PART I

CHAPTER I: DEFINITION AND PRINCIPLES OF NON-CONTRACTUAL LIABILITY LAW

✓ Non-Contractual Liability Law is a law that gives remedy by awarding compensation to the victim or ordering restitution or injunction. When those interests, which are protected by the Constitution and other laws, are violated, courts will award a sum of money, known as **damages (compensation)** for infringement of protected interest. Alternatively, the court may issue injunction. **Injunction** is a court order given to the defendant to refrain from doing something". **Restitution** is the third form of remedy. The victim seeks a remedy by bringing her case to a court (Art 37 of the constitution) or by settling it amicably with defendant directly or through a third party (art 2148 of the civil code)

Principles

✓ To make a person liable under this law, four requirements which are called principles of Non-contractual Liability Law are essential.

- The first one is **act or omission**.
- The second concerns **damage**.
- The **existence of casual relationship between the act or omission and the damage suffered by the victim** (art 2141)
- This damage should be a kind of harm recognized as attracting legal liability.

CHAPTER II: CONSTITUTIONAL RIGHTS

1. Personal Security

✓ These are torts involving a tress pass to the person. As per article 16 of the FDRE Constitution, everyone has the right to protection against bodily harm. This right is protected in a number of ways. For instance, if one makes a contact with another intentionally against the other person's will, the victim could bring action as per article 2038(1) of the CCE under assault. Assault is a condition where "one person puts another in fear of being hit. If (however) the blow is struck, then the person hit may have an action under bodily harm.

✓ As per article 17 of the FDRE Constitution any, Ethiopian or foreign national lawfully in Ethiopia has the right to liberty of movement. This freedom could be restricted unlawfully. A person whose freedom is restricted could sue that person who interfered with her liberty for interference with the liberty of another as it is stated under article 2040 of the CCE or for false imprisonment.

2. Interest in property

✓ As per article 40(1) of the FDRE Constitution, every Ethiopian citizen has the right to the ownership of private property. This right includes the right to acquire, use and dispose of such property by sale or bequest or to transfer it otherwise.

✓ Under the FDRE Constitution, private property is either classified into tangible and intangible or movable or immovable. On the other hand, land as well as natural resources is owned by the state and the peoples of Ethiopia as per Article 40(3) of the FDRE Constitution. Therefore, every Ethiopian has possessory or holding right over the land. No one will interfere with possessory right of the land. If someone, for instance, forces his way into the land under the possession of another, house of another, or takes possession of another's movable property, the tortfeasor shall be sued under trespass (Art 2053 and 2054)

✓ An interest in property can be affected by the negligent act of another. This as well is protected under Extra Contractual Liability Law. (Art 2055-2059)

3. Economic Interest

✓ As per article 41(1) of the FDRE Constitution, every Ethiopian has the right to engage freely in an economic activity and pursue a livelihood of his choice anywhere within the national territory. The Extra – Contractual Liability Law gives protection to this interest "… [w]here the defendant has acted unlawfully and has caused economic loss to the claimant" (Art 2055-2059)

4. Reputation and privacy

✓ The FDRE Constitution recognizes every

one's reputation and privacy under articles 24 and 26 respectively. Accordingly, under article 29(6) of the same, limitation on the right of thought, opinion and expression are put where these rights go against honors and reputation of individuals. As it is provided under article 29(7) of the FDRE Constitution, any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law. One of these laws is Extra – Contractual Liability Law. Hence, "where a person's reputation is damaged by untrue speech or writing then they may have an action in the tort of defamation (Art 2044 ff and 2109)

CHAPTER III: CONDUCT THAT GIVES RISE TO LIABILITY

- ✓ Conduct is a person's behavior in a particular place or in a particular situation.
- ✓ In legal sense, conduct is classified into two: **Act** and **omission**. Act is defined as an external manifestation of the actor's will.

Intention and Negligence

- ✓ Intention is related with behavior that is intended to be wrong. Intentional wrongs are, therefore, those wrongs in which the person charged must have acted in such a manner that he either wanted to harm someone or knew that what he did would result in harm.
- ✓ "Intention refers to the defendant's knowledge that the consequences of his conduct are bound to occur, where the consequences are desired or, if not desired, are foreseen as a certain result" (Art 2029(1))
- ✓ Intention exists where:
  a) The defendant knows that the consequences of her conduct are bound to occur; or
  b) Where the defendant desires the consequences or
  c) Where the defendant may not desire but foreseen the result of her action or omission. For example:
- ✓ On the other hand, if a person failed to act in a reasonable manner, we say that person acted negligently.
- ✓ To say negligence exists, four conditions are supposed to exist:
  1. The defendant must have owed the plaintiff a duty;
  2. The defendant must have breached that duty;
  3. The breach of that duty must be the actual as well as the "legal" cause of the plaintiff's injury.
  4. That injury must be one that the law recognizes and for which money damages may be recovered

REASONABLE AND PRUDENT PERSON

- ✓ There are three requirements to define a reasonable and prudent person is. These are **knowledge**, **investigation** and **judgment**.
- ✓ As members of a community, a certain standard of care is expected from us when we act. The standard of care expected from us is that of the reasonable man. It is objective. To that effect, it does not take into account the particular way of behaving, thinking, etc or weaknesses of the defendant.
- ✓ "If a particular danger could not reasonably have been anticipated, the defendant has not acted in breach of her duty of care, because a reasonable man would not take precaution against unforeseeable consequences.
- ✓ The other simple way of determining the reasonable and prudent man standard is how we judge our activity. Hence, before we start any activity, the law expects us to ask ourselves the following questions: What is the likelihood that our particular activity will harm someone else? If harm might occur, what is the likely hood of the extent of the harm? What must I give up in order to avoid the risk to others?

Statutory Standard

- ✓ The objective standard is not free from subjectivity for …"there is a subjective element in that it is left to the individual judge to decide what a reasonable or what could have been foreseen" Hence the law introduces statutory standard. Thus in some cases the law solves the problem of subjectivity by providing a standard

contained in a statute. The majority rule is that breaching the statutory standard is negligence *per se*. Negligence *per se* is inherent negligence, i.e. negligence without a need for further proof.

CHAPTER IV: CAUSATION AND REMOTENESS OF DAMAGE

1. CAUSATION

- ✓ It is not difficult to determine the cause for a damage where there is only one cause and that is established. "A causation problem, therefore, usually occurs when we look at the damage and see that it was actually caused by a number of different factors, or to put it another way, that a number of factors combining together brought about the damage."

THE 'BUT FOR' TEST

- ✓ To determine the cause for the damage [death] the judge may, among the many tests, uses "but for" tests. "According to this principle the plaintiff will have to show that he would not have been injured in the way he was but for the defendant's conduct".

Remoteness of Damage

- ✓ As a matter of principle once the conduct of the tortfeasor causes the damage, the tortfeasor will be obliged to make that damage good. There are, however, conditions where "even if the defendant's act caused the damage liability can still be excluded." That is, if the kind of damage was an unforeseeable consequence of the act, the damage is said to be too remote.

Exception to the Foreseeability Test

1. The egg -shell -skull rule

- ✓ This rule applies "Where the plaintiff is suffering from a latent physical or psychological predisposition to a particular form of illness, which the harm inflicted by the defendant triggers off, that his negligence has produced." Here the issue is whether a certain act causes a physical injury, which is different and much worse than the ordinary injury that would have been caused in the course of events.
- ✓ This rule also applies for an eggshell personality. This is a condition "where the injury to the plaintiff merely aggravated a pre – existing nervous condition"

2. Economic loss consequent on physical injury

- ✓ This is a condition where one single conduct causes two injuries, and the one is not foreseeable by the tortfeasor.
- ✓ As per the Ethiopian Non – Contractual Liability Law a victim who suffers both physical and economic loss should sue the defendant for both at the same time. Otherwise as per article 2151 of the Civil Code of Ethiopia the victim may not bring a fresh action for compensation for other damage he has suffered unless such damage was caused independently of that for which she has already claimed compensation. Therefore, as per Ethiopian law simply bringing an action for physical injury does not mean that it follows with compensation for economic loss.

3. Psychiatric Illness

- ✓ If a physical injury brings about the victims psychiatric illness, even though the defendant will not foresee that, he will be liable for the psychiatric illness.
- ✓ For e.g. a girl is raped. This girl does not simply suffer from physical injury. She also for sure will suffer from psychiatric illness which will stay with her for a long time or forever. In spite of this, rape victims are only awarded 'fair' compensation by way of compensation as per article 2114(1) of the CCE. The offender who commits rape, therefore, should not only be sentenced or pay nominal compensation. The offender has to cover the medical cost that is required to heal the psychiatric illness.

4. Intentional torts

- ✓ "The foresee ability test to determine whether the loss suffered by the victim of a tort was a remote consequence of that tort does not seem to apply to cases where someone commits an intentional tort"
- ✓ Nicholas classifies intentional tort into

two: The first one is the one which is committed by an actor who knows what he is doing. Examples of this are battery, false imprisonment, defamation and private nuisance. These are referred to as non-intentional torts. They are referred to as non – intentional torts because they can be committed unintentionally or inadvertently.

- ✓ Others are those which are committed intentionally. Examples for this are **malicious falsehood**. So the tortfeasor may be held liable to compensate the victim for the loss she suffers even if the damage is not reasonably foreseeable at the time the tortfeasor commits the act intentionally.

5. Statutory Torts

- ✓ There are certain human relations which are delicate and given special attention in statutes or laws. Among them are discrimination based on race, religion, or sex.
- ✓ Accordingly, as per articles 25 of the FDRE Constitution discrimination based on grounds of sex, nation and nationality is forbidden. Hence as per article 35(8) of the FDRE Constitution, women shall have a right to equality in employment, promotion, pay and the transfer of pension entitlement. Similarly, as per article (3)(1) of the Federal Civil Servants Proclamation no discrimination among job seekers or civil servants shall be made in filling vacancies because of their ethnic origin, sex, religion, political outlook or any other ground.
- ✓ In a similar manner, article 14(1)(f)of Labor Proclamation declares making discrimination between workers on the basis of nationality, sex, religion, political or any other conditions is forbidden. The Labor proclamation gives remedy for the violation of this right under its article 184, which reads: An employer who violates the provisions of article 14(1) shall be liable to fine not exceeding Br, 1200 if the Criminal Code does not provide more severe penalties. This liability is criminal liability.

CHAPTER V: Boundaries of Non–Contractual Liability Law

Non-contractual liability law v Contractual law

- ✓ In case of contracts, the obligations emanate from the agreement made between the parties (Art 1675), while the obligation of Non – Contractual Liability Law emanates from the law (Art 2027).
- ✓ From this, we may say that consent of the parties is necessary in case of Law of Contracts while this is not in Non-Contractual Liability Law Art 1678 and 1679).
- ✓ In case of Contract Law there are certain people who are exempted from performing their part of obligations, for instance, a minor. No exception is, however, made in Non – Contractual Liability Law (Art 2030(3) and 317 also 2099(1)).
- ✓ Breach in contract is established by simply showing that the performance promised has not been materialized without showing the promisor's fault. Exception is article 1795. In Non – Contractual Liability Law, however, Liability is established by demonstrating the defendant's fault within the meaning described to that term by articles 2021, 2030 or the specific case provisions. Labiality without fault, however, under Non – Contractual Liability is an exception applying only where the law specifically so provides (Art 2027(2)).
- ✓ In case of contract where it is established that the breach is intentional or due to "grave" fault (Art 1801(2)), the compensation shall be increased to cover the damage, which is greater than the normal damage. However, in the absence of intentional fault non – contractual compensation for wrongful harm may sometimes be decreased (Art 2101 and 2091).
- ✓ Where a person borrows money the damage for delay in payment is the amount of interest (art 1803). In case of Non - Contractual Liability the amount of compensation is assessed at the time of judgment (Art 2091 and 2150).
- ✓ If someone has to bring action, she has to bring it within a certain period. Otherwise, it is going to be barred by limitation of action. Limitation of action in contract is

10 years while in case of Non – Contractual Liability it is 2 years.

Non- Contractual Liability Law v Criminal Law

- ✓ Liability from both wrongs emanates from the law, unlike that of contractual wrongs, which emanates from agreement.
- ✓ Moreover criminal wrong gives rise to Non – Contractual Liability (Art 407 543 559 580 585 602 of criminal code). On the contrary in deciding whether a [civil] offence has been committed, the court shall not be bound by an acquittals or discharge by a criminal court (Art 2149).
- ✓ The criminal wrong doer may end up in jail or be punished with fine or both. In case of non – contractual wrong, the wrong doer may not go to jail. Rather he will be obliged to pay compensation to the victim or be ordered to restitute the thing she has taken away from the victim or be ordered to refrain from perpetuating the wrong. This is because the primary function of the criminal law is to protect the interests of the public while the primary function of the law tort is to provide of redress for individuals who have suffered a loss."
- ✓ In the criminal case, the parties are the offender and the state, the latter, representing the public through the public prosecutor. In Non – Contractual Liability case, the parties are the victim and the offender who are civilians.
- ✓ The object of a criminal prosecution is to punish a person who has been duly tried and convicted of a criminal offence. While 'The purpose of an action in the civil courts is to obtain compensation for the loss sustained by the plaintiff."

PART II: Ethiopian Non – Contractual Liability LAW

- ✓ In the common Law system, this law is referred to as Tort Law. In our case it is either referred to Non- Contractual or Extra – Contractual Liability Law.

