bürgerliches Gesetzbuch* (62th edn. 2003), § 828 no. 6; A. Zeuner in: Soergel, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Schuldrecht*, Vol. IV/2 (12th edn. 1998), § 828 no. 3.

[11] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 no. 24.

[12] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 no. 25.

[13] G. Geilen, [1965] FamRZ, 401, 406; J. Oechsler in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Vol. 2, Recht der Schuldverhältnisse* (13th edn. 1998), § 828 no. 11; M. Waibel (supra fn. 9), 102 et seq., 120 et seq.; equivocal A. Zeuner in: Soergel (supra fn. 10), § 828 no. 5.

[14] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 no. 8; E. Steffen in: *Reichsgerichtsrätekommentar, Das bürgerliche Gesetzbuch mit besonderer Berücksichtigung der Rechtsprechung des Reichsgerichtshofes und des Bundesgerichtshofes* (RGRK), Vol. II/5 (12th edn. 1989), § 828 no. 4.

it seems to rest on a misunderstanding. Within the framework of § 823 subs. 1 BGB, it is generally held to be sufficient that the tortfeasor was able to foresee his conduct infringing a protected legal right of the defendant. Likewise, the tort of § 823 subs. 2 BGB only requires that it was possible to discern the statutory duty, not that the tortfeasor was also able to foresee the injury itself. In both cases, the law requires neither the foreseeability of the damages caused by the infringement of the protected interest or statutory duty nor is it necessary that the tortfeasor was able to foresee and appreciate the course of events linking his conduct to the infringement of the defendant's interests. These principles also apply in the context of § 828 subs. 3 BGB. It is enough for the minor to be able to understand that his conduct may pose threats to the rights of third parties. It is not necessary that he also anticipates the exact scope and amount of consequential damages.[15]

7 Against this background, it becomes clear that the courts do not discriminate against minors when settling on the foreseeability of an "abstract danger". Rather, they do nothing else than to apply general principles of the law of delict. To require more, as some commentators would like to do, would amount to an encroachment of the subjective standard of § 828 subs. 3 BGB into the domain of the objective duty of care.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance?

8 There are no decisions which suggest that the court took a family-liability-insurance into account when determining the capacity of the tortfeasor.

5. What is the standard of care applicable to children?

9 The next step after assessing whether the minor has the relevant capacity is to determine whether the tortious conduct can be attributed to him. According to § 276 subs. 1 BGB, the tortfeasor can be held accountable for both intentional and negligent behaviour.[16] Negligence is defined in § 276 subs. 2 BGB as disregard for the duty to take care.[17] There is no legal definition for intent. A common short formula describes intent as wilfully committing an act calculat-

[15] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 no. 8; BGH (16.12.1953), [1954] VersR, 118, 119 = *Lindenmaier-Möhring* (LM), § 828 no. 2; BGH, LM § 828 no. 3; BGH (08.01.1965), [1965] FamRZ, 132, 133; BGH (28.2.1984), [1984] NJW, 1958; OLG Zweibrücken (13.2.1980), [1981] VersR, 660; cf. BGH (21.5.1963), 39, 281, 282 = [1963] NJW, 1609 and BGH (14.11.1978), BGHZ 73, 1 = [1979] NJW, 864; E. Steffen in: RGRK (supra fn. 14), § 828 no. 4; A. Zeuner in: Soergel (supra fn. 10), § 828 no. 5.

[16] § 276 BGB: „(1) Der Schuldner hat Vorsatz und Fahrlässigkeit zu vertreten, wenn eine strengere oder mildere Haftung weder bestimmt noch aus dem sonstigen Inhalt des Schuldverhältnisses, insbesondere aus der Übernahme einer Garantie oder eines Beschaffungsrisikos zu entnehmen ist. Die Vorschriften der §§ 827 und 828 finden entsprechende Anwendung."

[17] § 276 BGB: „(2) Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt außer Acht lässt."

ed or foreseen to cause an unlawful outcome („Wissen und Wollen des rechtswidrigen Erfolges").[18]

As a general rule, intention needs to relate only to the infringement of the protected right or statutory duty, while it is not required that it also covers consequential damages and the particulars of the causal chain.[19] Accordingly, it is sufficient that the minor wants to infringe the protected right or statutory duty. 10

§ 276 subs. 2 BGB stipulates an objective standard for determining negligence in the area of civil liability. A person is held liable for not having complied with the duty to take care, i.e. with the objective requirements of due care.[20] Everyone is held to the standard of care and diligence which a reasonable person of the same social group as the tortfeasor would observe.[21] The focus on the behaviour of a reasonable person drawn from the same group as the tortfeasor does in fact allow for some subjective elements which attenuate or aggravate the objective standard. In determining negligence, the different levels of care that different groups of people are expected to perform are taken into account. As a consequence, children are expected to observe a level of care and diligence which a reasonable child of the same age would observe.[22] The conduct of a child will be deemed negligent if a reasonable child of the same age could have foreseen that the conduct might result in the infringement of a right or statutory duty. Although retardations in the development of the particular child are not to be taken into account,[23] the courts tend to be generous: Even seven or eight year old children were held to not be able to foresee the dangers associated with matches,[24] and ten year old boys tussling with each other were thought not to be able to consider the possibility that casual bystanders might be hurt.[25] 11

Where a reasonable child of the same age could have foreseen the danger of the conduct, the minor is still not liable if even the reasonable child serving as a benchmark would not have been able to avoid the loss.[26] Such inability may be due to infantile curiosity, playfulness, lack of discipline, rowdiness or impulsiveness.[27] At this point, the inability of a child to control his behaviour as 12

[18] M. Löwisch in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Vol. 2, Recht der Schuldverhältnisse* (2001), § 276 no. 18; H. Heinrichs in: Palandt, *Bürgerliches Gesetzbuch* (62th edn. 2003), § 276 no. 10.

[19] Cf. M. Löwisch in: Staudinger (supra fn. 18), § 276 no. 20. The only exception is § 826 BGB, which is of almost no relevance for the liability of children.

[20] M. Löwisch in: Staudinger (supra fn. 18), § 276 no. 25; H. Heinrichs in: Palandt (supra fn. 18), § 276 no. 15.

[21] BGH (15.11.1971), [1972] NJW, 150 (151).

[22] RG (23.5.1908), RGZ 68, 422 (423); BGH (21.5.1963), BGHZ 39, 281 (283); E. Steffen in: RGRK (supra fn. 14), § 823 no. 409; A. Zeuner in: Soergel (supra fn. 10), § 823 no. 269.

[23] BGH (10.3.1970), [1970] NJW, 1038, 1039: „Die Fahrlässigkeit ist nach objektiven und nicht nach subjektiven Merkmalen zu bestimmen."

[24] BGH (19.12.1961), [1962] VersR, 256.

[25] BGH (16.5.1963), [1963] VersR, 950.

[26] Cf. H. Heinrichs in: Palandt (supra fn. 18), § 276 no. 21.

[27] BGH (28.2.1984), [1984] VersR, 641, 642.

well as adults can is taken into account (see supra no. 5). However, an objective standard applies such that personal shortcomings of the particular child acting dangerously are ignored.

6. Are children held to a higher standard of care if they engage in "adult activities"?

13 If the minor is engaging in activities which are reserved for adults only, like participating in road traffic, his behaviour must be measured against the general standard of care and must not be attenuated to allow for tender age.[28] Accordingly, a minor driving a motorbike has to meet the same standard a reasonable adult has to comply with.[29]

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

14 § 829 BGB stipulates that a minor lacking the capacity to act reasonably in the sense of § 828 BGB but committing what would otherwise be a tort is nonetheless liable in damages if equity so requires, provided that the victim cannot recover from a third party for disregard of his duty to supervise the child, and the latter is not deprived of the financial means necessary for his own maintenance, including his legal duties to support others.[30]

15 The courts have given § 829 BGB a broad interpretation, applying the principles of liability in equity whenever the tortfeasor would otherwise escape responsibility for personal, subjective reasons. As a consequence, the minor might be held responsible in cases where he does not lack the relevant capacity but did not act negligently, i.e. did not fall short of the level of care to be expected of a child of his age.[31] Likewise, to the extent that the minor is exoner-

[28] E. Deutsch, *Fahrlässigkeit und erforderliche Sorgfalt* (2nd edn. 1995), 142.

[29] BGH (16.6.1973), [1973] NJW, 1790, 1791; E. Steffen in: RGRK (supra fn. 14), § 823 no. 409; H.J. Ahrens, Existenzvernichtung Jugendlicher durch Deliktshaftung, [1997] VersR, 1064, 1065; E. von Caemmerer, Die absoluten Rechte in § 823 Abs. 1 BGB, in: Karlsruher Forum 1961, Beiheft zum Versicherungsrecht, Karlsruhe 1961, 27; E. Deutsch (supra fn. 28), 142.

[30] § 829 BGB: „Wer in einem der in den §§ 823 bis 826 bezeichneten Fälle für einen von ihm verursachten Schaden auf Grund der §§ 827, 828 nicht verantwortlich ist, hat gleichwohl, sofern der Ersatz des Schadens nicht von einem aufsichtspflichtigen Dritten erlangt werden kann, den Schaden insoweit zu ersetzen, als die Billigkeit nach den Umständen, insbesondere nach den Verhältnissen der Beteiligten, eine Schadloshaltung erfordert und ihm nicht die Mittel entzogen werden, deren er zum angemessenen Unterhalt sowie zur Erfüllung seiner gesetzlichen Unterhaltspflichten bedarf."

[31] BGH (21.5.1963), BGHZ, 39, 281, 285 et seq.; BGH (8.1.1965), [1965] VersR, 385, 386; OLG Braunschweig (23.12.1953), [1954] VersR, 460; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 nos. 8 et seq.; E. Steffen in: RGRK, § 829 no. 9; A. Zeuner in: Soergel (supra fn. 10), § 829 no. 11; E. Deutsch, [1964] JZ, 86, 90; E. Deutsch (supra fn. 10), no. 482.

ated from the reproach of negligence for the sake of a prudent child being unable to control his own behaviour, liability might still be based on equitable grounds.[32] To sum up, § 829 BGB applies to any case where a minor would be answerable for the damages caused by him but for his age. The relevant test for defining the scope of equitable liability is to place an ordinary and reasonable adult into the shoes of the minor and ask whether he would have been liable had he behaved in the same way as the child did.[33] If this question is to be answered in the affirmative, the minor will be held liable provided that equity so requires.

8. a) Is there a reduction clause as to the amount of damages owed by the child if he is not liable under the applicable standards and/or even if he is fully liable under the standard?

If the child does have the relevant capacity, the principle of full compensation expressed in § 249 subs. 1 BGB applies without exception.[34] Unlike § 21 of the *Strafgesetzbuch* (Criminal Code, StGB),[35] the BGB does not recognize a reduced capacity to act reasonably (verminderte Schuldfähigkeit) and accordingly does not allow for a reduction of the liability of the child. 16

As far as liability in equity is concerned, § 829 BGB does not contain a reduction clause either. However, a similar result is reached within the framework of equitable liability as it is not sufficient that equity requires compensation as such but necessary that the particular amount of compensation claimed for appears to be an equitable remedy. In other words, a court would impose liability under § 829 BGB only to the extent that equity requires. In truth, then, German law allows for partial liability in equity.[36] See infra no. 41. 17

b) What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

According to § 829 BGB, the child is liable in equity insofar as equity in consideration of the circumstances requires the compensation of the victim. In this regard, the courts emphasize the language employed by § 829 BGB, stip- 18

[32] BGH (21.5.1963), BGHZ, 39, 281, 286.

[33] G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 7.

[34] J. Oechsler in: Staudinger (supra fn. 13), § 828 no. 5; A. Zeuner in: Soergel (supra fn. 10), § 828 no. 2; E. Deutsch (supra fn. 10), no. 463.

[35] § 21 *Strafgesetzbuch* (Criminal Code, StGB): „Ist die Fähigkeit des Täters, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln, aus einem der in § 20 bezeichneten Gründe bei Begehung der Tat erheblich vermindert, so kann die Strafe nach § 49 Abs. 1 gemildert werden."

[36] G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 16, 24; J. Oechsler in: Staudinger (supra fn. 13), § 829 no. 42; A. Zeuner in: Soergel (supra fn. 10), § 829 no. 5.

ulating that liability be *required* by equity, not merely allowed by equitable considerations („als die Billigkeit nach den Umständen […] eine Schadloshaltung erfordert").[37]

19 Whether equity requires compensation always depends on a consideration of all the circumstances[38] but particular regard is to be paid to the *financial condition* of the parties. The Federal Supreme Court (Bundesgerichtshof, BGH) requires a substantial difference between the financial state of the parties in the way that the tortfeasor's economic circumstances must be substantially better than those of the victim.[39] To establish the relevant discrepancy, the court must compare the wealth of both parties, adding up the respective incomes and assets, like real estate and savings, and deducting current debts and financial obligations towards third parties. Since children are mostly without income or assets, some courts have turned to the financial circumstances of the parents instead.[40]

20 Further circumstances to be considered are the kind of wrong complained of,[41] i.e., the gravity of the injury sustained as well as contributory negligence on the part of the victim.[42] The courts also consider the *degree of fault* on the part of the defendant in spite of the fact that he lacked the capacity to act culpably. To escape this calamity, the courts entertain a notion of "natural fault".[43]

21 Commentators agree that liability in equity under § 829 BGB is not available if the victim is covered by first-party insurance.[44] To hold otherwise would

[37] BGH (11.11.1994), BGHZ, 127, 187, 192; BGH (18.12.1976), BGHZ, 76, 279, 284; BGH (24.6.1969), [1969] NJW, 1762; BGH (26.6.1973), [1973] NJW, 1795; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 16; E. Steffen in: RGRK (supra fn. 14), § 829 no. 12.

[38] BGH (5.1.1957), BGHZ, 23, 90, 99; BGH (11.11.1994), BGHZ, 127, 186, 192; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 15.

[39] BGH (18.12.1976), BGHZ, 76, 279, 284; BGH (24.4.1979), [1979] NJW, 2096; BGH (13.6.1958), [1958] NJW, 1630, 1631; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 16.

[40] Cf. BGH (13.6.1958), [1958] NJW, 1630, 1631; BGH (24.4.1979), [1979] NJW, 2096; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 14; E. Steffen in: RGRK (supra fn. 14), § 829 no. 13; J. Oechsler in: Staudinger (supra fn. 13), § 829 no. 54; Cf. for criticism OLG Köln (22.10.1980), [1981] VersR, 266, 267; R. Borgelt (supra fn. 9) 73.

[41] BGH (15.1.1957), BGHZ, 23, 90, 99; BGH (26.6.1962), [1962] NJW, 2201; BGH (24.6.1969), [1969] NJW, 1762; BGH (24.4.1979), [1979] NJW, 2096 et seq.; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 15; A. Zeuner in: Soergel (supra fn. 10), § 829 no. 5.

[42] E. Steffen in: RGRK (supra fn. 14), § 829 no. 16.

[43] BGH (24.6.1969), [1969] VersR, 860, 861; *Landgericht* (LG) Mainz (5.6.1975), [1976] VersR, 548; LG Mosbach (20.8.1985), [1986] NJW-RR, 24; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 15; cf. Prot. II 589: Hereafter, it has to be considered whether the tortfeasor's mental condition borders the threshold to responsibility.

[44] E. Deutsch (supra fn. 10), no. 488; K. Larenz/C. Canaris, *Lehrbuch des Schuldrechts II/2* (13th edn. 1994), § 84 VII 1, 652; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 22; J. Oechsler in: Staudinger (supra fn. 13), § 828 no. 55; M. Fuchs, Versicherungsschutz und Versicherbarkeit als Argumente bei der Schadensverteilung, [1991] *Archiv für die civilistische Praxis* (AcP), 191, 318, 324; cf. OLG Hamm (14.12.1976), [1977] VersR, 531, 532.

amount to creating a benefit to the insurer at the expense of a tortfeasor not of full age and thus not responsible in law for the harm caused. The reverse result obtains where the minor is covered by third-party insurance, provided that it may be taken into account at all (infra nos. 22 et seq.).[45] In this case, the responsibility of the liability insurance carrier takes priority over the liabilities of private or public first-party insurance schemes. In the familiar case where the victim enjoys the coverage of public health insurance, the competent public authority has rights of recourse against the insurance company of the minor tortfeasor.

22 The effects of third-party insurance on liability in equity is at once one of the most important and contested issues under § 829 BGB,[46] as evidenced by the fact that even the BGH has changed its position several times in the past. Originally, the court held that the availability of third-party insurance was a relevant aspect of the tortfeasor's financial circumstances, which had to be considered in determining liability in equity.[47] Later on, this jurisprudence was abandoned in favour of a distinction between the liability and the quantum issues: According to this new approach, the availability of liability insurance was relevant to the quantum issue, the amount of damages, only. The court was not allowed to grant the damage claim in equity for the sole reason that the minor was covered by liability insurance. If there was no claim but for the insurance coverage, because the other financial circumstances of the parties did not require compensation in equity, then the mere fact of insurance coverage could not create a claim in the first place. To hold otherwise, it was thought, was to make liability contingent on insurance although the relationship is generally thought to run the other way around, liability insurance being contingent on the establishment of liability in tort.[48]

23 In 1994 the court came back to the issue and revised its position.[49] The underlying facts were those of a traffic accident for which a person lacking the relevant capacity was responsible. In Germany, as in the other European countries, insurance coverage for liabilities arising out of road accidents is mandatory, and the victim may bring a claim against the insurer directly, without charging the tortfeasor first. It was these peculiarities that made a difference for the BGH. The court reasoned that the principle purpose of mandatory

[45] BGH (16.01.1979), BGHZ 73, 190, 192 et seq.; BGH (24.06.1969), [1969] NJW, 1762 et seq.; BGH (26.06.1973), [1973] NJW, 1795 et seq.; OLG Karlsruhe (09.10.1987), [1989] *Neue Zeitschrift für Verkehrsrecht* (NZV), 188, 189; KG (31.10.94), [1996] VersR, 235, 236; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 22.

[46] See in general G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 nos. 18 et seq.

[47] BGH (15.1.1957), BGHZ 23, 90, 100, under reference to the en banc decision of the BGH (6.7.1955), BGHZ 18, 149, 166. Hereafter, the liability insurance has to be considered as part of the equity-test for determining whether damages for pain and suffering are due under § 847 BGB.

[48] BGH (13.6.1958), [1958] VersR, 485, 487. The principle of disconnection prohibits construing a provision for damages in the light of the insurance covering these damages, cf. H. Drewitz, *Die Versicherung folgt der Haftung* (1977), 2.

[49] BGH (11.11.1994), BGHZ 127, 186.

insurance schemes was not only the indemnification of the policy holder but also the protection of the victim.[50] As a consequence, the fact that the tortfeasor enjoys the benefit of insurance coverage was thought to be relevant not only to quantum but to liability as well. The principle that insurance coverage follows liability – and not vice versa – was pushed aside by the purpose of mandatory insurance schemes to further the interests of the victim.[51] As a result of this decision, the impact third-party insurance has on liability in equity depends on whether coverage is mandatory or voluntary. If it is mandatory, the personal financial position of the tortfeasor is irrelevant to the extent that the insurance policy provides coverage; if it is voluntary, liability in equity must be established with regard to the financial means of the tortfeasor only. Once such liability is established however, the availability of insurance coverage is taken into account such that the victim may recover to a greater extent than had the tortfeasor been uninsured.

24 The majority of commentators reject the distinction between mandatory and voluntary liability insurance.[52] In their opinion, *any* type of liability insurance has to be considered for determining both the merits and the extent of the claim in equity. The tortfeasor's claim for insurance coverage is an asset in itself that must be considered when drawing up a balance sheet and comparing the financial positions of both parties. Had the tortfeasor self-insured, i.e. had he accumulated capital to cover potential liability claims brought against him in the future, these moneys had to be taken into account without doubt. Now, how can it be any different if the defendant did not save money for the purpose of self-insurance but bought insurance on the market, promising a stream of premium payments in return?[53] In addition, some commentators argue that voluntary liability insurance serves the protection of the victim too as the insured is barred from ceding his claim against the insurer to some third party to the detriment of the victim.[54]

[50] § 158c subs. 1 of *Versicherungsvertragsgesetz* (Code of Insurance Contracts, VVG): „Ist der Versicherer von der Verpflichtung zur Leistung dem Versicherungsnehmer gegenüber ganz oder teilweise frei, so bleibt gleichwohl seine Verpflichtung in Ansehung des Dritten bestehen."

[51] BGH (11.11.1994), BGHZ 127, 186, 192.

[52] A. Zeuner in: Soergel (supra fn. 10), § 829 no. 9; G. Wagner in: Münchener Kommentar (supra fn. 7), § 829, no. 20; C. von Bar, Das „Trennungsprinzip" und die Geschichte des Wandels der Haftpflichtversicherung, [1981] AcP 181, 289, 326; M. Fuchs, [1991] AcP, 191, 318, 338; H. Kötz/G. Wagner, *Deliktsrecht* (9th edn. 2001), no. 328; E. Lorenz, Einfluss der Versicherungspflicht auf die Billigkeitshaftung nach § 829 BGB, in: *Festschrift Medicus* (1999), 353, 365; M. Wolf, Billigkeitshaftung statt überzogener elterlicher Aufsichtspflichten – ein erneutes Plädoyer für die Anwendung des § 829 BGB aufgrund einer Haftpflichtversicherung in [1998] VersR, 812, 818; K. Larenz/C. Canaris (supra fn. 44), § 84 VII 1 b; and M. Waibel (supra fn. 9), 79. Dissenting J. Oechsler in: Staudinger (supra fn. 13), § 829 nos. 51 et seq., who rejects any consideration of liability insurance of whatever kind, pointing to the effect this consideration would have on the risk taken by the insurer.

[53] Cf. e.g. G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 20.

[54] Cf. § 156 subs. 1 VVG: „Verfügungen über die Entschädigungsforderung aus dem Versicherungsverhältnis sind dem Dritten gegenüber unwirksam. Der rechtsgeschäftlichen Verfügung steht eine Verfügung gleich, die im Wege der Zwangsvollstreckung oder der Arrestvollziehung erfolgt"; E. Lorenz (supra fn. 52), 353, 356.

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

Pursuant to § 829 BGB, liability in equity arises only if the victim cannot obtain compensation from the parents or any other person under a legal or contractual duty to supervise the child. According to commentators, the liability of the child may arise regardless of whether the failure to obtain compensation from the parents results from the fact that the legal requirements for the claim against them are not met, e.g. because a violation of the duty to supervise cannot be established, or whether the claim against the guardian cannot be enforced for factual reasons, i.e. for lack of financial assets.[55] There is no jurisprudence on this question. 25

C. Strict Liability

10) Are children subject to regimes of strict liability alike adults or are there any concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a cat or a plant?

Two heads of strict liability are of particular importance to children, i.e., the liability of keepers of animals of other than commercial purpose (§ 833 cl. 1 BGB)[56] and the liability of car-owners § 7 *Straßenverkehrsgesetz* (Road Traffic Act, StVG).[57] However, since the age of majority and the driving age have been harmonized and both fixed on the eighteenth birthday, cases involving a child as the keeper of a car have become exceedingly rare. 26

A keeper (*Halter*) in the sense of strict liability law is not the legal owner but the person actually supporting and controlling the animal or car in his own interest.[58] Since the position of keeper is determined by factual criteria, children may well be keepers in the sense of these provisions.[59] As strict liability follows a no-fault concept, the rules on capacity to act reasonably (§ 828 BGB) are not directly applicable. However, there is widespread consensus that this cannot be the last word as children must be protected in the area of strict liability as well. The scope and foundation of such protection are a matter of some dispute which the BGH has not had the opportunity to decide as of yet. 27

[55] G. Wagner in: Münchener Kommentar (supra fn. 7), § 829 no. 12; A. Zeuner in: Soergel (supra fn. 10), § 829 no. 4; J. Oechsler in: Staudinger (supra fn. 13), § 829 no. 39.

[56] § 833 cl. 1 BGB: „Wird durch ein Tier ein Mensch getötet oder der Körper oder die Gesundheit eines Menschen verletzt oder eine Sache beschädigt, so ist derjenige, welcher das Tier hält, verpflichtet, dem Verletzten den daraus entstehenden Schaden zu ersetzen."

[57] § 7 subs. 1 *Straßenverkehrsgesetz* (Road Traffic Act, StVG): „Wird bei dem Betrieb eines Kraftfahrzeugs ein Mensch getötet, der Körper oder die Gesundheit eines Menschen verletzt oder eine Sache beschädigt, so ist der Halter des Fahrzeugs verpflichtet, dem Verletzten den daraus entstehenden Schaden zu ersetzen."

[58] BGH (6.3.1990), [1990] NJW-RR, 789, 790; BGH (19.1.1988), [1988] NJW-RR, 655, 656.

[59] BGH (6.3.1990), [1990] NJW-RR, 789, 790.

28 Commentators are divided into two groups. Pursuant to the first opinion, the provisions of § 104 et seq. BGB governing the legal capacity with regard to contractual obligations are to be applied *per analogiam* to the assumption of the role of keeper of an animal or car.[60] These authors argue that strict liability is contingent upon the availability of insurance coverage. Thus, the argument goes, only those persons who effectively had the option to enter into a binding insurance contract which in turn requires legal capacity in the sense of §§ 104 et seq. BGB should be held liable.[61] According to this view, children under the age of seven are never subject to strict liability as they are unable to enter into contractual agreements, cf. § 104 no. 1 BGB. The responsibility of children between seven and eighteen years of age depends on whether their parents or guardians consented to them becoming the keeper of an animal or car, cf. §§ 106 et seq. BGB.

29 The opposing view argues that, since §§ 104 et seq. BGB govern the legal capacity to enter into *contractual obligations* they do not fit the purpose of defining the limits of strict liability in tort. Instead, these authors favour an analogous application of § 828 BGB to strict liability claims.[62] Thus, if the child has the capacity to understand the risk inherent in the keeping of an animal or the operation of a car he is liable for the damage caused by the thing at hand. Where the minor lacks the relevant capacity, his liability may still be established under § 829 BGB, given that equity so requires.[63] The main argument in favour of this approach is the synchronization of the child's extracontractual liability, regardless of whether it is strict or based on fault.[64] In fact, it is difficult to understand why the child should enjoy even broader immunities in the area of strict liability than within the framework of fault-based liability.

[60] J. Oechsler in: Staudinger (supra fn. 13), § 828 no. 40; C. Canaris, Geschäfts- und Verschuldensfähigkeit bei der Haftung aus „culpa in contrahendo", Gefährdung und Aufopferung, [1964] NJW, 1987, 1991; K. Larenz/C. Canaris (supra fn. 44), § 84 I 2 g.

[61] C. Canaris, [1964] NJW, 1987, 1990 et seq.

[62] A. Zeuner in: Soergel (supra fn. 10), Vor §§ 827 no. 2; H. Thomas in: Palandt (supra fn. 10), § 833 no. 9; G. Wagner in: Münchener Kommentar (supra fn. 7), § 833 no. 30; G. Schiemann in: Erman, *Bürgerliches Gesetzbuch* (10th edn. 2000), § 827 no. 1; E. von Caemmerer, Objektive Haftung, Zurechnungsfähigkeit und Organhaftung, in: *Festschrift Flume I* (1978) 359, 363; E. Hoffmann, Minderjährigkeit und Halterhaftung in [1964] NJW, 228, 232; E. Deutsch, Die Haftung des Tierhalters, [1987] *Juristische Schulung* (JuS), 673, 678; M. Waibel (supra fn. 9), 87.

[63] G. Wagner in: Münchener Kommentar (supra fn. 7), § 833 no. 30; A. Zeuner in: Soergel (supra fn. 10), § 829 no. 11; G. Schiemann in: Erman (supra fn. 62), § 829 no. 1.

[64] E. von Caemmerer (supra fn. 62), 359, 362.

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

30 In case one of the parents enters into an insurance contract covering the risk of liability, it automatically extends to spouses and children, as long as they are unmarried.[65] Children suffering from a mental handicap are protected for as long a time as they live together with the family and receive the care of their parents. The insurance coverage does not end necessarily with the age of maturity. Grown-ups who have not joined the workforce as of yet but continue their education, be it at school or at a university, or draftees to the military, still enjoy the protection of the family insurance contract.

31 The usual policy in the German market is a special liability insurance cover, sold separately from household contents insurance or occupier's liability insurance. That does not mean, however, that products bundling household contents and liability insurance together are not on offer.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependant on the number, sex, age, and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

32 There are no efforts by the insurance companies active on the German market to risk-rate premiums or to introduce bonus malus-schemes. However, the insurer enjoys a right of termination after each event of loss. In practice, an insurance contract will be terminated once the insurer is losing money on it.

12. a) How many per cent of families are covered by one or another form of family liability insurance?

33 Mandatory family liability insurance does not exist in Germany, but of course many families contract for such insurance voluntarily. According to a survey conducted by Allensbacher Werbeträger in 2002, 66% of all households enjoyed the benefit of liability insurance coverage.[66] The German Insurance Association („Gesamtverband der deutschen Versicherungswirtschaft e.V.") estimates that voluntary liability insurance is even more common for families with children

[65] Cf. no. 2 of the „Besondere Bedingungen und Risikobeschreibungen für die Privathaftpflichtversicherung", reprinted at J. Prölss/A. Martin, *VVG* (26th edn. 1998), 1221 et seq.

[66] Gesamtverband der Deutschen Versicherungswirtschaft (GDV) (ed.), *Jahrbuch 2002, Die deutsche Versicherungswirtschaft* (2002), 51.

than for other households, where the quota is likely to be 10% higher than average.[67]

b) Does the liability insurance cover extend to intentional torts committed by the child?

34 Pursuant to § 152 of the *Gesetz über den Versicherungsvertrag* (German Insurance Act, VGG) the insurer is not liable for harm that the insured person caused intentionally. Problems arise with respect to cases of co-insurance. The first question is whether the insurer is bound to cover claims against a tortfeasor who caused the wrong intentionally but is not himself the insured but merely a jointly insured person. The next question to ask is whether the fact that the tortfeasor acted intentionally is sufficient to discharge the insurer even with respect to the policy holder, provided that the latter is liable to the victim for ordinary negligence, e.g. for lack of supervision. The BGH addressed these questions in a decision concerning a motor accident caused intentionally by the driver with the owner of the car being held liable for failing to adequately protect the car against theft. The BGH applied the defence of § 152 Insurance Act to the claim for coverage brought by the driver who caused the damage through his own intentional act.[68] However, the court declined to discharge the insurer also with respect to the owner of the car.[69] § 152 Insurance Act was held not to take away the cover of an insured who did not act intentionally himself but was liable for the intentional act of a third party. These principles were also applied to cases where a child caused the harm intentionally and the parents were held liable for the loss under § 832 BGB.[70]

13. a) Are the parents under a private law duty to take out a liability insurance for their child?

35 It is generally accepted that parents are under no duty to take out liability insurance for their child. Commentators tried to develop such an obligation from the parental duties to take care of the child's property (§ 1626 subs. 1 cl. 2 BGB) and to support the child (§ 1610 subs. 1 BGB).[71] However, this proposal has not won much support.

[67] Information provided by the German Insurance Association by telephone on 4 December 2002.
[68] BGH (15.12.1970), [1971] VersR, 239, 240; cf. also OLG Köln (1.7.1981), [1982] VersR, 383; OLG Schleswig (15.11.1994), [1995] VersR, 827.
[69] BGH (15.12.1970), [1972] VersR, 239, 241.
[70] OLG Karlsruhe (5.4.1984), [1986] VersR, 985.
[71] C. Peters, Schutz Minderjähriger vor deliktischen Verbindlichkeiten, [1997] FamRZ, 595, 598 et seq.

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

There is no official policy encouraging parents to protect their children against ruinous tort claims, apart from the fact that the premium is deductible from the total amount of earnings for purposes of income taxation. Public schools do not care about the insurance coverage of their pupils. Although it has been suggested to introduce a statutory obligation to insure the family against the risk of liability,[72] this proposal has not gained steam as of yet. 36

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up a damage claim brought by the victim against the parent?

Under the law of co-insurance it is a well settled principle that the insurer does not enjoy any right of recourse against a person who is jointly insured. If it were otherwise, co-insurance would be worthless. The only exception which is conceivable is the situation where the child caused the damage intentionally and the parent is held liable under § 832 BGB. In such a case the insurer will be held accountable for the damage claim brought against the parent but not with respect to the damage claim brought against the child (§ 152 Insurance Act, see supra no. 34). § 67 subs. 2 Insurance Act generally excludes subrogation against relatives of the insured living together with him in the same household. However, this exclusion does not apply to cases of intentional infliction of damage. 37

b) Does the social insurance law provide a limit on the right of recourse of the insurance company against the child or his parents or legal guardian?

Under the German law of social security, the damage claim of the victim is transferred by operation of law to the insurance carrier providing funds and services aimed at restoring the person injured and at compensating financial loss, § 116 Code of Social Security Vol. X (*Sozialgesetzbuch, Buch X*, SGB X). Thus, in the ordinary personal injury case, the bulk of the damages is taken care of by social insurance carriers which in turn enjoy rights of recourse against the tortfeasor. Against this background § 76 subs. 2 no. 3 SGB IV[73] provides for the possibility of a waiver of such right if, upon the facts of the particular case at hand, its enforcement would yield inequitable consequences.[74] To the extent 38

[72] Cf. recently H.P. Schwintowski, [2003] *Zeitschrift für Rechtspolitik* (ZRP), 391.

[73] § 76 subs. 2 *Sozialgesetzbuch Buch IV* (Social Code IV, SGB IV): „Der Versicherungsträger darf Ansprüche nur […] 3. erlassen, wenn deren Einziehung nach Lage des einzelnen Falles unbillig wäre; unter den gleichen Voraussetzungen können bereits entrichtete Beiträge erstattet oder angerechnet werden."

[74] BGH (5.11.1983), BGHZ 88, 296, 300; § 116 subs. 1 SBG X: „Ein auf anderen gesetzlichen Vorschriften beruhender Anspruch auf Ersatz eines Schadens geht auf den Versicherungsträger oder Träger der Sozialhilfe über, soweit dieser aufgrund des Schadensereignisses Sozialleistungen zu erbringen hat, die der Behebung eines Schadens der gleichen Art dienen und sich auf denselben Zeitraum wie der vom Schädiger zu leistende Schadensersatz beziehen."

that such waiver is granted in favour of a minor otherwise responsible to compensate the insurance carrier, § 76 subs. 2 no. 3 SGB IV works like a reduction clause. The courts have held that the social insurance agency is under an obligation to waive its right of recourse if its enforcement would create undue hardship and would thus violate the *Verhältnismäßigkeitsprinzip* (principle of proportionality).[75] The tortfeasor may apply for such waiver, and if it is denied, may sue the social insurance carrier in court for wrongful denial.[76]

39 In determining whether the enforcement of the claim constitutes undue hardship, all circumstances of the case have to be considered, in particular the personal and economic circumstances of the tortfeasor, the quality of the tortious act that gave rise to liability and the amount in question.[77]

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

40 No. However, the provision in the SGB requiring the competent insurance carrier to waive its rights of recourse against the tortfeasor in cases of undue hardship comes close to a reduction clause.[78] However, it is limited to cases of personal injury and to victims covered by public health and disability insurance schemes. Where the victim is a public servant or self-employed and thus covered by private health insurance the rights of recourse of the insurer are not subject to a mandatory waiver in cases of undue hardship.

41 In addition, to the extent that the tortfeasor lacks the relevant capacity (§ 828 BGB) and is liable in equity only, § 829 BGB requires the court to limit the amount of damages as equity requires.[79]

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

42 The absence of a general provision or reduction clause in cases of crushing tort liability, possibly resulting in an unlimited liability of the child, has been criticised by both courts[80] and commentators.[81] As fault-based liability is un-

[75] BGH (5.11.1983), BGHZ 88, 296, 300 referring to the old version of § 76 Abs. 2 no. 3 SBG IV.
[76] *Bundessozialgericht* (Federal Social Court, BSG) (13.6.1989), [1990] VersR, 175, 177.
[77] F. Hauck/H. Haines, *Sozialgesetzbuch IV* (25th edn. 1997), § 76 no. 17.
[78] Supra no. 38.
[79] Cf. supra no. 17.
[80] OLG Celle (26.5.1989), [1989] NJW-RR, 791; LG Bremen (15.2.1991), [1991] NJW-RR, 1432, 1434.
[81] C. Canaris, Die Verfassungswidrigkeit von § 828 II BGB als Ausschnitt aus einem größeren Problemfeld, [1990] JZ, 679, 681; K. Goecke (supra fn. 5), 46 et seq.; K. Goecke, Unbegrenzte Haftung Minderjähriger, [1999] NJW, 2304, 2306; L. Kuhlen, [1990] JZ, 273, 278; E. Scheffen, Zur Reform der (zivilrechtlichen) Deliktsfähigkeit von Kindern ab dem 7. Lebensjahr (§ 828 I, II), [1991] ZRP, 458, 459; H.J. Ahrens, [1997] VersR, 1064, 1066.

limited in German law, it may well be that a minor who behaved maliciously or carelessly early in life will be burdened with a huge damage claim. Once of age, the child starts his life as an adult with a debt almost impossible to pay off. In the eyes of the critics, the law must not remain idle at these prospects but must protect the child's personality rights, as enshrined in art. 1 subs. 1, art. 2 subs. 1 of the *Grundgesetz* (German Constitution, GG).[82] To be sure, the German Constitutional Court struck down a provision in the law allowing the parents of a child to carry on with a business enterprise inherited by the minor and to confront him with a sea of debt at the time he becomes of age.[83] The Court stipulated that the legislature had to adopt provisions, which effectively prevent that the personal freedom of the young adult amounts to mere fiction.[84]

The same reasoning seems to apply to the law of torts. Thus, the Regional Court (*Landgericht*, LG) Dessau petitioned the Constitutional Court to declare § 828 BGB unconstitutional in so far as it allows for crushing tort liability.[85] In a chamber decision the Court rejected the request as inadmissible for procedural reasons not of interest here.[86] However, in an obiter dictum the chamber furnished some basic considerations of constitutional law with respect to these cases. In particular, the court acknowledged that the unlimited liability of children may be problematic in view of the general right of personality.[87] On the other hand, the court highlighted the safeguards available in order to protect a minor from liabilities which are likely to overburden him. The most important of such instruments is the waiver provision of § 76 subs. 2 no. 3 SGB IV,[88] and the discharge granted to individual debtors under §§ 286 to 303 of the Insolvency Act (*Insolvenzordnung*, InsO). To the extent that both safeguards fail, there is still the general principle of good faith and fair dealing, as codified in § 242 BGB, which – in the view of the Federal Constitutional Court – allows a civil court to limit liability in tort in exceptional cases.[89] 43

In spite of this catalogue of restrictions, commentators continue to question the constitutionality of unlimited liability in tort with respect to minors. To be sure, the waiver under § 76 subs. 2 no. 3 SGB IV provides relief only in cases 44

[82] Art. 1 subs. 1 GG: „Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt." Art. 2 subs. 1 GG: „Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt."

[83] *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG) (13.5.1986), Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 72, 155, 173.

[84] BVerfG (13.5.1986), BVerfGE 72, 155, 173. In the wake of this decision, the legislature adopted § 1629a subs. 1 BGB, which came into force on January 1, 1999 in [1998] *Bundesgesetzblatt* (BGBl), I 2487.

[85] LG Dessau (25.9.1996), [1997] VersR, 242.

[86] BVerfG (13.8.1998), [1998] NJW, 3557.

[87] BVerfG (13.8.1998), [1998] NJW, 3557, 3558.

[88] Supra no. 38.

[89] BVerfG (13.8.1998), [1998] NJW, 3557, 3558.

of personal injury taken care of by a public health or disability insurance.[90] As far as discharge in bankruptcy pursuant to §§ 286–303 InsO is concerned, it does not extend to claims resulting from intentional torts (§ 302 no. 1 InsO) and requires the debtor to file for bankruptcy and to live through cumbersome and costly bankruptcy proceedings in order to obtain relief. Finally, the principle of good faith in its current form provides no basis for cutting off claims of a certain magnitude.[91]

45 On the other hand, it seems that the discussion has focussed too much on the interests of the tortfeasor, neglecting the legitimate interests of the victim.[92] As was shown in a recent case, the victim may be of tender years as well, making the case for limits on tortious liability of minors pale considerably.[93] Furthermore, it should not be forgotten that tort law provides valuable incentives to behave prudently and to see to it that others are not injured. In this perspective, placing restrictions on the responsibility of children serves to weaken the incentives of minors and their parents to take care and to avoid dangerous situations.[94]

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

46 The Insolvency Act allows individuals to obtain discharge of their debts. However, §§ 286–303 InsO are applicable at the final stage of a drawn-out process of bankruptcy proceedings in which the obligations of the debtor are fixed, his assets liquidated and the proceeds distributed between his creditors. Even then, discharge takes effect only after a waiting period of another six years during which the debtor must not conceal any earnings or assets from his creditors and must cede all attachable claims for earnings or other benefits to a trustee for collection and distribution among his creditors. It is only after the expiration of these six years and contingent upon compliance by the debtor that discharge will be granted by the court, § 300 InsO.

18. If so, does the fresh start in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

47 According to § 302 no. 1 InsO, discharge does not extend to claims derived from intentional torts. With this exception, the debtor is exonerated from all his obligations, including claims sounding in tort.

[90] Supra no. 38.

[91] The policy reasons for the principle of full compensation have been disputed for a long time. See D. Looschelders, Verfassungsrechtliche Grenzen der deliktischen Haftung – Grundsatz der Totalreparation und Übermaßverbot, [1999] VersR, 141, 143 et seq. and E. Deutsch (supra fn. 10), nos. 629 et seq. for further references.

[92] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828, nos. 14 et seq.

[93] Cf. OLG Celle (17.10.2001), [2002] VersR, 241 = [2002] NJW-RR, 674.

[94] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 nos. 16 seq.

II. Liability of the Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

§ 832 subs. 1 BGB establishes the liability of the parents for the tortious conduct of their child.[95] § 832 subs. 1 cl. 1 BGB stipulates that the legal guardian of a person that requires supervision due to his minority or mental or physical condition is liable for the damage this person unlawfully causes. It is generally understood that this provision establishes liability for the guardian's own fault.[96] Accordingly, it is contingent on the guardian violating his duty to supervise the person that caused the loss. However, as § 832 subs. 1 cl. 2 BGB makes clear, it is not for plaintiff to prove fault on the part of the guardian but it is for him to convince the court that he took the reasonable precautions required under the circumstances. In the case of minors, the duty to supervise is incumbent upon the parents.[97] It originates from the parental right of custody, i.e. the right to educate the child and to care for it, §§ 1626 subs. 1, 1631 subs. 1 BGB.[98] As parental liability is based on the fault of the supervisors themselves, fault of the child is not a precondition for them being held responsible.[99] 48

[95] § 832 BGB: „(1) Wer kraft Gesetzes zur Führung der Aufsicht über eine Person verpflichtet ist, die wegen Minderjährigkeit oder wegen ihres geistigen oder körperlichen Zustands der Beaufsichtigung bedarf, ist zum Ersatz des Schadens verpflichtet, den diese Person einem Dritten widerrechtlich zufügt. Die Ersatzpflicht tritt nicht ein, wenn er seiner Aufsichtspflicht genügt oder wenn der Schaden auch bei gehöriger Aufsichtsführung entstanden sein würde."

[96] See G. Kreft in: *Reichsgerichtsrätekommentar, Das bürgerliche Gesetzbuch mit besonderer Berücksichtigung der Rechtsprechung des Reichsgerichtshofes und des Bundesgerichtshofes* (RGRK), Vol. II/5 (12th edn. 1989), § 832 no. 2; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 1.

[97] § 1626 BGB: „(1) Die Eltern haben die Pflicht und das Recht, für das minderjährige Kind zu sorgen (elterliche Sorge). Die elterliche Sorge umfasst die Sorge für die Person des Kindes (Personensorge) und das Vermögen des Kindes (Vermögenssorge). (2) Bei der Pflege und Erziehung berücksichtigen die Eltern die wachsende Fähigkeit und das wachsende Bedürfnis des Kindes zu selbständigem verantwortungsbewusstem Handeln. Sie besprechen mit dem Kind, soweit es nach seinem Entwicklungsstand angezeigt ist, Fragen der elterlichen Sorge und streben Einvernehmen an. (3) Zum Wohl des Kindes gehört in der Regel der Umgang mit beiden Elternteilen. Gleiches gilt für den Umgang mit anderen Personen, zu denen das Kind Bindungen besitzt, wenn ihre Aufrechterhaltung für seine Entwicklung förderlich ist." § 1631 BGB: „(1) Die Personensorge umfasst insbesondere die Pflicht und das Recht, das Kind zu pflegen, zu erziehen, zu beaufsichtigen und seinen Aufenthalt zu bestimmen. (2) Kinder haben ein Recht auf gewaltfreie Erziehung. Körperliche Bestrafungen, seelische Verletzungen und andere entwürdigende Maßnahmen sind unzulässig. (3) Das Familiengericht hat die Eltern auf Antrag bei der Ausübung der Personensorge in geeigneten Fällen zu unterstützen."

[98] G. Schiemann in: Erman (supra fn. 62), § 832 no. 1; D.W. Belling/Ch. Eberl-Borges in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Vol. 2, Recht der Schuldverhältnisse* (2002), § 832 no. 2; see infra nos. 53 et seq.

[99] See infra nos. 67 et seq.

2. If the parental liability is based on the parents' own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

49 The fathers of the first draft of the BGB saw no need for a special rule regarding the burden of proof but moulded the liability of the parents for the wrongs of their children in the form of fault-based liability.[100] However, later on in the legislative process, this position was abandoned, and the second draft of the BGB provided for shifting the burden of proof to the parents,[101] in this regard following the lead of art. 1384 of the *Code Civil* (French Civil Code, CC) of 1804.

50 General legal principles mandate that the plaintiff bears the onus of proving the facts necessary to establish his claim.[102] As an exception, § 832 BGB stipulates that the plaintiff (the victim) merely needs to prove the prerequisites set out in § 832 subs. 1 cl. 1 BGB, i.e., that the damages sustained were caused by a wrong committed by the child.[103] If the victim has met this burden of proof, § 832 subs. 1 cl. 2 BGB stipulates a two-fold presumption: First, it presumes that the legal guardian violated the so-defined duty to supervise. Second, it presumes the causal link between the violation of the duty and the wrong committed by the child. In practice, however, the decisive question in most of the cases is not whether the parents supervised the child in a particular moment or whether the child would have caused the damage anyway but the exact scope of the duty to supervise. If the duty to supervise is inflated, then liability of the parents expands, if the duty to supervise is kept within modest bounds, it shrinks. The important thing to note at this point is that the definition of the scope of the duty to supervise is not a factual matter in need of proof by one party or the other but a legal question to be answered by the court, as expressed by the principle of *iura novit curia*.[104]

51 For these reasons it may well be said that the reversal of the burden of proof provided by § 832 subs. 1 BGB does not really change much. Its main effect is that once the court has fixed the scope of the duty to supervise it is for the parents to prove that they did in fact take all the safety measures required. In this respect, the allocation of the burden of proof to the parents comes naturally as the victim has no access to the sphere of family life and thus lacks the relevant information. In practice, cases rarely turn on the burden of proof and decisions on non-liquet grounds are extremely rare.

52 In order to prove lack of causation between the violation of the duty to supervise and the damage, the legal guardian has to show more than the mere possi-

[100] The first draft of the provisions in § 832 BGB was § 710 BGB, reprinted in H. Jakobs/W. Schubert, *Schuldrecht III*, 935.

[101] The second draft of the provisions in § 832 BGB was § 755 BGB, reprinted in B. Mugdan, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, vol. 2* (1899), CXXIV et seq.

[102] BGH (25.5.1993), [1993] NJW-RR, 1261, 1262; *Baumbach-Hartmann*, Anh. § 286 no. 3.

[103] For details see infra nos. 67 et seq.

[104] G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 42.

bility that the damage would have been sustained anyway.[105] One example where the parents were able to meet this standard was when they proved that they had given explicit orders which the child refused to obey unexpectedly.[106] As this example proves, parents are not accountable for the *success* of their supervision. It is sufficient if they adopt a supervising measure that is appropriate under the individual circumstances, even if this measure does not avoid the damage caused by the child.[107]

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

The legal duty to supervise a minor results from the family law which has also been incorporated into the BGB. The duty to supervise forms a part of parental custody, as defined in §§ 1626 subs. 1, 1631 subs. 1 BGB. Accordingly, only those persons, who are invested with parental custody are subject to this duty. 53

a) Parents in a legal sense

If the parents are married at the time the child is born, parental custody vests in both of them, §§ 1626 subs. 1, 1631 subs. 1 BGB. Although the parents exercise parental custody together and are equal in rank, every parent exercises his duties independently.[108] The same principles apply to adoptive parents, § 1754 BGB. 54

If the parents are not married at the time the child is born, parental custody is invested in the mother alone (§ 1626a subs. 2 BGB) unless mother and father file a certified declaration of joint custody (§ 1626a subs. 1 BGB). For details see infra nos. 61 et seq. 55

In any case where the parents exercise parental custody *together*, upon the death of one of them, parental authority is vested in the surviving party alone 56

[105] RG (19.10.1911), [1912] *Warneyer: Rechtsprechung des Bundesgerichtshofs in Zivilsachen* (WarnR), no. 28; OLG Düsseldorf (14.9.1990), [1992] VersR, 321, 322; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 43; U. Immenga, [1969] FamRZ, 313, 316; § 286 ZPO: „(1) Das Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder nicht für wahr zu erachten ist. In dem Urteil sind die Gründe anzugeben, die für die richterliche Überzeugung leitend gewesen sind. (2) An gesetzliche Beweisregeln ist das Gericht nur in den durch dieses Gesetz bezeichneten Fällen gebunden."

[106] OLG Frankfurt (28.3.2001), [2001] MDR, 752, 753; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 43.

[107] RG (30.12.1901), RGZ 50, 60, 62; OLG Frankfurt (28.3.2001), [2002] NJW-RR, 236; G. Kreft in: RGRK (supra fn. 96), § 832, no. 31, G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 25.

[108] W.B. Dahlgrün, *Die Aufsichtspflicht der Eltern nach § 832 BGB – Entwicklung und Problematik* (1979), 58; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 9.

(§ 1680 subs. 1 BGB). The same result obtains if one parent has been suspended from, is unable to exercise, or has been deprived of parental custody (§§ 1673, 1678 subs. 1, 1680 subs. 3, subs. 1 BGB).

b) Other persons, who have the right of custody

57 The legal status of step-parents is in a state of transition. Within the present context the most common scenario is that of the divorced parent living together with the child and a new partner, be it a man or a woman. In former times, the courts did not subject the new partners of single mothers and fathers to liability under § 832 BGB. This did not mean, however, that step-parents were allowed to get away scot-free. Rather, they had to observe the general duty of care as derived from § 823 subs. 1 BGB.[109] The only difference remaining concerned the burden of proof: Within the framework of § 823 subs. 1 BGB, it is for the plaintiff-victim to prove that the defendant violated the duty of care. As has been said already, § 832 subs. 1 BGB does not change too much in this regard.[110] But still, modern jurisprudence is prepared to construe an implicit contractual agreement between the single parent and the step-parent with the latter taking the duty to supervise the child upon himself.[111] § 832 subs. 2 BGB mandates that such a contractual agreement establishes the same liability towards third parties as follows from § 832 subs. 1 BGB. This jurisprudence carries a general trend from the family law into the tort law, a trend that assigns legal rights and duties not according to a legal status but rather on the basis of an existing social relationship.

58 If a child is living in a foster home or with a foster family due to judicial decision (§§ 33 et seq. SGB VIII), §§ 1666 et seq. BGB, §§ 9, 12 JGG, the persons in charge of taking care of the child are subject to the duty to supervise only insofar as the child is in their sphere of actual influence.[112] Besides, foster homes may be liable under § 832 subs. 2 BGB if they contractually assume the duty to supervise.[113] The legal basis for the liability of foster homes depends upon the incorporation of the home under private or public law. Foster homes that are organized as a private entity are liable under § 832 BGB,[114] whereas those administered by a public entity are liable under § 839 BGB along with art. 34 GG.[115]

[109] BGH (16.12.1953), LM § 832 no. 3; OLG Düsseldorf (30.10.1975), [1976] VersR, 1133, 1134.

[110] Supra no. 51.

[111] OLG Düsseldorf (23.11.1990), [1992] NJW-RR, 857; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 10; for details see infra part IV, question no. 4.

[112] RG (15.3.1920), RGZ 98, 246, 247; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 19; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 11.

[113] See infra part IV.

[114] *Amtsgericht* (district court, AG) *Königswinter* (17.10.2001), [2002] NJW-RR, 748.

[115] OLG Dresden (4.12.1996), [1997] NJW-RR, 857 et seq.; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 19; for liability under § 832 OLG Hamm (21.9.1987), [1988] NJW-RR, 798; undecided OLG Hamburg (8.4.1988), [1988] NJW-RR, 799.

Legal advisers (*Beistand* §§ 1712, 1716 BGB), co-guardians (*Gegenvormund*, §§ 1792, 1799 BGB) and educational counsellors (*Erziehungsbeistand*, §§ 27, 30 SGB VIII, §§ 9, 12 JGG) are not subject to the duty to supervise the child.[116] 59

c) Persons living in the same household

A duty to supervise does not arise from the mere fact of living together with a child in the same household. As to step-parents see supra no. 57. 60

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

a) Children of unmarried parents

If the natural parents of the child were not married at the time the child was born, they can establish joint parental custody by subsequent marriage (§ 1626a subs. 1 no. 2 BGB). They may even do so without marriage if they create a declaration of joint custody before a public notary (§ 1626a subs. 1 no. 1 BGB). Such declaration requires the consent of both parents, that is, the father may not establish his parental custody without the consent of the mother. A child is regarded to be born out of wedlock even if it has been conceived at a time where mother and father were still married but born after divorce or annulment of the marriage. 61

Absent a declaration of joint custody, parental custody is invested in the mother alone (§ 1626 subs. 2 BGB). Where a parent who, alone, exercises authority over the child dies or is suspended from exercising this authority, parental custody does not automatically shift to the remaining parent. Thus, if a single mother dies, the father of the child does not acquire parental custody *ipso iure*. Instead, it is upon the family court to assign parental custody to the other parent, and the court may do so only if such a ruling is to be expected to further the welfare of the child (§§ 1680 subs. 2, par. 3, 1681 par. 2, 1678 subs. 2 BGB). 62

The subjection of the father's parental custody to the mother's consent has been challenged before the Federal Constitutional Court, but without success. According to this court, the dependence of the father on the cooperation of the mother complies with the guarantee of the father's parental right in art. 6 subs. 2 cl. 1 GG as well as with the principle of equal protection in art. 3 subs. 2 GG.[117] However, the court decided otherwise with respect to the father's right to have *contact* with his child, as codified in § 1684 BGB. The vis- 63

[116] The BGB distinguishes two legal guardianships for minors: "Vormundschaft" (§ 1793, 1800, 1631 subs. 1 BGB) and "Ergänzungspflegschaft" (§§ 1909, 1915, 1800, 1631 subs. 1 BGB). "Vormundschaft" is the assignment of the parental care to another person. "Ergänzungspflegschaft" is the assignment of certain *parts* of the parental care to another person.

[117] BVerfG (29.1.2003), [2003] NJW, 955, 956, 958; BGH (4.4.2001), [2001] FamRZ, 907, 909 et seq.

itation rights of the father were thought to be an indispensable remainder of the parental custody. Accordingly, the Constitutional Court considered the subjection of the father's visitation rights to the mother's consent unconstitutional.[118] As to the relationship between visitation rights and the duty to supervise see infra no. 66.

b) Separation of married parents and divorce

64 Since the passage of the Child Reform Act (*Kindschaftsreformgesetz*) in 1997,[119] neither divorce nor continuous separation of husband and wife have any impact on the allocation of parental custody in and of themselves. Although the petition for divorce must include a statement about whether husband and wife have minor children (§ 622 subs. 2 cl. 1 ZPO), this information is only designed to enable the competent public authorities to assist the parents in coping with potential problems (§ 17 subs. 2, subs. 3 SGB VIII). Thus, joint parental custody continues despite divorce or permanent separation.[120] However, each parent retains the option to petition the court to assign parental custody to him or her exclusively (§§ 1671, 1672 BGB). The court will follow suit where the other parent either consents to exclusive custody being vested in the petitioner or if such a ruling appears to be in the interest of the child. In this context, the familiar scenario is the one of parents deeply at odds with one another, fighting over each and every issue concerning the upbringing of the child.[121] Most often, the only way to make the parents stop their private warfare is to concentrate responsibility for the child in one parent alone. Provided that it is not the petitioner him- or herself who appears to be the source of the mess, the court will do so and terminate joint custody in favour of single custody.

65 During the state of separation, joint parental custody changes its character. § 1687 BGB provides for *divided* parental custody in order to accommodate for the fact that in most cases the child is living either with the mother *or* the father. In such a case, joint parental custody is limited to matters of substantial importance. In the common affairs of day-to-day life, parental custody is exercised exclusively by the parent with whom the child is actually living. This allocation of parental custody also affects the duty to supervise and thus parental liabilities under § 832 BGB: The duty of the parent not living with the child is reduced accordingly. Thus, the father of the child who spends the week away from home is not answerable for a wrong committed by the child while living with his mother.

[118] BVerfG (9.4.2003), Az: 1BvR 1493/96.
[119] [1997] BGBl. I, 2942.
[120] See BVerfG (3.11.1982), [1983] NJW, 101; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 9.
[121] BGH (29.9.1999), [2000] NJW, 203; U. Diederichsen in: *Palandt, Bürgerliches Gesetzbuch* (62th edn. 2003), § 1671 no. 17.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

66 In general, the duty to supervise is predicated on parental custody. However, if parental custody has been exclusively assigned to one side, e.g. to the mother (§ 1671 BGB), the father retains visitation rights (§ 1684 BGB). These rights are indispensable remainders of parental custody,[122] and as such they work to limit the exclusive rights of the mother. Insofar as the father actually enforces his visitation rights, the duty to supervise survives his loss of custody.[123] As in the case of divided custody discussed before,[124] the father remains in charge with respect to the time the child actually spends with him.

6. Which elements of a tort must the child have realized for the parents to be liable for it?

67 Parental liability under § 832 BGB requires that the child has caused damage through tortious conduct, i.e. committed one of the wrongs described in §§ 823 et seq. BGB.[125] Liability under § 832 BGB does not require that the child effected the last cause that led directly or immediately to the infringement,[126] or even committed the tort by his own hands. The mere mental support for another person's tort may be sufficient.[127] If the relevant tort requires a certain state of mind, like intent or malice, the child must be shown to have acted in such mental state.[128] On the other hand, fault on the part of the child is without relevance, since § 832 BGB establishes liability not for the fault of the child but for the legal guardian's own fault.[129] Therefore, the parents are answerable in damages even if the child has not grown to the age of discretion as fixed by § 828 subs. 1, subs. 2 cl. 1 BGB (supra nos. 1 et seq.), if the child lacked the relevant capacity pursuant to § 828 subs. 3 BGB (supra nos. 4 et seq.), or if the child did not breach his/her legal duties, i.e., behaved neither negligently nor intentionally, § 276 BGB (supra nos. 11 et seq.).

68 To these principles an important qualification must be added. The purpose of parental liability under § 832 BGB is to compensate for the preferential treatment of children within the law of torts,[130] not to extend the scope of delictual liability. However, just that would happen if parents were held accountable for the wrongs of their children regardless of whether the child acted in breach of duty. In particular, if the issue of negligence really was irrelevant then the par-

[122] BGH (13.12.1968), [1969] NJW, 422; OLG Frankfurt (27.11.1998), [1999] FamRZ, 1008.
[123] D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832, no. 14.
[124] Supra no. 65.
[125] BGH (29.5.1990), BGHZ 111, 282, 284; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832, no. 22.
[126] BGH (1.2.1966), LM § 832 no. 8a.
[127] BGH (29.5.1990), BGHZ 111, 282, 284.
[128] D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832, no. 49; H. Thomas in: Palandt (supra fn. 10), § 832 no. 10; Dissenting Fuchs, [1991] AcP, 111.
[129] Supra no. 51.
[130] BGH (29.5.1990), BGHZ 111, 282, 284; BGH (7.7.1987), [1987] NJW-RR, 1430, 1431.

ents would be subject to liability for wrongs which even the most reasonable and careful behaviour of an adult would not have been successful to avert. Once this is understood, it follows that § 832 BGB requires a qualification – the provision must be "reduced teleologically" (*teleologische Reduktion*) – that excludes those cases from compensation where the injury was caused by the behaviour of a child that would not amount to negligence had it been performed by a reasonable adult.[131] Although this exception receives general approval, it is a matter of dispute which party bears the burden of proof. The Supreme Court argued in an en banc decision for the comparable § 831 BGB on vicarious liability that it is for the principal – in the present context: the parents – to prove that the agent or child took all the safety measures required. The prevailing view among commentators is that the victim carries the burden of proof as it would be his burden to establish negligent behaviour had the principal or parent acted himself.[132]

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the d) parents are working or not?

a) Factual circumstances

69 Since the duty to supervise is merely a special case of the general duty to take care, general principles of tort law apply. Accordingly, the parents are *not* required to adopt every conceivable and imaginable safety measure or even to guarantee absolute safety as this is generally acknowledged to be impossible.[133] Rather, the duty to take care is limited by reasonableness, i.e., to those safety measures that can reasonably be expected from the parent.[134] In order to establish the required level of safety in a particular case, the severity of the injury must be discounted by the probability of its occurrence and then be balanced against the costs of available precautions.[135] The greater the loss and the higher the probability of its occurrence, the more efforts to prevent the damage can be expected from the parents.[136] As § 832 BGB does not call for abso-

[131] G. Kreft in: RGRK (supra fn. 96), § 832 no. 28; H. Kötz/G. Wagner (supra fn. 52), no. 330; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 22; K. Larenz/C. Canaris (supra fn. 44), § 79 IV 2 b, 486; J. Esser/H. Weyers (eds.), *Schuldrecht Band II. Besonderer Teil*, *Teilband 2* (8th edn. 2000), § 58 II, 216.

[132] E. von Caemmerer, *Festschrift 100 Jahre Rechtsleben*, 124 = *Gesammelte Schriften, Vol. I*, 539; M. Fuchs, [1991] AcP, 106.

[133] See BGH (25.5.1990), [1990] NJW, 2553, 2554 et seq. BGH (27.11.1979), [1980] NJW, 1044, 1045; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 25.

[134] BGH (29.5.1990), BGHZ 111, 282, 285 et seq.; BGH (26.1.1960), [1960] VersR, 355, 356; BGH (27.10.1965), [1965] VersR, 48 et seq.; BGH (6.4.1976), [1976] NJW, 1684; BGH (27.11.1979), [1980] NJW, 1044, 1045; BGH (10.7.1984), [1984] NJW, 2574, 2575; BGH (7.7.1987), [1987] NJW-RR, 1430, 1431; OLG Düsseldorf (15.9.2000), [2002] NJW-RR, 235.

[135] BGH (27.2.1996), [1996] NJW, 1404, 1405; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 24.

[136] BGH (2.12.1975), [1976] NJW, 1145, 1146; OLG Hamm (9.6.2000), [2002] NJW-RR, 236, 237.

lute safety, parents are usually not required to uninterruptedly supervise their child around the clock.[137] However, they may be required to find alternative ways to prevent the infliction of harm, such as securing that the child has no access to dangerous things, like matches, powered household appliances and cars.[138] These abstract principles will be illustrated by the case law developed with regard to two all-too-familiar situations,[139] i.e. road accidents and dangerous things.

i) Road Accidents

Parents have to instruct their children on the appropriate behaviour in road traffic, teaching them the rules of the road. Secondly, they have to practise the observance of these rules with them. Thirdly, they have to assure a sufficient supervision once their offspring takes to the road.[140] They must not allow their children to use the street as a playground, and they have to make sure that this prohibition is observed in practice.[141] Small children may not walk on the sidewalk without immediate supervision,[142] or be left behind in a car if there is a possibility that they may open the door and get out.[143] Likewise, children in first class of primary school may not walk to school alone but must be accompanied by an adult.[144] In case of imminent danger they have to be supervised with particular care or even be taken by their hand.[145] Older schoolchildren may be allowed to walk to school on their own but only after thorough instruction about how to behave properly, e.g. how to cross a busy road.[146] 70

Pursuant to § 828 subs. 2 BGB children under ten years are not responsible for their negligent behaviour in road traffic. This provision works to assign the risk of damage caused by the presence of children on the road to the keepers and drivers of motor cars, which in turn are required to insure their risk of liability with a professional carrier.[147] The balance of interests inherent in § 828 subs. 2 BGB must not be undermined by tightening the duties of super- 71

[137] See LG Potsdam (12.8.2002), [2002] NJW-RR, 1543: Small children throwing toys out of the window on a Sunday morning at 6:00 a.m.
[138] BGH (2.12.1975), LM § 832, no. 10; OLG Düsseldorf (15.9.2000), [2002] NJW-RR, 235.
[139] Overview on case law: G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 nos. 28–35.
[140] BGH (14.11.1969), [1965] VersR, 137.
[141] BGH (19.9.1961), [1961] VersR, 998, 999.
[142] OLG Oldenburg (23.4.1975), [1976] VersR, 199.
[143] OLG München (15.10.1976), [1977] VersR, 729–730.
[144] LG Osnabrück (22.5.1974), [1975] VersR, 1135, 1136.
[145] BGH (19.3.1957), [1957] VersR, 340, 341; as to the duty to take the child by his hands see OLG Hamm (18.4.1975), [1976] VersR, 392*;* AG Charlottenburg (21.12.1976), [1977] VersR, 779; as to playing on the sidewalk see AG Rendsburg (3.1.1966), [1966] VersR, 839, 840; AG Aalen (18.12.1985), [1987] *Recht und Schaden* (r+s), 226, 227; as to playing and bike-riding on a parking lot see AG Bersenbrück (3.3.1993), [1994] VersR, 108.
[146] BGH (30.1.1962), [1962] VersR, 360 et seq.; BGH (7.7.1987), [1987] NJW-RR, 1430, 1431; OLG Celle (12.1.1978), [1979] VersR, 476; OLG Hamm (18.4.1975), [1976] VersR, 392 et seq.; OLG Oldenburg (3.4.1970), [1972] VersR, 54, 55.
[147] G. Wagner in: Münchener Kommentar (supra fn. 7), § 828 no. 5.

vision incumbent upon parents under § 832 BGB with respect to motor accidents.[148]

ii) Dealing with dangerous things

72 The principle that children must strictly be kept away from dangerous things makes perfect sense, but only at first glance. In the long run, it is counter productive. Only by being exposed to sources of danger the child may learn how to reasonably deal with them, and the experience and skills accumulated in this way will then work to the benefit of third parties.[149] On the other hand, of course, a child is in urgent need of information as to how to properly use dangerous things, and the parents have to provide the appropriate instructions. Non-compliance with parental orders have to be appropriately reacted upon: when a four-year old child turns on the oven repeatedly, a mere warning and reminder is not sufficient; rather the parents must keep him away from the oven and check that it is switched off when leaving the house.[150]

73 Parents have to exercise a high degree of care and caution with regard to *matches or other lighters*, since children tend to be attracted by fire, and fire, in turn, is apt to cause severe damage.[151] Therefore, the parents have to lecture the child on the dangers associated with playing with open fire, and they have to assure that the child has no access to sources of fire.[152] Within the house, matches or other lighters are to be stored out of reach; where they disappear anyway, the child has to be questioned immediately and with great resolve.[153] A search of the child's body is necessary if particular circumstances give rise to the assumption that the child might have taken the matches, e.g. if the child has a known tendency to play with them.[154] If the child has an aggressive character, and if it is not able to understand the danger of playing with fire and to follow the parents' orders due to his mental condition, the parents may not leave the child playing outside for several hours without supervision;[155] significantly aggressive children might even require continuous supervision "at every turn"[156]. With increasing age and reasonableness of the child, the appropriate

[148] E. Steffen, Zur Haftung von Kindern im Straßenverkehr, [1998] VersR, 1449, 1451. Dissenting C. Karczewski, Der Referentenentwurf eines Zweiten Gesetzes zur Änderung schadensersatzrechtlicher Vorschriften, [2001] VersR, 1070, 1074.

[149] BGH (6.4.1976), [1976] NJW, 1684; BGH (17.5.1983), [1983] NJW, 2821.

[150] OLG Düsseldorf (15.9.2000), [2002] NJW-RR, 235.

[151] BGH (29.5.1990), BGHZ 111, 282; BGH (17.5.1983), [1983] NJW, 2821; BGH (1.7.1986), NJW-RR 1987, 13, 14; BGH (19.1.1993), NJW 1993, 1003; BGH (10.10.1995), [1995] NJW, 3385; BGH (27.2.1996), [1996] NJW, 1404; BGH (18.3.1997), [1997] NJW, 2047, 2048.

