

MSE 2025

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# CM PRIVACY AND LAW

## BASICS OF LIABILITY UPON CO AND OTHER LAWS

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## TOPICS

- ▶ Liability
- ▶ Obligation in Tort
- ▶ Definition of „Damage“
- ▶ Requirements for Compensation
- ▶ Contractual & Non Contractual Liability / Fault-Independent Liability
- ▶ Product Liability
- ▶ My Take Away...
- ▶ Examples

## GOALS

- ▶ You know the multiple requirements for compensation
- ▶ You know the difference between fault-dependent and causal liability
- ▶ You know the relative and absolute deadlines when liability claims expire
- ▶ You know the consequences of being liable in solidarity
- ▶ You know the essentials of the Product Liability

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„sh\* happens“... who has to pay for? (liability)



## WHY LIABILITY?

**Compensation for Damage & Satisfaction (= money) is better than vengeance (blood)!**

Why: vengeance/revenge tends highly to escalation („eye for an eye/a tooth for a tooth“ - **lex talionis**). Part of Conflict



## A STEP BACK...

Where do we (mainly) find legal regulations about compensation? In civil law legal obligations (only!) may arise by

- Contract (Art. 1 ff. CO),
- **Tort (Art. 41 ff. CO)** or
- Unjust Enrichment (Art. 62 ff. CO)

### **Art. 41**

<sup>1</sup> Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.

<sup>2</sup> A person who wilfully causes loss or damage to another in an immoral manner is likewise obliged to provide compensation.

## CONTRACTUAL & NON CONTRACTUAL LIABILITY

- ▶ In liability law, a distinction is made between **contractual** and **non-contractual** liability.
- ▶ A **contractual liability** is in effect when an existing contract between the damaging party and the injured party has been violated. Example: no or late delivery of the goods.
- ▶ A **non-contractual liability** is in effect when a person cause a damage and the parties hadn't been bound by a contract (e.g. accident).



## FAULT-DEPENDENT & FAULT-INDEPENDENT (CAUSAL) LIABILITY

- ▶ With regard to **non-contractual liabilities**, the law differs between general fault-dependent liability situations (fault-based liability Art. 41, CO) and fault-independent liability situations listed to some degree in the CO, CC and special laws (causal liability, e.g. in Art. 55 CO, Art. 333, CC).
- ▶ Product liability is one of the causal independent liability situations and is regulated in a special law, the Product Liability Law (PrHG).



## **MULTIPLE (& CUMULATIVE) REQUIREMENTS FOR COMPENSATION**



- 1. Damage**
- 2. Unlawfulness (or not fulfilling the contract)**
- 3. Adequate causal connection**
- 4. Fault (not to proof for contractual liability!)**
- 5. (no expiry of liability claims)**

## 1. DAMAGE

- ▶ Damage ≠ Satisfaction

**Damage** = Financial compensation to refund an asset, that has been reduced (or couldn't rise) by an unlawfully action.