CHAPTER VI: SOURCES AND TYPES OF LIABILITIES

- ✓ The sources of Non – Contractual Liability Law are three:

1. Fault (offence)
2. Activities one engages in or things possessed by a person
3. Where a third party for whom a person is responsible incurs liability.

1. **Liability for Fault**

- ✓ This type of liability is an ordinary one while the other two, i.e. Strict and Vicarious Liabilities are exceptions, for they arise when the law says so. Article 2030 (1) may help us to understand a circumstance when to say an act or omission is a fault. Hence when an act or forbearance of an individual is in a manner or in a condition which offends morality or the usual standard of good conduct, we say that person is at fault. As per article 2029 the types are:
    1. Intentional positive act
    2. Intentional forbearance
    3. Negligent positive act and
    4. Negligent forbearance.
- ✓ To say these acts or forbearances are faults they have to fulfill what is given under article 2030.
- ✓ When assessing the damages or the consequence the law takes into consideration the mental and the age of the defendant. Hence though in principle it is stated under article 2091 that the amount of compensation is equal to the damage suffered by the victim, the court shall take into consideration those elements mentioned under article 2099(3). Furthermore, article 2099 is applied when the wrong doer is not aware of the consequence of his act for … a person who was not in a state to appreciate the wrongful nature of his conduct committed the fault.

Professional Fault (2031)

- ✓ A profession is an activity for the proper exercise of which a special training, skill and knowledge is required. A professional is, therefore, someone who practices profession. A person practicing a profession shall observe the rules governing that practice (Art 2031 (1)).

Therefore, if he fails to observe the rules of the said profession fault is committed.

- ✓ The rules for the profession could be written or it may not be written but is simply recognized by the professionals.

Intent to Injure (2032)

- ✓ This is an area where the right of an r5gtbntindividual is restricted or controlled. Individual rights are protected as long as they are used primarily for the advantage of the individual himself. When they are used mainly not for personal gains, but primarily "with intent to injure another" a fault is committed.
- ✓ Where a person either injures another intentionally without personal gain or intentionally causes damage in seeking personal gain, which is less proportional to that of the damage, we say he abuses her rights and he is at fault. On the other hand, a person does not abuse his rights where he injures another incidentally to a lawfully gainful activity as in e.g., fair business competition.

Diversion of power [2033]

- ✓ There are two types of power. The first is the one, given in the interest of a private individual, and the second is that given to an individual in the interest of the public. In any case, if such person who is conferred with such power uses the power in his interest or to the benefit of a third party we say there is a diversion of power. That power could emanate from a law or the decision of a court.
- ✓ There is private diversion (abuses) of power where the powers are directed from their basic purposes by being exercised with a view to personal gain. In case of the public one the diversion is done not only to benefit the individual who diverted the power but also a third part.

Purpose of Rights (2034)

- ✓ If one exercises her rights under article 2032 and 2033, though they are within the economic or social purpose of the thing, one could be at fault.

Infringement of Laws (2035)

- ✓ Concerning this article there are points which need some elaborations. The first one is the use of the word law, decree or administrative regulations. In contemporary Ethiopia, we have laws issued as Proclamation by the House of Peoples Representatives, Regulations enacted by the Council of Ministers and Directives to be issued by respective Ministries. These are Federal laws. We also have state legislations enacted by State Councils. So article 2035 should be read in this context. The laws we mentioned should be specific. A violation of contractual agreement is infringement of a law as well. We, however, do not apply article 2035. As per article 2037, we should apply the appropriate contract provisions. Therefore, the application of article 2035 is very narrow. For one thing, the infringed law should not be exposed to various interpretations. It should be explicit. The fault should not be regulated by other Non – Contractual Liability Law or Contractual provisions.

Chain of Command (2036)

- ✓ There are three approaches concerning the relationship in hierarchical order.
- ✓ The first approach is always obeying the law. This is what the rule of law says and it is true where it is assumed everybody knows the law. This approach is that of Britain. The approach, however, is not free from criticism, for it invites discussion, which makes the administration to face problems. This is especially true in the military.
- ✓ The second approach is obeying the order and forgetting the law. It is a blind obedience approach. According to this approach, it is up to the superior to give order as per the law. The presumption is that the superior knows the law. This approach is good especially in military operation. It has never been, however, free from criticisms and it was rejected after the Second World War. The theory caused so many sufferings to human beings and damage to materials, and those who carried on those atrocities invoked

superior order as a defense.

- ✓ The third approach is obeying both the law and the order. Article 2036 seems to have adapted this approach. To apply article 2036 there has to be superior subordinate relationship and in that relationship the superior should give an order to the subordinate and the act of the latter should give rise to harm. To that effect, **a chain of command relation should exist between persons of whom one has the right to command and the other the duty to obey.** Second, **superiority should be in authority not in rank**. Third, **the authority should emanate from the public law**. If the subordinate acts on an order given by a superior in rank but not by superior in authority she is at fault. Moreover, even if a superior in authority gives the order but the executants exceed the order or causes additional harm by improper execution, e.g., where a soldier is wrongfully ordered to confiscate one head of cattle, intentionally or negligently slaughters the whole heads of cattle, the subordinate commits fault.
- ✓ Where the subordinate is aware of the criminal nature of the order and carries out the order he is at fault. Article 74(1) of the Criminal Code of FDRE can be used to illustrate this , which reads as follows: The subordinate shall be liable to punishment **if he was aware of the illegal nature of the order**, in particular, **if he knew that the order was given without authority** or **knew the criminal nature of the act ordered**, such as in case of homicide, arson, or any other grave crime against persons, or national security or property, essential public interests or international Law.
- ✓ The author of the act, i.e. the subordinate may know the illicit and criminal nature of the act. But as it is stated under article 2036(3) if in the circumstances of the case and particularly under disciplinary compulsion it was practically impossible for the subordinate to discuss the order or disobey, i.e. act otherwise than he did, he is not at fault.
- ✓ Circumstances of the case must indicate that the subordinate was in such fear of imminent harm as to make it "practically" impossible for him to disobey to execute arson at the gunpoint. The following, depending on the circumstances, could be drastic impossibility forms to disobey: Fear of arrest, Dismissal from a civil office

Non – Performance of a contract (2037)

- ✓ Both Contractual and Non – Contractual Liabilities arise, as a rule, from the breach of duty. The mere fact that a person does not perform an obligation (duty) in a contract, however, does not amount to non – contractual fault as it is given under article 2037(1).
- ✓ There are cases, however, where it is difficult to determine which provisions are pertinent. For instance, article 2533 deals with the secret that is to be kept even after the employee abandoned the job. What if the employee discloses the information? What is the remedy? This provision does not give any solution. The obligation not to disclose the information after the contract is terminated seems to persist. On the other hand, article 2035 may not be invoked for article 2037 prohibits us from doing that.
- ✓ The following two possibilities could be solutions. Even though the contract has been already terminated, the law imposes an obligation not to disclose the secret. So if the employee discloses this we may take that as an infringement of a specific law and invoke article 2035.On the other hand, it is to say that though the contract is terminated generally the obligation not to disclose, however, persists under an obligation "not to do". So the proper articles of contract could be invoked.

Special Cases

1. Trespass To Person

- ✓ Trespass to person consists of
  1. Physical Assault [Battery]
  2. Interference with the liberty of another [false imprisonment]
  3. Defamation

• Physical Assault (2038)

- ✓ In the common law context, this is referred to as battery. Battery is doing something which induces in another reasonable fear and apprehension of

immediate violence.

- ✓ To say a person has committed a physical assault, first, there has to be contact to the person of the victim. This contact could be made by having direct personal contact or by utilizing other objects, which could be a living thing or a non – living thing.
- ✓ The contact should be done intentionally. If the contact is made negligently or it is careless contact there is no physical assault.
- ✓ Physical assault is invoked whether the contact has caused bodily harm or not.
- ✓ The mere threat of physical assault on someone shall not constitute an offence as a matter of rule. If, however, the law says so, it shall constitute an offence (Art 580 of criminal code).
- ✓ A person who has been allegedly regarded as having committed an offence with the meaning of article 2038 can find a complete defense when certain conditions exist. These are:

1) **Unforeseen objection (Art 2039(1)):** This is where the defendant could not reasonably have foreseen the plaintiff's objection beforehand to the physical assault.
2) **Self defense (Art 2039 (2)):** exists where the act was done in "a reasonable manner in legitimate defense of one's person or of another in the safeguard of property of which the defendant is the lawful owner or possessor" as per article 2039. The purpose of the self – defense is to protect one's person or of another or it could be in the safeguard of property of which the defendant is the lawful owner or possessor. Here the law does not discriminate between defending oneself and someone else. The law, however, does not allow the use of force to protect someone else's property (Art 78 of criminal code). The use of force is allowed only to safe – guard of property of which the defendant is the lawful owner or possessor.

Corporeal Punishment [2039(3)]

- ✓ This act consists in a reasonable corporeal punishment inflicted by the defendant on his child, wards, pupil or servant. This is what is called lawful chastisement which is an act used to punish someone for misbehaving.
- ✓ FDRE Constitution states under article 36 (1) (e) that children are free of corporal punishment or cruel and inhuman treatment in school and other institutions responsible for the care of children. Even the Revised Family Code does not allow corporal punishment expressly. What parents can do, when their children misbehave, is to take disciplinary measures. Some argue these disciplinary measures include corporal punishment. The ground they invoke for their argument is that the FDRE Constitution does not expressly include parents among those who are forbidden from administering corporal punishment. Nevertheless, article 576 of the Criminal Code prohibits beating a child by making this act a crime.
- ✓ Concerning the servant and others, it is as well unconstitutional to administer corporal punishment in whatever form, for the FDRE Constitution declares that everyone has the right to protection against cruel, inhuman or degrading treatment or punishment (Art 18).

A dangerous Lunatic (2039[4])

- ✓ Where the plaintiff is a dangerous lunatic whom it was necessary to prevent from doing harm and the act was done in reasonable manner. If a notoriously insane person is categorized as dangerous lunatic those people with whom he lives or his family would restrict his liberty of moving. This is usually done, especially in rural areas, by tying that person's arms and legs with rope so that, that person may not injure people or himself or cause damage to property. Applying reasonable force to tie that person could be necessary and it is justifiable.

Any other justification (2039[5])

- ✓ This is where the act of the defendant is justified in the eyes of a reasonable person.

- **Interference with the Liberty of another (2040)**

- ✓ This is referred to as false imprisonment in the common law legal system.
- ✓ It is a detention of one person by another against the will of the former and without just cause. Article 2040 consists of elements

1. The first one is the "… without due legal authority…." It is where one who restricts the free moving of another has done that without due legal authority, i.e. lawful justification or excuse. For instance, as per article 49 of the Criminal Procedure Code of The Empire of Ethiopia of 1961 a person is arrested if arrest warrant is issued by a competent court. Therefore, if a police officer arrests a person without arrest warrant, the arrest is said to be without due legal authority Art 50 and 51 of criminal procedure code. It is not only the police that may interfere with the liberty of another. A citizen may interfere with the liberty of another citizen as well.
2. The other point is that the detention should not necessarily be for a long period to say there is interference .The detention should be as well absolute. In other words, the deprivation must be complete, for "It is not false imprisonment if the plaintiff had any *reasonable* means of leaving, e.g. if his path was barred in one direction, but not in another."
3. There is a phrase … as he is entitled to… This entitlement emanates from the Constitution (Art 32).
4. Finally, material injury is not a pre – request to say there is fault under this article for an offence shall be deemed to have been committed not withstanding that no injury is done to the plaintiff's person. This is *injuria sin damno* and it is actionable without proof of damage and so it is actionable *per se*

DEFENSES

Lawful authority (2041).

- ✓ The first justification to restrain another person and prevent him from moving is where the constraint has been imposed on a person in the legal custody of the defendant and for enforcing the authority conferred up on the latter by law. Three elements are needed
  1) The constraint should be exercised in a reasonable manner.
  2) The one who interferes with the liberty of another should have a legal custody of the plaintiff.
  3) The law should confer that authority upon the defendant.

Criminal offence (2042)

- ✓ This is done in prevention of a crime. As per article 2042 (1) the person who interfered with the liberty of another has to show that he has a good reason to believe that the plaintiff had committed a criminal offence.
- ✓ The offence has to be a criminal offence. In other words, for civil offences we cannot restrain the liberty of another. Moreover, once we have constrained the liberty of another, we have to immediately hand over the person in our custody to the police. Otherwise, we are going to be liable as per article 2042 (2)

Bail (2043)

- ✓ There are two points. One is the fact that the defendant was standing surety for a person who is to abscond. The other point is the defendant has given her assurance to the officials as to the whereabouts of the residence of the person whose liberty is obscured.
- ✓ If the person who stood surety for a person has a good reason to believe that person is about to abscond and prohibits that person from leaving his residence, the one who interfered with the liberty may not be said has committed an offence. Some of the indications to believe a person is to leave his place is if he starts packing his staff or booking to travel in a plane.