[152] BGH (28.2.1969), [1969] MDR, 564; BGH (17.5.1983), [1983] NJW, 2821; BGH (1.7.1986), [1987] NJW-RR, 13, 14; BGH (29.5.1990), BGHZ 111, 282; BGH (19.1.1993), [1993] NJW, 1003.

[153] BGH (17.5.1983), [1983] NJW, 2821; BGH (1.7.1986), [1987] NJW-RR, 13, 14; OLG Düsseldorf (14.9.1990), [1992] VersR, 321.

[154] BGH (1.7.1986), [1987] NJW-RR, 13, 14. See also BGH (28.2.1969), [1969] MDR, 564: No duty to control the child's bag before visiting relatives.

[155] BGH (27.2.1996), [1996] NJW, 1404, 1405.

[156] See infra no. 95.

measures of supervision shift from physical barriers and control to instruction about the dangers of playing with fire.[157]

b) Circumstances in the person of the parent

The factual circumstances expounded above primarily turn on the severity of the injury and the likelihood of its occurrence. The burden of safety measures placed on the parents depends on other factors, namely their occupation,[158] the number and age of their children[159] and the economic condition of the family. 74

c) Circumstances in the person of the child

Relevant factors to determine the scope of the duty to supervise are the age, character[160] and inclination of the child to cause trouble.[161] The controlling circumstances are those of the *individual* child, not those of an average child of the same age, although the determination may refer to the capacities of an ordinarily developed child if the particular one does not show any significant deviations from the ordinary state of development.[162] The older the child becomes, and the more it progresses on his way to maturity, the less control is appropriate.[163] An empirical formula suggests that the *youngest children* need continuous control, while *children of tender years* usually require a half-hourly control,[164] if this allows to identify dangerous situations in due time and to adopt preventive measures.[165] Minors *approaching the age of majority* require almost no supervision; it is sufficient if the parents know about what their child is doing in his leisure time.[166] 75

The particular character of the child is relevant for the determination of the duty to supervise if it increases the probability that the child inflicts harm on third parties.[167] Accordingly, a child with a tendency to aggressive or violent behaviour, dirty tricks or criminal offences needs particularly close attention.[168] Su- 76

[157] BGH (19.1.1993), [1993] NJW, 1003.
[158] RG (15.3.1920), RGZ 98, 246, 248.
[159] BGH (1.2.1966), [1966] FamRZ, 228, 230.
[160] BGH (10. 7.1984), [1984] NJW, 2574, 2575; BGH (10.10.1995), [1995] NJW, 3385; BGH (27.2.1996), [1996] NJW, 1404, 1405.
[161] RG (15.3.1920), RGZ 98, 246, 248; BGH (10.7.1984), [1984] NJW, 2574, 2575; W.B. Dahlgrün (supra fn. 108), 56.
[162] BGH (10.7.1984), [1984] NJW, 2574, 2575; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 59.
[163] BGH (10.7.1984), [1994] NJW, 2574, 2575; BGH (19.1.1984), [1985] NJW, 677, 679; BGH (19.1.1993), [1993] NJW, 1003; OLG Frankfurt/Main (28.3.2001), [2002] NJW-RR, 236.
[164] BGH (19.11.1963), [1964] VersR, 313, 314; BGH (10.7.1984), [1984] NJW, 2574, 2575; BGH (18.3.1997), [1997] NJW, 2047, 2048.
[165] OLG Oldenburg (12.4.1994), [1995] MDR, 699; OLG Düsseldorf (15.9.2000), [2002] NJW-RR, 235.
[166] M. Fuchs, [1991] AcP, 124.
[167] OLG Düsseldorf (15.9.2000), [2002] NJW-RR, 235; OLG Frankfurt/Main (28.3.2001), [2002] NJW-RR, 236; OLG Hamm (9.6.2000), [2001] VersR, 386.
[168] BGH (26.1.1960), [1960] VersR, 355, 356; BGH (27.11.1979), [1980] NJW, 1044, 1045; BGH (19.1.1984), [1985] NJW, 677, 679; BGH (19.1.1984), [1995] NJW, 3385, 3386; BGH (27.2.1996), [1996] NJW, 1404.

pervision "at every turn" can be appropriate if the child is significantly maladjusted and shows a pathological tendency to play with fire,[169] or demonstrates uncontrollable aggressiveness.[170] Parents may even be required to seek out the assistance of public authorities if they are unable to rein in their offspring themselves. The administrator of a home designed for adolescents with a criminal record is therefore subject to increased supervision and is not allowed to assign this task to a person that has no experience in working with this kind of children.[171]

77 § 832 BGB is confined to the *duty to supervise* and does not mention the *duty of parents to educate* their children in the interest of safety.[172] There is, however, a close interrelation between both duties as the scope of the duty to supervise depends on the child's level of education, which in turn depends on the success of educational efforts of the parents – well educated children need less supervision than those with difficulties in complying with parental orders.[173] Children do not learn how to deal with sources of danger, and how to reasonably behave, by permanent supervision. Autonomous and responsible conduct is rather furthered through repeated instruction and "learning by doing", both in specially protected areas and in real life.[174] Permanent supervision, control and surveillance is likely to have a detrimental effect on the personality of the child, and thus does not comply with the educational goals set out in §§ 1631 subs. 1, 1626 subs. 2 BGB.[175] Since tort law does not require a conduct that family law rejects, the scope of the duty to supervise has to be assessed against the background of these educational goals.[176] Thus, the defendant parents of a well-developed child may discharge their burden of proof by establishing that they instructed the child and trained him to develop his own sense of reasonable behaviour.[177]

d) Parents at Work

78 If a parent is physically unable to supervise the child because he or she is at work the relevant duty does not go away but rather changes its character as the parent now is held to organise the attention of someone else.[178] The working

[169] BGH (27.2.1996), [1996] NJW, 1404, 1405.
[170] BGH (10.10.1995), [1995] NJW, 3385, 3386.
[171] BGH (27.10.1964), [1965] VersR, 48 et seq. See also OLG Hamm (21.9.1987), [1988] NJW-RR, 798; AG Königswinter (17.10.2001), [2002] NJW-RR, 748.
[172] A. Zeuner in: Soergel (supra fn. 10), § 832 no. 14.
[173] BGH (27.11.1979), [1980] NJW, 1044, 1045; BGH (10.7.1984), [1984] NJW, 2574, 2575; BGH (19.1.1984), [1985] NJW, 677, 679; H. Thomas in: Palandt (supra fn. 10), § 832 no. 8; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 26.
[174] See BGH (27.11.1979), [1980] NJW, 1044, 1045; BGH (10.7.1984), [1984] NJW, 2574, 2575; BGH (1.7.1986), [1987] NJW-RR, 13, 14; OLG Hamburg (08.04.1988), [1988] NJW-RR, 799; H. Thomas in: Palandt (supra fn. 10), § 832 no. 8.
[175] OLG Hamburg (08.04.1988), [1988] NJW-RR, 799.
[176] H. Kötz/G. Wagner (supra fn. 52), no. 315; E. Jayme, *Die Familie im Recht der unerlaubten Handlungen* (1971), 152.
[177] G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 27
[178] D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 74.

parent may usually assume that the other parent is exercising the supervision properly,[179] unless there is a specific reason for doubt,[180] e.g. where the other parent does not warrant a proper supervision for lack of assertiveness.[181] Despite the delegation of the duty to supervise, the working parent continues to be subject to a residual duty of organisation and surveillance. To comply with this duty, the working parent has to adopt measures which make sure that supervision is rendered while he is absent. These principles may result in a situation where the working parent as the more solvent part is not liable for want of fault, while the less solvent husband or wife that is staying at home and raising the children is subjected to the liability of § 832 BGB. Since the default matrimonial property regime of German family law[182] is not one of common property or, for that matter, joint debts,[183] the victim is running the risk of being unable to collect any monies on a judgment in his favour.

8. To what extent are parents held to supervise their child during the time the child is attending school or is at work?

79 During the time the child is attending school the parental duty to supervise is reduced to a collateral duty of surveillance and organisation. In the case of public schools, the parent may reasonably assume that the school is properly exercising its duties to supervise the pupils. The parents may remain idle during school time unless there are specific reasons for them to doubt the diligence of the school board.[184] The same principles apply with regard to children at work, either as apprentices or otherwise.[185]

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

80 The duty to supervise is not a personal duty of the legal guardian. Therefore, it may be assigned to a third person upon consent of both parties.[186] The third party may well be a private boarding school which is then subjected to a duty to supervise independent from the parents' duty. However, the assignment of the duty to a third party does not release the legal guardian from his obligation entirely.[187] Rather, it transforms the duty to supervise into a duty to properly

[179] OLG Koblenz (18.12.1984), [1987] *Zeitschrift für Schadensrecht* (ZfS), 162; OLG Düsseldorf (14.9.1990), [1992] VersR, 321, 322; OLG Düsseldorf (15.9.2000), [2001] MDR, 333; W.B. Dahlgrün (supra fn. 108), 189.

[180] OLG Düsseldorf (15.9.2000), [2001] MDR, 333; RG (25.11.1918), LZ 1919, 695 no. 8; M. Fuchs, [1991] AcP, 105.

[181] RG (25.11.1918), LZ 1919, 695 no. 8; H. Albilt, *Haften Eltern für ihre Kinder?* (1986), 188.

[182] The default matrimonial property regime (Zugewinngemeinschaft) mandates the joint ownership of the increase in capital value of assets occurred during the marriage.

[183] G. Brudermüller in: Palandt, *Bürgerliches Gesetzbuch* (62th edn. 2003), § 1363, no. 3.

[184] See infra part IV.

[185] OLG Köln (4.12.1956), [1957] MDR, 227.

[186] BGH (11.6.1968), LM § 832 no. 8c; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 113.

[187] D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 28.

select,[188] instruct,[189] and control the third party,[190] as well as a duty to stay informed about the child's conduct.[191] This transformation of parental duties corresponds with general principles developed within the framework of § 823 subs. 1 BGB and the general duty to take care (*Verkehrspflicht*), which is reduced to obligations of surveillance and organisation upon assignment as well.[192]

81 If the child attends a public boarding school and causes damage to another person, the government is liable for violations of the duty to supervise under § 839 BGB along with art. 34 GG. This liability is not displaced by parental liability, although the subsidiarity rule enshrined in § 839 subs. 1 cl. 2 BGB might indicate a different result. The reason is, of course, that parental liability under § 832 BGB does not arise where the child is placed under the protection of a public boarding school.

82 In sum, then, if children attend private or public boarding schools, the parents are not liable under § 832 BGB for damage caused by them.

10. What is the relation between the damage claim against the parents and the damage claim against the child?

83 Given that the child is liable under general rules of tort law and the parents are liable for a failure to supervise, parents and child are jointly liable under § 840 subs. 1 BGB. If the child is not liable under the general rules of tort law for reasons of incapacity (§ 828 BGB, supra nos. 4 et seq.) or if the child has not violated the appropriate standard of care (§ 276 subs. 2 BGB, supra nos. 11 et seq.), the child may still be liable in equity under § 829 BGB. This liability in equity, however, is a liability of second degree and is therefore displaced if the victim is able to obtain compensation from the parents, as stipulated in § 829 BGB.[193]

84 Each parent is liable only for his own failure to supervise and not for the other parent's failure.[194] The practice of the courts, however, has long departed from this principle. Often, the conduct of one parent is considered to determine the scope of the other parent's duty to supervise.[195] Furthermore, one parent is

[188] BGH (11.6.1968), [1968] NJW, 1672, 1673; OLG Köln (31.10.1961), [1962] FamRZ, 124, 125.

[189] OLG Hamm (27.4.1989), [1990] VersR, 743, 744; H. Berning/J. Vortmann, Haftungsfragen bei von Kindern verursachten Schäden unter besonderer Berücksichtigung der Brandstiftung, [1986] *Juristische Arbeitsblätter* (JA), 12, 18.

[190] OLG Hamm (27.4.1989), [1990] VersR, 743, 744.

[191] H. Bering/J. Vortmann, [1986] JA, 12, 18. See A. Zeuner in: Soergel (supra fn. 10), § 832 no. 12; G. Kreft in: RGRK (supra fn. 96), § 832 no. 26; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 19.

[192] BGH (9.11.1982), [1983] VersR, 152.

[193] G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 41.

[194] BGH (14.11.1861), [1962] FamRZ, 116.

[195] See OLG Stuttgart (28.6.1955), [1955] VersR, 685. Distinguishing OLG Düsseldorf (15.9.2000), [2002] NJW-RR, 235.

credited with the other parent's rebuttal of the presumption of fault. This shows that the courts do not consider one parent's failure to supervise in an isolated manner but really operate on the basis of a joint parental duty to supervise.[196]

If both parents have violated their duty to supervise, they are jointly liable under § 840 subs. 1 BGB. 85

11. Is there any possibility either for the child or the parents to have recourse against each other?

As a general rule, joint debtors may have recourse against each other under §§ 840 subs. 1, 426 subs. 1 BGB, seeking contribution from the other side. § 840 subs. 2 BGB modifies this general rule with regard to the relationship between parents and child and mandates that it is for the child to bear the full loss. The only exception is, again, liability in equity under § 829 BGB where it is for the parents to swallow the full costs. See supra no. 25. 86

Under the general rule of §§ 840 subs. 1, 426 subs. 1 BGB, one parent may have recourse against the other. Pursuant to a per analogiam application of § 254 BGB the share of each parent is determined by the weight of his contribution and by the degree of his fault.[197] 87

III. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

If the family court assigns the custody to a legal guardian, he becomes subject to the duty to supervise.[198] The guardian is liable under § 832 subs. 1 BGB rather than under the provisions for state liability set out in § 839 BGB in connection with art. 34 GG, since the guardian does not exercise public authority.[199] Though the relationship between the family court and the legal guardian is governed by provisions of public law, the legal guardian is exercising his public office within the sphere and in the ways of private law.[200] This applies 88

[196] B. Großfeld/B. Mund, Die Haftung der Eltern nach § 832 I, [1994] FamRZ, 1504, 1507; W.B. Dahlgrün (supra fn. 108), 186.

[197] H. Heinrichs in: Palandt (supra fn. 18), § 426 no. 10.

[198] G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 11; H. Thomas in: Palandt (supra fn. 10), § 832 no. 4; A. Zeuner in: Soergel (supra fn. 10), § 832 no. 7. The BGB distinguishes two types of legal guardianship for minors: *Vormundschaft* (§§ 1793, 1800, 1631 subs. 1 BGB) and *Ergänzungspflegschaft* (§§ 1909, 1915, 1800, 1631 subs. 1 BGB), supra fn. 116.

[199] BGH (30.3.1955), BGHZ 17, 108; U. Diederichsen in: Palandt (supra fn. 121), Einl. vor § 1773 no. 4. For details on the state liability system see infra nos. 104–106.

[200] H. Engler in: Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Vol. 4 Familienrecht* (2004), vor § 1773 no. 19.

even if the legal guardian is vested with custody ipso iure instead of being assigned the custody by a decision of the family court (*Amtsvormundschaft*).[201]

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

89 If the child is an apprentice in a private business, the principal's duty to supervise does not follow the principles of the parental custody in § 832 BGB but rather the rules of vicarious liability in § 831 BGB.[202] The latter does not take the form of strict liability but remains liability for fault, albeit with the particularity that the burden of proof is imposed on the principal, who can escape liability if he proves that he selected and supervised the apprentice with reasonable care or if he shows that the damage would have occurred anyway, even if reasonable care had been observed, § 831 subs. 1 cl. 2 BGB. However, the principal is also subject to a duty to organise his business in a way that will avoid the infliction of harm upon others. This duty, derived from the general clause in § 823 subs. 1 BGB, significantly restricts the impact of the exoneration allowed by § 831 subs. 1 cl. 2 BGB.

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or an other institution?

a) Children's home

90 The liability of children's homes for a violation of the duty to supervise depends upon the legal entity which operates the particular home in question. Those administered by a private entity are liable under § 832 subs. 2 BGB,[203] whereas homes administered by a public entity are liable under § 839 BGB along with Art. 34 GG.[204] For details see infra nos. 101 et seq.

[201] *Oberverwaltungsgericht* (supreme administration court, OVG) Münster (6.3.1978), FamRZ 79, 345, 346; U. Diederichsen in: Palandt (supra fn. 121), Einl. § 1773 no. 4; H. Engler in: Staudinger (supra fn. 200), Vor §§ 1773 et seq. no. 16; dissenting BGH (20.4.1953), BGHZ 9, 255, 257; H. Maurer, Das privatrechtliche Unterbringungsrecht und Art. 104 des Grundgesetzes, [1960] FamRZ, 468.

[202] See D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 21; T. Schoof, *Die Aufsichtspflicht der Eltern über ihre Kinder iSd § 832 Abs. 1 BGB* (1999), 29 et seq.; E. Scheffen/F. Pardey, *Schadensersatz bei Unfällen mit Minderjährigen* (2nd edn. 2003), nos. 185 et seq.; J. Esser/H. Weyers (supra fn. 131), 58 II; dissenting W. Barfuss, *Verantwortlichkeit und Haftung des Ausbilders im Berufsausbildungsverhältnis, Betriebsberater (BB)* (1976), 935, 937; H. Berning/J. Vortmann, [1986] JA, 12, 14; H. Thomas in: Palandt (supra fn. 10), § 832 no. 5; distinguishing H. Albit (supra fn. 181), 23 et seq.; G. Wagner in: Münchener Kommentar, § 832 no. 12.

[203] AG Königswinter (17.10.2001), [2002] NJW-RR, 748.

[204] OLG Dresden (4.12.1996), [1997] NJW-RR, 857 et seq.; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 19; for liability under § 832 BGB cf. OLG Hamm (21.9.1987), [1988] NJW-RR, 798; left open by OLG Hamburg (8.4.1988), [1988] NJW-RR, 799.

If the child is living in a foster family (§§ 33 et seq. SGB VIII, §§ 1666 et seq. BGB, 9, 12 JGG), the foster parents are subject to the duty to supervise insofar as the child is in their actual sphere of influence.[205] Besides, the foster family may be liable under § 832 subs. 2 BGB if it contractually assumed the duty to supervise.[206] For details see infra nos. 96 et seq. 91

b) Boarding school

If the child is living in a *private* boarding school, the entity administrating the school assumes the duty to supervise by way of the admission contract. The teacher's duty to supervise then follows from his actually assuming responsibility for his class. Both the private entity and the teacher are liable for violations of this duty under § 832 subs. 2 BGB. If the child is living in a *public* boarding school, the teacher is under an official duty (*Amtspflicht*) to avoid the child inflicting harm upon others.[207] The teacher's liability for violations of this official duty follows from § 839 BGB and is assumed by the state under art. 34 GG.[208] 92

c) Other institutions

The principles of state liability under § 839 BGB and Art. 34 GG govern the liability of *military superiors* for minor soldiers (§ 41 *Wehrstrafgesetz*, WehrstrafG) and the liability of *prison officers* for minor inmates as well.[209] Probation officers are not subject to a duty to supervise in the sense of § 832 BGB.[210] 93

The *entity operating a hospital* contractually assumes the duty to supervise a minor patient during stationary treatment and is liable for violations under § 832 subs. 2 BGB.[211] During the period of stationary treatment, the parental duty to supervise is reduced accordingly. If the medical treatment has been mandated by a court and is therefore coercive, like in cases of mental illness, the duty to supervise is governed by the principles of state liability under § 839 BGB, Art. 34 GG.[212] 94

Attendance at a kindergarten does not involve public authority.[213] Rather, the kindergarten's duty to care for the child is assumed contractually. Accordingly, the kindergarten may be liable to third parties under § 832 subs. 2 BGB. 95

[205] RG (15.3.1920), RGZ 98, 246, 247; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 19; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 11.
[206] BGH (16.12.1953), LM § 832 no. 3; OLG Düsseldorf (23.11.1990), [1992] VersR, 310.
[207] See infra no. 112.
[208] BGH (15.3.1954), BGHZ 13, 25, 27; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 5; A. Zeuner in: Soergel (supra fn. 10), § 832 no. 9.
[209] D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 23.
[210] E. Scheffen/F. Pardey (supra fn. 202), no. 200.
[211] BGH (2.12.1975), [1976] NJW, 1145, 1146 = LM § 832 no. 10; OLG Koblenz (12.10.1995), [1997] NJW-RR, 345; LG Bremen (23.3.1999), [1999] NJW-RR, 969.
[212] BGH (5.10.1972), [1973] NJW, 554.
[213] E. Scheffen/F. Pardey (supra fn. 202), no. 200.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

a) Contractual adoption of the duty to supervise

96 The duty to supervise can result both from statutory law and from a contractual agreement. The liability of the legal guardians is established by § 832 subs. 1 BGB, whereas the liability of those guardians that assumed the duty to supervise contractually results from § 832 subs. 2 BGB. This provision stipulates that the party assuming the duty to supervise is subject "to the same responsibility" as the legal guardian.[214] This wording is misleading, since the responsibility is not necessarily of a derivative nature. As the legislative history proves, the original language that the responsibility must have been assumed "in place of the legal guardian's responsibility", was changed later to its current form.[215] The framers intended to assure that a duty to supervise might be assumed even without entering into a contractual agreement with a legal guardian in the sense of § 832 subs. 1 BGB. The contract does not need to be concluded with the legal guardian, but can also be concluded with the supervised person himself, provided he has the relevant capacity, or with a third party.[216]

97 As always, an express agreement or the use of magic words is not necessary as an implied contract suffices.[217] For example, the hospital's explicit promise to care for the patient involves the implied obligation to supervise him.[218] An implied agreement may generally be assumed if a party agrees to care for a person in exchange for remuneration, like foster parents[219] and private institutions, kindergartens, children's homes,[220] institutions for the mentally ill whose operation does not involve the exercise of public authority,[221] hospi-

[214] § 832 subs. 2 BGB: „Die gleiche Verantwortlichkeit trifft denjenigen, welcher die Führung der Aufsicht durch Vertrag übernimmt."

[215] H. Jakobs/W. Schubert, *Die Beratung des Bürgerlichen Gesetzbuchs, Recht der Schuldverhältnisse III* (1983), 948 et seq.

[216] E. Scheffen/F. Pardey (supra fn. 202), no. 118; H. Albilt (supra fn. 181), 29; I. Rogge, *Selbständige Verkehrspflichten bei Tätigkeiten im Interesse Dritter* (1997), 1997; G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 16.

[217] BGH (2.7.1968), [1968] NJW, 1874 et seq. = LM § 832, no. 9; BGH (19.1.1984), [1985] NJW, 677, 678 = LM § 832, no. 14; OLG Celle (1.7.1987), [1987] NJW-RR, 1384; OLG Celle (18.6.1968), [1968] VersR, 972; OLG Schleswig (18.7.1979), [1980] VersR, 242.

[218] BGH (2.12.1975), [1976] NJW, 1145, 1146 = LM § 832, no. 10; OLG Koblenz (12.10.1995), [1997] NJW-RR, 345; LG Bremen (23.3.1999), [1999] NJW-RR, 969; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 33.

[219] See supra fn. 206.

[220] Vgl. BGH (19.6.1956), [1956] VersR, 520 et seq.; BGH (18.3.1957), [1957] VersR, 370. This does not necessarily apply to homes for the elderly, OLG Celle (30.10.1960), [1961] NJW, 223; affirmed for protective workshops, OLG Hamm (7.10.1993), [1994] NJW-RR, 863, 864.

[221] BGH (19.1.1984), [1985], 677 = LM § 832, no. 14; LG Bremen (23.3.1999), [1999] NJW-RR, 969. But cf. also LG Kassel (2.6.1992), [1993] VersR, 582: there is no duty to supervise a patient of full age whose freedom of movement cannot be limited since the placement in a home for the mentally ill has not yet been ordered by the court. In closed homes for the mentally ill, the liability is governed by § 839 BGB in connection with art. 34 GG.

tals,[222] schools etc.[223] It is irrelevant who provides the remuneration, be it the supervised person himself or a third party, like an insurance company or a public entity. The remuneration does not need to be in money: the possibility to gain experience in interacting with children may be the only consideration tendered in exchange for the services of a babysitter.[224] In all these cases, § 832 subs. 2 BGB establishes the liability of the entity that administers the institution and not of the person that actually exercises the duty to supervise.[225] However, the employee working within such an institution becomes subject to the duty to supervise through his contract of employment.

98 According to the dominant view, liability under § 832 subs. 2 BGB arises only if the parties enter into a full-blown contract, but not if they simply agree to transfer supervision from one side to the other.[226] The underlying motive is arguably the protection of minor supervisors and babysitters.[227] Under this premise, the central problem of § 832 subs. 2 BGB is the distinction between binding contracts and mere acts of courtesy not crossing the threshold to a binding promise.[228] Courts had to deal in particular with cases where relatives, friends and neighbours cared for a child without receiving remuneration in return. The application of § 832 subs. 2 BGB in those cases depends on whether the parties had the will to contractually bind themselves (*Rechtsbindungswille*). Whether the parties harboured such intention in turn depends on a number of criteria – purpose, length and regularity of the supervision, interests of the parties and extent of the assumed risk[229] – which are to be evaluated against the background of how a reasonable person would have understood the offer (*objektiver Empfängerhorizont*).[230] The results of this test are almost impossible to foresee: Courts denied the liability under § 832 subs. 2 BGB in cases where a mother left her child with the grandmother or friends while going shopping,[231] where two couples alternated in caring (also) for the children of the other couple,[232] and where a nine-year-old boy regularly met his eleven-year-old friend in the latter's family house two or three times a week.[233] On the other hand, courts considered invitations to child birthday parties as implied contractual agreements[234] and

[222] BGH (2.12.1975), [1976] NJW, 1145, 1146 = LM § 832, no. 10.
[223] Summarizing BGH (2.7.1968), [1968] NJW, 1874 et seq. = LM § 832, no. 9; G. Kreft in: RGRK (surpa fn. 96), § 832, no. 24.
[224] OLG Celle (1.7.1987), [1987] NJW-RR, 1384.
[225] G. Kreft in: RGRK (supra 96), § 832, no. 24.
[226] G. Kreft in: RGRK (supra 96), § 832, no. 22; E. Scheffen/F. Pardey (supra fn. 202), no. 118; H. Albilt (supra fn. 181), 30 et seq.
[227] Cf. D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 40.
[228] G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 17.
[229] RG (9.3.1938), RGZ 157, 228, 233; BGH (2.7.1968), [1968] NJW, 1874 et seq. = LM § 832, no. 9; D. Medicus, *Bürgerliches Recht* (15th edn. 1991), nos. 365 et seq.
[230] In a different context BGH (22.6.1956), BGHZ 21, 102, 106 et seq.
[231] BGH (2.7.1968), [1968] NJW, 1874 = LM § 832, no. 9; OLG Nürnberg (29.9.1960), [1961] VersR, 571.
[232] BGH (2.7.1968), [1968] NJW, 1874 et seq. = LM § 832, no. 9.
[233] BGH (2.7.1964), [1964] VersR, 1085, 1086.
[234] OLG Celle (1.7.1987), [1987] NJW-RR, 1384; with doubts OLG Düsseldorf (21.5.1999), [2000] VersR, 1254, 1255.

subjected relatives and friends to the liability under § 832 subs. 2 BGB if the children spent time of a considerable length with them[235] or accompanied them on a journey.

99 Instead of relying on a valid and binding agreement in the technical sense, liability under § 832 subs. 2 BGB should rather be premised on the factual assumption of supervision.[236] This solution complies with the principles that generally govern the delegation of a duty of care from its principal obligor to someone else. In addition, as any person factually assuming the duty to supervise is liable under the general provision of § 823 subs. 1 BGB anyway, the only legal issue turning on the applicability of § 832 subs. 2 BGB is the reversal of the burden of proof. The purpose of this rule, however, applies regardless of who supervised the child at the time the damage was caused.[237]

b) Remaining Duties of the Parents

100 Where the parents have entrusted the supervision to somebody else, the duty incumbent upon them under § 832 subs. 1 BGB is reduced to a collateral duty to properly select, instruct, control and inform the supervisor, as it corresponds to the general principles applicable to the delegation of a duty of care.[238] According to the prevailing view among courts and commentators, this reduction of the parental duty to supervise does not depend on whether there is a valid agreement to assume the duty to supervise,[239] but also comes into operation if the supervisor assumes the supervision only *de facto*.[240] In the latter cases, neither the parent (under § 832 subs. 1 BGB) nor the supervisor (under § 832 subs. 2 BGB) is liable for violations of the duty to supervise, as long as the parent fulfilled his collateral duty of selection, surveillance and organisation. The victim may of course try to obtain compensation from the supervisor under § 823 subs. 1 BGB but does not enjoy the benefit of the reversal of the burden of proof and thus has to establish the violation of the duty to supervise. The resulting gap in the liability regime with respect to supervisors may be closed easily by extending § 832 subs. 2 BGB to the factual assumption of the

[235] RG (18.6.1934), HRR 1934 no. 1449 (since the death of his father, a minor is living with permission of his legal guardian together with his older sister).

[236] Cf. G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 18, § 823 nos. 136 et seq.

[237] Cf. G. Wagner in: Münchener Kommentar (supra fn. 7), § 823 no. 18.

[238] BGH (11.6.1968), [1968] NJW, 1672, 1673 = LM § 832, no. 8c; BGH (2.12.1975), 1976, 1145, 1146; H. Albilt (supra fn. 181), 192 et seq.; T. Schoof (supra fn. 202), 69; E. Scheffen/F. Pardey (supra fn. 202), no. 257; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 nos. 28, 42 et seq., 112 et seq.

[239] But so D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 126; A. Zeuner in: Soergel (supra fn. 10) no. 14; M. Schnitzerling, Aufsichts- und Verkehrssicherungspflichten gegenüber Kindern im Haus- und Grundstücksbereich, [1978] *Blätter für Grundstücks-, Bau- und Wohnrecht* (BlGBW), 28.

[240] BGH (11.6.1968), [1968] NJW, 1672, 1673 = LM § 832, no. 8c; OLG Köln (31.10.1961), [1962] FamRZ, 124; OLG Celle (8.4.1968), [1969] VersR, 333, 334; OLG Hamm (29.10.1996), [1997] NJW-RR, 344; OLG Hamm (16.9.1999), [2001] VersR, 386; D. Deutsch, note BGH (2.7.1968), [1969] JZ, 233, 234; W.B. Dahlgrün (supra fn. 108), 195; H. Albilt (supra fn. 181), 185 et seq.; T. Schoof (supra fn. 202), 70.

duty to supervise, since then the reduction of the parental duty to supervise corresponds to the extension of the supervisor's duty.[241] See supra no. 99.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

In Germany, the majority of children are educated in public schools and only a smaller part attends private schools most of which are run by the catholic or the protestant churches. The duty to supervise follows different regimes, depending upon whether the school is organized as a private or public entity. Within a public school, the duty to supervise imposed on the school's employees, in particular on the teachers, assumes the character of an official duty rooted in public administrative law.[242] 101

This is different in private schools. Although accredited private schools exercise public authority insofar as they grade their pupils and award degrees,[243] the supervision of the children stays in the realm of private law.[244] Although the large Christian denominations are organized as public entities in Germany, private tort law governs even in schools operated by a church.[245] The school assumes the duty to supervise by way of agreement with parents pursuant to § 832 subs. 2 BGB. Usually, the admission contract between the parents and the school does not explicitly provide for the transfer of the duty to supervise, but the school's care for the child constitutes implied consent to accept this duty,[246] see supra no. 97. 102

The rules on state liability deviate significantly from the provisions of private tort law. For details see infra nos. 105 et seq. The scope of the duty to supervise, however, remains the same under both private and public law. Private and public schools are thus subject to obligations of the same scope and strength.[247] The distinction between the two regimes of liability results primarily in different rules of evidence.[248] As against a public school, the victim 103

[241] G. Wagner in: Münchener Kommentar (supra fn. 7), § 832 no. 20.

[242] RG (25.5.1929), RGZ 125, 85, 86; BGH (15.3.1954), BGHZ 13, 25, 26; BGH (3.11.1958), BGHZ 28, 297, 299; BGH (19.6.1972), [1972] VersR, 979; OLG Düsseldorf (14.12.1995), [1996] NJW-RR, 671; H.-J. Papier in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (2004), § 839 no. 168; G. Kreft in: RGRK (supra fn. 96), § 839 no. 269; cf. BGH (9.11.1959), BGHZ 31, 148, 149; BGH (28.11.1960), BGHZ 34, 20, 21; BGH (27.6.1963), [1963] NJW, 1828.

[243] *Bayerischer Verwaltungsgerichtshof* (Bavarian Administrative Supreme Court, BayVGH) (28.01.1982), [1982] *Die Öffentliche Verwaltung* (DÖV), 371, 372.

[244] Cf. BGH (19.1.1984), [1985] NJW, 677, 678; BayVGH (28.01.1982), [1982] DÖV, 371, 372.

[245] BayVGH (28.1.1982), [1982] DÖV, 371 et seq.

[246] G. Schiemann in: Erman (supra fn. 62), § 832, no. 5; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 38.

[247] OLG Düsseldorf (14.12.1995), [1996] NJW-RR, 671; OLG Dresden (4.12.1996), [1997] NJW-RR, 857, 858; cf. also BGH (19.1.1984), [1985] NJW, 677, 678; D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 166; with respect to a kindergarten also OLG Köln (20.5.1999), [1999] MDR, 957.

[248] BGH (15.3.1954), BGHZ 13, 25, 28; OLG Hamburg (8.4.1988), [1988] NJW-RR, 799; OLG Dresden (4.12.1996), [1997] NJW-RR, 857, 858.

has to prove that the teacher violated his official duty to supervise the child. At a private school, the burden of proof is shifted to the supervisor who may escape liability only if he proves that he fulfilled his duty to supervise or that the damage would have occurred anyway, even if the duty had been observed, § 832 subs. 1 cl. 2 BGB. The impact of these different rules of evidence is lessened considerably, however, since the resolution of a legal dispute usually depends on the court's definition of the scope and strength of the duty to supervise, i.e. on issues of law which are not subject to proof but which are governed by the principle of *iura novit curia* (supra no. 50). Nevertheless, there is no normative justification for the unequal treatment of private and public schools, such that § 832 subs. 1 cl. 2 BGB should be applied *per analogiam* to the regime of state liability that is governing public schools.[249]

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

a) Public schools

104 Under the BGB as it was enacted on 1 January 1900, teachers at both private and public schools were personally liable, the teacher at a private school under § 832 subs. 2 BGB, and the teacher at a public school, respectively, as a public officer under § 839 BGB. After the Second World War, the personal liability of public officers was effectively removed by art. 34 cl. 1 GG as the officer's liability is now assumed by the state.[250]

105 Art. 34 cl. 1 GG mandates that the liability imposed on the public officer by virtue of § 839 BGB is transferred to the public entity that employs the officer. Teachers at public schools are employees of the states (*Länder*), even if the schools are run by the cities.[251] Accordingly, art. 34 cl. 1 GG passes the officer's liability over to the state (*Land*) the school is located in, not to the school board itself or to the competent municipality. The state is not only liable for the individual teacher's failure to properly exercise his supervisory function, but also for the deficient organisation of the supervision by the head (director) of the school.[252] Ultimately, what matters is the proper operation of the administrative machinery of the school as a whole. Therefore, the victim does not need to individualize the teacher who bears responsibility for the wrong at issue.[253]

[249] Cf. H. Marburger, Therapie und Aufsichtspflicht bei der Behandlung psychisch Kranker, [1971] VersR, 777 (788); D.W. Belling/Ch. Eberl-Borges in: Staudinger (supra fn. 98), § 832 no. 167.

[250] BVerwG (24.8.1961), [1961] NJW, 2364, 2366; H.-J. Papier in: Münchener Kommentar (supra fn. 242), § 839 no. 119.

[251] BGH (5.7.1973), [1973] NJW, 1461.

[252] Cf. BGH (13.6.1960), [1960] VersR, 909; BGH (24.5.1976), BGHZ 66, 302, 312 et seq.; BGH (19.6.1972), [1972] VersR, 979, 980.

[253] H. Vinke in: Soergel, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Schuldrecht* (12th edn. 1998), § 839 no. 201.

In the realm of public authority the regime of state liability under § 839 BGB and art. 34 GG is exclusive and displaces the other provisions of private tort law, including § 832 BGB.[254] Thus, liability of public entities as carriers of the school system may be based on § 839 BGB, art. 34 GG only, and no private right of action may be entertained against the teacher who actually failed to supervise the child that ultimately committed the wrongful act. As to rights of recourse of the state against the teacher see infra no. 109. 106

b) Private Schools

In the area of private tort law, a provision like art. 34 GG, transferring the liability of an individual within an organization into the liability of the organization itself is absent. Thus, to the extent that the reproach is against an individual teacher for failure to take reasonable care in supervising the pupils entrusted to him, the teacher is personally liable, along with the institution which employs him. See supra no. 97. As to rights of recourse of the teacher against his employer see infra nos. 110 et seq. In addition, the duty to supervise is also incumbent upon the head of the school who is bound to organize classes as well as breaks and whatever events are held at school with reasonable care.[255] If he fails to live up to this standard, e.g., if he allows a class of teenagers to spend hours on their own without the attendance of a teacher, he himself is answerable in damages towards third parties that have been injured by one of the pupils. 107

In any case, the church or other private entity running the particular school may also be liable to the victim as a principal under § 831 BGB. § 831 BGB does not attribute the wrongs committed by an employee to his employer but is based on the fault principle, with the only modification that it is the employer who bears the burden of proving that he supervised his employee with all reasonable care. In this regard, then, there is no difference between liability for the acts of minors under § 832 BGB and liability as principal under § 831 BGB. With respect to the head of the school, matters might be different as the courts might regard him as an officer of the church or corporation running the school. If this happened, the wrongs of the head of school would then be attributed to the church or corporation without any chance of exoneration under § 31 BGB.[256] 108

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

The assumption of liability in art. 34 cl. 1 GG protects the public officer only from being held accountable by the victim: As against the latter, only the state is liable.[257] Internally, however, the state may seek redress from the public of- 109

[254] BGH (12.7.1951), BGHZ 3, 94, 102; BGH (15.3.1954), BGHZ 13, 25, 27 et seq.; BGH (19.12.1960), BGHZ 34, 99, 104; OLG Hamburg (8.4.1988), [1988] NJW-RR, 799.
[255] Cf. BGH (19.6.1972), [1972] VersR, 979, 980.
[256] For details see G. Wagner in: Münchener Kommentar (supra fn. 7), § 823 nos. 372 et seq.
[257] Supra no. 106.

ficer. Art. 34 cl. 2 GG allows such recourse if the public officer violated his official duty intentionally or recklessly. This provision does not by itself establish the claim against the public officer.[258] Rather, the legal basis is to be found in the Civil Servants Acts of the several states (*Länder*).[259]

8. Same question with respect to private schools: May the school entertain a recourse action against the teacher who has failed to supervise?

110 Unlike teachers at public schools (supra no. 106), teachers at private schools are not immune from liability. Accordingly, the question is not whether the school carrier may seek redress from the teacher, but rather whether the teacher may have recourse against the school carrier as his employer. German labour law recognizes such right of recourse of the employee against the employer. If the employee inflicts harm upon a third party in the course of his employment and the victim holds the employee accountable, the employer must indemnify the employee for the costs necessary to cover the damage award.[260] If the victim claims damages from the school directly under the principles of vicarious liability (§ 831 BGB), § 840 subs. 2 BGB provides for redress by the school against the teacher. However, such redress would flatly contradict the principles just expounded placing the full loss upon the employer. Thus, the school may not seek contribution from the teacher responsible for the wrong.

111 These principles apply without reservation to negligent conduct of the teacher only. If he has violated his duty to supervise intentionally, he is subject to his employer's recourse action and may not himself claim indemnification or compensation; the same principles apply generally also for reckless conduct.[261] In special cases of reckless conduct the damage might be divided among the two parties to the labour contract, provided that the damage is exorbitant in magnitude and exceeds the employee's financial capacities by far.

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

112 The teacher is bound to exercise the duty to supervise in a manner that third parties are not harmed by the conduct of the child.[262] This applies, however, only to school activities, which comprise the times of classes, breaks and free periods between two classes.[263] School activity does not constitute the journey

[258] H. Vinke in: Soergel (supra fn. 253), § 839 no. 259.
[259] Most of these provisions are modelled on § 46 *Beamtenrechts-Rahmengesetz* (Uniform Civil Servants Act, BRRG).
[260] For details cf. H. Kötz/G. Wagner (supra fn. 52), no. 299.
[261] *Bundesarbeitsgericht* (Federal Labour Tribunal, BAG) (27.9.1994), [1995] NJW, 210, 211. But cf. also BAG (11.3.1996), [1996] NJW, 1532: the employee's liability to the employer is not generally limited to recklessness, but has to be determined in the individual case upon weighing the degree of fault against the probability of the damage.
[262] Supra no. 92.
[263] E. Scheffen/F. Pardey (supra fn. 202), no. 208.

from the child's domicile to the school, during which, however, the child enjoys the protection of statutory accident insurance.[264]

Accordingly, the teacher does not violate his duty to supervise if he sends the children back home after school without further company or supervision.[265] This is different with regard to those journeys that need to be covered during class and which are therefore subject to the teacher's duty to supervise.[266] Pertinent examples are physical activities taking place at a public swimming pool or sporting facility. Here, the teacher is released of his duty if the parents – for example – allow their child to ride the bike to a school event, which takes place outside school premises. In this case, the school cannot reasonably be expected to provide enough teachers to supervise the children's behaviour during the entire journey.[267] 113

Within the scope of the duty to supervise, the school does not need to guarantee absolute security. Rather, the range of supervising measures is limited by what can reasonably be expected of the school.[268] Here, the same principles apply that govern the parental duty to supervise, which likewise is not without limits but determined upon considering the benefits and costs of safety measures.[269] Of particular importance is the extent of the potential damage and the likelihood of its occurrence. Pupils with a known tendency to aggressive behaviour require more oversight, while well-educated adolescents need less.[270] Ten and eleven-year-old kids with a known tendency to disobey orders and to cause trouble and who are therefore living in a foster home must not be left unattended for several hours. Thus, the home is liable if it was possible for them to escape and set a house on fire.[271] A further criterion is the age of the pupil: the younger a child is, the more supervision is required.[272] In any case, it must be borne in mind that large, unattended groups of children are more prone to cause serious trouble than an individual child entirely on his/her own. Thus, classes of pupils must not be left to themselves for hours but the head of the school must provide for some substitute supervision where their teacher is unavailable for some special reason.[273] The duty to supervise also extends to the time the pupils spend in the schoolyard during breaks between classes. The teacher in charge of the yard must take reasonable care to avoid the children throwing stones at cars parked nearby, but he is not required to supervise 114

[264] Cf. §§ 2 para. 1 no. 8 b, 106 para. 1 SGB VII.
[265] LG Hamburg (26.4.1991), [1992] NJW, 377; cf. K. Vollmar, Zur Haftung der Erzieher, Lehrer und Schüler nach der Einführung der gesetzlichen Schülerunfallversicherung, [1973] VersR, 298, 299.
[266] LG Hamburg (26.4.1991), [1992] NJW, 377, see also BGH (28.5.1965), BGHZ 44, 103, 106.
[267] BGH (28.5.1965), BGHZ 44, 103, 106.
[268] OLG Düsseldorf (18.12.1997), [1999] NJW-RR, 1620; BGH (8.7.1957), [1957] VersR, 612, 613.
[269] Supra nos. 69–73.
[270] Supra no. 76.
[271] OLG Dresden (4.12.1996), [1997] NJW-RR, 857, 858.
[272] OLG Düsseldorf (14.12.1995), [1996] NJW-RR, 671; see supra no. 75.
[273] BGH (19.6.1972), [1972] VersR, 979 et seq.

every one of them at each and every moment.[274] During celebrations and other events hosted by the school where not only the pupils but also their parents are present, the supervisory duties of the school staff is reduced as teachers may rely on the parents looking after their offspring themselves.[275] Finally, other measures than mere supervision have to be taken into account. In some cases it may be appropriate to protect a schoolyard that is used for ballgames with a net in order to avoid balls flying onto the neighbour's premises and causing damage there.[276]

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other? May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

a) Public Insurance Schemes and Private Tort Law

115 Approximately 90% of the German population are covered by public health insurance.[277] In cases of personal injury caused by the intentional or negligent behaviour of school children, the carriers of the public health insurance system are most likely to pick up the costs of recovery. However, these entities are not to be burdened with these costs for good as they enjoy rights of recourse against the tortfeasor. Pursuant to § 116 SGB X the tort claim of the person injured is transferred to the public health insurance carrier which in turn may enforce such claim against the tortfeasor ultimately bearing responsibility for the loss.[278] The same principles govern in the area of disability insurance covering cases where the victim sustains permanent injuries resulting in total or partial disability to work.

b) Private Schools

116 The indemnity system just described applies without reservation where the liability of private schools is at stake. In this type of case, the victim will collect the social security benefits available in the instance of personal injury without being compensated twice. Rather, to the extent that the social insurance carrier provides assistance to the victim and compensates for losses which are attributable to the third-party tortfeasor, the social security carrier enjoys rights of recourse against the latter. Thus, where the private entity running the school has to bear the loss under § 832 subs. 2 BGB, the social insurance carrier will enforce the tort claim of the victim against the tortfeasor. Of course, the victim remains in charge of his claims in those areas of loss which have not been tak-

[274] OLG Düsseldorf (12.10.1995), [1996] NJW-RR, 671; OLG Köln (20.5.1999) [1999] MDR, 997, 998.
[275] OLG Koblenz (19.10.1999), [2000] MDR, 394, 395.
[276] Cf. OLG Düsseldorf (14.12.1995), [1996] NJW-RR, 671.
[277] H. Kötz/G. Wagner (supra fn. 52), no. 217.
[278] Supra no. 38.

en care of by way of social security benefits. In particular, as public health and disability insurance schemes never include damages for pain and suffering, the victim may seek compensation for these losses from the entity administering the school.

c) Public Schools

In the more familiar case of an injury which occurs within the operation of a public school, the matter is more complicated. Pursuant to § 839 subs. 1 cl. 2 BGB, the public officer's liability for negligence is excluded where the individual can obtain redress from another source. This principle of "subsidiarity" operates under the prevailing view also in favour of the state and may therefore release the state operating the school from liability.[279] 117

Thus, at least prima facie it looks as if the public entity liable under § 839 BGB, art. 34 GG might refer the victim to the social security system, limiting its exposure to those heads of damage that are not covered by public health and disability insurance. In fact, the older jurisprudence embraced this view,[280] but nowadays the reverse position prevails. The new learning is that the rights of recourse granted to social insurance carriers by § 116 SGB X take priority as their very existence is evidence of the legislative intent not to burden the social security system with losses arising from accidents caused by the fault of private parties or civil servants.[281] Thus, § 839 subs. 1 cl. 2 BGB does not apply to social security benefits, and the state running the school in question has to indemnify the competent carrier for any costs incurred in compensating the victim. 118

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

If the accident occurred in a private school, the general principles of tort law apply, such that several tortfeasors are jointly liable for the entire damage, § 840 subs. 1 BGB. Where the child had the relevant capacity under § 828 BGB when committing the wrong, he is jointly liable together with the teacher and the in- 119

[279] BGH (15.5.1997), [1998] NJW, 142, 145; BGH (19.3.1992), [1992] *Neue Zeitschrift für Verwaltungsrecht* (NVwZ), 911, 912; BGH (13.12.1990), [1991] NJW, 1171; BGH (12.4.1954), [1954] NJW, 993; F. Ossenbühl, *Staatshaftungsrecht* (1991), 79 et seq.; cf. G. Kreft in: RGRK (supra fn. 96), § 839 no. 498; dissenting H.-J. Papier in: Münchener Kommentar (supra fn. 242), § 839 no. 299; K. Bettermann, Rechtsgrund und Rechtsnatur der Staatshaftung, [1954] DÖV, 299, 304; U. Scheuner, Probleme der staatlichen Schadenshaftung nach deutschem Recht, [1955] DÖV, 545, 549; J. Isensee, *Subsidiaritätsprinzip und Verfassungsrecht* (1968), 86, 87 et seq.

[280] BGH (9.11.1959), BGHZ 31, 148, 150 = [1960] NJW, 241; BGH (29.1.1968), BGHZ 49, 267, 276 = [1968] NJW, 696, 698; BGH (19.6.1972), [1972] VersR, 979, 980; BGHZ 62, 394, 397 = [1974] NJW, 549.

[281] BGH (20.11.1980), BGHZ 79, 26, 31 = [1981] NJW, 623; BGH (17.3.1983), [1983] NJW, 2191; cf. also BGH (10.11.1977), BGHZ 70, 7 = [1978] NJW, 495.

stitution administering the school, whose responsibilities follow from § 832 subs. 2 BGB.

120 Within the realm of public schools, joint liability of the minor and the state is precluded up front by operation of the subsidiarity clause in § 839 subs. 1 cl. 2 BGB.[282] Provided that the teacher acted negligently only and not recklessly or even intentionally, the state may refer the victim to another person who is also liable in damages, i.e., the child that committed the wrong and is responsible for this under § 828 BGB. In case, however, that the child that caused the damage cannot be identified or is known but lacks the financial means to cover the damages claimed for, § 839 subs. 1 cl. 2 BGB does not bar the action against the state.[283] As children typically lack the financial means to compensate the victim, the state will ordinarily be liable for the full amount.

121 These principles apply only if the child was held accountable for the damage caused by his act or omission on the basis of § 828 BGB. If the minor tortfeasor did not have the relevant capacity, his liability might still be established under § 829 BGB, supra nos. 14 et seq. However, pursuant to the language of this provision liability in equity only arises where compensation may not be obtained from someone charged with a duty to supervise the child.[284] In this context it does not matter whether the duty to supervise is drawn from the private law provision of § 832 subs. 2 BGB or from the public law provision of § 839 subs. 1 BGB. As a consequence, liability of the school always takes priority over liability in equity of the child.

12. Is there any possibility either for the child or the teacher to have recourse against each other?

122 In the internal relationship between the child and a teacher of a private school, § 840 subs. 2 BGB provides that it is for the child to ultimately bear the loss. Accordingly, the teacher or school administrator may seek redress from the child. This does not apply, however, if the child is liable in equity, as § 840 subs. 2 BGB explicitly stipulates.[285]

123 In the relationship between the child and a teacher of a *public* school, joint and several liability towards the victim may only occur if the subsidiarity clause in § 839 subs. 1 cl. 2 BGB does not apply (supra no. 120), so that the school may not refer the victim to the child. In addition, it must be kept in mind that equitable liability under § 829 BGB may not be established if the state is liable under § 839 BGB, art. 34 GG for want of diligent supervision (supra no. 121). Both restrictions taken together account for the fact that recourse actions of

[282] Supra no. 117.
[283] BGH (5.11.1992), BGHZ 120, 124, 126 et seq. = [1993] NJW, 1647 et seq.
[284] See supra no. 25.
[285] See supra nos. 25, 86.

private school administrators and public educational authorities against their own school children are virtually unknown in practice.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

During class attendance the parental duty to supervise continues to exist, albeit reduced to a collateral duty of selection, surveillance and organisation (supra no. 79). If the child is sent to a public school, it is generally assumed that the parents satisfied their collateral duty. Only if there are signs that indicate the opposite are the parents obliged to adopt appropriate supervising measures. 124

If both parents and the teacher at a public school are liable, the parental liability under § 832 subs. 1 BGB is "another source of compensation" in the sense of § 839 subs. 1 cl. 2 BGB.[286] Accordingly, the parents are liable alone, provided the public officer acted merely negligently (supra no. 111) and the parents are in command of the necessary financial means to compensate the victim.[287] 125

[286] See supra no. 81.
[287] See supra no. 120.

Children as Tortfeasors under Italian Law

Giovanni Comandé and Luca Nocco

I. Short Introduction

As a preliminary remark, we need to mention that the rules of tort law apply equally to both adults and children.[1] Indeed, children can be liable under the general rules of tort law provided by artt. 2043 et seq. of the Italian civil code (*Codice civile*, c.c.[2]), since no minimum age has been fixed by the legislature as a condition for liability. However, courts have progressively adapted these rules to the peculiarities of torts involving children, in cases where they are either victims or tortfeasors. 1

Italian tort law provides that in order to be held liable, one must be "capable of understanding or intending at the time he committed the act causing injury".[3] This general rule of liability provided by art. 2046 c.c.,[4] requires the capacity to act reasonably and has been interpreted in the sense that a person should be 2

[1] We will assume hereinafter that the word "children" are minors of 18 years old. See Law No. 39 of 8 March 1975. For a general introduction to minors under Italian law see F. Giardina, *La condizione giuridica del minore* (1984) and F. Giardina, voce Minore (Diritto civile) in: *Enc. Giur. Treccani*, XX (1990). A critical approach to current Italian law, too sharply distinguishing between minors and full age individuals is, among others, in E. Calò, Appunti sulla capacità d'agire dei minori, [1997] *Diritto della famiglia e delle persone* (Dir. fam. pers.), 1604 et seq. The interplay between minors and tort law is in S. Patti, *Famiglia e responsabilità civile* (1984), passim; F.D. Busnelli, Nuove frontiere della responsabilità civile, [1976] *Jus*, 64; M. Mantovani, Responsabilità dei genitori, dei tutori, dei precettori e dei maestri d'arte in: *La responsabilità civile*, II, 1 (1987); A. Scarpa, Il diritto ad essere minore, [1976] *Archivio civile* (Arch. civ.), 665 et seq.; R. Scionti, Sulla responsabilità dei genitori ex art. 2048 c.c., [1978] Dir. fam. pers., 1014; B. Pagliara, L'obbligazione dei genitori al risarcimento del danno per i danni cagionati dai figli minori, [1979] *Diritto e pratica nell´assicurazione* (Dir. prat. ass.), 30. See also P. Stanzione, Diritti esistenziali della persona, tutela delle minorità e Drittwirkung nell'esperienza europea, [2002] *Europa e diritto privato* (Eur. dir. priv.), 41 et seq.; and E. Quadri, L'interesse del minore nel sistema della legge civile, [1999] *Famiglia e diritto* (Fam. dir.), 80 for an analysis of the interplay between fundamental rights and legal rules applicable to children.

[2] Enacted in 1942. Translations of c.c. articles are from M. Beltramo/G.E. Longo/J.H. Merryman (eds.), *The Italian civil code and ancillary legislation* (1969).

[3] Art. 2046 c.c., the "capacità d'intendere o di volere al momento della commissione del fatto".

[4] Art. 2046 c.c.: "A person who was incapable of understanding or intending at the time he committed the act causing injury is not liable for its consequences, unless the state of incapacity was caused by his own fault. Those who are not able to act reasonably are considered incapable."

able to understand the implications of his/her action (or omission) and capable of self-determination.

3 While the civil code of 1865 provided for liability of parents, guardians and teachers in one article (art. 1153), in the civil code of 1942 there are several provisions dealing with parental or guardian's liability (mainly artt. 2047[5] and 2048[6] c.c.), which render *de facto* children's liability subsidiary to that of their father, mother, guardians, teachers and masters of apprentices (hereinafter "parents, etc."). To summarise, it could be said that the only consequence of minority in tort law is "to trigger a peculiar damages compensation system that involves the family".[7]

4 It is important to stress from the outset the distinction which is made between a child who is "incapable of understanding or intending at the time he committed the act causing injury", following the wording of art. 2046 c.c., from one who is capable. In the first case, the child will be liable in tort and their parents, etc., are jointly and severally liable along with the child. In the second case, the parents, etc., are solely liable. Besides, minors can only be held liable in equity if the civil action against the parents, guardians, etc. fails.

5 In order to hold these persons liable for an incapable person's act (minor or not), it is necessary that the act has all the characteristics of a tort, barring the mental element that would have otherwise established capacity. In other words, art. 2047 c.c. does not make any reference to a "tort" committed by the

[5] Art. 2047 c.c.: "If an injury is caused by a person incapable of understanding or intending, compensation is due from those who were charged with the custody of such person, unless they prove that the act could not have been prevented. If the person injured is unable to secure compensation from the person charged with the custody of the person lacking capacity, the court, considering the financial conditions of the parties, can order the person who caused the injury to pay an equitable compensation."

[6] Art. 2048 c.c. "The father and mother, or the guardian, are liable for the damage occasioned by an unlawful act of their minor emancipated children, or of persons subject to their guardianship (343 et seq., 414) who reside with them. The same provision applies to a parent by affiliation. Teachers and others who teach an art, trade, or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices while they are under their supervision. The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were unable to prevent the act". See, among several cases: *Tribunale di Milano* (First Instance Court, Trib.), 18 December 2001, [2002] *Giustizia civile* (GC), 2365 establishing that in order to apply art. 2047 c.c., the liable person must know the incapacity of the one who committed the fact. Hence, when parents do not know their child's state of incapacity, art. 2048 c.c. applies. In this case, parents relieve themselves from liability by showing that they properly supervised the child and offered proper education according to what is required by art. 147 c.c.

[7] F. Giardina, *voce Minore* (supra fn. 1), 3. The role of financial guarantee assumed by liability of parents in case law is stressed by A. Pinori, Sulla responsabilità dei genitori per culpa in educando ed in vigilando, [1995] *Giurisprudenza italiana* (GI), I, 2, 558 and S. Patti, L'illecito del "quasi maggiorenne" e la responsabilità dei genitori: il recente indirizzo del Bundesgerichtshof, [1984] *Rivista di diritto commerciale* (Riv. dir. comm.), 32. L. Corsaro, Funzione e ragioni della responsailità del genitore per il fatto illecito del figlio minore, [1998] GI, IV, 228 emphasises that this role is part of the parents' duties with regard to one's own children's behaviours capable of affecting third parties. See also F.D. Busnelli, Capacità ed incapacità d'agire del minore, [1982] Dir. fam. pers., 54 et seq.

incapable person. On the contrary, art. 2048 c.c. postulates the illicit act of a minor, capable of understanding or intending at the time he committed the act causing the injury, for which parents (or guardians) might also be held liable, for their failure to educate or supervise the child properly.[8] In other words, both the minor and the parents, etc., must have committed a tort; regarding the latter, it consists in the violation of the duty to properly educate and raise the child[9] arising from art. 147 c.c.[10] In light of this provision, judges must therefore ascertain both the tort committed by the child and the absence of evidence exonerating parents (or guardians) from their presumed defect in control or education.[11] Nevertheless, the elimination of "the strong paternalistic accretions of our case law"[12] may appear in conflict with maintaining an anachronistic sanction against parents "liable" for not having properly educated their children.[13]

Finally, when it is not possible to obtain compensation from the person who is legally liable for children's acts or omissions, the child that is not capable at the time of the act causing the injury could be held liable in equity (art. 2047 c.c.). 6

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

As mentioned previously, there is no fixed minimum age for children to be liable in tort;[14] the general rule of liability is linked to the notion of capacity. Accordingly, liability is attributed if the person (either adult or child) is able to 7

[8] Minors and parents' etc. liability concur. See *Corte di cassazione, sezioni civili* (Italian Supreme Court, Cass.) 3 March 1995, No. 2463, [1995] GC, I, 2093, with comment of F. Casini; Cass. 13 September 1996, No. 8263, [1997] *Studium Juris*, 80.

[9] Cass. 9 October 1997, No. 9815, [1998] *Studium Juris*, 426.

[10] Art. 147: "Marriage imposes on both spouses the obligation to maintain, educate and instruct the children taking into account their ability, natural inclination and aspirations." See A. Germanò, Potestà dei genitori e diritti fondamentali dei minori, [1979] Dir. fam. pers., 1514 et seq.

[11] Difficulties in the application of artt. 2047 and 2048 c.c. have led some scholars to wonder whether these rules are up-to-date. See P. Morozzo della Rocca, La responsabilità civile dei genitori, tutori, maestri in: P. Cendon (ed.), *La responsabilità civile* (1998), 39 and 44. Furthermore, see R. Pardolesi, Danni cagionati dai minori: pagano sempre i genitori?, [1997] Fam. dir., 225.

[12] This way F. Giardina, I rapporti personali tra genitori e figli alla luce del nuovo diritto di famiglia, [1977] *Rivista trimestrale di diritto e procedura civile* (Riv. trim. dir. proc. Civ.), 1352 et seq.

[13] Similar doubts are in V. Carbone, Non rispondono i genitori per gli incidenti causati dal minore in motorino, [2001] *Danno e Responsabilità* (DR), 501 et seq.; and in S. Patti (supra fn. 7), 29 et seq.; comparing with similar results the German and Italian law. See also, S. Patti, [1984] Riv. Dir. Comm., 30, fn. 7, where the author stresses that courts do not actually ask themselves in which way parents could have prevented several activities they do not even know their children are performing. More recently see R. Pardolesi (supra fn. 11), 225.

[14] It is necessary to mention art. 2 c.c., which sets the legal capacity to exercise rights at the majority age of 18 ("*al compimento del diciottesimo anno*").

understand the general implications of his/her actions or omissions. Please refer above under nos. 3–6.

8 In the civil code, the legislature has moved away from the solution reached in the criminal field. In fact, the criminal code of 1930 (*Codice penale*, c.p.)[15] provides a general principle expressed in terms of "capacity to act reasonably"[16] (art. 85 c.p.) which is completed by specific rules for minors which follow this general provision.[17] According to those rules, minors up to 14 years of age can never be liable for the crimes they have committed. However, minors between 14 and 18 years of age can be held liable for a crime, if it is proved that they had the "*capacità d'intendere e di volere*".[18] In any event, their sentence is reduced with respect to the usual rules applicable to adults with capacity.

9 Those special provisions of the criminal code are not applicable in civil actions, even by analogy.[19] Nevertheless, very often judges do not even test whether a child between one to six years of age has capacity ("*capacità di intendere o di volere*").[20] They presume, owing to the very young age of the tortfeasor, an incapacity "*in re ipsa*".

10 Art. 2 of law no. 689 of 24 November 1981 excludes the liability of minors of eighteen with regard to administrative sanctions. On the contrary, the same law establishes the liability of their guardians, unless the guardian proves that the act could not have been prevented. Scholars[21] have been very critical of this exemption from liability, because it does not take into account the actual freedom that minors enjoy today; freedom that should be linked to a corre-

[15] *Codice penale* (Criminal Code, c.p.).

[16] Art. 85 c.p.: "Nessuno può essere punito per un fatto preveduto dalla legge come reato, se, al momento in cui lo ha commesso, non era imputabile". (Translation of the author: "No one can be punished for a fact that is a crime if, at the time of it, it was not chargeable.").

[17] Art. 97 c.p.: "Non è imputabile chi, nel momento in cui ha commesso il fatto, non aveva compiuto i quattordici anni" (Translation of the author: "A minor of 14 years is not chargeable."). Art. 98 c.p.: "È imputabile chi, nel momento in cui ha commesso il fatto, aveva compiuto i quattordici anni, ma non ancora i diciotto, se aveva capacità d'intendere e di volere; ma la pena è diminuita" (Translation of the author: "One who is 14 years old, but not yet 18, is chargeable if, at the time of the commission of the act, s/he was capable of understanding or intending; but the penalty is reduced.").

[18] A more extensive discussion on criteria to assess minors' intellectual maturity is in P.P. Martucci, Maturità psicofisica e imputabilità del minore, [2000] Fam. dir., 146 et seq.

[19] Cass. 18 June 1953, no. 1812, [1953] *Repertorio del Foro italiano* (Foro it., Rep., voce Responsabilità civile), no. 94; Cass. 8 April 1965, no. 597, [1965] Foro it., Rep, voce Responsabilità civile, no. 153; Cass. 18 June 1975, no. 2425, [1975] Foro it., Rep., voce Responsabilità civile, no. 157; *Corte di cassazione, sezioni unite* (Italian Supreme Court, Cass., sez. un.), 6 December 1982, no. 6651, [1983] *Il Foro italiano* (Foro it.), I, 1630; Cass. 19 November 1990, no. 11163, [1990] Foro it., Rep., voce Responsabilità civile, no. 98.

[20] See Trib. Piacenza 4 March 1961, [1962] *Archivio giuridico della circolazione* (Arch giur. circ.), II, 290 and *Corte di appello* (Appeal Court, App.) Firenze 13 March 1964, [1964] *Giurisprudenza toscana* (Giur. tosc.), 598.

[21] S. Verzaro, La prova liberatoria a carico dei genitori ex art. 2 l. 24 novembre 1981, no. 689, [1996] *Responsabilità civile e previdenza* (Resp. civ. prev.), 1159.

sponding responsibility. Moreover, this exemption is in contrast with the corresponding provision of the criminal code, which penalises minors above fourteen years of age who are capable of understanding and intending. Furthermore, the courts' interpretation of art. 2048 c.c., especially strict against parents,[22] creates compatibility problems between the provisions of art. 2 law 689\1981, on the one hand, and, on the other, both the general principle of personal responsibility and of necessary statutory intervention introduced by the same L. 689/81.[23]

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

11 As already mentioned, a specific distinction between the criminal and the civil code is that, while the first one typifies specific causes of non-liability ("*non imputabilità*"),[24] the civil code leaves the issue of establishing liability in all cases to the discretion of the judges. They base their opinion upon the child's intellectual and physical faculties, incidental diseases, the way in which s/he behaved, his/her studies, education, and similar criteria.[25] Therefore, to be held liable,[26] a child must be able to act reasonably; however, the specific "judicial presumption" of incapacity for children between the age of one to six years often applies (see above nos. 7 to 10).

12 Nevertheless, recent decisions of the Supreme Court of Cassazione have held that it is not enough for the judge to refer merely to age and to the fact causing injury in order to establish the minor's incapacity. The court should take into consideration the intellectual and physical capacity of children as well as their development, their character, their ability to perceive the illicit nature of their actions and their ability to make reasoned choices. The criteria for those evaluations are not fixed by law but should be established in light of common experience and scientific notions.[27]

[22] Please refer to nos. 42 et seq.

[23] See S. Verzaro (supra fn. 21), 1162.

[24] That is, the impossibility to be punished. Please refer to art. 88 et seq. c.p.

[25] See Cass. 28 May 1975, no. 1642, [1975] Foro it., Rep., voce Responsabilità civile, no. 158–159; Cass. 15 January 1980, no. 369, [1981] *Il foro padano* (Foro pad.), I, 329 and [1980] GI, I, 1, 1593; Cass. 30 January 1985, no. 565, [1985] *Repertorio della Giurisprudenza italiana, voce Responsabilità civile* (Giur. it., Rep., voce Responsabilità civile), no. 112; Cass. 26 June 2001, no. 8740, [2001] Foro it., I, 3098, with comment of F. di Ciommo and [2002] DR, 283, with comment of F. Agnino, Il fatto repentino ed improvviso esclude la responsabilità dei precettori.

[26] Cass. 4 April 1959, no. 1006, [1959] Foro it., I, 533, with comment of A. De Cupis.

[27] Cass. 26 June 2001, no. 8740, [2001] Foro it., I, 3098; Cass. 28 May 1975, no. 1642, [1975] Foro it., Rep., voce Responsabilità civile, no. 158–159.

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

13 Under Italian law, the expression "capacity to act reasonably" means to realise the dangers of one's own behaviour, as well as the ability to direct one's behaviour towards the achievement of one's purpose. In this sense, art. 2046 c.c. uses the term "*intendere o volere*" (understand or will), as opposed to "*intendere e volere*" (understand and will), while the lack of any of those requirements makes it impossible to hold a person liable. Most particularly, the expression "*capacità d'intendere o di volere*" is understood as being the ability of a person to understand the implications of his/her action or omission and, respectively, the aptitude to behave reasonably.[28]

14 Under Italian law, it is a highly controversial issue as to whether a child has to realise a particular danger in an individual case or if it is sufficient that s/he understood the danger s/he creates by his/her own behaviour. Some scholars[29] stress the necessity to ascertain whether the person was also actually able to understand the consequences of the action and/or the omission; according to them, a theoretical analysis is insufficient to trigger liability.

15 Besides, there are several contradicting opinions regarding the criteria to be used in determining whether a person behaves negligently. While some authors[30] believe it is necessary to establish negligence in the light of subjective standards, the majority conversely stress that negligence exists when a person behaves differently from a social or professional standard of conduct.[31] This way, delictual capacity ("*imputabilità*"), as defined above, becomes a legal requirement for liability based on fault.

16 Note, however, that judges regularly presume incapacity of understanding or intending from the minority age and/or from the minor's education and upbringing.[32]

[28] See G. Marini, voce Imputabilità, in: *Digesto delle discipline penalistiche* (Digesto disc. pen.) (1992), VI, 253; A. Crespi, voce Imputabilità (*diritto penale*, dir. pen.), in: *Enciclopedia del Diritto* (Enc. dir.) (1970), XX, 772.

[29] See E. Pellecchia, L'art. 2047 c.c. tra anacronismi e pericolose fughe in avanti: ovvero, quando l'infermo di mente, il sorvegliante e il danneggiato sono tutti vittime, [1994] Resp. civ. prev., 1074, for the specific case of a person with mental disorder (art. 2 c.c.), who is, like the child, "*incapace d'agire*".

[30] See, among several authors, C.M. Bianca, *Diritto civile, V, La responsabilità* (1994), 656.