**Satisfaction** = Financial compensation for physical or mental injury upon discretion (Art. 47 & 49 CO).

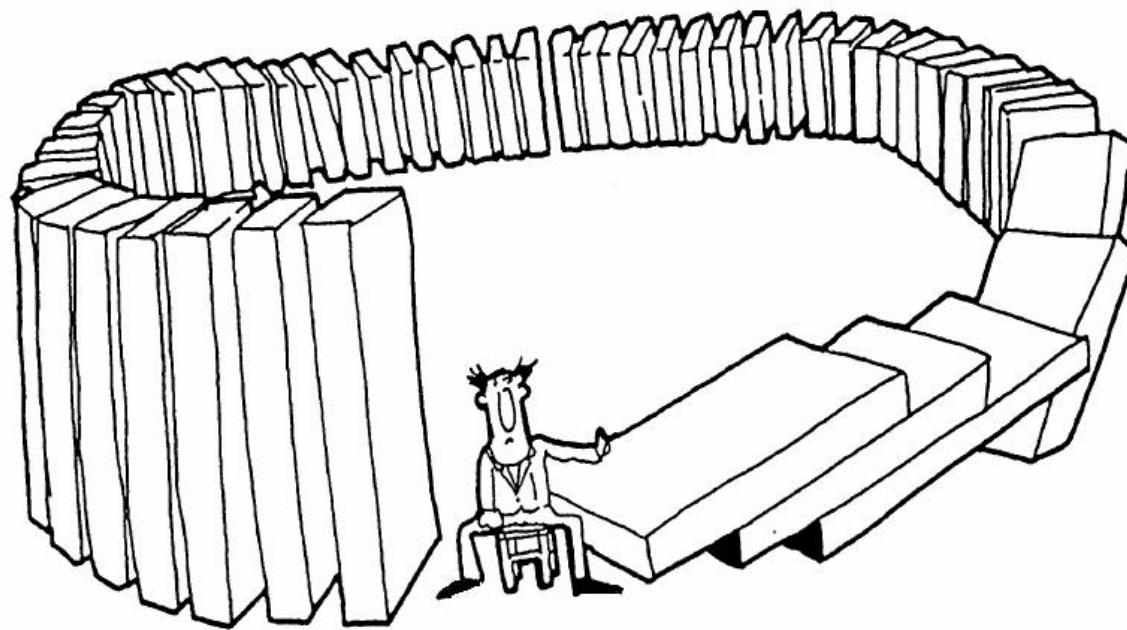
- ▶ **Damage** =  $\Delta$  of value **before** and **after** the incident
- ▶ The exact amount has to be **proven** by submitting invoices, accounting documents etc. The judge has the right to estimate the damage (Art. 42 Abs. 2 CO). But he needs evidences.



## 2 „UNLAWFULNESS“

- ▶ Includes the proof that a legally protected right has been illegally infringed.
- ▶ Any infringement of an **absolutely protected** legal right such as the right to life and limb and property is per se illegal.
- ▶ Infringement of a **relative protected** legal right, such as an asset, is only illegal if a standard of protection has been violated. (e.g. a stock exchange trader is normally not responsible for losses)
- ▶ As an exception and if there are special reasons, the illegality can be suspended. Possible justification grounds include **self-defence**, **consent by the injured party**, **official obligation** etc.

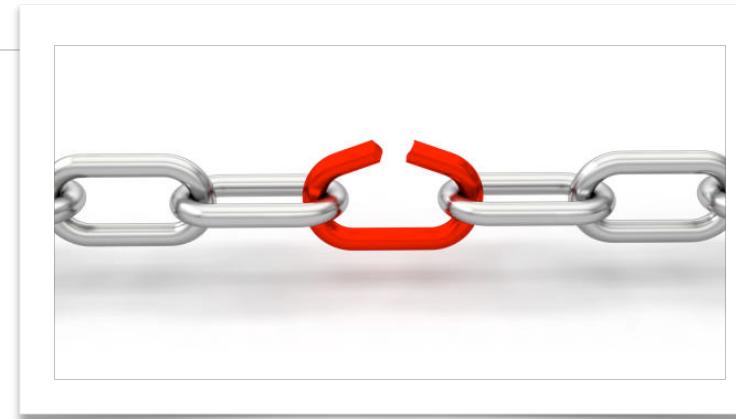
## CAUSE & EFFECT...



**In complex systems, cause and effect are often distant in time and space...**  
(e.g. prove me that the surgery was the cause that the patient died 4 weeks later)

## CAUSE & EFFECT

- ▶ You have to prove that the cause led to a certain effect/damage!
- ▶ Example: A defective sensor caused a machine to overheat and started a fire that burned down the factory.
- ▶ Example: During rock cleaning on the Lopper, stones fell over two protective fences. One of them hit a motorcyclist (with a passenger) on the highway below. Both fell, with the rider sustaining fatal injuries. (BGE 4A\_562/2012)



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### 3 THE LEGAL SOLUTION: „ADEQUATE CAUSAL CONNECTION“

- ▶ The proof must be provided that there is a direct causal connection that makes sense in the normal course of life between the damaging event and the damages being claimed.
  
- ▶ **This means that in the normal course of things and according to general life experience, the damaging behaviour was liable to cause damages of the type that occurred.** (Definition by the Swiss Federal Court).