- **Defamation (2044)and Defenses**

- ✓ Article 2044 defines defamation and the means used to that end. Therefore, the means utilized for the purposes of defamation could be words, writings or any other means.
- ✓ The consequences of defamation are to make a living person detestable, contemptible or ridiculous and jeopardize

his credit, his reputation or his future. So defamation is related to living person. Not to a deceased one (Art 46(2) of civil code). Some examples of defamation are stated under article 2109. So as per that article there is defamation or insult where;

a) The injurious or defamatory charges are that the plaintiff has committed a crime or an offence punishable under criminal law she has not committed the crime
b) It is alleged that the plaintiff is incompetent or dishonest in the exercise of her profession while she is honest or competent in the exercise of her profession.
c) It is alleged that the plaintiff, a businessperson, is insolvent while she is a successful businessperson.
d) It is alleged that the plaintiff is suffering from a contagious disease or
e) It is alleged that the plaintiff is of low moral while she is not.

✓ Defamation exists when the defamatory words or statements are communicated to a third party. If the words or statements are limited to the victim herself, they are said to be insults not defamation. Their consequences, however, as you can see from article 2109 are all the same, i.e. awarding of fair compensation to the plaintiff or to a charity named by the plaintiff.

✓ There is no group defamation as per article 2045(2). The other name for group defamation is defamation of a class.

Defenses

✓ A person may use defamatory words or statements against another. He may not, however, be liable, for he has justification for his act. Under the Ethiopian Non – Contractual Liability Law these defenses are laid down under article 2046 – 2049

– **Public Concern [2046]**

✓ Expressing an idea of public concern is not defamation Public concern or interest is related with fair comment. To say a certain statement is fair comment the following three conditions should exist.

a) The statement should be, on its face, statement of opinion, not a statement of fact.
b) The expression should be an opinion on matters of public interest, rather than private interests.
c) The holder of that opinion should hold that opinion honestly and should not act maliciously in expressing that opinion (Art 2032)

– **Truth of the Alleged Fact (2047)**

✓ In principle if what someone states is true, there is no defamation provided this is not done with intent to injure. Alan says this defense is a dangerous defense for if it fails heavier damages will probably be awarded. The burden of proof is that of the defendant. When the defendant proves he is not expected, however, to prove every word of what he said is correct. It suffices if he proves substantial amount of it.

– **Immunity (2048)**

✓ As per article 2048(1) no liability shall be incurred in respect of utterance made in parliamentary debates or in the course of legal proceedings. From this reading, we can see this immunity or privilege is given to certain persons. These are Members of Parliament [MP] and those who engage in the judicial proceedings. This immunity seems is extended to members of the constitutionally established executive as per article 611 of the Criminal Code of the FDRE. The question is whether the immunity stated in the Criminal Code is immunity either from civil and criminal liability or only from criminal liability. In addition, remember that the outcome of the criminal proceedings may not affect the civil one.

✓ MPs have constitutional guarantee for article 54(5) of the FDRE Constitution states that no member of the House may be prosecuted because of any…opinion he expresses in the House, nor shall any administrative action be taken against any member on such grounds. The rationale could be if "… Members of Parliament being [are] allowed to say what they say in parliament without fear of being sued that assures MPs that what they say in parliament will always be privileged".

✓ Other people who are immune are those who are involved in the course of judicial proceeding. As per article 79(1) of the

FDRE Constitution judicial powers, both at Federal and state levels are vested in the courts. As per article 80 of the same at both Federal and State level, the courts are Supreme, High and First Instance Courts and it is to tell the obvious that those who involve in those courts proceedings are immune.

- **PUBLICATION (2049)**

✓ Defamation could be committed by way of publication. In whatever form the defamation is carried out, the responsibility of press arising from criminal offences and civil damages shall be laid down in the Criminal Code and the Civil Code. As per article 2049 of the CCE the defendant may not be liable provided that:

i. He has acted without intent to injure and without negligence.
ii. At the request of the plaintiff, he publishes immediately a withdrawal and an apology.

✓ If he, however, acts with intent to do harm or with gross negligence he is liable. Moreover, when he is requested to withdraw and make an apology, he fails to do so immediately (forth with) he will be liable.

✓ Concerning compensation as per article 2109 of the CCE fair compensation may be awarded to the plaintiff. While as per article 14(2) of the press law the award, in case of a non – profit making press, is reasonable compensation and incase of a profit – making press, compensation could be up to double the capital of the press registered under the commercial code.

✓ Where the defamation is committed by way of a periodical, which appears at intervals of more than one week, the plaintiff may require the withdrawal and apology to be published immediately in a periodical of his choice.

✓ The plaintiff may demand the withdrawal and apology to be published in other newspapers which the defendant should comply with. If the periodical on which the defamatory statement is published at intervals of less than a week or weekly base, the withdrawal and apology shall be published in the periodical in which the defamatory matter was published.

2. Trespass to Goods

✓ Our Civil Code uses trespass to indicate trespass to land or a house (Art 2053) while trespass to movables is referred to as assault to property.

- **Trespass [2053]**

✓ There is trespass as per article 2053 where without due legal authority, someone forces his way on the land or into the house of another against the clearly expressed will of the lawful owner or possessor of the land or house. The elements of this article are:

1. "…without due legal authority….": This exists when a person enters a land or a house without having any justification.
2. .... He forces his way on the land or into the house of another...: This could be done directly by personal entry or by procuring the entry of another person, object or animal.
3. .... Against the clearly expressed will of....: The expression could be oral, written or by conduct. A notice could be put on a door or fences of some ones holding which reads "Stay away. This is private property" or you may have a notice saying "Dangerous water. No swimming" which are written expressions. If someone fences a piece of land under his possession, he is expressing his will by conduct.
4. ... a lawful owner or possessor of the land or a house: The expression should be given not by wrongful owner or possessor. As per article 40 of the FDRE Constitution since land cannot be owned privately, what we have on both rural and urban land is possessory or holding right. Thus, those who secured possessory right as per the relevant law shall have the possessory right over the land. Therefore, they are lawful possessors of the land. A house can be owned privately and that can be proved by producing a title deed (Art 1195). A person could have also the possessory right over the house as lessee, as usufructory or a keeper, etc. Therefore, these are lawful possessors of a house.

- **Assault on property [2054]**

✓ This is a trespass to movable property. Therefore, as per article 2054 a person commits an offence where, without due

legal authority, he takes possession of property against the clearly expressed will of the lawful owner or possessor of the property. The elements of this article are:

1. Without due legal authority... : It could mean without having lawful justification.
2. ...she takes possession of property...: This conduct includes actual damage of goods, use of goods or moving of goods from one place to another.
3. ... against clearly expressed will of....: Using force to repel any act of usurpation as indicated under article 1148(1) is clear expression of will. So if a person takes away the thing while the possessor or owner is using force to repel the usurpation we say he is a trespasser to goods for he takes possession of goods against clearly expressed will of the lawful possessor or owner.
4. ...the lawful owner or possessor of property: Possession, as per article 1140 of CCE, consists of the actual control, which a person exercises over a thing. This possession, however, could be lawful or unlawful. Possessor in good faith is a lawful possessor. If he steals a thing, he is not a lawful possessor. Hence, the one who takes possession of a thing by stealing cannot invoke article 2054, for he is not a lawful possessor

CHAPTER VII: Interference against Economic Interest

Pre contractual Negotiations [2055]

Before they conclude a contract, parties make negotiations. This is done by expressing their intentions to enter into a contract. When one declares his intention, he may induce others to incur expenses and then decline from entering into the contract. This is an offence as per article 2055

Inducement to breach of contracts [2056]

As per article 2056, whosoever is **aware of the existence of a contract between two other persons** commits offence where he **enters into a contract with one of those persons** thereby **rendering impossible the performance of the first contract**.

.....Being aware of the existence of a contract between other persons...: Here it is necessary to establish that a defendant acted with knowledge of a contract existence between other persons.

...entering with one of them...: This act has to be done with intent to induce one of the parties to breach the contract he has with the other party.

... rendering impossible the performance of the first contract: It is not enough that the entering into a contract with one of the other persons makes the already existing contract performance difficult. The second contract should render the previous contract impossible to be performed. If the one who complains the breach of a contract, nevertheless, failed to take the necessary measure, which would have ensured the effective performance of that contract the one that made the latter contract would not be liable (Art2056(2) with 2155).

Unfair competition [2057]

Competition in trade is necessary to bring growth in that sector. The competition, however, should be fair. Hence, the effort of two or more parties to secure profit out of their identical business by offering the most favorable terms to their customers is what we mean by fair competition. Examples are reducing the prices of commodities and services up to economic level, producing quality goods and providing efficient services.

On the contrary, publishing inaccurate information about other competitors (Art 126 of commercial code) or any false statement in the course of business with a view to discredit a competitor; misleading customers by using the same trademark, same commercial name, or same container is unfair competition, which is generally a dishonest practice used by the defendant (Art 2127) Hence a person commits an offence where, through unfair competition, he compromises the reputation of a product or the credit of a commercial establishment (Art 2057 with 2127)

Simulation (2058)

Simulation is a deliberate making of certain conditions that could exist in

reality. This is the equivalent of 'Kutch yebelu' in Amharic.

- **False Information (2059)**

✓ In the common law, this is referred to as the tort of deceit. Hence as per article 2059 a person who intentionally or by negligence, supplies false information to another commits an offence where:

– He knows that the person to whom the information is supplied or another given person will act upon the information and thereby suffers damage. However, where the information supplier is not bound by the rules of his profession to give correct information, he will be at fault if he knows that the persons to whom the information is supplied or another given person will act upon the information and thereby suffers damage.

- **Exception 2060**

✓ A person may provide false information and someone may act upon that and suffers damage. The provider of that information may not be liable where the false information is supplied orally with the intention of helping others. Thus the person supplying incorrect information shall not be liable where, the statement made by him relates to the qualification, conduct, solvency, competence, or under taking of another person and was made with the object of securing credit, money, or goods to that person i.e. with the intent of helping.

- **Witnesses [2061]**

✓ Witnesses could testify the occurrence or the non-occurrence of certain events or they may testify the existence or the non-existence of certain facts. For instance, they may be present at a marriage ceremony (event) and later testify the occurrence of that event (Art 95 of RFC). The existence of a marriage is a fact. So the existence of marriage is either established by a marriage record or in default of the certificate by other reliable evidence or witnesses (Art 94 and 95 of RFC).

✓ Thus witnesses shall guarantee the accuracy (exact or without error) of their statements Art 2061(1). If they could not do that they would be liable to those who acted on the faith of such statements. There is a possibility for witnesses to be misled by others. In such cases the witness has the right to bring recourse against whosoever led them into error provided that they acted in good faith Art 2061 (3).

- **Advice or recommendations (2062)**

✓ Where a person comes to seek advice and one renders only that advice or makes recommendations the one who gives the advice or makes the recommendation may not be liable.

- **Seizer of another's property or Distrait (2063)**

✓ Here we have a creditor-debtor relationship. The creditor, in order to force the debtor, to pay her debt, holds the property of the debtor. If the property that is held by the creditor is disproportionate to the value of the debt this act is a fault. The question that we may raise is whether the debt is owed extra contractually or contractually. If it is extra contractual, the amount first has to be determined by a court. Otherwise, the victim cannot determine the amount by herself. If it is contractual, the creditor has recourse to judicial proceedings. Thus, she does not have to take the law into her hand. The situations envisaged in this article are those governed by article 2076 though that article deals solely with animals.

- **Execution of a court order (2064)**

✓ A court gives order for sale of judgment-debtor's property to execute its judgment by giving a valid execution order Art 394 ff of civil procedure code. An execution officer or a bailiff carries out the execution order. To be a valid order it should bear:

– The day on which it is issued;
– The signature of a judge
– The seal of the court and
– Obviously it has to be in a written form

✓ Thus, the execution officer who seizes the property of judgment-debtor to execute the court order shall not be at fault provided he carries it out in accordance with the order. The execution officer, however, shall be liable where:

– He executes the court order that is not made in a prescribed form, i.e. either where it does not have the signature of a judge, the seal of the court, or
– the execution officer exceeds the

instruction in the order, for instance while the order is to seize specific movable property the execution officer seizes another

– The execution officer carries them out without due regard for the provision of the law. For instance, if she seizes those properties which are not subject to the attachment

- **Prescription 2065**

✓ There is a prescription in which one is supposed to bring an action. For instance in a contract case it is 10 years Art 1845. Thus, the creditor has to bring his action within this period. If she does not, she is barred from bringing her action by prescription.

✓ By virtue of article 2030 the debtor's action of not paying the debt within this period, however, is a fault. Nevertheless, article 2065 is an exception. Thus, if the creditor invokes article 2030 (for not settling one's debt is a fault) the debtor can invoke article 2065 not to be liable. As a rule, by virtue of article 2164 one can demand restitution. The one who effects the restitution or who pays after the prescription, i.e. after the period has ran out cannot claim the restitution because the law says he paid what he owed.

CHAPTER VII: Other Interests

Injury to the Right of Spouses (2050)

✓ This is a condition where someone induces one of the spouses to leave the other against the will of the other spouse. Here we have elements worth discussion.

1… knowing her/him to be married…: The one who induces the spouse knows that the one (s) he is inducing is married. This knowledge could be direct or indirect. It is direct where, for instance, he has witnessed the marriage event. It is indirect where, for instance, he learnt that from someone who has been at the marriage event or from documents to that effect. Having a wedding ring on the ring finger or any other sign is another indication for marriage.