[31] See M. Comporti, Fatti illeciti: le responsabilità presunte. Artt. 2044–2048, in *Comm. al Codice Civile Schlesinger-Busnelli* (2002), 65 et seq.

[32] Cass. 15 January 1980, no. 369, [1981] Foro pad., I, 329. Among criminal law experts please refer to A. DellaBella/G. Ripamonti, Minori e capacità di intendere e volere: una importante pronuncia del Tribunale di Milano, [2003] *Cassazione penale* (Cass. pen.), 1384 et seq.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

There is no evidence that appreciation of children's capacity to act reasonably is influenced either by parental liability or by the existence of a family liability insurance policy. Nevertheless, we assume that case law easily relies on the fact that parents are liable for their children acts, whether or not capable. 17

5. What is the standard of care applicable to children?

The standard of care applicable to children, as referred above, is not any different from the general one. If, when determining capacity ("*capacità d'intendere o di volere*" or "*capacità naturale*" – "natural capacity"), it seems that a child is able to understand the sense and the consequences of his/her conduct, s/he can be held liable.[33] 18

6. Are children held to a higher standard of care if they engage in "adult activities"?

It would appear that there is no difference as to the kind of activity the child engages in for determining the standard of care. However, different consequences may follow in different approaches to the legal requirements, as suggested by some scholars. Please refer to nos. 13 to 16 for more details. 19

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

A child may be liable in equity if the victim cannot receive compensation from the person who is legally liable for the child's act causing damage. This principle is set out in art. 2047 c.c., second paragraph, which reduces greatly the immunity of children and individuals not able to act reasonably. Causes leading to an obligation to compensate damage sustained are: the absence of a person under a duty to supervise;[34] his/her insolvency; the proof that the person obliged to supervise the child could not avoid the damage. 20

In these cases, nevertheless, the tortfeasor cannot be compelled to pay the total amount of damages suffered by the victim. The child, for instance, will pay a fair indemnity ("*equa indennità*"),[35] which is lower than the full loss. Accord- 21

[33] See Cass. 8 April 1965, no. 597, [1965] Foro it., Rep, voce Responsabilità civile, no. 153; Cass. 15 January 1980, no. 369, [1981] Foro pad., I, 329.

[34] Cass. 28 January 1953, no. 216, [1953] GI, 1953, I, 1, 496.

[35] This rule has been applied only a very few times. Among them: Cass. 28 January 1953, no. 216, [1953] GI, 1953, I, 1, 496 and App. Torino, 14 July 1956, [1956] GI, I, 2, 574.

ing to some scholars,[36] though, this is a case in the civil code in which the judge has discretionary power to decide whether or not indemnity is due in its full amount.

22 It is controversial whether the award requires actual fault of the child[37] or if it is rather a case of strict liability.[38] Scholars almost unanimously hold that this is a rule based on equity; one author, however, argues that children's liability in equity can indeed be described as being a strict liability rule.[39]

23 In addition, one should remember that liability based on art. 2047 para. 2 c.c. is secondary. Thus, no one can be found liable under this provision if there is no principal debtor.[40] Such would be the case if the supervisor were the injured person.

8. Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard? What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

24 If the child is liable in tort, there are no reduction clauses which differ from the regular ones (e.g. contributory negligence of the victim). However, in determining liability in equity under art. 2047 c.c., judges must take into account the economic conditions of the parties.[41] This may lead *de facto* to a reduction in the amount of damages due (in equity) by a child.

[36] F.D. Busnelli/S. Patti (eds.), *Danno e responsabilità civile* (1997), 297, note 2, who stress the difference between this article of the civil code and art. 2045 c.c. ("*Stato di necessità*"), that obliges the judge to condemn the tortfeasor to pay the "*indennità*", and limits judicial powers only to determine the amount; art. 2045: "If a person who commits an act which causes injury was compelled by the necessity of saving himself or others from a present danger of serious personal injury, and the danger was neither voluntarily caused by him nor otherwise avoidable, the person injured is entitled to compensation in an amount equitably established by the court." See also S. Rodotà, *Il problema della responsabilità civile* (1967), 143.

[37] C. Salvi, La responsabilità civile dell'infermo di mente in: P. Cendon (ed.), *Un altro diritto per il malato di mente. Esperienze e soggetti della trasformazione* (1988), 821.

[38] M. Comporti, *Esposizione al pericolo e responsabilità civile* (1965), 237 and M. Franzoni, Dei fatti illeciti, art. 2043–2059 in: F. Galgano (ed.), *Commentario al codice civile Scialoja-Branca* (1993), 342 et seq., who specifies that all the elements for establishing tort liability must be present, at least *in abstracto*.

[39] M. Comporti, Fatti illeciti: le responsabilità presunte. artt. 2044–2048 in: *Commentario Schlesinger-Busnelli* (supra fn. 31), 342 et seq. and E. Bonvicni, *La responsabilità civile per fatto altrui* (1975), 635.

[40] See Trib. Perugia 30 October 1995, [1996] *Rassegna giuridica umbra*, 89.

[41] See Trib. Macerata 20 May 1986, [1987] Resp. civ. prev., 107.

25 According to one opinion,[42] another basis for reduction concerns only the amount of non-pecuniary losses suffered by the victim of a child's tort. At first, judges affirmed that "danno non patrimoniale" – non-economic loss – ought not to be compensated by reason of the effect of art. 2059 c.c.[43] The underlying argument was to the effect that Italian law requires the commission of a crime in order to allow compensation for non-economic loss; such a rule was hardly compatible with the long established principle that only individuals over 14 of age can commit a crime.[44] Another judicial trend,[45] nowadays predominant, holds that in order for the victim to recover non-pecuniary damages, it is sufficient that the crime be ascertained *in abstracto*. Nonetheless, we were left with two contradictory decisions[46] for which judges were obviously influenced by the dramatic factual context.

26 It must be added that, in May 2003, the Court of Cassazione changed its reading of all the liability rules whenever a presumption of liability applies, stating that non-patrimonial damages must be awarded also when liability is presumed and there is no positive evidence of negligence.[47] The text of the decisions referred explicitly only to artt. 2050 to 2054 c.c.; however the reasoning behind them clearly applies to artt. 2047 and 2048 c.c. as well.

27 In summary, the recoverability of non-pecuniary losses when the tortfeasor is incapable of understanding or intending at the time of the commission of the

[42] Cass. 4 April 1959, no. 1006, [1959] Foro it., I, 533; Cass. 29 October 1965, no. 2302, [1966] GI, I, 1, 1282; Cass. 26 July 1974, no. 2259, [1974] Foro it., Rep., voce Danni civili, no. 43; Trib. Venezia 14 July 1999, [2000] Foro pad., I, 428, with comment of G. Franceschini. See also G. Bonilini, *Il danno non patrimoniale* (1983), 515 and G. Visintini, Imputabilità e danno cagionato dall'incapace, [1986] *Nuova giurisprudenza civile commentata* (NGCC), II, 117.

[43] See art. 2059: "Non-patrimonial damages shall be awarded in cases provided by law." See art. 185 c.p.: "Ogni reato obbliga alle restituzioni, a norma delle leggi civili. Ogni reato, che abbia cagionato un danno patrimoniale o non patrimoniale, obbliga al risarcimento il colpevole e le persone che, a norma delle leggi civili, debbono rispondere per il fatto di lui".

[44] Please refer to the very recent decisions rendered by the Italian Supreme court and Constitutional court (Cass., 31 May 2003, no. 8827 and no. 8828, [2003] DR, 816 et seq., with comments of F.D. Busnelli, Chiaroscuri d'estate. *La Corte di Cassazione e il danno alla persona*; G. Ponzanelli, *Ricomposizione dell'universo non patrimoniale: le scelte della Corte di Cassazione* and A. Procida Mirabelli Di Lauro, *L'art. 2059 c.c. va in paradiso* and Corte Costituzionale 11 July 2003, no. 233, [2003] DR, 939 et seq. with comments of G. Ponzanelli, *La corte costituzionale si allinea alla Corte di cassazione* and A. Procida Mirabelli Di Lauro, *Il sistema della responsabilità civile dopo la sentenza della Corte Costituzionale no. 233/03*).

[45] See Cass. 6 June 1977, no. 1623, [1977] Foro it., Rep., voce Danni civili, no. 28; Cass., sez. un., 6 December 1982, no. 6651, [1983] Foro it., I, 1630; Cass. 30 January 1985, no. 565, [1985] GI, voce Responsabilità civile, no. 112; Cass. 12 August 1995, no. 8845, [1995] Foro it., Rep., voce Danni civili, no. 156. See also V. Zeno Zencovich, Danni non patrimoniali e reato commesso dal non imputabile, [1983] Riv. dir. comm., II, 227; P. Ziviz, *La tutela risarcitoria della persona* (1999), 121; G.B. Petti, *Il risarcimento del danno patrimoniale e non patrimoniale alla persona* (1999), 123.

[46] Trib. Trieste 23 November 1990, [1993] NGCC, 1993, I, 986 and Trib. Macerata 20 May 1986, [1987] Resp. civ. prev., 107.

[47] Cass. 12 May 2003, no. 7281 and 7283, [2003] DR, 713 and Cass., 17 May 2003, no. 7282, [2003] *Giustizia civile* (Giust. civ.), I, 1480 et seq.

act are particular cases in which the influence of equity upon compensation is obvious.

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

28 The civil action for liability in equity provided for by art. 2047, para. 2 c.c. cannot succeed if the previous action against the father, mother, guardians, etc. who had custody of the incapable person (art. 2047, sec. 1, c.c.) has not come to an end. In other words, the judge can decide upon the action in equity against the tortfeasor without capacity only if the action against the guardians has failed.[48]

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

29 Children are subject to strict liability under the same requirements as adults are. The scope of art. 2046 c.c. is debated under Italian law. Indeed, the possibility of declaring a minor liable in tort depends on liability capacity ("*imputabilità*") under negligence principles. Hence, when Italian law does not require negligence to be proved, art. 2046 c.c. is not applied. In other words, the general requirement of delictual capacity is not applied in cases in which a regime of strict liability is provided. Indeed, in those hypotheses, the law does not require negligence even for tortfeasors older than 18 years.[49] This means that a child may actually be a keeper of a dog or a plant.[50]

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

30 It really depends on the insurance policy the family has taken out (if any). Usually, a family liability insurance policy covers all damage occurring in the private (i.e. non-professional) sphere of the family members. In any event, several clauses exclude damage caused intentionally from cover. Research

[48] Trib. Orvieto 22 February 2001, [2001] Rass. giur. umbra, 38, with comment of G. Sangro.

[49] M. Comporti (supra fn. 38); P. Trimarchi, *Rischio e responsabilità oggettiva*, (1961) 38; L. BigliazziGeri/U. Breccia/F.D. Busnelli/U. Natoli, *Diritto civile 3* (1991), 696. Contra: C.M. Bianca (supra fn. 30), 656, note 5. For courts' decisions, see among several, Cass. 29 April 1993, no. 5024, [1994] Resp. civ. prev., 472.

[50] See V. Geri, *La responsabilità civile da cose in custodia, animali, rovina di edificio* (1973), 3 et seq.

into the market has shown insurance policies exist against damage caused by any family members, unless caused while engaging in professional activities. Cover is also available for all personal injury and material damage involuntarily caused to third parties in relation to the property or rent of a building including that caused in the course of daily family life.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

To the best of our knowledge "*bonus malus*" clauses are mainly in the automobile liability insurance market. Their presence in other fields is rather minor. 31

12. a) How many per cent of families are covered by family liability insurance?

In Italy, family liability insurance is still not widely used. However, we were unable to find actual data on the issue. Nevertheless, the National Association of insurance confirmed that cover for family liability is offered in various forms (home insurance, multipurpose risk insurance, third-party liability). This makes monitoring it for percentages and prices very difficult. With regard to child-related tort liability, the named insurance policies cover the civil liability of the head of the family (or the person in charge of the child), along with their spouses and other relatives living with them. Accidents in the course of professional activities are excluded. These insurance policies cover all torts committed by the child, including those related to driving motor vehicles.[51] 32

b) Does the liability insurance cover extend to intentional torts committed by the child?

As a general rule (art. 1900 c.c.), "the insurer is liable for the accident caused by intent or gross negligence of the individuals for whose action [or omission] the insured is liable".[52] The underlying policy is to not frustrate the operation of the insurance in those cases where there is a presumption that the motive for taking out insurance was to provide cover for events for which the insured could be held liable.[53] However, the contract may contain an exclusion clause 33

[51] See Cass. 7 September 1977, no. 3907, [1979] GI, I, 1, 694.

[52] G. Angeloni, voce Assicurazione della responsabilità civile, [1958] Enc. Dir., III, 557 et seq.; V. Salandra, Dell'assicurazione in: *Commentario al codice civile Scialoja-Branca* (1966), 333 and M. Rossetti, Commento sub art. 1917 c.c. in: A. La Torre (ed.), *Le assicurazioni* (2000), 243 et seq.

[53] L. Farenga, *Diritto delle assicurazioni private* (2001), 99. See also D. de Strobel, *L'assicurazione di responsabilità civile* (3rd edn. 1992), 142 et seq.

in favour of the insurer in the case of intent or gross negligence of those individuals for whom the insured is liable.[54] There must be express written agreement to this clause, since it is proposed by the insurer, under art. 1341 c.c.[55] Courts[56] have not held to be intrinsically unfair – *ex* art. 1469*ter* c.c. – those clauses which do not also cover the spouse, the children or any other relative living with the insured.

13. a) Are the parents under a duty to take out a liability insurance for their child?

34 No, under Italian law such a duty does not exist.[57]

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

35 There are no actual incentives to take out insurance for damage caused by minors. Such an insurance policy is not a prerequisite for admission to State schools. Unlike other areas – such as life assurance and professional indemnity insurance – where the insurance premium can be deducted from taxes due, there is no tax relief for the said insurance policy.

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up a damage claim brought by the victim against the parents?

36 Art. 1916, sec. 2 c.c. provides that "except in the case of intent, there is no subrogation if damages are caused by children, adopted children (in Italian "*figli affiliati*", parents and grandparents, other relatives or related persons living together permanently with the insured or by servants". The Italian Constitutional court has added to this list the insured's spouse.[58] Scholars explained the rule with two main policy arguments: 1) the insured person is already liable according to artt. 2048 or 2049 c.c. for the behaviour of the listed individuals;[59] 2) the insured would not file an action against these tortfeasors anyway.[60]

[54] See Cass. 8 June 1988, no. 3890, [1988] *Massimario della giustizia civile* (Mass. Giust. Civ.), fasc. 6.

[55] See Cass. 8 June 1988, no. 3890, [1988] Mass. Giust. civ., fasc. 6 and Cass. 18 October 1990, no. 10170, [1991] Giust. civ., 932 and [1991] GI, I, 1, 936.

[56] Trib. Roma 28 October 2000, [2001] *Contratti*, 441, with comment of A. Scarpello.

[57] On the ongoing debate for the introduction of a compulsory insurancee cover for parental liability see S. Patti (supra fn. 7), 33, V. Carbone (supra fn. 13), 504; L. Rossi Carleo, La responsabilità dei genitori ex art. 2048 c.c., [1979] Riv. dir. civ., II, 142.

[58] C. Cost. 21 May 1975, no. 117, [1975] Foro it., I, 1561.

[59] S. Toffoli, Commento sub art. 1916 in: A. La Torre (ed.) (supra fn. 52), 209.

[60] A. La Torre, Surroga assicuratoria: ancora sul concorso di colpa dell'assicurato danneggiato, [1978] Giust. civ., IV, 244 and L. Farenga (supra fn. 53), 141.

b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

No, there is no such a limit. 37

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

The only limits are under (incapable) children liable in equity. Please refer to nos. 24–27. 38

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

No, although it has been shown that there is an increase in the number of trials in which the victim is a child.[61] A large debate concerns litigation involving people with mental disorders, rather than children. There is an interesting proposal to introduce a "charter of minors' rights and duties".[62] 39

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

No, debtors must pay the entire amount owed. However, if debtors cannot pay their debts and have no assets of their own, it is obvious that creditors cannot recover their loss. Moreover, if the debtor is an entrepreneur, bankruptcy law intervenes. A minor 16 years old can be authorized to continue an entrepreneurial activity, in this case s/he is exposed to bankruptcy law as well. 40

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

No to both questions. Please refer to no. 41. 41

[61] See the statistics quoted in M. Rossetti, *Il danno da lesione della salute* (2001), 671 and F. Agnino, Il fatto repentino ed improvviso esclude la responsabilità dei precettori, [2002] DR, 285. Among criminal law experts see E. Calvanese/E. Mariani/V. Gazzaniga, Il minorenne omicida: dati di una ricerca svolta presso il Tribunale per i minorenni di Milano, [2002] *Rassegna italiana di criminologia* (Rass. it. criminol.), 437 et seq.

[62] See M.T. Canzi Poggiato, Uno statuto per i minori?, [1994] Dir. fam. pers., 802 et seq. For a critical approach see P. Stanzione, Personalità, capacità e situazioni giuridiche del minore, [1999] Dir. fam. pers., 260 et seq.

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

42 One must bear in mind again the distinction between the respective applications of art. 2047 and art. 2048 c.c. Under the scope of the former, parents are liable as "supervisors" of a minor not capable of understanding or intending at the time s/he committed the act causing the injury. Under art. 2048 c.c., parents are liable as such when their child is liable in tort (please refer to nos. 3–6).[63]

43 In practice, case law has distinguished these two rules in the light of the burden of proof to be discharged in relation to parents, guardians etc. Under art. 2047 c.c., the person who has custody of the child must prove that s/he took all steps to keep the person incapable within the meaning of art. 2046 c.c. under control. On the contrary, under art. 2048 c.c., in order to escape liability parents must demonstrate they have provided suitable education for the child, so as to discourage him/her from behaving negligently.

44 Following the traditional interpretation of this provision by scholars, it actually reverses the burden of proof in favour of the victim ("*relevatio ab onere probandi*").[64] It can therefore be defined as fault-based liability. By contrast, another opinion stresses that fault is irrelevant in this case.[65] This means that parents or other custodians are in theory always liable, unless they can prove that they were unable to avoid the act or omission and, consequently, the damage. Since the reversal of the burden involves the parents, etc. proving the absence of fault, the rule then fits into the category of semi-strict liability rules ("*responsabilità semi-oggettiva*").[66]

[63] F. Giardina, voce Minore (supra fn. 1), 3.

[64] See R. Scognamiglio, Responsabilità per colpa e responsabilità oggettiva in: *Studi in memoria di Andrea Torrente* (1968), 1111; M. Comporti, Nuovi orientamenti giurisprudenziali sulla responsabilità dei genitori ex art. 2048 c.c., [2002] DR, 353 and F. Galgano, La commedia della responsabilità civile, [1987] *Rivista critica diritto privato* (Riv. crit. dir. priv.), 197. More recently, P. Morozzo della Rocca (supra fn. 11), 6 et seq. For the opinion of the courts, see Cass. 14 June 1952, no. 1701, [1953] GI, I, 1, c. 284 with comment of A. Trabucchi, *Sulla prova liberatoria della presunzione di colpa esimente dalla responsabilità indiretta del genitore*; Cass. 29 May 1992, no. 6484, [1993] GI, I, 1, 588. More recently, Cass. 10 July 1998, no. 6741, [1999] Resp. civ. prev., 107, with comment of A. Sbrighi Scotto.

[65] A. Venchiarutti, *La protezione civilistica dell'incapace* (1995), 555.

[66] M. Comporti (supra fn. 31), 155; L. Corsaro, [1988] GI, 226 s., after referring the prevailing opinion that bases the liability rule provided for by art. 2048 c.c. on fault, stresses the different result reached by the courts. See also E. Bonvicini, *La responsabilità civile per fatto altrui* (1976), 629 et seq.

Another highly debated issue is whether parental liability is linked to parents' misconduct or to the child's behaviour. According to one scholar,[67] the answer may be found in the possibility of action against the tortfeasor (recourse). If such action is possible, we have a case of liability for the deed of another person (vicarious liability). If such recourse is not possible, as in this case, the source of liability is the conduct of the person obliged to pay damages. Note, however, that according to case law, the admissibility of an action depends on whether the child is capable of understanding or intending (action is admissible because there is a tort) or not (action is not admissible). 45

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

There is a rebuttable presumption. Please refer to nos. 3–6. As already indicated, there is much debate as to the actual meaning of the expression "unless they prove that the act could not have been prevented" in art. 2047 c.c. A similar debate involves the proposition "if they prove that they were unable to prevent the act" in art. 2048 c.c. 46

As stressed from the outset and in order to simplify the reconstruction of the Italian system, it is better to distinguish case law concerning the supervision of an incapable adult ("*incapace*") and the supervision of a child. In the former case, courts generally take the view that the guardian must take all necessary steps to avoid the damage, considering the kind of incapacity which the person has.[68] It is important to emphasise that all possible sources of damage or danger must be removed from the environment.[69] In the latter case, numerous conflicting judgments exist.[70] 47

However, judges generally express themselves in terms of *culpa in educando* when applying art. 2048 c.c. and *culpa in vigilando* when applying art. 2047 c.c. The first formula has justified court decisions holding parents liable although a child has caused damage while at school. In addition, courts have gradually made the burden of proof more difficult for parents to reverse. Indeed, liability arises when it is shown that parents had tolerated or encouraged any imprudence or abnormality in the minor's behaviour. Although it is theoretically necessary to prove causation between parents' behaviour and the damage sustained, very often liability is determined in light of the factual cir- 48

[67] M. Comporti (supra fn. 31), 169 et seq. See pages 165 et seq. for other scholars opinions. Courts state parents' liability for example in: Cass. 9 October 1997, no. 4945, [1998] DR, 254, with comment of F. Montaguti; Cass. 9 October 1997, no. 9815, [1998] DR, 254; Cass. 10 May 2000, no. 5957, [2000] Foro it., Rep., voce Responsabilità civile, no. 257.

[68] See Cass. 28 June 1976, no. 2460, [1976] Mass. Giust. civ., 1065; Cass. 19 June 1997, no. 5485, [1997] Foro it., Rep., voce Responsabilità civile, no. 137. According to a decision (Cass. 10 March 1980, no. 1601, [1980] Foro it., I, 2526), it is necessary to prove that the lack of supervision is not attributable to the caretaker to avoid liability. Contra*:* M. Comporti (supra fn. 31), 195 et seq.

[69] Cass. 14 September 1967, no. 2157, [1968] Resp. civ. prev., 468.

[70] See, for instance, Cass. 5 April 1963, no. 880, [1963] Resp. civ. prev., 593.

cumstances.[71] This operates in a way similar to the presumption "*res ipsa loquitur*".

49 Prevailing case law stresses the need for the parents to actually show they have offered the minor an "education normally sufficient to provide a basis for correct social interrelation according to the surrounding environment, his or her habits and personality"[72]. This interpretation leads, *de facto*, to the transformation of a theoretically negative burden of proof into a burden of proving positively the provision of education.[73] Hence, judicial interpretation has changed the rule provided under art. 2048 c.c.[74] Moreover, on some occasions, the facts of the tort committed have been held to be so serious as to preclude any possible evidence of proper education from the outset.[75] In conclusion, one may observe that good education is relevant only when it leads to a concrete result: that is, that no damage has ever been caused.[76]

50 This judicial trend puts parental liability and masters' and employers' liability on the same footing, notwithstanding the fact that parents do not make a profit from their parental relationship.[77] In the last analysis, parents can be considered as a sort of "insurance company" for third parties.[78] A different reading, advanced by a minority of scholars, seems to reflect present-day family dynamics more accurately, by requiring parents to show only that they did not

[71] See Cass. 16 May 1984, no. 2995, [1985] Dir. prat. ass., 311; Cass. 29 May 1992, no. 6484, [1993] GI, I, 1, 588; Cass. 4 June 1997, no. 4971, [1998] DR, 252, with comment of E. Montaguti; Cass. 26 November 1998, no. 11984, in DR, with comment of F. di Ciommo, Minore "maleducato" e responsabilità dei genitori; Cass. 9 October 1997, no. 4945 (supra fn. 67); Cass. 7 August 2000, no. 10357, [2001] Fam dir., 512, with comment of W. Finelli, Ancora sulla responsabilità del genitore per i danni causati dal figlio minore; Cass. 29 May 2001, no. 7270, [2001] DR, 1211 and [2002] NGCC, I, 326, with comment of A. Solinas, *Responsabilità dei genitori per culpa in educando ed in vigilando. Criteri di determinazione.*

[72] Cass. 11 August 1997, no. 7459, [1997] Giust. civ., I, 2390; Cass. 24 October 1988, no. 5751, [1989] Arch. civ., 170; Cass. 26 June 1984, no. 3726, [1985] Arch. civ., 51; Trib. Verona 26 April 1979, [1981] GI, I, 1, 271; Cass. 25 May 1977, no. 2174, [1978] Resp. civ. prev., 422.

[73] A. Pinori, [1995] GI, 556; M. Bessone, La responsabilità civile dei genitori tra presunzione di colpa e obbligo legale di garanzia, [1982] *Giurisprudenza di merito* (Giur. mer.), IV, 127.

[74] M. Bessone, Fatto illecito del minore e regime della responsabilità per mancata sorveglianza, [1982] Dir. fam. pers., 1012; U. Majello, Responsabilità dei genitori per il fatto illecito del figlio minore, [1960] Dir. giur., 44. See also M. Comporti, (supra fn. 64), 354 et seq., enumerating scholars' criticisms to the prevailing judicial trend.

[75] Cass. 29 October 1965, no. 2302 (supra fn. 42); Cass. 16 May 1984, no. 2995, [1985] Dir. prat. ass., 311; Cass. 18 June 1986, no. 3664, [1986] GI, I, 1, 1525, with comment of A. Chianale, In tema di responsabilità dei genitori per i danni causati dai figli minori. Here also are useful comparative remarks. These hypotheses show a vicious circle: if parents show adequate surveillance or can justify their absence when the deed was committed it is usually required to show proper education to escape liability; but if proper education is shown, often courts argue that actually the deed reveals a peculiarly unrestrained attitude of the minor suggesting the necessity of a higher surveillance. Almost literally this way S. Patti, [1984] Riv. dir. comm., 31. See also E. Capaccioli, Responsabilità dei genitori per il fatto illecito del figlio minore, [1946] Riv. dir. comm., II, 259.

[76] P. Morozzo della Rocca (supra fn. 11), 41; L. Rossi Carleo, [1979] Riv. dir. civ., 120.

[77] See G. Alpa, *Responsabilità civile e danno* (1992), 304.

[78] This way S. Patti (supra fn. 1), 269, and L. Corsaro, [1998] GI IV, 229.

actually have any *chance* to prevent the child from doing the deed which caused the damage.[79]

With regard to "*culpa in vigilando*", the same trend we have highlighted previously can be identified.[80] At present, case law evolution has established a stricter liability rule for parents, although it would be an overstatement to say they should control their children everywhere to avoid liability.[81] It is obvious that the level of supervision decreases with the age of the minor.[82] 51

In order to reduce the extremely severe judicial reading of parental liability, some scholars have recently proposed[83] keeping the "vicarious" nature of parental liability, but for it to be mitigated by the application of art. 2043 c.c. on all those occasions when damage has been caused "in the course of normal and free social, recreational and sporting activities". This reading would limit the scope of art. 2048 c.c. to "damage caused by the minor in intentional torts constituting a punishable crime or in the case of dangerous activities or abnormal and unusual conduct demonstrating reprehensible behaviour". 52

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

The duty to supervise a child is imposed, by law, primarily on parents and on the guardian chosen by the judge in the absence of the parents. The duty is exercised by each parent – as well as parental authority – and their liability is joint and several.[84] In addition, the spouse of a parent is under a similar duty to 53

[79] Cass. 30 October 1984, no. 5564, [1985] Foro it., I, 145, with comment of M. Paganelli.

[80] Please refer to nos. 50 et seq.

[81] See Cass. 15 October 1973, no. 2595, [1974] Resp. civ. prev., 432; Cass. 21 September 2000, no. 12501, [2001] Resp. civ. prev., 73, with comment of R. Settesoldi. Already A. Tabet, Questioni in tema di fatti illeciti dei minori, [1953] Foro it., I, c. 1432, more than half a century ago, wondered: "*Devono i genitori impedire al figlio ventenne di uscire la sera?*" (Must the parents forbid the 20-year-old child from going out in the evening?). Note the possible side effects on education of such a prohibition. On these "side effects" see E. Maschio, Responsabilità ex art. 2048 c.c. e "grandi minori", [1988] Dir. fam. pers., 875 et seq.). Nevertheless, there are some recent decisions that can trigger a change in this judicial trend: Trib. Verona 18 February 2000, [2000] GI, I, 1409, with comment of F. Ferri, La responsabilità dei genitori ex art. 2048 c.c.; Cass. 28 March 2001, no. 4481, [2001] DR, 498, with comment of V. Carbone, Non rispondono i genitori per gli incidenti causati dal minore in motorino and in Familia, 2001, 1171, with comment of S. Patti.

[82] See Cass. 30 October 1984, no. 5564, [1984] Resp. civ. prev., 385; Cass. 10 April 1988, no. 2738, [1989] Arch. civ., 46; Cass. 24 October 1988, no. 5751, [1989] Arch. civ., 170; Cass. 24 May 1994, no. 5063, [1995] Dir. fam. pers., 109. In a case involving the application of art. 2048 c.c. to tutors Cass. 20 August 2003, n. 12213, [2003] *Guida al diritto-Il sole 24 ore*, 40, 47 emphasized that *culpa in vigilando* must be evaluated "taking into account age and normal evaluation capacity of students case by case" ("in modo relativo, tenendo conto dell'età e del normale grado di valutazione degli alunni, in relazione al caso concreto").

[83] M. Comporti, [2002] DR, 360.

[84] See art. 316 para. 2 of the civil code: "*La potestà è esercitata di comune accordo da entrambi i genitori*" ("The authority is exercised by both parents by mutual agreement"). Among different decisions see Trib. Palermo 4 January 1980, [1980] *Rivista giuridica della circolazione e dei trasporti* (Riv. giur. circol. trasp.), 771. Cass. 12 May 1981, no. 3142, [1981] GI, Rep., voce Responsabilità civile, no. 136 applies art. 2048 c.c. also to children born out of the wedlock. See S. Patti (supra fn. 1), 281.

supervise the children of the other spouse, since there is a duty under art. 143 c.c. to provide moral and material help.[85] Moreover, whoever in fact has custody of the child has a duty to supervise. Hence, all people who have custody of the child under a contract, or public assistance authorities, are under this duty.[86]

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

54 There is no difference between married and unmarried parents with reference to the duty to supervise a minor and further liability in case of tort.[87] Whenever children live with both their parents (whether or not they are married), the parents have the same duty to supervise as long as they are living together. When parents do not cohabit, a judge decides which parent shall have custody. The same occurs in the case of separation or divorce, as provided by art. 155 c.c.[88] Note that the judge may award joint custody, even though they are not living together.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

55 In principle, the parent who is not awarded custody has no duty of supervision because the element of cohabitation is lacking.[89] However, the parent who is not actually living with the child still has the authority and the duty to control the education and the living conditions of his/her child (art. 317bis c.c. and art. 155 para. 3, c.c.). This may eventually trigger liability as well (please refer to nos. 46–52).

6. Which elements of a tort must the child have realized for the parents to be liable for it?

56 In order to trigger the application of art. 2047 c.c., children must have behaved in such a way that, but for their being incapable of understanding or intending, their action would have rendered them liable in tort. In order to trigger parental liability under art. 2048 c.c. the child must have committed a tort, i.e. all

[85] A mutual obligation to loyalty, moral and material support, cooperation in the interest of the family and cohabitation derives from the marriage.

[86] M. Comporti (supra fn. 31), 222. Contra: C.M. Bianca (supra fn. 30), 699.

[87] See article 30, para. 3 of the Constitution: "*La legge assicura ai figli nati fuori dal matrimonio ogni tutela giuridica e sociale, compatibile con i membri della famiglia legittima*". Furthermore, see A. Chianale, Responsabilità dei genitori, [1988] Riv. dir. civ., 2, 278. Contra: M. Comporti (supra fn. 31), 221, who states the applicability of art. 2047 c.c. in such a case.

[88] Art. 155 c.c.: "The court which decrees separation declares which of the spouses shall have custody of the children and makes all other provisions relating to the children, with exclusive reference to their moral and material interest." The text, with minor stylistic changes, is contained in art. 6, para. 2 of l L. 1 December 1970, no. 898 on divorce.

[89] See Cass. 13 April 1979, no. 2195, [1979] Resp. civ. prev., 48.

the elements of the tort committed by the child must be shown, including liability (delictual capacity). Please refer to no. 2.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

The most important requirement in applying art. 2048 c.c. is cohabitation, which courts interpret in a broad way.[90] However, in the case of separation of married parents or of divorce, the courts' reading of cohabitation allows us to state that art. 2048 c.c. is not applicable to the parent who does not actually have custody of the child. However, in this case it is always possible to apply the general rule of tort liability (art. 2043 c.c.).[91] When separation occurs "*de facto*", art. 2048 c.c. may be applied, owing to the temporary nature of the situation and the possibility of a new cohabitation. 57

The case in which a child has left home spontaneously is another controversial issue. This situation shows the likely cultural antiquity of the rule. The other criteria mentioned in the question are not applied for assessing the duty to supervise (factual situation, circumstances related to the parent or the child and the fact of whether the parents are working or not). 58

In cases of incapable persons, art. 2047, para. 1, c.c. uses the expression "charged with the custody" meaning that duties to supervise could arise from other sources than laws or contracts. The obligation to supervise may also arise from undertaking a particular role or task or responsibility freely accepted by the person undertaking it and acknowledged as such by others so as to acquire effect *erga omnes.* Such a case could be that of someone acting as host to a person incapable of understanding and intending at the time s/he committed the act.[92] 59

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

Often, the meaning given by courts to the term "*culpa in educando*" is so broad that parents are held liable even when damage occurred while the child 60

[90] See Cass. 20 April 1978, no. 1895, [1978] *Archivio giuridico della circolazione e dei trasporti* (Arch. giur. circ. trasp.), 510; Cass. 9 April 1976, no. 2115, [1976] Foro it., Mass., 459; Cass. 18 December 1992, no. 13424, [1992] Foro it., Rep., voce Responsabilità civile, no. 125. For an overview on several decisions: M. Comporti (supra fn. 31), 225 et seq. and A. Solinas (supra fn. 71), 330 et seq.

[91] Art. 2043: "Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages."

[92] Cass. 1 June 1994, no. 5306, [1994] Fam. dir., 505, with comment of A. Figone.

is at school, at work, or under the supervision of another adult such as the owners of a club.[93]

61 It is important to stress that courts have developed this argument only because the theory of "*culpa in vigilando*" was not applicable in those cases.

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

62 Parents' liability is usually linked to art. 147 c.c., which obliges parents to maintain, educate and bring up their children, along with art. 30 of the Constitution.[94] Criteria utilised by courts to assess the duty to supervise children imposed on their parents when the children live in a school are not different from those already discussed.[95] In other words, also in this case judges apply the argument of "*culpa in educando*". It is a truism to remark that the "*culpa in vigilando*" is not applied, because it requires physical proximity between parents and child.

10. What is the relation between the damage claim against the parents and the damage claim against the child?

63 Parents' liability may exist concurrently with that of the child, based on art. 2043 c.c., if the child has natural capacity ("*capacità d'intendere o di volere*").[96] However, they are independent from each other.

11. Is there any possibility either for the child or the parents to have recourse against each other?

64 When a minor with capacity caused damage and his/her parents have been held liable under art. 2048 c.c., the parents or guardians have a cause of action against him/her according to art. 2055 c.c.[97] This is not possible, in the light of case law, against an incapable person (whether or not a minor).[98] In fact, there are no decisions reporting such an action against children or tortfeasors who are not capable.[99]

[93] Cass. 10 February 1987, no. 1427, [1987] Resp. civ. prev., 828. For criticisms to the role of culpa in educando see A. Chianale (supra fn. 75), 1536.

[94] "*È dovere e diritto dei genitori mantenere, istruire ed educare i figli, anche se nati fuori dal matrimonio*" (omissis). (Translation of the author: "It is a duty of the parents to maintain, instruct and educate their children even if born outside of marriage.") We must take into account the differences between today's society and that of the 1940s, when the c.c. was enacted: M. Comporti (supra fn. 31), 246 et seq.

[95] Please refer to nos. 57 et seq.

[96] See Cass. 13 September 1996, no. 8263, [1997] *Studium Juris*, 80; Cass. 3 March 1995, no. 2463, [1995] GC, I, 2093; Cass. 26 June 2001, no. 8740, [2001] Foro it., I, 3098.

[97] Art. 2055 c.c.: "If the act causing damage can be attributed to more than one person, all are liable *in solido* (art. 1292 c.c.) for the damages."

[98] See Tribunale Roma, 28 May 1987, [1988] Riv. giur. circol. trasp., 635.

[99] Furthermore, see nos. 42–45.

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense

The duty to supervise children who have no parents in the legal sense is imposed by law upon the people or the institutions chosen as guardians by the judge.[100] However, an old decision which still seems relevant today found a married couple liable, who had been chosen to undertake temporary custody (which is called "*affidamento preadottivo*" under Italian law), rather than the institution which had official custody.[101] The decision was based only on the spouses' actual authority to control the child. We can infer from this case that actual authority to control triggers a duty, in the absence of formal delegation of a duty to supervise. Please refer also above under nos. 57 to 60. 65

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

First of all, we must remember that minors are not allowed to work until they are at least 15 years old (law no. 345/1999). However, art. 2048, para. 2, c.c. provides for a duty of the employer to supervise the child.[102] It is a debated issue whether or not the list set out in art. 2048 c.c. can be interpreted extensively by analogy.[103] Moreover, art. 2047 c.c. establishes a general duty to supervise the incapable person ("*incapace*") and this rule is applicable to the case in which an incapable child or a mentally ill person works, which is allowed in some circumstances by law, or when the person is temporarily unconscious. We should remember also that art. 2049 c.c. provides for employers' liability for damage caused by their employees.[104] 66

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

The duty to supervise is assessed by law to the person who exercises actual control and authority over the child.[105] 67

[100] See art. 2047 and 2048 c.c. and no. 54

[101] App. Napoli, 7 November 1966, [1967] *Rivista di diritto minerario*, 312. See also A. Chianale, [1967] Riv. dir. civ., 278.

[102] "Teachers and others who teach an art, trade, or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices while they are under their supervision. The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were unable to prevent the act."

[103] In the positive sense, P. Morozzo della Rocca (supra fn. 11), 48; in the second and negative sense, A. De Cupis, Dei fatti illeciti in: *Commentario al codice civile Scialoja-Branca* (2nd edn. 1971), 58.

[104] Art. 2049: "Masters and employers are liable for the damage caused by an unlawful act of their servants and employees in the exercise of the functions to which they are assigned." See also Cass. 12 November 1979, no. 5851, [1979] Foro it., Rep., voce Responsabilità civile, no. 1368; Trib. Roma 28 May 1987, [1988] Riv. giur. circol. trasp., 635.

[105] Furthermore, see nos. 42–45.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

68 Courts apply art. 2047 c.c. to whoever agrees to supervise a child, even "*de facto*" or just for a limited period.[106] If the persons originally charged with the duty to supervise are the parents, their liability may not be reduced by the mere fact that a duty to supervise has been imposed on others, if they are sued under art. 2048 c.c.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

69 Art. 350 of the Regio Decreto 26 April 1928, no. 1297 provides for the regulatory regime for teachers' duties of supervision in primary school ("*scuola elementare*"). The duty to supervise of secondary school teachers ("*scuola media*") is provided for by the Regio Decreto 30 April 1924, no. 965.

70 Briefly, teachers must be present when pupils come into the school and when they exit; they must supervise the children during both classes and breaks; they must guarantee hygiene and they must give first aid in cases of emergency.

71 The Decreto del Presidente della Repubblica 10 January 1957, no. 3 (the so-called "*Testo unico degli impiegati civili dello Stato*" setting out duties and rights for civil servants), introduced a specific liability regime for civil servants. It limits their liability to intentional torts and torts caused by gross negligence (artt. 22 and 23). Nevertheless, the main judicial trend is to apply the same liability regime provided for other fields.[107] Art. 61 of law 11 July 1980, no. 312[108] confirmed the specific regime for civil servants, establishing its ap-

[106] See Cass. 12 May 1981, no. 3142 (supra fn. 84); Cass. 10 April 1988, no. 2738, [1989] Arch. civ., 46; Cass. 1 June 1994, no. 5306, [1994] Fam. dir., 505. See G. Vidiri, Danno al "lupetto" e responsabilità dell'associazione scout, [1998] DR, 182.

[107] See Cass., sez. un., 9 April 1973, no. 997, [1973] Foro it., I, 3091, with comment of M. Grossi. See also E. Casetta, L'illecito degli impiegati civili dello Stato, [1956] *Rivista trimestrale di diritto pubblico* (Riv. trim. dir. pubbl.), 436; G. Landi/G. Potenza, *Manuale di diritto amministrativo* (1971), 308; D. de Strobel, Culpa in vigilando di genitori, tutori, precettori e maestri d'arte, [1969] Dir. prat. ass., 16; F. Ferrero, La responsabilità civile degli insegnanti statali per gli atti illeciti degli alunni. Deroga alla presunzione ex art. 2048 c.c. per effetto degli artt. 22 e 23 del T.U. n. 3 del 1957, [1974] Arch. resp. civ., 15 and L. Corsaro, Sulla natura giuridica della responsabilità del precettore, [1967] Riv. dir. comm., I, 38. More recently: S. Baccarini, La responsabilità penale, civile ed amministrativa degli insegnanti nell'esercizio della funzione docente, [1980] Resp. civ. prev., 454; S. Baccarini, *La responsabilità civile degli insegnanti e dei dirigenti scolastici* (1981); M. Bessone, La ratio legis dell'art. 2048 c.c. e la responsabilità civile degli insegnanti per il fatto illecito dei minori, [1982] Foro pad., I, 304; G. Moneta, Note in tema di responsabilità civile del personale scolastico statale dopo la legge n. 312 del 1980, [1988] GI, IV, 49 and G. Scalfi, La responsabilità civile dell'insegnante statale dopo le innovazioni del 1980, [1989] Resp. civ. prev., 987.

[108] Nowadays, the provision is included in art. 574 d. lgs. 297/1994, the so-called "Testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado."

plicability to State school teachers and providing that the plaintiff's claim can be made only against the public administration. The Italian Constitutional Court endorsed the constitutional legality of these rules.[109] Thus, in general terms, we can say this is more a matter of administrative law rather than private law.

Schools are usually insured against accidents happening to their students and they are obliged to pay the agreed premium to the insurer (art. 1882 c.c.) and must report the accident (art. 1913 c.c.). The right to indemnity arising from the contract has a limitation period of one year from the accident (art. 2952 c.c.). Although the contract is valid, in the case of late payment or failure to pay the first instalment of the premium, the insurer can refuse to pay the claim because the insurance cover was not operating at the time the accident happened. In fact cover operates from 12 p.m. of the day following the payment. However, in the case of late payment of an instalment subsequent to the first, the cover is suspended only after the fifteenth day after the date payment was due. The coverage resumes at 12 p.m. of the day after the payment has been made (art. 1901 c.c.). 72

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

First of all, it is necessary to take into account the principles illustrated before (nos. 69–72 especially no. 71). While it is clear that art. 2048 c.c. is applicable to teachers in primary and secondary schools, its applicability to professors is rather controversial, since liability does not only imply teaching, but also supervising.[110] For example, it was held that liability under art. 2048 c.c. arises when a teacher carries out a specific activity, although s/he acted as a substitute for another teacher.[111] Therefore, *prima facie*, the teacher is liable; however, both State schools and private schools may be liable as well (see art. 2049 c.c. and please refer to supra no. 67). 73

Art. 2, sec. 1, Lit. b of D. lgs 19 September 1994, no. 626 declares the employer responsible for the application of accident prevention rules and regulations, the protection of employees and workplace safety. The D. lgs 19 March 1996, no. 242 modified the d.lgs 626\1994 with reference to accident prevention in the civil service. The new statute emphasises that the manager or the civil servant, even if they do not have the position of director, can be equated with the employer if they have been expressly put in charge of an independent unit and this has been confirmed in writing. These directors must ensure the safety rules are observed: to appoint the person in charge of the safety system; 74

[109] See C. Cost. 24 February 1992, no. 64, [1992] GI, I, 1, 1618, with comment of M. Comba, Ulteriore estensione della responsabilità dell'Amministrazione ex art 28 Cost.

[110] M. Comporti (supra fn. 31), 278 and A. Lanotte, Condotta autolesiva dell'allievo: non risponde l'insegnante, [2003] DR, 51, note 1.

[111] See Cass. 26 April 1996, no. 3888, [1996] Foro it., Rep., voce Responsabilità civile, no. 138; Cass. 10 June 1994, no. 5663, [1994] Giust. civ., Mass., fasc. 6.

prepare a risk prevention plan; to monitor procedures which have been identified as risky; to monitor the safety equipment and action taken.

75 In State schools it is the "head teacher" who is treated as the employer with regard to health and safety at work. In this capacity s/he must fulfil the above mentioned duties. In private schools, the 'employer' is the "headmaster/headmistress", who has the same duties and liability as the head teacher in State schools with regard to accident prevention for protecting both employees and students.

76 The "head teacher" (called "*preside*" in secondary and high schools) who organises and supervises the teaching activities must co-operate with the "head administrator" in the correct application of the statutory rules and in identifying specific risks. However the "*preside*" is not directly responsible for the fulfilment of safety duties towards the employees (teachers or not) and the students. The "head", as employer, is liable for the failure to apply the safety rules and regulations and possibly for the violation of rules for the prevention of industrial accidents.

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

77 In State schools, the right of action in favour of the administration against civil servants is restricted to intentional torts and torts caused by gross negligence (art. 61 of law 312/1980). We must stress that only the State may be sued.[112]

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

78 Although there are no existing decisions on this point, according to general rules of liability it is clear that private schools can sue their teachers and employees. This right can be limited or removed by a collective labour agreement. We should remember also that strict liability of schools exists concurrently with the teacher's liability. However, schools do not need to prove the gross negligence of the teacher in order to have a cause of action, as, conversely, happens in State schools.

[112] *Ex plurimis*, see Cass., sez. un., 11 August 1997, no. 7454, [1998] Resp. civ. prev., 1071, with comment of R. Settesoldi, La responsabilità civile degli insegnanti statali: l'obiter dictum delle Sezioni unite segna definitivamente il tramonto della presunzione di culpa prevista dall'art. 2048, comma 2 c.c.?, [1998] DR, 260, with comment of M. Rossetti; Cass. 3 March 1995, no. 2463, [1995] GC, I, 2093; Cass. 10 February 1999, no. 1135, [2000] GI, 507, with comment of V. Pandolfini, Sulla responsabilità dei precettori e dell'ente scolastico per il danno cagionato dall'allievo a sé medesimo; Cass. 4 December 2002, no. 17195, [2003] Giust. civ., I, 1826. Sometimes courts do not even require to ascertain which teacher did not comply with his/her duty of surveillance since the action can be exercised only against the State. See for example Trib. Milano 3 June 1985, [1985] Foro pad., 376, with comment of V. Frattarolo. See on State liability for torts committed by civil servants M. Giracca, Responsabilità civile e pubblica amministrazione: quale spazio per l'art. 2049 c.c.?, [2001] Foro it., I, 3293.

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

79 It is not clear whether or not art. 2048 c.c. is applicable to State school teachers.[113] Usually, courts state that the scheme of exceptions provided for civil servants is consistent with the liability provided for in the civil code. In any event, the level of supervision must be assessed according to the age of pupils.[114] To rebut the presumption of liability, it must be shown that the child's misbehaviour was so unforeseeable that it could not have been prevented.[115]

80 In general terms, all school employees have a duty to prevent damage to students in the course of school life. Their liability varies according both to diversity of situations (e.g. students' age, or their peculiar personal conditions) and role. However, this duty is limited to actual working hours. Therefore, for example, the teacher has a duty to be in class during the teaching time and is liable only for damage occurring within this time frame.[116]

81 A specific regulation deals with the case of students arriving at school earlier than expected or whose parents pick them up later (so called "pre-school activities"). An agreement signed on 12 September 2000 leaves the organisation of "pre-school activities" and the appointment of responsible individuals in the event of damage arising, to specific agreements between the local authority and the school. Table A of national agreement for schools (C.C.N.L. 16 May 2003 for "comparto Scuola") attributes the duty of surveillance to the administrative employees (so called "personale A.T.A.") both before lessons start and during recreation time.[117]

82 In high school, students have their assemblies, during which a different set of rules applies.[118] Schools' employees still have a duty to guarantee students' safety through "external vigilance" and the power to intervene in the case of danger or disorder. According to art. 14 "the *preside* has the power to intervene in case of violation of the assembly rules or when it is impossible to continue the assembly in an orderly way". To this end, the *preside* or a repre-

[113] M. Comporti (supra fn. 31), 286 et seq. Cass. 18 April 2001, no. 5668, [2001] Foro it., I, 3098, with comment of F. di Ciommo; Cass., sez. un., 21 December 1999, no. 916, [2000] GI, 1043; Cass. 26 June 1998, no. 6331, [1999] Foro it., I, 1574, with comment of F. di Ciommo, Danno "allo" scolaro e responsabilità "quasi oggettiva" della scuola, seem to apply it. Cass., sez. un., 11 August 1997, no. 7454, [1998] Resp. civ. prev., 2390; does not apply.

[114] Trib. Reggio Emilia 18 March 1992, [1983] Riv. giur. scuola, 511, with comment of G. Bondoni; Cass. 10 December 1998, no. 12424, [1997] Giust. civ., Mass., 2560.

[115] Cass. 21 August 1997, no. 7821, [1997] Giust. civ., Mass., 1871.

[116] According to a decision, the fact that the teacher is on another duty (namely a committee meeting) during class hours, leaving the students in custody of an assistant, does not exclude his/her liability. See for example Corte dei Conti 1 June 1987, no. 542, [1987] Riv. Corte Conti, I, 1090.

[117] However, the duty of surveillance remains also during recreational time: see Cass. 6 February 1970, no. 263, [1970] GI, I, 1, 852 and the more recent decision rendered by Trib. Firenze 19 March 1993, [1993] Arch. civ., 561.

[118] See art. 12 ss. D.lgs. 16 April 1994, no. 297.

sentative may remain in the assembly room (art. 13, sec. 8) or close to it. No teacher, except the preside, can exercise this power with the corresponding duties and liability. The above described rules are the normative parameter for assessing liability in cases requiring intervention, which in fact was not carried out.

83 The same surveillance regime applies in the case of other activities – such as recreational ones, sight seeing, etc. – outside the school and possibly outside the regular school hours.[119] School employees are liable for damage to the students, even if caused by other students, only when there is an intentional omission or gross negligence in surveillance. However, before engaging in any extracurricular activity, it is usual to inform the family of the whole programme and to ask them to put the students directly under the responsibility of the accompanying teachers, not the school. Such consent to the extracurricular activity is decisive in attributing liability. Moreover, when the student is entrusted to a teacher not belonging to the school, the teacher assumes professional liability for the organisation and management of the recreational, educational or sporting activity.

84 In the case of an accident occurring during these activities, damage can not be imputed to the accompanying teacher if s/he could have not prevented the event or could not have taken any further steps to avoid the accident. For example, the accompanying teachers are not liable for damage sustained while skiing, since entrusting the students to ski instructors does not constitute a negligent lack of surveillance.[120]

85 If teachers are on strike, the surveillance of students can be entrusted to non-teaching employees or other teachers not on strike. Alternatively, by notifying the families, it is possible to let the students leave the school earlier than scheduled. Note that the rule also applies to students who are over 18 years of age.[121]

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other? May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

86 Under Italian law, there are no specific rules about collateral sources. The general compensation rule is that all damages (but only those incurred) should be compensated. Therefore, we can say that the social security benefits are con-

[119] *Ex plurimis*, Trib. Reggio Emilia 18 March 1982, [1983] Riv. giur. scuola, 511.
[120] Corte dei conti, 27 April 1993, no. 104, [1993] Riv. corte conti, 95.
[121] See circ. Ministero Pubblica Istruzione no. 389 23 November 1982 and art. 7 *Decreto del Presidente della Repubblica* (D.P.R.) 31 May 1974, no. 420.

sidered in determining the amount of damages. Expenses incurred by the national health system ("*servizio sanitario nazionale*") are not recoverable. The system is based upon contribution from all citizens and the users, sometimes, are obliged only to pay a small fee to share the expenses incurred by the system.[122]

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

87 The claims against the child and/or the parents can be joined simultaneously with the claim against the teacher (*rectius:* the State, for State school teachers). For example, parents can be negligent in educating ("*culpa in educando*") and the teacher can be negligent in supervising ("*culpa in vigilando*"). Furthermore, the child may also be liable according to art. 2043 c.c.,[123] if capable of understanding and intending when the act or omission was committed.

12. Is there any possibility either for the child or the teacher to have recourse against each other?

88 There are no existing decisions on this point. However, according to general rules, teachers can take action against a pupil-tortfeasor who is liable in tort as well. Yet, we must recall that an injured party cannot directly sue a State school teacher,[124] and that a teacher can be ordered to refund the State only in the case of gross negligence or intent,[125] These requirements severely limit the actual possibility to take such actions. With reference to child's action against the teacher, it is obvious that the teacher can defend him/herself by proving the contributory negligence of the child. Moreover, art. 2048 c.c. does not apply if damage to a pupil is due to his/her own negligence.[126] Indeed the policy reason

[122] See Law 23 December 1978, no. 833.

[123] Cass. 21 September 2000, no. 12501, [2001] Resp. civ. prev., 73; Cass. 10 May 2000, no. 5957, [2000] Foro it., Rep., voce Responsabilità civile, no. 257.

[124] See Cass. 21 September 2000, no. 12501, [2001] Resp. civ. prev., 73.

[125] See A. Ferrari/E. Folgheraiter/G. Furlani, *La gestione contabile della scuola. Funzioni, compiti e responsabilità del direttore didattico o preside, del segretario e degli organi collegiali* (1982).

[126] Cass. 10 February 1999, no. 1135, [2000] GI, 507; Cass 28 July 1967, no. 2012, [1968] Riv. circol. trasp., 390; Cass. 12 July 1974, no. 2110, [1975] GI, I, 1, 70; Cass. 13 May 1995, no. 5268, [1996] NGCC, 1, I, 239, with comment of A. Zaccaria, Sulla responsabilità civile del personale scolastico per i danni sofferti dal minore; App. Firenze 17 April 1964, [1964] Giur. tosc., 748; App. Milano, 22 March 1974, [1974] Arch. civ., 258; Trib. Roma 2 October 1997, [1998] Giur. romana, 1, 27. Among scholars see M. Franzoni (supra fn. 38), 351; M. Franzoni, Illecito dello scolaro e responsabilità del maestro elementare, [1997] DR, 454; L. Corsaro, [1967] Riv. dir. comm., I, 38; S. Patti (supra fn. 1), 258; F. di Ciommo, L'illiceità (o antigiuridicità) del fatto del minore (o dell'incapace) come presupposto per l'applicazione dell'art. 2048 (o 2047) c.c., [2001] Foro it., I, 3100. Contra: C.M. Bianca (supra fn. 30), 701; Cass. 3 February 1972, no. 260, [1972] Foro it., I, 3522, with comment of M. Grossi; Cass., sez. un., 11 August 1997, no. 7454, [1998] Resp. civ. prev., 2390; Cass. 26 June 1998, no. 6331, [1999]

behind the rule is the protection of third parties damaged by a minor's tort. In case of damages to a pupil caused by his/her own negligence the general rule of liability for fault applies (art. 2043 c.c.).[127] More recently, courts have also applied the contractual liability rule (art. 1218 c.c.) because the burden of proof for the victim is lighter.[128]

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

89 Please refer to nos. 65–72 and 87, for the general framework.

90 In principle they might have causes of action if they are all liable. For example, parents may have violated their duty to educate and teachers their duty to supervise. Whoever is held liable for the whole damage can have a claim pro quota against the other(s).

Foro it., I, 1574; Trib. Messina 28 November 2001, [2002] Foro it., I, 602. See also N. Daniele, La responsabilità dell'amministrazione scolastica per i danni recati dall'alunno a sé stesso, [2000] Riv. giur. scuola, 157; V. di Spirito, La responsabilità del personale della scuola per gli infortuni degli alunni, [1998] *Lavoro e previdenza oggi*, 1934; S. Masala, Sulla applicabilità della disciplina dell'art. 2048 c.c. (relativa alla responsabilità degli insegnanti per il fatto illecito degli allievi) nel caso in cui l'allievo procuri un danno a sé stesso, [2000] *Rivista giuridica sarda*, 59.

[127] Cass. 10 February 1999, no. 1135, [2000] GI, 507.

[128] This conclusion seems to provide for liability for mere "social contact". See Cass., sez. un., 27 June 2002, no. 9346, [2002] Foro it., I, 2635, with comment of F. di Ciommo, La responsabilità contrattuale della scuola (pubblica) per il danno che il minore si procura da sé: verso il ridimensionamento dell'art. 2048 c.c., [2003] DR, 46, with comment of A. Lanotte, Condotta autolesiva dell'allievo: non risponde l'insegnante. In dottrina, in tal senso, F. di Ciommo, Danno "allo" scolaro e responsabilità "quasi oggettiva" della scuola (supra fn. 113), 1575; F. di Ciommo, Figli, discepoli e discoli in una giurisprudenza "bacchettona"?, [2001] DR, 266. On these issues see also M. Rossetti, Responsabilità civile, le grandi decisioni della Corte nell'anno 2002, [2003] *Diritto & Giustizia*, 57.

Children as Tortfeasors under Dutch Law

Willem H. van Boom[1]

I. Short Introduction

Dutch law distinguishes between fault-based liability for wrongful acts, on the one hand, and strict liability, on the other. In Dutch law, fault-based liability for wrongful acts is codified in art. 6:162 *Burgerlijk Wetboek* (Civil Code, BW): 1

> 1. A person who commits a wrongful act vis-à-vis another person, which can be imputed to him, is obliged to repair the damage suffered by the other person as a consequence of the act.
>
> 2. Save grounds for justification, the following acts are deemed to be wrongful: the infringement of a subjective right, an act or omission violating a statutory duty, or conduct contrary to the standard of conduct seemly in society.
>
> 3. A wrongful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.[2]

As the first paragraph of art. 6:162 BW suggests, fault-based liability consists of two main elements: the wrongfulness of the act itself, and imputability of the act to the person acting. According to the second paragraph of art. 6:162 BW, there are three categories of wrongful acts: infringement of subjective rights (e.g. property and physical inviolability), acts contrary to a statutory duty, and acts contrary to 'maatschappelijke betamelijkheid' (i.e. the standard of conduct seemly in society). The category of acts contrary to the standard of conduct seemly in society is by far the most important, especially when the injured party cannot make a claim on the basis of a direct infringement of his property right or physical inviolability. According to case law, a great many 2

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[2] Translation based in part upon P.P.C. Haanappel/E. Mackaay, *New Netherlands Civil Code: Patrimonial Law (Property, Obligations and Special Contracts)* (1990).

factors determine wrongfulness in a concrete case, e.g., foreseeability of the loss (also described as the chance of a loss occurring as a result of the act), the degree of blameworthiness, the costs of avoiding the loss, the nature of the damage, and the relationship between the injured party and the injurer.[3] A prima facie wrongful act is considered not to be wrongful whenever *force majeure*, self-defence, or a statutory provision justified it.[4]

3 The second element, that of imputability, is divided into three alternative grounds for imputation, the first of which is currently the most important: the person can be blamed for his act ('schuld', i.e. fault, blameworthiness), or his act or its cause must be imputed to him, either on a statutory basis, or plainly because the 'verkeersopvattingen' (i.e. an unwritten source of legal and moral opinion, as it is expressed in case law) demand it.[5] So, according to the third paragraph, tortious liability is incurred not only in case of subjective fault, but also in case of objective 'answerability'. The scope of this 'answerability', as an alternative for a 'fault', remains unclear.[6]

4 As far as strict liability is concerned, there are, generally speaking, two main categories of strict liability: strict liability for wrongful acts of other individuals, and strict liability for objects and substances. The former category includes strict liability for employees (*viz. respondeat superior*) and for agents, while the latter includes liability for defective moveable objects, buildings, and structures, products liability, and liability for the inherent risks of hazardous and noxious substances.[7]

5 Additionally, some remarks on contributory negligence are required. Art. 6: 101 BW provides:

> "When the damage is partly caused by an occurrence that can be imputed to the injured party, the obligation to pay compensation is reduced by apportioning the damage between the injured party and the liable party in proportion to the degree in which the occurrences that can be imputed to the parties have contributed to the damage, provided that account is taken of the disparity in the seriousness of the respective faults, or other circumstances of the case, to decide whether equity demands that an alternative apportionment or full recovery takes place or that the obligation to pay lapses."

[3] Most of these criteria originate from the landmark decision *Hoge Raad* (HR) 5 November 1965, [1966] *Nederlandse Jurisprudentie* (NJ), no. 136. See further on the subject: J. Spier, The Netherlands – Wrongfulness in the Dutch Context, in: H. Koziol (ed.), *Unification of Tort Law: Wrongfulness* (1998), 94–95.

[4] See A.S. Hartkamp, Verbintenissenrecht; deel III – de verbintenis uit de wet [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht] (11th edn. 2002), nos. 58 et seq.

[5] See further on the relationship between 'verkeersopvattingen' as a ground for imputation of wrongful acts and wrongfulness as such: B.G.P. Rogmans, *Verkeersopvattingen* (1995), 9 et seq.

[6] See further on the subject A.S. Hartkamp (supra fn. 4), nos. 70 et seq. Cf. G.H.A. Schut, *Onrechtmatige daad* (5th edn. 1997), 95 et seq.

[7] See J. Spier (supra fn. 3), 95–96.

This article leaves room for adjustment between the tortfeasor and the injured, contributorily negligent party on a double basis: a causal and an equitable adjustment. Equity may come into play when either the tortfeasor or the injured party is a child. 6

Finally, some remarks on the relationship between tort law and *criminal law* are required. In the Netherlands, there is no exclusive jurisdiction of penal courts in cases concerning damage caused by criminal acts. Therefore, the civil courts in principle decide these claims as well, but the criminal courts are competent to render verdicts with respect to small or simple claims.[8] These verdicts are based on the general law of torts and damages. 7

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

Under the 1838 Civil Code, children could only be held liable if they were at fault.[9] This basically meant that the mental capacity to know, understand, and obey the rule at hand was required. Although no fixed age was set, very young children were not supposed to behave according to the standard that was set for the average grown-up person. Instead, the child's culpability was measured according to the mental and developmental standards that matched its age. This approach necessitated a case-by-case evaluation of the mental capacities of the child in order to ascertain whether he/she was culpable or not.[10] 8

Moreover, under the 1838 Civil Code parents were not strictly liable for the wrongful acts of their children. They could only be held responsible if they were at fault themselves, e.g., whenever they negligently allowed the child's behaviour that caused the damage. This principle was laid down in art. 1403 (2), which burdened the parents with the onus of proving they were not at fault.[11] In practice, this presumption of fault was quickly rebutted.[12] 9

[8] If the extent of the damage cannot be assessed easily, the criminal court usually refers the case to a civil procedure. See W.J.J. Beurskens, Schadevergoeding voor slachtoffers van strafbare feiten, in: *Trema* (2002), 445 et seq.

[9] A.S. Hartkamp (supra fn. 4), no. 130. According to art. 1401 (more or less a translation of art. 1382 of the French Civil Code), liability was only incurred whenever the damage suffered was caused by the 'fault' of the person acting. On this subject, see C.H. Sieburgh, *Toerekening van een onrechtmatige daad* (2000), 116 et seq.

[10] See, for example, the case of HR 28 November 1986, [1987] NJ, 791, where the question had to be answered of whether a 5½-year-old city boy was supposed to understand the basic concepts of how to behave as a pedestrian in traffic and to act accordingly.

[11] HR 26 November 1948, [1949] NJ, 149; HR 9 December 1960, [1963] NJ, 2; HR 9 December 1966, [1967] NJ, 69. For liability of the parents it was not required that the child him/herself was culpable; see HR 18 October 1985, [1986] NJ, 226.

[12] A.S. Hartkamp (supra fn. 4), no. 131.

10 The 1992 Dutch Civil Code introduced a groundbreaking new principle on the liability of children.[13] Under art. 6:162 BW, a wrongful act can only induce liability if the act is *imputable*. Under art. 6:164 BW, however, imputability of the acts of children younger than fourteen years is fully excluded. As a result, children younger than fourteen are completely exempt from any tortious liability. Therefore, the fixed minimum age is fourteen years.

11 However, the injured party is not left without compensation. In most cases of wrongful infliction of damage by children, the parents are strictly liable. Art. 6:169 BW states that the parents[14] can be held liable if the wrongful act – omissions not included[15] – would have been imputable to the child if, at the time of the act, it had already reached the age of fourteen. To be more precise, art. 6:169 BW distinguishes three stages in parental liability:

- from the child's birth up to and including the age of 13, the parents are strictly liable for the wrongful acts of the child;
- if the child is 14 or 15, the parents are liable for the damage that the child causes unless they can prove that they have done everything that was reasonably in their power to avoid the damage from occurring;
- for children aged 16 and up, there is no specific provision on parental liability. As a result, parents can only be held liable if all the requirements of art. 6:162 BW are met.

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

12 As stated supra no. 10, children younger than fourteen years are not liable for their wrongful acts. The vicarious liability of the parents (art. 6:169 BW) is dependent upon the question of whether the child would have been liable in the hypothetical situation that it would have been older than fourteen. When answering this question, one must ask himself whether a prudent person of average age could and should have acted otherwise. If the answer is affirmative, then the parents are vicariously liable in the actual situation.

13 Although there is hardly any case law on the liability of children of fourteen years and older, they are believed to be judged according to the *objective standard* of conduct for tortfeasors of fourteen years and older. Gradually, this standard merges with the standard for average tortfeasors. It must be noted, however, that any physical or mental disabilities of tortfeasors of fourteen years and older do not stand in the way of liability. Under the 1992 Civil Code, handicapped tortfeasors can no longer claim exemption from liability: their wrongful acts – omissions not included – are imputed on a statutory basis (art. 6:165 BW).

[13] See J. Spier (supra fn. 3), 89 et seq.
[14] This includes legal custodians.
[15] On the basic idea behind the exclusion of omissions, see C.C. Van Dam, *Aansprakelijkheidsrecht* (2000), no. 1405.

To conclude, the capacity to act reasonably is always necessary for blameworthiness of the wrongful act by any tortfeasor of fourteen years or older. However, as set out supra no. 3, blameworthiness is not an exclusive ground for imputation. If the act was performed under the influence of a mental or physical handicap – omissions not included – then there is a statutory basis for imputation (art. 6:165 BW). As a result, an epileptic patient is 'strictly' liable for wrongfully damaging the dentist's medical equipment if he suffers from an epileptic fit while being treated by the dentist.[16] 14

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

Fault presumes the ability to discern right from wrong; fault-based liability is built upon the legal reproach that the liable person *could* and *should* have acted in a different fashion.[17] Therefore, under the 1838 Civil Code, the capacity to act reasonably included both the knowledge of the wrongfulness or dangerousness as well as the capacity to act accordingly in the concrete circumstances.[18] For ordinary people, a normal degree of reasonable care was and is set as a standard. Not complying with this standard is blameworthy. For children and handicapped persons, however, more lenient standards seem to be applicable: they seem to be judged not by a standard of reasonable care to be observed by 'reasonable children' or 'reasonable handicapped persons', but by a more or less subjective standard: could and should *this specific person* have acted differently in these specific circumstances? This can be considered to be a *subjective standard*. 15

However, as stated supra, children younger than fourteen years are not liable at all for their wrongful acts (art. 6:165 BW) and handicapped adult tortfeasors are in principle strictly liable for their wrongful behaviour (art. 6:164 BW). So, in practice, the matter of capacity seems to be restricted to the wrongful omissions of mentally and physically handicapped persons. 16

[16] C.C. Van Dam (supra fn. 15), no. 920.
[17] See, e.g., HR 9 December 1966, [1967] NJ, 69.
[18] See, e.g., HR 9 December 1966, [1967] NJ, 69, and A.S. Hartkamp (supra fn. 4), nos. 70 et seq.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

17 There is no hard evidence that the capacity issue is or was influenced by the existence of insurance coverage. There are no strong indications of the opposite either. It should be borne in mind that the overriding majority of Dutch families has some kind of liability insurance that covers all family members, including children and strict parental liability.[19]

5. What is the standard of care applicable to children?

18 I refer to the answers to the preceding questions.

6. Are children held to a higher standard of care if they engage in "adult activities"?

19 There is no case law that indicates that adult activities lead to adult standards of care, but I feel that it is not unlikely. If a sixteen-year-old boy steals a car and causes an accident, he will undoubtedly be blamed for stealing and driving a car without having a licence and without the proper skills needed to drive a motor vehicle. In this sense, he would be judged according to the same standard that would apply to an average adult stealing a car and subsequently driving it.