## EXAMPLE „ROLLING STONES”

- On June 29, 2005, a serious traffic accident occurred on the cantonal road from Hergiswil in the direction of Stans (region „Lopper”), in which the motorcyclist F. X. was hit in the head by a stone falling from the rock face and died of his serious head injuries at the scene of the accident. His Sozia remained uninjured.
- The area was secured with several rockfall nets, as rock cleaning work was taking place above on the Lopper. However, it was not possible to determine whether a worker caused the rockfall or not. The legal question was whether the safety measures with several high nets were sufficient or not.
- Unfortunately, the judgments of the Cantonal and High Court of Nidwalden (2011 & 2012) are not available, but the case shows that the responsibility for action ends when, despite all reasonable safety measures, a damaging event could not be prevented.

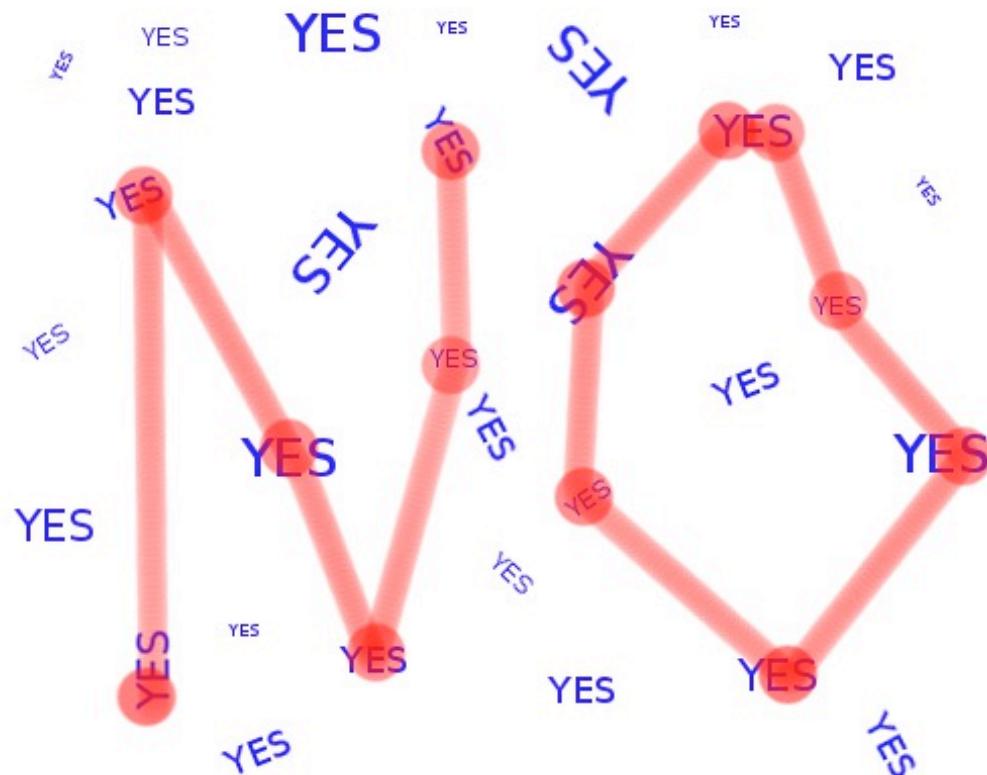
In other words, according to the usual course of events and general life experience, it was not to be expected that the fatal stone (of considerable weight) could jump over all safety nets and fall onto the road (or motorcyclist).

**Media**

## GUILT (FAULT)



## CONFIRMATION BIAS



The answer is clearly NO!

## 4 „FAULT“

- ▶ From an **objective viewpoint**, fault requires that the damaging party can be judged.  
From a **subjective viewpoint**, it requires intent or negligence. Even minor negligence, i.e. simply a violation of due care, is sufficient to constitute fault.
- ▶ **In the case of contractual liability fault does not need to be proven! It is assumed by law!** (see also Art. 97 CO). 
- ▶ **Strict (causal) liability** means that the damaging party is liable irrespective of fault. Liability is founded here on the fact that he is responsible e.g. for a generally dangerous circumstance.  
For example, in **animal keeper's liability** according to CO 56, proof that the damages were caused by an animal under the care of the animal keeper and that an adequate causal relationship exists is sufficient. Or car- or aircraft-holders. Or house-owners and and...