2…he or she induces one of the spouses…: This is where the actor persuades one of the spouses to leave the other

3…against one of the spouses' opposition: In other words, even if you induce one of the spouses to leave the other where there is no opposition from the spouse there is no commission of offence for spouses can agree to live separately Art 55(1) of RFC. Under article 2050(1) and (2) the one who induces one of the spouses is playing the active role and he is pro-active. The spouse is reacting to the situation. Under sub article 3 however, the third party is a recipient. Moreover, the one who he receives, harbors or detains is a married woman. It is not a married man. Thus, this is done against the will of the husband. The act of receiving, harboring or detaining in full knowledge of the husband's opposition shall be a fault. The recipient should have the knowledge of the un willingness and opposition of the husband. If this knowledge does not exist there is no fault.

- **Duty to Educate and Supervise (2052)**

✓ Article 2052 is a good example to a fault by omission. Thus, where a person has responsibility to educate and supervise an individual who is under his control or entrusted to his fails to carry on this responsibility in "I –do- not- care style" it is said he has committed fault.

✓ As per article 2052 a person could be entrusted to the charge or supervision of another by law or in conformity with the law. Thus, parents' custody of their children emanates from the law. Art256 of RFC. This obliges them to educate and supervise their children. If the parents or legal guardians fail to educate and supervise their children, they are at fault. Similarly, schools have the custody of children for the time the children are at school. During this time, the schools have responsibility to educate and supervise the children at school.

CHAPTER IX: Liability Irrespective of Fault

Strict Liability (2066-2089)

- **Necessity (2066)**

✓ When there is imminent danger against property, oneself or another person, one

may cause harm to another person to avoid that danger. However, where a person acts of necessity as per article 75 of the Criminal Code of FDRE he may not be criminally liable he is, however, civilly liable as per article 2066 of the CCE. The reason to make a person who acts of necessity civilly liable and criminally free could be to strike a balance between the interest of the victim and the doer of the action.

- ✓ The interest that one saved should be greater than that which was damaged, for "The courts seem to take the view that where personal injury is threatened then any necessary damage to property will be justified. The doer of the action may incur liability where he saved not only herself or property but also a third party from the imminent danger. The damage is assessed not in accordance with article 2091.It is rather estimated equitably as per article 2103.

- **Bodily Harm and Defenses (2067)**

- ✓ In the common law legal system bodily harm is referred to as battery
- ✓ The defenses are stated under sub-article 2 of article 2067. These are:
  1. **Where the act causing the harm was ordered by law:** Article 56 of the Criminal Procedure Code governs how arrests are made. As per that article if the person against whom a warrant is issued for arrest submits himself to the custody of the police officer he may not be touched. If, however, he resists the endeavors to arrest such officer may use all means proportionate to the circumstances to effect the arrest. That may cause bodily harm to the one who resists the arrest. Nevertheless, the police officer may not be liable for the act that causes that harm ordered by law art 18 and 19 of criminal procedure code.
  2. **Where it was done in legitimate self-defense**: Self-defense is a defense where reasonable force is used to repulse an attack on a person, property or another person. Though what amounts to self-defense will be a question of fact in each case the basic principle is the force used must be reasonable in proportion to the attack. That seems the reason why self-defense is qualified by the word *legitimate* under article 2067 (2).
  3. **Where the harm is due solely to the victim's fault:** No contribution is made by the offender to cause that injury. In other words, the injury would not have been caused had the victim not committed fault. That seems the reason why the law uses the word *solely*.

- **Sport Activities [2068]**

- ✓ In sporting activities, one may injure another who is taking part in the same activity or a spectator. Where the one who causes the damage observes the rules of the game he may not be liable. The rationale behind this is what is called voluntary assumption of the risk. If there is, however, a deceit or gross infringement of the rules of the sport the person who causes the injury shall be liable.

- **Dangerous Activities [2069]**

Creation of abnormal risks

- ✓ The activities are enumerated as follows under article 2069.
  1. Storing or using explosives or poisonous substances.
  2. Establishing high-tension electric transmission lines.
  3. Modifying the natural lie of the land.
  4. Engaging in exceptionally dangerous industrial activities.
- ✓ These activities are economic activities and they have advantages to the community. Thus we cannot prohibit them. At the same time we have to protect the public and individuals from hazardous activities that cause damage. Thus the owners are liable without the victim establishing fault for it would be"… unreasonable to expect the victim to establish fault, which is very difficult.
- ✓ The law rather requires those who engage in those activities to establish fault from the side of the victim thereby shifting the burden of proof to those who engage in those kinds of activities. They do that by proving the victim is at fault fully or partly Art2086(2). The reason why the law takes this position seems that the giant corporations engaged in those activities

are powerful in every aspect when compared with the victim. Moreover, they are the beneficiaries of the activities. Finally, yet importantly, they are in a position to distribute the loss among the community by adding the compensation they paid to the victim by adding it on the value of the products they produce.

Types of Instruments

1. Liability for Animals (2071_2076)

- ✓ Under the common law legal system, animals are classified into *ferae naturae* [fierce by nature] and *mansuetae naturae* [tame by nature]. The purpose of this classification is to determine the circumstances under which the keeper of the animal would be liable.
- ✓ The keeper of the *ferae naturae* is strictly liable for the damage caused by the animal, for knowledge of its dangerous propensity is being presumed. The keeper of the mansuetae is liable for the damage caused by the animal if science or knowledge of its dangerous propensity could be proved, e.g. proving it had previously manifested behavior of the type complained about or has displayed a general vicious propensity. Thus, in the first case, the law presumes and the owner has to disprove that. In the second case, the victim is supposed to prove.
- ✓ Our law does not classify animals for purposes of determining whether the liability is strict or not. Per article 2071, the owner of an animal shall be liable for any damage caused by the animal not withstanding t*hat it has eluded his control accidentally or the damage caused was unforeseeable.* Three elements need discussion.
- ✓ The first one is … any damage caused by the animal.' This could mean damage to property or person.
- ✓ The second one is… 'it has eluded his (its!!) control accidentally'… We said under common law legal systems animals are classified into *ferae naturae* and *mansuetae naturae.* Examples of the former are lions, tigers and gorillas while dogs, cats and camels are *mansuetae naturae*. The first type of animals could cause harm by eluding their control accidentally for the keeper may not let free these types of animals.
- ✓ The third point is … 'the damage caused was unforeseeable'. This point could be related with the second type of animals. For instant, most of the time dogs are trained to bark and simply scare intruders and frighten them away. If, however, such kind of dogs bite people we may say the damage was unforeseeable. Nonetheless, it cannot be a defense for the keeper of the dog.

Custodian (holder) (2072)

- ✓ The holder is a person who uses the animal for his personal benefits. He is liable for any damage caused by that animal while it is under his holding.
- ✓ This holds true where a person hired the animal as well
- ✓ The case of an employee is different. The employee attending the animal is not liable unless the damage is caused due to fault committed by him. The same is true for a person making use of the animal for the owner's account or for the account of another person.

Transfer of Liability (2075)

- ✓ A person who suffers damage by an animal may bring action against the owner though the damage was caused while it has been in charge of someone else. The reason could be the fact that the victim may only know the owner or the victim may think that the owner has the capacity to pay damage. Similarly, the courts may order the owner to make the damage good. The owner who paid the victim may recover the amount from the person in whose charge the animal was when it caused the harm.

Transferring the ownership (2074)

- ✓ Ethiopian Non- Contractual Liability Law classifies animals into domestic animals and animals other than domestic, unlike the common law classification into tame by nature and fierce by nature. Domestic animals are those animals, which it is customary to keep for purposes of

pleasure or gain. The purpose of the classification is to determine whether the owner and the person in whose charge the animal is could relieve themselves of their liability by simply transferring the ownership of the animal in case of the owner and paying the value of the animal in case of the person who was in charge of the animal when it caused damage. Thus in case of the owner, she can relieve herself of her liability by surrendering the ownership of the animal to the person who suffered the damage provided that the damage is not the consequence of an offence (fault) committed by the owner or by a person for whom he is liable (child or employee) or where the animal is domestic animal.In case of a person in whose charge the animal is he can relieve himself by paying the value of the animal at the time when the damage was caused provided the animal is a domestic animal.

Victim's guarantee (2076)

- ✓ Animals may cause damage to crops or grasses. The owner or holder of these interests may seize the animals as a guarantee until compensation for the damage is paid for him. Such kind of situation is envisaged by sub article (1) of 2076. Sub article (2) governs a situation where the animals brought damage disproportionate to their value. Such animals could be dogs or cats, which the holder of the interest could kill and notify the owner.

Liability for Buildings (2077 – 2080)

- ✓ Buildings could create risk if they collapsed. A building could collapse and the reason could be manmade or natural. Where a building collapses due to lack of maintenance we say the cause is manmade. Whereas if it collapses due to earth quack or other natural reason, we say the reason is natural. For whatever reason the building is collapses or is demolished and brought damages, the owner is liable as per article 2077(1).
- ✓ Where the reason for the damage is the fault committed by the person who built the building or occupier, the owner, after paying the compensation to the victim, may claim compensation from those persons as per article 2077 (2).Similar to the owner of an animal, the owner of a building may relieve himself of liability by surrendering the ownership of the building to the person who has suffered the damage as per article 2078 (1).
- ✓ On the other hand, the owner may not relieve himself simply by transferring ownership of the building where the damage is due to the fault committed by the owner or a person for whom he is liable. The compensation is therefore greater than the value of the building where the damage comes because of fault as per article 2078 (2).
- ✓ According to article 2079, a person endangered by another's building may require the owner thereof to take the necessary measures to avert the danger. Maintaining the building could be one of the necessary measures to avert that danger.
- ✓ Under article 2077, the occupier is one among those who are liable for the damage due to the building. His liability, however, is for any damage caused by the objects failing from the building as per article 2080.

Machines and motor vehicles

- ✓ Most of the time machines are used in industrial complex. They are fixed in certain places. Nevertheless, there are certain machines which are not fixed; such are water pumps, bulldozers, caterpillars etc.
- ✓ Usually, the machines cause harm to employees who are connected with the machines through a contract. Hence, if the victim is connected with the dangerous industrial activity…which has caused the damage the consequence of the damage shall be settled in accordance with the rules governing the agreement reached Art 2088.
- ✓ Thus, the owner of machines and motor vehicles are liable for the employees in accordance with the labor proclamation 377/2000 while for others the owners of a machine or vehicle shall be liable for any damage caused by the machine or vehicle

in accordance with extra contractual liability. They are liable even if the damage was caused by a person who was not authorized to operate, or handle the machine or drive the vehicle Art 2081. The fact that the machine is operated or the vehicles driven by a person who is not authorized cannot be a defense. The only defense to relieve the owner from being liable is where the damage is due solely or partly to the fault of the victim Art 2086 (2). Moreover, the owner shall not be liable where he proves that, at the time when the damage was carried, the machine or vehicle had been stolen from him.

- ✓ Machines could be operated by someone else other than the owner or someone else could drive the vehicle. Thus, a person who has taken possession of the machine or vehicles for purposes of personal gain shall be liable for any damage caused by the machine or vehicles while the machine or the vehicle is in his possession. An agent who has charge of the machine or vehicle for the owners account or for the account of another person shall be liable if the machines or vehicles caused damage due to her fault.
- ✓ The victim may not know the keeper or the agent who caused the damage. Thus, they may go against the owner. In addition, the court may order the owner to make the damage good in accordance with article 2081(2). Nonetheless, the owner who paid compensation to the victim may recover fully from the person in whose keeping the machine or vehicle was, provided she has not committed an offence or a person for whom she is liable has not committed a fault Art 2083.
- ✓ Two motors could collide in a road accident. When it is not proved the accident was due, entirely or chiefly, to the fault of one of the drivers, it shall be deemed each driver has contribute equally to the accident. Consequently, the owner of each vehicle, or person responsible for it, shall bear half the total amount of the damage resulting from the accident. Art 2081.