20 Another indication that adult standards are applied to children engaging in adult activities is found in art. 6:183 (2) BW. On that article, see infra no. 27.

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

21 As stated supra no. 10, children younger than fourteen years are not liable for their wrongful acts. Although an equitable liability was considered during the parliamentary discussion on the 1992 Civil Code, eventually the idea was abandoned in favour of a vicarious liability of the parents.

[19] See infra no. 47.

8. Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard? What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

The Dutch Civil Code contains a *reductionary clause*. As a rule, any liable person is held to compensate in full, but under extraordinary circumstances, the court may apply art. 6:109 BW. This article reads: 22

> 1. The court may reduce the obligation to repair damage if awarding full reparation would lead to clearly unacceptable results in the given circumstances, including the nature of the liability, the legal relationship between the parties, and their respective financial capacities.
>
> 2. The reduction may not exceed the amount for which the debtor has covered his liability by insurance or was obliged to maintain such a cover.
>
> 3. Any stipulation derogating from paragraph 1 is null and void.[20]

So far, this new[21] instrument has not been widely used to mitigate the far-reaching financial consequences of liability; the discretionary authority to reduce the amount due should only be used if the consequences of full liability would, from a socio-economic point of view, be *clearly unacceptable*. It is assumed that the decision to reduce the amount due is based not only on the concrete financial consequences of full liability, but also on the degree of blameworthiness, the nature of the liability (fault-based or strict liability?), and the possibility of a cascade of claims.[22] 23

To give an example: the clause may be applied in favour of extremely poor parents of a young child that slightly negligently causes a car to collide, when the car owner is insured and the insurance company instigates a recourse claim against the parents. 24

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

Not applicable. 25

[20] See supra fn. 2.

[21] The 'old' Civil Code did provide for a similar reduction in cases of personal injury and defamation (art. 1406–1408 *Burgerlijk Wetboek* (BW) 1838).

[22] See A.S. Hartkamp, Verbintenissenrecht; deel I – de Verbintenis in het algemeen [Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht] (11th edn. 2000), no. 494.

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

26 Apart from the vicarious parental liability for the wrongful acts of their children (art. 6:169 BW), the most important strict liabilities are those dealt with in art. 6:170–179 BW. Under art. 6:170 BW, an employer is vicariously liable for the torts committed by employees in the course of their employment. Under art. 6:174 BW, either the possessor of an immovable *construction*, or the person or legal entity that uses the object in the course of its business is liable if that construction is defective in the sense that it poses a (serious) danger to persons or goods, and this danger subsequently materialises. A similar strict liability for defective *moveable* objects is codified in art. 6:173 BW. In art. 6:175 BW, a strict liability for the *business risks* inherent in the use of *dangerous substances* was introduced. Finally, according to art. 6:169 BW the possessor of a domestic animal is strictly liable for the damage that the animal causes.

27 How do these strict liabilities relate to children? Again, the Civil Code distinguishes between children under fourteen years and children above this age threshold. For children of fourteen years and older, the general rules of strict liability apply. As far as younger children are concerned, if the child has its own business, and it either uses the chattel, immovable construction, dangerous substance or animal in the course of its business, or is the employer of the tortfeasor, he is strictly liable without any restrictions. Art. 6:183 BW explicitly states that the strictly liable person operating a business cannot avail himself of any defence based on its age. If, however, the child does not operate a business, but still is in possession of objects of strict liability – this may be the case, for example, with private ownership of pet animals, movables and immovables – then the strict liability is shifted onto the shoulders of the parents (art. 6:183 (2) BW).

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance? b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus/malus-systems or by reserving termination rights in case of repeated accidents?

28 Generally speaking, there is no compulsory liability insurance in the Netherlands.[23] However, in practice, most families have some form of liability insurance. The current policies cover both the strict liability of the parents under art. 6:169 BW as well as the tortious liability of the children of 15 to 18 years that live together with the parents. Intentional torts are usually not covered under any third party insurance policy. The Dutch liability insurance industry is reluctant to provide cover for intentional wrongdoing, and in effect the intentional torts of adolescents are not always covered under the household liability insurance policy.[24] It is not known whether the insurance industry does in fact apply a risk-rate premium policy or an experience-rate policy.

12. a) How many per cent of families are covered by one or another form of family liability insurance? b) Does the liability insurance cover extend to intentional torts committed by the child?

29 It is estimated that some 80 to 90 percent of all Dutch households have a family liability insurance.[25] The coverage is not regulated by law, so every insurance company can determine the insured amount. In practice, the coverage varies from € 500,000 to € 2.5 million per event. Most private liability insurance policies exclude coverage for intentional wrongdoing, and it depends on the wording of the specific policy whether this includes intentional wrongdoing by insured parties (resident children) other than the policy holder (e.g. the head of the family). Most policies seem to cover the strict liability of parents for intentional torts by children under 15 years of age, but exclude coverage of the child him/herself. This leaves the 14 to 18-year-old child residing with its parents without coverage (see fn. 24).

[23] Compulsory motor vehicle insurance is a well known exception.

[24] Most private liability insurance policies exclude coverage for intentional wrongdoing, and it depends on the wording of the specific policy whether this includes intentional wrongdoing by insured parties (resident children) other than the policy holder (e.g. the head of the family). Most policies seem to cover the strict liability of parents for intentional torts by children under 15 years of age, but exclude coverage of the child him/herself. This leaves the 14 to 18-year-old child residing with its parents without coverage. On these policies, see J.H. Wansink, *De algemene aansprakelijkheidsverzekering* (1994), 277–278.

[25] A.S. Hartkamp (supra fn. 4), no. 132.

13. a) Are the parents under a duty to take out a liability insurance for their child? b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

30 As stated supra no. 10, children younger than fourteen years are not liable for their wrongful acts. Instead, the parents themselves are strictly liable. Therefore, there is no longer the issue of whether the parents should take care of insuring their children against liability. Under the 1838 Civil Code, however, the issue was raised. The *Hoge Raad* decided that parents were not to be held liable by the injured party for omitting to conclude a contract of liability insurance on behalf of and for the benefit of their child.[26] There is no specific government policy with regard to this issue.

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up a damage claim brought by the victim against the parents? b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

31 Recourse of both private insurance carriers and social security agencies is allowed if and to the extent that a tortfeasor is liable.[27] Children younger than 14 years are not liable, so there is no room for recourse. The strictly liable parents, however, can be the object of recourse. There are no specific limits to recourse.

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

32 I refer to no. 22.

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

33 I refer to no. 22.

[26] HR 14 February 1969, [1969] NJ, no. 189; C.C. Van Dam (supra fn. 15), no. 1407.
[27] See, in general, C.E. du Perron/W.H. van Boom in: U. Magnus (ed.), *The Impact of Social Security Law on Tort Law* (2003).

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

34 Although Dutch bankruptcy law does provide for specific leniency towards private persons undergoing bankruptcy proceedings, including discharge after faithfully paying off a part of their debts for a number of years,[28] the need for leniency towards minors is actually not inspired by tort law but by the excessive spending behaviour of adolescents. It must be noted that the court can decline the request for a leniency programme if the debts have been incurred in bad faith. This exception may be of importance if the child has intentionally caused major damage. In that case, the general rules of insolvency rather than the specific leniency programme rules would apply.

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

35 There is no specific position of creditors with a claim in tort, so the general rules on extinction through bankruptcy apply. There are no specific insolvency rules on intentional torts other than the one mentioned supra no. 34.

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

36 As mentioned supra nos. 10 et seq., the parents are strictly liable for the wrongful acts of their children until they reach the age of fourteen. For imputable wrongful acts of children between fourteen and sixteen, the parents are liable under a rebuttable presumption of fault.[29]

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

37 See supra no. 11.

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

38 Art. 6:169 BW addresses the parents in a legal sense (relatives with 'parental authority'), and includes legally appointed custodians.[30] Adults living with the

[28] See art. 284 et seq. *Faillissementswet* (Insolvency Act).
[29] See art. 6:169 BW.
[30] See C.J. van Zeben et al., *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek, boek 6 algemeen gedeelte van het verbintenissenrecht* (1981), 676.

child as such are not considered to be parents in the legal sense. Parents remain liable even if the child does no longer live with them.[31]

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

39 A custodian is appointed if both parents are released (art. 1:266 BW et seq.) from their parental authority (art. 1:275 BW) or a custodian has been appointed by one of the parents. Children of unmarried parents are under maternal authority (art. 1:253b BW) unless both parents have agreed upon authority by both father and mother (art. 1:252 BW). As a rule, after divorce, one or both parents retain parental authority. Actual separation does not change parental authority.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

40 The parent without authority over the child is not subject to the liability of art. 6:169 BW. However, the general rules of tort law do apply. As a consequence, a parent without authority could be held liable, e.g., for omitting to intervene when the child's wrongful act was foreseeable and the parent could have prevented the damage from occurring.

6. Which elements of a tort must the child have realized for the parents to be liable for it?

41 For the strict liability of art. 6:169 BW, the child (0–14 yrs.) must have i) acted wrongfully ii) vis-à-vis the injured person, and iii) there must have been damage which was iv) caused by his act. The parents are liable if v) the child itself would have been liable were it not for his young age. See supra no. 11.

42 For the liability of art. 6:169 (2) BW, a 14 or 15-year-old child must have i) acted wrongfully, must be at fault (or, the act must be imputable to the child) ii) vis-à-vis the injured person, and iii) there must have been damage which was iv) caused by his act. See supra no. 11. The parental liability is based on the presumption of fault of the parents, so they can escape joint and several liability with their child when they succeed in rebutting this presumption.

[31] C.J. van Zeben (supra fn. 30), 676.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

In practice, circumstances hardly matter: parents are strictly liable for the wrongful acts of their children (0 to 14 yrs.). All of the circumstances mentioned in the questionnaire may be relevant for rebutting the presumption of fault with regard to the torts of 14 and 15-year-old children. 43

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

The extent of the duty to supervise (especially with regard to children who are 14 or 15 years old) largely depends on the circumstances of the case; if the child is known to be accident-prone a more active supervision will be required than is the case with prudent children.[32] It is feasible that one of the parents can rebut the presumption if the other cannot.[33] The fault presumption can also be rebutted on the basis that the parents have underdeveloped mental capacities.[34] 44

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

The strict liability for wrongful acts of children up to 14 years of age also applies to parents who do not live with their children. The fault presumption for 14 and 15-year-olds may easily be rebutted if the act was committed when the child was not under the actual supervision of the parents. 45

10. What is the relation between the damage claim against the parents and the damage claim against the child?

For the torts of 14 and 15-year-olds, the parents are liable (if they are at fault) if and insofar as the child is liable itself. 46

11. Is there any possibility either for the child or the parents to have recourse against each other?

Recourse against children up to 14 years of age is not possible, for they are not liable themselves. Recourse by parents against their children of 14 or 15 is 47

[32] See HR 18 October 1985, [1986] NJ, 226 *Onrechtmatige daad* (looseleaf), art. 169, no. 28 (Oldenhuis).
[33] HR 9 December 1966, [1967] NJ, 69 (Joke Stapper); *Onrechtmatige daad* (looseleaf), art. 169, no. 31 (Oldenhuis); A.S. Hartkamp (supra fn. 4), no. 138.
[34] *Onrechtmatige daad* (looseleaf), art. 169, no. 31a (Oldenhuis).

theoretically possible,[35] but in practice this problem seems to be avoided by liability insurance. In the case of intentional torts, however, there usually is no insurance coverage. In that case, there is room for recourse and, in legal doctrine, it has been argued that parents should bear the bigger part of the loss because of their greater financial ability to bear the loss,[36] but there is no case law that supports this opinion.

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

48 One or more custodians are appointed if both parents have lost parental authority; see supra no. 37.

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

49 If a child is trained or at work, the company or institute is strictly liable for the torts the child commits (14 and 15-year-olds). This follows from art. 6:170 BW, which provides for a strict liability of employers (in a broad sense).[37]

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

50 A children's home, a (boarding) school, or any other institution (e.g. a mental hospital), that assumes responsibility for the child is obliged to supervise the child. If negligence in this supervision is established, the supervisor is liable in tort. The liability of the child itself is not relevant.[38]

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

51 A duty to supervise may be established by means of contract. This contract does not reduce the duty of others to supervise, although it may be of relevance in a recourse claim.

[35] On recourse of joint and several liable tortfeasors, see W.H. van Boom in: H.W.V. Rogers (ed.), *Joint and several liability* (forthcoming).
[36] See, with further references, *Onrechtmatige daad* (looseleaf), art. 169, no. 55 (Oldenhuis).
[37] See further on that topic, C.E. du Perron/W.H. van Boom in: B. Koch/H. Koziol (eds.), *Unification of Tort Law: Strict Liability* (2002), 231.
[38] HR 12 May 1995, [1996] NJ, no. 118 (*Mental hospital 't Ruige Veld*).

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

Under current law, no specific regime applies, so liability is in principle based on the role of schools in society and the duties of care this imposes on schools. If negligence of teachers in supervising is established, the school (public or private) is liable in tort. 52

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

For accidents caused by pupils aged up to 14 years, parents are liable (art. 6:169). If negligence on the part of a teacher is established, the teacher is liable in tort, and the school is vicariously liable (art. 6:170) for this negligence. It depends on the legal status of the school whether a private legal entity or a governmental body (e.g. municipality, city) is liable. 53

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

Except in cases of intent or gross negligence bordering on intent, there is no possibility of recourse against the teacher employed by the vicariously liable school (art. 6:170 (3) BW).[39] Recourse is possible under a contract of employment if and insofar as the teacher is insured against liability (art. 7:661 BW).[40] 54

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

See supra no. 54. 55

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

The criteria that have been developed in case law on the negligence of supervisors do not point in one direction. According to case law, foreseeability of the loss (also described as the chance of a loss occurring as a result of the act), the degree of blameworthiness, the costs of avoiding the loss, the nature of the damage, and the relationship between the injured party and the injurer are relevant in deciding whether the supervisor was negligent.[41] For example: a dis- 56

[39] In this respect, the employment may be either public or private. In either case, art. 6:170 BW applies.

[40] Although no specific legislative provision for publicly employed civil servants exists, it is generally assumed that the same rules apply to the civil service.

[41] Most of these criteria originate from the landmark decision HR 5 November 1965, [1966] NJ, no. 136. See further on the subject: J. Spier (supra fn. 3), 94–95.

trict court ruled that *one* teacher supervising a school yard where one hundred children were playing constituted negligence on the part of the school.[42]

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

57 See supra no. 31.

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

58 All liable parties are jointly and severally liable.

12. Is there any possibility either for the child or the teacher to have recourse against each other?

59 Recourse of the child against the teacher or the school (and vice versa) is possible if the child is liable itself (14 and 15-year-olds); in that case, they are jointly and severally liable.[43] Assessment of the apportionment between multiple tortfeasors is based on the degree in which "the occurrences that can be imputed to the parties have contributed to the damage, provided that account is taken of the disparity in the seriousness of the respective faults, or other circumstances of the case, to decide whether equity demands that an alternative apportionment or full recovery takes place or that the obligation to pay [viz. contribution] lapses".[44] Causation and fairness keep each other in balance: the larger the part of the primary tortfeasor in causing the damage (the child), the larger his share in the contribution, unless fairness demands an alternative apportionment. Fairness may demand an alternative apportionment, for example, in cases where the supervisor is clearly grossly at fault and the child is not.[45]

[42] Rechtbank Zwolle (Zwolle District Court) 27 January 1999, Prg. 1999, 5155.

[43] If the child is under 14, the parents are liable and they can be held to contribute to the jointly owed debt.

[44] Art. 6:102 BW in conjunction with art. 6:101 BW.

[45] A stricter rule is laid down in art. 6:165 (2) BW, which states clearly that a mentally or physically handicapped tortfeasor that acts wrongfully and, as a consequence, is strictly liable for his own behaviour, can claim full indemnity from his jointly liable negligent supervisor (if there is one).

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

As far as children up to 14 years of age are concerned, the parents are strictly liable. A negligent teacher can be held liable as well. He can also be the object of a recourse claim by the parents, under similar conditions as the conditions described supra no. 59. 60

Children as Tortfeasors under Portuguese Law

Maria Manuel Veloso

I. Short Introduction

Children can be liable if they have the capacity to understand the consequences of their acts and the capacity to act according to that understanding. The law presumes children under seven do not have such capacity. 1

Parents are held liable for the acts of their children, on account of their natural incapacity. Parents' fault is presumed. 2

If the minor does not have the mentioned capacity and if the victim cannot sue the parents, the minor might be liable in equity. 3

As a general, unfinished remark, we can say that the rules on tort law apply indistinguishably to children and adults. Moreover, the Portuguese system is rather reluctant to accept, *de lege ferenda*, strict liability of parents for damages caused by their children, except for damages caused in traffic accidents. 4

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

According to art. 488, 2 *Código Civil Português* (Portuguese Civil Code, CC), children under seven are presumed to be unimputable.[1] It is however a refutable presumption, although it never seems to be refuted.[2] 5

As a general principle, liability depends on "tortious capacity" or *imputabilidade*. In this capacity one can distinguish an intellectual element (the capaci- 6

[1] This is the literal translation of the Portuguese word "inimputável".

[2] *Relação de Coimbra* (Coimbra Court of Appeal, RC) 26 May 1999, www.dgsi.pt, stresses that the presumption of *inimputabilidade* does not extend to all minors. In the case of minors aged seven years or older, that incapacity must be proved.

ty to realize the content and the consequences of one's acts) and an element of *voluntas* (of self-determination).

7 The age of seven was clearly chosen due to the German influence and the acceptance of the reasons of the German approach. It does not correspond to a marked age in terms of the Portuguese educational program, since children start primary school at the age of six years. Still, in terms of moral development and of knowledge of social rules, the age of seven is regarded as a starting point.

8 The minimum age, an early age, "enhances the fundamental, universal character of the rights protected by Tort Law".[3]

9 If in criminal law, the relevant age is sixteen years, that can only be explained by the seriousness of criminal sanctions coupled with the required state of discernment that the proximity to coming of age (18 years old) enables.[4]

10 The minor's coming of age is also relevant in cases of breach of contract. *Capacidade de exercício* or capacity to be bound by a contract is fully acquired[5] at the age of eighteen (artt. 122 and 123 CC). Before that age, the eventual replacement by legal representatives (according to art. 124 CC) protects the minor from his own inexperience.

11 In case of pre-contractual liability, the majority of scholars adopt the rule on capacity in contract law.[6]

12 It might be surprising that small children can be held liable, either because of the economic consequences of compensation or taking into consideration the psychological impact of a claim against a child, whose personality is in a process of definition. But in practice claims are addressed towards the parents. That happens even when their children are working and are somehow autonomous.

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

13 In general, liability for tortious acts depends upon the existence of imputability. Under art. 488, 1 CC, liability is excluded if the tortfeasor did not have, at

[3] M. Carneiro da Frada, *Teoria da confiança e responsabilidade civil* (2004), 293.

[4] According to art. 19 Criminal Code, minors under 16 years of age are not "imputable". On the differences of civil and criminal liability, M.F. Palma, Desenvolvimento da pessoa e imputabilidade no Código Penal Português, [1996] *Sub Iudice*, January-June, 62. The threshold age in criminal law will impinge on parental liability for the acts of their children aged 16 or older, as explained infra nos. 106 et seq.

[5] Art. 127 CC establishes the cases where the minor can be party to the contract in spite of lacking a general capacity to act.

[6] See, for all, M. Carneiro da Frada (supra fn. 3), 262, fn. 240 and 294.

the moment of the fact, the capacity to understand or to act according to that understanding (the legislature uses the word "*querer*", that is "to want").[7]

There is no specific provision on the capacity of children, apart from the presumption mentioned supra nos. 5 et seq. 14

3. What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization? Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)? Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

a) The term "capacity to act reasonably" is unknown to the Portuguese Civil Code. 15

Capacity to understand (art. 488, 1 CC) means capacity to realize the consequences of one's own acts and to evaluate them.[8] In modern terminology, we could say that it means intellectual capacity and emotional intelligence. 16

The mentioned capacity is not enough. The agent must have the capacity to decide according to the previous conclusions about the attitude to overtake. The "biological element" of this capacity concerns the conditioning of the agent's will (causing total absence or perturbation of the will due to a mental disease or a pathology in the personality), while the "psychological element" regards the impact of the biological element on the behaviour under consideration.[9] 17

b) It is sufficient that the child might understand that the action can be dangerous. This is expressly said, for instance, in the decision of the *Relação de Lisboa* (Lisbon Court of Appeal, RL) of 15 April 1977, where a child used a gun left in his friends' kitchen.[10] 18

Predictability of damages is not an element of a faulty behaviour according to Portuguese scholarship. It suffices to realize that there is an unlawful act. 19

[7] R. de Alarcão, *Direito das Obrigações* (1983), 211; J.A. Varela, *Das obrigações em geral* I (2000), 563; M.J.A. Costa, *Direito das Obrigações* (2000), 522 et seq. and A.M. Cordeiro, *Direito das obrigações* (1999), 310.

[8] See J.A. Varela (supra fn. 7), 563 and F.P. Jorge, *Ensaio sobre os pressupostos da responsabilidade civil* (1972), 68.

[9] A.M. Cordeiro (supra fn. 7), 312.

[10] RL 15 April 1977, apud H.S. Antunes, *Responsabilidade civil dos obrigados à vigilância de pessoa naturalmente incapaz* (2000), 212.

20 The general principles on fault apply. That might be extremely important where there is a presumption of fault, such as the presumption of fault when performing dangerous activities, provided for in art. 493, 2 CC.

21 c) The judge should adopt the standard of a reasonable child of the same age. The age factor is constantly repeated by the courts, which take into consideration the usual features of young children, such as the challenging energy or the excitement and rashness. Even the defying character (such as the disobeying of parental or tutorial commands) is pointed out as a common characteristic of some stages in the development of personality.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

22 The appreciation of the capacity of a child is not influenced by the fact that there is a liability insurance policy.

23 The fact that the child is (or is not) covered by a (family) liability insurance policy is irrelevant to the problem of the standard of care.

24 There is a controversy on classifying the existence of insurance as a factor of assessment of damages,[11] particularly when there is a decision in equity, as in the following cases:

25 a) Compensation where there is not an intentional act. According to art. 494 CC, the judge may take into consideration the degree of fault, the economic situation of both parties (the tortfeasor's and the victim's) and other circumstances of the case in order to limit compensation, in cases of non-intentional fault. One of these circumstances, which are not specifically described by the legislature, might be the existence of insurance. Only a few decisions regarded the insurance as an element of the "economic situation" factor. More criticisable seems to be the result of limiting compensation on account of the bad economic situation of the tortfeasor.

26 b) Compensation of non-pecuniary losses. Under art. 496, 3 CC, first part, the judge will grant compensation for non-pecuniary losses according to the factors mentioned in the above-mentioned art. 494 CC. Notwithstanding the fact

[11] In favour of regarding the existence of insurance as a factor, see, with relevant differences between them, J.A. Varela (supra fn. 7), 568, fn. 3; J.S. Monteiro, Reparação dos danos pessoais em Portugal- a lei e o futuro (Considerações de lege ferenda), [1986] *Colectânea de jurisprudência* (CJ), IV, 8, fn. 27; J.C.B. Proença, *A conduta do lesado como pressuposto e critério de imputação do dano extracontratual* (1997), 161–169. See for victims of violent crimes, art. 2, 2 Decree-Law 423/91, 30 October 1991 (and Decree-Law/96, and *Decreto regulamentar* 4/93, of 22 February 1993) and Decree of the President of the Republic 4/2000, 6 March 2000 ratifying the European Convention on compensation of the victims of violent crimes (insurances may be taken into consideration). See also infra nos. 56 et seq.

that the tortfeasor is a child, if the damages are covered by insurance the court will probably more easily accept the claim for damages. In this case, the punitive function of non-pecuniary losses (accepted unproblematically in legal writing and emphasized by the case law) is probably of less relevance than the function of compensation *tout court*.

c) Compensation of damages of uncertain value. In this case, the judge will decide in equity within the limits of the damages already proven, according to art. 566, 3 CC. Usually the courts do not take into consideration the insurance coverage, but it will be in theory possible. Whether that solution would be grounded in acceptable public policy is more doubtful. 27

d) Compensation of future damages. Art. 564, 2 CC allows the judge to compensate for future damages, if predictable. Different from the previous rulings, there is no reference to equity whatsoever. But, substantially, the decision cannot follow *ius strictum* and there must be a flexible assessment of damages. It is feasible to think that a judge might see in this rule the opportunity to decide in equity, weighing up the insurance's impact. 28

As far as insurance can be regarded as a factor of liability on equity, see infra nos. 56 et seq. 29

5. What is the standard of care applicable to children?

The standard of care applicable to children does not differ from the one applicable to adults. The required standard of care is that of the *bonus pater familias* (art. 487, 1 CC), under the circumstances of each single case. 30

It is an abstract evaluation, but not a rigid one. Among the circumstances of the case, the age of the tortfeasor will be prominent.[12] 31

6. Are children held to a higher standard of care if they engage in "adult activities"?

That solution is not expressly mentioned by the courts. 32

The capacity to realize if it is an adult activity (in the sense of a forbidden activity) has to be ascertained. If such is the case, and the child was not allowed to act in such a manner or to engage in a specific activity, then it is reasonable to draw the conclusion that there was a faulty behaviour. 33

If the activity requires skills and most probably some kind of a licence, then judges will be more demanding (and, in this case, not only in ascertaining the child's fault but also the parent's fault).[13] This is particularly evident when the 34

[12] R. de Alarcão (supra fn. 7), 233; A.M.Cordeiro (supra fn. 7), 151 et seq.

[13] *Supremo Tribunal de Justiça* (Supreme Court of Justice, STJ) 25 November 1992, [1992] *Boletim do Ministério da Justiça* (BMJ), 421, 420.

minor caused an accident with a stolen car; the judges will probably draw the conclusion that the minor should be aware of the need to respect the assets of others and the requirement of a formal "driving licence".

35 If by adult activity we mean a professional activity, there is no excuse to refrain from applying the general rule on the standard of care. If the minor, a computer expert working for a firm, destroys some devices and is tortiously liable, he will be liable "as an adult".

36 If it is an adult activity in the sense that it is commonly associated with adults (e.g. taking care of other children, writing newspaper articles), then it is likely that the judge will disregard the fact that the tortfeasor is a minor since he acted as an adult could have acted.

37 An interesting exception in the case law – a case where the court takes into account the minor's lack of experience when dealing with guns – can be found in RL 15 April 1977.[14] The minor used a gun belonging to the victim's father. According to the court, the lack of experience lead to the belief that the gun left in the kitchen of the family was not loaded. In this case, minority played an important role in order to keep separate the standard of a "reasonable adult".

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

38 Children may be liable in equity (art. 499 CC) in the same conditions as any "unimputable".[15]

39 These conditions are:[16]

a) the existence of an unlawful act;[17]
b) the existence of damages;
c) the fact would have been regarded as a faulty act if committed by someone with capacity;

[14] See supra fn. 10.

[15] For case law about incapable agents (but older than seven), see, as an example, STJ 20 April 1994, [1994] *Colectânea de Jurisprudência do Supremo Tribunal de Justiça* (CJ/STJ), II, 190. As many incapable agents do not have a formal supervisor (as happens with some Alzheimer's patients), the Supreme Court held them directly liable, in analogy with art. 489, that mentions that incapables can be sued *where it is not possible to obtain compensation from the supervisors*: STJ 2 April 1994, www.dgsi.pt. See also H.S. Antunes (supra fn. 10), 306 and 306, fn. 901.

[16] J. A. Varela (supra fn. 7), 566.

[17] J. Ribeiro de Faria, *Direito das Obrigações* (1990), I, 468. See also STJ 9 November 1995, www.dgsi.pt.

d) causation;
e) impossibility to sue supervisors;
f) equity[18] justifies total or partial liability.

Scholarship always points out that the child must have acted in such a way that, if he/she were imputable, he/she would be liable in tort. 40

But the liability of tortfeasors without the capacity "to act reasonably" (children under seven or others without the capacity to act reasonably) is subsidiary to the liability of any person who had the duty to supervise the unimputable. 41

Under Art. 491 CC, he "who, by law or contract, has the duty to supervise another person, because of her natural incapacity, is liable for the damages caused to a third party by that person, unless he can prove that the duty was not broken or that damages would have occurred even if there was due care" (see infra nos. 59 et seq.). 42

The legal scholarship justifies liability in equity, invoking the idea of *iustitia distributiva*. There is a strict liability case for risks related to personal status or circumstances.[19] 43

The extension of this ruling to cases of breach of contract or pre-contractual liability has been denied.[20] 44

It has already been held that liability in equity would also be applicable if the minor is not deemed liable according to the yardstick applicable on account of his age.[21] But that doctrinal position was clearly rejected by Vaz Serra[22] (with the unanimous accordance of the case law). 45

8. a) Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard?

Yes. Firstly, the judge has a discretionary power to decide if the child is liable (in equity) and if there will be full or partial compensation. 46

Secondly, the extension of the right to support the child acts as a limit (Art. 489, 2 CC). This means that the amount of compensation cannot interfere with the child's right to maintenance. It cannot, furthermore, curtail the right of 47

[18] STJ 21 April 1999, www.dgsi.pt.
[19] M. Carneiro da Frada (supra fn. 3), 299, fn. 278.
[20] M. Carneiro da Frada (supra fn. 3), 300, fn. 281.
[21] H.S. Antunes (supra fn. 10), 307. That would imply a judgement according to "the abstract criterion" that is the general rule under art. 497; H.S. Antunes (supra fn. 10), 308.
[22] A.V. Serra, Culpa do devedor ou do agente, [1957] BMJ, 68, 116, fn. 181.

maintenance that third parties can ask of the agent (usually not a child, in this case).

48 Some authors highlight that the limit goes beyond the traditional content of maintenance, because, in contrast to the general rule (art. 2003 CC), "status" and condition are taken into consideration (art. 482, 2 CC).[23]

49 The limit is, as seen, broader than maintenance *stricto sensu.*

50 Although this ruling is exceptional, the case law sees no reason to deny the applicability of art. 496 CC to non-pecuniary losses.

51 If the child (with capacity) is not liable because she acted without fault, she will not be liable in equity. The basic requirement of this kind of liability is the lack of capacity. If general requirements of liability for wrongful acts (such as fault or causation) fail, then the minor will not be liable.

52 On the other hand, if the child is liable, but acted without intent, his minority might be taken into consideration. As seen, supra nos. 1 et seq., art. 494 CC provides that the judge might moderate compensation in cases of non-intentional acts, taking into consideration also the circumstances of the case. Minority can be seen as one of these situations.

53 It should be added that this is a rather dogmatic question since decisions on liability (of children) in equity are extremely rare.

b) What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

54 Some examples of "equity reasons" are the following situations: if the agent has economical means, if the victim is in a bad economic situation (after the injury), if the infringement is serious.[24] Also, the degree of discernment of the minor should be taken into consideration.

55 Another extremely important factor concerns contributory negligence.[25]

56 The fact that the victim is insured against the loss by a private insurance company or the social system security is usually regarded as irrelevant.

[23] F. Pires de Lima/J.A. Varela, *Código Civil Anotado* I (1967), 491. Also, M.J.A. Costa (supra fn. 7), 524, fn. 1. On the right of maintenance, see R. Marques, *Algumas notas sobre alimentos* (2000), in particular, 179–201.

[24] See J.A. Varela (supra fn. 7), 564–565.

[25] STJ 2 April 1994, [1994] BMJ, 436, 168.

The decisions in Germany and the debates in German law on the issue are known and are taken as a starting point[26] in the reasoning offered by legal scholarship. 57

Only a few lines are dedicated to this item in the Portuguese scholarship. Sousa Antunes, one of the few commentators who take a clear viewpoint, deems insurance a factor of equity. Even if is a non-compulsory insurance, it should be taken into consideration, because it is part of the agent's patrimony.[27] Furthermore, the fact there is insurance should also be weighed in deciding if equity justifies this kind of liability in the particular case. Afterwards, the judge will once again regard the insurance coverage when assessing damages. 58

9. Is the liability in equity if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

Liability is subsidiary to the liability of "supervisors" (usually legal guardians). This means that the child (unimputable) is liable: 59

a) if supervisors are not responsible (because they prove they acted with due care.);
b) if one cannot individualise the supervisors;
c) if they do not exist at all;
d) if they have no means.

In the last case, the unimputable have a right of recourse against those who did not supervise.[28] 60

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

a) The only provision dealing with the liability of the "unimputable", under the section of strict liability (that occurs as an exception and that must be stated by a legal norm, according to art. 483, 2 CC), concerns damages caused in traffic accidents. 61

If the unimputable is the keeper of a car, he is liable in equity (art. 503, 2 CC). Some authors prefer to say that here there is a real case of strict liability, on account of risk created.[29] 62

[26] See, in detail, H.S. Antunes (supra fn. 10), 303.
[27] H.S. Antunes (supra fn. 10), 305.
[28] See F. Pires de Lima/J.A. Varela (supra fn. 23), 491; J. Ribeiro de Faria (supra fn. 17), 211, H.S. Antunes (supra fn. 10), 306.
[29] See L.M. Leitão, *Direito das Obrigações* (2000), 279, fn. 592. See also, A.M. Cordeiro (supra fn. 7), 385.

63 This ruling has been regarded as a principle; in cases of strict liability (e.g., for keeping an animal) persons without capacity could be held liable according to art. 489 (liability in equity).[30]

64 b) According to art. 136, 5, b, of *Código da Estrada* (Road Traffic Code), there is direct liability of parents and guardians that allow (or do not forbid) the use of a car by the minor.[31] Some authors say it is not a rule of tort law; it just fixes who has to pay the fine for breaching the traffic rule. In fact, the wording of the mentioned rule is compatible with both interpretations.

65 The case law has repeatedly used this ruling, avoiding discussions on whether there was or there was not a faulty behaviour of parents (on buying the vehicle or on letting the child use the family car or even because of the lack of instructions on the use of cars). If this is the reasoning accepted, discussion as to the status of the minor as the keeper of the car are irrelevant. Parents are, for the legislature, the "primary" keepers of a car. See also infra no. 120 on the vicarious liability of parents when minors are driving family cars.

66 c) As far as vicarious liability of minors is concerned (also a case of strict liability, under Art. 500 CC), it seldom occurs. Where, for instance, the child is in charge of smaller brothers or sisters or other children, the courts have accepted direct liability of parents (for *culpa in eligendo* or *in instruendo*, depending on the age and character of the child).

67 d) A child can be a keeper of an animal. Under art. 502 CC, the keeper of an animal is strictly liable for the damages it causes, if the damage is due to the particular risk associated with the use of the animal. Portuguese law does not require a formal relationship of possession of, or property in, the animal.[32] It is the power of use as the material control and the interest in the object that counts when establishing who is the keeper (of an animal or of a car).

68 Recently, legislation on "Dangerous Animals" came into force. Notwithstanding the omission of a specific rule on liability, the fact that an animal is classified[33] as a dangerous animal forces the conclusion that it might be in this case a dangerous activity. In such a case, there is a presumption of fault (art. 493, 2 CC). Also, according to art. 493, 1 CC, if there is the duty to supervise a movable or an immovable, the fault is presumed (applicable to damages caused by any animal, dangerous or not). In these recent Acts, the keeper must be older than sixteen years, but in the case of minors they cannot be left on their own with the dangerous animal (even if there is an authorization).

[30] H.S. Antunes (supra fn. 10), 299, fn. 878 and also A.V. Serra, Fundamento da responsabilidade civil, [1959] BMJ, 90, 83.

[31] See, on traffic accidents caused by minors, STJ 5 November 2002, www.dgsi.pt.

[32] M.J.A. Costa (supra fn. 7), 565. Somehow different is the ruling on "*ultraleves*" (Decree-Law 71/90, 2 March 1990, establishes strict liability of proprietor and pilot).

[33] Portaria 422/2004 24 April 2004 implements Decree-Law 312/2003, 17 December 2003, Lei dos Animais Perigosos.

e) Dangerous things: 69

i) Guns, knives: in the case of using these dangerous things, the minor can be held liable for his unlawful act; there are no cases of strict liability connected with the use of guns or knives. If the use can be classified as a "dangerous *activity*", fault is presumed according to art. 493, 2 CC. They can also be liable if they had the duty to control the thing; fault is also presumed (art. 493, 1 CC). 70

ii) Hunting devices: its use in a hunting accident corresponds to a presumed faulty behaviour.[34] According to Law 173/99, 21 September 1999, the licence of hunting is given only to persons over sixteen years (art. 21). Art. 20, 2 imposes a requirement of parental consent. Art. 61 DL 227-B/2000 prescribes that minors should always have upon their possession the written consent of their parents as well as a reference to the time limitation of that consent. 71

iii) Bricks, stones, and similar things. See supra i). 72

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liaility only or is the liabiliy cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

It is not common to see liability insurance policies exclusively concerned with damages caused by minors. Usually, the so-called "multi-riscos" insurance includes damages caused by any member of the family, dependants, baby-sitters and even animals. 73

Some insurers offer the product "seguro do agregado familiar", usually a liability insurance, but it can also be a feature of first-party insurance.[35] 74

The insurance covers acts or omissions of the insured party or of those for whom he can be liable. It also covers direct liability of members of the family. In this case, there is an extension of the coverage to the acts of children up to the age of 25 who are not living together with the parents because of their studies. 75

Damages caused by minors under the custody of the insured are also covered, unless he was being paid and it was in the framework of his profession. 76

[34] On insurance matters, see art. 25 law 99, DL 227-B/2000 see also art. 72 Decree-law 338/2001, 26 December 2001.

[35] J. Vasques, *O contrato de seguro* (1999), 121. Policies from insurers such as *Fidelidade-Mundial, Tranquilidade* and *AXA* were taken into consideration (they represent the biggest share in the market).

77 As far as exclusions are concerned, the most important ones regard (see also infra nos. 83 et seq.) the use of drugs or the influence of alcohol, the peculiar situation of fights (where it is difficult to establish if there was provocation and who started the fight), and the use of vehicles.[36]

78 Fifty euros is the threshold value *(franquia)* and the capital insured is around € 75,000 to € 250,000. The premium is € 16 to € 30; and up to € 65 if it covers damages caused abroad.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

79 Insurers usually disregard the number, sex, age and criminal history of the children. They pay attention to previous cases of injuries and to the existence of another insurance covering the same damages.

80 Since it is not common for Portuguese families to take out an insurance of this type, insurers realize this is probably a case of adverse selection. Parents with dutiful sons are probably the last to think of the need of an insurance coverage. This is probably the explanation for the overall practice of reserving termination rights in case of repeated accidents.

12. a) How many per cent of families are covered by one or another form of family liability insurance?

81 Entities such as Instituto Nacional de Estatística, Instituto Português de Seguros and Associação Portuguesa de Seguradores do not have this data available.

82 There is a self-evident difficulty: many of the "family liability insurances" are offered as secondary insurances or become part of *multi-riscos* insurances.

b) Does the liability insurance cover extend to intentional torts committed by the child?

83 No, the liability insurance cover does not extend to intentional torts committed by the child. "Damages caused by children with intent are not covered unless they do not have capacity of exercise of rights" is a common clause in the family liability insurance policies. In this case, only acts of children over eighteen years would be set apart.

[36] It is not an unexpected solution, since there is a compulsory automobile insurance. What may cause be of surprise is the fact that damages caused by other vehicles, like bicycles, are usually excluded. But there is an ad hoc insurance that covers these damages.

One can probably ask: what is the meaning of "capacity of exercise of rights"? If the clause was thought to be an exclusion clause, in practice it has the opposite effect. It would also be unreasonable to replace that expression referring to tortious incapacity, because tortious capacity is a requirement of fault (intentional or non-intentional fault). If what was meant was an exclusion of intentional acts, with the exception of the acts that would be regarded as intentional if the child would be imputable, the wording of the clause goes in a quite different direction. 84

13. a) Are the parents under a duty to take out a liability insurance for their child?

Parents are not obliged to take out liability insurance for their children as a general rule. 85

b) Does the government do anything to encourage families to contract for insurance coverage, e.g., by requiring families in the course of the admission of children to public schools to establish that they are covered?

No. 86

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case where they pay out for a damage claim brought by the victim against the parents?

Starting from the "general rules on right of recourse", they simply do not exist. General rules on the insurance contract can be found in Commercial Code (of 1888) and in the Decree-Law 176/95, 26 July 1995 (*Regime jurídico do contrato de seguro*). In neither of these Acts is a rule on the right of recourse prescribed. Policies of compulsory (liability) insurances must be approved by the *Instituto de Seguros de Portugal*, but in the case of "family liability insurances" only the general standard clauses of non-compulsory insures can solve the problem. 87

Recourse against the intentional tortfeasor is a typical standard clause. As there is always a direct exclusion of intentional acts of the insured, this right of recourse takes special meaning where the insured was liable for acts (intentional or non-intentional) of third parties. 88

Private insurance carriers usually do not enjoy rights of recourse against children, even if by way of a general standard clause they could enjoy them. 89

b) Does the social insurance law provide a limit on the right of recourse of the insurance company against the child or his parents or legal guardians?

There is no specific provision regarding these subjects.[37] 90

[37] I. das Neves, *Direito da Segurança Social* (1996).

91 According to art. 71 Law 32/2002, 20 December 2002, in case of co-existence of social insurance payments and compensation of third parties, social insurance institutions can subrogate the victim's rights up to the limit of the value of such payments.

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

92 A general limitation or a reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult does not exist. But, as mentioned in supra nos. 46 et seq., if the child was incapable of acting reasonably (unimputable), than the award of damages cannot interfere with the rights of maintenance (owed or granted).

93 Minority (or rather the economic status of minority which usually does not correspond to a wealthy situation) is, nevertheless, a factor to be taken into consideration in order to limit compensation, if the minor acted without intent (art. 494 CC).

16. If not, there is a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

94 The discussions on "children in tort law" concern in particular four topics:

a) The act of a child as a cause of exclusion in strict liability;
b) The contributory negligence of children and parents;
c) The adequacy of tort law liability rules with new conceptions of parental care and minor's autonomy;
d) The influence on tort law of criminal law discussion concerning the minor's liability and of public policies in administrative measures in what has become almost a separate field of law (*Rules on Protection of Children*).

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts, which they are unable to pay off?

95 The general rule limits the discharge (usually partial) of debts if the creditors come to an agreement.

96 The writ of distrain cannot have regard for the following items: two-thirds of salary and two-thirds of pensions (art. 824, 1, a and b, Civil Procedure Code; which includes Law of Execution). Amongst others, these are assets regarded as indispensable to survival.

In the Decision of the Constitutional Court 318/99, Diário da República, II, 247, 22 October 1999, the Court defended that the one-third reminder of social contributions(or pensions) could not only be executed if it surpassed the national minimum income. Several other decisions (TC 62/02 and 177/02) led to a reform of art. 824 (by Decree-law 38/03,8 March 2003). Amongst other changes, the judicial discretionarily on deciding the extent of the execution was reinforced, always taking into consideration that "personal dignity" forces the protection of a minimum level of income.[38] 97

Execution will be suspended if there is a request for a declaration of insolvency (art. 870 Civil Procedure Code). 98

Already, in the preamble of *Código da Insolvência e da recuperação de empresas* (Bankruptcy Code-CI), Decree-Law 53/2004, 18 March 2004, one can read that it also applies to non-merchant debtors. There had been a previous unified regulation in the *Código dos processos especiais de recuperação da empresa e de falência*, Decree-Law 132/93, 23 April 1993, art. 2, 1 a). 99

The request declaration of insolvency can be asked for by the debtor (with capacity as it derives from art. 19 CI), by the legal entity/person actually responsible for the debts, the creditor (art. 20) or the public officer. 100

Special creditors, according to art. 49, such as some relatives (parents, children or brothers and sisters), are treated preferentially. 101

The debtor may request a reduction of the extent of the credit. He can also, with the agreement of the creditors, obtain the postponement of the debts. But it is up to the creditors' *assembleia* to decide. 102

The Bankruptcy Code also establishes the conditions of the agreement with the creditors, such as the delays and the rules on votes (for instance, it establishes if a qualified majority is needed). 103

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

The existence of debts sounding in tort or of damages caused intentionally does not lead to the application of a different ruling. 104

[38] C. Lopes do Rego, Penhorabilidade de vencimentos e pensões e garantia de um mínimo de sobrevivência condigna do executado, [2004] *Sub Iudice*, 29, 23 et seq., where the author describes the judicial and legal developments on the extent of the execution. See also with new evolving considerations, TC 96/04 (commented by L.do REGO) and TC 306/05 (a recent case on the balance between the right to maintenance of children and the right of the debtor (father of the child) to have a "decent income" in order to satisfy basic needs).

105 The creditor of a debt emerging from a tort (intentional or non-intentional) benefits from a specific privilege (only regarding movables) thought to protect the compensation owed by the insurer of the tortfeasor (art. 741 CC).[39]

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

106 Parental liability depends on a breach of duty to supervise the child (art. 491 CC).[40] It states that he "who, by law or contract, has the duty to supervise another person, because of her natural incapacity, is liable for the damages caused to a third party by that person, unless he can prove that the duty was not broken or that damages would have occurred even if there was due care".

107 Parental liability is dependant on a fact of the parents; the breach of the duty to supervise as it is systematically referred to by the case law.

108 The duty to supervise depends upon three factors:

a) Natural incapacity

109 Natural incapacity[41] is not an equivalent of indisputability.[42] It concerns persons who, due to the lack of experience or of certain faculties, cannot rule their own lives.[43] It includes, of course, minors (whether imputable or not), but only when that capacity is actually missing.[44] There is a judicial presumption that minors do not have natural capacity.

[39] M.L. Pires, *Dos privilégios creditórios: regime jurídico e sua influência no concurso de credores* (2004), 249.

[40] The previous Code (*Código de Seabra*) in art. 2379 established: "Minority does not interfere with civil liability, but if the minor, on account of his age, cannot be held liable in criminal law, parents or the person in charge of the minor will compensate the damages caused by the minor, unless they prove they did not act with fault." The requirements of parental liability were: the minority of the child, the fact the minor was accompanied by the parents or in a place where supervision was possible, the existence of an unlawful act, causation between the minor's act and the lack of supervision; L.C. Gonçalves, *Tratado de Direito Civil* XII (1937), 656.

[41] Natural capacity is also required to become a *procurator* (even if the law seems more demanding, by mentioning the capacity to understand and the will adequate to the nature of the future contract) or a *gestor* (although it is arguable to disregard *capacidade de exercício*, at least when there are binding contracts involved).

[42] Differently, R. Capelo de Sousa, *O direito geral de personalidade* (1995), 372, fn. 928 and A. Sá e Mello, Critérios de apreciação da culpa na responsabilidade civil (Breve anotação ao regime do Código), [1989] *Revista da Ordem dos Advogados* (ROA), Sept., 581. In an isolated case (RL, 28 February 1975, BMJ, 244, 306) the judges mangled natural incapacity with unimputability.

[43] H.S. Antunes (supra fn. 10), 100.

[44] Solution largely accepted in case law and in doctrine, see, inter alia, F.P. Jorge (supra fn. 8), 334.

Still, minors of more than sixteen years are sometimes regarded differently,[45] since they have a recognized autonomy.[46] 110

The evolving understanding of "parental power", which impinged on the adoption of a new terminology, "parental care", seems to justify the extension of a minor's freedom. Some discretion on the part of parents in the case of minors with more than sixteen years (and in some cases with more than fourteen years) is probably the counterpart of recent developments in legal scholarship, enhancing the fact that these minors must have the power to choose in important and delicate matters, such as the freedom of religion or informed medical consent. 111

This is particularly self-evident if the minor committed a crime, where "one cannot speak, in general, of a specific duty to supervise of parents (…), since their command only is directed to non-criminal acts, as enhanced in several decisions.[47] 112

Some legal commentators alerted to the fact that there is a traditional identification between minority and natural incapacity (even if this is broader, since it might include severely physically disabled persons, for instance). A strict interpretation of art. 491 CC would be the methodological device to adopt,[48] justified either by the evolving understanding of "parental care"[49] or by the substantial change on the policies for protecting minors (from a philosophy of prohibitions to a psychology of respect and mutual help). Hence, parents would not be liable for acts committed by their children aged sixteen years or older. 113

A strong contention is represented by the traditional and prevailing viewpoint of the case law. In a much commented upon case, the decision of the Supreme Court of 20 March 1991,[50] the minor aged about sixteen years was convicted, in spite of his "semi-imputability". When robbing some packets of cigarettes, the offender caused the death of the security guard. The parents were held liable for *culpa in educando*. There was some criticism of the decision, due to the severity in the assessment of the parents' fault. The minor had a problematic personality and, in fact, psychiatrists stressed that point in the criminal 114

[45] The Supreme Court held the parents of minors aged over 16 years not liable for the damages caused by criminal acts; the duty to supervise does not exist thereafter: STJ 2 November 1995; [1995] CJ/STJ, III, 220 and [1995] BMJ, 451, 39 (with the dissenting opinion of Sousa Guedes).

[46] A.V. Serra, Responsabilidade das pessoas obrigadas à vigilância de outrem, [1959] BMJ, 85, 7. In the same sense, F. Pires de Lima/J.A. Varela (supra fn. 23), 492, M.F. Duarte, *O poder paternal. Contributo para o Estudo do seu actual regime* (1989), 196 and J. Miranda, *Revista de direito e estudos sociais* (RDE), 52–56.

[47] See STJ 2 November 1995 (supra fn. 45).

[48] M.C. Sottomayor, A Responsabilidade civil dos Pais por factos ilícitos praticados pelos filhos menores, [1995] *Boletim da Faculdade de Direito* (BFD), LXXI 409.

[49] R. Martins, *Menoridade. Da (in)capacidade* (2004), 165–166.

[50] STJ 20 March 1991, BMJ 405, 220.

process. This severity on the judgements for parental liability in case of *grandes menores* contrasts with the benevolence sometimes bestowed in parental liability cases for damages caused by children of tender years. Reasons such as social tolerance or acceptance and the unavoidability of the damages might serve as an explanation.[51]

115 The strict interpretation of art. 491 CC or the denial of seeing minors aged 16 as incapable *prima facie* sound deceptively attractive. The underlying reasoning seems convincing. But the result emerging from that solution can be harmful to the victim who will have to sue a minor without patrimony in most of the cases.

b) A close and durable relationship (living together)

116 The case law was never particularly strict in respect to this doctrinal requirement.[52] The legislature omits any reference and many legal commentators see that situation as a *criterium* to assess fault on the breach of the duty to supervise instead of a condition of the existence of the duty to supervise. That is particularly evident in the case of *culpa in educando* of one of the parents who does not live with the child.

c) The source of the duty

117 Artt. 1877 and 1878 CC regulate the extent and duration of *poder paternal.* The duty to supervise is grounded in the power to educate (art. 1878, 1 CC).

118 The conclusion that parents have the duty to supervise in a particular case implies that parents might be liable for their unlawful act.

119 Parents can also be vicariously liable for the damages caused by their children, as long as general requisites of vicarious liability are proved (art. 500 CC).

120 One of the features of the Portuguese tort law system, these days, is the judicial trend to presume that children are driving parents' cars or other vehicles on account and in the interest of their parents (even when the car was used to pick up fiancées or to go out with friends).[53] That way, parents are more easily sued, on the ground of vicarious liability.

121 In case law, however, the dividing line between fault liability of parents under art. 491 and strict liability is clearly drawn. Some commentators have called for a modification of this desideratum, seeking a legal change to a system of

[51] M.C. Sottomayor (supra fn. 48), 453.
[52] M.C. Sottomayor (supra fn. 48), 435.
[53] Vicarious liability was also the way used to hold liable the proprietor of a gun who lent it to a minor (STJ 2 November 1995, www.dgsi.pt). The court bypassed the problem of the lack of actual *comissão* (task ordered by someone who takes advantages of others performance). It was enough to prove that the proprietor had given some instructions on the use of the gun.

parental strict liability.[54] The principle *ubi commoda, ibi incomoda*, the idea of sources of danger, equity, precaution and the principle of family solidarity were some of the reasons to modify the present ruling. The decisive argument is the protection of the victim.[55]

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or there is a rebuttable presumption of fault?

According to art. 491 CC, parents are not liable if they prove they acted with due care[56] or that the damages would have occurred even if they had acted with due care. 122

There is, therefore, a rebuttable presumption of fault. 123

As was written in STJ, 23/2/1988 (BMJ, 374, 466), "*culpa in vigilando* occurs because in practice damages are a consequence of the lack of supervision of parents and because there is the risk of insolvency or irresponsibility of the minor." 124

Other reasons seem to justify the presumption of fault. It is easier for parents to prove that they did not contravene the breach of duty. This solution also prevents attempts to take advantage of the fact that children are not legally responsible.[57] 125

As to the extent of the presumption, the legal scholarship offers various answers: 126

a) M. Cordeiro holds the view that the presumptions of fault adopted by the Civil Code in artt. 491 to 493 are equivalent to a presumption that there was a *faute* (in the French sense, not strictly identified with the requisite fault).[58] 127

b) To other authors, not only is fault presumed. Also, causation is included in order to assure the effectiveness of the presumption of fault.[59] 128

c) The most controversial issue concerns the extension of the presumption to culpa *in educando*. The case law is almost unanimous,[60] in the sense that the 129

[54] Also third persons, M.C. Sottomayor (supra fn. 48), 462, fn. 180.
[55] But compulsory insurance should exist for damages caused by unimputables, M.C. Sottomayor (supra fn. 48), 463. See also J.S. Monteiro, *Estudos sobre responsabilidade civil* (1983), 102 et seq.
[56] See RC, 21 March 1979, [1979] CJ, II, 562: the father allowed the use of a car by a son who did not have a licence, although with a series of strong advices; the presumption still remained.
[57] M.C. Sottomayor (supra fn. 48), 412–413.
[58] A.M. Cordeiro, *Da responsabilidade civil dos administradores* (1997), 468 et seq.
[59] M.C. Sottomayor (supra fn. 48), 411–412.
[60] Following the opposite direction, see STJ 18 May 1999, www.dgsi.pt, where it is possible to read that parents' fault is in the breach of duty to supervise not in the inadequateness of education.

duty to supervise includes also the duty to offer a good education and the duty to ascertain if the models and rules of education explained and imposed to the minor were interiorised by him. Also, it accepts that the presumption affects this duty and the duty to supervise *stricto sensu*. *Culpa in vigilando* corresponds to the literal expression used in the code: "responsabilidade das pessoas obrigadas à *vigilância* de outrem". It means that parents must be aware of the movements of their children and must verify the safety of objects used and activities performed.

130 In legal scholarship, questioning the extension of the presumption seems a feature of the authors whose dedication to the theme produced the most complete and interesting monographies: Maria Clara Sottomayor and Sousa Antunes.

131 The theory of the strict sense of the presumption is embedded in the following arguments: a literal interpretation of art. 491 (where the word *vigiar* is used) and the difficulties to rebut a presumption of *culpa in educando.*[61]

132 But, of course, "one must accept the idea that education's results play the role of a criterion to ascertain the intensity of the duty to supervise".[62] A possible connection between education and supervision occurs when skills are required to perform an activity (the use of guns or driving cars).

133 The practice of criminal acts was probably one of the results of a bad education, but the courts deny the existence of an immediate link, as can be illustrated by Relação de Lisboa, 7 July 1992, where the court did not hold parents liable for the damages caused by their child with a stolen car.

134 The legislature describes the ways to rebut the presumption (see infra i) and ii)). This is not merely theoretical. Judges do tend to analyse if the presumption is actually rebutted by having regard to the following:[63]

135 i) Proof that there was not a faulty breach of duty, since parents acted with due care. Due care means "supervising but allowing moments of freedom, otherwise the education tends to be oppressive".[64] It also concerns the "condicionalismo educativo antecedente",[65] a commonly used expression in the case law, meaning that the judge cannot circumscribe the facts from the injury itself and what parents did *a propos*. He must also wonder what in the parents' previous behaviour failed in the prevention of unlawful acts perpetrated by the child.

[61] H.S. Antunes (supra fn. 10), 232–234.
[62] M.C. Sottomayor (supra fn. 48), 424–429.
[63] See also H.S. Antunes (supra fn. 10), 245.
[64] As stated in STJ 13 February 1979, [1979] BMJ, 284, 187. See also STJ 2 March 1978, [1978] BMJ, 275, 170; STJ 15 June 1982, [1982] BMJ, 318, 430.
[65] STJ 17 January 1980, [1980] BMJ, 293, 308-I. M.C. Sottomayor (supra fn. 48), 420–422.

ii) Proof that damages would have occurred even if there was due care is also a possibility to be exempt from liability. The traditional viewpoint regarded this possibility as a hypothetical cause.[66] More recently it seemed more adequate to talk of a presumption of causation.[67] In case law, there is no clear option for any of the mentioned viewpoints on the defence of parents. Moreover, such a defence seems more academic than real. In most of the cases, the exemption of liability does not take place due to the failure to prove that there was not a breach of duty. *Culpa in vigilando* (as well as the theory of *deveres de prevenção do perigo* and recent cases on medical malpractice) is regarded as one of the reasons of the enlargement of tort liability.[68] 136

A mere glimpse of the case law on the most delicate occasions of possible injury (use of guns and driving) will probably give a suggestive idea of the trends that characterize the Portuguese legal system. 137

In the case of using guns or dangerous things, parents are not usually liable for the mere fact of having offered the gun.[69] Usually, culpa in instruendo seems to be the ground of liability.[70] 138

As far as driving is concerned, some situations must be distinguished: 139

i) If the minor is driving without a licence, parents could be liable because they ought to have forced the minor to obtain the driving licence (only in the case of motorcycles). Abstaining from any consideration on fault, the courts usually mention art. 136, no. 5, b) Traffic Code (Código da Estrada). It states that parents (or guardians) are directly liable for the infringements that the code punishes, as long as they knew of their child's inability or imprudence and did not prevent, if they could have done so, the use of the vehicle.[71] 140

ii) Driving with a licence does not exempt the parents from a duty to supervise.[72] It becomes limited to general instructions on the use of vehicles and it may contain prohibitions on driving by night or giving lifts to friends. If the minor flouts the parents advices, that does not lead to an immediate exclusion from liability. Parents ought to have taken other measures. 141

iii) Driving vehicles, like bicycles, does not require a licence. Parental consent also requires constant supervision. For example, parents should warn the minor about the dangers of driving in public places (STJ 25 November 1992). 142

[66] M.C. Sottomayor (supra fn. 48), 417.
[67] H.S. Antunes (supra fn. 10), 270–286.
[68] A.M. Cordeiro (supra fn. 58), 480.
[69] *Relação do Porto* (RP) 23 November 1979, www.dgsi.pt is an interesting exception.
[70] STJ 11 July 1978, BMJ, 279, 170.
[71] It is nevertheless doubtful if the legislature in that article meant only that parents would have to pay the corresponding fines.
[72] M.C. Sottomayor (supra fn. 48), 420, fn. 6.

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

143 The *parental duty*[73] *to supervise* is recognised as applying to parents (art. 1877 and art. 1878, 1 CC) and to the guardian (chosen by the judge or by the parents, for instance, in the case of death of both parents).

144 The power to educate the child remains unaffected for parents living apart from the child or unable to exercise parental authority (custody).

145 The case law seems to embrace the theory according to which if the parent is not living with the child he is still in charge of the duty, but by proving that the parent is not living with the child he will rebut the presumption (of *culpa in vigilando stricto sensu*).[74] Still, with respect to the responsibility for the debts of the couple, the parent who proves he could not supervise also has to compensate. Debts caused by civil liability actions, if they are connected with the normal course of family life) are supported by both the parents. This specific ruling, according to the prevailing view in the scholarship, prevails over the rules on damages. That might lead to the conclusion that a person who marries someone who has children, in spite of not having custody of the child, might be responsible for the payment of the debt originated by the injury, due to the rules on conjugal debts (artt. 1691–1697 CC).[75]

4. If custody determines the duty to supervise: what are the rules for the allocation of custody in the following circumstances: a) Children of unmarried parents; b) separation of married parents; c) divorce.

a) Children of unmarried parents

146 Parental authority is established regardless of whether there is a marriage or not. Custody is allocated to the parent who is actually taking care of the child, if parents are not living together (art. 1911 CC).

b) Children of separated parents

147 *De facto* separation is irrelevant in this field. If there is a judicial separation (not only concerning patrimony), the judge will decide to whom custody is granted, if there is no agreement on the issue.

[73] A.M. Cordeiro, *Tratado de direito civil* I (2004), 400–404, R. Martins (supra fn. 49), 209; M.C. Sottomayor, *Exercício do poder paternal* (2003), 21.
[74] H.S. Antunes (supra fn. 10), 109.
[75] H.S. Antunes (supra fn. 10), 113–114.

c) Children of divorced, separated parents (after a judicial separação de pessoas e bens) or of parents with a void marriage

According to art. 1906, 1 CC: "With the agreement of parents, parental authority is assumed by both of them, taking decisions on the life of the child as if they were married. 2. Where there is no agreement, the court must decide that parental care is recognized to the parent to whom the child is entrusted." Even in this case, according to number 3, parents may decide that some issues are decided by both of them. 148

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

If one of the parents does not have the right to custody and does not live with the child, he still has the duty to supervise. That is because he still has parental authority (the right exists; however, it may not be exercised).[76] He is charged with the duty to supervise, but he might easily rebut the presumption, because he was not living with the child. 149

According to art. 1906, 4 CC, the parent who does not exercise parental authority has "the power to supervise the education and living conditions of the child".[77] It contains simply a power of opposition. 150

Whenever the child visits the progenitor who does not live with the child, the presumption of *culpa in vigilando* falls on this progenitor. 151

The parent might also be liable because of his attitudes previous to the act of the child. That is the case if the parent offered a dangerous toy to the child. According to Lisbon Court of Appeal of 17 March 1987, due care of parents regarding their children starts before the act; it concerns the personality development of the children.[78] 152

6. Which elements of a tort must the child have realized for the parents to be liable for it?

Parents are liable for damages caused by a child whether the child is imputable or not. Therefore, the minimum requisite seems to be the one mentioned about liability in equity: the child behaved in such a way that, if she were imputable, the act would have been faulty. 153

If the child is strictly liable (as keeper of an animal, for instance), there is a trend to keep the ruling of art. 491 CC separate.[79] 154

[76] M.C. Sottomayor (supra fn. 48), 439.
[77] M.C. Sottomayor (supra fn. 48), 351–474.
[78] In BMJ, 366, 550; see also STJ 18 May 1999, www.dgsi.pt.
[79] V. Serra, Anotação ao Acordão do STJ de 8 de Fevereiro de 1977, *Revista de Legislação e de Jurisprudência* (RLJ) 111, 24–26. In the same sense, RP 5 July 1979, [1979] CJ, IV, 125.

155 In the decision of *Relação de Lisboa* of 3 January 1978, the court stated firmly that the only requirement is causation (fault of the minor is irrelevant). In this case, a child was using a gun offered by the parents when he was thirteen. The court held the parents liable for *culpa in instruendo*.

156 The act (and conscience of the child) seems irrelevant. What really counts is the break of the duty to supervise.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

157 The main criteria for assessing the duty to supervise concern:

158 i) Circumstances in the person of the child. The age of the child, her character, and the degree of intellectual development, of autonomy and of maturity are usually taken into consideration.

159 ii) Personal conditions of supervisors are less frequently mentioned. In *Relação do Porto*, the court decided that in the case of grandparents (but the same could be said of parents) there is no reduction of the standard of fault. The court added that "it might be different if their age or state of health pointed in another direction" (in the case, facts concerning the health were not proven).[80] The fact that parents are working (occupied with domestic tasks or in the field of their profession) does not exempt parents from liability neither justifies the use of a less demanding standard of fault.

160 iii) Place where the injury occurred. More freedom is recognized in rural areas. Therefore the simple fact that minors are playing outdoors without a supervisor is regarded as normal. In rural surroundings the use of knives or penknives or even guns used in hunting is also considered normal. But, of course, parents are still forced to give correct and full instruction.

161 iv) Use of dangerous things/stones. The courts demand proof that the minor understood the dangerousness of these objects.[81]

162 v) Proximity of sources of danger. Parents should be more attentive if the child is playing in the proximity of a road.

[80] RP 14 February 2002, [2002] CJ, I, 205.

[81] Playing in the churchyard, an eleven-year-old minor threw some stones. There was proof of good education, but the act in itself reveals he had not interiorised it, STJ 3 June 2004, www.dgsi.pt (also STJ 23 February 1988, BMJ, 374, 466).

8. To what extent are parents held to supervise their children during the time the child is attending school or at work?

Where there is a case of *culpa in vigilando stricto sensu,* parents are exempt from liability. If the teacher leaves the children alone in the classroom and one of the pupils causes an injury that the teacher would probably have prevented from happening were she present, parents are no longer liable.[82] 163

If the minor is at work,[83] he can probably already 'self-determine' as an adult would. That would dispense with the duty to supervise, because natural capacity is no longer lacking. 164

In the decision of Relação do Porto of 11 December 1974, [1975] BMJ, 242, 362, parents' liability was excluded for the damages caused by their child at work. The court recognized there was no educational failure or erroneous choice or help with the choice of the kind of job selected. 165

Culpa in eligendo or in instruendo seems to be a ground for parental liability. 166

If the damages reveal an "educational failure" (the expression adopted in the decision just mentioned), then the court would probably hold parents liable (regardless of the fact that the child and the employer or the teacher could also be liable). 167

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

Portuguese courts would not hold parents liable unless there had been *culpa in eligendo* of the boarding school. 168

Even if the duty to supervise was connected to some lack of instruction or education, the judge would have to have regard to the duties assumed on that matter by the boarding school. 169

If the child was using a knife or other dangerous object that parents should have checked, they will be liable for failure in their duty to supervise.[84] 170

10. What is the relation between the damage claim against the parents and the damage claim against the child?

There is joint liability, if the child is imputable. The solution is provided by the general rule on tort liability in the case of plurality of agents: art. 487 CC. 171

[82] *Relação de Évora* (RE) 27 May 1999, [1999] CJ, II, 261.
[83] See Decree-Law 396/91, 16 October 1991; Decree-Law 58/2002, 15 March 2002, Decree-Law 107/2001, 6 April 2001 (regarding activities permitted of minors under 16 years of age, or forbidden to minors aged 16 years or older).
[84] H.S. Antunes (supra fn. 10), 320.

Joint liability is an exception since, according to art. 513 CC, that can only happen where there is a legal provision or agreement to that effect.

172 Otherwise, if the child, unimputable, is liable in equity, because the parents, although liable, cannot afford to pay the compensation then, according to some scholars, there is right of redress against the parents.[85]

11. Is there any possibility either for the child or the parents to have recourse against each other?

173 Vaz Serra, responsible for the *travaux préparatoires* of the section on tort in the CC, wrote that only the parents could have recourse against the child for any monies they paid.[86] According to this author, "between the person who simply broke the duty to supervise and the person who caused immediately the damage, the latter is the main responsible, since the former only acted to guarantee that the victim was going to be paid". But he added the important exception of the situation where the supervisor is liable towards the supervised person. General rules of joint liability would apply, but the minor could not benefit from the fault presumption of parents. The reason of such a condition regards the aim of the presumption: protection of third parties.

174 The evolving understanding of this ruling (taking the orientation of the case law into consideration) will probably strengthen another viewpoint. The aim of the ruling is not merely a concern for the pecuniary guarantee, as nor is the presumption simply justified as being for the protection of third parties. The ruling of art. 491 aims at an effective protection of the person who needs supervision and it is based on the existence of a duty of care (of supervising) owed directly to the minor. That is the case if the duty flows from the parental care, but the contractual frame does not change substantially the aim of protecting the minor. Not only because in some situations will he not be solely liable, but mainly because a special duty to prevent his unlawful action is most probably the main interest of the contract.

175 The scope of the article is also to ensure that supervision will take place.[87] Therefore those who break the duty are also liable for that particular action of breaking their duty. Some legal scholarship claims that this can also justify the maintenance of the presumption where the minor demands his right of redress.[88]

176 More recently, the general rules on joint liability were regarded as fair enough: each of the tortfeasors has to pay according to his own degree of fault and his contribution to the fact.

[85] See, inter alii, M.J.A. Costa (supra fn.7), 524, fn. 1.
[86] A.V. Serra (supra fn. 46), 430.
[87] R. Martins (supra fn. 49) on the protective character of parental care, 166–169.
[88] H.S. Antunes (supra fn. 10), 312.