## 5 EXPIRY OF LIABILITY CLAIMS

- ▶ Liability claims are subject to a statute of limitations. When the statute of limitations expires, the claims do not go away; they simply can no longer be legally executed against the will of the liable party.
- ▶ The general statutes of limitations in liability law are:
  - **3 (new!) year relative/10 years absolute** in non-contractual liability (Art. 60 CO - 20 years & expiry due of criminal acts in special cases)



- **5 or 10 years** in contractual liability (Art. 127 ff. CO)
- other rules can be found in some special laws

## SPLITTING THE DAMAGE BETWEEN SEVERAL RESPONSIBLE

- ▶ What, when multiple people caused a damage? Then they are regarded as a „Simple Society”.

**Externally** (damaged party vs. group) they are liable in solidarity („**one for all, all for one**”)!

**Internally** (any member of the group) they are liable equally.

## ART. 100 CO - EXCLUSION OF LIABILITY !



- ▶ In many terms & trades you find liability exemption clauses:

„8. Limitation of Liability

...You understand and agree that the Tesla entities, **shall have no legal, equitable, or other liability of any kind** to you in any event, regardless of the form of the action, whether for breach of contract, warranty, negligence, strict liability in tort or otherwise relating to or arising from the Service and you waive any and all such claims or demands.” ([www.tesla.com/legal/additional-resources](http://www.tesla.com/legal/additional-resources))

- ▶ But Art. 100 CO states:

„**1 Any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void.**

**2 At the discretion of the court, an advance exclusion of liability for minor negligence may be deemed void provided the party excluding liability was in the other party's service at the time the waiver was made or the liability arises in connection with commercial activities conducted under official licence.**

**3 The specific provisions governing insurance policies are unaffected.“**

## SWISS PRODUCT LIABILITY (1)

- ▶ **WHAT?** Only personal injuries or property damages of consumers are covered (Art. 1, PrHG).
- ▶ **WHO?** The manufacturer or the importer are liable (Art. 2, PrHG).
- ▶ **WHAT?** Products are movable things (Art. 3 PrHG). No software!
- ▶ **EXCEPTIONS?** Manufacturer are not liable e.g. if they can prove that they did not bring the product to market OR the defect that caused the damage did not exist at the time the product was delivered (Art. 5 PrHG)
- ▶ **WHEN?** Claims according to PrHG expire 3 years after the date on which the damaged party becomes aware or should have become aware of the damages, the defect and the manufacturer (Art. 9, PrHG).

## SWISS PRODUCT LIABILITY (2)

- ▶ The Swiss Product Liability Law is quite weak and outdated (\*1994, latest revision 2010).
- ▶ The EU has recently (in effect since December 8, 2024 but applicable for products placed on the market after 9.12.26) revised the Product Liability Law (EU Directive on Liability for defective Products). The EU-directive is **much stricter and encloses also software!**

### Art. 4 Definitions:

„For the purposes of this Directive, the following definitions apply:

- (1) 'product' means **all movables**, even if integrated into, or inter-connected with, another movable or an immovable; **it includes electricity, digital manufacturing files, raw materials and software**;
- (2) 'digital manufacturing file' means a digital version of, or digital template for, a movable which contains the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools;
- (3) 'related service' means a **digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions**;
- (4) 'component' means any item, whether tangible or intangible, raw material or related service, that is integrated into, or inter-connected with, a product;..."

## EXAMPLE

- ▶ Real case: In their terms-and-trades the shipping company excludes any liability in the event of loss of the freight. You shipped a medical device (ca. 20k CHF) with that company. Unfortunately your device never arrived to customer and - for unclear reasons - got lost. By investigation you found out that your correction of the customer-address (you can prove that the shipping-company took notice of it) at the very beginning of the transport wasn't corrected in the systems of the shipping company. Therefore the driver couldn't deliver it to the right place. It's unclear where & to whom he handed out the medical device.



## MY TAKE AWAY . . .

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