Liability for manufactured goods (2085)

- ✓ A person who manufactures goods and sells to the public for profit shall be liable for any damage to another person resulting from the normal use of goods.
- ✓ There are elements

1. A person …This person could be either physical or natural person.
2. …who manufactures goods…: Under common legal system manufacture goods are referred to as "Manufactured products". manufactured products do not simply refer to food and drinks as some think. "It has been held to cover motor vehicles, lifts, clothes, cleaning fluids and building" Under our law, however a building may not be classified as manufactured products Art 2077 ff.
3. …Sells to the public for profit… To start with if someone gives a manufactured product for donation and the donee is injured this article may not be applicable. Furthermore, if two individuals exchange different manufactured products, since barter is not sales under Ethiopian law, and if one of the individuals is injured due to the manufactured goods this article is not applicable. The sale should be to the public and for profit. An enterprise could, for instance, distribute food items free for the public. And if someone is injured due to that food, the victim may not be successful under this article.
4. …shall be liable for any damage…: Here any damage could mean damage to person or damage to property. For instance, you may eat food and you could be ill. This damage is to person and the manufacturer shall be liable as per article 2085(1). It is similar if you buy a certain spare part and assemble it in your car and your car is damaged due to that spare part.
5. …resulting from the normal use of the goods. Each good has normal use. The normal use of a chair is to sit on it. The normal use of edible oil is to cook food items not to drink like water. The chair or the all could be defective. Nonetheless, if someone suffers is while using the defective chair like a ladder the manufacturer shall not be liable. Neither the oil manufacturer is liable for the damage suffered by a victim who drank

the oil. Nor is the manufacturer liable where the defect caused the damage could have been discovered by a customary examination of the goods

Defenses or justifications for strict liability

- ✓ Thus, regarding articles 2066 and 2067 the defenses are given under each sub article (2) as victims fault. They are uniform defenses. Moreover, sub article (2) of 2067 presents order by the law and legitimate self-defenses as justifications. As regards article 2081, if the vehicle or the machine is stolen and that can be proven by the owner that can serve as a defense.
- ✓ Article 2088 states that if the harm is occurred to a person who connected with instruments due to the contractual relations there will not be liability based on tort.
- ✓ Article 2088, applicable under all situations as a defense. There seems to be a difference between the English and Amharic versions of sub article (1)of 2088. While the English version reads… "May relieve themselves…" The Amharic version reads…The Amharic version seems correct for two reasons. The simple reason is where there is inconsistency between the English version and the Amharic version the latter one prevails, for the Amharic language is a working language of the FDRE government Art 5(2) of the constitution. Second, in light of sub article (2) of the article 2086 the Amharic version gives more sense than the English version. For as per article 2086(2) those persons declared legally liable shall be relieved of their liability, entirely or in part, only where the damage is due solely or partly to the fault of the victim. Thus, the only justification to relieve those persons declared legally liable is the claimant's fault which is referred to "as the claimant's lack of care." Here the test, however, is not whether the damage or the accident was foreseeable but whether the claimant acted reasonably, that is to say, with the amount of self-care that a normal person would have exercised in the circumstances.
- ✓ Thus, those grounds enumerated under sub article (l) of article 2086 may not be invoked by those persons who are legally declared liable to relieve themselves from liability. The grounds are the following:

1) Those persons cannot say we have not committed fault, for as we have already said strict liability is a liability without fault. And the persons, i.e. owners, custodians of animals; owners, those who build the buildings and occupy them; users or those who store explosives or poisonous substances; owners or keepers of motor vehicles and finally manufacturers of goods are liable not because they committed fault. Rather, among others, they are either owners or the beneficiaries.
2) They cannot relieve themselves by stating that it was impossible to establish the cause of the damage.
3) They cannot exempt themselves from liability by establishing that it was not within their power to prevent the damage. This is what is known as force majeure or acts of God. Thus, acts of God may not be a ground to relieve those persons from liability.
4) Finally, the fact that the damage was due to the fault of a third party as well cannot be a justification to relieve oneself from liability. These third parties, however, do not include an employee attending to an animal (2072(3)), thieves and agents (2081(2)) and 2082(2) respectively for if the damage was caused due to the fault of those third parties, the actors themselves will be liable and the fault could be invoked by the owner.

- ✓ The amount of liability depends on how much is contributed by the victim for the damage to occur. Thus, if the damage is due solely to the fault of the victim the defendant will be relieved from liability entirely. If, however, the contribution of the victim is partly, the defendant will be relived in part. The issue is a question of apportionment, i.e. dividing the liability between the victim and the defendant. Thus, "In principle, the damage to which apportionment applies is only that part of the claimant's over all loss which is jointly attributable both to his own fault and that of the defendant. If the claimant suffers the loss entirely through his own fault, apportionment should be irrelevant.

- ✓ Art 2087 states "…the owner or the keeper of an object shall be liable for any damage caused by the object *only* where she has committed an offence. Thus, the victim is obliged to establish fault from the side of the owner or the keeper to claim damage. Otherwise, the owner or keeper may not be liable.

CHAPTER X: VICARIOUS LIABILITY

- ✓ Vicarious liability is "…liability imposed on one person for the wrong doing of another."
- ✓ Similar definition is given by John Cooke, which reads "Vicarious liability is where one person is made liable for the tort of another person.
- ✓ Under the Ethiopian tort law parents and others listed under article 2125 are liable for the wrongs done by a minor child. The state is liable for its civil servants and employees acts Art 2126. Similarly, bodies corporate are liable for their representatives, agents or paid workers ac Art 2129. The employers are held liable for the acts of their employees Art 2130. Finally, the managing editor of the newspaper, the printer of the pamphlet or publisher of a book is liable for defamation committed by the author of the printed text Art 2135.

The Rationale why one is held liable for the wrong *committed by another*

- ✓ Some authors refer to vicarious liability as another instance of strict liability in the sense that one person is made liable for another without himself committing any fault. The possible rationales are:

1. ***The control test:***

- ✓ This theory attributes to those who are made liable the ability to control the behavior and precise manner of the wrong doers. For instance, the employer has the ability to control the behavior and precise manner of his employees. This is expressed under article 4(1) of Labor Proclamation No 377\2003 which reads "A contract of employment shall be deemed formed where a person agrees directly or indirectly to perform work for and *under the authority of the employer*. Furthermore, one of the obligations of the workers is to *follow instructions given by the employer* as per article 13(1) of the same proclamation. Thus, the fact that the employee is working under the authority of the employer and follows instructions given by the same tells us the employer has the ability to control the behavior and precise manner of his employees.
- ✓ The same is true for parents, for they have the ability to control the behavior and precise manner of their minor children by doing the following:
  1. Direct the upbringing of the minor.
  2. Take the necessary disciplinary measures for ensuring her upbringing.
  3. Direct and supervise the social contacts of the minor.
  4. Ensure the minor is given general education or professional training commensurate with her age and abilities Art 258, 259, 260.
- ✓ Thus, when the law makes the employers or the parents liable for their employees or children's wrong doing respectively it is implying you have committed wrong for you failed to control the behavior and precise manner of your employees or children. This test is not free from criticism, especially concerning employees "…as many employees perform skilled tasks, which the employer is incapable of understanding.

2. ***Analogy with causation***

- ✓ The state, the employers or the bodies corporate are those who…set the whole thing in motion and that, therefore, they should bear the consequences of a third party who suffers through their employees wrongful conduct. Setting in motion by the employer is expressed in the Labor Proclamation under article 12 as follows:
  - The employer provides work to the worker.
  - The employer provides the worker with implements and materials necessary for the performance of the work.
  - The employer pays the worker wages and other emoluments.

3. ***Deep pockets***

- ✓ The father, the state, bodies corporate and the employers are richer. Hence they should pay.

- ✓ The weakness of this theory is that it "…justifies the employers being liable for all the torts committed by his employees, whether they were committed within or without the course of their employment.

4. Economic and moral consideration

- ✓ This theory is based on the fact that "…the person who drives a benefit from the activity of another should also bear the risk of the damage inflicted by those acts."
- ✓ Nicolas refers to this as elementary fairness. It …dictates that if you seek to make money from engaging in some activity and other people suffer losses as a result of your engaging in that activity, you should compensate them for that loss." In simple language, if you want to obtain the gains resulting from engaging in that activity, then you should bear the losses as well.

5. Losspreading

- ✓ This is another economic variant, which enables the employer to spread the loss through insurance or the price of the products. The employer does this "Either by charging his customers slightly higher prices or by making a claim on his liability insurance.

Liability of parents and others under Ethiopian law

- ✓ As per article 2124, the father shall be liable under the law where his minor child incurs liability. The mother is only liable where she exercises the paternal authority over the child as per article 2125(a). As per article 635 of the Civil Code of Ethiopia, the husband is the *head of the family*. Hence, the spouses shall co-operate under the *guidance of the husband*, to bring up the children and to prepare for their establishment. Thus, the father who is the head of the family in up bringing the children has to take the blame for the wrongdoing of the children.
- ✓ This is no truer in contemporary Ethiopian. To start with, as per article 34(1) of the FDRE Constitution men and women have equal rights while entering into, during marriage and at the time of divorce. Consequently, the spouses shall have equal rights and obligations in the management of the family. Concerning their children, they shall cooperate to bring up and ensure the good behavior and education of their children in order to make them responsible citizens Art 50 RFC. Thus, both spouses should take responsibility for the wrongdoing of their children.
- ✓ As per article 204 of the CCE or article 219 of the RFC, the father and the mother are, during their marriage, jointly guardians and tutors of their minor children. It is in case of death, disability, unworthiness or removal of one of the parents, the one who remains shall alone exercise such functions. Thus, the one who exercises that function shall be answerable for the wrongful act of the children. Furthermore, where the marriage is dissolved by divorce and children are in the custody of one of the parents, the one who has the custody shall be liable for the wrong done by the children. Article 2125(a) is applicable where the father of the child is unknown.
- ✓ This is true where the child lives inside the family home. Where the child lives outside the family home, however, the person in whose charge the child is placed shall be liable Art 2125 (b). The child could be said is living outside the family home when she lives, for instance, in governmental or private orphanages Art 192 of RFC. If children commit wrong while they are at school the head master of the school shall be liable.

Liability of the state 2126

- ✓ The FDRE Constitution established a Federal Democratic State. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia. It consists Federal Government and State Members. Thus, state refers both to government at Federal and Regional levels.
- ✓ The state, as any other person, employs civil servants to provide services to the public. While giving these services the civil servant or government employee may commit fault. This fault could be personal or professional fault. Where the fault is personal, the state shall not be liable. Where the fault is professional, however,

the victim may claim compensation from the state. Nevertheless, the state may subsequently claim it from the servant or the employee at fault.

- ✔ if the civil servant or employee believes in good faith that he acted within the scope of his duties and in the interest of the state, then the fault shall be deemed professional fault. In addition, the good faith is presumed. Thus, one who challenges that has to prove the contrary.

Liability of bodies corporate and employers [2129-2133]

- ✓ As per article 31 of the FDRE Constitution, every person has the right to freedom of association for any cause or purpose. The cause or the purpose of such association, nonetheless, cannot be to illegally subvert the constitutional order or to promote such activities.
- ✓ Association, therefore, could be established to secure or share profits as it is stated under article 404 of CCE. These types of associations are subject to the provisions of the Commercial Code of Ethiopia relating to partnership. The same shall apply to cooperative and other grouping, which tend to satisfy the financial interests of their members by placing them in a position to save money. Trade unions and groupings of a religious character are bodies corporate. The former one is governed by Labor Proclamation 377\2003 while the later shall be subject to the special laws concerning them. Thus bodies corporate are those associations established in accordance with Memorandum of Associations and Statutes with a view to obtaining a result other than the securing or sharing of profits. These associations shall have directors appointed by the general meetings as per article 437 of CCE. They also shall have servants as we can read from article 457(1) of the CCE. Other bodies corporate we mentioned are established as per the proper special laws governing them. Thus bodies corporate shall be liable for the acts and omissions of its directors and servants as well as their employees, whenever such acts and omissions have taken place in the execution of the functions which entail liability. These bodies corporate are liable for their directors, servants or employees where the directors, servants, or employees are at fault while executing their functions, which is referred to as discharge of duties. If the damage is caused at the place where he is normally employed or if the damage is caused during the time when he is normally employed Art 2132, it is presumed the fault is done while he is discharging her duties. This presumption is rebuttable for proof to the contrary is admissible to rebut such presumption as per article 2132(2).
- ✓ Carrying out the duties is referred to in the common law legal system as "In the course of his employment." The employee committed the wrong in the course of his employment if either:
  - A) A wrongful act was authorized by the employee's employer or
  - B) The employee's employer authorized a wrongful and authorized mode of doing some act.

DEFAMATION

- ✓ Under article 2049 a person is liable for defamatory matter because of positive act, i.e. where he communicates words, pictures, or written materials to at least one person other than the person defamed. Here the author has a primary responsibility. Nevertheless "exceptionally one may also be liable for not taking positive steps to prevent the publication by someone else". Or, "because he approved it" Thus the managing editors of the newspaper, the printer of the pamphlet or publisher of the book shall be liable for defamation committed by the author of a printed text.
- ✓ Hence, the authors are liable for positive acts under article 2049 for they have primary responsibility for the defamatory matter. And the managing editor, the printer and the publisher may be liable for either approving the defamatory matter or as accomplices.
- ✓ Our law, however, does not seem to make any discrimination in making liable both the author of a defamatory matter and the

publisher, the managing editor or the printer. For under article 2136(2) it is stated that the person who caused the damage and the person whom the law declared to be liable for such damage shall be jointly liable to repair the damage.The reason seems that the person who caused damage (the author) shall repair it notwithstanding that another person (printer, managing editor or publisher) is declared by law to be liable for such damage.

PART III: REMEDIES TO EXTRA CONTRACTUAL WRONG

Chapter XI: Introduction to the Basic Notions of Damage

- ✓ The word "damage" is derived from a Latin word "*damnum*" meaning loss or species of loss. It is a harm or injury caused to a person's legitimate interest. The interest harmed may be related to the person's material (pecuniary) interest or to moral (non pecuniary) interest.
- ✓ Based on the nature of the interest harmed, damage can be classified into two: material damage and moral damage. **Material damage** is a damage which affects the person's pocket, whereas harm to his moral interests affects his feelings or emotions **(moral damage)**.
- ✓ Categorizing damage as material and moral is not known in the common law legal system. They sometimes divide material damage into intangible material interest and tangible material interest. But the usual classification of damage in common law systems is pecuniary and non-pecuniary, which is equivalent to material and moral damage respectively.
- ✓ Be it material or emotional, proving the existence of damage and its extent is a prerequisite for compensation. Many countries provide damage as a primary criterion to order awards for damage.
- ✓ The cross reading of Articles 2092 and 2102(2) of the civil code clearly shows that proof of the existence of damage is a mandatory requirement for the plaintiff to claim compensation.