There is no case law on the matter. 177

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

In that case, the duty of supervise is imposed by law on the person or the institution acting as guardian (*tutor*). Guardians have the same rights and duties than parents (art. 1935 CC).[89] Parents might have chosen the person who, in the case of their deaths, plays the role of guardian (artt. 1928–1929 CC). Otherwise it is the judge who chooses the guardian (artt. 1927 and 1931 CC). 178

The unfitness of parents is of course another reason for the existence of guardianship (art. 1921 CC). 179

Under Law 147/99, 1 September 1999, *Lei de Protecção de crianças e jovens em perigo* (Law protecting children "in danger", with absence of educators or lack of education), the child can be entrusted to an "adequate person" (*pessoa idónea*), to a family, or to an institution. Taking care of the child also includes the right/duty to supervise. 180

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

It depends on the contractual frame.[90] If the child is being trained in a private business enterprise, assuming it is not forbidden, the professional might have assumed a specific duty to supervise. 181

If the child is working in a private business enterprise, the employer will be vicariously liable for the damages caused by the employee under art. 500 CC. He can also be liable for culpa in eligendo, in instruendo or in vigilando. 182

The *Código do Trabalho* (Labour Code) approved by Law 99/2003, 27 August 2003, is extremely detailed on the section dealing with work by minors (see, v. g. artt. 55–57, 60, 61). No specific rules on liability can be found, but there is a whole range of protective rules. The main concern of the legislature is to avoid a situation where the minor will perform some dangerous or otherwise unsuitable activities. Also Law 35/2004, 29 July 2004, regulates infantile work (see artt. 114–146) and allows the employer to choose a "training guardian" (tutor), who will be responsible for the formation of the character of the minor (art. 130). It seems obvious, due to the closer relationship between the 183

[89] But they are subject to the control of the *conselho de família* (art. 1954 CC), in particular by the member of the *conselho de família* chosen to be *protutor* (art. 1955–1956 CC).

[90] See J. Ribeiro de Faria (supra fn. 17), 475.

minor and this ad hoc guardian, that the latter has a heavier role than the employer himself.

184 Parents' liability is not excluded in principle, as seen supra nos. 5 et seq.

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

185 A general rule might be found in art. 1907 CC: "When the child is entrusted to a third person or an educational or social institution, these persons have the same rights and duties as parents, in order to accomplish their functions."

186 If the child is living in a boarding school, the boarding school has the duty to supervise, usually because the contract with the parents includes that duty.

187 In case of liability of public institutions (ruled by DL 48051), the presumptions of fault provided for art. 491 to art. 493 of the civil code apply, as it is accepted by the majority of courts and the legal scholarship.

188 By law, the person responsible for a holiday camp for children older than six years (under Decree-Law 304/2003, 9 December 2003) also has the duty to supervise, if by the duty of *acompanhamento* (to keep the child's company, according to art. 12) the legislature meant more than mere companionship, which seems reasonable to accept.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

189 Yes. Art. 491 CC mentions the duty to supervise, by law or *by contract*.

190 The contract might even replace the duty to supervise (of parents, for instance). It depends on whether the act was a consequence of a lack of supervision (*culpa in vigilando stricto sensu*). In that case, parents are no longer liable. It is nevertheless conceivable that there is an allocation of the duty to educate, where the child is living in a boarding school or in a relative's home, due to the lengthy absence of the parents.

191 The case law is rather demanding in respect of this requisite – "duty of supervision by law or contract". It denies that the duty has been transferred where there was just a courtesy or a temporary link between the child and the adult.[91] The above-mentioned case (STJ 12 November 1992) concerning "parental liability" in the case of the injury caused by children playing in the courtyard of

[91] Strangely enough, the family liability insurance covers damages caused by children staying temporarily with adults (like at children's parties). That can be explained by the fact that there is no uniformity in the case law and in legal scholarship.

one of them, which was situated near a road, seems at first glance an exception to what was just said. But underlying the solution was most probably the idea that the owners of the house (parents of one of the children) were the ones who had the best position to prevent the damage. Therefore, the duty of supervising would have originated in law (in a broad sense), accepting the idea that there is in principle the general duty to prevent damages in specific circumstances (see infra no. 197).

A clear case of a contractual duty to supervise is the case where children are left in playgrounds inside stores with an employee of the store. 192

The fact that this service is for free does not collide with the contractual assumption of the duty to supervise.[92] In case of doubt as to whether there was an assumption of the duty, the answer must be negative, according to the general rules on interpretation. Where there are different possible meanings, preference must be given to the less "compromising" meaning (art. 237 CC). Furthermore, some legal commentators consider that, in courtesy relationships, it does not suffice to prove absence; parents have also to prove they cannot supervise the child, that the absence is due to an acceptable reason and that the chosen person could be regarded as an adequate supervisor.[93] 193

The most problematic cases occur within the family.[94] The discussions concern mainly the duties of step-parents and grandparents. 194

a) Step-parents: It has been accepted that their duty is charged on the ground of a tacit contract.[95]

b) Grandparents: The same legal framework (a tacit contract) was adopted by RP 14 February 2002. A 10-year-old child injured another child by throwing a stone. The mother (the only living parent) had abandoned the child at an early age and it was living with his grandparents. The court held that there was *culpa in educando* (or at least the presumption was not refuted). Had there been a good effective education, the child would realize how dangerous it was to play with stones. In the dissenting vote of Judge Gonçalo Silvano, the position adopted by the court is criticised: the grandparents did not assume the duty to supervise *freely*; besides, as their act was independent of remuneration, this revealed it as being an act of solidarity. The idea of a tacit contract has also been rejected in cases where the grandmother takes care of the children while the parents are working.[96]

That does not mean they are not liable at all. 195

[92] It might also depend on the length of the contract, H.S. Antunes (supra fn. 10), 130.
[93] M.C. Sottomayor (supra fn. 48), 407, fn. 8.
[94] M.C. Sottomayor (supra fn. 48), 407.
[95] M.C. Sottomayor (supra fn. 48), 406, fn. 7. See also A. Pais de Sousa/C.O. Matias, *Da incapacidade dos menores interditos e inabilitados* (1983), 199–200.
[96] See RP 27 May 1993, www.dgsi.pt.

196 In the case of *de facto* supervisors, some authors find the concept of *gestio negotiorum* applicable.[97]

197 Also, liability for *omissio* is conceivable in this case. The *omissio*[98] is regarded as the cause of damages, whenever there is the legal duty to adopt some measures that would be almost certainly, or likely, to prevent the damage[99] (Article 486 CC), especially when the adult provoked the damage.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

198 According to art. 5 Law 30/2002, 20 December 2002, which approved the Statute on non-university students, teachers have the power to prevent and control behavioural problems at school.

199 The State is liable within the terms of Decree-Law 48051, 21 November 1965, which concerns State liability for acts of "public order" (actos de gestão pública). The general principle identifies a situation of vicarious liability. One of the requirements is the existence of an unlawful act of the employee or agent.

200 It is a matter of administrative law, but presumptions of fault in (private) tort law apply.

201 In the decision of Supremo Tribunal Administrativo 4 December 2003 (www.dgsi.pt), a minor caused personal injuries to a classmate. They were skipping classes and were off the school grounds. The court decided that even if there was a clear rule charging the schools with the duty to prevent minors from "escaping", the protection of third parties does not correspond to the circle of protected interests of the rule.

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state

202 In the case of public schools, the teacher and the State (or the *Direcções regionais de educação*) are liable.

203 There is a classical controversy on whether the victim can sue public employees directly (apart from the case expressly provided for by law: intentional acts).[100]

[97] See H.S. Antunes (supra fn. 10), 133–136.

[98] P. Nunes de Carvalho, *Omissão e dever de agir em direito civil* (1999).

[99] J.A. Varela (supra fn. 7), 528. See RE 27 May 1999, www.dgsi.pt.

[100] R. Medeiros, *Ensaio sobre a responsabilidade civil do estado por actos legislativos* (1992), 122, denied the conformity of Decree-Law 48051 with art. 22 of the Portuguese Constitution, that provides for joint liability of the employee and the State. See also, M.G. Garcia, *A responsabilidade civil do Estado e demais pessoas colectivas públicas* (1997), 67–70. Opposed to this viewpoint, J.S. Monteiro, *Aspectos particulares da responsbilidade médica, in Direito da Saúde e bioética* (1991), 142–143.

Both the teacher and the private school are liable. The school assumed the duty to supervise in the contract with the parents, and therefore is liable for the acts of any helper, *in casu*, the teacher, under art. 800 CC. 204

7. In public schools: Given that the teacher is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

The State may entertain a right of recourse against the teacher only if the teacher had acted with gross negligence (art. 2, Decree-Law 48051). 205

Some recent proposals wanted to make the right of redress of the State compulsory. 206

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

Where there was a breach of contract on the part of the teacher, in the terms of artt. 798 et seq. CC, the school may sue the teacher. 207

Usually it does not occur. 208

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

The primary criteria for assessing the extent of the teacher's duty to supervise concern: 209

a) Circumstances of the child. The age and the character (if she is precocious, dutiful or restless, etc.) of the child impinge on the extent of the teacher's duty. Small children spend more time with just one teacher, and then it is likely that in this case the predictability of the behaviour of individual children is easier for the teacher. 210

b) Circumstances of the victim. Victims are usually the classmates. It is important to have regard to the previous relationship between the children (enmity is rather common in some ages and requires special control). 211

c) Circumstances of time and place. As seen before, if injuries were caused after leaving the premises, the school might not be liable, even if the children were skipping classes. The place where the act occurred (playground or inside of classroom?) is also relevant. Due to the excitement typical of excursions, teachers must be aware of deviant behaviours.[101] 212

[101] In the same sense, H.S. Antunes (supra fn. 10), 155.

213 d) Circumstances at the classroom. The number of children or the existence of mixed classes (with children of different ages) can be factors that aggravate the duty of care. The ambience of the classroom is sometimes out of (total) control where the school is situated in a "problematic area" (usually in the poorest suburb of big or more industrialized cities).

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other? May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

214 According to art. 71 Law 32/2002, 20 December 2002, in the case of co-existence of social insurance payments and compensation of third parties, social insurance institutions can subrogate the victim's rights up to the limit of the value of such payments.

215 Art. 495, 2 CC states that in the case of personal injuries the institutions (hospitals, but also social insurance carriers) have a direct action against the tortfeasor, on account of having helped or assisted the victim.

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

216 Both claims can co-exist. If the child is imputable, we might have three tortfeasors: the child (usually over seven), the parents (*culpa in educando*) and the teacher (*culpa in vigilando*).[102]

217 There is joint liability of the child and school (or parents). The question of whether the school (or parents) have recourse against the child or vice-versa is unsolved. Saying that parents and other guardians also broke their duty might lead to the application of the general rule: each tortfeasor pays according to the degree of fault and the contribution to the damages (art. 497, 2 CC).

218 In some cases there is a particular duty to inform on parents. If the child has, for instance, a violent character, parents should inform the teacher of that feature.

12. Is there any possibility either for the child or the teacher to have recourse against each other?

219 The right of recourse is granted to the child against teachers or parents whenever the supervisors did not have the means, and the child was held liable in equity; but such an action seems unlikely.

[102] Also the private school is charged with the presumption of fault of the debtor.

Otherwise, the general rules apply. The right of recourse depends on the degree of fault and the contribution to the damages (art. 497, 2 CC). See also supra no. 137. 220

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

They can both be liable, as seen supra nos. 46 et seq. If the parents and the teacher are liable, the recourse follows the general rule (art. 497, 2 CC). 221

Children as Tortfeasors under Russian Law

Igor V. Kornev

I. Introduction

It would be impossible to write about the modern state of Russian law in the described area without reference to the historical development of the law in the Russian empire, soviet and post-soviet periods of state development. 1

The oldest Russian legal documents do not mention anything about the capacity of minors in torts. Like elsewhere in medieval Europe, children "soon attended full age; life was good and there was not much to learn".[1] Art. 43 of Prince Yaroslav's Charter on the Church Courts (the eleventh century) imposed church punishments on children for beating their parents, but the age of offenders was not established.[2] The first known legal rule relating to criminal liability of minors was introduced in 1669 in an amendment to *Sobornoe Ulozhenie* (Russia's major medieval code of 1649). The rule released a seven-year-old child from capital punishment for homicide.[3] In Russian medieval law "individual capacity would be established after examining a particular person".[4] "Tort liability was not personal in those times."[5] Thus, parents could be held liable for torts of their minors but if the latter had any property available for compensation they could be held personally liable. The first Russian Emperor, Peter the Great, introduced criminal liability of minors for theft in 1715[6] and one of his ancestors, Katherine the Second, was the first to establish the age of the beginning of criminal law capacity (ten years of age for all minors).[7] However, liability of minors and their parents for torts was directly es- 2

[1] History of English Law by Sir Frederich Pollock and Frederic William Maitrand (2nd edn. 1996), 438.

[2] Ystav Knaz'a Yaroslava o Tzerkovnih Sudah, Prince Yaroslav's Charter on the Church Courts in: *1 Rossijskoe Sakonodatelstvo X–XX Vekov* (1984), 193.

[3] G.B. Sliosberg, *Vosrast v Ygolovnom Prave* (Age in Criminal Law) in: 12 *Encyclopedicheskij Slovar Brokgauza i Efrona* (reprinted in 1991), 909.

[4] See N.N. Debolskij, *Grazhdanskaja Deesposobnost po Russkomu Pravu do Konza XVII Veka* (Civil Capacity in Russian Law until the End of the Seventeenth Century) (1903), 23.

[5] S.V. Jushkov, *Istoria Gosudarstva i Prava SSSR* (History of Law and State of the USSR) (1950), 289.

[6] See 1715, *Aprelja 26 Artikul Voinskij* (Military Rules from the 26th of April, 1715) in: *4 Rossijskoe Sakonodatelstvo X–XX Vekov* (1986), 327.

[7] See G.B. Sliosberg (supra fn. 3), at 909.

tablished for the first time only in 1832 in the tenth volume of The Collection of the Laws of Russian Empire. Art. 213 of The Civil Laws distinguished minors who have not attained seventeen years of age and minors aged seventeen to twenty one years of age.[8] Artt. 653 and 654 of The Civil Laws imposed liability for torts on parents of minors under seventeen years of age residing with them if the minor acted without understanding and the parents were negligent in controlling the child.[9] This rule applied to one or both parents by court decision and did not depend on the existence of any property in possession of the minor. Guardians of minors were liable under the same conditions. If the parents proved that they could not have prevented damages or the minor had acted with intent then the minor was liable himself.[10] Thus, liability of parents absolutely excluded liability of minors and vice versa. Minors who attained seventeen years of age were personally liable in all situations.[11] These rules of liability for torts of minors were typical civil law rules and resembled those in *Code Napoleon* of 1804[12] and the *Bürgerliches Gesetzbuch* (German Civil Code, BGB) of 1900.[13] *Code Napoleon* was also introduced in some western territories of the Empire such as Lithuania and Poland.

3 The Civil Laws were abolished by the Bolsheviks in 1917–1918 after they took power in Russia. However, The Civil Laws and rules on minors' liability were in force on the territories controlled by the opposition during the following Civil War.

4 New Bolshevik legislation introduced a dualistic approach to the matter. On the one hand, according to the Decree from 14 January 1918 on Commission for Minors, minors under seventeen years of age were not criminally liable.[14] On the other hand, criminal sanctions could be imposed on minors and their parents instead of tort liability in some cases (Decree on Liability for Destruction of Railways).[15] Thus, the distinction between the consequences of damaging state and personal property became crucial because advanced criminal liability was established in the first case. Criminal Code of 1926 established general criminal liability of minors starting from sixteen years of age and, in exceptional cases, from fourteen years of age.[16] The first soviet Civil Code of 1922 did not accept the pre-revolutionary rule and made minors primarily responsible for their torts starting from fourteen years of age.[17] Parents could be held liable only for the torts of minors who had not attained fourteen years of

[8] See S. Zakonov Rossijskoj, *Imperii* (Collection of the Laws of Russian Empire) (1857), 574.
[9] See S. Zakonov Rossijskoj (supra fn. 8), 148.
[10] See S. Zakonov Rossijskoj (supra fn. 8), 148.
[11] See S. Zakonov Rossijskoj (supra fn. 8), 148.
[12] § 1384 (4) Code Napoleon.
[13] §§ 828, 829, 832, 1664 BGB.
[14] *Sbornik Documentov po Istorii Ygolovnogo Zakonodatelsva SSSR and RSFSR1917–1952* (Collection of the Documents on the History of Criminal Legislation in the USSR and RSFSR 1917–1952) (1953), 21.
[15] See Collection of the Documents (supra fn. 14), 31.
[16] See *Ugolovnii Kodeks RSFSR* (Criminal Code of RSFSR) (1923), art. 18.
[17] See V. Gsovski, *Soviet Civil Law* (1948), 532.

age.[18] Parents were also not responsible for damages and injuries inflicted by juvenile delinquents. At the same time, minors under fourteen years of age were civilly not responsible in all circumstances. Thus, the Code introduced unusual legislative provisions, which were based neither on pre-revolutionary rules nor on the rules of civil law countries. The rule lead to a situation where victims of a minors' misconduct could almost never obtain compensation.[19] However, soviet courts of that period sometimes made parents civilly and even criminally responsible for torts of their children in order to compensate victims.[20]

5 In the early 1930s a new wave of political terror and repression began. The famous Governmental Decree on Protection of Property of State Enterprises, Collective Farms and Cooperation and Strengthening of Community (Socialist) Property from 7 August 1932 introduced unreasonable long-term criminal punishments and executions for the small theft of railroad, collective and cooperative property.[21] However, minors who committed a sufficient percent of property crimes in that period were not criminally liable before reaching fourteen years of age; the absence of parental civil liability for torts of their children older than fourteen years of age made any compensation impossible in the majority of the cases as well. Brutal hunger occurred because planned food expropriations in rural areas all over the country made parents enforce their younger, and thus not responsible criminally, children to commit thefts from the state fields and food storages. The repressions and deportations to Siberia of hundred of thousands of wealthy peasants dramatically increased the number of unattended homeless minors who committed property crimes. The number of torts committed by children increased dramatically.

6 In that situation the government attempted to make minors criminally liable and create a class of persons who would be responsible for compensating the harm. Governmental Decree from 7 April 1935 on Measures of Struggle Against Crimes of Minors introduced criminal liability starting from the age of twelve years including all forms of criminal punishment.[22] Joint Governmental and Bolshevik Party Decree on Liquidation for Lack of Attention to and Supervision of Minors from 31 May 1935 made parents responsible for compensation of harm inflicted by their children.[23] These Decrees lead to severe repressions against minor children. Former mayor of St. Petersburg, law professor, and one of the first post-socialist democratic leaders, A. Sobchak believed that mass juvenile delinquency in the U.S.S.R. in the 1930s was eliminated due to mass executions of homeless children who had committed minor

[18] See *Grazhdanskii Kodeks RSFSR* (Civil Code of RSFSR) (1925), art. 9.
[19] Most of the population lived below the poverty level, liability insurance did not exist.
[20] See *Postateinij Kommentarij k Ugolovnomy Kodeksu RSFSR* (Commentaries to the Criminal Code of RSFSR) (1927), 49.
[21] See S. Zakonov, *I Rasporjazhenij Raboche-Krestjanskogo Pravitelstva SSSR* (Collection of Laws and Decrees of Peasants and Workers Government of the USSR) (1932), no. 62.
[22] See Collection of the Documents (supra fn. 14), 236.
[23] S. Zakonov (supra fn. 21), no. 32. art. 252.

thefts of food in order to feed themselves.[24] In 1935 both Criminal and Civil Codes were changed accordingly. Art. 405 of the Civil Code made parents liable for harm caused by minors.[25] Parents were liable for their own fault, but the type of liability was not established. In practice, courts imposed joint and several liability on parents and their children. However, the state did not make orphanage homes and other custodial facilities liable for torts of children in their custody.[26] Thus, citizens who had suffered from wrongful acts of minors under fourteen years of age placed in the state's custody could not seek compensation from the state.

7 Following the death of Joseph Stalin, repressive rules on the liability of minors were abolished. Criminal Code of RSFSR of 1960 re-introduced criminal liability from fourteen years of age and Civil Code of RSFSR of 1964 introduced personal liability of minors for torts from fifteen years of age accompanied with additional parental liability in cases where compensation could not be obtained from minors. These rules became fundamental and were only slightly changed in post-soviet Russia's Criminal Code of 1996 and the Civil Code of 1993.

8 Modern Russian civil law appeared after the fall of the U.S.S.R. in 1991 and inherited from its soviet predecessor theoretical requirements for making a person liable in the law of torts. These requirements are quite similar to those existing in western law and include harm (damages), unlawfulness of the act, causation and fault on the part of the tortfeasor (art. 1064 of the Civil Code). However, the new Civil Code also introduced such institutes, heretofore unknown to soviet law, as monetary compensation for moral (emotional) harm and sufferings and personal liability insurance.

9 One can find several main problems relating to compensating the victim of harm caused by minors in modern Russia:

10 a) The social stratification of the society has changed dramatically. A new class of big private owners has appeared as opposed to all other people who still live close to the level of poverty. The middle class of society has not formed yet. That is why common means of inflicting injuries and damages to others such as BB guns, snowmobiles, automobiles, motorboats and sometimes even bicycles are not available for an absolute majority of Russian children. Hence, most of the tort cases still arise in criminal courts where victims of minors' crimes (mostly property crimes) can initiate civil actions against juvenile offenders (mostly for minor thefts) and their parents. The age at which limited capacity begins is fourteen in both criminal and civil law.[27]

[24] A. Sobchak, *Radio of Russia* interview from 16 December 1999.
[25] Civil Code of RSFSR (Moscow, 1957).
[26] See O.S. Ioffe, *Objasatelstva po Vosmesheniju Vreda* (Obligations to Make Compensation for Inflicted Harm) (1952), 58.
[27] See UK RF (Criminal Code), art. 18 Nr. 2; GK RF (Civil Code), art. 26.

b) Although facing a huge number of crimes committed by adolescents every year, the Russian system of juvenile justice does not have sufficient funds either for introducing new compensational programs of restitution and victim-offender mitigation or for maintaining already existing means such as similar to juvenile probation institute of compulsory measures of educational influence.[28] Thus the primary way of compensating the victim is still the appeal to the child's parents' funds even if the inflicted damages are small and could be easily compensated by children independently through juvenile justice programmes. 11

c) Liability insurance does not play any significant role due to the reluctant acceptance by the population of it. 12

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

Art. 1082 of the Russian Civil Code states that in awarding compensation for harm, a court shall, in accordance with the circumstances of the case, oblige the person responsible for the harm to compensate it in kind (to grant a thing of the same type and quality, to rectify the damaged thing and so forth) or to compensate the losses caused. Children under fourteen years of age are not held liable for their torts in Russia (art. 1073 of the Civil Code). In this case the wrongful act is not imputable as children under fourteen lack the required capacity to commit a tort (art. 26 of the Civil Code). 13

Persons who have jointly caused harm shall be jointly and severally liability to the victim.[29] This rule can be applied to children as well. A court may not impose liability in shares on juveniles who caused harm acting together. Liability in shares may be imposed only if the victim of the offence asks about it.[30] 14

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

There is a specific window within the lifetime of a child during which the liability of the child depends on his/her capacity to act reasonably or any similar standard. If a child aged between fourteen and eighteen years (eighteen being the age of majority) or an adult is declared incapable by the court due to mental illness such person is not personally liable. Children aged between fourteen and eighteen years may be found not civilly liable for their acts if they were 15

[28] See G.I. Zabrjanski, *Nakasanie Nesovershennoletnih I ego Regionalnie Osobennosti* (Punishment of Minors and its Regional Distinctions) (2000), 36.
[29] GK RF, art. 1080, no. 1.
[30] GK RF, art. 1080, no. 2.

not able to understand the significance of their actions or direct their actions (art. 1078 of the Civil Code). This standard is not applied for children only but is also applicable to adult persons. Children are usually found not liable when they reach fourteen but are slow in their mental development due to their lack of education or other circumstances such as mental illness, etc. Usually psychiatric examinations are ordered by criminal courts which deal with civil liability issues in criminal cases. However, if a child could not understand what he/she was doing due to voluntary alcohol or narcotic intoxication the exemption from liability is not applicable.

3. a) What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realization?

16 Capacity to act reasonably means that a person was able both to understand and direct his/her actions. Liability (with the exception of strict liability cases) is based on fault which means that the person acted either intentionally or negligently. In the latter case, the person was able to predict and ought to have foreseen the consequences of his/her actions but did not do it.

b) Does the child have to realize the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)?

17 There are no such special distinctions but in each case courts make decisions upon considering all relevant circumstances including possible dangers in particular situations.

c) Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

18 Children over the age of fourteen are liable on the same basis as adults. There is no comparative standard of a reasonable (ordinary) child of the same age. The Civil Code especially underlines the equal status in civil liability cases of adult persons and children over fourteen. Thus, each case is decided upon characteristics of an individual child with the same standard applicable to all persons who reached the age of fourteen years. At the same time, the rule of art. 1078 of the Civil Code, that a minor is not obliged to compensate for harm caused by him if he has caused harm in a state in which he could not understand the significance of his actions or direct them, may seem to be similar to the "reasonable child" common law concept as courts are obliged to evaluate the mental condition of a child tortfeasor if there are reasons to suspect deviations.[31] While

[31] See e.g. Restatement (Second) of Torts § 283 A: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."

making such evaluation based on medical expertise, experts and courts have to compare mental conditions of children of similar ages. However, nothing supports the idea that Russian courts actually use the legal concept of the reasonable child. Courts apply a general or an adult standard of care to minors in negligence cases. For example, if there were damages inflicted by a child the courts will not say "boys will be boys"[32] in order to defend wrongful behaviour of a child and reduce compensation, but simply will award the full compensation as it if the harm had been inflicted by an adult.

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

The Civil Code provides that all damages exceeding sums of liability insurance shall be covered by the tortfeasor (art. 1072). However, liability insurance does not play any role in the qualification of tortfeasors' actions because of both the small number of persons who are insured and the absence of a connection established in law. 19

So far the Civil Code and courts do not establish any connection between liability insurance and a child's capacity or the standard of care. 20

5. What is the standard of care applicable to children?

6. Are children held to a higher standard of care if they engage in "adult activities"?

There is no established circle of 'adult activities' in Russian law. Most activities which could be called adult activities such as driving, using dangerous instruments and materials fall into the category of strict liability cases. 21

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

There is no such equitable liability as described in the above question. Two provisions do exist however. The first special clause relates to grown-ups and concerns former minors who had no capacity when they committed their torts. The second is a general reduction clause and applies to all tortfeasors seeking to reduce the level of their obligations towards their victims. 22

[32] Seamons v. Snow. 84 F.3d 1226 (10th Cir. 1996).

8. a) Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard?

23 There is a sort of liability in equity/special-reduction clause for former children under fourteen who otherwise are not liable. If the persons obliged to compensate the victim of the child tortfeasor have died or do not have sufficient funds for compensation and at the same time the minor has reached majority or was emancipated and acquired property sufficient for such compensation, a court, upon consideration of other circumstances such as the financial situation of the victim, may oblige him/her to compensate the victim in part or in full.[33] This is a new provision similar to those in the German Civil Code,[34] which was not included in any of the previous Soviet civil codes.[35] Such equitable liability may be called the "rich child liability" because it depends on the wealth of the child and the victim.

24 However, the existence of both parental liability and equitable liability of the child tortfeasor does not provide real additional guarantees to the victim. As we see, victims may be compensated only years after infliction of the harm because, if the child tortfeasor has sufficient funds, courts need to wait until he/she has reached the age of majority or has been emancipated. Existing requirements do not afford courts to consider compensating the victim from the property of child tortfeasors under fourteen years.

25 As for children over fourteen, they are personally liable and the described equitable liability is not applicable.

b) What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

26 The existing general reduction clause refers to all tort cases including liability of children. Art. 1083 of the Civil Code provides that the court may diminish compensation having considered the financial situation of the tortfeasor with the exception of where intentional harm has been inflicted. Hence, art. 1083 introduces a broad rule which may be applied using all the factors cited above – intensity of violation, wealth of the parties, and compensation of the victim by the insurer. Such liability reduction is decided separately in each case and there is no general rule with regard to types of insurance.

[33] See GK RF, art. 1073, no. 4 (2).
[34] See § 829 BGB.
[35] The Civil Codes adopted in 1922 and 1964.

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

Liability in equity in both of the situations described above comes after liability of the parents and simply does not exist if parents or other liable persons are able to compensate from their own funds and is not connected in any way with liability insurance of any kind. 27

C. Strict Liability

10. a) Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability?

Under the special rule of art. 1079, any person who causes material harm to another person by engaging in an activity involving the use of dangerous instruments (that is, an instrument that poses a source of increased danger to the surrounding environment) shall be held liable even if he/she acted without fault. Liability does not exist if there was a force majeure or intent on the part of the victim. Such strict liability is rationalized by the notion that any person who knowingly engages in activities involving extraordinary danger takes the risk that his activity may cause harm to others even if it can be shown that he acted with utmost care. There are no exceptions to general rules here – children under fourteen are not liable and after fourteen are liable on the same basis as adults. 28

b) In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

Children almost never become owners of such sources of increased danger. Technically a child may become an owner of an automobile or some business (e.g. by means of inheritance) but for their operation (creation of a company, obtaining required licenses) having reached the age of majority (eighteen) is a usual requirement. 29

However, operation of scooters and motor bikes, possession of hunting guns (in some regions where the local population engages in hunting) is allowed for children aged sixteen and over and in these cases strict liability is applied on a general basis. 30

As for dogs and other animals, children may be owners and here parents will be liable if the child-owner is under age and the child will be liable himself/herself after fourteen on the general grounds and parents will be vicariously liable in the latter case as well. 31

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

32 Liability insurance is regulated by art. 1072 of the Civil Code and The Law on Insurance from 27 November 1992. According to this law, liability insurance is either compulsory or voluntary. The law does not create a list of possible risks to be insured but allows for insurance contracts which protect lawful interests.[36] Hence there may be parental liability insurance, personal liability insurances for children, etc. These types of insurance may be incorporated into complex polices such as family liability insurance or premises liability insurance.

33 Legislation created all possibilities for the existence of family liability insurance. However, there is no compulsory family insurance in Russia and existing obligatory liability insurance does not include coverage of parental liability for torts of children of the insured.

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

34 There are no established limits on the ways in which liability insurance shall regulate risk premiums. The coverage is not regulated by law, so every insurance company can limit the amount insured. A child's criminal history is likely to affect the terms of an insurance contract. However, sample personal liability insurance contracts, which include parental liability provisions, obtained by the author do not include any special provisions related to the personality of the children of the insured. Reported case law on this matter does not exist as of now.

12. a) How many per cent of families are covered by one or another form of family liability insurance?

35 The major Russian insurance companies Rosgosstakh (Russian State Insurance) and Rosno, which share more than fifty percent of the insurance market, have introduced family insurance polices and personal insurance polices which include parental liability for torts of children under fourteen years of age. Though official statistics do not exist here, officials of those companies

[36] See e.g. Conditions of Licensing of Insurance Business adopted by Rosstrakhnadzor (Russia's State Insurance Control Body) from 19 May 1994.

confirmed that the percentage of complex family insurance contracts is very limited. Polices which cover personal liability insurance and include liability for torts of children are more popular but, still, the number in Russia cannot be compared with the number of similar contracts in any western country. Currently compulsory driver's liability insurance is being introduced in Russia. Thus, children who drive motorbikes and scooters shall be covered. Usually intentional torts are not covered.

b) Does the liability insurance cover extend to intentional torts committed by the child?

Samples of insurance contracts cover parental liability for all acts committed by their children under fourteen. However such children lack capacity and negligent or intentional acts are not qualified. Usually intentional acts may not be covered. Though having no legal obstacle to cover intentional acts of children with parental liability insurance, insurance companies do not introduce such policies. 36

13. a) Are the parents under a private law duty to take out a liability insurance for their child?

No such duty currently exists. 37

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

There are no special governmental programmes obliging parents to provide liability insurance for their children. Neither public schools nor other facilities require such insurance as an admission requirement. However it is not unlikely that some private childcare institutions (summer camps, etc.) will presently introduce and in the future public institutions will introduce such requirements. 38

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case they pay up a damage claim brought by the victim against the parents?

According to the general rule, damages are covered if they exceed the insurance coverage. 39

Insurance companies may enjoy rights of recourse against the child older than fourteen where they pay out on a damage claim brought by the victim against the parents. However existing sample insurance polices obtained by the author include only children under the age of fourteen who are not liable. The recourse right of insurance companies against children older than fourteen comes from the general recourse rule, established by art. 965 of the Civil Code. How- 40

ever, the article provides that the recourse rule may be abolished by the parties to the insurance contract.

b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

41 The law of social security does not provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian.

E. Scope of Liability/Damages

42 The victim of the child-tortfeasor in Russia may be compensated either through filing a civil suit[37] either as a civil action in a civil procedure[38] or as a civil action in a criminal procedure[39] or through receiving benefits of criminal courts orders if a criminal court orders a convicted juvenile to compensate the harm as a condition of conditional conviction (probation)[40] or if a juvenile is released from criminal punishment or liability with the imposition of *compulsory measures of educational influence* such as compensating the victim[41] or if agreement about compensation is achieved between the accused and the victim before the criminal trial and the court approves this agreement.[42] Changes in the social and political life of Russia influence both civil and criminal methods. So, compensation for moral harm (emotional distress) was introduced into Russian legislation and now is often sought against minors and their parents. Thus, in State v. H. (a minor), H. was accused of robbery and the victim was awarded compensation, for moral harm, to be paid by the juvenile.[43]

43 In criminal or administrative procedures, an accused child may be ordered by the court to pay compensation to the victim or work for the victim to make necessary reparations.

44 Russian criminal court compensational orders differ from simple compensation because the goal of the criminal court is mainly to punish the juvenile delinquent and not to compensate the victim. Compensation orders may not be imposed on persons other than the juvenile delinquent himself.[44] Civil law countries consider criminal or juvenile court compensation orders as special ju-

[37] Civil action is known as a common way of compensation as apposed to orders of criminal courts which are issued relatively rare.
[38] See gen. GPK RF (Code of Civil Procedure).
[39] See UPK RF (Code of Criminal Procedure of 2001), art. 44.
[40] See UK RF, art. 73, p. 5.
[41] See UK RF, art. 91, p. 3.
[42] See UK RF, art. 75, p. 1.
[43] Ivanovo Oblast Court. Unpublished Decisions of Cassation Court, 2001, case No. 1–261.
[44] See Criminal Code of the Russian Federation art. 91, no. 3 (William E. Butler (ed.), trans., Simmons & Hill Publishing Ltd., London 1997): "The duty to make amends for harm caused shall be imposed by taking into account the property status of the minor and whether he has respective labour skills."

venile justice rehabilitative measures,[45] while common law jurisdictions sometimes allow courts to impose compensation or restitution orders on parents of juvenile delinquents.[46] Compensation orders in Russia are rarely imposed on juveniles due to the lack of sufficient funds to create effective probation and mitigation systems.

45 According to the old Rules on Commissions on Juvenile Affairs, the regional commission for juveniles may order a juvenile who committed a misdemeanour or who has not attained the age of criminal responsibility to compensate the victim.[47] However this compensation depends on the juvenile's possession of property and labour skills. Any order of a commission to compensate the victim requires special control over the compensation and special controlling body, which simply does not exist in Russia nowadays.

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

46 Art. 1083 of the Civil Code provides that the court may diminish compensation having considered the financial situation of the tortfeasor with the exception of intentional harm infliction. See supra Liability in Equity, nos. 22 et seq.

47 Some Soviet law regulations survived the Civil Law reforms and still influence the sphere of compensation. Thus, the Supreme Court of Russia did not allow the municipal hospital, which had cured the victim of a minor's negligent behaviour, to recover the costs from the minor's parent.[48] The decision was based on several old Soviet law rules.

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off? If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

48 Civil procedure legislation (the Code of Civil Procedure) contains the list of personal property which may not be alienated in any case. It includes children's belongings, means of their education (such as musical instruments, desks, etc.), means for minimum housing and hosing supplies, etc.

[45] R. Ottenhof/J.-F. Renucci, France in: *International Handbook on Juvenile Justice* (1996), 119: "Mediation/compensation constitutes an important […] measure. The law of January 3, 1993, the new Article 12-1 of the Ordinance of February 2, 1945 created the possibility […] to order the minor to aid or compensate the victim or engage in any other type of public service work."

[46] See, e.g., AR ST § 9-27-330 7 (A) (West, 2001): "If a juvenile is found to be delinquent, the court may enter an order making any of the following dispositions based upon the best interest of the juvenile: […] order restitution to be paid by the juvenile, a parent, both parents, the guardian, or his custodian."

[47] See Poloshenie o Komissijah po Delam Nesovershennoletnikh (Rules on Commissions on Juvenile Affairs) (1986).

[48] See Biull. Verkh. Suda RF, 2000, no. 3., 13.

49 Bankruptcy law allows individuals to obtain a discharge of debts which they are unable to pay off. However, this rule is not applied to intentional acts and to tort liability for harm to life and health of the victims (artt. 24, 25 of the Civil Code).

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

50 Parents (or any other legal guardians appointed instead of parents) are liable for acts of children under fourteen years of age as personal liability is not imputed to such children.

51 However, for children who have attained their fourteenth year only an additional (subsidiary) liability of parents exist.

52 Parents are not strictly liable for the torts of their children.

53 For harm caused by a minor who has not attained fourteen years of age, his or her parents (adoptive parents or other responsible persons) shall be liable unless they prove that the harm arose not through their fault.[49] Parental liability in Russia resembles liability of parents in common law jurisdictions where parents may be held liable for their own fault in negligent control of the child,[50] entrustment of a dangerous instrument to him or her,[51] etc.

54 If a child is older than fourteen years of age parental liability may arise as well. As already mentioned, the common way of compensation is in getting a civil judgment against the juvenile and/or his parents in a criminal procedure. One can find several problematic issues here.

55 Russian legal practice adopted the doctrine established by the Soviet legal scholars that parents of a minor child under fourteen years of age are liable for the bad education of, and the lack of control (supervision) over, the minor.[52]

[49] GK RF, art. 1073.

[50] See, e.g., Bieker v. Owens, 234 Ark 102 (Ark 1961), The defendants, Carroll Owens and M.N. Griffin, knew that their sons, Milton and Bill, had dangerous tendencies and propensities of a wilful and malicious nature and that by their lack of parental discipline and authority they had permitted, or failed to correct, the acts of their sons in the striking, beating and abusing of other younger men less physically endowed than themselves and thus knowing of the propensities of these minors, the defendant parents failed and neglected to exercise needed restraint and authority over them and that due to such negligence the appellant alleges he was injured.

[51] See, e.g., McGinnis v. Kinkaid, 1 Ohio App 3d 49 Ohio App. 1981, Parent's acquiescence to possession of shotgun by 17-year-old son with record of delinquent behaviour could constitute negligence.

[52] See, e.g., N.M. Ershova, *Voprosi Semji v Grashdanskom Prave* (Family Matters in Civil Law) (1977), 150–151.

This is relatively unusual, as many European countries directly imposed only the duty of supervision on parents and guardians in their civil codes.[53]

Because of the existing presumption of fault on the part of parents[54] and their inability to prove the contrary in courts, such cases do not often come to trial (children under fourteen may not be prosecuted, thus civil law actions in criminal procedure are not applicable here). 56

Art. 1074 p. 2 of the Civil Code provides that if a minor between fourteen and eighteen years of age has no property or earnings sufficient to compensate harm caused by him, the harm in its respective part or in full must be compensated by his parents (or adoptive parents) or guardians unless it is proved that the harm arose not through their fault.[55] Appointed guardians and institutions in which the child was in custody are responsible under the same conditions as well.[56] Liability for acts of minors over fourteen years of age is an additional (subsidiary) liability. 57

In distinction to liability for acts of minors under fourteen years of age, the doctrine established that the fault of the said parties is mainly in the bad education of the child, because children over fourteen years of age do not require extensive control (supervision).[57] 58

Minors aged between fourteen and eighteen years of age are liable, on the general grounds, for harm caused.[58] Thus, the court must primarily impose liability on the minor himself. However, in spite of explanations of higher courts,[59] regional (town) courts[60] often impose the liability on parents instead. Thus, the Savino regional court in a criminal judgment from 22 December 1999, concerning a violation of art. 1074 of the Civil Code, obliged parents of the juvenile to pay compensation to the victim.[61] However, minors usually do not have sufficient funds to make compensation and in these cases parents can be found secondarily liable to the victim.[62] Sometimes courts violate this rule as well and impose liability on minors who are not able to make compensation.[63] The Supreme 59

[53] See, e.g., *Schweizer Zivilgesetzbuch* (Swiss Civil Code, ZGB) art. 333 (1), "The head of the family is liable for any damage caused by minors …, unless he can prove that he has given them the customary amount of supervision and the care required by circumstances of the case."

[54] See O.S. Ioffe/J.K. Tolstoi, *The New Civil Code of RSFSR 370* (1965).

[55] GK RF, art. 1074, p. 2 (1).

[56] See GK RF, art. 1074, p. 2 (2).

[57] See L.G. Kuznetcova/J.N. Shevchenko, *Grazhdansko-pravovoe Polozhenie Nesovershennoletnih* (Minors in Civil Law) (1968), 100.

[58] GK RF, art. 1074, no. 1.

[59] See O. Sudebnoj, *Praktice po Delam o Prestuplenijah Nesovershennoletnih 02.14.2000* (On Court Practice on Crimes of Juveniles) (2000), Biull. Verkh. Suda RF, no. 4.

[60] The primary civil and criminal courts in Russia.

[61] Ivanovo Oblast Court. Unpublished Decisions of Cassation Court, 2000, case no. 22–148.

[62] See GK RF, art. 1074, no. 2.

[63] Ivanovo Oblast Court. Unpublished Decisions of Cassation Court, 2000, case no. 22–274. Two juveniles were held jointly and severally liable for damages; however, none of them had resources for compensation. The judgment was reversed by the Cassation Court in this part.

Court obliged all lower courts to establish during the trial and before the sentence whether an accused minor has property sufficient for compensation.[64]

60 The liability of all parties ends when the minor reaches the age of majority, is emancipated or acquires property sufficient for compensation.[65] That is why this type of parental liability is an additional/subsidiary liability to that of a minor.[66] Thus, any possibility of payment by a minor himself eliminates this addition. But there is no recourse against minors over fourteen years of age when they reach adulthood or get sufficient property to compensate.

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

61 *De jure*, the parents may try to prove that the harm arose not through their fault. The absence of legislative provisions on such a proof[67] or any special guidelines explaining how to prove that the harm arose not through the fault of parents similar to guidelines existing in common law jurisdictions[68] makes the task hardly achievable. Probably in many circumstances "a parent may pay for damage caused by his child simply because he thinks it is the right thing to do".[69]

62 However, there were a few cases tried at the Supreme Court of Russia (formerly the Supreme Court of the RSFSR) where parents were not held liable for the torts of their minor children. Thus, in the case when a minor F. and S. were playing with some home-cleaning and disinfectant chemicals at the house of F's parents, and F asked his friend to mix some substances and S. was injured as a result of an explosion, F.'s parents were not held liable to S. The court found that F. was a disciplined and a well-educated boy, and there was no fault of his parents in what had happened.[70]

63 But nowadays Russian courts are unlikely to release parents from liability especially in such cases as *Horton v. Reaves*.[71] Minors under fourteen years of

[64] See O. Sudebnoj (supra fn. 59), no. 4.
[65] See GK RF, art. 1074
[66] See J. Bespalov, Prichinitel Vreda – Nesovershennoletnij (A Minor, Who Causes the Harm), [1996] *Rossijskaja Justizia*, no. 10.
[67] See, e.g., § 832 Nr. 1 BGB. The duty to make compensation does not arise if he fulfils his duty of supervision, or the damage would have occurred notwithstanding the exercise of proper supervision.
[68] See, e.g., 45 Am. Jur. Pof. 2d. *Parental Failure to Control Child* 549 (1986).
[69] E.R. Alexander, Tort Liability of Children and their Parents, in: *2 Studies in Canadian Family Law* (1972), 846, 845–846.
[70] See Biull. Verkh. Suda RSFSR, 1964, no. 7, p. 3.
[71] See Horton v. Reaves, 186 Colo 149, 154 (Colo. 1974). "Testimony indicates that Mrs. Horton (the defendant parent) exercised due care in watching over Johnny and Keit. Evidence that two children picked up the neighbor's baby and dropped it resulting in injuries to the baby did not present a jury question as to negligence of the mother of the two children, where the baby's mother testified that the two children had pushed another of her children off the bed and that their mother reprimanded them for this behavior indicating an exercise of due care on part of the children's mother."

age are presumed incapable,[72] and parents would be liable even if there was no fault in the minor's actions which led to harm. So, in the example above, a modern Russian court would be likely to find the parents liable for leaving children at home alone or for the entrustment of dangerous chemicals.

Equitable considerations will dictate to impose liability on the party which caused the harm. However the same consideration will probably preclude a court from awarding gross damages to a state or private plaintiff corporation when harm is caused by non-wilful acts of children of tender years in cases similar to *Mastland, Inc. v. Evans Furniture, Inc.*[73] 64

Thus, the liability of parents of minors under fourteen years of age is a liability with a rebuttable presumption of fault but according to existing practice parents rarely escape liability. The same may be said about children aged from fourteen to eighteen. 65

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody, c) persons just living together with the child?

To hold parents liable, it is not necessary to prove that a child actually lived with them. Only official custody is important. If a minor caused the harm while living at another place, the official custodians would still have to prove that harm arose not through their fault.[74] Thus, persons with whom a child actually resides but who are not the child's legal representatives (the situation with grandparents is a usual example) will not be responsible. 66

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

According to the Family Code of the Russian Federation, children of unmarried parents are not different from children of married parents as both parents have the same rights and responsibilities towards their children. In a case of separation or divorce, parents keep their rights unless a court deprives them of their parental rights. 67

If the parents of a minor tortfeasor are divorced or live out of wedlock, they are supposed to compensate in parts as well as other responsible persons. But to escape liability a divorced parent who does not reside with the child may prove that the other parent did not allow him to visit and educate their child or other facts eliminating or reducing his share of compensation. 68

[72] See GK RF, art. 28, no. 1.

[73] Mastland, Inc. v. Evans Furniture, Inc., 498 N.W. 2d. 682 (Iowa, 1993): Landlord brought a suit against tenants seeking to recover for damages to the home resulting from fire caused by a two-year-old child who was playing with a cigarette lighter in his crib.

[74] See Mastland, Inc. v. Evans Furniture, Inc. (supra fn. 73), artt. 1073, 1074.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

69 No. But there is a special rule, which allows holding a parent liable for harm inflicted by his or her child three years after the parent had been deprived by the court of the parental rights (custody).[75] The doctrine is that such a parent may still be responsible as it did not educate the child properly prior to their separation.

6. Which elements of a tort must the child have realized for the parents to be liable for it?

70 Children under fourteen years lack capacity which is why they do not have to realize any element of a tort in order to hold parents liable. Children aged fourteen and older are considered as capable as adults are and that is why they must realize all elements of a tort.

71 There are no court decisions or publications on the problem of whether parents (or other legal guardians) are liable if an incapable child under fourteen years uses his/her right to necessary defence in cases such as school bullying, etc. Generally if a child harms another child at school while using his right to defend himself/herself against an attack of a fellow student it is not a case for damages if a child is of age. But for a minor under fourteen the parents are automatically liable unless they prove the lack of fault and that may be complicated.

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

72 Parents are equally liable in shares for the harm inflicted by their children; spouses bear joint and several liability. Generally there is no legal connection between the duty to supervise and work of the parents. On the liability of working and non-working parents and parents of several children who inflicted harm together.

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

73 If a child is a minor under fourteen years of age, a responsibility of the parents for lack of appropriate education exists even when their child is out of their direct supervision (attend school) as although the institution supervising such a child is liable this does not exclude parental liability as there is no provision

[75] GK RF, art. 1075.

that parents are not liable in such situations and the institution may try to prove that the harm arose through the fault of the parent.

If a child is older than fourteen, institutions (unless they are legal representatives of the child) are not bound by law to be liable for torts committed by children and, thus, parents shall be liable even if the child is out of their direct supervision. 74

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

According to the law, legal representatives (guardians) of children are responsible for the supervision and education and on these grounds are liable for torts committed by the children. Hence, if a boarding school is the legal representative of the child, then parents will not be liable; otherwise, if a boarding school does not become the legal representative, parents must be liable. 75

10. What is the relation between the damage claim against the parents and the damage claim against the child?

Art. 1080 of the Civil Code provides that persons who have jointly caused harm shall be jointly and severally liability to the victim.[76] There are some special situations of joint liability of children tortfeasors, their parents and accomplices. 76

a) Responsibility of the parents of several minors who committed the offence in a group shall be in shares. In the State v. K., K., S. (minors) the court separated the total sum of compensation due to the victim of the three minors into three equal shares and ordered the parents of each minor to make compensation for their child.[77] 77

b) If a minor commits a crime in a group with an adult person, which type of compensation should be ordered? In the State v. S., S., and K (a minor) the court found both adults and minor defendants to be jointly and severally liable to the victim. However, the parents of the minor were ordered to compensate only one-third of the total sum of compensation.[78] In a similar case, the State v. M. and Tz. (a minor),[79] another regional court at the same city found the parents and an adult companion of their minor son to be jointly and severally liable to the victim. There are some explanations of the Supreme Court of Russia on this matter.[80] Thus, the Supreme Court found that if it is established that both parents and other custodians of a minor are liable for harm caused by 78

[76] GK RF, art. 1080, no. 1.
[77] Leninskij Regional Court of Ivanovo, 2000–2001. Case no. 1–81 (unpublished).
[78] Leninskij Regional Court of Ivanovo, 2000–2001. Case no. 1–936 (unpublished).
[79] Oktabrskij Regional Court of Ivanovo, 2000–2001. Case from 27 April 2000 (unpublished).
[80] Although explanations of the Supreme Court are not an official source of law in Russia, they are binding for lower courts all over the country.

the minor, they are responsible for compensating the victim in shares based on their degree of fault.[81] Hence, according to the present legislation and the Supreme Court's explanations the parents may not be held jointly and severally liable to the victim with any other persons.

79 Many courts hold that the parents of one minor should make compensation to the victim of his offence in shares.[82] However, this is not true. Russia's civil legislation can be distinguished from German or French civil legislation because Russia does not have a separate Commercial Code but traditionally enacts Family Codes. Thus, the liability of parents between themselves is regulated by rules incorporated into Russia's Family Code of 1995. Art. 45 of the Family Code obliges parents to pay compensation for harm inflicted by their minor children from their common property.[83]

80 If the common property is not enough to compensate victims, parents are jointly and severally liable to them with their personal property.[84] Civil law jurisdictions usually follow similar rules. Thus, in Germany, "if both parents are liable for loss they are liable as joint debtors";[85] in France, "mother and father to the extent that they exercise the right of custody, are jointly liable for damage caused by their minor children living with them".[86]

81 Russian family law allows the changing of the main regime of common property in wedlock by entering into a marriage contract.[87] The institute of a marriage contract is a new one in Russia and any practice of its application is only to be established in the future. One may find several possibilities as to how parents could regulate their parental liability in their marriage contracts:

82 They could establish special property shares derived from their personal property and include them in a common property of the spouses for compensation. It could improve the potential unfairness of legislation and the parent who, for example, works and supplies the family and cannot control minor children could insert a smaller share than the parent whose primary responsibility is to look after their children. At the same time, parents are not allowed to abolish the responsibility of one of them at all. Only the court can release one of the parents from liability if the parent is able to prove that the harm arose not through his or her fault.[88]

[81] See O Praktike Primenenija Sudami Materilanogo Usherba Prichinennogo Prestupleniem 03.23.1979 (On Court Practice on Compensation for Crimes) Biull. Verkh. Suda USSR, 1979, No. 4.; O. Sudebnoj (supra fn. 59), no. 7.
[82] Ivanovo Oblast Court. Unpublished Decisions of Cassation Court, 2000, case No. 22–246.
[83] See SK RF (Family Code), art. 45, pp. 2–3.
[84] See SK RF, art. 45, pp. 2–3.
[85] § 1664 no. 2 BGB.
[86] § 1384 (4) Code Napoleon.
[87] See SK RF (Family Code of Russia), art. 40.
[88] See GK RF, artt. 1073, 1074, no. 2 (1).

Marriage contracts may include other similar provisions. Parents may oblige themselves to create a bank account for their minor children, to insure against their liability or the liability of their children who attain fourteen years of age.[89] Insurance of parental or family liability is available in Russia but it is still very uncommon for parents to purchase such insurance. 83

11. Is there any possibility either for the child or the parents to have recourse against each other?

The responsibility of the said parties to compensate the victim of the minor under fourteen years of age does not end when the minor who caused the harm reaches majority or acquires property sufficient for the compensation.[90] Because minors under fourteen are incapable the parents and guardians are solely liable to the victim. The law treats them as if they caused the harm themselves. 84

There is no recourse against minors aged fourteen and older or when they reach adulthood and there is no recourse of children against parents. 85

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

Appointed guardians (orphanage homes, adoptive families, etc.) and curators of minors (persons and institutions acting as appointed legal representatives) are subject to a duty to supervise and are liable under the same rules as parents.[91] 86

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

If a child aged fourteen or older is an employee, a liability of the employer for the acts of employees in a course of business is applied. Children older than fourteen are personally liable and only legal representatives may be subsidiarily liable as described above. 87

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

Usually administrations of children's homes are appointed legal representatives and, thus, are responsible for the supervision. 88

[89] See GK RF, art. 931.
[90] See GK RF, art. 1073, no. 4 (1).
[91] GK RF, art. 1073, no. 2.

89 Other institutions contracted to control/educate a child under fourteen years of age within a period of time are liable for the harm caused by such a child within such time. No such institution's liability exists for facilities contracted to control/educate children older than fourteen years.

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

90 For children under fourteen years such a duty may be established. Such contracted persons will be liable under art. 1073 of the Civil Code on the same grounds as schools and other institutions. Such liability exists unless they prove lack of fault. Such contracts do not reduce the duty of the legal representative (parents, etc.) if it is proved that harm arose both through the fault of the representative as well.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

91 The Civil Code distinguishes between schools and those who contract to control and supervise the minor. The legislators decided that the said parties are liable only for the lack of control (supervision) over the minor under fourteen years. They "[…] shall be liable unless they prove that the harm arose not through their fault in the lack of control".[92] Private contractors may not reduce their duty of supervision (control) in a contract provision.

92 There are some potential problems which can arise in the future court proceedings. The idea that schools are not liable for bad education may seem inconsistent because each minor is supposed to spend much of his or her time at kindergarten/school and those facilities are responsible for the formation of children's characters and abilities as well.

93 The Civil Code does not provide that schools and persons contracted to control minors of fourteen years of age and older are responsible for the act of the latter. For example, if a minor older than fourteen years injures another minor during any school activity, such as a sport game or museum excursion, the public school might be held responsible under art. 1069 of the Civil Code, which imposes the liability for harm caused by intentional and negligent actions of the sate and municipal institutions.[93]

94 It is a matter of both public and private law.

[92] GK RF, art. 1073, no. 3.
[93] See GK RF, art. 1069.

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

According to the Civil Code, liability is imposed on schools/facilities as institutions and not on teachers/employees who actually control children. 95

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

According to the Labour Code schools (school districts) may have a right of recourse against their employees but to limited amounts. The rule is applied to all types of public and private institutions dealing with children under fourteen years. 96

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

The same rule as for public schools. 97

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

Teachers are held to supervise during curriculum school activities, breaks, and extra-curricular activities. Usually the rule also applies to cases where children are out of direct supervision and inflict harm on school grounds between lessons (unsupervised games, school cafeterias, etc.). 98

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

According to the general rule, social security benefits are not considered for purposes of tort liability (art. 1085 of the Civil Code). 99

There is no recourse of social security carriers against teachers or the state. 100

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

If a child is under fourteen years of age, then he/she may not be found liable and only the institution is liable as described above. If the child is aged fourteen or older and the institution is not his/her legal representative, then only the child is liable. 101

12. Is there any possibility either for the child or the teacher to have recourse against each other?

102 No. Because children and teachers may not be held liable at the same time.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

103 A few categories of defendants may be held liable at the same time. Both teachers and parents have a duty to supervise and this duty shifts with the child under fourteen years of age from the parents to the institution (kindergarten/school/club/camp) where he/she stays.

104 The victim may claim damages from all responsible persons if a child is under fourteen and inflicted harm while supervised at school, from both parents (legal representatives) and that school if the child is aged fourteen or older, and then from the child and the parents (legal representatives).

105 In the case of children under fourteen years of age, schools or other institutions may be held liable in shares together with parents or guardians if it is proved that the harm arose through the fault of both of them. Parents are at risk of being always liable because, in order to minimize their liability, schools can try to prove that the harm arose not through the bad supervision but through the bad parental education in any circumstance.

106 Parents and institutions, when they are liable together, are liable in shares and not as joint tortfeasors; thus, they do not have recourse against each other.

107 Sometimes school districts adopt rules making parents responsible for any property damage to school property inflicted by minors under fourteen. Such rules are inconsistent with current legislation, but parents are usually forced to compensate.

108 In cases of children aged fourteen and older only legal representatives and the children may be held liable.

Children as Tortfeasors under Spanish Law

Miquel Martín-Casals, Jordi Ribot and Josep Solé Feliu

I. Liability of the Child

A. *Liability for Wrongful Acts*

1. Is there a fixed minimum age for children to be liable?

Spanish tort law, unlike criminal law – see art. 19 *Código Penal* (Spanish Penal Code 1995, CP)[1] – has not established an age limit below which a person should be excluded from liability regardless of his or her actual mental capacities and abilities. 1

Moreover, being underage is not in itself a ground for exoneration.[2] The prevailing opinion stresses that the general clause of art. 1902 *Código Civil* (Spanish Civil Code, CC) does not contain any limit based on the age of the tortfeasor.[3] Mainly for economic reasons, however, plaintiffs usually only address their claims towards the parents or the legal guardians of children.[4] 2

[1] "Minors under eighteen shall not be liable according to this Code. When a minor commits a criminal act he or she shall be deemed liable according to the provisions of the Act concerning the criminal liability of the minor" ("Los menores de dieciocho años no serán responsables criminalmente con arreglo a este Código. Cuando un menor de dicha edad cometa un hecho delictivo podrá ser responsable con arreglo a lo dispuesto en la Ley que regule la responsabilidad penal del menor"). This Act is the *Organic Act on Criminal Liability of Minors* (Ley Orgánica 5/2000, de 12 de enero, *reguladora de la responsabilidad penal de los menores*, LORPM) (BOE no. 11, 12.1.2000), which came into force on 13 January 2001. Art. 1.1 LORPM provides that the Act is applicable to criminal and civil liability arising from crimes or misdemeanours of persons under 18 years of age but over 14 years of age.

[2] See nevertheless L. Díez-Picazo/A. Gullón, *Sistema de Derecho civil* vol. I (2001), 229, who deny that minors can be held liable in tort. L.F. Reglero in: *Tratado de Responsabilidad Civil* (2002), 192, contends that, although the Spanish Civil Code has no direct rules regarding tortious capacity of minors, incapacity results indirectly from the rules that subject certain persons to liability for the acts of persons with no tortious capacity such as children. Implicitly, in a similar sense, also M. Yzquierdo Tolsada, *Sistema de responsabilidad civil, contractual y extracontractual* (2001), 230–231. However, the prevailing legal opinion is that art. 1903.2 CC – which makes parents liable for the tortious acts of their children – has consequences for the parents, but leaves the issue of the underage liability unaffected.

[3] See E. Gómez Calle, *La responsabilidad civil de los padres* (1992), 27.

[4] E. Gómez Calle (supra fn. 3), 190.

Therefore, the Supreme Court has had few occasions on which to consider the issue of direct liability of minors.[5]

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?

3 Since a fixed minimum age for children to be liable does not exist (see supra nos. 1 and 2) any case of damage caused by a minor will have to be dealt with by first applying the rule that requires the tortfeasor – at least within fault liability – to have capacity to commit a culpable act.[6]

4 The capacity to commit a culpable act requires the tortfeasor to possess the general aptitude to understand and to want, which depends on him or her having enough maturity of judgement to understand what damaging others means,[7] assessed according to his or her intellectual conditions. Insofar as he or she has the tortious capacity so defined, the child may be held liable for his or her wrongful act.[8]

5 In the same way that, as pointed out, there are no *legal* rules establishing an age limit under which children cannot be considered capable of committing a culpable act, there is no legal age limit after which it can be presumed that a minor has tortious capacity.[9] Case law has also eschewed general declarations on this topic and has proceeded on a case-by-case basis.[10]

[5] In these cases the Supreme Court has usually held them liable together with their parents. See *Sentencia del Tribunal Supremo* (Supreme Court Decisions, STS) 24.5.1947 ([1947] *Repertorio de Jurisprudencia Aranzadi* (RJ), 631 and 631bis); 15.2.1975 (RJ 1975\566) and 10.4.1988 (RJ 1988\3116). See also STS 22.1.1991 (RJ 1991\304; commented by S. Díaz Alabart in *Poder Judicial* 1991, no. 23, 135–140); 22.9.1992 (RJ 1992\7014); 30.12.1992 (RJ 1992\5547) and 12.4.1994 ([1994] *Jurisprudencia Civil*, 334). See C. López Sánchez, *La Responsabilidad civil del menor* (2001), 260 et seq.

[6] M. Navarro Michel, *La responsabilidad civil de los padres por los hechos de sus hijos* (1998), 112.

[7] F. Pantaleón Prieto, Comentario a la sentencia de 10 de marzo de 1983, [1983] 2 *Cuadernos Cívitas de Jurisprudencia Civil* (CCJC), 452.

[8] M. Navarro Michel (supra fn. 6), 112; F. Rivero in: J.L. Lacruz et alii, *Elementos de Derecho Civil, II, Derecho de Obligaciones* (1999), 467; F. Pantaleón (supra fn. 7), 453.

[9] In the Spanish legal scholarship S. Díaz Alabart, Comentario a la sentencia de 15 de diciembre de 1994, [1994] 38 CCJC, 639, ventures to talk about the age of 10 years as a limit "under which one could consider that incapacity exists and if we move to an age above, for instance 12, it is clear that he has capacity". Nevertheless, clearly against this yardstick, STS 12.6.1997 (RJ 1997\5423) considers that a 12-year-old child has no capacity. More recently, C. López Sánchez (supra fn. 5), 169 et seq. seems to suggest the limit of 7 years. Nevertheless, the same author recognises that case law has not set up a specific threshold and that several decisions have considered that minors 10 or 12 years old have no tortious capacity.

[10] Among the decisions of the Supreme Court, it is possible to find judgments that consider that not only 4-year-old children (STS 8.11.1995 (RJ 1005\8636)) but also 8-year-old children (*Sentencias del Tribunal Supremo*, SSTS 17.9.1998 (RJ 1998\6544); 16.5.2000 (RJ 2000\3930)) cannot be held liable in tort for lack of tortious capacity. By contrast, courts usually consider that 14-year-old children have tortious capacity, as for instance the *Sentencia Audiencia Provincial* (Provincial Court decision, SAP) Madrid 11.2.2002 (JUR 2002\113980), which held that in the case at stake, the 14-year-old child "had enough discretion to know the results and effects that could arise from his act".

6 The only rule shared by legal doctrine and case law is that, in the same way that not all adults are *per se* capable of tortious acts in a legal sense, all minors must not necessarily be deemed incapable of committing a culpable act only because they are underage.[11] That is fully consistent with the opinion which sees the minor as a person with restricted capacity and not as an incompetent person.[12] Consequently, the prevailing legal opinion considers that a certain capacity must be presupposed in those minors that are close to the legal age, although no clear borderline is drawn and legal doctrine refers the solution of the problem to the circumstances of the case.[13]

7 Yet if the wrongful act of the minor amounts also to a crime or to a misdemeanour, *Ley Orgánica reguladora de la responsabilidad penal de los menores* (Organic Act on Criminal Liability of Minors, LORPM) provides that minors over 14 years of age are liable *in tort* for the damage caused[14] (art. 61.3 in connection with art. 1.1 LORPM). Some scholars have pointed out that the fact that LORPM deems minors over 14 years of age liable also indicates that the legislator presumes the tortious capacity of minors over 14 years, unless other concurring circumstances may exonerate the tortfeasor.[15] However, technically speaking, the Act does not establish any presumption and, although it is likely that at this age the minor has tortious capacity, the general rule, which establishes that the minor's tortious capacity must be analysed on a case-by-case basis, must be followed.[16] In fact, the threshold age set by this Penal Act is not the result of a presumption of discretion with regard to tortious capacity, in general, but the result of an option of criminal policy which gives priority to educative measures over retributory ones.[17] Therefore, and in line with the prevailing legal opinion, we consider that this age does not apply as a presumption of tortious capacity when the tortious act is not, at the same time, a crime or misdemeanour punishable by law[18] (see infra nos. 9–13).

[11] M. Navarro Michel (supra fn. 6), 112.

[12] C. López Sánchez (supra fn. 5), 167.

[13] S. Díaz Alabart, La responsabilidad por los actos ilícitos dañosos de los sometidos a la patria potestad o tutela, [1987] *Anuario de Derecho Civil* (ADC), 852–857; F. Pantaleón Prieto, Comentario a la sentencia de 22 de septiembre de 1984, [1984] 6 CCJC, 1779 et seq.; R. De Ángel Yágüez, *Tratado de responsabilidad* civil (1993), 347.

[14] Solidarily (i.e. jointly and severally) liable together with their parents, guardians, foster parents, legal carers and carers in fact.

[15] E. Gómez Calle in: *Tratado de Responsabilidad Civil* (2002), 407.

[16] See, in this sense, C. López Sánchez (supra fn. 5), 408.

[17] See, in this sense, C. López Sánchez (supra fn. 5), 394. For the opposite opinion, see E. Gómez Calle (supra fn. 15), 407.

[18] For a different opinion see E. Gomez Calle (supra fn. 3), who with regard to the old art. 19 CP stated that if minors shall be deemed liable for the purposes of Criminal Law (and now according to the provisions of LORPM), *a maiore* it should be considered that children over 14 years of age have tortious capacity for the purposes of civil actions unrelated to crimes or misdemeanours, pointing out that, as a matter of fact, the capacity to assess the wrongfulness of one's own conduct and its consequences (criminal capacity) purports the capacity to understand and to want which defines capacity in tort.

8 If minors are under 14 years of age, the provisions of the LORPM do not apply (cf. art. 3 LORPM). However, they may still be liable in tort according to the general tort law provisions.[19]

3. a) What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or the ability to adjust the behaviour according to this realization as well?

9 As a rule, in order to be liable in tort a child must be *imputable*, i.e. to have what has been called "capacity for civil fault". Civil imputability is understood with regard to minors in the same way as it is understood with regard to adults and does not depend on *capacidad de obrar* (*Handlungsfähigkeit,* capacity to act) of the minor.[20]

10 The Civil Law scholars have borrowed the concept of imputability from Penal Law, where it is based both on the capacity to understand the wrongfulness of the act *and* the ability to adjust ones conduct accordingly (see art. 20.1 and 2 CP).[21]

11 Therefore, legal writing considers that in the framework of tort law imputability includes an *intellectual* element, i.e. the capacity of discernment needed to understand the importance of one's own act and its consequences, and a *willpower* element, which encompasses the required maturity of determining one's own will in accordance with one's own understanding and to behave accordingly.[22]

b) Does the child have to realise the particular danger in the individual case (concrete danger), or is it sufficient that it understands that his action can in some way be dangerous (abstract danger)?

12 Imputability must be related to the capacity to foresee the consequences of one's conduct, and therefore the person causing the harm must pass the so-called "test of foreseeability". In general terms, there is fault not only when the person should have foreseen the damage ensuing from a certain activity, but also when, according to the rules of ordinary human experience, the per-

[19] See, in this sense, among others, E. Gómez Calle (supra fn. 15), 1061 and M. Yzquierdo Tolsada (supra fn. 2), 261.

[20] Instead of many see E. Gómez Calle (supra fn. 3), 189.

[21] See F. Peña López, *La culpabilidad en la responsabilidad civil extracontractual* (2002), 317 et seq.

[22] Instead of many see E. Gómez Calle (supra fn. 3), 24 and F. Peña López (supra fn. 21), 322. So, for instance, STS 8.3.2002 (RJ 2002\1912) dealing with the injuries caused by a 17-year-old boy who injured a girl seriously by thumping her with the ball while he was playing football in a park, considers that the boy had tortious capacity since, due to his personal circumstances (in fact his age) and other psychological factors, "both [the boy's] will power and intellectual capacity were sufficient for him to understand the consequences of his acts and the possible risks and results ensuing therefrom".

son should have foreseen the occurrence of a damaging result or event.[23] The person who lacks capacity to grasp this possibility must be deemed unimputable and it becomes unnecessary then to question further whether this person did or did not adjust his or her behaviour to what could be expected from a person with full capacity.

c) Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity to act reasonably of the individual child?