Classifications of Damage

1. Material Damage

- ✓ This damage affects the victim's credit worthiness or economic status in one or another way. The common example of material damage is loss of earnings with all other expenses attributable to the tort such as medical care, expense of traveling, cost of equipment, loss of pension rights and other losses, which have pecuniary nature. It also includes harm, which makes a thing deteriorate or destroys it and injury to property that has pecuniary nature
- ✓ Material damage may have two important components. These are present (actual) material damage and future material damage.

Present Material Damage:

- ✓ The material or pecuniary loss sustained by the victim of the tort that covers the loss occurred from the date of the commencement of the injury up to the date of final assessment by the court. It can be measured by the difference between the plaintiff's present estate and what would be now his estate had the harmful fact for which redress is sought not occurred. Present material damage can be further classified into two: **a *damnum emergens***, a Latin term, which denotes the occurrence of a loss (diminution of estate), or **a lucrum cessans**, the Latin term, which denotes the prevention of a gain (non-increase of estate). *Damnum emergens* includes two different aspects. Firstly, it refers to the type of damage caused to a person's tangible or intangible asset due to the depreciation, destruction or loss caused to such asset. In this case the value of the plaintiff's assets is diminished due to the injury-causing agent that makes the defendant liable. The other aspect of *damnum emergens* refers to the increment or creation of a liability to the plaintiff. This does not refer to the direct injury caused to the person's material interest. Rather it refers to the circumstances where a person becomes civilly liable to a third party because of the wrongful damage caused by the

defendant.

- ✓ Lucrum cessans in the context of present material damage refers to the damage incurred by the plaintiff due to the prevention of gainful opportunities or loss of earnings resulting from the tortuous act of the defendant. It refers to the prevention of gain that could have been materialized had the injurious event not occurred.

Future Material Damage

- ✓ It is a damage that is going to occur in the future. The dividing line between present damage and future damage is drawn in terms of time. The dividing date is that of the judgment assessing the damage. Where the judgment as to the amount of compensation is appealed and varied, it is the date of the new assessment on appeal that separates present from future harm.
- ✓ Includes the damage that will occur certainly or with a higher probability after the date of judgment. Although future damage was not present at the time of a judgment, it is compensable without waiting for it to materialize provided that it is certain to occur.
- ✓ As compared to present damage, assessment of future damage is very problematic. Assessment of future damage becomes very difficult because it is not related to the actual occurrence of loss at the time of assessment but only to the non-occurrence of expected future earnings or gainful opportunities. It is sometimes more than difficulty. It may be temporarily impossible, for instance, the medical prognosis for a bodily injury may still be reserved at judgment time. The ultimate result may be death, or full recovery, or disability of an unknown degree. Now in view of the short limitation period (article 2142) and the immediate need of the victim for funds to cover his present expenses, the victim often cannot postpone his action until the final medical prognosis, but has to bring it earlier. And under the *res judicata* prohibition of article 215a 1, he may be unable to bring a fresh action after the final prognosis for the plaintiff is technically prohibited to split his claim for present damage and future damage.
- ✓ The terms "present" and "future" denote no difference in the nature of the harm. In particular, *damnum emergens and lucrum cessans* may affect both the past and the future, although *lucrum cessans* is more frequent and pervading in the "future" harm category.

Moral Damage

- ✓ The term moral damage refers to the harm or injury inflicted to a person's feeling or non-pecuniary interest. It is an injury caused to a person's honor, reputation or personal feelings of the victim. In many bodily injury cases, both moral damage and material damage are inflicted to the victim. There are situations where the same tortuous act can inflict both material damage and moral damage to a person. This is usually what happens in many bodily injury cases.

Chapter XII: Modes of Compensation

Modes of Compensation for Material Damage

1. The Rule of Pecuniary Compensation

- ✓ The modes of compensation for material harm, as stipulated in Article 2090 of the civil code, can be categorized into **pecuniary or non-pecuniary** compensation**.**
- ✓ "Pecuniary" compensation, means compensation by means of money. That means that the damage inflicted to the pecuniary interest of the victim has to be quantified and valued in terms of monetary equivalence so that the harm will be made good by the award of compensation expressed in terms of money.
- ✓ *Article 2090 of the civil code that deals with "Modes of Compensation" for material damage laid under sub-article one is as follows:* "*As a rule, the damage is made good by compensating the victim by means of an equivalent sum of money". In the absence of any strong reason to deviate from the rule, the material damage suffered by the victim has to be*

compensated by monetary equivalence.

- ✓ *Pecuniary (monetary) compensation is the rule, whereas non-pecuniary compensation is the exceptional mode of compensation for material damage.*

2. Non-Pecuniary Compensation

- ✓ Although our law sets pecuniary compensation as an ordinary or usual mode of compensation, there are also other non-monetary or non-pecuniary forms of compensation or remedy that may be awarded by the court in exceptional circumstances.
- ✓ The exception to the rule of pecuniary compensation is laid down under Sub-Article two of Article 2090 of the civil code, which reads: "The court may, subject to the liberty of persons and to the right of third parties, order in lieu or in addition to money damages other appropriate measures to make good or limit the damage". The provisions of the civil code Article 2118 through Article 2123 provides a partial enumeration of the "other modes of compensation" other than payment of monetary compensation to the victim. Restitution, reparation in kind, retraction of defamatory publications, enjoining cases of unfair competition and injunction are prominent among such non-pecuniary modes of compensation that can be granted in addition to or as alternative to monetary compensation in appropriate cases envisioned in Article 2090(2) of the civil code.
- ✓ The phrase "*subject to the liberty of persons" incorporated under sub-Article two of Article 2090 articulates that deviation from the rule of pecuniary compensation is possible where* non-pecuniary civil compensation does not contradict with the liberties of the defendant recognized under the various laws including the constitution. Insofar as the awards of monetary compensation can reasonably rectify the mischief caused to the victim, the other modes of non-pecuniary compensation shall not be granted where the personal liberty of the defendant is at stake.
- ✓ The other phrase *subject to the "rights of third parties" incorporated in Article 2090(2) also* illustrates the *in personam* aspect of the remedies of the law of obligation. The remedies enumerated in Articles 2118 through Article 2123 of the civil code apply against only the party in breach of the tortuous obligation and not against third party right-bearers.

Modes of Compensation for Moral Damage

1. The Rule of Non-Pecuniary Compensation

- ✓ As a rule, the mode of compensation for moral damage is non-pecuniary. This is because injury to a person's feeling cannot be measured in terms of money. In addition to the difficulty to measure an injury caused to a person's feeling in terms of money, the other strong reason may be that moral damage may be better made good by non-pecuniary forms of compensation than by monetary awards.
- ✓ In Article 2105 of the civil code, the principle related to the mode of compensation for moral damage is clearly stated. Sub-Article one of this provision stated that the author of a wrong shall make good the moral harm resulting from the wrong wherever adequate procedure exists for such redress. Sub-Article two further stipulated that pecuniary compensation for moral harm may be awarded only in cases expressly provided by law. The phrase "only in cases expressly provided by law" indicates the exceptional nature of awarding pecuniary compensation for moral damage. And the word "may" incorporated under Sub-Article two of Article 2105 gives the court a broad discretion that is, even in such cases expressly provided by law, awarding monetary compensation for moral harm is no mandatory. The court is required to order other appropriate non-pecuniary redresses where the law provides adequate procedure for redressing moral damage.

2. Pecuniary Compensation as an Exception

- ✓ The rule set under Article 2105(1) states that the "author of a wrong shall make good the moral harm resulting from the wrong wherever adequate procedure exists for such redress." That means where there is a procedure set under the law that is adequate and appropriate to

redress the specific moral harm inflicted a person, the court is obliged to order the wrong doer to make the damage good. As to the meaning of the phrase "adequate procedure" and the type of redress that may be ordered by the court the law lacks clarity. But, when Sub-Article one is read in conjunction with Sub-Article two which states that pecuniary compensation can be awarded to redress moral damage only in cases expressly provided by law, one can safely conclude that the type of redress envisioned under sub-one must be non-monetary (non-pecuniary) in its nature. Sub-Article two of Article 2105 is applicable only to such nominated cases of moral injury enumerated in Article 2106 through 2115 of the civil code. It may also apply to other moral harms expressly stated to such effect in other pertinent provisions. In a nutshell, the Ethiopian extra contractual liability law allows monetary compensation as a redress only for exceptionally nominated types of moral harms.

- ✓ In the assessment of moral damage, Ethiopian courts have discretionary power in two respects: in awarding the compensation and in fixing the amount of compensation. That is, even in those nominated cases of moral harms enumerated as pecuniary compensable as provided in Article 2105 through Article 2115 of the civil code, it is not obligatory for the court to award monetary compensation to the victim. Only when it deems appropriate having regards to the circumstances of the case, the court can exercise its discretion in awarding equitable compensation to the victim of a moral harm. The question of what equitable compensation for moral injury is also left to the discretion of the court. Of course, the court is required to consider the type and the nature of the harm caused to the victim's moral interest.

Chapter XIII: Quantum/ Extent of Compensation

Quantum of Compensation for Material Damage

1. The Rule of Equivalence

- ✓ The principle of equivalence between material damage and compensation is incidentally mentioned in Article 2090 and explicitly laid down in Article 2091 of the civil code. While dealing with modes of compensation for material damage, Article 2090 incidentally states that: "as a rule, the *damage is made good by compensating the victim by means of an equivalent sum of money."* Article 2091 of the code, which deals with the extent of compensation, also explicitly states that: "The compensation due by the person legally liable is equal to the damage caused to the victim by the fact giving rise to the liability." The principle of equivalence between compensation and damage goes in line with the overriding purpose of extra contractual liability law. Compensation in Ethiopia can in no circumstance exceed the damage sustained by the victim of the tort. However, there are situations where compensation that is less than the damage incurred by the victim may be awarded. This is possible where any of the mitigating circumstances specified under the law come into operation.
- ✓ Determining the extent of the harm or damage sustained by the victim is a prerequisite for determining the quantum of compensation to be awarded to him. As clearly stated under Article 2141 of the civil code, the burden is on the victim to establish the amount of the harm sustained and to prove the circumstances which render the defendant liable to make it good. There are no rules and standards set under the law to regulate the methodology of assessment of damage. The judge seems to have been left with broad discretion to choose the rational assessment methods having regard to the nature of the case in hand. Neither statutes (in continental systems) nor precedents (in common law systems) normally impose specific harm-assessment methods; nor, it seems, will they always be successful if they attempted to do so. But while the judge assesses the damage, he is expected to critically consider all constituting elements or components of the damage; both the material and the moral aspect of

the harm need to be considered, the internal classifications of material damage between *damnum emergens* and *lucrum cessans* as well as between present damage and future damage has to be properly addressed and weighed.

✓ Thus, while calculating the material damage caused to a person's pecuniary interest due to the injurious act of another person, the court is required to calculate not only the out of pocket payments made by the victim to repair the property damaged or the medical and other related expenses he incurred to heal the physical injury caused to his body but also the *lucrum cessans* (gainful opportunity prevented, frustration or interruption) because of the injury causing event for which the defendant is liable. Even where the property is completely destroyed, the person liable should pay the plaintiff not only the monetary value of the property destroyed at the time of but also the gain prevented due to the destruction of the property up to the date of assessment. The principle of equivalence between damage and compensation should be construed in that so far as money can make the injury caused to a person good, the victim of tort should be put in a position he would have now had not the injury causing event been occurred. The purpose is not to restore the victim to his pre-injury creditworthiness, it is rather to put him in a position he would have been now had not been for the injury.

2. Departures from the Rule of Equivalence

For various policy reasons, the rule of equivalence between damage and compensation may be qualified by several exceptions. The exceptions are:

Compulsory Mitigation

As exceptions to the rule of equivalence between damage and compensation, there are situations where the quantum of damages (compensation) may be reduced or should be reduced to a certain amount, which is less than the material damage sustained by the victim. Mitigating circumstances may take one of three forms: compulsory, discretionary or optional.

Cases of compulsory mitigations, which are prescribed in the civil code, are binding on the court. They are stipulated to the benefit of the defendant, that is, the defendant as of right can invoke them. The concept of compulsory mitigation is incorporated in Article 2098 of the civil code. According to this provision, where the damage is caused to the victim due to his own partial (contributory) fault, then he is entitled to partial compensation. In this case, the liability of the defendant could be fault-based liability, strict liability or vicarious liability. Regardless of the nature of the type of liability of the defendant, if the victim by his own intentional or negligent fault contributed to the occurrence or aggravation of the damage to his interest, then his claim for compensation shall be reduced in proportion to his relative contribution.

Where the damage is caused solely due to the victim's fault, there shall be a complete denial of compensation as compensation may not be claimed contrary to good faith against an innocent person (Article 2097 civil code) In this case, the victim shall bear fully the consequences of his fault. Hence, mandatory mitigation of compensation is relevant in situations where the victim's own fault is partly contributed to the damage sustained by him.

Sub-Article 2 of Article 2098 provides a clue to the judge in fixing the damage to consider all the circumstances of the case, particularly the respective gravity of the fault of the defendant and the plaintiff. But weighing the relative contributory fault of the parties seems relevant where the liability of the defendant is fault based. In circumstances where the liability of the defendant does not depend on fault, that is, in strict liability cases, the judge should consider only the contribution of the victim's faulty behavior in materializing or aggravating the damage. Otherwise the defendant may escape liability for each and every contributory fault of the victim, which would be contrary to the purpose of the goals of the law of torts.

- **Discretionary Mitigation**

Article 2099 talks about a case where the

court may reduce the amount of compensation regardless of the principle of equivalence provided in Article 2091, where the fault giving rise to the liability is committed by a person who was not in a state to appreciate the wrongful nature of his conduct. In reducing the award based on this article, the court must first ascertain whether or not the defendant is liable for fault, that means strict liability and vicarious liabilities cannot be mitigated under Article 2099. And the defendant must establish that he was not conscious of his fault and was not in a state to appreciate the wrongful nature of his act. This may be due to age, mental condition or other circumstances.

- ✓ Article 2100 states another instance where the court may reduce the amount of compensation for damage caused under the "chain of command". To reduce the award based on this article the court must first ascertain whether the defendant committed the fault envisaged in Article 2036 (2). And the defendant, to get the reduction, must establish that he was moved to commit the fault by his sense of duty deriving from discipline or obedience. This may be inferred from his past conduct and apparent absence of improper motives. The extent of mitigation shall be roughly apportioned to the degree of the imperativeness of the duty. Indecently, where this degree is so high as to lead to practical impossibility to disobey, the court shall fully exculpate the defendant pursuant to Article 2036 (3). However, this does not mean the victim shall be left helpless. There could be claim for compensation against the superior order giver where the order is unlawful or against the state as the case may be.
- ✓ Unforeseeability of the damage as stated in Article 2101 is another ground for reduction of the amount of damage. This article allows the possibility of reducing the liability of the defendant to a reasonable amount where in consequence of unforeseeable circumstances the damage expanded beyond what could reasonably be expected.
- ✓ Another mitigating circumstance is provided under Article 2103 of the civil code. That is, when a person causes injury to the property of another because of acts of "necessity" in the sense stated in Article 2066, he is liable to compensate the victim. But he can invoke Article 2066 to mitigate the extent of his liability. But whether or not mitigation in this case is compulsory or discretionary, the wording of the provision is not clear. The other most important thing that we need to bear in mind is that article 2103 speaks only of damage to the property, not to the body of another

- **Optional Mitigation**

- ✓ In optional mitigation cases there are alternatives other than paying money, therefore, the defendant can opt for an alternative to that of paying the damages otherwise due by him. Cases of optionally mitigating circumstances are covered in Articles 2074, 2075 & 2078. As stated in these Articles, the defendant may surrender the animal or building that caused the damage to another or pays an equivalent sum of money due. The defendant may choose to surrender the animal or building instead of paying an equivalent some of money where the value of the animal or building is less than the monetary value of the overall damage sustained by the defendant.
- ✓ In order to exercise such option the person shall be the owner of the animal or the building that caused the damage to the victim's legitimate interest. The defendant cannot exercise this options where the damage was caused by his fault or that of a person for whom he is answerable. (Article 2074(2) cum Article 2078(2))

- **Nominal Damages**

- ✓ As a rule, a claimant in extra contractual liability law has the burden to prove the nature and the extent of the harm he sustained and the circumstances that render the defendant liable to make it good. But this is not the case in an action for nominal damages. Without the need to proving any real or actual damage, a very small fraction of money can be awarded to the victim simply as a recognition or declaration of his rights violated or infracted by the defendant. The term

"nominal" connotes the symbolic (unreal) and insignificant nature of the award that does not correspond to any real damage sustained by the claimant. Its purpose is to bolster the court's declaration that a certain right of the plaintiff is infringed or that the defendant is liable for the infringement of such right. Nominal damages are awarded when the claimant has established his case, particularly in relation to torts actionable per se, such as trespass, but has not shown there is any actual loss. The award marks his success.

- ✓ Article 2104 of the civil code that deals with Nominal Compensation states that: "Damages of a purely nominal amount may be awarded where the action has been brought solely with a view to establishing that a right of the plaintiff has been infringed, or that a liability has been incurred by the defendant."

Quantum of Compensation for Moral Damage

- ✓ The principle of equivalence between damage and compensation envisaged in Article 2090(1) cum 2091 is practically impossible in the case of moral damage. Admitting the difficulty or impossibility of the rule of equivalence, our civil code uses the word "equitable" rather than equivalent as a standard for fixing the quantum of compensation for moral damage. This is evidenced by the wordings of Article 2106 through Article 2126 of the civil code that deals with instances of moral damage that may be subject to monetary compensation in appropriate cases.
- ✓ The absence of a concrete standard for measuring non-pecuniary (moral) loss in terms of money creates the danger that the courts arbitrarily award different amounts for non-pecuniary harm in comparable cases. Acknowledging this danger of arbitrariness in assessment of moral damage and the concomitant discrepancy in the quantum of the awards that may result from such arbitrariness in assessment, our civil code puts a ceiling amount, which is one thousand Ethiopian Birr (Article 2116(3)).
- ✓ It is not as such easy to award a monetary compensation for a victim in case of moral damage because of the immeasurability of one's feeling in money terms. So the principle of equivalence does not apply to moral damage. Hence the solution adopted is compensating the victim based on equity. The word equity in this context refers to standards of fairness and justness, which results from a conscientious judge's appreciation of what is fair in the circumstances of a case.

Compensation for personal Injuries

General Damages vs. Pecuniary Loss

General Damages: which may be taken as synonymous with moral damages refers to the monetary award granted to a person who suffered loss of amenity, pain and suffering due to the tortuous acts of another person. Loss of amenity is in essence the reduction in the capacity to enjoy life. It will depend in part on the nature of the injury, so that it will be greater where there is permanent loss of mobility, or of an organ or limb. It will also depend in part on the characteristics of the claimant, so that there will be a higher award if the injury prevents or curtails continued enjoyment of sport or hobbies. There should be a positive correlation between the gravity of the bodily injury and the moral damages to be awarded for that injury. To deny moral damages for a person who was reduced to absolute unconsciousness because of serious bodily injury would be against the very principle of equity underscored in Article 2113 of the code. It would be unjust to deny a person rendered unconscious due to a serious injury by analogizing him with a dead person. It deems also immoral to equate a person rendered unconscious with a dead person and deny him general damages.

Pecuniary Loss:

- ✓ Personal injuries, in addition to causing loss of amenity, pain and suffering, usually result in pecuniary loss (loss of earnings, medical expenses and other outlays) to date and future pecuniary losses to the victim. It is clearly relatively easy to assess pecuniary loss to date (present material damage), although in

practice, especially in cases of average or below average complexity, a settlement figure is taken is reached which can take a broad approach rather than analyzing each item of the claim in fine detail. On the other hand, it is extremely difficult to assess future loss. While assessing future pecuniary loss, the following three key variables need to be considered:

(a) the future progress of the injury;
(b) the impact of all the other vagaries of life, such as unrelated illness, on the claimant;
(c) The claimant's future employment prospects.

✓ In Ethiopia, material damage (pecuniary loss) that will be "certain to occur" in the future is compensable without waiting for it to materialize (Article 2092 civil code). Acknowledging the complications and difficulties in assessing future harms (harms that have not yet materialized) in advance, especially most bodily harm cases, Article 2102 of the civil code devised a solution as follows: "(1) Where the exact amount of the damage cannot be ascertained, the court fixes it equitably, taking into account the ordinary course of events and the measures taken by the injured party. (2) Nevertheless, no indemnity shall be awarded in respect of a damage of which the very existence, and not only the amount, is uncertain." While assessing future pecuniary losses, in difficult situations, the court is required to take two things into consideration. Firstly, it has to critically appraise the usual future consequences of an injury of the type under consideration. Secondly, it has to consider the measures taken by the victim in aggravating or otherwise of the consequences of the harm. And then the court is required to fix the amount of compensation equitably where it is difficult to determine the extent of the damage exactly. But where the very existence of the damage is uncertain and questionable, no compensation is required to be awarded on mere speculation.

✓ Article 2150(2) of the civil code could also be relied on to address the complication and uncertainty related to the assessment of future pecuniary loss. Where it is impossible to finally assess the damage sustained by the victim on the date of judgment, the court has the discretion to grant a provisional judgment that may be reconsidered within a period of two years upon the application of the parties. Within this period of two yours, the medical prognosis concerning the nature and the gravity of the injury may be completed.

✓ While calculating future damages (compensation), that is, compensation to be awarded in advance in a lump sum form for pecuniary losses to be suffered by the claimant in the future, some foreign jurisdictions consider other additional factors such as inflation and interest. In fixing future compensation, inflationary tendencies that diminish the real value of the money are required to be considered. That means, the compensations, needs adjustment, having regard to the rate of inflation. And since the claimant receives a lump sum now rather than a stream of income over a period of time, and can invest that lump sum to produce further income, a discount to such effect has to be made in the compensation.

❖ **Injury of an employee**

✓ Like any person, the general losses discussed above such as loss of amenity, pain and suffering as well as pecuniary losses, may be suffered by an employee, too. Despite the complications involved in their assessments, general damages are awarded for injuries caused to a person's non-economic (moral) interest.

✓ In order to determine the quantum of compensation for the pecuniary loss sustained by an employee, it is a prerequisite to calculate the economic loss suffered by the employee due to the bodily injury. Based on the classifications made under Article 99 of the "Labour proclamation No. 377/2003", bodily injuries that decrease or impair the capacity of the person injured to work have the following effects:

a. **Temporary disablement:** impairs the working capacity of the worker partially or totally for a limited period of time. The pecuniary loss that may be suffered by this worker includes loss of net wage (if any), loss of interest that would accrue from saving part of the wage, if any, increased outgoings such as medical

expenses and nursing expenses, if proved any, and any other pecuniary loss occasioned by the temporary cessation of capacity to work for the duration of such period.

b. **Permanent partial disablement:** refers to incurable bodily injuries that decrease, but not absolutely impair the victim's future working (earning) capacity. While assessing the material damage suffered by the victim in this case, in addition to calculating the loss of earning (net income) and the increased outgoings suffered by the victim up to the date of assessment (judgment), the magnitude of the decrease in the working capacity of the employed victim and the future earnings that will be frustrated because of the injury has to also be measured as permanent partial incapacity decreases the future earning capacity of the victim permanently.

c. **Permanent total disablement:** means incurable employment injury, which prevents the injured worker from engaging in any kind of remunerated work. This type of injury not only results in total frustration of the net income and increases the outgoings of the injured worker up to the date of judgment, but also frustrates all future gainful opportunities of the injured worker. Thus, the economic loss caused to the injured worker in this instance is absolute in its nature.

d. Death.

✓ Although theoretically it is possible to categorize disability as done above, practically determining the exact degree of disablement even in each category is not an easy task.

✓ Whether the damage incurred by the person shall be calculated based on the gross or net income of the victim after deducting the tax that would have been paid to the government from the frustrated gross income had the injury causing event not occurred, our law lacks clarity. Some Ethiopian authorities argue that the gross income of the victim should be taken into account.

✓ As it has been already discussed, the purpose of extra contractual liability is to restore the victim to a state he would have been had the injury causing event not occurred. Thus, since the loss incurred by the victim is the net earning, the assessment of pecuniary damage should be computed based on the monthly or annual net earnings of the victim. In this the principles of equivalence between damage and compensation envision under Articles 2091 and 2092 of the civil code is contemplated.

✓ As can be inferred from Articles 2093 and 2094 of the civil code, insurance and pension benefits received by the victim on the occasion of a bodily injury caused to him cannot be raised by the tortfeasor as a ground to set off the victim's claim for compensation. The tortfeasor cannot escape full liability for the pecuniary loss he caused to another by inflicting bodily injury. Insurance and disability pension benefits are independent claims of the victim that cannot be invoked by the tortfeasor to set off the victim's claim for compensation. But whether or not this position can be sweepingly extended to other independent benefits received by the victim on the occasion of the injury is a moot issue for both the practitioner and the academics.

❖ **Injury of self-employed Persons**

✓ As contrasted to employees, self-employed persons do not work for wages pursuant to Article 2512 ff. but for remuneration or income as an independent entrepreneur pursuant to Article 2610 one doing intellectual work pursuant to Article 2632 ff., one in the medical profession pursuant to Article 2639 ff. ,an innkeeper (Article 2653 ff.), publisher (Article 2672 ff.), or any kind of independent businessman, craftsman, etc

✓ The phrase includes all classes of persons who pursue their livelihood in any independent activity other than employment. Assessment of material damage incurred by self-employed persons resulting from bodily injuries is much more difficult than loss of wages from an employee. The earnings of self-employed persons usually fluctuate from time to time because of uncertain external market and non–market related variables and factors personal to each person.

- ✓ However, depending on the nature of the bodily injury, the victim's pecuniary injury can be roughly assessed having regard to his pre-injury earnings. But, even here, there are difficulties: the plaintiff may have kept no accounts, his other evidence may be shaky, or he may keep accounts which (for fiscal reasons) conceal some earnings. Once such hurdles are passed, the self-employed person's pre-injury year's earnings could – as in the case of wage-earners, be presumed to represent what would have been his subsequent yearly earnings as well, subject to counter - evidence by plaintiff and, exceptionally, counter-evidence by defendant.