The capacity to act reasonably is measured with an objective standard referring to an ordinary child of the same age[24] and not by examining the capacity to act reasonably of the individual child. 13

4. Is the appreciation of whether the child has a capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

Neither legal scholarship nor case law relate the child's capacity to act reasonably, in anyway, or the standard of care required of children to the coverage of damages by way of a (family) liability insurance policy. 14

However, and only with regard to the so-called "objectivisation" of parent's fault, which case law has carried out with regard to the liability of parents for the acts of their children (see infra nos. 66–71), legal scholarship considers as one of its grounds the widespread take-up of multirisk home liability insurance (see infra nos. 34–40).[25] 15

5. What is the standard of care applicable to children?

The prevailing opinion stresses that "a child will be more negligent than an adult […] therefore his or her care must not be compared with the care required of an adult but with the care demanded of another person of his or her age".[26] Accordingly, a child will be able to avoid his or her liability if proof is given to the effect that he or she acted in accordance with the standard of care referring to a "good lad of his age" (*buen muchacho de su edad*). In other words, the child will only be considered liable if his or her conduct is negli- 16

[23] L.F. Reglero Campos (supra fn. 2), 191–192. Other scholars, trying to avoid the duality of concrete and abstract danger, point out that a halfway position must be adopted, in the sense that what must be foreseen is the "abstract type of damage". Accordingly, it is sufficient that the injured person belongs to the group of persons with regard to which it is foreseeable that damage may occur. See in this sense, L. Díez-Picazo, *Derecho de daños* (1999), 363.

[24] See in this sense, for instance, SAP Valencia 20.11.1995 (AC 1995\2056), which starts from the standard of the conduct of a 14 or 15-year-old child to hold the defendant liable for the damage caused when throwing a piece of dry mud into the eyes of a schoolmate.

[25] See C. López Sánchez (supra fn. 5), 265–266.

[26] See M. Navarro Michel (supra fn. 6), 113.

gent when compared with the standard of care that a minor normally of the same age and in similar circumstances of time and place would display.

17 The standard of care applicable to children is thus *objective*. It leaves aside *diligentia quam in suis*[27] but, as in the case of adults, is to be adapted to the single particular situation by taking into account the circumstances of persons, time and place in which the conduct took place.[28] This is consistent with art. 1104 CC, the relevant rule to establish the required care in negligence claims and which explicitly mentions the "circumstances of persons" among those that must be taken into account in setting the standard of care.[29]

6. Are children held to a higher standard of care if they engage in "adult activities"?

18 In the very few cases in which, in the practice of the courts, a minor is held liable in tort, he or she has been usually carrying out adult activities such as the use of firearms or driving of motor vehicles. Nevertheless, no mention is made of the eventual application of a standard of care which would be higher by comparison to the standard applying to ordinary activities.

19 It must be borne in mind that minors can also be held strictly liable (see infra nos. 30–33).

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

20 If the minor has tortious capacity (see supra nos. 1 et seq. and 3–8), he or she will be held liable according to art. 1902 CC or to the corresponding specific norm establishing liability. This is a direct and unlimited liability, which is different and independent from the liability of his or her parents (see infra nos. 66–108), or guardians (see infra nos. 109–120), or of his or her employer (see infra nos. 121 and 123), school or education centre (see infra nos. 132–136), or of any other persons who for one reason or another can be held liable by the victim. If the minor causing harm is unimputable, he will be exonerated from liability, independently of any possible liability of other persons.

21 The so-called liability in equity is unknown to Spanish Law, both in the case of the minor who is imputable but who had not been negligent according to the yardstick applicable on account of his or her age (see supra nos. 16 and 17) and for the inimputable minor (see supra nos. 1 seq. and 3–8).

[27] M. Yzquierdo Tolsada (supra fn. 2), 226; L.F. Reglero Campos (supra fn. 2), 187.
[28] See E. Gómez Calle (supra fn. 3), 184
[29] Instead of many, see L. Díez-Picazo/A. Gullón, *Sistema de derecho civil* vol. II (8th edn. 1999), 609; J. Santos Briz, *La responsabilidad civil* I (1991), 46; M. Yzquierdo (supra fn. 2), 226; L.F. Reglero Campos (supra fn. 2), 187–188; and, among many others, the decisions SSTS 24.12.1994 (RJ 1994\10384) and 8.5.1995 (RJ 1995\3626).

22 However, legal scholarship deals with this topic and whereas some scholars consider that *de lege ferenda* it would be convenient to be able to hold inimputable minors liable on the grounds of equity,[30] others set out that such a result can already be achieved with the existing regulation by an interpretation of art. 1902 CC according to fairness (*equidad)*. Since art. 3.2 CC provides that "fairness (*equidad*) shall be weighed up when applying norms", what the provision actually forbids is only that courts ground their decisions "exclusively" on fairness.[31] Therefore, it is contended that minors with no tortious capacity, as in the case of incompetent persons, for the mere fact that they are persons, are holders of rights and duties, and therefore, in spite of their lack of discern, their property can be subject to the obligation to compensate for the damage done which arises from tort liability.[32]

23 Nevertheless, this alleged tort liability based on the fair interpretation of the existing rules cannot find any explicit recognition in the provisions governing the liability of the parents for their children currently in force, not even in the rules of the tort liability of the parents for the acts of their children that also qualify as a crime or a misdemeanour, as could be the case under the old Penal Code 1973, which was the only set of norms in which liability on equity could find some legal support in Spanish law.[33]

24 Indeed, before the LORPM came into effect, a result, equivalent to liability in equity, could be reached by the application of the rule established in art. 20.1.II CP 1973 to all cases of harm caused by a minor with no tortious capacity, even if they were not related to a crime or a misdemeanour.[34] This provision explicitly held persons with no tortious capacity subsidiarily liable in tort for the damage resulting from a crime or a misdemeanour. Currently, art. 118.1st CP applies to incompetent adults[35] and art. 61.3 LORPM to minors over 14 years of age. LORPM has abrogated art. 20.1.II CP 1973 (DF 5ª.1 LORPM) and, therefore, there is no longer a legal provision permitting a victim who cannot obtain compensation from the parents to claim it from a minor with no tortious capacity, even if he or she is economically solvent.[36]

[30] M. Navarro Michel (supra fn. 6), 117.

[31] M. Yzquierdo (supra fn. 2), 230; C. López Sánchez (supra fn. 5), 174.

[32] In this sense, M. Yzquierdo (supra fn. 2), 230. Against this result, on different grounds, see C. López Beltrán de Heredia, *La responsabilidad civil de los padres por los hechos de sus hijos* (1988), 182; M. Navarro Michel (supra fn. 6), 115, fn. 283 and Pantaleón, [1984] 6 CCJC, 453.

[33] Instead of many see E. Gómez Calle (supra fn. 15), 1051.

[34] E. Gómez Calle (supra fn. 3), 207–212 and F. Pantaleón, [1983] 2 CCJC, 456.

[35] According to art. 118.1st CP, insane persons are directly liable in tort, and solidarily liable, together with the persons who have them in their custody, if these have been negligent. For more details, M.A. Parra Lucán, Comentario a la sentencia de 5 de marzo de 1997, [1997] 44 CCJC, 790 and V.L. Montés Penadés in: T.S. Vives Antón (Coord.), *Comentarios al Código Penal de 1995* vol. 1 (1996), 632.

[36] For a reasoning in detail, see E. Gómez Calle (supra fn. 15), 1051. Legal scholarship agrees that the legal regime applying to unimputable adults cannot be applied by analogy to children with no tortious capacity. See in this sense, M. Yzquierdo Tolsada (supra fn. 2), 230 and E. Gómez Calle (supra fn. 15), 1051. See also M.A. Parra Lucán, [1997] 44 CCJC, 787.

8. a) Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard?

25 Spanish law does not acknowledge, in any of these cases, the possibility of reducing or limiting the compensation award that the minor owes on the grounds of his minority. It does not acknowledge either a possible reduction of compensation which, being beyond his means, would impair his ability to meet his needs in the future (see infra nos. 57 and 58).

26 The only express mention of the possibility of reducing or limiting the compensation awards for damage caused by minors refers not to the children but to their parents, guardians, foster parents, legal carers or carers in fact, when children under their supervision have caused harm that also amounts to a crime or a misdemeanour. Pursuant to art. 61.3 *in fine* LORPM, "when they have not favoured the conduct of the minor with intent or gross negligence, *the judge will be able to moderate their liability according to the circumstances of the case*".[37]

27 Art. 1103 II CC provides that "liability arising from negligence is likewise required in the performance of all types of obligations, *but it may be moderated by the courts according to the circumstances of the case*".[38] The Spanish Supreme Court has admitted that the power that courts have in order to moderate damages awards pursuant to art. 1103 CC applies both to obligations stemming from contract and to obligations stemming from tort. However, neither legal writing nor case law use this provision with regard to damage caused by minors in order to reduce the compensation award taking into account either that the tortfeasor is a minor or that full compensation would impose too heavy a burden on the child.

[37] For a very critical position with regard to this power of moderation of the judge see, A. Vaquer Aloy, *La responsabilidad civil en la Ley Orgánica de responsabilidad penal de los menores: Una propuesta de interpretacion*, La Ley 2001, no. 5224, 4. SAP Valladolid 22.10.2002 (JUR 2002\284904) applies art. 61.3 LORPM when reducing the damages that a foster home had to pay for the damage caused by a child under its supervision by 30% on the grounds that the security forces acted promptly and that, in general, it is not convenient that security forces are present all the time in such educational centres. By contrast, the court rejects the reduction in SAP Jaén 10.1.2003 on the grounds that the parents breached their duties by allowing their child to leave the school and wander around unsupervised from a tender age.

[38] See F. Pantaleón, El sistema de responsabilidad contractual. (Materiales para un debate), [1992] ADC, 1019–1091, Short Introduction 1037-49 and also S. Díaz Alabart, Comentario del art. 1103 in: M. Albaladejo (ed.), *Comentarios al Código civil y Compilaciones forales*, T. XV-1 (1989), 537–539 and J. Solé Feliu, La concurrencia de culpa de la víctima en la jurisprudencia reciente del Tribunal Supremo, [1997] ADC, 865–902.

b) What are the factors of equity? i) Intensity of violation of legal duty (negligence, gross negligence, intention); ii) Wealth of child and victim; iii) The fact of the child carrying liability insurance. If answered in the affirmative: Is there a difference between compulsory and optional liability insurance?; iv) The fact of the victim being insured against the loss by a private insurance company or the social security system.

Liability in equity does not exist under Spanish law (see supra nos. 20–23). 28

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

Liability in equity does not exist under Spanish law (see supra nos. 20–23). 29

C. Strict Liability

10. a) Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability?

The Acts that establish strict liability regimes do not provide for any specific rules which aim at reducing or excluding the liability of minors. Accordingly, when liability is not based on the negligent conduct of the tortfeasor but on his or her relationship with the source of danger that gives rise to the particular case of strict liability, the minor will be held directly liable and he/she will have to bear the consequences with is or her own assets.[39] 30

b) In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

In contradistinction to other legal systems, Spanish law does not take the condition of *keeper* or *Halter* of the thing whose existence or operation caused the damage as the sole or main criterion that leads to the attribution of liability to a person. It uses a variety of criteria, such as ownership of the thing that caused the harm (as, for instance, in the case of harm caused by noxious fumes, art. 1908.2 CC or by trees that fall, art. 1908.3 CC), the possession of it (so, for instance, in the case of damage caused by animals, art. 1905 CC), the condition of "head of the family" (art. 1910 CC) or "operator" of an activity (for instance, in the case of damage caused by nuclear energy) or of the means of transport (for instance, in the case of air navigation), etc.[40] 31

The application of certain rules of strict liability to minors needs qualifying. Thus, for instance, the liability regime established by art. 1905 CC with regard to the liability for damage caused by animals is a strict liability regime. The 32

[39] Quoting art. 1905 and 1908.3 CC, see L. Díez-Picazo/A. Gullón (supra fn. 2), 243.

[40] See the different criteria currently in force in M. Martín-Casals/J. Ribot/J. Solé, Spain in: B.A. Koch/H. Koziol, *Unification of tort law: Strict Liability* (2002), 302–306.

person who is held liable is the *possessor* of the animal, even if he can show that he acted with all the required care in order to prevent the harm from happening.[41] Since this is a case of strict liability, tortious capacity of the tortfeasor is not a condition of liability.[42] However, since as a condition for attributing liability the legal provision links liability to possession of the animal and not its property, it must be established whether the minor had actual power over the thing (art. 443 CC). Moreover, in spite of the wording of art. 433 CC,[43] which could give the impression that every minor or incompetent person has the capacity to possess, the prevailing legal opinion considers that possession, in a legal sense, requires natural capacity of understanding and wanting.[44] If the minor lacks the natural capacity which is required to be able to possess, he cannot be considered as a "possessor" of the animal and, pursuant to art. 1905 CC, cannot be held liable for the damage that it has caused.[45] In all likelihood, liability, for one ground or another, will then lie on other persons such as the parents of the child or the brothers or sisters of the child who own the animal.[46]

33 Another example is the strict liability regime that the *Ley sobre Responsabilidad Civil y Seguro en la Circulación de Vehículos a Motor* (Road Traffic Act, LRCSCVM) establishes with regard to personal injuries and death resulting from traffic accidents. Pursuant to art. 1.1, the *driver* is strictly liable on the grounds of "the risk created by driving the vehicle" and no restriction or limitation is provided for cases in which the driver has been a minor. However, by definition, the notion of *driver* requires that the person who drives has some sort of natural capacity.[47] With regard to his or her eventual liability as *owner* of the vehicle, it must be borne in mind that leaving aside the specific rules that apply when the tortious acts amount also to a crime or to a misdemeanour

[41] In this case liability will cease only when the damage was caused by *force majeure* or by the victim.

[42] C. López Beltrán de Heredia (supra fn. 32), 154; E. Gómez Calle (supra fn. 3), 193.

[43] Art. 443 CC provides that "(M)inors and incapacitated persons may acquire the possession of things, but they need the assistance of their legal representatives in order to exercise the rights arising in their favour from posession".

[44] See, in this sense, A. Martín Pérez, Comentario del art. 443 in M. Albaladejo/S. Díaz Alabart (eds.), *Comentarios al Código Civil y Compilaciones Forales*, T. VI (1993), 243.

[45] C. López Sánchez (supra fn. 5), 291–300. See also A. Ramos Maestre, Responsabilidad civil por los daños causados por los animales: Consideracion particular de los sujetos responsables, [1997] *Revista de Derecho Privado* 81, 696–738 at 730.

[46] This leaves aside the fact that the parents or guardians can also be held liable for their children in respect of damage caused by animals under their children's control (which can also be important with regard to the insurance coverage, as in SAP Cádiz 7.2.2001 (JUR 2001\134836)).

[47] In fact, in the very few cases where the Supreme Court has held a defendant minor directly liable the cases involved driving motor vehicles and always minors over 16 years of age. See for instance STS 22.9.1992 (RJ 1992\7014) and 12.4.1994 [1994] *Jurisprudencia Civil*, 334. Cf. C. López Sánchez (supra fn. 5), 286 et seq. Actually, before the new Penal Code came in to force, a minor over 16 years of age could be convicted for crimes and misdemeanours related to traffic (see STS 22.1.1991 (Commented on by M. García-Ripoll Montijano in [1991] 25 CCJC, 219–236) and 7.2.1991 (RJ 1991\1151).

(cf. art. 120.5 CP),[48] the owner will be responsible only when he cannot prove that he acted with due care and, in this case, tortious capacity is a prior condition of fault (art. 1 subs. 5 LRCSCVM).[49]

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multirisk insurance policy, e.g. part of a household contents or occupier's liability insurance?

34 The risk of liability for the damage caused by minor children is normally included in the so-called *seguro multirriesgo del hogar* (home multirisk insurance). This is a wider coverage framework that encompasses, as the main object of coverage, the accidental damage caused to the dwelling or to its contents and the damage resulting from accidents suffered at home (first-party insurance), but which also aims at covering the damage caused by the persons living together as a family in the insured premises as regards their private activities (third-party or liability insurance). The policies usually cover the liability in tort on further grounds, such as tort liability of the tenant or liability for damage caused by animals belonging to family members.

35 As regards the coverage of damage caused by minor children, it must be stressed that normally the insured person in home multirisk policies is not the minor, but his or her parent or the parent who took out the insurance. Accordingly, what is covered is not the liability of the minor child, but the liability of the persons whom the law holds liable for the acts of the minor child. The usual wording laid down in the home multirisk insurance policies states that it covers "damage caused to third parties and stemming from acts or omissions of the insured or of those persons for whom he can be held liable, which have been carried out […] in his capacity as: (a) head of family *for the damage caused by his minor children and other minors placed under his custody*" […].

36 A striking exception can be found, however, in the *Sentencia Audiencia Provincial* (Provincial Court decision, SAP) Salamanca 22 July 2003,[50] which holds a grandparent and his insurance company liable for the damage caused to third parties by one of his grandsons who was spending his holidays with him. According to the decision "the responsibility for the care of the child was placed on the grandfather (who moreover underwrote an insurance contract to meet any possible damaging consequences), *something which excludes the li-*

[48] Pursuant to art. 120.5 CP, the owner of a vehicle will be held subsidiarily liable in tort for the crimes and misdemeanours committed by his employees, agents or authorised persons with the vehicle.

[49] See M. Martín-Casals/J. Ribot/J. Solé (supra fn. 40), case B-4, 318–319.

[50] JUR 2003\235228.

ability of the parents". In fact, this criterion is wrong, since according to Spanish law, grandparents are not held liable for the acts of their grandchildren, even if they live together with them (see infra nos. 73–78 and 112–120).

37 It must also be emphasized that some contractual terms explicitly lay down that coverage includes not only the tort liability of the holder of the policy, but also covers those cases in which "the members of the family are liable in tort within the scope of their private family life".[51] At other times the coverage of the tort liability of the minor child himself or other members of the family is carried out by extending the notion of "insured" contained in the policy.[52]

38 At any rate, the usual practice, in the cases of damage caused by minors, is to bring a claim against the adult persons or legal persons who are liable for the acts of the minors, and also against the insurance company that has issued the multirisk home insurance policy.[53] In all events, a cap applies and, besides the insured sum referring to the value of the building and its contents, the amount is set at a maximum of € 150,000 per victim[54] or € 300,000 per accident.[55]

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

39 Home multirisk insurance policies, either when dealing with accident insurance or when referring to liability insurance, do not include any terms making the amount paid out in premiums dependant on the sex, number of children or their eventual criminal record. Neither do they include deductibles or any other possible restrictions or limitations, such as the right to termination, which are connected in one form or another with the subjective characteristics of the children.

[51] Standard Terms of *AXA Aurora Ibérica*.

[52] In this sense, some policies, after stating that they cover "compensation in money to which the insured may be held liable with regard to third parties pursuant to artt. 1902–1910 of the Civil Code", specify that "for the purposes of this guarantee, the consideration of who is to be insured is extended to the non-separated legal or de facto spouse, to minor children of both, to underage persons under their custody and also to their of age children or other relatives who live together with the insured, depend economically on him or her and have no other legal domicile" (cf. Standard Terms of *Euromutua Hogar* (art. 18)).

[53] See, for instance, SAP Murcia 2.2.2002 (JUR 2002\75463) (in a fall caused by juice that had been spilled on the stairs by a minor, the parents of the child and their multirisk insurer must pay compensation).

[54] So for instance standard terms of *Seguro Multirriesgo Vitalicio Hogar Top*, 14 or *Euromutua Hogar*, 45.

[55] Standard Terms of *AXA Casa Tradicional Hogar Seguro*, 16.

Surcharges or bonuses provided by some policies have general character and apply to the entire insurance policy, i.e. both to third-party and to first-party insurance.[56] 40

12. a) How many per cent of families are covered by one or other form of family liability insurance?

Underwriting home multirisk insurance, which, as explained, includes, among other coverage, coverage for damage caused by underage children, is quite an extended practice in Spain. According to the information published in the Spanish Journal "Consumer" in February 2003, at the end of 2002, 12 million "home multirisk insurance" policies were underwritten in Spain. That means three out of every four households are insured.[57] 41

The main reason for the great success of this type of insurance is that banks and other credit institutions require their customers to subscribe to first-party insurance if they want to take out a mortgage for purchasing or renovating a house or a flat. However, for commercial reasons, insurance companies (which usually depend on banks and savings banks or have close ties with them) do not offer this coverage but home multirisk insurance policies instead, which include it. 42

The premium paid for multirisk home insurance came to an amount of around 1,350 million euros in 2002.[58] The average premium for every policy ranges from € 100 to € 160. 43

b) Does the liability insurance cover extend to intentional torts committed by the child?

Coverage includes the damage caused by the minors with intent[59] and even damage that also amounts to a crime or a misdemeanour,[60] as long as this dam- 44

[56] Thus, for instance, the policy of *Axa Aurora Ibérica* provides for the loss of any discount granted or, additionally, a surcharge of 10% "if over the twenty one months prior to the issue of the receipt (the insured) had made three claims corresponding to the net premium of the receipt". Conversely, the policy "Multirriesgo Estrella Hogar" from *Seguros La Estrella*, offers a "no claim bonus" when no claims have been brought under the policy for over two years. This system applies a bonus of 10% on the premium corresponding to the third year with no claims, a bonus of 15% on the premium of the fourth year and, from the fourth year of no claim onwards, a bonus of 20%.

[57] Available at http://revista.consumer.es/web/es/20030201/pdf/informe.pdf (date: 24.2.2004). According to the 2001 census, for a population of 40,847,371 inhabitants the total number of first homes was 14,270,656. Second homes numbered 3,323,127. Source: Instituto Nacional de Estadística. Censo 2001 (http://www.ine.es (Date: 8.7.2003)).

[58] Source: http://www.inese.es/serviseguros/idaram29.htm (Date: 8.7.2003).

[59] See for instance, SAP Teruel 29.5.2001 (JUR 2001\201323) (the insurance company must cover the harm resulting from an attack of the defendants' child on the claimant, since "it is true that, when dealing with liability in tort and the direct liability of the insured, the policy refers to damage caused by accident, excluding thereby damage caused by intent. However, in the following section, when dealing with family liability for the acts of the others, it does not require any longer that the damage has been caused by accident"). See also SAP Toledo 3.3.1999 (AC 1999\4247).

age entails a detriment to third parties. With regard to the right of recourse of private insurance carriers against the child in these sorts of cases see infra nos. 48–54.

45 The insurance contract can exclude damage caused with intent by the children of the policyholder.[61] For this to be possible, however, it must be expressly established in a clause which meets the conditions required by art. 3 *Ley de Contrato de Seguro* (Insurance Contract Act, LCS)[62] for terms limiting the rights of the insured.[63] In other words, this particular clause must be highlighted "in a special way" and "specifically accepted in writing". If these conditions have been met, the insurance company will have to pay compensation to the victim who brings the so-called *acción directa* (third-party direct claim) provided by art. 76 LCS against the company, but will be entitled to recoup the amount paid from the insured.

13. a) Are the parents under a private law duty to take out liability insurance for their child?

46 No.

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of the admission of children to public schools to establish that they are covered?

47 No.

[60] Pursuant to art. 63 LORPM "(T)he insurers who have taken on the risk of the payment of damages awards resulting from the acts of minors dealt with in this Act, will be directly liable up to the limit of the compensation sum awarded or agreed on by the parts, without any prejudice of their right of recourse to the person concerned".

[61] Some policies expressly exclude coverage of tort liability with regard to "damage caused with intent by the insured or *by any of the other persons for whom he may be held liable*, except if he proves that the damage has been caused in order to avoid a greater harm" (Euromutua, art. 18.4). Other policies include a general exclusion clause for all the risks covered by the multirisk insurance policy (i.e. both *first-party* and *third-party* insured risks). See *Axa Aurora Ibérica*, in the section referring to "Risks Excluded in General Terms", 22, where it is provided that "all accidents which have been intentionally caused by (the insured) or by the members of his or her family" are excluded.

[62] Ley 50/1980, de 8 de octubre, *del contrato de seguro*.

[63] Since this is considered an exception to the general rule according to which the damage caused with intent *by the insured* is the only one that is excluded from insurance coverage, and the damage caused by another person for whom he may be held liable is not. In this sense, F. Sánchez Calero, Comentario del art. 19 in F. Sánchez Calero (ed.), *Comentario a la Ley del Contrato de Seguro* (2nd edn. 2001), 335.

14. a) Do private insurance carriers enjoy rights of recourse as against the child in case where they pay out for a damage claim brought by the victim against the parents?

As a general rule of the so-called "seguros de daños" (*insurance for damage*) – which in the LCS includes both accident insurance (*first-party*) and liability insurance (*third-party*) – "once the insurer has paid compensation, he will be entitled to exercise the rights and actions that the insured person has as a result of the accident, against all those persons who are responsible for it, up to the amount that he has paid as compensation" (art. 43 I LCS). 48

However, according to art. 43 III LCS: 49

> The insurer will not be entitled to subrogation either against any person whose acts or omissions give rise to the insured's liability, according to the law, or against the person causing the accident who, with regard to the insured, is a relative in direct line or a collateral within the third civil grade of consanguinity, adoptive parent or adopted child who live together with the insured person. However, this norm shall not have effect if liability results from an act committed with intent or if it is covered by an insurance contract. In this last case, subrogation will be limited in its scope according to the terms of this insurance contract.

Therefore: 50

i) Accident insurance (first party)

Once the victim has obtained compensation from the insurance company, the insurer will be able to recoup the amount paid from the person who caused the damage (or from his or her parents or guardians).[64] Nevertheless, if the victim and the tortfeasor are relatives in direct or collateral line within the third civil grade of consanguinity or if they are adoptive parent and adopted child, the right of subrogation of the insurer is legally excluded. The legislator assumes thus that if the person causing the harm could be held liable, in practice the relationship of kinship existing between the parties would exclude this possibility and, therefore, it has also opted for excluding the possibility of the insurer subrogating the obligation of the insured person.[65] However, a legal condition for this exclusion to take place is that the insured person and the tortfeasor live together, a requisite that has been sharply criticised by legal writing.[66] 51

[64] However, as an exception to the general rule, art. 82 LCS provides that "in insurance of persons, the insurer cannot subrogate, even after having paid compensation, the actions that the insured may have against third parties as a result of the accident. Exception is to be made for medical expenses".

[65] F. Sánchez Calero, Comentario del art. 43 in: F. Sánchez Calero (ed.), *Comentario a la Ley del Contrato de Seguro* (2nd edn. 2001), 727. Some scholars also justify this rule in the fact that the collection of the credit against the person causing the harm could have negative repercussions, as a whole, on the household community to which the insured belongs. Cf. A. Tato Plaza, *La subrogación del asegurador en la Ley del contrato de seguro* (2002), 188.

[66] A. Tato Plaza (supra fn. 65), 195.

ii) Liability insurance (third party)

52 When liability of the insured person results from acts of other persons for whom he or she is responsible, art. 43 III LCS works on the principle that the insurer has no right of subrogation against any of those persons "whose acts or omissions give rise to the insured's liability, according to the law", a wording which includes all the cases of liability for the acts of others provided by art. 1903 and, included in that, the case of liability for the acts of minor children. As a result, the right of recoupment that the insured person may have against the tortfeasor is not transferred to the liability insurer.[67]

53 As an exception that will be applicable both to first-party and to third-party insurance contracts, the insurer will be entitled to subrogation "if liability results from an act committed with intent".[68] Therefore, in this case the insurance company which has paid the corresponding compensation will be entitled to subrogate the rights of the insured person against the person who caused with intent the damage that has already been compensated by the insurance company. In other words, the insurance company will be entitled to recoup against the child who, with intent, caused the damage that the company has compensated on the grounds of the insurance contract existing between the insurance company and the parents of the minor.

54 Nevertheless, if the insurance contract expressly excluded the coverage of the damage caused with intent by minor children, there will be no subrogation of the rights of the insured but the recoupment of what the insurer has paid to the victim. In this case, however, the claim for recoupment is not addressed against the minor child but against the other party in the insurance contract. i.e. the policyholder (see supra nos. 44 and 45).

b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

55 As a rule, in Spanish law, social security allowances and services, social benefits and other schemes of compensation do not replace tort liability.[69] Moreover, the prevalent opinion of courts and of legal scholarship is that the tort

[67] F. Sánchez Calero (supra fn. 65), 726.

[68] Subrogation is also available "if it is covered by an insurance contract". This exception has been explained as being a preference to the first-party insurer over the third-party insurer, in spite of the fact that, usually, the insured party would not have brought this action against the tortfeasor. See F. Sánchez Calero (supra fn. 65), 728.

[69] Art. 127.3 I *Real Decreto Legislativo 1/1994, de 20 de junio, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social* (Social Security Act, LGSS) (BOE no. 154, 29.6.1994) provides that when the "allowance has been originated by cases that involve someone's criminal or tort liability, including the employer, the allowance will be paid, if all the requirements are met … *regardless of these responsibilities*". Additionally, it provides that "(I)n these cases, the worker or his or her dependants will be able to claim the corresponding compensation from the persons who are allegedly responsible for the crime or for the tort".

claim of the victim and the social benefits awarded to him or her are compatible and do not exclude each other.[70]

With regard to a possible recourse against the tortfeasor or his parents, two norms must be taken into account. One of them is general in scope and establishes that whenever there is a third person who has the duty to pay "the public bodies that have provided services to the users will have the right to claim the cost of the services that they have provided *from the third person who is responsible*" (art. 83 *Ley General de Sanidad* (General Health Act, LGS)[71]). The other norm refers specifically to the person who is liable in tort for the personal injuries that have given rise to the service provided by the Social Security or any of the entities that cooperate with it, and establishes that the Social Security and these cooperating entities will be "entitled to claim from the person liable in tort or, possibly, from the person who legally or contractually is subrogated in his or her obligations, *the cost of the health services that they have provided*" (art. 127.3 *Ley General de la Seguridad Social* (Social Security Act, LGSS)). The courts have expressly specified that Social Security can recoup from the tortfeasor medical expenses only, but not other benefits and allowances (for instance, allowances for temporary disability or allowances for personal injuries and death).[72] 56

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

There is no such limitation in the cases of tort liability of children.[73] 57

However, the old art. 20 CP 1973, which admitted the eventual subsidiary tort liability of children with no tortious capacity when they had no parents, guardians or other persons who could be held liable for their acts or when these persons were insolvent or had been proven to be acting with due care (see supra nos. 20–23), established a limitation in these cases. Pursuant to art. 20 CP, the liability of children who lacked tortious capacity could be claimed only "within the limits provided by the Civil and Criminal Proceedings Acts for the seizure of assets", the wording of which was understood in the sense that the minor was responsible in respect of the assets existing when the damage occurred but not in respect of those he might acquire in the future.[74] The new LORPM has repealed this provision and, therefore, also this specific limitation. 58

[70] See STS 27.11.1993 (RJ 1993\9143) and 13.7.1998 (RJ 1998\5122). See also STS 3ª, 4.2.1999 (RJ 1999/1614).
[71] Ley 14/1986, de 25 de abril, *General de Sanidad* (BOE no. 102, 29.4.1986).
[72] See SAP Asturias 29.9.1999 (AC 1999\1975), Palencia 31.12.1999 (AC 1999\2606) and Vizcaya 26.6.2000 (AC 2000\4692).
[73] See also supra nos. 25 et seq.
[74] See the references compiled in E. Gómez Calle (supra fn. 3), 204–206.

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

59 No. In practice, tort liability for the damage caused by minors is channelled through the liability of their parents or other persons who have the duty to supervise them and this has prevented situations of hardship for minors from occurring. In the vast majority of claims, children are left out of the claim and, even in those cases in which the claim is addressed against the child, the parents are also sued (see infra nos. 102–103). Although parents are held solidarily liable for the damage caused by their children, we do not know of any case in which the parents have tried to recoup (totally or partially) the compensation that they have paid from the child (see infra nos. 104–108).

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

60 Art. 1911 CC sets forth that a "debtor is liable for the performance of his obligations with all his present and future assets". There is no specific rule either for obligations arising from tort or for those cases in which the debtor is a minor.

61 With regard to the enforcement of compensatory awards, the courts will apply the limits provided by artt. 605 and 606 LEC, that establish on which assets debts cannot be enforced and which apply regardless of whether the debtor is a minor or not.

62 With regard to the possibility of discharge of those debts that the debtor cannot pay, art. 1912 CC provides that a debtor may request of the court a reduction in the amount or an extension of time for the payment of his debts, or both from his creditors (the so-called *beneficio de quita y espera*), as long as he has not failed to pay his current obligations (art. 1913 CC and art. 1130 I Civil Procedure Act (LEC) 1881). In order to obtain this benefit the debtor must file a petition in accordance with the proceedings established by artt. 1130–1155 LEC 1881, which the new LEC does not repeal. The resulting agreement shall be binding on all those creditors who, having been cited and notified in due form, did not object to it (art. 1917 CC).[75] The agreement is approved by a qualified majority and can be challenged by those creditors who had disagreed to it and those who had been duly cited but who had not attended the meeting, but only for one of the grounds expressly provided by art. 1149 LEC 1881.[76]

[75] L. Díez-Picazo/A. Gullón (supra fn. 29), 220. The proposal of reduction or remission made by the debtor must be approved in a meeting of all the creditors called specifically for this aim. The required attendance at this meeting is a number of creditors representing at least three-fifths of the liabilities (cf. art. 1138 LEC) and the decision must be taken by at least a majority of two-thirds of the votes representing at least three-fifths of the liabilities (cf. art. 1139.6 LEC 1881).

[76] Such as formal defect, lack of capacity of the persons attending votation, collusion of one of the creditors with the debtor or fradulent overrating of the credits in order to obtain majority. See also art. 903 Commercial Code.

Once bankruptcy proceedings have started, it is also possible that the debtor, through interlocutory proceedings and substantially under the same conditions and with the same effects (cf. artt. 1312–1313 LEC 1881),[77] enters an agreement with the creditors in order to reduce the amount or extend the time for payment of his debts (cf. art. 1303 LEC 1881 and 898 CCom). 63

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating the consequences of intentional acts?

When the debtor enters an agreement with his creditors in order to reduce the debts or to extend the time allowed for their payment and the agreement is judicially approved (see supra nos. 60–63), the origin of one debt is irrelevant as long as it does not give rise to a privileged credit. If the credit is privileged, the judicially approved agreement cannot be used as a defence against the creditor who has not given his consent to the agreement.[78] 64

Currently, credits stemming from tort liability are still ordinary credits or with no specific privilege (cf. art. 1924 CC). After the entrance into force of the new *Ley Concursal* (Bankruptcy Act, LC) on the 1 September 2004,[79] these sort of credits benefit from the so-called *privilegio general* or privilege on the whole property of the debtor (cf. artt. 89 and 91.5 LC) and, therefore, the creditors entitled to a compensation award are able to avoid the compulsory application of the judicial agreement reducing or putting off the debts of the bankrupted tortfeasor. 65

II. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

A distinction must be drawn between the behaviour of the child that also qualifies as a crime or a misdemeanour (infra no. 66 a)) and other harmful acts of the children (infra no. 66 b)). In the first case, parents are strictly liable (art. 61.3 LORPM), whereas in the second they are liable unless they can prove to have acted with all due care to avoid the harm caused by the child.[80] 66

[77] If the debtor is a merchant, see also art. 1389–1396 LEC 1881, art. 898-97 Commercial Code and art. 1147–1167 Commercial Code from 1829.

[78] Currently, as long as the debtors have made use of their right of abstention (cf. art. 1140 LEC 1881). In the new Bankruptcy Act, only if they have voted in favour of the proposal or have formally given their support to it (cf. art. 134.2 Bankruptcy Act).

[79] Ley 22/2003, de 9 de julio, *Concursal* (BOE no. 164,10.7.2003).

[80] Legal writing has severely criticized this dual model, which nonetheless to some extent develops the dual system currently in force in Spanish tort law. Regarding liability of the parents, it seems completely unreasonable to link criminal liability of the child with a strict liability regime, since more maturity of judgement in fact means that the parents have less means to control the conduct of their children. See E. Gómez Calle (supra fn. 15), 1071.

a) When the tortious behaviour of the child qualifies as a crime or a misdemeanour, art. 61.3 LORPM provides for joint and several liability of the parents with the child[81] who is younger than 18 years of age and older than 14 years of age.[82] According to legal doctrine, this is a case of strict and direct liability, since acting with fault is not a condition of liability.[83] Therefore, this is one of the very few instances in which true vicarious liability is expressly stated in Spanish law, even if the compensation due from the parent can be moderated by the judge when no *intent* or *gross negligence* can be attributed to the parents (art. 61.3 in fine LORPM) (see supra nos. 24–28).[84]

b) When the tortious acts of the minor do not qualify as a crime or a misdemeanour, liability of parents is governed by art. 1903 II CC, which provides that "(p)arents are responsible for the damage caused by their children who are under their guard".

67 All instances of the so-called liability *for the acts of others* of art. 1903 CC rely on the same pattern of liability, i.e. personal liability for one's own negligent act or omission in relation to the conduct of another person, with a rebuttable presumption of fault.[85] In the case of the parents, liability is based on a presumption of *culpa in vigilando* or *in educando*.[86] Thus if the child caused

[81] Art. 61.3 LORPM: "(W)hen the person responsible for the acts is a child under 18 years of age, his parents, guardians, foster parents, legal carers or carers in fact, in this order, shall be held solidarily liable with him for the damage caused. If these persons have not promoted the conduct of the minor with intent or with gross negligence, the judge may adjust their liability according to the circumstances of the case."

[82] Since art. 3 LORPM provides that the minor under 14 years of age "will not be held liable under the provisions of this Act".

[83] See S. Durany Pich, Las reglas de responsabilidad civil en el nuevo derecho penal de menores, [2000] 10 *InDret*, 1 et seq. and E. Gómez Calle (supra fn. 15), 1062 and more details there. Other scholars prefer to describe tort liability pursuant to art. 61.3 LORPM as *sui generis* (see J. Carrera Doménech, Minoría de edad y responsabilidad civil: de la culpa in vigilando a los criterios objetivos. Estudio del artículo 61.3 de la Ley Orgánica 5/2000, de 12 de enero, [2002] 16 *Sentencias de Tribunales Superiores de Justicia y Audiencias Provinciales y otros Tribunales* (STJyAP), 1–7 at 2–3).

[84] In these cases, as long as the minor is convicted in the criminal proceedings, the Juvenile Courts deal with the liability issue, in a separate piece of the criminal proceedings, and apply the tort law provisions included in this Act and in the Penal Code. However, if the minor is acquitted or, for any other reason, is not held criminally liable, the victim will have to bring a civil claim in accordance with the Civil Code and the Civil Proceedings Act if he wants redress for the damage suffered (see SAP León 13.6.2002 (JUR 2002\211355)). This is also the case if the victim, within the framework of the criminal proceedings, has saved the civil action in order to bring it to an eventual civil proceeding, something which is allowed by the rules governing criminal proceedings (cf. Art. 111 *Ley de Enjuiciamiento Criminal* (Law of Criminal Procedure, LECr) and by art. 64.10 LORPM).

[85] In this sense, among many others, L. Díez-Picazo/A. Gullón (supra fn. 29), 554; C.I. Asúa González in: L. Puig Ferriol et alii, *Manual de Derecho Civil*, Vol. II (3rd edn. 2000), 498; R. De Ángel (supra fn. 13), 326; F. Pantaleón, Culpa in: *Enciclopedia Jurídica Básica* (1995), 5955. Art. 1903 VI CC provides that "The liability referred to in this Article shall cease when the persons mentioned in it prove that they employed all care of a reasonable person to prevent the damage".

[86] Even if this latter ground is considered discredited and thus not applied in practice.

the damage it is presumed that it was caused because his or her parent did not supervise him or her with the attention that was required and, therefore, the parent is to be held liable unless he or she can show that he or she acted with due care.[87]

68 However, in practice this system of fault liability with reversal of the burden of proof is watered down to a great extent, since courts render it impossible to escape liability by proving the diligence of the parents who are held liable for the acts of their children.[88] When assessing the parent's liability, case law does not usually take into account circumstances such as the age of the minor, the activity that he or she was carrying out when the harm was caused, the personal circumstances of the parents (such as their job or number of children) or their attitude with regard to the child who caused the damage. Thus, the practical impossibility of rebutting the burden of proof provided by art. 1903 CC makes the parents liable in cases where they could have hardly have fulfilled their duty of supervision, either because there were important reasons that justified that they were not present when the act that caused the damage was performed or because it was clearly unavoidable.[89]

69 So, for instance, Spanish courts have held parents liable for the acts of their children even after proving that they had to leave them alone to go to work,[90] or that there were serious family or social circumstances that prevented them from being present when the child committed the wrongful act,[91] or that they had forbidden their child to do something that was what finally caused the damage, as for instance smoking or driving without a driving licence,[92] or that they had taken very reasonable precautions, such as having hidden the magazine of a handgun that was kept in the glove compartment of the car in the spare wheel, where the child found it and took it secretly away.[93] By way of example, in Supreme Court Decision, STS 13.10.1998[94] it was held that the fact that their 14-year-old children had taken pictures of another minor in the shower and had posted them on a notice board located in the main square of the village was an "obvious case of *culpa in vigilando*" of the parents.

[87] Given the likely insolvency of children, the need to secure compensation for the victim is also mentioned as a basis of parents' liability. Instead of many, R. De Ángel, Comentario del Art. 1903 in: C. Paz-Ares/L. Díez-Picazo/R. Bercovitz/P. Salvador (eds.), *Comentario del Código Civil* vol. II (1991), 2005.

[88] E. Gómez Calle (supra fn. 15), 1035; see also M. Yzquierdo (supra fn. 2), 255 and C. López Sánchez (supra fn. 5), 263.

[89] See F. Rivero (supra fn. 8), 525 and, criticising this result, F. Pantaleón, Comentario a la sentencia de 22 de septiembre de 1984, [1984] 6 CCJC, 1990.

[90] STS 29.12.1962 (RJ 1962\5141) and 7.1.1992 (RJ 1992\149).

[91] STS 7.1.1992 (RJ 1992\149).

[92] See STS 14.4.1977 (RJ 1977\1654) for a case where the father had forbidden his son to smoke, and the son, breaching this prohibition, smoked and threw a cigarette butt to the floor and caused a fire. Or STS 4.5.1983 (RJ 1983\2623), where the parents had forbidden their 17-year-old son, with no driving licence, to drive the van which caused the accident. Or STS 22.9.1992 (RJ 1992\7014), where the father had even hidden the keys of the vehicle.

[93] STS 24.5.1996 (RJ 1996\3915).

[94] RJ 1998\8068.

70 According to this practice, it can be stated without hesitation that this is not just a case of presumption of liability. In spite of the wording of the Code, in practice parents are held liable even without fault, i.e., strictly liable[95] or at least, when applying art. 1903 II CC, the courts act as if liability of the parents was strict[96] and an ever-increasing number of decisions even refer to "risk" as the ground for liability of the parents in art. 1903 CC.[97]

71 In spite of the fact that the Spanish Supreme Court has applied art. 1903 II CC to parents of children between 15 and 17 years of age, and even to older teenagers who were just about to reach 18 years of age,[98] legal scholarship considers that the age of the child and his capacity of discernment should be taken into account in order to tone down or even to exclude the liability of the parents.[99]

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

72 Liability of parents is deemed to be a personal liability based on their own fault even if related to the behaviour of their offspring. The burden of proof of this fault does not rest upon the victim since a statutory rebuttable presumption of fault applies (see art. 1903 VI CC). However, as already stated (supra nos. 66–71), in practice courts render it impossible to escape liability by proving the diligence of the parents who are regularly held liable for the acts of their children.

[95] M. Yzquierdo (supra fn. 2), 256 and C. López Sánchez (supra fn. 5), 263.

[96] E. Gómez Calle (supra fn. 15), 1035; F. Peña López, Comentario del Art. 1903 in: R. Bercovitz (ed.), *Comentarios al Código Civil* (2001), 2126. See also M. Navarro Michel (supra fn. 6), 28–29.

[97] They speak about "the insertion of an objective shade in this type of liability, which practically reflects criteria of risk in no smaller proportion than subjective criteria of fault" (SSTS 22.9.1984 (RJ 1984\4332); 30.6.1995 (RJ 1995\5272); 22.1.1991 (RJ 1991\304); 7.1.1992 (RJ 1992\149); 20.6.1995 (RJ 1995\5272); 28.7.1997 (RJ 1997\5810) and 11.3.2000 (RJ 2000\1520)). Cf. M. Yzquierdo (supra fn. 2), 256. Nevertheless, in fact, even if mentioning the *risk* created by the child, legal doctrine contends that the risk situation is not the existence of the child but the dangerousness related to the omission of due care that seems to trigger liability. In this sense, E. Gómez Calle (supra fn. 15), 1036.

[98] Recently, see STS 8.3.2002 (RJ 2002\1912).

[99] In this sense, S. Díaz Alabart, La responsabilidad por los actos ilícitos dañosos de los sometidos a patria potestad o tutela, [1987] ADC, 852, who talks about the "older adolescents" or "older minors". See also F. Pantaleón, [1984] 6 CCJC, 1990, who considers that it is against justice that innocent parents of children who have an age close to majority are held liable for their tortious acts.

3. Who is subject to the parental duty to supervise?

a) Only the parents in a legal sense?

Art. 1903 II CC refers to the fact that children are under the custody of their parents.[100] The wording of the provision encompasses both minors who are not emancipated and children who have reached majority but who are under extended or re-established parental responsibility (cf. art. 171 CC).[101] The legal condition of parent is not enough to trigger liability[102] since "guard" implies an effective exercise of parental rights.[103] 73

b) Persons who have the right of custody?

Parental responsibility and the exercise of parental rights and duties are incumbent on the parents of the child, regardless of whether they are married or not. Accordingly, as a matter of principle, the custody corresponds to both parents insofar as they shall exercise the parental responsibility jointly (see art. 156 I CC and art. 137.1 *Codi de Família* (Catalan Family Code, CF)). Therefore, both will be held liable pursuant to art. 1903 II CC.[104] 74

By way of exception, in the following cases the exercise of parental responsibility pertains to one of the parents only: 75

[100] The present wording of art. 1903 II CC was given by the Ley 11/1981, de 13 de mayo, *de reforma del Código Civil en materia de filiación, patria potestad y régimen económico del matrimonio* (BOE no. 119, 19.5.1981), an Act which amended the Civil Code in matters related to affiliation, parental responsibility and property regime of the marriage. The wording in force until then required specifically the child to be minor and to live together with his parent.

[101] Legal scholarship considers that the emancipated minor is not included in the cases of liability of the parents as provided by art. 1903.2 CC (R. De Ángel (supra fn. 13), 349) and this provision does not apply either to cases of deprivation or suspension of parental responsibility (cf. artt. 111, 156.4, 169.3 and 170 CC). The provision does not encompass either the case of the minor who lives an independent life, since the practical effect of this situation is to suspend parental responsibility (cf. art. 319 CC).

[102] Instead of many, see C. López Sánchez (supra fn. 5), 270. The wording of art. 61.3 LORPM can give the wrong impression that it establishes strict liability of the parents merely for their condition as such. However, legal scholarship rejects a literal construction of this provision (so, for instance, E. Gómez Calle (supra fn. 15), 1062–1063 and M. Yzquierdo (supra fn. 2), 259) and this is also the position of the courts (see, for instance, SAP Valladolid 22.10.2002 (JUR 2002\284904), holding liable the public body in charge of the child, insofar as his parents, leaving aside when they have contact with him, cannot supervise the child while he is under the custody of the institution). See also A. Vaquer (supra fn. 37), 2.

[103] E. Gómez Calle (supra fn. 15), 1040. See also M. Yzquierdo (supra fn. 2), 257. Some legal scholars, however, consider that the expression "guard" in art. 1903 II CC must be broadly construed, so that even when the custody of the child has been attributed to one of the parents both are liable for the harm caused by their child. See F. Rivero (supra fn. 8), 526 and C.I. Asúa (supra fn. 85), 499 (insofar as case law has transformed liability of parents in fact to a strict liability).

[104] Even if the child causes the harm while the parent is acting individually within a joint custody regime (v.gr. on emergency basis, in conformity with customs, having implicit or explicit consent of the other). See art. 156 I CC.

i) In the case of reiterated disagreements between the parents or any other cause seriously hindering the exercise of parental responsibility, the court will allocate the right of custody to one of them (cf. art. 156 II CC and art. 138 I CF).

ii) In default, absence, incapacity, or inability of one of the parents will mean that parental responsibility shall be exercised by the other exclusively (cf. art. 156 IV CC and art. 137.3 CF).

iii) If the parents live separately from each other, parental responsibility shall be exercised by the parent with whom the child lives (cf. art. 156 V CC).[105]

76 In these cases, the parent incumbent on the exercise of parental responsibility will be the person whom art. 1903 IV CC holds liable for the damage caused by his or her children, even if the other parent has not been deprived of parental responsibility.[106]

c) Persons just living together with the child

77 The mere fact of living together with the minor does not give rise to a duty of custody and, therefore, does not lead to attribution of tort liability for the damage caused by the child. Conversely, living together with the minor is not indispensable in order to attribute tort liability for the infringement of the duty to supervise the minor.[107]

78 In the case of the father or the mother the duty of supervision results from the exercise of parental responsibility or, failing it, from the right of access to the child (see infra nos. 86–88). In the case of other persons, the duty to supervise arises from the legal relationship that they have with the child, such as guardianship, curatorship, foster parentage, etc. (see infra nos. 109–151, Liability of Other Guardians and of Institutions).

[105] By contrast, in Catalan law this is the case only if the judge so expressly decrees when there is disagreement of the parent (cf. art. 137.3 CF), since the separation of the parents does not change the general rule that provides for joint parental responsibility.

[106] See SAP Castelló 26.1.1999 (AC 1999\187). Instead of many, see L. Díez-Picazo/A. Gullón (supra fn. 29), 554; R. De Ángel (supra fn. 13), 349; F. Pantaleón (supra fn. 85), 5956; F. Peña López (supra fn. 96), 1125. M. Navarro Michel (supra fn. 6), 70.

[107] E. Gómez Calle (supra fn. 15), 1041. According to the wording existing before this provision was amended, "the father, and if he has died or has no capacity, the mother, are liable for the damage caused by their minor children *living together with them*". However, in STS 30.4.1969 (RJ 1969\2411) it was already held that the mother of the child was liable for the harm he had caused throwing stones, in spite of the fact that he was not living with her but with his grandfather. Cf. M. Navarro Michel (supra fn. 6), 66.

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce.

a) Children of unmarried parents

When parents live separately from each other, parental responsibility will be incumbent on the parent with whom the child lives (cf. art. 156 V CC), without prejudice to the right of the other parent to have access to the child (cf. art. 160 I CC).[108] 79

If the separated parents are unmarried, they can enter an agreement on the allocation of custody of their children and this agreement can be officially approved by the court.[109] Failing agreement, custody may be allocated by the means of an ordinary civil proceedings dealing exclusively with custody and supervision of the minor children. In this case, in order to allocate custody to one parent or to the other, the judge is confined to the criteria provided by art. 92 CC (see infra nos. 84 and 85). 80

b) Separation of married parents

When the parents are not judicially separated, the question arises whether *de facto* separation is sufficient in order to eschew tort liability for the acts of the child pursuant to art. 1903 II CC.[110] 81

As has been pointed out (see supra nos. 79 and 80), art. 156 V CC provides, as a matter of principle, that if the parents live separately from each other, the exercise of parental responsibility will be incumbent on the parent with whom the child lives. However, if the parents are married, judicial allocation of the exercise of parental responsibility, with the corresponding right of custody for the parent who lives with the child and the right of access for the parent who does not live with him, is deemed necessary and is carried out by the means of a matrimonial proceeding. 82

Therefore, on the grounds that *de facto* separation cannot entitle the parent who does not live with the child to eschew his or her legal duties, even if he or she enters a private agreement with the other partner, it is considered that, for that to happen, it is also required that parental responsibility is allocated by a court to the other partner.[111] 83

[108] By contrast, in Catalan law the principle of joint parental responsibility also holds true in this case (cf. art. 137.3 CF). However, the Catalan Family Code refers explicitly to supervision, within the framework of the exercise of parental responsibility or outside of it (cf. art. 139.3 CF), see infra no. 87.

[109] Cf. J. Ferrer, Comentari de l'art. 139 in: J. Egea/J. Ferrer (eds.), *Comentaris al Codi de Família, a la Llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua* (2001), 668.

[110] On this question see R. De Ángel (supra fn. 13), 349 and F. Pantaleón (supra fn. 85), 5956.

[111] C. López Sánchez (supra fn. 5), 273. See also M. Navarro Michel (supra fn. 6), 74.

c) Divorce

84 In the case of legal separation or divorce the spouses can agree on the allocation of parental responsibility with the regard to the common children, as well as shared custody or visitation, communication and staying with the children which constitutes the exercise of right of access of the parent who does not live with them by regulatory agreement. This regulatory agreement is mandatory in the proceedings filed by both spouses in common agreement and must be approved by the judge, unless the agreement is detrimental to the child (see artt. 92.4 and 92.5 CC and 76.1.b) CF).

85 Failing a regulatory agreement dealing with the conditions for the exercise of parental responsibility and for the right of access, the judge will decide on shared custody or with which of the two parents the children are to remain (cf. art. 92, 8 CC).

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

86 Although the duty to supervise the child is incumbent on the parent to whom the exercise of parental responsibility has been allocated (see supra nos. 74 and 75), legal writing considers that during the period in which the non-custodial parent exercises his right of access and supervision, liability of the parents pursuant to art. 1903 II CC falls upon him or her.[112] Case law also follows this opinion; for instance, in STS 11 October 1990,[113] a clear illustration of this, besides finding the non-custodian father liable in tort, the mother, to whom custody had been legally awarded, was exempted from liability.

87 By generalising this reasoning, it can be concluded that, in fact, the parent who will be held liable will be the one with whom the minor actually was when he caused the damage, even if custody was allocated to the other parent.[114] In Catalan law, art. 139.3 CF clarifies this conclusion when it provides, with regard to parents who do not live together, that "in any event, supervision must be exercised by either of them, the father or the mother, who has the minor child with him or her, either because the usual family dwelling has been *de facto* or legally allocated to such parent, or because the minor is accompanying him or her as a result of the communication, contact and visitation rights that have been established".[115]

[112] C. López Sánchez (supra fn. 5), 270 and E. Gómez Calle (supra fn. 15), 1043 and more details there.

[113] RJ 1990\7860.

[114] As C. López Sánchez (supra fn. 5), 271, points out, this way real or material custody prevails over the legal one when determining liability, a result which seems more coherent in spite of the fact that it could be seen as a covert device for reintroducing living together as a condition for liability. Cf. also J. Ferrer Riba, Comentari de l'art. 139 in: J. Egea/J. Ferrer (eds.), *Comentaris al Codi de Família, a la Llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua* (2001), 673.

[115] C. López Sánchez (supra fn. 5), 272.

The situation is different, however, when the child is not with the non-custodial parent. Provided that this parent has not been deprived of parental responsibility, he or she still has a duty to take care of the well-being of the child (cf. art. 154 II 1 CC and art. 143.1 CF). However, this duty does not bring about any further duty to supervise the child or to control the custodial parent whose infringement gives rise to liability in tort for the acts of the child. 88

6. Which elements of a tort must the child have realised for the parents to be liable for it?

Tortious capacity of the child is not an essential requirement in order to establish liability on the part of the parents.[116] If the child has no tortious capacity it is only necessary that the conduct that caused the damage directly has been *objectively intentional or negligent*, i.e. that it was suitable for generating liability had it been performed by a person with tortious capacity.[117] 89

By contrast, when the child has tortious capacity, fault on his or her part is also a condition for the liability of the parents.[118] 90

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger, etc.); b) circumstances in the person of the parent (disabilities, workload); c) circumstances in the person of the child (age, viciousness, accident-proneness, etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

As stated above (see supra nos. 66 and 71), under current case law it is practically impossible to rebut the burden of proof provided by art. 1903 CC regarding the proper performance of the duty to supervise. In theory, circumstances such as the age of the child, workload of the parents, economic situation of the family and so on should be taken into account when assessing the liability of parents. However, in practice courts disregard them as circumstances that could discharge parents from liability. They favour instead the victim's right to obtain compensation from a solvent debtor. In practice, parents are only exonerated from liability when their duty to supervise has been transferred to another person or institution. 91

a) Factual situation

According to the criteria mentioned by art. 1104 CC, the standard of care that can be required of the parents is the conduct that could be reasonably required 92

[116] In the words of STS 22.9.1984, "regardless of the level of discretion of the person under parental responsibility" (commented by F. Pantaleón, [1984] 6 CCJC, 1979–1990). See also STS 10.3.1983 (commented by F. Pantaleón, [1983] 2 CCJC, 447–459) and 30.6.1995 (RJ 1995\5272).

[117] F. Pantaleón (supra fn. 2), 5955, on the grounds that "it would be unreasonable to hold someone liable for not preventing a conduct which is perfectly normal and for which he would not have been liable if he had performed it personally". E. Gómez Calle 2002, 1039.

[118] C.I. Asúa (supra fn. 85), 498.

of prudent parents in similar circumstances. Particularly, the provision mentions the circumstances of the persons, of the time and of the place.[119] Therefore, these criteria seem to convey the necessity of reinforcing supervision of the children in circumstances such as the type of setting (for instance rural or urban) in which the life of the child takes place, the neighbourhood in which the family lives, whether there are any eventual sources of danger for the child or for other persons in the vicinity of the place where they live, etc. Moreover, parents must control the child or prevent him from taking part in dangerous activities or in the operation of objects that can harm him or pose a risk to third persons. Taking into account the age of the minor child and the circumstances of the case, conduct permitting the children to carry out these activities may be considered as fault on the part of the parents.[120]

b) Circumstances in the person of the parent

93 Not being able to take care of the children personally during the whole day does not exempt parents from liability.[121]

94 The scarcity of economic resources of the family or the great number of children are not circumstances that can be taken into account either in order to reduce the required standard of care of the parents.[122]

95 The Spanish Supreme Court has never accepted that the working commitments of the parents can be used as grounds for exonerating them from liability for the damage caused by their children.[123] The fact that, for work or social reasons, the parents are temporarily not living with their children does not exclude the duty to supervise them which lies at the heart of their liability[124] and courts repeat frequently that "this happens currently to all parents and if this opinion was admitted, the courts would give rise to full exclusion of liability for the damage caused by minors"[125].

[119] E. Gómez Calle (supra fn. 15), 1045.

[120] M. Navarro Michel (supra fn. 6), 106–107.

[121] E. Gómez Calle (supra fn. 15), 1046, considers that the parents have met the required care if they have entrusted their children to a person who was in mental and physical condition to take care of them and have warned him, if this was the case, of the character or habits of the child deserving specific attention. However, unless this person is liable for his own acts pursuant to the general rule established in art. 1902 CC or unless, on other grounds, is already included in art. 1903 CC (for instance, school or boarding institution) in practice parents do not free themselves from liability by entrusting their child to another person no matter how careful they are when doing so.

[122] See STS 11.3.2000 (RJ 2000\1520). What they must do, if necessary, is to request the help from the public institution concerned (E. Gómez Calle (supra fn. 15), 1046).

[123] SSTS 22.1.1991 (RJ 1991\304); 7.1.1992 (RJ 1992\149) and STS 11.3.2000 (RJ 2000\1520).

[124] M. Navarro Michel (supra fn. 6), 104–105. STS 22.1.1991 (RJ 1991\304); 7.2.1991 (RJ 1991\1151) and 7.1.1992 (RJ 1992\149).

[125] Quoting verbatim what was stated in STS 29.12.1962 (RJ 1962\5141).

c) Circumstances in the person of the child

Several circumstances can have some influence in the parent's duty to supervise: 96

i) Age: In principle, the younger the child is, the greater is his lack of ability to gauge the possible results of his or her actions and, therefore, the greater is the care that is required in the supervision. Conversely, a higher age could allow some loosening in the supervision. In spite of that, parents are usually held liable without taking into account the age of the child. In many judgments, the age of the child is not even recorded. Moreover, decisions holding the parents responsible for acts of children who are close to coming of age are not rare.[126]

ii) Character (problematic, aggressive, irresponsible).

iii) Habits (frequented places, companies kept).

iv) Degree of intellectual development, education and training – specifically, regarding his or her participation in potentially dangerous activities – and manners (an ill-mannered child needs closer supervision).[127]

Although it should suffice to have instructed the child in how to behave or to have forbidden certain behaviour, it is usually required to show that sufficient measures have been taken for it to be actually observed (this is the case, for instance, with regard to the prohibition of using firearms, driving a car or smoking at a certain place).[128] If children disobey the instructions given by their parents or do not abide by the measures they have taken in order to protect them and other persons, parents are entitled to make use of the power to "reasonably and moderately correct their children", in the words of art. 154 IV CC, and even "to request the assistance of public authorities" (cf. art. 154 CC). 97

The lack of knowledge that the parents may have with regard to potential dangerous activities carried out by their children is not a defence, since parents have the duty to endeavour to keep themselves informed about the activities of their children, their inclinations and their personality.[129] 98

[126] For instance STS 7.2.1991 (RJ 1991\1151).

[127] In STS 12.5.1999 (RJ 1999\4576) the 13-year-old child who caused the death of the brother of the claimant had "no conditions for social coexistence". Against the statement of the parents contending that they had only allowed him to go to the swimming pool and that they did not know that he used his friends' airgun, the court held that it was obvious that the child was wandering about freely and that, due to his character, "some sort of supervision about his whereabouts would have been necessary".

[128] M. Navarro Michel (supra fn. 6), 105.

[129] E. Gómez Calle (supra fn. 15), 1047.

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

99 The prevailing opinion in case law and legal doctrine set outs that when the child is in an educational institution[130] or at the workplace, the parents have neither the duty nor the possibility of exercising their power to supervise and they delegate this power to the educational centre or the company.

100 Therefore, the theses of the *exclusivity of the duties of supervision* and the respective *transfer of responsibility* from the parents to the person who has the minor under his or her supervision at the time when the damaging event takes places are the predominating ones.[131]

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

101 According to the principle of transfer of responsibility (see supra nos. 99 and 100), the fact that a child is under the control or supervision of a centre that takes care of him on a more intense level speaks even more for the exemption of liability of the parents.[132]

10. What is the relation between the damage claim against the parents and the damage claim against the child?

102 If the damaging event amounts to a crime or a misdemeanour, art. 61.3 LORPM expressly states that, together with the minor child, parents are directly and solidarily liable.

103 If the damaging event does not amount to a crime or a misdemeanour, the liability of the parents pursuant to art. 1903 II CC will be direct.[133] However, if the child has tortious capacity and, therefore, is also liable for the damage caused, the victim will be entitled to address his claim against any of them for the whole damage. The basis for this solution is, in this case, the solidarity among joint tortfeasors established by case law, either on the grounds that it has been impossible to establish in which share every tortfeasor contributed to the damaging event[134] or expressly for the purpose of bettering the victim's position.[135]

[130] STS 3.12.1991 (commented by S. Díaz Alabart in [1992] 28 CCJC, 115–121). See also STS 15.12.1994 (RJ 1994\9421).

[131] M. Navarro Michel (supra fn. 6), 121.

[132] E. Gómez Calle (supra fn. 15), 1079. See STS 15.12.1994 (RJ 1994\9421); 19.6.1997 (RJ 1997\5423) and 30.12.1999 (RJ 1999\9094). See also SAP Valladolid 23.12.2002 (JUR 2003\34960).

[133] E. Gómez Calle (supra fn. 15), 1038.

[134] SSTS 21.12.1999 (RJ 1999\9747); 9.3.2000 (RJ 2000\1515); 11.4.2000 (RJ 2000\2148); 27.6.2001 (RJ 2001\5087), amongst many others.

[135] See STS 12.4.2002 (RJ 2002\2607). In favour of this position, see among legal scholars: F. Pantaleón, Comentario del artículo 1902 in: C. Paz-Ares/L. Díez-Picazo/R. Bercovitz/P. Salvador (eds.), *Comentarios del Código Civil* II (1991), 2001 and E. Gómez Calle (supra fn. 15), 414.

11. Is there any possibility for either the child or the parents to have recourse against each other?

104 Legal writing and case law do not deal with the case in which a child who has paid compensation for the damage that he has caused has recourse against his parents for the infringement of their duty to supervise. The case would be purely theoretical under Spanish law, since in practice the action is always brought not only against the child but also against the parents, the parents are always held liable when children under their supervision cause a damage, and there are no cases where a child pays compensation and his or her parents do not.

105 The possibility of recourse of the parent who has paid compensation against the child is also a purely academic issue since in practice this never takes place. However, this possibility is discussed in legal writing with regard to art. 1904 I CC which provides that "a person who pays the damage caused by his auxiliaries may recover from the latter what he has paid".

106 Some scholars consider, on the grounds of the historical background of this provision, that art. 1904 CC applies not only to the employer but also to all other cases of tort liability resulting from acts of the others pursuant to art. 1903 CC and, therefore, also to liability of the parents for the acts of their children.[136]

107 It is worth emphasizing, however, that parents are liable not only because their child is at fault but also because they have also been at fault, a fault which consists in not supervising the child with the required care. Accordingly, some other scholars consider that recoupment should be limited to that share of the damage that is exclusively attributable to the child.[137]

108 Finally, there are also some legal writers who consider that art. 1904 CC does not apply to the parents or wards on the grounds that what justifies their liability is the infringement of their duty to supervise the child or ward. Therefore, the provision is consistent with the fact that the child could use this infringement as a defence to any action of recoupment brought against him or her by the parents or guardians.[138]

[136] Among others see M. Navarro Michel (supra fn. 6), 102.

[137] E. Gómez Calle (supra fn. 15), 1050. See also E. Roca i Trías, La acción de repetición prevista en el artículo 1904 del Código Civil, [1998] ADC, 7–39 at 31–32.

[138] F. de Castro y Bravo, *Derecho civil de España* vol. II (1984), 191. See also F. Rivero (supra fn. 8), 509.

III. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

109 Children who have no parents, in the legal sense, or whose parents are deprived of parental rights, or simply are not able to exercise them properly may find themselves in different situations. For the sake of simplicity, we will divide them into ordinary guardianship (see infra nos. 110 and 111) and other situations, mostly measures of protection for neglected children (legal guardianship, foster care) (see infra nos. 112–120). Both types of situations are relevant in order to allocate liabilities for the harmful acts of underage children.

a) Ordinary guardianship

110 Every unemancipated child who is not under parental responsibility must be subject to guardianship (cf. art. 222.1 CC and art. 170 CF). Relatives called to undertake guardianship and the person in whose custody the child is found are obligated to request the constitution of guardianship from the time they learn of the facts making it necessary (art. 229 CC).[139]

111 Pursuant to art. 269 CC, the guardian has the duty to protect the ward, to support him and to educate the minor and provide a wholesome upbringing for him (cf. also art. 207.1 CF). Art. 1903 III CC provides that "guardians are liable for the damage caused by minors or incapacitated persons under their responsibility who live with them". The ground for liability established by this article is fault, which is also rebuttably presumed here (art. 1903 VI CC). It is worth emphasizing that the provision refers to "minors and incapacitated persons" and that it requires both that they are "under their responsibility" and that they "live with them". This means that guardianship shall be legally constituted. The requirement of living together, however, is to be understood in a broad sense since the duty to supervise is unaffected by the social or working requirements of the guardian.[140]

b) Legal guardianship, foster carers and guardians in fact

112 Legal scholarship wonders whether the rules of liability for the others laid down in art. 1903 CC apply analogically to other cases not expressly referred to in the provision. The opinion prevailing in legal scholarship considers that

[139] If they do not request it, they will be held solidarily liable for the damage caused (art. 229 in fine CC). A sector of legal scholarship understand this provision in the sense that if these persons breach the obligation of requesting the constitution of guardianship they will be liable for all the damage that arises, including damage caused by the minor to third parties (see P. Lucán, [1997] 44 CCJC, 786). Other scholars, however think that this provision cannot impose tort liability for the damage caused by the minor on them (see F. Peña López (supra fn. 96), 2126 and, to some extent, STS 5.3.1997 (RJ 1997\1650)). Catalan Law has opted to consider that they will be liable only for the damage caused to the minor (cf. art. 83.1 CF).

[140] See F. Peña López (supra fn. 96), 2126.

art. 1903 CC contains a closed list that does not admit analogical or extensive construction.[141] However, whereas in the case of parents (art. 1903 II CC) the application of this provision to other relatives (as, for instance, grandparents or uncles) must be rejected at any event,[142] in the case of guardians art. 1903 III CC might exceptionally apply to "carers in fact" when the acts that they are performing can compare with those of a guardian.[143]

Some writers[144] even adopt a more flexible position and accept an analogical application of art. 1903 II and III CC not only to the adopting parents but also to foster parents (cf. art. 173 CC), to legal guardians (cf. artt. 103.1.II and 172.2.III CC), as well as to guardians *ad litem* (cf. art. 299.2 CC). In fact, when tort liability derives from a crime or a misdemeanour committed by a minor, art. 61.3 LORPM enlarges the list of persons who, according to art. 1903 CC, could be held liable. Thus when the damaging event is caused by a minor over the age of 14 years, besides the parents, "the guardians, the foster parents, the legal carers and the carers in fact" will be held strictly liable – in this order, and the next one in the order will be liable only when the previous one fails – and also jointly and severally liable together with the liable minor. 113

This approach is coherent with the system established for the legal protection of unprotected children and with the protection instruments (such as guardianship falling *ex lege* upon the public body or administrative guardianship) provided by the law. 114

When it is established that a child is unprotected, the public body entrusted with the protection of children in the relevant area shall take the necessary steps regarding his or her custody and shall communicate it to the Attorney General and to his parents, guardians or carers within the following 48 hours (art. 172.1 CC). The legal effect of the declaration of unprotection is that it triggers the so-called guardianship *ex lege* or by operation of law, which entails the suspension of parental responsibility (or ordinary guardianship) over the child (art. 172.1 III CC)[145] and, consequently, tort liability pursuant to art. 1903 CC can no longer be claimed against his parents (or ordinary guardian). 115

[141] Instead of many see F. Peña López (supra fn. 96), 329; F. Rivero Hernández (supra fn. 8), 523 and F. Pantaleón (supra fn. 85), 5956. However courts have evolved towards more flexible positions, especially in the case of liability for employees (art. 1903 IV CC), which has been extended to the loan of motor vehicles with the undeclared aim of holding the insurer liable through liability of the owner. See F. Pantaleón (supra fn. 85), 5956.

[142] See F. Pantaleón (supra fn. 85), 5956 and (supra fn. 8), 523.

[143] The case of the carer in fact has been the object of much scholarly debate. However, for a carer in fact to exist it is necessary that he acts in a way similar to the position legally held by a guardian, and does not include persons who are temporarily entrusted with the minor (see M. Yzquierdo (supra fn. 2), 262).

[144] As, for instance, F. Pantaleón (supra fn. 85), 5956. In the same sense, see also C.I. Asúa (supra fn. 85), 509.

[145] Although by way of exception, the acts related to the property of the minor carried out by the parents or guardians as his legal representatives and to his benefit are deemed valid.

116 On the other hand, even without any declaration of unprotection and at the requests of parents or guardians who cannot take care of the minor due to illness or other serious circumstances (see art. 172.2 CC and art. 165 CF) or where the court so provides in cases where it is legally appropriate (cf. artt. 103.1.II and 172.2.III CC), the public body entrusted with the protection of minors can also assume the minor's custody temporarily.[146]

117 In both cases, custody may be exercised either by a person or persons who receive the minor into foster care (the so-called *acogimiento familiar*) or by the placement of the minor child in a public institution or in a private cooperating institution (the so-called *acogimiento residencial*) (cf. artt. 172.3 CC and 242 CC). In cases of foster care, the person or persons so determined by the public body shall exercise custody. Foster care carries therewith full participation by the minor in family life and imposes upon the person receiving him in foster care the duties of having the minor in his company, educating him and procuring a wholesome upbringing for him (cf. art. 173.1 CC). In the second case, the director of the centre in which the minor is placed (art. 172.3 CC) may exercise custody.

118 For the purpose of tort liability for the damage caused by the minor who is in foster care, legal scholarship considers that it can fall on the foster family, the public body or solidarily on both. The public body can be held liable since it has a duty of control and supervision (implicit in art. 173.2.4 CC) and, moreover, for the unsound selection of the persons who foster the minor. The liability of the foster parents will depend on whether they had been allocated the powers in order to carry out the control and supervision of the minor.[147] Accordingly, in the case of so-called *acogimiento familiar simple* the foster parents cannot be held liable in tort because the parents keep their powers over the child, and because no transfer of the power to supervise has occurred on the grounds of the temporary nature of this form of foster care.[148] Moreover, foster parents exercise their powers as delegates of the public body and under the instructions of the parents of the child. By contrast, in the case of the so-called permanent and preadoptive foster care (*acogimiento familiar permanente y preadoptivo*) the public body delegates custody upon the foster parents and these are to be held liable, although it is also possible that the public body is held liable as well.[149]

[146] For a case of tort liability stemming from crime in which the public body is held liable in tort, see STS 2ª 26.3.1999 (RJ 1999\2054).

[147] Taking into account its aim, foster care (*acogimiento familiar*) can be *simple* (when reintegration of the minor into his original family is foreseen), *permanente* (when foster parents hold the powers pertaining to guardianship because the circumstances of the minor and of his family of origin so require) and *preadoptivo*, when the minor can be adopted and a period of adaptation with the adopting family is required (see art. 173bis CC).

[148] For more details see C. López Sánchez (supra fn. 5), 360–363.

[149] C. López Sánchez (supra fn. 5), 361.

Since in the cases of foster care the custody and supervision of the children has the nature of a public service, tort liability stemming from the damage caused by a minor placed in foster care will have to be channelled through a claim against the public body entrusted with the protection of children (normally belonging to the Autonomous Communities). This claim will follow the administrative law proceedings as well as the liability norms provided by the *Ley de Régimen Jurídico de las Administraciones Pública y del Procedimiento Administrativo Común* (Legal Regime of Public Administrations and General Administrative Procedure Act, LRJAP[150]) (see infra nos. 132–136 and 137 et seq.). 119

The law provides that the document establishing foster care must include "the coverage system used by the public body or by other persons liable in tort with regard to the damage suffered by the minor or that *the minor can cause to third parties*" (art. 173.2.3 b) CC). This obligation, however, does not entail compulsory insurance and does not aim at altering the regular tort liability regime as established in the Civil Code and the Penal Code.[151] 120

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

Tort liability for the damage caused by a minor employee acting within the scope of the employment is governed by art. 1903 IV CC, which provides for direct liability of the employer.[152] It is considered that when the minor is working at his or her workplace the duty to supervise the minor, originally incumbent on the parents, is transferred to the employer. Therefore, tort liability of the employer does not accumulate to tort liability of the parents but excludes it.[153] 121

With regard to those minors who are trained by working in a company, both the wording of the Civil Code and of the Penal Code prior to the 1991 amendments mentioned expressly the liability in tort of *bosses* and *masters* (sic) for the damage caused by *apprentices* (cf. artt. 22 CP 1973 and 1903 VI CC[154]). The deletion of this mention of apprentices by the 1991 amendment confirms 122

[150] Ley 30/1992, de 26 de noviembre, *de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (BOE no. 285, 27.11.1992 (correction of mistakes in BOE no. 311, 28.12.1993 and no. 23, 27.1.1993)), amended by the Act 4/1999, of 23.1.1999 (Ley 4/1999, de 13 de enero, *de modificación de la Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (BOE no. 12, 14.1.1999)).

[151] C. López Sánchez (supra fn. 5), 356.

[152] According to art. 1903 IV CC, "The owners or directors of an establishment or an enterprise are liable for the damage caused by their employees in the service of the branches in which they are employed or on account of their duties".

[153] Among many others, see J. Barceló Doménech, *Responsabilidad extracontractual del empresario por actividades de sus dependientes* (1995), 270–271.

[154] Before the 1991 amendment, art. 1903 IV CC mentioned the tort liability of "directors of manual training, *with regard to the damage caused by their … apprentices, as long as they are in their custody*".

that these cases have been included in the ordinary cases of employer's liability (art. 1903 IV CC)[155] and not in the liability of educational institutions that are not of higher learning (art. 1903 V CC). This amendment is coherent with the fact that in these sorts of relationships, the labour aspect prevails over the school aspect[156] and currently these sorts of relationships are legally defined as a specific type of labour contract.[157]

Indeed, pursuant to art. 6 *Real Decreto* (Royal Decree, RD) 1992/1984, of 31 October 1984, which governs work experience placement, "in the contract for work experience placement the employee commits himself, simultaneously, to carrying out a job and to receiving training, and the employer to pay a salary and, at the same time, to provide his employee with a training that enables him to perform a job". Art. 3 of Act 10/1994, of 19 May 1994, on urgent measures aiming at job creation, stresses that the work experience placement contract has to combine theoretical training with effective labour and that the former must fill at least 15% of the maximum working day established in the collective agreement.

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

123 As a general rule parents and guardians transfer their duty to supervise their children or wards to the centres and establishments receiving them (see supra nos. 99 and 100). Some decisions specifically stress this when centres take more intensive charge of children, as is the case when minors remain at the centre for lunch or are in a boarding school or spend some days in an educational establishment carrying out school and out-of-school activities.[158]

124 The only difficulty is that some centres or establishments are not on a level with either educational institutions that are not of higher learning or institutions that receive children in ward, and for this reason they are left out of the scope of liability for the acts of the others pursuant to art. 1903 II CC. In these cases, a private institution will be liable only if it is considered that it has been at fault, according to the general provision of art. 1902 CC, for its own acts, since it has not acted with due care while performing its own activities, which include control and supervision of the minors who are placed in their charge.

[155] Long before the 1991 amendment, see STS 2ª 16.10.1970 (RJ 1970\4303).

[156] J. Barceló Doménech (supra fn. 153), 273. See also S. Díaz Alabart, *Un apunte histórico para la determinación de la responsabilidad de los maestros en el artículo 1903 del Código Civil, Centenario del Código Civil* vol. I (1990), 703.

[157] E. Gómez Calle, Responsabilidad civil extracontractual. Reforma de los Códigos Civil y Penal en materia de responsabilidad civil del profesorado. Ley 1/1991, de 7 de enero, [1991] ADC, 269–288 at 271.

[158] See E. Gómez Calle (supra fn. 15), 1079 and STS 19.6.1997 (RJ 1997\5423) and 30.12.1999 (RJ 1999\9094).

4. May a duty to supervise be established by means of private contract? If so, does such contract reduce in any way the duty of the person originally charged with the duty to supervise?

125 Persons who have the legal duty of control and supervision over minor children may entrust the practical performance of this activity to other persons. However, this does not excuse them from liability for the damage caused by these children and the fact that another person actually performs the supervision is not a defence. On the contrary, parents and guardians will be held liable for the damage caused by their child or ward, respectively. This, however, will not prevent them from bringing a claim for recoupment against the persons who, neglecting their duties of supervision, have enabled the damaging activity of the child.

126 This issue arose in a case decided by the Supreme Court in STS 5.10.1995 dealing with a minor who was in a special education centre belonging to the *Diputación Provincial* of Guipúzcoa.[159] The public body was sued for the death of a child under its supervision and raised as a defence that custody was incumbent upon an association of educators. The public body had entrusted the organisation of the activities out of the centre to this association and the fatal accident took place while they were being carried out. The Supreme Court rejected this defence by stressing that the legal doctrine freeing the principal from the damage caused by an independent contractor does not apply to the case since "both the Association of Special Educators as well as the instructors of the farm «Los Niños» in Fuentes de Ropel remained at all times under their control, instructions, supervision and direction".

127 The true *ratio decidendi* of the case is, however, that the *Diputación* cannot transfer the risks embedded in its task of protection, control, supervision, custody and education of minor children through "private agreements aiming at modifying its liability in a subject matter that has the nature of *ordre public* for its social importance, as is the case with parental responsibility".[160]

128 A similar approach also applies when parents or guardians are empowered by law to delegate their powers, in particular, when they are not, in practice, able to carry them out (Art. 172.2 CC) and, therefore, they request the cooperation of social services. Since in these cases parents have not been legally deprived of their parental responsibility, in principle they will be held liable in tort for the damage caused by their children. However, other persons, such as the public body entrusted with the protection of minors or the persons to whom custody of the minor has been entrusted (*acogimiento familiar*) can also be held liable in these cases[161] (see supra nos. 112–120). The condition for liability of the

[159] RJ 1995\7020. Commented by J. Barceló Doménech in [1996] 40 CCJC, 225–236.

[160] Linking this decision with the doctrine of *non-delegable duties*, see J. Barceló Doménech, [1996] 40 CCJC, 234.

[161] See C. Núñez Zorrilla, La delegación de las funciones paternas. Aproximación a su configuración en los supuestos no contemplados en nuestro ordenamiento, [1996] *La Notaria* 9, 65–126 at 112 (suggesting solidary liability between parents or guardians delegating their powers and the institution or person to whom they have delegated).

parents and guardians lies precisely in the fact that the powers that they delegate involve legal responsibilities from which they cannot free themselves by means of a contract or a private agreement.[162]

129 A seeming exception to this rule is the fact that the law attributes liability for the damaging acts of the minor to the person or entity to whom the parents have entrusted the supervision of the minor by a means of contract or other legal relationship. This is precisely what happens when the educational institutions are not of high learning or with employers (art. 1903 IV and V CC). As has already been pointed out, since the prevailing case law has not accepted an accumulation of liability, the only person who is going to be held liable for the acts of the minor is the person who had the duty to supervise the minor when the accident occurred. The other persons who would usually be liable for the acts of the minor are freed from liability (see supra no. 29). An explanation for this outcome can be that in such cases the exercise of supervision is, by definition, carried out without further supervision or control of the parents or guardians and is exclusively incumbent upon the owner of the educational institution or upon the direction of the company or establishment where the minor is.[163]

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

130 All schools have the duty to supervise their pupils during school hours while children are in the school premises or while they perform out-of-school activities organised by the educational institution. This is a duty set by the law which applies regardless of the type of ownership of the school or the type of management of the teaching service that the school renders (public schools, private schools or purely private bases or private schools under a specific public regime established by the public body entrusted with education (*centres concertinos*)).

131 By contrast, public or private ownership of the school gives rise to the application of a different tort liability regime for the damage caused by minor pupils (see infra nos. 132–136).[164]

[162] Cf. art. 133.1 CF, which refers to parental responsibility as an *inexcusable* duty, something that must be understood both in the sense that it is forbidden to waive it or to transfer it and also to delegate it to a third party without keeping control (see J. Ferrer, Comentari de l'art. 133, in J. Egea/J. Ferrer (eds.), *Comentaris al Codi de Família, a la Llei d'unions estables de parella i a la llei de situacions convivencials d'ajuda mútua* (2001), 616). A different question is whether parents, in spite of retaining their parental responsibility, can actually exercise it when their children are taken in by a family or institution.

[163] See S. Díaz Alabart, [1992] 28 CCJC, 120.

[164] With regard to offences commited by minors who are school pupils, LORPM does not refer directly to any norm (in contrast to the former art. 22 II CP 1973). Must the school be included in the carers in fact referred to in art. 61.3 LORPM? In principle, legal writing considers that it must not (E. Gómez Calle (supra fn. 15), 1096 and especially M.L. Atienza Navarro, *La Responsabilidad civil por los hechos dañosos de los alumnos menores de edad* (2000), 159 et seq.) and applies art. 1903 V and 1904 II CC both when the tort does result from a crime and when it does not. See also A. Vaquer (supra fn. 37), 3.

6. Who is liable for accidents caused by pupils in public and private schools: the teacher, the school, the education authority or the state?

a) Private schools

132 Tort liability of private schools is subject to the provisions of the Civil Code, specifically art. 1903 V CC, which holds persons or entities that own an educational institution[165] that is not of higher learning liable for the damage caused by their minor pupils during the time periods in which such pupils are under the control or supervision of the teachers of the institution, while engaged in curricular or extracurricular activities and in those complementary thereto.[166]

133 Once again, this is a case of direct liability for one's own fault, which is rebuttably presumed (art. 1903 VI CC).

134 The current wording of art. 1903 V CC stems from the amendment introduced by Ley 1/1991, of 7 January 1991, which suppressed the reference to the liability of the *teacher* for the damaging acts of his pupils.

Prior to this amendment of the Civil Code (and also of the Criminal Code) a teacher who had negligently contributed to damage caused by a pupil could also be held personally liable in tort (art. 1903 VI CC)[167] together with the owner of the centre (in this case, in his condition of *employer* and, therefore, pursuant to art. 1903 IV CC). Nevertheless, the usual practice was to always sue the school, sometimes also the director of the school, and only exceptionally the teacher.

b) Public Schools

135 In the case of public schools, the rules referring to liability of public bodies apply (cf. artt. 139 et seq. LRJAP). These provisions establish that public bodies are strictly liable for the damage caused by civil servants and other personnel in its service.

[165] A sector of legal scholarship considers that centres referred to by art. 1904 V CC are not only schools but also nurseries, educational farms, camps, etc. See C. López Sánchez (supra fn. 5), 329.

[166] Art. 1903 V CC provides that "persons or entities that own an educational institution that is not of higher learning shall be liable for the damage caused by their minor pupils during the time periods in which such pupils are under the control or supervision of the teachers of the institution, while engaged in curricular or extracurricular activities and those complementary thereto".

[167] Which provided that: "(F)inally, the teachers or directors of manual training are also liable, with regard to the damage caused by their pupils or apprentices, as long as they are in their custody".

136 Currently, administrative courts are the only courts that are empowered to try cases dealing with liability of public bodies, even when private citizens or institutions are also involved in the case.[168]

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

137 This case is governed by the general rule established by art. 145.2 LRJAP which provides that:

"Once the appropriate public body has paid compensation to the victims, it shall file *ex officio* a claim against the civil servants and other personnel at its service for their share of liability if incurred with intent or gross negligence, after having started against them the proceedings required by administrative regulations. In order to file this claim, among others, the circumstances to be taken into account will be the following: the damaging result, the existence of intent or not, professional liability of the personnel serving the public bodies and their relationship with the causation of the damaging event."[169]

138 As can be seen, the claim for recoupment against the personnel that has caused the damage with intent or with gross negligence is mandatory (art. 145.2 I LRJAP) and the norm starts from the position that the victim cannot claim directly against the teacher (art. 145.1 LRJAP).

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

139 Art. 1904 II CC entitles the educational institution that has paid compensation for the harm sustained to recover damages from the teachers who have acted with intent or who have been, at the least, grossly negligent while performing

[168] See art. 9.4 *Ley orgánica del Poder Judicial* (Organic Act of Judicial Power, LOPJ, in the wording given by LO 6/1998, of 13th of July which amended this Act). However, if the only defendant is the insurance company the claimant may bring his claim to the civil jurisdiction, since the insurer neither depends on the public body nor is a joint tortfeasor (E. Gómez Calle (supra fn. 15), 1101 and S. Díaz Alabart, Comentario de la sentencia de 18 de octubre de 1999, [2000] 52 CCJC, 309–322 at 316). If the damage is also a crime or a misdemeanour the court concerned is the Juvenile Court, which will decide on the criminal liability issues and, if this is the case, also on the tort liability ones (i.e. whether the person liable in tort is the child, his parents or the institution; in the latter case, the Civil Code will apply (see supra fn. 164)).

[169] With regard to tort liability deriving from a crime or misdemeanour committed by children, Art. 63.4 LORPM provides that "where appropriate art. 145 of the Ley 30/1992, de 26 de noviembre, *de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (Legal Regime of Public Administrations and General Administrative Procedure Act) and in the Ley 35/1995, de 11 de diciembre, *de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual* (Assistance to Victims of Violent Crimes and Crimes Against Sexual Liberty Act) and their complementary provisions will apply". The latter Act establishes the right of recourse of the public body against the person who committed the offence.

their duties.[170] In practice, however, this claim for recoupment does not take place, either generally or specifically against teachers and school personnel.[171]

The wording of the provision seems to suggest that the school can recoup from the teacher the total amount of damages that it has paid. However, since the school is also directly liable for its own fault pursuant to art. 1903 IV CC, legal scholarship points out that if there is any recoupment it will be only partial and in proportion to the respective grade of contribution of the tortfeasors.[172] 140

The school can only recoup against the teacher if he or she has acted with intent or with gross negligence. From this it has been deduced that the victim will not be able to address his claim against the teacher unless he or she has acted with intent or with gross negligence.[173] In fact, we are facing here a case of *channelling* of the liability of the teachers through the schools, a case entailing a legal privilege for the teaching personnel obtained by the pressure exerted by the trades unions and which gave rise to the 1991 amendment. 141

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

In contrast to the liability of the parents, in the case of liability of the schools and teaching staff the courts in practice accept lack of fault as a defence and therefore it cannot be said that in this case liability has undergone a process of "objectification".[174] Although the Spanish Supreme Court frequently refers to the lack of due care of teachers or of the educational institution in the supervision of their students (*culpa in vigilando*),[175] it seems, however, that as far as liability falls on the educational institution and not on the teachers, fault is measured with regard to the care taken in the selection and control of the teaching staff by the educational institution.[176] 142

[170] Art. 1904 CC, amended by the Act 1/1991 provides that: "(I)n cases involving educational centres not of higher learning, the owners thereof can claim the sums paid from the teachers, if the latter have acted with intent or gross negligence in the exercise of their function that caused the damage".

[171] E. Gómez Calle (supra fn. 15), 1086.

[172] E. Gómez Calle (supra fn. 15), 1088 and there more details.

[173] E. Gómez Calle (supra fn. 15), 1089. See also A. Moreno Martínez, *Responsabilidad de centros docentes y profesorado por daños causados por sus alumnos* (1996), 216–217 (insisting on the aim pursued by the amendment). Against this position see F. Pantaleón (supra fn. 85), 5957; J.R. García Vicente, Comentario de la sentencia de 20 de mayo de 1993, [1993] 32 CCJC, 629–637 at 635 and M.L. Atienza (supra fn. 164), 461.

[174] Lately, SSTS 8.3.1999 (RJ 1999\2249) or 27.9.2001 (RJ 2001\8155). See E. Gómez Calle (supra fn. 15), 1082–1083 and C. López Sánchez (supra fn. 5), 278.

[175] SSTS 10.11.1990 (RJ 1990\8538); 31.10.1998 (RJ 1998\8359) and 29.12.1998 (RJ 1998\9980).

[176] In this sense, E. Gómez Calle (supra fn. 157), 269 et seq. In addition, the same author suggests that liability which pursuant to art. 1903 V CC falls on persons or entities that own the educational institution shall be deemed a liability for defects in the organisation of the enterprise. Therefore she thinks that that should expand beyond the possible negligence (of a teacher) when supervising his pupils and embrace the organisation and supervision of curricular, extracurricular activities and those complementary thereto and the management and the maintenance of the premises and facilities (E. Gómez Calle (supra fn. 15), 1073).

143 Tort liability includes the harm that the pupils cause to other persons, whether they are also pupils, personnel of the schools or third persons unrelated to the school. A sector of legal scholars considers that it also includes self-inflicted injuries,[177] although case law usually reroutes these cases of liability of the school to the general clause of fault liability pursuant to art. 1902 CC or to employer's liability pursuant to art. 1903 IV CC.[178]

144 A condition for the liability of the school is that the damage has been caused while the pupil actually was or should have been under its supervision. However, it is not necessary for the harm to arise within the premises of the educational institution. It suffices that the activity is performed within the framework of the competences of the institution and under its supervision, since the yardstick used to demarcate liability is related to time and not to place ("curricular", "extracurricular" and "complementary" activities).[179] Accordingly, schools are liable for the damage caused by their pupils during the full school day, including during transportation organised by the centre, breaks, dining and other activities.[180]

145 One hard case is that of the damage that pupils cause before starting the school day or while they are waiting for their parents on the school premises once school is over. STS 3 December 1991[181] extended liability to the period in which, after the school day, children are waiting for their parents to pick them up. By contrast, in a very similar case, STS 4 June 1999,[182] it was found for the defendant school with regard to the damage which occurred before the school day began on the grounds that the facts had taken place in the area outside the school and when the duty to supervise had not yet been transferred to the school.

146 Pursuant to art. 1104 I CC, in order to specify the level of care that may be required of the school the court must take into account all the circumstances of the case and, among them, the following must be stressed:

a) *With regard to the pupil*, circumstances such as his or her age,[183] possible mental deficiencies,[184] the number of pupils that have to be supervised,[185] as well as certain sorts of habits that may be dangerous, or his or her trou-

[177] S. Díaz Alabart, [2000] 52 CCJC, 322 and also E. Gómez Calle (supra fn. 15), 1077. Against this position, A. Moreno Martínez (supra fn. 173), 240 and C. López Sánchez (supra fn. 5), 276.
[178] See J.R. García Vicente, [1993] 32 CCJC, 629–637 at 635.
[179] F. Rivero (supra fn. 8), 531 and A. Moreno Martínez (supra fn. 173), 237.
[180] See C.I. Asúa (supra fn. 85), 507.
[181] RJ 1991\8910. Commented by S. Díaz Alabart in [1992] 28 CCJC, 115–121.
[182] RJ 1999\4286. Commented by E. Gómez Calle in [1999] 51 CCJC, 1187–1195.
[183] See STS 10.10.1995 (RJ 1995\7186).
[184] STS 15.12.1994 (RJ 1994\9421. Commented by S. Díaz Alabart in [1995] 38 CCJC, 631–643).
[185] STS 18.10.1999 (RJ 1999\7615. Commented by S. Díaz Alabart in [1999] 52 CCJC, 309–322).

blesome or aggressive character. With regard to elder pupils, it is also important to find out whether the children have obtained the authorisation of their parents to leave the school premises during the morning break or during the school day, since in this case the centre is freed from liability.[186]

b) *With regard to the sort of activity performed or the means that children use*, the practice of the courts shows that the school must increase its supervision depending on the characteristics of the place where pupils are. Another element to be weighed is the intrinsic dangerousness of the performed activity with regard to the age of the children who take part in it,[187] especially in order to find in favour of the defendant school when an accident occurs in the course of children's games that are not dangerous.[188]

c) *With regard to the premises and facilities of the school*, the school must take all the steps necessary to avoid accidents in relation to machines and facilities that may be dangerous and that the security measures must be adapted to the specific characteristics of children.[189] A particular case refers to pupils who cause harm or suffer injuries after having left the school premises without permission. If leaving the premises without permission could have been avoided by appropriate supervision and control, the school will be liable. In order to be freed from liability, schools will have to show that they effectively adopted appropriate measures to prevent the children from leaving the centre at their will and it will not be sufficient to show that they had forbidden their pupils to do so.[190]

10. What is the relationship between damages claims against teachers, schools, school boards, public authorities sounding in tort on the one hand and social security benefits on the other? May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school boards and the state?

As has been previously pointed out, tort claims and, in this case, the tort claim against the school, the public body or the teacher, and social security benefits resulting from the harm are fully compatible. With regard to the recoupment 147

[186] E. Gómez Calle (supra fn. 15), 1084.

[187] See García Vicente, [1993] 32 CCJC, 633 and STS 10.6.1983 (RJ 1983\3517); 30.6.1995 (RJ 1995\5272); 29.12.1998 (RJ 1998\9980); 18.10.1999 (RJ 1998\7615) and 11.3.2000 (RJ 2000\1520).

[188] See STS 8.3.1999 (RJ 1999\2249) and 28.12.2001 (RJ 2002\3094). STS 27.9.2001 (RJ 2001\8155) where it was found in favour of the defendant school, in a case where injuries were sustained by a girl who had been crushed by other children when falling while they were playing a children's game consisting of holding each other in order to make a train. The Supreme Court points out that such accidents "could only be avoided by putting the girl to absolute inactivity".

[189] E. Gómez Calle (supra fn. 15), 1085. See STS 10.10.1995 (RJ 1995\7186) and particularly STS 14.2.2000 (La Ley 2000, 6367), where a school was held liable for not having displayed the security measure necessary to prevent a 12-year-old pupil from killing himself by jumping into the void.

[190] E. Gómez Calle (supra fn. 15), 1080. See STS 15.12.1994 (RJ 1994\9421. Commented by S. Díaz Alabart in [1995] 38 CCJC, 631–643).

of the damages, the amount corresponding to the health care services is currently the only portion that can be claimed from the tortfeasor (cf. art. 123 IV LGSSS) (see supra nos. 48–56).

11. What is the relation between the damages claim of the victim against the child and his damages claim against the teacher or other institution liable for the tort of the child?

148 Tort liability of the school or educational institution pursuant to art. 1903 IV CC does not exclude the liability of the pupil pursuant to art. 1902 CC, as long as he or she has tortious capacity.[191]

12. Is there any possibility for either the child or the teacher to have recourse against each other?

149 Since art. 1904 II CC mentions specifically the action of recourse against the teacher (see supra nos. 139–141) but not against the pupil, in this case the general rule governing joint tortfeasors applies. Therefore, whenever the contribution of the child and of the teacher or institution to the damaged caused cannot be apportioned, they will be solidarily liable.[192] As a solidary debtor, the one who pays compensation in full will be able to recoup from the other debtors the amount of damages corresponding to the share of the damage imputable to the other (art. 1145 II CC). Certainly, this will require, in our case, that the minor has tortious capacity and that he has been at fault in the sense provided by art. 1902 CC (see supra nos. 2–19).

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or for the parents to have recourse against each other?

150 As has been pointed out, the general rule is that as long as the pupil is under the control of the school the duty of supervision is transferred to the school and to its personnel. For that reason, no tort liability claims pursuant to art. 1903 II CC can be brought against the parents for the damage caused by their children during this span of time, either by the school or teaching personnel or by third parties. Moreover, the fact that parents are normally liable for their children does not give rise, in these cases, to a possible diminution of the liability of the school or of the teachers in charge of the supervision of the minor.[193]

[191] E. Gómez Calle (supra fn. 15), 1089.
[192] M.L. Atienza Navarro (supra fn. 164), 540.
[193] SSTS 3.12.1991 (RJ 1991\8910. RJ 1991\8910. Commented by S. Díaz Alabart in [1992] 28 CCJC, 115–121) and 10.12.1996 (RJ 1996\8975. Commented by E. Gómez Calle in [1997] 43 CCJC, 385–400). See SAP Sevilla 13.3.2000 (AC 2000\1828), where it was found for the defendant parents, who had been ordered to pay compensation by the Court of First Instance, on the grounds that liability fell on the public body concerned, which had not been sued in the process.

151 However, legal scholarship considers that it cannot exclude that parents be held liable according to the general fault liability rule provided by art. 1902 CC if it can be shown that the parents have also somehow contributed to the causation of the damage.[194] This is the case, for instance, if they do not control and supervise their children during the moments prior to the transfer of the duty of supervision to the school, or if they allow their child to carry objects to school that, in view of his or her age or character, can be considered dangerous.[195] However, in STS 10 December 1996[196] the Supreme Court exonerated the parents from any liability and held that the school was the sole liable defendant on the grounds that it was incumbent on the teachers to prevent a four-year-old girl from injuring a playmate with a prickly clasp she had brought from home.

[194] S. Díaz Alabart, [1995] 38 CCJC, 640.

[195] E. Gómez Calle (supra fn. 15), 1091. See also C. López Sánchez (supra fn. 5), 275 (who accepts the possibility of *concurrent* (sic) liability of the parents if it is found that there was "any insuficiency in the education by the parents") and S. Díaz Alabart, *La responsabilidad de los centros docentes por los hechos dañosos de sus alumnos menores de edad* (2000), 133 (referring to cases in which parents can contribute with their fault to causing the damage, since the cases are situations in which the damage occurred on the occasion of an activity organised by the school but in cooperation with the parents).

[196] RJ 1996\8975. Commented by E. Gómez Calle in [1997] 43 CCJC, 385–400.

Children as Tortfeasors under Swedish Law

Bertil Bengtsson

I. Introduction

The Swedish liability rules concerning children illustrate some traits that are typical for the tort law of the country, among others the tendency to stress the value of loss distribution by insurance and the inclination to give the courts a discretionary power to determine the liaility in a reasonable way.[1] 1

According to the Tort Liability Act (*Skadeståndslagen*, SkL),[2] the liability of minors (up to 18 years of age) is determined on grounds of reasonableness; the age and development of the minor, the character of the damaging act, existing liability insurance, the wealth of the parties and other circumstances should be considered (SkL chapter 2 sec. 4). However, the most important question in this context is whether there is an insurance covering the liability of the minor; in such cases, it is never considered reasonable to reduce damages on account of the tortfeasor's age. The liability insurance creates, as it were, a liability which would not exist if the defendant had no insurance (a way of reasoning that is characteristic of the importance attached in Swedish law to the argument of risk distribution). In general, the insurance pays full compensation for the damage or injury suffered. For obvious reasons, it is seldom worth while to claim damages from children who have no insurance protection. In view of the frequency of liability insurance (about 95% of Swedish households are protected in this way), a mitigation of the liability of minors is seldom a problem for the courts. However, most liability insurance exclude intentional damaging acts by children over twelve years of age, and in this way the rule in the SkL has still some practical importance. 2

It should be mentioned that in all other respects than those treated below, the general rules concerning tort liability are applied in determining the liability of the child. Thus, the compensation can be reduced in case of contributory 3

[1] Some general traits of Swedish Tort Law are treated in H. Tiberg/F. Sterzel/P. Cronhult (eds.), *Swedish Law – a survey*, 155–173. The leading Swedish text book on tort law is J. Hellner/S. Johansson, *Skadeståndsrätt*, (6th edn. 2000). A commentary on the Tort Liability Act is B. Bengtsson/E. Strömbäck, *Skadeståndslagen. En kommentar* (2002); see above all 62–67 concerning the following.

[2] *Skadeståndslagen* (1972:207).

negligence (SkL chapter 6 sec. 1), and the rules concerning assessment of damages are also the same.

II. Liability of the Child

A. Liability for Wrongful Acts

4 There is no fixed minimum age for children to be liable. However, according to a Supreme Court decision concerning a child aged three years and two months,[3] very young children cannot be liable in tort for damaging acts; the age limit may be about four or five years. On the other hand, insurance companies generally cover damage caused even by children that are too young to be legally responsible for their acts, according to a particular clause in the policy. This is another instance of the liability insurance going further than the liability in law.

5 According to the SkL, the behaviour of a child should be judged in the same way as the behaviour of an adult person in the same situation; the wording of the Act is the same as in the section regulating the general rule of liability for negligence, and the comments in the *travaux preparatoires* (which Swedish courts treat with great respect) underline that the way of reasoning should be the same.[4] If for instance a child causes damage by negligent cycling, infringing the traffic rules, he will in principle be liable even if his behaviour can be explained by his age. Instead, he is protected by the rule mentioned above that his liability should be assessed on the ground of reasonableness. In other words, the capacity to act reasonably should be measured by an objective standard, and this standard should refer to people in general in the same situation – not to children of the same age. However, the age and individual capacity of the child will influence the amount of damages (unless there is a liability insurance that pays full compensation as soon as there is liability at all).

B. Liability in Equity

6 As appears from the above, the liability of children may be regarded as a kind of liability in equity which often exists even if they are not capable of acting reasonably. The factors of equity are summarized by the SkL (see above). Where there is no liability insurance, the court will take into consideration whether there is (gross) negligence or even intention on the part of the child, as well as the economic circumstances of the child and the victim. If the damage or injury of the victim is covered by private or social insurance, this will be taken into account, too. There is no difference between compulsory and optional liability insurance. The liability of the child exists independently of the possible liability of the legal guardian.

[3] [1977] *Nytt juridiskt Arkiv* (NJA), 186.
[4] See above all *Proposition 1972:5*, 161–169; 455–463.

C. Strict Liability

The child can be strictly liable according to particular rules imposing such liability upon owners of certain dangerous things, for instance dogs. The particular rule concerning liability of minors is not applied in these cases. However, the child can be protected by a general provision in the SkL that the burden of liability can be reduced if it is unduly heavy, also in view of the interest of the person suffering the injury or damage and of other circumstances (chapter 6, sec. 2). This provision is not so favourable to the liable party as the particular rule concerning minors, but it may still be invoked in some cases. 7

D. Insurance Matters

The decisive influence of the existence of insurance has already been treated in the introduction. The liability insurance is generally part of a multi-risk insurance policy, e.g. a home insurance. Apparently, there is no tendency to make the premiums dependent on the individuality of the members of the family. However, there are often deductibles according to the policies, and repeated accidents will, at least theoretically, be a reason for the insurance company not to renew the policy (although the *Konsumentförsäkringslag* (Consumer Insurance Act) limits this possibility to such a degree that it is hardly practical[5]). There is no need for the government to encourage families to contract for insurance coverage, as they generally protect themselves in this way on their own initiative. 8

In general, insurance policies do not allow recourse against such family members who are protected by the insurance, e.g. children of the insured party; nor is there any right of recourse whatsoever from social insurance even in cases of intentional tort. 9

E. Scope of Liability/Damages

This question has also been dealt with in the introduction. Today, the liability of children seems to be rather seldomly discussed among lawyers or politicians. There is a possibility for debtors to obtain a discharge of debts in general in certain situations,[6] but it has no practical importance in this case. 10

III. Liability of Parents

The liability of parents presupposes fault on the part of the defendant. The law implies a rather strict duty to supervise younger children, as long as the parent has the custody.[7] The burden of proof concerning the fault of the parent rests on the victim. Also parents who have no right of custody and other persons 11

[5] See *Konsumentförsäkringslag* (Consumer Insurance Act) (1980:38), sec. 15 (the insurance will be renewed unless there are particular reasons for the insurer to refuse renewal).

[6] See *Skuldsaneringslag* (The Debt Rescheduling Act) (1994:334).

[7] See Code relating to Parents, Guardians and Children (1949:381) chapter 6, sec. 2. In order to prevent the child from causing damage to others, the custodian should be responsible for the child being supervised or other appropriate measures being taken.

living together with the child have a duty of supervision, though it is not so strict. The mother is custodian for children of unmarried parents, unless joint custody has been awarded to a cohabiting couple. As for married parents, there may be joint custody even after a divorce; in other cases, one of the parents can be awarded sole custody.[8]

12 As mentioned before, the liability of the parent for acts of the child is governed by the general principle of fault liability, though for natural reasons it will generally be based upon omission rather than negligent acts. Here, the factual situation will be considered as well as for instance the individual circumstances of the parent and the disposition of the child. Of course, when assessing the possibilities of looking after the child and alternative solutions the court will among other things take into account whether one or both of the parents are working or not. When the child is at school, the parents have normally no duty of direct supervision, still less in the unusual case that the child is living in a boarding school.

13 If there is liability on the part of both the parent and the child, they will be jointly and severally liable (if the liability of the child is reduced, up to that amount).[9] Theoretically, the child and the parent can have recourse against each other.

IV. Liability of Other Guardians and of Institutions

14 Children without any parents in the legal sense will be under the custody of some other person. If they live together, this custodian will have a duty to supervise the child. When a child works or is trained in a private business enterprise, the employer will have a certain duty to look after the child, depending upon the circumstances, and the same is true of a children's home or other institution where the child is living. Theoretically, a duty to supervise may be established by means of a private contract; such a contract will at least reduce the duties of direct supervision that rest with the custodian.

15 As for the schools, there is a duty of supervising the pupils depending, above all, upon their age but also upon other circumstances, e.g. earlier experiences concerning the children in question. The duty can be regarded as a matter of administrative law but can also be invoked as a ground for a claim in tort against the school, for instance in cases involving accidents caused by pupils in the school when the supervision has been faulty. The liability will, in principle, rest upon the public entity, e.g. the municipality,[10] or the private person who runs the school (or, in reality, the liability insurance that is common in this case, too). Also the teacher who should have looked after the pupils may be liable jointly and severally with the other party, but he can invoke a general rule that an employee is liable for a wrongful act or omission only if and to the

[8] Code relating to Parents, Guardians and Children chapter 6, sec. 3.
[9] SkL chapter 6, sec. 4.
[10] SkL chapter 3, sec. 2 and 3.

extent that there are particular reasons for such liability (SkL chapter 4, sec. 1); the idea is that the employer who is vicariously liable should be sued in the first place. In this way, the teacher is protected also against the possible recourse of the school or other party paying for the accident. In general, he will have to pay only in case of intent or gross negligence. As the parent's duty of supervision is reduced during school time, there is generally no point in suing that party in this situation.

16 If the victim sues the school, the teacher, a negligent parent, and the child causing the damage or injury, all these parties will be jointly and severally liable as far as their liability is not reduced according to the rules mentioned here,[11] and they can have recourse against each other.

[11] SkL, chapter 6, sec. 4.

Comparative Report

Comparative Report

Miquel Martín-Casals

I. General Introduction

It is a well-known fact that several international texts acknowledge the necessity of awarding special protection to children. Thus art. 25.2 of the *Universal Declaration of Human Rights*[1] provides that "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection". The *Declaration of the Rights of the Child*,[2] acknowledges in its Preamble that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" and adds in its Principle 8 that "the child shall in all circumstances be among the first to receive protection and relief". Finally the *Charter of Fundamental Rights of the European Union* provides that "(C)hildren shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity" (cf. art. 24.1) and it adds that "[I]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" (cf. art. 24.2). 1

The European Constitutions enacted around the second half of the 20th century and afterwards have also considered that children deserve special protection. Thus, for instance, the Spanish Constitution 1978 (CE-1978), besides ensuring that "children shall enjoy the protection provided in international agree- 2

[1] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
[2] Adopted and proclaimed by General Assembly resolution 1386 (XIV) of 20 November 1959.

ments which safeguard their rights" (art. 39.4), establishes that "public authorities shall assure the complete protection of children […]" (art. 39.2) and that "parents must provide their children, born in or out of wedlock, with assistance of every kind during the time they are minors and in other cases where it is legally proper" (art. 39.3). More specifically, in Germany the Federal Constitutional Court, in a famous decision, has held that the fundamental rights guaranteed by the Federal Constitution must be taken into account in framing rules of tortious liability and applying such rules to minors.[3]

3 However, the protection offered to children by national legislatures in the area of tort law varies widely from country to country. The unifying thread of the problems related to tort liability of children should be the general principle of protection of children generally acknowledged by international instruments and national provisions and the necessity of striking a fair balance between this need of protection, on the one hand, and the need to protect victims, on the other. A harmonisation according to general principles is even more urgent if we bear in mind that over the last two decades, whereas several European legal systems have passed specific rules related to children in different areas of tort law, others have produced case-law that has reshaped the traditional tort law rules. Both phenomena have led to an increase in divergence with the result that the area of tort liability of children is one of the least harmonised as well as intricate areas of tort law.

4 When children cause harm there are at least four crucial questions which must be examined in the different legal systems:

a) When children are liable for the damage they cause and whether there is any age limit below which they have no tortious capacity and, therefore, they are exonerated from liability (see supra nos. 5–23).
b) Whether in spite of their lack of tortious capacity, for reasons of equity, children can be held liable in exceptional conditions and which these conditions are (see nos. 24–38).
c) Whether the general answers that legal systems give to solve tort law problems are the same or, on the contrary, follow different rules when children are involved. Special attention requires the application of strict liability regimes to children (supra nos. 39–41), the coverage of damage caused by children by certain types of insurance (supra nos. 42–58) and the scope of the liability of children and the awards for damages (supra nos. 59–66).
d) Finally, it is important to analyse what the relationship is between liability of children and liability of their parents (supra nos. 67–115) or other persons, such guardians and public or private institutions who are in charge of a child at a given moment and who may be held responsible for them (supra nos. 116–149). In particular, how their corresponding liabilities are organised (whether it is a subsidiary or a direct liability, and in this latter

[3] German Federal Constitutional Court (*Bundesverfassungsgericht*), 13.8.1998 – 1 BvL 26/96, [1998] *Neue Juristische Wochenschrift* (NJW), 3557.

case, whether these persons are solidary liable or not with the child who has caused the damage.

II. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

There is a clear division between those countries, such as Austria, Germany, the Netherlands, Portugal and Russia,[4] where there is a minimum age for children to be liable and those other countries, such as Belgium, the Czech Republic, England and Wales, France, Italy, Spain, Sweden,[5] where a fixed minimum age does not exist. 5

However, even in those countries where an age limit exists, the age and the scope of the limit may vary. 6

Thus, for instance, both Germany and Portugal establish a minimum general age which is 7 years. In Germany[6] children under the age of 7 are not liable in tort (§ 828 subs. 1 German Civil Code (*Bürgerliches Gesetzbuch*, BGB)). This minimum age is raised to 10 years if the damage was sustained in an accident involving a motor vehicle, a track railway, or a cable railway, (§ 828 subs. 2 cl. 1 BGB), unless the child caused the injury intentionally, (§ 828 subs. 2 cl. 2 BGB). In Portugal,[7] by contrast, children under 7 – with no further distinctions with regard to certain types of accidents or circumstances – are presumed to be non-imputable (cf. art. 488, 2 Portuguese Civil Code (*Código Civil*, CC)). However this presumption, which is established as rebutable only, never seems to be rebutted in practice. 7

Again, in the Netherlands, Austria and Russia, the minimum age is, in this case, 14 years, but the significance of the fixed minimum age also varies from one country to another. In the Netherlands[8] a wrongful act can only give rise to liability if the act is imputable (cf. art. 6:162 Dutch Civil Code (*Burgerlijk Wetboek*, BW)). However, the law fully excludes imputability for the acts of children younger than 14 (cf. art. 6:164 BW), with the result that children who have not reached this age have no tortious capacity and, therefore, are completely exempt from liability in tort. In Austria,[9] by contrast, persons over 14 years of age are presumed to have sufficient power to discern good from evil and, accordingly, to be fully responsible for their tortious acts (cf. § 153 Aus- 8

[4] Austria no. 5; Germany no. 1; the Netherlands nos. 8–11, Portugal no. 5 and Russia no. 13.
[5] Belgium no. 22; the Czech Republic nos. 8 et seq.; England and Wales no. 10; France nos. 8–9; Italy no. 7; Spain nos. 1–2, Sweden no. 4.
[6] Germany no. 1.
[7] Portugal no. 5.
[8] The Netherlands no. 10.
[9] Austria no. 5.

trian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB)). Since "minors", i.e. persons under 14, regularly lack discernment, they are rebuttably presumed not to be responsible. Thus, the injured party has to prove the minor's fault and therefore his discernment in the particular case (subjective standard). In contrast to Portugal, Austrian practice admits the rebuttal of the presumption. In Russia, children under the age of 14 cannot be held liable for their torts (art. 1073 Russian Civil Code) since, according to art. 26 Civil Code, they are considered to lack tortious capacity.[10]

2. Is there a specific window within the life of a child during which the liability of the child depends on his or her capacity to act reasonably or any similar standard?

9 Those countries that provide for a specific age limit establish thereby a window that is between the age so fixed and the age of majority.

10 In Germany,[11] for instance, since liability of children under 7 years of age is excluded (cf. § 828 subs. 3 BGB), the liability of a child older than 7 (or 10, in the case of traffic and other specific accidents) but younger than the age of majority (18 years old) depends on his or her capacity. This is also the case in Russia regarding children over 14, whose liability depends upon their capacity to understand and to direct their actions (art. 1078 Civil Code).[12] In the Netherlands[13] the window is also established between 14 and 18 years of age (art. 6:164 BW). However, in the Netherlands,[14] blameworthiness is not an exclusive ground for imputation, as art. 6:165 BW provides another base for liability, even when the tortfeasor suffers a physical or a mental disability. Thus, if a person up to 14 performs a wrongful act under the influence of a mental or physical handicap, their wrongful acts are imputed to them on a statutory basis.

11 Austria[15] and Portugal[16] also have a specific window, but in a slightly different sense: both systems establish a rebuttable presumption of discernment relating to minors 7-years-old or older in Portugal, or to minor 14-years-old or older in Austria. Thus, if the tortfeasor is a minor, liability is based on his individual capacity to act reasonably, but under the mentioned ages their tortious incapacity is presumed.

12 In most of the other countries, there is not a specific window and, accordingly, the analysis of the capacity to act reasonably is always relevant.[17] In France, since some decisions made in 1984, the French *Cour de Cassation* has established that children are always liable for the damage they cause regardless of

[10] Russia no. 13.
[11] Germany no. 2.
[12] Russia no. 15.
[13] The Netherlands nos. 12–14.
[14] The Netherlands no. 14.
[15] Austria nos. 5, 6, 10.
[16] Portugal no. 13.
[17] Belgium no. 23; the Czech Republic nos. 8–12; Italy nos. 11–12; Spain no. 3; Sweden no. 4.

their age and capacity. Therefore it has been contended that fault (in the sense of blameworthiness) has been abandoned and is no longer a component of civil tort applied to minors.[18]

3. a) What is the exact significance of the term "capacity to act reasonably": Mere ability to realize the dangers of one's behaviour or as well the ability to adjust the behaviour according to this realisation?

Except in England and Wales, where a concept of "capacity to act reasonably" has not been developed,[19] in most countries under survey the "capacity to act reasonably" is understood as encompassing both the ability to realise the dangers of one's behaviour and the ability to adjust one's own conduct according to this understanding.[20] In this sense, for instance, it is explained in Spain that, private law scholarship has borrowed the concept of imputability from Penal Law, where it is based both on the capacity to understand the wrongfulness of the act and the ability to adjust one's conduct accordingly.[21] German legal scholarship has also tried to transfer the learning of criminal law into the framework of the law of torts, but since the Civil Code does not mention the child's ability to adjust his conduct in accordance with his understanding of his legal obligations (cf. § 823 subs. 3 BGB), courts have not assumed this point of view and have stood firm to the traditional view not requiring the minor's capacity to act reasonably.[22] 13

b) Does the child have to realise the particular danger in the individual case (concrete danger), or is it sufficient to understand that his or her action can in some way be dangerous (abstract danger)?

Although controversial in some countries,[23] there is a general tendency to consider that it is enough for the minor to be able to understand that his or her conduct endangers others (abstract danger). It is not necessary for him or her also to anticipate the exact consequences of his or her conduct (concrete danger).[24] 14

c) Is the capacity to act reasonably measured by an objective standard referring to an ordinary child of the same age or is it determined by examining the capacity of the individual child to act reasonably?

A subjective standard is applied only in Austria,[25] Belgium[26] and the Czech Republic.[27] In Austria, since fault is based on the personal attribution of "de- 15

[18] See France nos. 10–11.
[19] England and Wales no. 12.
[20] Austria no. 12; Belgium nos. 8–13, 24; the Czech Republic nos. 5–6; Italy no. 12; the Netherlands no. 15; Portugal nos. 16–17; Russia no. 16; Spain nos. 9–11.
[21] Spain nos. 9–11.
[22] Germany no. 5.
[23] Italy no. 14 and Spain no. 12.
[24] Austria nos. 13–14; Germany nos. 6–7; Italy no. 13; Portugal no. 19, Spain no. 12.
[25] Austria nos. 15–17.
[26] Belgium no. 26.
[27] The Czech Republic nos. 15–16.

fective will", the courts must not apply abstract yardsticks to certain age groups. They have to establish whether the individual tortfeasor was able to realise the wrongfulness of his behaviour and to adjust his conduct accordingly. In order to do this, the judge not only has to take into account the minor's age but also the stage of his mental development and the circumstances of his behaviour.[28] In Belgium, the capacity of the child is not measured by the objective standard of an ordinary child of the same age either. The capacity of the child is assessed in concrete terms, i.e. taking into account the personal characteristics and possibilities of the child.[29] In the Czech Republic, in order to protect victims from the hurdles of a subjective standard, the burden of proof is generally reversed in their favour. For this reason, fault is presumed and it is for the child to prove that he did act with due care according to the subjective standard.[30] In the Netherlands children are not judged by a standard of reasonable care to be observed by "reasonable children", but by a subjective standard, i.e. taking into account whether the specific child could have acted differently in the same circumstances.[31]

16 In most countries, however, an objective standard applies.[32] This is the case, for instance, in England and Wales, where the standard of care applicable to children is that of an ordinarily prudent and reasonable child of the defendant's age;[33] or in Germany, where children are expected to observe the level of care and diligence, which a reasonable child of the same age would observe.[34]

17 The most objective standard can be found in Sweden,[35] where the capacity to act reasonably is measured by an objective standard referring to people in the same situation, not specifically to children of the same age. Consequently, the conduct of children will be judged in the same way as the conduct of an adult in the same situation, although the age and the individual capacity of the child may influence the amount of damages.[36] The same solution is also adopted in Russia, where courts apply a general or an adult standard of care to minors.[37]

[28] Austria no. 15.
[29] Belgium no. 26, although heavily disputed see nos. 17–21.
[30] The Czech Republic no. 16.
[31] The Netherlands no. 15.
[32] England and Wales nos. 14–15; Germany nos. 11–12; Italy no. 15; Portugal nos. 21, 30–31; Spain no. 17.
[33] England and Wales no. 14.
[34] Germany nos. 11–12.
[35] Sweden no. 5.
[36] Cf. Sweden no. 5.
[37] Russia no. 18.

4. Is the appreciation of whether the child has capacity to act reasonably in any way influenced by the fact of the child being covered by a (family) liability insurance policy? Is there such influence on the standard of care?

In no country, except in Sweden, does coverage by a liability insurance policy seem to have an open influence on the capacity of the child.[38] However, in countries such as Austria, England and Wales, Italy, Portugal and Spain,[39] the existence of liability insurance seems to have a covert influence in the decisions of the courts in order to find in favour of the victims. 18

By contrast, the Swedish Tort Liability Act (*Skadeståndslagen*, SkL) provides that "the liability of minors (up to 18 years of age) is determined on grounds of reasonableness; the age and development of the minor, the character of the damaging act, the existence of any liability insurance covering the damage, the wealth of the parties and other circumstances should be considered" (SkL chapter 2 sec. 4). When there is insurance covering the liability of the minor it is never considered reasonable to reduce damages on the grounds of the tortfeasor's age.[40] 19

5. What is the standard of care applicable to children?

See the answers given to the question 3. c) in nos. 15–17. 20

6. Are children held to a higher standard of care if they engage in "adult activities"?

Except in Sweden,[41] where the general rule is the application to minors of the standard of conduct of adults acting in the same situation, irrespective of the sort of activity performed by the minor, and France,[42] where children are held liable regardless of fault, the rest of the legal systems under survey can be divided into two groups. 21

In some legal systems, such as those in Austria, Italy, Russia and Spain,[43] it is considered that the general rules always apply and, therefore, children are not held to a higher standard. In Austria, however, it is emphasized that if the child had the necessary capacity to realise the danger of the situation, but still went ahead with the activity, it could be considered that he was at fault if he lacked the necessary skills.[44] It is probable that the absence of care at the time prior to the damaging event is taken into account when establishing fault, not only in 22

[38] In this sense, Austria nos. 32–34; Belgium no. 27; the Czech Republic no. 17; England and Wales no. 13; France no. 25; Germany no. 8, Italy no. 17, the Netherlands no. 17, Portugal nos. 22–23, Russia nos. 19–20, Spain nos. 14–15.
[39] Austria no. 34; England and Wales no. 13; Italy no. 17; Portugal nos. 24–29 and Spain no. 15.
[40] Sweden no. 2.
[41] Sweden no. 5.
[42] France no. 27.
[43] Austria nos. 36–40; Italy no. 19; Russia no. 21; Spain no. 18.
[44] Austria no. 40.

Austria, but also in all of these countries, although in the other cases the standard will not be established according to the particular child but according to what a child of the same age would have done under similar circumstances (objective standard).[45]

23 By contrast, in some countries, such as Germany, England and Wales, the Netherlands and Portugal[46] it is emphasized that the conduct of children who engage in activities which are ordinarily open for adults must only be measured against the general standard of care, i.e. the care that is required from a child may be the same as that which is required from an adult engaging in the same sort of activity. A different result, however, may well be warranted where the child is compelled to undertake an adult activity by force of circumstance as, for example, where a child is left in a parked car whose handbrake fails, causing it to roll downhill, and the child attempts unsuccessfully to steer the car around a hazard before bringing it to a stop.[47]

B. Liability in Equity

7. May children be liable in equity if they have no capacity to act reasonably or if they act in accordance with the (lower) standard of care applicable to children but violate the general duty of care incumbent upon adults?

24 The expression "liability in equity" is used in this questionnaire to refer to those cases in which the law provides that the victim, instead of obtaining full compensation, may only obtain an amount of compensation which can be considered fair (*Billigkeitshaftung*, *responsabilità in equità*), normally due to the fact that the minor has no tortious capacity and there is no other person who can be held liable for him or her. According to the general rules, the victim would be left empty-handed, since tortious capacity is a condition for the fault of the minor and, therefore, when certain requirements are met, the system tries to strike a balance between the interest of the minor and of the victim. As such the institution is known only in Austria, Germany, Italy, Portugal and Russia[48] and, with a different shade of meaning, in Belgium and in Sweden.[49] In the Netherlands[50] equitable liability was considered during the parliamentary proceedings of the 1992 Dutch Civil Code with regard to children younger than 14, but finally the plan to adopt it was abandoned in favour of strict liability of the parents. In practice, however, the general *ad hoc* reduction clause can fulfil a similar function in certain cases.

[45] See supra question 3. c).
[46] Germany no. 13; England and Wales no. 16; the Netherlands no. 19 and Portugal nos. 34–36, in this later country, however, with possible exceptions. See Portugal no. 37.
[47] See, in this sense, England and Wales no. 16.
[48] Austria nos. 41 et seq.; Germany nos. 14 et seq.; Italy nos. 20–28; Portugal nos. 38–60; Russia no. 23.
[49] Belgium nos. 31–39; Sweden no. 6.
[50] The Netherlands nos. 21–25.

Liability in equity is provided by a legal disposition in Austria[51] (cf. § 1310 ABGB), Germany[52] (§ 829 BGB), Italy[53] (art. 2047.2 Italian Civil Code (*Codice Civile*, c.c.) – in fact, it is considered embedded within it) and Portugal[54] (cf. art. 499 CC). According to these provisions, a child lacking the capacity to act reasonably but committing what would otherwise be a tort, may be liable in equity if the victim cannot receive compensation from the person who is legally liable for the act of the child causing the damage. Therefore, it is said that liability in equity plays a *subsidiary* role,[55] in the sense that the person who had the duty to supervise cannot be held liable (either because such a person did not exist when the child caused the damage or cannot be identified, or because the damage occurred despite the fact that he or she was acting with due care) or because, although this person can be held liable, he cannot pay compensation because he is insolvent. 25

In order to establish liability in equity most of these legal systems require that the conduct of the minor would have given rise to his or to her liability in tort if he or she had had tortious capacity.[56] However, German courts have given a broad interpretation to the provision of the Code establishing liability in equity (cf. § 829 BGB) and have applied it whenever the tortfeasor would otherwise have escaped liability for personal or subjective reasons, i.e. even to cases where the minor's conduct was in accordance with the standard of care which was to be expected from a child of the same age. As a result of this case law, liability in equity has been applied to cases in which the child would have been liable if he had been an adult.[57] 26

In Austria, by contrast, liability in equity also extends to children who are at fault in order to reduce the award of damages they have to pay. The judge is thus allowed to impose the liability only for an equitable part of the damage. Since when establishing liability and deciding on the amount of compensation the pecuniary circumstances of both, plaintiff and defendant, have to be considered according to the rules of liability in equity (cf. § 1310 ABGB), unfavourable pecuniary circumstances of the minor may speak for reducing the compensation.[58] 27

In Sweden[59] the liability of children is regarded as a kind of liability in equity which often exists even if they are not capable of acting reasonably. The relevant factors for equity are provided by SkL chapter 2, sec. 4, which mentions the reasonableness, the age and development of the minor, the character of the damaging act, the existence of liability insurance and the wealth of the parties. 28

[51] Austria nos. 41 et seq.
[52] Germany nos. 14–15.
[53] Italy nos. 20–23.
[54] Portugal no. 38.
[55] Germany no. 14; Italy no. 23; Portugal no. 41.
[56] See Germany no. 15; Italy no. 22; Portugal no. 39.
[57] Cf. Germany no. 15.
[58] Cf. Austria nos. 7 and 8.
[59] Sweden nos. 6 and 2.

Where there is no liability insurance, the court will take into consideration whether there is gross negligence or even intention on the part of the child, as well as the economic circumstances of the child and the victim. Whether the damage or the injury sustained by the victim is covered by private or social insurance will also be taken into account.

29 In Belgium,[60] liability in equity is only provided for persons who have no tortious capacity on the grounds of their mental state and not for children who have no tortious capacity because of their age (*infantes*) (cf. art. 1386bis Belgian Civil Code (*Code civil*, CC)). Accordingly, children who are not imputable due to their age and who do not suffer these disturbances cannot be held liable in equity. Only when the child who causes damage is insane, seriously mentally disturbed or impaired may the judge rule for a reduced damages award.

30 In Russia, there is a specific provision establishing a sort of liability in equity regarding children under 14. In this case, the general rule is that these children are not liable, since they have no tortious capacity. However, if no adult person can be held liable for their acts, when these minors reach majority or are emancipated and acquire enough assets to enable compensation, the victim will be able to bring an action against them in order to obtain a partial or a full award for the damage sustained.[61]

8. a) Is there a reduction clause as to the amount of damages owed by the child if it is not liable under the applicable standards and/or even if it is fully liable under the standard?

31 As already explained, in Germany courts have given a broad interpretation to the provision dealing with liability in equity (cf. § 829 BGB), and they apply it whenever the tortfeasor would otherwise escape liability for personal reasons. Thus, it also applies to those cases in which the minor's conduct was in accordance with the conduct of the child of his or her age, but not according to the standard of the reasonable adult. However, under the principle of full compensation (§ 249 BGB), its application is not allowed so as to reduce the liability of minors when they are held liable according to the standard of children of the same age.[62]

32 In Austria, however, the institution can fulfil both functions and the unfavourable pecuniary circumstances of the minor who causes the damage can justify a reduction in compensation, even if the minor acted with fault according to the required standard (subjective fault).[63] In Sweden, by contrast, liability in equity serves this reductionary function whenever children are liable and, in a way, counterbalances the harsher standard, i.e., the adult standard, applied to children.[64]

[60] Belgium no. 39.
[61] Russia no. 23.
[62] Cf. Germany nos. 16, 17 and 41. This also seems to be the case in Italy no. 24 and Portugal nos. 51–52.
[63] Austria no. 44.

b) What are the factors of equity?

The factors mentioned in all countries following liability in equity are very similar, although they do not always have the same weight. These factors are: 33

i) *The financial conditions of the parties* is the basic consideration in Austria[65] and Russia,[66] and also one of the most important factors in Belgium, Germany, Portugal and Sweden.[67] 34

ii) *The existence of liability insurance covering the damage caused by the child*. In Austria, Belgium, Germany, Portugal and Sweden,[68] liability insurance coverage is also considered a relevant factor, but its meaning and its scope is very much debated. Sometimes it is discussed whether it is relevant in determining liability in equity or whether it is a quantum issue only, i.e. a factor which does not allow the damage claim to be granted but which prevents the amount of compensation from being reduced. It is also discussed whether it is relevant that insurance is mandatory or voluntary.[69] The opinion that seems to prevail is that, where applicable, this factor serves both purposes[70] and that it is irrelevant whether liability insurance is mandatory or voluntary.[71] 35

iii) *The existence of an accident insurance covering the damage suffered by the victim* is also a relevant factor in Austria, Belgium, Germany and Sweden,[72] since this is one of the factors that have to be taken into account in establishing the financial conditions of the victim. According to what is applicable in the corresponding country, it can exclude liability of the minor or any reduction in the compensation that he or she must pay. To hold otherwise would amount to creating a benefit for the insurer at the expense of the child, since a child who is otherwise not liable could be sued by the insurance company when subrogating in the claim of the victim. 36

iv) *The "degree of fault" of the child*, i.e. whether the minor acted with negligence, gross negligence or intention, is also mentioned in Belgium, Germany, Portugal, and Sweden.[73] It is obvious, however, that in these cases the degree of fault, in its proper sense, cannot be referred to children who have no tortious capacity. Therefore, the "degree of fault" can sometimes be understood, 37

[64] Sweden nos. 6 and 2.
[65] Austria no. 45.
[66] Russia no. 23.
[67] Belgium no. 43; Germany no. 19; Portugal no. 54; Sweden nos. 2 and 6.
[68] Austria nos. 58 et seq.; Belgium no. 43; Germany no. 22; Portugal no. 58; Sweden nos. 2, 6.
[69] See the different positions in Austria nos. 58–82 and in Germany nos. 22–23.
[70] See in this sense case law in Austria nos. 81–82, Belgium no. 43 and Germany no. 24.
[71] See in this sense Germany no. 24; Portugal no. 58 and Sweden no. 6.
[72] Austria nos. 83–86; Belgium no. 43; Germany no. 21 and Sweden nos. 2 and 6.
[73] Belgium no. 42; Germany no. 20; Portugal no. 54; Sweden no. 6. In Austria these are not considered as factors of liability in equity, but have to be taken into account according to the general tort law rules, both for establishing liability and the amount of the award for damages (see Austria nos. 49–54).

as in Germany, as whether the mental condition of the tortfeasor borders on the threshold of responsibility (*natural fault*).[74]

9. Is the liability in equity, if any, subsidiary to the liability of the legal guardian or has the latter liability priority?

38 In all countries under survey,[75] except in Belgium, liability in equity is always subsidiary to the liability of the parents or legal guardians. In Belgium,[76] however, the judge may take into consideration the fact that the victim also has a claim against a person who is liable together with the insane or seriously mentally impaired minor in order not to oblige this minor to pay compensation or to reduce the amount of compensation that he or she must pay.

C. Strict Liability

10. Are children subject to regimes of strict liability like adults or are there special concepts to restrict their liability? In particular: May a child be a keeper of a dangerous thing, like a dog, a car or a plant?

39 In most legal systems children are subject to regimes of strict liability like adults. Strict liability is normally linked to the condition of keeper, *gardien* or *Halter*, but can also be linked to ownership. In most countries,[77] lack of discernment in a child of a young age is not an obstacle to him becoming keeper of a thing. The important point about becoming a keeper is that the child can exercise a power of use, direction and control of the thing which is totally independent.

40 In Germany[78] and Austria[79] the question has been the subject of a great deal of debate. In order to hold children strictly liable, some scholars require that they have capacity to contract, since strict liability is contingent upon the availability of insurance coverage. Others, by contrast, apply tort law provisions by analogy, including those provisions referring to liability in equity. Thus, if the child has the capacity to understand the risk involved in keeping an animal or in operating a car, he or she is liable for the damage caused by the thing in question. When the minor lacks this capacity, his liability may still be established under the rules of liability in equity. The rules of liability in equity are also extended to this case in Portugal[80] for the very specific case of traffic accidents caused by non-imputable minors who are keepers of cars (cf. art. 503, 2 CC), or keepers of animals (art. 502 CC).

41 By contrast, Swedish law[81] does not make recourse to the rules of liability in equity and applies a general provision establishing that when an award of dam-

[74] Germany no. 20 and fn. 43.
[75] Austria nos. 90 et seq.; Germany no. 25; Italy no. 28; Portugal nos. 59–60; Russia nos. 23, 27.
[76] Belgium no. 45.
[77] Belgium nos. 46–50; France nos. 53–60; Italy no. 29; Portugal nos. 62–63, 67; Spain nos. 30–33.
[78] Germany nos. 26–29.
[79] Austria nos. 91 et seq.
[80] Portugal nos. 62–63.
[81] Sweden no. 7.

ages is unduly burdensome for the person liable with regard to his financial situation, it may be reduced according to what is reasonable, having regard also for the victim's need for compensation and other relevant circumstances (cf. SkL chapter 6, sec. 2). In the Netherlands[82] a specific provision of the Dutch Civil Code provides that when non-imputable minors are held strictly liable – except when they are held strictly liable on the grounds of the operation of a business – strict liability is shifted to their parents (cf. art. 6:183.2 BW).

D. Insurance Matters

11. a) Are children covered by family liability insurance policies? Do these policies cover the risk of liability only or is the liability cover part and parcel of a multi-risk insurance policy, e.g. part of a household contents or occupier's liability insurance?

42 It is usually stressed in all the countries under survey that children do not insure themselves, i.e., they are not policyholders. The coverage is usually concluded through different sorts of insurance contracts where the policyholders are their parents.

43 In most countries,[83] liability coverage for the damage caused by children is normally included in a wider coverage framework which encompasses, as the main object of coverage, the accidental damage caused to the dwelling or to its contents and the damage resulting from accidents suffered at home (home multi-risk insurance policy). The scope of the basic coverage is very similar in these policies; they provide coverage for a) the policyholder, b) his or her spouse sharing the household and c) the children of the policyholder or of the policyholder's spouse. Usually they also cover the damage caused by any member of the family, other dependants and even animals

44 In other countries, such as in Belgium,[84] Italy,[85] Germany[86] or the Netherlands,[87] family liability insurance is more common. It covers liability of the parents for the acts of their children, normally including both the liability for personal acts of the children and their liability as keepers of animals. When one of the parents enters into an insurance contract covering the risk of liability, it automatically extends to spouses and children, as long as they are unmarried.[88]

[82] The Netherlands no. 27.
[83] See Austria no. 138; England and Wales no. 19; France no. 64; Portugal no. 73; Spain no. 34; Sweden no. 8.
[84] Belgium no. 51.
[85] Italy no. 30.
[86] In Germany no. 31.
[87] The Netherlands no. 29.
[88] In Russia, the two main insurance companies offer family insurance policies and personal insurance policies covering parental liability for damage committed by children under fourteen. However, the success of these products in Russia is very limited when compared with the situation in other western countries (cf. Russia no. 35).

b) Whatever kind of insurance is available – are there efforts on the part of the insurance industry to risk-rate premiums, e.g. by making the level of premiums dependent on the number, sex, age and criminal history of the children in the particular family, by employing deductibles and/or bonus malus-systems or by reserving termination rights in case of repeated accidents?

45 In the home multi-risk insurance the premium calculation is usually based on different features related to property insurance (construction of building, geographical area, sum insured), rather than to exposure with regard to liability insurance. In these cases and in the cases of liability insurance, there is no tendency to make the premiums dependent on the individual characteristics of the members of the family. However, there are often deductibles according to the policies.[89]

46 *Bonus malus* clauses are mainly applied in the automobile liability insurance market and their presence in other areas is not so evident. In this area, insurance premiums are not subject to increases/decreases according to the number of claims or the persons covered. In most countries, it is customary to determine the premium of householder civil liability insurance according to average costs provided by statistics and not on a case-by-case basis.[90] However, repeated accidents could, at least theoretically, be a reason for the insurance company not to renew the policy.

12. a) What percentage of families is covered by one form or another of family liability insurance?

47 It seems that liability insurance, in any of the forms appropriate for covering liability for the damage caused by children, is fairly widespread in most of the countries under survey. Probably the only exception is Russia, where the number of insurance policies dealing with these matters is very low, in comparison with the data obtained from the other countries under survey.[91]

48 In those countries where data are available, the percentage of families covered by a liability insurance that encompasses the liability for damage caused by children seems very high. So, for instance, in Austria[92] the percentage of insured households was, at the end of 2001, around 82% and in the Netherlands[93] between 80 to 90% of households have liability insurance for these cases.

[89] Austria no. 143; the Czech Republic no. 48; France no. 65; Germany no. 32; Italy no. 31; Spain nos. 39–40, Sweden no. 8.
[90] See in this sense, for instance, Belgium no. 53 and France no. 65.
[91] Russia no. 35.
[92] Austria no. 144.
[93] The Netherlands no. 29. In France nos. 66–67 most families also have liability insurance for these cases.

A slightly lower percentage, according to 2002 data, is to be found in Germany and in Spain.[94] In Germany around 66% of households have liability insurance coverage and this percentage increases to 76% among families that have children. In Spain around 64.7% of households have bought multi-risk insurance, which means approximately 12 million home multi-risk insurance policies. Similar percentages can also be found in England and Wales,[95] where 61% of households purchased building insurance, and 75% contents insurance in 2001. In the Czech Republic,[96] though there are no official statistics concerning the number of insurance holders, it can be estimated that about 20 to 40% of families buy such an insurance. 49

b) Does the liability insurance cover extend to intentional torts committed by the child?

All legal systems under survey agree that if the policyholder, i.e. the parent, has caused the damage intentionally, the insurer must not make it good, since intent is excluded from coverage.[97] However, if this is also the case when the person who has caused the damage is the child is open to debate. 50

In Austria, the Czech Republic and Portugal[98] it is contended that the general exclusion of coverage for damage intentionally caused applies also to damage caused intentionally by the children of the insured. 51

The opposing solution, by contrast, seems more common. In Germany the exclusion for intentional damage does not apply to an insured person who does not act intentionally himself but who is liable for ordinary negligence (for instance, for lack of supervision) for the acts of a third person who has acted intentionally.[99] The same holds true for France, Italy and Spain.[100] Under Italian and Spanish law,[101] coverage includes the damage caused with intent by the children of the policyholder, unless the insurance contract excludes it. The exclusion requires an express agreement meeting the conditions provided by the law. Whether this exclusion is possible or not has been discussed in France, but since 1991 the *Cour de Cassation* has systematically declared that the terms that exclude coverage for damage caused intentionally by children are void.[102] In Belgium, although the question is not clear, some family liability insurance policies – with different types of restrictions – cover the damage intentionally caused by minors. In the field of motor vehicle insurance, a deci- 52

[94] Germany no. 33; Spain no. 41.
[95] England and Wales no. 21.
[96] The Czech Republic no. 49.
[97] See in this sense, for instance Belgium no. 56; Germany no. 34; Italy no. 33; Russia no. 36 and Spain nos. 44–45.
[98] Austria no. 145, the Czech Republic no. 50 and Portugal no. 83.
[99] Germany no. 34.
[100] France no. 68; Italy no. 33 and Spain nos. 44–45.
[101] Italy no. 33 and Spain nos. 44–45.
[102] France no. 68.

sion of the "Executive Department of the Section Common Accidents of the Professional Association of Insurance Companies" dated in 2000, stated that damage intentionally caused by minors younger than 14 years of age should be covered.[103]

13. a) Are the parents under a duty to take out a liability insurance for their child?

53 Among the countries under survey there is no country where third-party or liability insurance of the parents for the damage caused by their children is compulsory.[104] In France, Belgium and in Germany, however, the topic has been discussed by legal scholarship. Whereas French legal scholarship is very much in favour of introducing it, the idea has not gained much support in Germany.[105]

b) Does the government do anything to encourage families to contract for insurance coverage, e.g. by requiring families in the course of admission of children to public schools to establish that they are covered?

54 In no country, except in France, does the government do anything to encourage families to buy insurance coverage.[106] In France,[107] both independent and state schools generally require parents to take out insurance to cover extra-curricular risks concerning their children.

14. a) Do private insurance carriers enjoy rights of recourse as against the child in cases where they pay up a damage claim brought by the victim against the parents?

55 The most common rule is that insurance carriers do not enjoy rights of recourse against children who have caused damage when the victim brings claims against their insured parents.[108] Insurance rules usually exclude subrogation against relatives of the insured or, sometimes, even against other persons who live together with the insured in the same household. The only exception is, generally, when the child has caused the damage intentionally and the insurer has paid damages to cover the liability of the parent.[109]

[103] Belgium nos. 57–58.

[104] Austria no. 146; Belgium no. 59; the Czech Republic no. 51; England and Wales no. 23; France no. 72; Germany no. 35; Italy no. 34; the Netherlands no. 30; Portugal no. 85; Russia no. 37; Spain no. 46.

[105] France no. 72; Germany no. 35. In Belgium no. 59, in 1977 and 1995 some bills were introduced in Parliament in favour of a compulsory family liability insurance. However, to date, none of them has turned into an act.

[106] See, for instance, Austria no. 147; Belgium no. 61; the Czech Republic no. 51; Germany no. 36; Italy no. 35; Portugal no. 86; Russia no. 38; Spain no. 47; Sweden no. 8.

[107] France no. 74.

[108] See Austria no. 148; Belgium no. 62; the Czech Republic no. 53; France nos. 75–81; Germany no. 37; Italy no. 36; Portugal nos. 87–89; Spain nos. 51–54; Sweden no. 8.

[109] See, for instance, Belgium no. 62; France nos. 75–81; Germany no. 37; Italy no. 36; Spain nos. 51–54.

In England and Wales, however, when the policy covers only the parents, it seems possible that the insurer may seek a contribution from the child. Nevertheless no cases seem to have been decided on this point in practice. By contrast, in the typical case of a household contents policy covering both the liability of the parents and of the child, the insurer clearly cannot seek contribution from the child.[110] 56

b) Does the law of social security provide a limit on the right of recourse of the insurance carrier against the child or his parents or legal guardian?

Except general limitations not exclusively established to protect minors, in most countries there are no specific limits on the rights of recourse against children and their parents.[111] In practice, however, there is some reluctance on the part of social security agencies to take recourse in cases other than traffic accidents.[112] 57

In Germany, by contrast, courts have held that the social insurance agency has the obligation to waive its right of recourse if its enforcement would create undue hardship and, in this way, violate the principle of proportionality.[113] 58

E. Scope of Liability/Damages

15. Is there a general limitation or reduction clause in cases of tort liabilities exceeding the financial means of the child or prospective adult?

The most common position is that no general limitation or reduction clause applies when liability exceeds the financial means of the child.[114] 59

Liability in equity does not help in these cases in Germany, Italy and Portugal,[115] where it does not operate as a means-tested reduction of the amount of damages that otherwise the child should pay, but only as the grounds for liability, i.e. for those cases where, if it were not for this institution, the victims would go empty-handed because the child has no tortious capacity and no other person can be held liable (or even, if held liable, is not solvent). 60

By contrast, this means-tested reduction function is fulfilled by liability in equity in Austria,[116] where unfavourable pecuniary circumstances of the minor, 61

[110] England and Wales no. 25.
[111] Austria no. 150; Belgium no. 63; the Czech Republic no. 54; England and Wales no. 26; France no. 82; Italy no. 37; the Netherlands no. 31; Portugal nos. 90–91; Russia no. 41; Spain nos. 55–56.
[112] See, in this sense, Austria no. 150.
[113] Germany no. 38.
[114] England and Wales no. 27; France nos. 84–85; Germany no. 40; Italy no. 38; Portugal no. 92 and Spain nos. 55–56.
[115] Germany no. 41; Italy no. 38 and Portugal no. 92. The same applies in Belgium no. 64 for insane minors.
[116] Austria no. 151.

even if he has tortious capacity, can justify an adjustment in the compensation sum, and in Sweden,[117] where as a general rule, the liability of minors is always determined by taking into account, among other factors, the wealth of the parties.

62 Finally a similar reductionary function can be fulfilled in the Czech Republic, the Netherlands and in Portugal[118] by the general reduction clause (§ 450 Czech Civil Code (*občanský zákoník*, OZ), art. 6:109 BW, art. 494 CC). When its conditions are met, it will apply equally to children. The same holds true in Russia where, with the exception of the cases of intentional infliction of harm, the court may diminish compensation on consideration of the financial conditions of the tortfeasor (cf. art. 1083 of the Civil Code).[119]

16. If not, is there a discussion within domestic tort and/or constitutional law on the problem of excessive tort liability of minors?

63 In the Czech Republic, in the Netherlands and in Portugal[120] the general reduction clause can be used to cope with such a problem. In Germany[121] and in Austria,[122] case law and legal scholarship have criticised the absence of a general reduction clause when tort liability may result in such a heavy burden for children that they will start their adult life with a debt that is almost impossible to pay off over the rest of their lives. In Germany it has been pointed out that, although some rules of bankruptcy and of social security law may offer children some protection in cases of crushing liability, the courts may also have recourse to the general principle of good faith and fair dealing (cf. § 242 BGB) if these safeguards fail.[123]

64 In most of the countries, however, this debate does not take place,[124] probably because there is already a general reduction clause or because as, for instance, in Belgium, France and in Spain,[125] tort liability for the damage caused by minors is channelled through the liability of their parents or other persons who have the duty to supervise them, thereby preventing situations of hardship for minors from occurring. It is true that in some cases children may still be held liable, but in practice the parents or the supervising institution can never escape liability (as, for instance, in France) or, although in theory they can, they can hardly ever escape in practice (as, for instance, in Spain).

[117] Sweden no. 2.
[118] The Czech Republic nos. 55–56, the Netherlands no. 22 and Portugal no. 93.
[119] Russia nos. 26, 46.
[120] The Czech Republic no. 57, the Netherlands nos. 33, 22 and Portugal no. 93.
[121] Germany no. 42.
[122] Austria nos. 152–156.
[123] Germany no. 43.
[124] See, for instance, Belgium no. 65; England and Wales no. 28, France no. 86, Italy no. 39 and Spain no. 59.
[125] Belgium no. 65; France no. 86, Spain no. 59.

17. Does the domestic bankruptcy law or the law concerning the execution of money judgements allow individuals to obtain a discharge of debts which they are unable to pay off?

In most countries, bankruptcy provisions governing insolvency establish, in one way or another, the possibility for debtors to obtain a discharge of the debts they are unable to pay off (out-of-court settlement with the creditors, compulsory settlement after realisation of assets or even after some years have elapsed, etc.).[126] 65

18. If so, does discharge in bankruptcy also extinguish debts sounding in tort? If so, does it also apply to debts compensating for the consequences of intentional acts?

In most countries[127] bankruptcy law, when providing discharge of debts, does not formulate special rules for debts concerning tortious liability, not even if liability is based on intentional conduct. In Germany, however, discharge does not extend to claims arising from intentional torts.[128] In Russia, bankruptcy laws allow individuals to obtain a discharge of debts which they are unable to pay off, with the exception of those resulting from intentional acts and of tort liability arising from harm to life and to health.[129] In Belgium, a distinction is made between a recovery of debts plan with cancellation of capital or without it. In this latter case, the judge could allow a postponement of the payment, a complete or partial reduction of interest rates, or other measures. Under very strict conditions, the judge can also decide to cancel the debts including the capital, except when these debts arise from compensation for physical damage caused by a tortious act.[130] 66

III. Liability of Parents

1. Are parents strictly liable for the tort of the child or does the parental liability depend on a breach of duty to supervise the child and thus on the fault of the parents?

a) Strict liability of the parents:

Strict liability as the general regime for the liability of parents for the acts of their children can be found only in France,[131] where case law has developed the legal system evolving from a fault liability regime. When the Code was 67

[126] Austria nos. 157–162; Belgium nos. 66–67; the Czech Republic nos. 58–63; England and Wales no. 29; France nos. 88–90; Germany no. 46; Italy no. 40; the Netherlands no. 34; Portugal no. 102; Russia nos. 48–49; Spain nos. 60–63 and Sweden no. 10.

[127] Austria no. 163; the Czech Republic no. 64; England and Wales no. 30; France nos. 91–93; the Netherlands no. 35; Portugal no. 104; Spain nos. 64–65.

[128] Germany no. 47.

[129] Russia no. 49.

[130] Belgium no. 68.

[131] France nos. 94–101.

adopted in 1804, art. 1384 subs. 4 French Civil Code (*Code civil*, C. civ.) aimed at establishing a system where parents were liable because they were at fault and presumed fault rebuttably. Accordingly, parents could be exonerated from liability by proving that they had acted with the required care. In 1997 the *arrêt Bertrand*[132] established the basis for a system of strict liability of parents, since it declared that "only force majeure or exclusive fault of the victim can exonerate the father from full liability incurred as the result of damage caused by his underage child living with him". The notion of strict liability (lit. "full liability", *responsabilité de plein droit*) implies that the parent cannot escape liability any longer by proving that he acted with due care and that he can avail himself only of *force majeure* and exclusive fault of the victim as defences.

68 In the Netherlands[133] the parents are also held strictly liable for the acts of their children, but only until they reach the age of 14.

b) Vicarious liability of the parents:

69 For specific cases, this is established in Spain[134] by the Act dealing with criminal liability of minors, which applies only when the tortious behaviour of the child amounts to a crime or a misdemeanour: In such a case, art. 61.3 Organic Act on Criminal Liability of Minors (*Ley Orgánica reguladora de responsabilidad penal de los menores*, LORPM) provides for joint and several liability of the parents with the child who is younger than 18 and older than 14. This is a case of vicarious liability of the parents, since a condition for their liability is that the child has tortious capacity and is at fault – which is established by the law when considering that the child can be held criminally liable – but fault of the parents themselves is not required.

c) Fault liability of parents for the acts of their children:

70 This is the most common rule, which can be found in Austria,[135] Belgium,[136] the Czech Republic,[137] Germany,[138] Italy,[139] the Netherlands (for children between 14 and 16 years old),[140] Portugal,[141] Russia,[142] Sweden[143] and, theoretically, also in Spain.[144] However, the regimes of liability vary depending on whether fault of the parents is presumed or not and whether parents may in practice be exonerated by proving that they acted with due care (see infra question 2).

[132] See France no. 98.
[133] The Netherlands no. 36.
[134] Spain no. 66.
[135] Austria nos. 166–167.
[136] Belgium nos. 113–115.
[137] The Czech Republic nos. 65–67.
[138] Germany no. 48.
[139] Italy nos. 42–45.
[140] The Netherlands nos. 36, 11.
[141] Portugal nos. 106–121.
[142] Russia no. 53.
[143] Sweden nos. 11–12.
[144] Spain nos. 66–71.

d) Fault liability of the parent for his or her own conduct:

This is the case in the Netherlands for children between 16 and 18 years old. Since there is no specific provision on parental liability for these cases, parents can only be held liable if all the requirements of Art. 6:162 BW, i.e. for their own acts are met.[145] Probably England and Wales could also be placed under this heading, since there is no specific norm imposing liability of parents for the acts of their children. Consequently, their liability can only arise on the basis of their personal fault arising from breach of the parent's duty to take reasonable care in the supervision of the child.[146] 71

2. If the parental liability is based on their own fault: Is the burden of proof on the victim or is there a rebuttable presumption of fault?

In some countries fault of the parents is not presumed and, therefore, the victim bears the burden of establishing that the parents infringed their duty to supervise the child. This is the case in Austria,[147] England and Wales[148] and Sweden[149] where, in accordance with the general rules of tort law, the burden of proving the parent's fault is on the claimant. This is also the case in the Netherlands[150] with regard to children between 16 and 18, since starting from the age of 16, there is no specific provision on parental liability and, therefore, the general tort law rules apply. 72

By contrast, fault is rebuttably presumed in Belgium[151] (art. 1384.5 CC), the Czech Republic[152] (artt. 420 and 422 OZ), Germany[153] (§ 832 BGB), Italy[154] (artt. 2047 and 2048 c.c.) and Portugal[155] (art. 491 CC). Russia[156] and Spain,[157] as will be seen, follow the same rule in theory only and in the Netherlands[158] this presumption applies to the case of children between 14 and 16 years of age only (cf. art. 6:169 BW). 73

Thus, for instance, in Germany,[159] as an exception to general principles, § 832 BGB provides that the plaintiff merely needs to prove that the damage sustained was caused by a wrong committed by the child (cf. § 832 subs. 1 cl. 1 BGB). If the victim has met this burden of proof, § 832 subs. 1 cl. 2 BGB 74

[145] The Netherlands nos. 11, 36.
[146] England and Wales no. 31.
[147] Austria no. 168.
[148] England and Wales no. 32.
[149] Sweden no. 11.
[150] The Netherlands nos. 11 and 37.
[151] Belgium nos. 114–115.
[152] The Czech Republic no. 68.
[153] Germany no. 50.
[154] Italy nos. 46–52, 42–43.
[155] Portugal no. 122.
[156] Russia nos. 61–65.
[157] Spain nos. 67–68.
[158] The Netherlands no. 11.
[159] Germany no. 50.

rebuttably presumes both that the legal guardian violated his or her duty to supervise and that there was a causal link between the violation of the duty of supervision and the damage caused by the child.

75 In the case of Italy,[160] one has to bear in mind that parents can be liable not only for not having met their duty to supervise their child (art. 2047 c.c.), but also for not having educated him or her properly (art. 2048 c.c.). In both cases there is a rebuttable presumption of fault, but whereas under art. 2047 c.c., the person who was in charge of custody must prove that he or she did everything possible to keep the child under control, under art. 2048 c.c. the parents must prove that they have given a proper education to the child to prevent him or her from damaging others. Similarly, in Portugal, case law is unanimous in the sense that the duty to supervise also includes the duty to offer a good education and the duty to ascertain whether the models and rules of education explained to and imposed on the minor were internalised by him. Consequently, it accepts that the presumption of fault affects both the duty to supervise *strictu sensu* and the duty to educate. This result has been highly criticised by some legal scholars because art. 491 CC mentions only the duty to supervise and because the rebuttal of the presumption of *culpa in educando* is extremely difficult.[161]

76 The Spanish Civil Code (cf. art. 1903 VI Spanish Civil Code (*Código Civil*, CC) deals with the liability of parents as fault liability and provides expressly for the reversal of the burden of proof of fault. However, since in practice the courts do not accept any case in which parents can escape liability by proving that they acted with due care, liability of the parents operates as if it were vicarious in spite of the wording of the Code.[162] The same conclusion is pointed out in the Russian report. Thus, while *de jure* liability of parents for the acts of their children is liability with a rebuttable presumption of fault, but according to existing practice, parents rarely escape liability.[163]

3. Who is subject to the parental duty to supervise: a) only the parents in a legal sense; b) persons who have the right of custody; c) persons just living together with the child?

77 No country links the liability for the acts of children to the mere condition of being a parent in a legal sense. On the contrary, the duty to supervise the child is derived, in most countries, from the condition of having custody of the child.[164] Custody of the child is determined by family law rules, which usually link custody to the exercise of parental responsibility. However, custody is not

[160] Italy nos. 46–52, 42–43.
[161] Portugal nos. 129–132.
[162] Spain no. 72.
[163] Russia nos. 61–65.
[164] See, for instance, Austria no. 171: "persons who have the right and duty of custody are subject to the duty to supervise the child". Also Russia no. 66: "only official custody is important".

limited to parents and other persons, such as guardians or public or private institutions, may have custody instead.

78 The custody of the child is thus primarily entrusted to parents in a legal sense and, therefore they have, among other duties, the duty to supervise (see, Austria,[165] Belgium,[166] the Czech Republic,[167] Germany,[168] Italy,[169] the Netherlands,[170] Portugal,[171] Spain[172] and Sweden[173]). England and Wales seems to be the only jurisdiction where it has not yet been determined whether custody itself gives rise to a duty to supervise, or whether it is only an assumption of responsibility on a specific occasion that can have this effect.[174]

79 Therefore, in general terms, family law rules are also important for tort law, since they determine who is going to be held liable for the acts of children. However, having custody of the child sometimes is not a sufficient condition and, occasionally, is not even a necessary condition.

80 Custody is not a sufficient condition in France,[175] where a second condition, namely that the child lives with the parents, is required (cf. art. 1384 subs. 4 C. civ.). Since 1997 a series of decisions have modified this condition,[176] considering that the exercise of the right of access to the child does not make cohabitation of the minor with the other parent who has the right of custody cease. It has thus been established that the notion of cohabitation derives from "the legal residence of the child in the domicile of both the parents or of one of them". Accordingly, the fact that a child is placed under the care of third persons by his parents and in fact lives with them (grandparents, other members of the family, even a boarding school) does not change the rule of strict liability of the parents. In practice, the most problematic and shocking result arises when parents are separated or divorced. In these cases the only parent who will be liable pursuant to art. 1384 subs. 4 C. civ. is the one who has been vested with the custody of the child by the court, in spite of the fact that the other parent will have a right of access to the child, which includes visiting the child and providing accommodation for him/her. Therefore, even if the child causes damage while he is together with the parent who is exercising his or her right of access, the only parent who will be liable pursuant to art. 1384 subs. 4 C. civ. will be the other, i.e. the parent who has the right of custody. Nevertheless, the parent who is exercising his or her right of access can also be held liable, but

[165] Austria nos. 171–172.
[166] Belgium nos. 93 et seq., 117–119.
[167] The Czech Republic nos. 70 et seq.
[168] Germany no. 53.
[169] Italy no. 53.
[170] The Netherlands no. 38.
[171] Portugal no. 143.
[172] Spain no. 73.
[173] Sweden no. 11.
[174] England and Wales no. 33.
[175] France nos. 103 et seq.
[176] France no. 105.

in this case not strictly – i.e. not according to art. 1384 subs. 4 C. civ. – but only according to the general rules of fault liability (cf. artt. 1382 and 1383 C. civ.).

81 In some countries, such as the Czech Republic[177] and Germany,[178] case law extends to tort law a legal trend that can be observed in family law and which assigns legal rights not to legal status but to *de facto* social relationships**.** This is the case with regard to step-parents. Czech case-law considers that since step-parents live together with one of the parents of the child, they are also involved in the education and supervision of the child and, therefore, can also be held liable. In Germany[179] modern jurisprudence is prepared to construe an implied contractual agreement between the parent and the step-parent with the latter taking the duty to supervise the child upon himself or herself.

82 Except in Sweden,[180] where parents who have no right of custody and also other persons living together with the child have a duty of supervision, in most countries such a duty does not arise from the mere fact of living together with a child in the same household.[181]

4. If custody determines the duty to supervise: What are the rules for the allocation of custody in the following circumstances: a) children of unmarried parents; b) separation of married parents; c) divorce?

e) Children of unmarried parents

83 In Belgium,[182] the Czech Republic,[183] France,[184] Italy,[185] Portugal,[186] Russia,[187] and Spain,[188] parental responsibility and the exercise of parental rights and duties are incumbent upon both parents of the child regardless whether they are married or not.

84 In countries such as Austria,[189] Germany,[190] the Netherlands[191] and Sweden,[192] the law allocates parental responsibility to the mother only if the parents are not married. However, the parents can establish joint parental custody by subsequent marriage or the mother may let the father participate in her rights and

[177] The Czech Republic no. 72.
[178] Germany no. 57.
[179] Germany no. 57.
[180] Sweden no. 11.
[181] Austria no. 174; Germany no. 60; the Netherlands no. 38; Spain no. 77.
[182] Belgium nos. 118–121.
[183] The Czech Republic no. 82.
[184] France nos. 107–111.
[185] Italy no. 54.
[186] Portugal no. 146.
[187] Russia no. 67.
[188] Spain nos. 79–80.
[189] Austria no. 175.
[190] Germany nos. 61–63.
[191] The Netherlands no. 39.
[192] Sweden no. 11.

duties of custody. This is the case, for instance, in Austria, where if both parents live in the same household, they may agree upon being entrusted with the custody of the child together. The court must approve this agreement except when it can be considered detrimental to the child's welfare.[193]

b)/c) Separation or divorce of the married parents

85 In some countries separation or divorce does not have any impact on the allocation of custody and the exercise of parental responsibility (Austria,[194] the Czech Republic,[195] France,[196] Germany,[197] Italy,[198] the Netherlands,[199] Russia,[200] and Sweden[201]). So, for instance in Austria, the amendment of the Law of Filiation introduced in 2001 provides for joint custody as long as parents agree on it. This is also the case according to the French Civil Code (art. 373-2 1 C. civ.). In Belgium, since the application of the presumption of liability set out in art. 1384.2.5 CC depends only upon the legal condition of being a parent, but not upon custody, the circumstance that parents are separated or divorced is irrelevant in order to establish their liability according to that provision. These circumstances can only influence – but will not do so automatically – the assessment of the judge as regards to whether parents have supervised their child adequately.[202]

86 In Germany, however, in cases of separation or divorce, joint parental responsibility (*gemeinsame elterliche Sorge*) changes its character, i.e., it is divided in order to accommodate for the fact that in most cases the child is living either with the mother or with the father (§ 1687 BGB). In such a case, joint parental responsibility is limited to matters of substantial importance. In the common affairs of day-to-day life, parental responsibility is exercised exclusively by the parent with whom the child is actually living together. This allocation of parental custody also affects the duty to supervise and therefore, parental liability under § 832 BGB, the duty of the parent not living together with the child being reduced accordingly. Thus, the father not living with the child is not liable for a tortious act committed by the child while he is with his mother, with whom he lives.[203]

87 In Italy,[204] the custody of the child on separation or divorce is entrusted to the parent chosen by the judge (cf. art. 155 c.c.). The situation is also very similar

[193] Austria no. 175.
[194] Austria no. 177.
[195] The Czech Republic no. 83.
[196] France no. 110.
[197] Germany nos. 64–65.
[198] Italy no. 54.
[199] The Netherlands no. 39.
[200] Russia no. 67.
[201] Sweden no. 11.
[202] Belgium no. 121.
[203] Germany no. 65.
[204] Italy no. 54.

in Portugal[205] and in Spain.[206] In this latter country, in the case of legal separation or divorce the spouses can agree on the allocation of parental responsibility with regard to the common children, as well as shared custody or visitation, communication and staying with the children which constitutes the exercise of right of access of the parent who does not live with them by regulatory agreement. This regulatory agreement is mandatory in the proceedings filed by both spouses in common agreement and must be approved by the judge, unless the agreement is detrimental to the child (see artt. 92.4 and 92.5 CC and 76.1.b) *Catalan Family Code* (CF)). Failing a regulatory agreement dealing with the conditions for the exercise of parental responsibility and for the right of access, the judge will decide on shared custody or with which of the two parents the children are to remain (cf. art. 92, 8 CC).

88 Finally since in England and Wales[207] it is not clear whether custody itself gives rise to a duty to supervise, it cannot be predicted with confidence how the courts will treat cases of damage caused by the children of unmarried, separated or divorced parents. It is thus not particularly relevant to consider the principles of family law on the basis of which custody is allocated and it seems that the parent who is together with the child at a given moment is the one who has the duty to supervise him.

5. Is the parent, who is not awarded the custody of the child and who does not live together with the child, subject to the duty to supervise?

89 Some reports set out that the parent who is not awarded the custody of the child and who does not live together with him or her is not subject to the duty to supervise, even if the damage is caused when the child is with this non-custodian parent. Nevertheless, the general rules of tort law may also apply to these cases. Then the non-custodian parent, although not liable for the acts of his or her child pursuant to the tort law rules deriving from the family relationship, may be held liable for personal fault according to general tort law rules.[208]

90 By contrast, other reports emphasise that, since not having the custody of the child does not amount to having been deprived of parental responsibility,[209] the non-custodian parent retains visitation rights. These rights are indispensable remainders of parental custody, and as such, they operate as a limitation to the exclusive rights of the other parent. Insofar as one parent actually enforces his or her visitation rights, the duty to supervise survives his or her loss

[205] Portugal nos. 147–148.
[206] Spain nos. 84–85.
[207] England and Wales no. 34.
[208] Austria no. 180; France no. 112 and the Netherlands no. 40.
[209] Belgium no. 122; the Czech Republic no. 86; Germany no. 66; Italy no. 55; Portugal no. 149 and Spain nos. 86–88. In England and Wales there are no rules on this topic (England and Wales no. 31).

of custody and the visiting parent has the duty to supervise the child during the period he or she spends with the child.[210]

6. Which elements of a tort must the child have realised for the parents to be liable for it?

A distinction between non-imputable children, i.e., children who lack tortious capacity, and imputable children, i.e. children that do have tortious capacity, must be drawn. This distinction is paradigmatically drawn in the Netherlands and in Italy. 91

In the Netherlands[211] for children up to 14 years of age, i.e. for children who lack tortious capacity, it is only required that the child acted wrongfully (cf. art. 6:169 (1) BW). If this is the case, parents are held strictly liable. By contrast, for children between 14 and 16 years of age. i.e., for those children who have tortious capacity, it is not sufficient that the child has acted wrongfully, but it is also required that he has been at fault (cf. art. 6:169 (2) BW). In this case, liability of the parents is based on a presumption of fault of the parents and they will be able to escape solidary liability with the child if they succeed in rebutting this presumption. 92

In Italy[212] liability for the acts of children who have no tortious capacity (cf. art. 2047 c.c.) requires them to have behaved in such a way that would have made them liable in tort if they had had tortious capacity. By contrast, liability for the acts of children who have tortious capacity (art. 2048 c.c.) requires that the child has also committed a tort, i.e., that all the elements of the tort committed by the child are shown. 93

A similar distinction between non-imputable and imputable children is drawn in Belgium,[213] Portugal[214] and in Spain,[215] where, if the child has no tortious capacity, it is only necessary for the conduct that caused the damage directly to have been *objectively intentional or negligent*, i.e. that it was suitable for generating liability had it been performed by a person with tortious capacity. By contrast, when the child has tortious capacity, fault on his or her part is also a condition for the liability of the parents.[216] 94

In Germany, although the same distinction between non-imputable and imputable children is drawn, a literal interpretation of the wording of the Civil Code could result in holding imputable children liable when they have behaved nei- 95

[210] Belgium no. 101; the Czech Republic no. 86; Germany no. 66; Portugal no. 149 and Spain nos. 86–88. This could also be the practical outcome in England and Wales no. 35.
[211] The Netherlands nos. 41–42.
[212] Italy no. 56.
[213] Belgium no. 124.
[214] Portugal nos. 153, 156.
[215] Spain nos. 89–90.
[216] In a similar sense, Russia no. 70.

ther negligently nor intentionally.[217] Since according to this interpretation the parents would be subject to liability for acts which even the most reasonable and careful behaviour of an adult would not have been successful in averting, legal doctrine and case law carry out a "teleological reduction" (*teleologische Reduktion*) of these provisions and exclude from parental liability those cases where the injury was caused by the behaviour of a child that would not qualify as a fault if it had been performed by a reasonable adult.[218]

96 A minority of countries consider, however that the conduct of a child does not need to meet any of the elements that are required to establish the existence of a tort. In Austria,[219] for instance, it is of no relevance whether the child's act constitutes an actionable tort. The minor must have caused the damage but it is neither necessary that he acted with fault nor that he acted wrongfully, in the sense of the *Verhaltensunrechtslehre* (which is always related to a human conduct not to a detrimental result).

97 In England and Wales[220] the question is whether the parent, not the child, committed a tort. If we are talking about negligence, the required elements are a breach of the parent's duty to take reasonable care in the supervision of the child and injury consequent on that breach. It is not necessary for the child personally to have done anything that satisfies the elements – or any of the elements – of the tort.

98 Finally in France,[221] contrary to previous law, the liability of parents for their children's acts has been strict since 1984.[222] Further decisions of the *Cour de Cassation* have confirmed that liability of the parents for the damage caused by acts of their children is not subordinate to the existence of a wrongful act by the child.[223]

7. What are the criteria for assessing the duty to supervise: a) factual situation (intensity of danger etc.); b) circumstances in the person of the parent (disabilities; workload); c) circumstances in the person of the child (age, viciousness, accident-proneness etc.)? In particular: Does the extent of the duty to supervise depend on whether (both of) the parents are working or not?

99 It is obvious that these criteria are irrelevant when, as in France or in the Netherlands with regard to children under 14, parents are held strictly liable[224] and that they are also irrelevant when, as in Spain in the cases of tort liability of minors arising from crimes or misdemeanours, the law provides for vicarious

[217] Germany no. 67.
[218] Germany no. 68.
[219] Austria nos. 181–182.
[220] England and Wales no. 36.
[221] France nos. 113–119.
[222] France no. 113.
[223] France no. 117.
[224] France no. 120; the Netherlands no. 43.

liability of the parents.[225] Thus, the criteria for assessing the duty to supervise become important when parents are held liable because they have negligently breached this duty. In general terms, the different legal systems do not use these criteria in a uniform way. In the Netherlands, for instance, all these criteria may be relevant for rebutting the presumption of fault of the parents with regard to acts of 14- and 15-year old children[226] By contrast, in Italy none of these criteria is considered relevant in assessing the parents' duty to supervise.[227]

With regard to the factual situation, the intensity of the danger and the seriousness of the impending injury are mentioned in several countries,[228] whereas, by contrast, the value of the endangered goods is only expressly mentioned in Austria.[229] 100

Most country reports also set out, with regard to the circumstances in the person of the parent, that the living conditions of the parents, their economic circumstances, their professional duties, and the number and the age of the children they have are relevant.[230] In this respect, Spain is an exception, since courts consider that none of these circumstances can be taken into account in order to establish what the required standard of care of the parents is.[231] However, this position is not surprising if we consider that, as has already been mentioned, in the practice of the courts, liability of parents for the acts of their children operates as if it were vicarious liability, i.e. irrespective of fault of the parents. 101

An important question with regard to the circumstances of the parents is the liability of the parent who is at work for the damage caused by the child during his or her absence. The fact that parents are at work does not allow them to elude their duty to supervise the child and they must take steps for someone to supervise the child in their absence.[232] If only one of them is working, the working parent can delegate his or her duty to the other parent who is not working but, despite this delegation, the working parent continues to be subject to a residual duty of organisation and supervision.[233] 102

With regard to the circumstances in the person of the child, the most important circumstance mentioned by most reports is age,[234] thus considering that the 103

[225] Spain no. 91.
[226] The Netherlands no. 43.
[227] Italy no. 58.
[228] Austria no. 186; England and Wales no. 37; Germany nos. 69–73; Spain no. 92.
[229] Austria no. 186.
[230] Austria nos. 189–190; England and Wales no. 37; Germany no. 74.
[231] Spain nos. 93–95.
[232] See in this sense, Germany no. 78, Portugal no. 159, Russia no. 72 and the Czech Republic no. 92. This latter report states that it is irrelevant whether both parents work or not.
[233] Germany no. 78.
[234] Austria nos. 187–188; Belgium no. 126; the Czech Republic no. 92; England and Wales no. 37; Germany no. 75; Portugal no. 158 and Spain no. 96.

older the child becomes the less supervision is required. Paradigmatic in this sense is the Dutch regulation, which even follows different liability regimes depending on the age of the child. The maturity of the child, his character and his inclination to cause trouble or to do something particularly dangerous (as, for instance, playing with fire) are also relevant factors. Less mature children, disobedient children and accident-prone children require more supervision.[235]

8. To what extent are parents held to supervise their child during the time the child is attending school or at work?

104 The extent of the duty varies in the different countries. In France parents retain their duty to supervise in full. The liability of parents for the acts of their children, wherever they are located at a certain moment, is always strict. Therefore the fact that the child is at school, working, or has been entrusted to another person, either in fact or by contract, does not exonerate them from liability. The possible liability of these other persons, in the event that the child causes harm, will cumulate to the liability of the parents, which persists.[236]

105 By contrast, in some other countries, such as Austria, Belgium and Germany, the duty to supervise is reduced to an "organisational duty"[237] which prevents the persons primarily charged with the duty to supervise, i.e. usually the parents, from being totally discharged. In other countries, such as Italy and Portugal, although it is considered that in these cases the duty of the parents to supervise ceases, the discharge of the parents is prevented by taking into account that they also have the duty to educate and, although they cannot be held liable for lack of supervision, they can be held liable if the damage caused by the child is attributable to an infringement to their duty *in educando*.[238] The same rule applies in Russia, where liability of parents for lack of appropriate education exists even when their child is out of their direct supervision.[239] This rule seems to be applicable to children under 14, as well as to children over 14.[240]

106 Finally in other countries such as the Czech Republic[241] and Spain[242] it is considered that the duty to supervise is delegated to the educational institution or to the workplace and, accordingly, parents cannot be held liable for the harm children cause while at school or at work. In spite of the dissimilarities in detail, in a functional approach the same practical result is reached in England and Wales[243] and in Sweden.[244]

[235] Austria nos. 187–188; Germany no. 76; Portugal no. 158 and Spain nos. 96–98.
[236] France no. 121.
[237] Austria nos. 193–195; Belgium nos. 128–131; Germany no. 79 and probably the Netherlands no. 44.
[238] Italy no. 60 and Portugal nos. 166–167.
[239] Russia no. 73.
[240] Russia no. 58.
[241] The Czech Republic no. 96.
[242] Spain nos. 99–100.
[243] England and Wales no. 38.
[244] Sweden no. 12.

9. Under which conditions may parents be held liable for acts of their children committed while they were living in boarding schools?

The conditions under which parents may be held liable vary in the different countries. In France[245] the fact that the child is living in a boarding school at the time at which the damage occurs has no effect on the liability of the parents. The notion of cohabitation now used is a legal one, which actually refers to the legal residence of the child and, therefore, only a legal decision may change residence. Case law has established that the presence of an underage child at a school, even as a boarder, does not negate the child's cohabitation with his parents. 107

In other countries, such as Austria,[246] Belgium[247] and Germany,[248] the boarding institution has the duty to supervise the child and the parent's duty to supervise is transformed to a quite restricted organisational duty, i.e. into a duty to properly select, instruct, and control the third party, as well as a duty to stay informed about the child's conduct. In Germany, however, parental liability does not arise if the child is placed in a public boarding school.[249] 108

In Italy,[250] Portugal[251] and Russia,[252] the boarding institution also has the duty to supervise, which however, does not exclude the possible liability of the parents. In Italy and Russia, the parents can still be held liable if the harm is attributable to the breach of their duty to educate their children. In Portugal, by contrast, *culpa in educando* is not relevant here and the parents can only be held liable for not properly selecting the boarding school (*culpa in eligendo*).[253] 109

Finally, in other countries such as the Czech Republic[254] and Spain[255] it is considered that the duty to supervise is delegated to the boarding school and, therefore, the parents cannot be held liable for the harm the child causes. In spite of the dissimilarities, in a functional approach the same practical result is reached in England and Wales[256] and Sweden,[257] In the Netherlands[258] the fault presumption for 14- and 15-year olds may be easily rebutted if the act was committed when the child was not under the actual supervision of the parents. 110

[245] France nos. 122–123.
[246] Austria no. 196.
[247] Belgium no. 132.
[248] Germany nos. 80–82.
[249] Germany nos. 81–82.
[250] Italy no. 62.
[251] Portugal nos. 168–170.
[252] Russia nos. 74–75.
[253] Portugal no. 168.
[254] The Czech Republic no. 97.
[255] Spain no. 101.
[256] England and Wales no. 39.
[257] Sweden no. 12.
[258] The Netherlands no. 45.

10. What is the relation between the damage claim against the parents and the damage claim against the child?

111 For the vast majority of countries, the answer to this question depends on whether the child is imputable or not. When the child is not imputable, he will not be held liable, except in those systems where liability in equity may be established. On the grounds of liability in equity, and assuming that the claimant cannot obtain compensation from the parents, in these systems the claim against the minor will be subsidiary to the claim against his or her parents.[259] However, in Austria it is considered that if the supervisor is liable but impecunious, and therefore not able to compensate for the damage, the child's liability according to equity can be established. In this case, the minor tortfeasor and the supervisor can exceptionally be held solidarily liable.[260]

112 When the minor is imputable, all systems admit the liability of the minor himself. In this case, if the parents are held liable for having infringed their duty to supervise the minor, solidary liability is established between the minor and the parents.[261] In Austria, in this case, the parents can also be held liable together with the child, but not according to the provisions regulating the liability for others (i.e. § 1309 ABGB), but to the general rules of *Verkehrssicherungspflichten*.[262] An exception to solidary liability can be found in Russia, where parental liability for the acts of minors over 14 is subsidiary (cf. art. 1074 Civil Code), although in practice regional courts often impose liability primarily on parents.[263]

113 In France, since 1984 the *Cour de Cassation* has held children liable irrespective of their imputability, being sufficient to hold them personally liable that their conduct gives rise to an objective infringement of the standard of care.[264] With regard to the liability of the parents, this requirement does not seem necessary and recent decisions hold parents liable irrespective of the existence of a wrongful act of the child.[265] Therefore the victim can bring an action either against the child only (cf. art. 1382 C. civ.) or against the parents only (art. 1384.4 C. civ.), both actions being totally independent.[266]

[259] Austria no. 197; Germany no. 83; Italy nos. 20–23; Portugal no. 172; Russia no. 23. Belgium is an exception, since liability in equity of a mentally ill minor is not subsidiary but it may concur together with the liability of his/her legal guardian. In that case, the legal guardian is solidary liable together with the mentally ill minor (in equity) (see Belgium nos. 45, 135).

[260] Austria no. 198.

[261] Belgium no. 136; the Czech Republic no. 100; England and Wales no. 40; Germany no. 83; Italy no. 63; the Netherlands no. 46; Portugal no. 171; Spain nos. 102–103.

[262] Austria nos. 197–198.

[263] Russia nos. 51, 57, 59.

[264] France nos. 27–28.

[265] France nos. 118–119.

[266] France no. 124.

11. Is there any possibility either for the child or the parents to have recourse against each other?

In countries where liability in equity applies, such as in Austria, Germany or Italy, due to the fact that the liability of the non-imputable is subsidiary, the possibility of recourse is not allowed,[267] since, if it were allowed, it would remove the benefit of subsidiarity.[268] However, in Belgium since liability in equity is not subsidiary to the liability of parents, recourse is theoretically possible, although in practice the judge will take into consideration the fact that the victim has a claim against the parents in order to reject the minor having to pay compensation.[269] In the rest of the countries – except France – minors who are not imputable cannot be held liable and, therefore, there is no place for recourse. 114

In the case of minors who are imputable, the majority of countries, according to general rules of solidarity, allow the recourse either of the parents against the child and vice-versa.[270] However, some of them emphasise with regard to the recourse of the parents against the child that this is more a theoretical possibility than a practical one and consider that, in practice, it is really unthinkable for the parents to bring an action for recoupment against their children.[271] An exception to this rule can be found in Germany, where § 840.2 BGB modifies this general rule and provides that it is for the child to bear the full loss.[272] In France[273] such a recourse against an under-age child is also hard to conceive, but there are cases where the parents have brought an action for recoupment against a son or a daughter for harm caused when he or she was underage.[274] 115

IV. Liability of Other Guardians and of Institutions

1. Who is subject to a duty to supervise those children who have no parents in the legal sense?

Except in England and Wales, where it is not known whether liability for the acts of children is linked to legal custody,[275] in the other countries the legal custodian has, among other duties, the duty to supervise the child and, therefore, is the person who is held liable in place of the parents. 116

[267] Austria no. 199; Germany no. 86; Italy no. 64.
[268] Austria no. 199.
[269] Belgium no. 138.
[270] Belgium no. 139; England and Wales no. 41; Italy no. 64; the Netherlands no. 47; Portugal nos. 173 et seq.; Spain nos. 104–108; Sweden no. 13.
[271] Belgium no. 139; Italy no. 64; the Netherlands no. 47; Spain nos. 104–108; Sweden no. 13.
[272] Germany no. 86.
[273] France nos. 128 et seq.
[274] France no. 130.
[275] England and Wales no. 42.

117 When children have no parents, or when parents have no custody because it has been withdrawn from them or they are not able to exercise it, other persons are usually appointed as legal guardians.[276] Guardianship is normally established by the courts and the persons who are appointed are usually relatives.[277] Guardianship can also be entrusted to foster parents[278] or to any other suitable persons. If any of these persons are lacking, guardianship can also be exercised by a legal person or institution. If no person is legally exercising custody, persons who are *de facto* taking care of the child can be held liable.[279]

2. Who is subject to a duty to supervise while the child is trained in a private business enterprise or simply working there?

118 While the child is being trained in a private business enterprise or simply working there, most countries subject the master or employer to the duty to supervise and reject the liability of parents on the grounds of lack of supervision. Belgium, France, Italy and Austria have specific provisions for apprentices. In Belgium, art. 1384.4 CC establishes a rebuttable presumption of fault of the craftsman for the acts of his apprentices while they are under his supervision. On the other side, art. 1394.6 CC sets up a strict liability regime for "masters" (*maîtres* and *commettants*) as a consequence of the damage caused by their employees.[280] In France art. 1384.6 C. civ. establishes the liability of masters (*artisans*) for the damage caused by their apprentices. However, if the child does not qualify as an apprentice, art. 1384.5 C. civ., referring to the general rule of liability of the employer for the acts of his employees, may apply.[281] In Italy a similar distinction between liability for apprentices (art. 2048.2 c.c.) and liability for employees (art. 2049 c.c.) can be found.[282] In Austria, a specific Act on vocational training provides that, although the master does not have a general duty to supervise the apprentice and, therefore, the apprentice is personally liable, certain duties to supervise deriving from the duty of the master to direct him may still arise and, in this case, the master is also liable.[283]

119 Spain also used to distinguish between apprentices and employees, but the current version of the Civil Code does not have any specific provision for apprentices and the liability of masters for their acts is governed by the general rule established for employers (cf. art. 1903 IV CC).[284] In this sense, Spain

[276] Austria nos. 201–204; Belgium nos. 140–142; the Czech Republic nos. 102–103; Germany nos. 88–89; Italy no. 65; the Netherlands no. 48; Portugal nos. 178–180; Russia no. 86; Spain nos. 109–120; Sweden no. 14.

[277] For instance, grandparents have preference over other relatives in Austria no. 201.

[278] So, for instance in Austria no. 201; the Czech Republic nos. 102–103; Italy no. 65; Spain nos. 109 and 112.

[279] So, for instance, in Spain no. 112.

[280] Belgium nos. 143–144.

[281] France nos. 137–138.

[282] Italy no. 66. The same distinction can be found in Portugal nos. 181–182.

[283] Austria no. 206.

[284] Spain no. 121, fn. 152.

follows the most common solution – followed also in England and Wales,[285] the Czech Republic,[286] Germany,[287] the Netherlands[288] and Sweden[289] – which is to deal with the liability for the acts of apprentices according to the general rules of liability for employees.

Except in the Netherlands, where the liability of the employer for the acts of his employees is vicarious (i.e. it requires fault of the employee but not of the employer),[290] in Belgium[291] and in Austria, where it is also vicarious but subject to narrow limits,[292] in the other countries – even in France – the liability of the employer (or master) for the acts of his employees (or apprentices) is based on fault[293] and, normally, also with reversal of the burden of the proof in favour of the victim.[294] In France, the *Cour de cassation* has tried to bring the masters' liability closer to liability of the parents but this approximation has not yet led to an extension of strict liability.[295] 120

3. Who is subject to a duty to supervise when the child is living in a children's home, a boarding school or other institution?

In these cases, almost all systems recognise that there is a transfer of the duty to supervise from the parents to the children's home, boarding school or other institution,[296] France being the only exception. 121

In France the parents retain the duty to supervise in these cases (see infra answer to question III. 8.).[297] In all the other countries the duty to supervise falls on the corresponding institution. In countries such as Austria,[298] Belgium[299] and Germany,[300] the corresponding institution has the duty to supervise the child and the parents' original duty to supervise is transformed to a quite restricted organisational duty, i.e. into a duty to properly select, instruct, and control the third party, as well as a duty to stay informed about the child's con- 122

[285] England and Wales no. 42.
[286] The Czech Republic nos. 105–108.
[287] Germany no. 89.
[288] The Netherlands no. 49.
[289] Sweden no. 14.
[290] The Netherlands no. 49.
[291] Belgium no. 144.
[292] See H. Koziol/K. Vogel, Liability for Damage Caused by Others Under Austrian Law in: J. Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others* (2003), nos. 4, 12.
[293] France no. 138; Germany no. 89; Italy no. 66; Portugal nos. 181–182; Spain nos. 121–122; Sweden no. 14.
[294] This is the case in France no. 152; Germany no. 89; Italy no. 66; Spain nos. 121 et seq.
[295] France no. 138.
[296] Austria nos. 208–209; Belgium nos. 128–131; the Czech Republic no. 110; England and Wales no. 42; Germany nos. 90–95; Italy no. 67; the Netherlands no. 50; Portugal nos. 185–188; Russia no. 89; Spain nos. 123–124; Sweden no. 12.
[297] France nos. 122–123.
[298] Austria nos. 208–209.
[299] Belgium no. 132.
[300] Germany nos. 90–95.

duct.[301] The corresponding institution also has the duty to supervise in Italy,[302] Portugal[303] and Russia as regards children under 14 in this later case,[304] whereas the parents retain a duty *in educando* or *in eligendo* (see infra answer to question III. 8.).

4. a) May a duty to supervise be established by means of private contract?

123 Some countries accept that the specific duty of the parents to supervise can be transferred to others by contract. This is the case in Germany and Portugal, where this transfer by contract is expressly provided by the Civil Code (cf. § 832 subs. 2 BGB and 491 CC).[305] The prevailing legal doctrine and case law also accept this possibility in Austria[306] and in Italy.[307] In these countries it is sometimes emphasised that, for this duty to supervise to be established, a legally binding contract is necessary, a mere act of courtesy of not crossing the threshold of a binding promise not being sufficient.[308]

124 In the other countries, contracts where parents establish duties to supervise their children upon others are also valid. However, in these cases there is no transfer of the duty, since parents use these contracted persons as their auxiliaries to fulfil their duties of supervision. Therefore, as a rule, such contracts do not exempt the parents from their possible liability for the infringement of their duty to supervise.[309]

b) If so, does such a contract reduce in any way the duty of the person originally charged with the duty to supervise?

125 In those countries where the transfer of the parental duty to supervise one's children is possible, this does not mean that parents are exempted from liability for the acts of their children after this transfer has taken place.[310] Some legal systems consider that the duty incumbent upon them is reduced to a collateral duty to properly select, instruct, control and inform the supervisor,[311] whereas others mention that a duty still rests on the parents to educate (*in educando*) or to properly select the person who exercises supervision (*in eligendo*).[312] These

[301] Germany nos. 80–82.
[302] Italy no. 67.
[303] Portugal no. 184.
[304] Russia no. 75.
[305] Germany no. 96; Portugal no. 189.
[306] Austria no. 210.
[307] Italy no. 68.
[308] Germany no. 98 and Portugal no. 191 but not in Austria nos. 213–214 and Italy no. 68.
[309] Belgium no. 156; the Czech Republic nos. 110–111; France nos. 146–147; the Netherlands no. 51; Spain no. 125; Sweden no. 14. However, a different position is held by the English report, where a contract charging a third party with the duty to supervise "could have the effect of terminating the responsibility of the person previously charged with that duty" (England and Wales no. 43).
[310] Austria no. 215; Germany no. 100; Italy no. 68; Portugal nos. 166, 168; Russia no. 90.
[311] Belgium nos. 105 et seq., 156; Germany no. 100 and Austria no. 215, where *culpa in eligendo*, *in instruendo* or *in vigilando* are also spoken about.
[312] See Italy no. 68, Portugal nos. 166, 168 and Russia no. 73.

different remaining duties can then still give rise to liability of the parents for the acts of their children.

5. What are the legal principles concerning schools for the duty to supervise pupils? Is it a matter of public administrative law or of (private) tort law?

126 The legal principles concerning schools' duty to supervise is a matter of public or administrative law in Austria[313] and Portugal,[314] whereas in England and Wales[315] and the Netherlands,[316] schools or educational authorities' liability is governed by the ordinary principles of (private) tort law.

127 In most of the other countries the duty to supervise is a matter of public or private law and, therefore, follows different regimes, depending on whether the school is organised as a private or as a public entity.[317] In France, however, the vast majority of private schools are treated as public schools, since they are regulated by association contracts with the state.[318]

128 In all countries teachers and schools have the duty to supervise,[319] which normally extends beyond the time for classes, as for instance, when children have a break between classes and when they are on the premises of the school.[320] The duty also extends to out-of-school activities organised by the educational institution, including trips organised by the school.[321] More problems arise with regard to whether this duty extends to those cases in which children are outside the school waiting for their parents to pick them up[322] or coming and going to the school.[323] The result will depend on the consideration of whether their duty has already been transferred to the school or whether, on the contrary, already transferred back to the parents. That will depend on the particular circumstances of the case,[324] as for, instance, if children are very young, the duty of the school may extend to these cases.[325]

[313] Austria no. 222.
[314] Portugal no. 200.
[315] England and Wales no. 44.
[316] The Netherlands no. 52.
[317] Belgium nos. 145 et seq.; France no. 150; Germany nos. 101–103; Italy nos. 69–72; Russia no. 94; Spain nos. 130–131; Sweden no. 15.
[318] France no. 160.
[319] Austria no. 222; England and Wales no. 44; France no. 149; Germany nos. 101–103; Italy nos. 69–71; Portugal nos. 198–199; Russia no. 91; Spain no. 130; Sweden no. 15.
[320] Austria no. 222; Italy no. 70; Germany no. 107; Spain no. 130.
[321] Austria no. 222; England and Wales no. 44; Germany no. 108; Spain no. 144.
[322] England and Wales no. 44; Germany no. 112; Spain nos. 130, 144–145.
[323] Germany no. 112.
[324] Spain nos. 130, 144–145, with different results depending on the cases.
[325] England and Wales no. 44.

6. Who is liable for accidents caused by pupils in public and private schools: The teacher, the school, the education authority or the state?

129 For accidents caused by pupils of public schools liability falls upon the state or the public body on which the schools depends.[326] Although the public body is liable for the acts of teachers and, in this case, the teacher himself or herself must have been at fault, in some countries, such as Germany, the public body can also be liable, regardless of fault of the teacher, for deficient organisation. Therefore, in these cases it will not be necessary to identify the lack of supervision of any individual teacher.[327] In Austria, it is emphasized that "fault" of the teacher must be understood as objective carelessness, since the federation can also be held liable if the teacher is not responsible because of a mental disorder.[328]

130 When the public body is liable for the acts of the negligent teacher, liability of the teacher is channelled through the public body, i.e. the victims cannot bring a claim against the teacher, but only against the public body.[329] Belgium,[330] France[331] and Portugal[332] are exceptions, since it seems always possible to sue both the public body and the teacher.

131 For the damage caused by pupils of a private school, most systems recognise the liability of the school for the teacher's infringement of the duty to supervise.[333] In some of these countries, the legal ground for this liability is found in the general rule establishing the liability of employers for the acts of their employees.[334] The teacher himself or herself can also be held liable for his or her failure to take reasonable care in supervising the pupils.[335] In Spain, a specific provision regulating the liability of schools for the acts of their teachers excludes the liability of the individual teacher and channels the liability through the persons or entities that own the educational institution (art. 1903 V CC). However, it must be stressed that this is not a case of vicarious liability, but of direct liability of the institution for one's fault, which is rebuttably presumed (art. 1904 VI CC).[336] In Russia, the liability is also imposed on the institutions and not on teachers or employees who actually controlled the children.[337] In

[326] For instance, the Land or the Federation (Austria nos. 229–232; Germany nos. 104–106) or, more in general, the State (Belgium no. 147; France nos. 151–158; Portugal no. 202; Spain nos. 135–136, 137–138; Sweden no. 15, among many others).
[327] Germany no. 105.
[328] Austria no. 228.
[329] Austria no. 227; Germany no. 105; Spain nos. 137–138.
[330] Belgium no. 147.
[331] France nos. 165–166.
[332] Portugal no. 202.
[333] Belgium nos. 152–155; England and Wales no. 45; Germany no. 108; Italy nos. 66, 73; the Netherlands no. 53; Portugal no. 204; Russia no. 95; Sweden no. 15.
[334] Belgium no. 152; Germany no. 107; Italy no. 66, 73; Portugal no. 182.
[335] Belgium no. 158; England and Wales no. 45; Germany no. 107; Italy no. 73; the Netherlands no. 53; Portugal no. 204.
[336] Spain nos. 132–134.
[337] Russia no. 95.

Sweden, although the teacher can be held solidarily liable together with the school, he can invoke a general rule which provides that an employee is liable for a wrongful act or omission only if and to the extent that there are particular reasons for such liability, which means in practice that the employer who is vicariously liable should be sued in the first place.[338]

7. In public schools: Given that the state is liable for the failure to supervise, may the state entertain a right of recourse against the teacher or the school?

All countries admit the right of recourse against the civil servant or person employed by a public body.[339] However, while the Czech Republic, England and Wales and France admit this recourse in any case,[340] the majority of countries restrict the right of recourse against the teacher to the case where he or she acted with intent or with gross negligence.[341] 132

8. Same question with respect to private schools: May the school entertain a recourse action the teacher who has failed to supervise?

Again, all countries admit such a right of recourse.[342] In this area, a distinction must be drawn between those countries that allow the right of recourse of the school against the teacher in the case of intent or gross negligence of the latter only,[343] and those other countries that allow recoupment without this requirement.[344] 133

9. What are the criteria for assessing the extent of the teacher's duty to supervise?

Most legal systems refer to the relevance of the circumstances of the case.[345] In particular, attention must be paid to the number of pupils under the supervision of the teacher,[346] the sort of activity that was performed when damage occurred,[347] the extent or gravity and the probability of the damage ensued[348] and 134

[338] Sweden no. 15.
[339] Austria nos. 236–237; Belgium no. 159; the Czech Republic nos. 119–120; England and Wales no. 46; France no. 159; Germany no. 109; Italy no. 77; the Netherlands no. 54; Portugal no. 205; Russia no. 96; Spain nos. 137–138; Sweden no. 15.
[340] The Czech Republic nos. 119–120; England and Wales no. 46; France no. 159.
[341] Austria no. 236; Belgium no. 159; Germany no. 109; Italy no. 77; the Netherlands no. 54; Portugal no. 205; Russia no. 96; Spain nos. 137–138; Sweden no. 15.
[342] Austria no. 238; Belgium no. 160; the Czech Republic no. 121; England and Wales no. 47; France no. 159; Germany nos. 110–111; Italy no. 78; the Netherlands nos. 53 and 55; Portugal no. 224; Russia nos. 96, 97; Spain nos. 139–141; Sweden no. 15.
[343] Austria no. 238; Belgium no. 160; the Netherlands nos. 54–55; Spain nos. 139–141; Sweden no. 15.
[344] The Czech Republic no. 121; England and Wales no. 47; France no. 159; Germany nos. 110–111; Italy no. 78; Portugal no. 207.
[345] Among others Austria no. 240; Belgium no. 161; the Czech Republic no. 122; England and Wales no. 48; Spain nos. 146.
[346] See, for instance, Belgium no. 161; Germany no. 114 and Portugal no. 207.
[347] Belgium no. 161; France no. 163; Russia no. 98; Spain no. 146.
[348] Germany no. 114; the Netherlands no. 56; Spain no. 146.

the cost and benefit of the possible safety measures.[349] Relevant may also be the place where the damage was caused[350] and, without any doubt, the foreseeability of the damage for the teacher.[351]

135 With regard to the circumstances in the person of the child, his or her age is emphasised in most legal systems as being one of the most relevant criteria.[352] The personal subjective conditions of the child, such as a handicap, a known tendency to aggressive behaviour or to disobeying orders, or a specific type of disturbance which requires a higher degree of supervision, may also be relevant.[353]

10. What is the relationship between damages claims against teachers, schools, school-boards, public authorities sounding in tort on the one hand and social security benefits on the other. May damages be recovered from the teacher or school authority for those heads of damages which are covered by social security benefits? Do social insurance carriers enjoy rights of recourse against teachers, schools, school-boards and the state?

136 In most countries the damage covered by social security benefits may be recovered by the social insurance carrier, who may recoup from the tortfeasor ultimately bearing responsibility for the loss, regardless of whether the damage occurred in a private or a public school.[354] By contrast, recoupment is not possible in Italy[355] and Russia.[356]

137 In the case of public schools, social security can recoup from the public body held responsible and, at least theoretically, it also seems possible that it may recoup from the teacher when he acted with intent or with gross negligence.[357]

11. What is the relation between the damages claim of the victim against the child and his or her damages claim against the teacher or other institution liable for the tort of the child?

138 In Austria and in Germany the relation depends on whether the minor is imputable or not. If the minor is not imputable, the claim against him or her is subsidiary, on the grounds of the rules of liability in equity. If the minor is imputable, he or she will be held personally liable.[358] In this case, in Austria the

[349] Germany no. 114 and the Netherlands no. 56.
[350] Portugal no. 212; Russia no. 98; Spain no. 146.
[351] For instance, Austria nos. 240–243 and the Netherlands no. 56.
[352] Austria nos. 241–243; Belgium no. 162; the Czech Republic no. 123; France no. 162; Germany no. 114; Italy no. 80; Portugal no. 210; Spain no. 146.
[353] Austria no. 241; Belgium no. 162; the Czech Republic no. 123; Germany no. 114; Italy no. 80; Portugal no. 210; Spain no. 146.
[354] Austria nos. 244–248; Belgium no. 163; the Czech Republic nos. 134–135; Germany nos. 115–118; the Netherlands no. 31; Portugal nos. 214–215; Spain no. 147.
[355] Italy no. 86.
[356] Russia no. 100.
[357] See in this sense Austria no. 247.
[358] Cf. Austria nos. 249–251 and Germany nos. 119–121.

guardian cannot be held liable on the grounds of liability for others (cf. § 1309 ABGB), but only on the general rules of *Verkehrssicherungspflichten* and, if these rules apply, he or she will be solidarily liable with the minor.[359] In Germany, if the school is private, the minor will be solidarily liable together with the teacher and the institution administrating the school on the grounds of liability for others (cf. § 832 subs. 2 BGB); the same rule will apply if the school is public and the teacher acted with gross negligence or intent. However, if the teacher of the public school acted with ordinary negligence only, the only liable person will be the minor who caused the damage, as long as it is known who the minor tortfeasor is and this minor has the financial means to cover the damages.[360]

139 In most of the other countries under survey, the claims against the child and the claims against the teacher, school or other institution are more independent of one another. However, once again attention must be paid to whether the minor was imputable or not and whether the school or institution was public or private.

140 With regard to imputability of the minor, France is the only country where since 1984 the minor will be held liable even if he is not imputable, and accordingly, he will always be held be liable together with his or her parents (who are not excluded) and with the school. Since most schools have association contracts with the state, the divide between private and public schools is not relevant in practice and, in most cases, the State may also be held liable.[361]

141 In the remaining countries, the child will not be liable if he is not imputable. If he is imputable, he will be solidarily liable together with the teacher or educational institution (in the case of private schools) or with the state (in the case of public schools).[362] In most countries, except in Spain,[363] the parents may also be held solidarily liable together with the child.[364]

12. Is there any possibility either for the child or the teacher to have recourse against each other?

142 With regard to the recourse of the teacher against the child, most legal systems agree that the teacher may have recourse against the child according to the general rules,[365] but in some countries, such as in Germany, there are specific rules regarding this matter.[366] However, here again the right of recourse will

[359] Austria no. 251.
[360] Germany nos. 119–120.
[361] France nos. 167–171.
[362] Belgium no. 164; the Czech Republic no. 136; England and Wales no. 50; Italy no. 87; the Netherlands no. 58, Portugal no. 216; Spain no. 148; Sweden no. 16.
[363] See Spain no. 149.
[364] For instance Belgium no. 164; Italy no. 87, the Netherlands no. 58, Portugal nos. 216–218, Sweden no. 16.
[365] England and Wales no. 51; Italy no. 88; the Netherlands no. 59.
[366] Germany nos. 122–123.

depend on whether the minor was imputable or not and whether he was attending a private or public school.

143 In the case of non-imputable minors, no right of recourse is accepted, even in those countries where liability in equity exists,[367] except in Belgium.[368] In those countries where there is no liability in equity, the teacher cannot have recourse against the minor because the minor is not responsible because of his or her lack of tortious capacity.[369] In those countries where there is liability in equity, the teacher cannot have recourse against the minor because liability of the minor who has no tortious capacity is subsidiary and allowing the recourse would be contrary to this rule of subsidiarity.[370]

144 In the case of imputable minors, a second distinction between private and public schools must be drawn. In Germany,[371] for instance, in the internal relationship between the child and the teacher of a private school, the Civil Code provides that it is ultimately for the child to bear the loss (cf. § 840 subs. 2 BGB). Accordingly, the teacher or school administrator may seek redress from the child. In the case of public schools, since the teacher acting with ordinary negligence does not give rise to the liability of the state, the state will have a right to recourse against the teacher only when the teacher has acted with gross negligence or with intent. It is in these cases where the teacher who has paid compensation to the state in the action of recourse can, in his or her turn, bring an action of recourse against the child. Due to this restriction, this recourse is practically unknown in practice.

145 With regard to the recourse of the minor against the teacher, since in most countries the teacher and the minor are solidarily liable when the minor has tortious capacity, if the minor has paid compensation for the damage caused, he has a right of recourse against the teacher according to the general rules of solidary obligations. However, this recourse is very unlikely to take place in practice, since the victim will normally seek compensation from the teacher or, in cases of public schools, from the state or public body who runs it.[372] The only probable exception is Germany, where the idea that prevails is that, in these cases, it is the minor who has to bear the loss (cf. § 840 subs. 2 BGB).[373]

[367] See, for instance, Austria no. 252; Germany no. 122.
[368] Belgium no. 165.
[369] See, the Netherlands no. 59; Spain no. 149.
[370] Austria no. 252; Germany no. 122.
[371] Germany no. 122.
[372] Austria no. 255; Belgium no. 166; the Czech Republic no. 137; England and Wales no. 52; Italy no. 88; implied, the Netherlands no. 59; Portugal no. 219; Spain no. 149.
[373] Germany nos. 122–123.

13. What is the relation between the teacher's duty to supervise and the parental duty to supervise? Is there any possibility either for the teacher or the parents to have recourse against each other?

There are several possible relations: 146

a) In France, parents do not transfer their duty to supervise to teachers and, therefore, parental liability is incurred automatically irrespective of the location of the child at the time at which damage is caused, so the fact that the child is at school does not exempt parents from their liability.[374] Therefore parents retain the possibility of recourse according to the general rules of fault liability against the teacher to whom they have entrusted their child (cf. artt. 1382 and 1383 C. civ.).[375] The same holds true in the Netherlands for children up to the age of 14, because parents are strictly liable irrespective of where the child is located when he has caused the damage.[376] 147

b) In other countries, parents transfer their duty to supervise to teachers. In Spain, as long as the pupil is under control of the school, the duty to supervise is transferred to the school and this excludes parents' liability for the damage caused by the child while at school.[377] In Italy, Portugal and Russia regarding minors under 14, parents and teachers have different spheres of responsibility. The duty to supervise passes to the teacher when the child is at school, but parents do not only have the duty to supervise their children but also a duty *in educando* or *in eligendo*. Therefore, if the child has caused damage while at school not only due to a lack of supervision but also to a lack of education, the parents will be liable as well.[378] In England and Wales, the duty to supervise is normally transferred to the school/teachers, though there may be exceptional cases where both parents and teachers have a concurrent duty to supervise. Only in this latter case, may they have recourse against each other.[379] 148

c) In other countries the parents and the teachers share the duty to supervise, in spite of the fact that the child is at school. This is the case in the Czech Republic,[380] Sweden[381] and in the Netherlands for children between 14 and 16 years old.[382] In Germany and Austria the parents' duty to supervise is transformed into a sort of collateral duty of selection, surveillance and organisation; if the child causes damage at school, parents can still be held liable if the damage is the result of the breach of one of these collateral duties.[383] 149

[374] France no. 121.
[375] See France no. 181
[376] The Netherlands no. 60.
[377] Spain no. 150.
[378] Italy nos. 89–90; Portugal nos. 166, 221 and no. 66; Russia no. 105. In Russia if the minor is over fourteen, the liability will only fall upon the child and the parents, but not upon the institution (nos. 74, 101, 108).
[379] England and Wales nos. 38, 52.
[380] The Czech Republic nos. 138–139.
[381] Sweden nos. 14–15.
[382] The Netherlands nos. 60 and 58.
[383] Austria no. 256 and Germany no. 124.

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The letters refer to the country reports, the numbers refer to the marginal notes. The country reports are marked by the international letter symbols: A stands for Austria, B for Belgium, CZ for Czech Republic, D for Germany, E for Spain, EW for England and Wales, F for France, I for Italy, NL for the Netherlands, P for Portugal, RUS for Russia, S for Sweden and C for the Comparative Report.

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