❖ **Injury of Non-Employed Persons**

- ✓ The term "non-employed persons" in this context refers to persons who are neither employees nor self-employed individuals in the sense discussed under the preceding sub-sections. The reasons for their unemployment could be, among other things, lack of incentive, opportunity, or ability to work.
- ✓ The problems related to the assessment of pecuniary losses suffered by unemployed individuals because of another person's tortuous acts in a comparative perspective as follows:
  - Lack of incentive to work professionally may be due to the possession of wealth, which allows a person choice of leisure or work. Suppose that a medical graduate does not practice because of having inherited enough assets to live on. In case of an injury disabling him from such practice, it seems that most American courts would compensate him for loss of professional earning "capacity", while English courts would refuse to compensate him for loss of "earnings" which he will not lose. The latter approach seems imperative for us. Indeed the American practice of placing of a pecuniary value on a person's earning capacity whether or not used and/or intended to be used is incompatible, in Tort law, with Article 2091of the Ethiopian civil Code and, in Contract Law, with Article 1800.
  - Lack of opportunity for permanent work is often connected with the existence of a largely unused *residuum* of unskilled workers. When one of them suffers a disabling injury, the amount of his prospective loss of earnings is very uncertain. In this country such men, commonly named "coolies", are, from time to time, called to do some sporadic work.
  - Where an injury does not increase a person's pre-existing physical and/mental inability to work, there is no loss of earnings. Where, however, the pre-existing inability to work for profit is transitional because it is due merely to tender age (child) or learning process (student), loss of future earnings, even though uncertain in amount, can be claimed. It will be easier to predict in the case of a student or apprentice than in that of a young infant, whose future is a guess. But the issue here also is whether or not we should bound only by these exceptions.

Compensation for Fatal Accidents

- ✓ For the purpose of assessment of bodily injuries suffered by employees, we have already classified disabilities into those that cause physical/mental injury of various degrees, and injuries resulting in death. Where a person suffers personal injuries other than death, the nature and extent of the harm can be assessed having regard to surrounding circumstances of the case and the interest frustrated by the injury.
- ✓ In bodily injury cases, it is only the direct victim of that injury who is entitled to claim compensation for moral and material injuries suffered by him due to tortuous acts committed by another. No matter how serious the bodily injury may be, dependants of the victim are not entitled to independent claim. This is because an award to an injured claimant is intended to replace his total income, out of which he is expected to maintain his dependents as he would have done out of his earnings.
- ✓ As a principle, no action for compensation lay for the death of another except by dependants nominated under the law. The

way compensation awards for fatal cases are treated and the purpose it serves is different.

- ✓ The Ethiopian Civil Code under Article 2095 entitled specified dependants of the victim of a mortal accident with the right to institute a civil action for compensation for the loss of the economic support they suffered by the death of the person providing such support.
- ✓ The starting point in any estimate of the number of years that a dependency would have endured is the number of years between the date of the deceased's death and that at which he would have reached normal retiring age. That is reduced to take account of the possibility not only that he might have not lived until retiring age but also the chance that by illness or injury he might have been disabled from gainful occupation. The former risk can be calculated from available actuarial tables. The latter cannot. There is also the chance that the widow may die before the deceased would have reached the normal retiring age (which can be calculated from actuarial tables).
- ✓ The starting point in any estimate of the amount of the "dependency" is the annual value of the material benefits provided for the dependents out of the earnings of the deceased at the date of his death. But quite apart from inflation, there are many factors that might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependents. They might have diminished with a recession in trade or he might have had spells of unemployment. As his children grow up and become independent the proportion of his earning spent on his dependents would have been likely to fall. But in considering the effect to be given in the award of damages to possible variations in the dependency, there are two factors to be borne in mind. The first is that the more remote in the future is the anticipated change the less confidence there can be in the chances of its occurring and the smaller the allowance to be made for it in the assessment. The second is that as a matter of the arithmetic of the calculation of the present value, the later the change takes place the less will be its effect on the total award of damages.
- ✓ The Ethiopian Civil Code clearly demarcates the distinction between dependency awards and moral awards both occasioned on the death of a certain person due to the tortuous act of another person (see Article 2095 cum Article 2113 civil code). So, while assessing the extent of damage ensued in cases of fatal accidents for the purpose of determining the quantum of compensation, it is imperative to have such distinction in mind.

Finality of Assessment and Appeals

- ✓ Save the exception provided under Sub-Article two, where the court can pass provisional judgment on the grounds of impossibility of final assessment of damage, Article 2150(1) of the Ethiopian Civil Code requires assessment of the damage to be made on the day on which the court renders its final judgment. Thus, two types of judgments are envisioned under Article 2150. The first is a provisional judgment that can be granted by the court in exceptional circumstances where it is impossible to finally assess the damage on that date. The presumable purpose of this provisional judgment is to provide an interim compensation to a victim who is in urgent need of means of livelihood. The law in this regard anticipates the difficulties and complications abound the assessment of damage that may prolong final judgment. So, until such complications are resolved in one way or another and having regard to the conditions of the claimant, the court can provisionally fix the amount of compensation award. In this case any of the parties are at liberty to apply to the court for reconsideration of the provisional judgment within a period of two years from the date when the provisional judgment was granted. In the absence of any application to such effect within the time bound, the judgment would be final.
- ✓ The other judgment is final from the very beginning. Where the extent of damage is

ascertained and valued in terms of money, the court is required to pass its final judgment concerning the quantum of compensation awards. It is this court judgment that is stated as "final" in Article 2051(1) of the Civil Code. Finality in the context of this provision seems to imply two things. Firstly, it implies *re judicata.* That is, a person cannot bring fresh action for compensation for another damage that arose from the same tortuous act that has been already litigated and determined on the same issues of fact and law. Civil claims arising from a single and the same transaction cannot be split and be separate grounds of action. Secondly, it implies the absence of statutory right of appeal as stated in Article 2152. This provision is reproduced as follows: "No appeal shall lie against the judgment of the court of first instance relating to the amount of compensation." Depending on the amount of the claim, extra contractual action for compensation can be instituted either before the Federal First Instance or the Higher Court or any of the Regional Courts having jurisdiction. The judgments passed by the courts under their respective original (first instance) jurisdictions relating to the amount of compensation are non-appealable, except for the reasons specified under Article 2153 of the Civil Code as follows: (1) the court has considered circumstances which it should not have taken into account or has failed to consider circumstances which it should have taken into account; or (2) the amount of compensation fixed by the court is manifestly unreasonable and could only have been inspired by prejudice or anger; or (3) such amount is due to an error of calculation on the part of the court.

Modes of Payment

1. Lump sum Payment: the Rule

✓ As a principle, lump sum payment of compensation is widely recognized in almost all jurisdictions as an appropriate mode of disposition of awards for civil wrongs. Our Civil code also, although lacks clarity to the desired degree, seems in line with this principle. Pertinent provision in this regard is Article 2154, which deals with the possibilities where the court may order compensation awards to be disposed in the form of periodical allowance in appropriate cases. Sub Article one of Article 2154 is reproduced as follows: " (1) Where such mode of payment is justified by the nature of the damage or other circumstances, the court may order the damage to be made good by means of a periodical allowance." From the very wordings of this sub-article inference can be made that lump sum payment of compensation is the ordinary rule of compensation in Ethiopia. As an exception to this rule implied in this sub-article, the court is conferred with a narrow discretion to order payment of compensation awards in the form of periodical allowances only for strong justifications. In the ordinary parlance of the law, payment of compensation in lump sum form may have extra advantages. It is easy for execution and avoids further complications in the relation of the judgment debtor and judgment creditor. It avoids any sense of insecurity on the part of the judgment creditor whether or not payment will be frustrated by intervening events, which sometimes happens in the case of periodical allowance.

✓ But it has to be noted that when the court is convinced to depart from the rule for strong reasons, it has to make sure first that the judgment debtor can produce adequate security for the payment of the allowance. Sub-Article two of Article 2154, which says: "In such a case, the debtor shall provide security for the payment of the allowance" has to be considered as a cumulative requirement to order periodic allowance as a mode of payment of the compensation award.

2. Periodical Allowance: Exception

✓ Periodical allowance, also known as "structured settlement" is recognized as a mode of payment of compensation in exceptional cases. Having regard to the nature of the damage to be made good and other relevant circumstances, the court is at liberty to order the damage to be made good in the form of periodical

allowance (structured settlement) provided that the judgment debtor is ready to produce adequate security for the payment of the allowance.

Chapter XIV: Action for Compensation

Who May Claim Compensation?

1. Independent Claimants

- ✓ One or more persons may bring independent action for compensation for injuries resulting from a given tort. But in order to bring such action each person must have interest at stake. That is, proving damage caused to one's legitimate interest is a prerequisite for instituting action for compensation in tort. So, in order to stand as an independent claimant, the plaintiff must show vested interest in the subject matter of the suit. This prerequisite, which is set under Article 33(2) of the civil procedure code, is applicable for civil actions.
- ✓ *The possible persons that may sue for compensation on their own behalf by invoking the relevant provisions of the Ethiopian extra contractual liability law:*

A. The Victim Himself. In a case where a non-mortal bodily injury is caused to a person or where an injury is caused to any person's material interest, only that person whose interest is at stake can sue the harm doer for compensation. As clearly provided under Article 2146(1) of the civil code, the victim's claim against the person liable for the damage may not be assigned so long as it has not been upheld by a judicial decision and the amount fixed. However, there are exceptional circumstances where a person can institute an independent action for compensation on his own behalf for the non-mortal bodily injury ensued to another person. These persons are stated under Articles 2114 and 2115 of the civil code. Sub-Article 2 of Article 2114 states "where a girl or a woman has been raped, equitable compensation may also be awarded to the husband of the woman, or to the family of the girl." This refers to the amount that may be independently claimed in the form of compensation by the husband of the woman or the family of the girl raped apart from the compensation awarded to the direct victims (the woman or the girl raped). The other exception provided under Article 2115 deals with a bodily harm to a wife. As per this article, where the companionship of the wife is rendered less useful or less agreeable to the husband because of tortuous act of another person, apart and in addition to the compensation awarded to the woman for the bodily injury she sustained, the husband of the woman can institute an independent action for compensation against the harm doer.

B. Next of Kin in Case of Mortal Accidents

- **Dependants of the Deceased for Compensation of Material Damage:** when a person dies from an accident caused to him, some of his specified dependants are entitled to institute an independent action for compensation against the person liable. As provided under Article 2095(1) of the civil code, the spouse of the victim, his ascendants and descendants can institute an independent action for compensation for the material damage they have sustained because of the death of the victim. Thus, if any of the persons listed under Article 2095 are able to show that he had been receiving a material support from the victim and that the support would have continued had the death of the victim not resulted from the accident, he can institute action for compensation against the person liable. Brothers and sisters who were dependents of the victim of mortal accident cannot claim compensation for the loss of support they forgo due to the death of their breadwinner brother or sister. Because, to this effect Article 2096 states "No other persons shall have independent claims to be compensated because of a mortal accident, even where a plaintiff was factually supported by the victim, or the latter was bound to maintain him." The purpose of the law in conferring the right to institute independent claims to the persons specified above is probably to help such claimants in getting compensation for the loss of the material support they would have received from the deceased had not been killed by the

event for which the defendant is liable.

- **Family of the Deceased for Compensation of Moral Damage**

✓ When a person dies from a tortuous act of another person, the families of the victim may claim compensation for the moral damage they suffered by the family due to the death of their family member. Thus, the family (through their qualified representative who may be determined in accordance with local custom as per Article 2116 or in default of it by the law as provided Article 2117 of the civil code) can sue the person liable for compensation of the moral damage they suffered due to the death of their family member because of an event that makes the defendant liable. The court is given the discretion to award equitable moral damage to the family of the deceased having regard to local custom and the ceiling figure set under 2116(3) of the civil code.

Derivative Claimants

✓ Refers to persons who can bring action for compensation by substituting the victim of the tort. As stated earlier, the victim's claim against the person liable may not be assigned so long as it has not been upheld by a judicial decision and the amount fixed (Art. 2146). However, there are circumstances where a person may derive the right to institute an action for compensation from the victim of the wrong. The source of this right could be a contractual or legal subrogation.

A. **Heirs of the Victim**: Testamentary or in testamentary heirs of the victim may also institute action for compensation for material damage suffered by the victim. As was discussed earlier, material damage is an injury caused to a person's estate either by an act that directly diminishes the value of the estate or by increasing (creating) a third party's claim against the estate in one or another way. Where the estate of the victim of mortal accident is affected negatively by any tortuous act for which the victim could have claimed compensation had he survived the accident, his heirs can claim compensation by substituting him on behalf of the estate.However, heirs of the victim cannot claim compensation for the moral damage sustained by the victim, unless the victim has initiated an action to such effect during his lifetime. Article 2144(2) envisions exceptions to this exception by incorporating the phrase "save where otherwise provided by law" which phrase indicates that there could be circumstances where by heirs of the victim can claim compensation for the moral damage sustained by the victim. Article 2113 may be treated among such exceptions.

B. Creditors of the Victim: According to Article 2145(1) of the civil code, the creditors of the victim may exercise the debtor's action where the debtor has, after the date on which they became his creditors, suffered a damage affecting solely his pecuniary interests. The creditor of the victim can subrogate the latter by virtue of the law when the conditions laid down in Articles 2145(2) and 1993 of the civil code are met. These conditions are:

- There must be a debtor creditor relationship between the victim and the person to be subrogated;
- The damage suffered by the victim must be solely against his pecuniary interest as opposed to damage connected to the debtor's person, bodily integrity or honour;
- The damage must be suffered by the victim after the creation of the debtor-creditor relationship;
- The person (creditor of the victim) must apply to the court and be authorized by the court to exercise such action by subrogating the victim.

✓ Insurance Companies and Pension Paying Institutions can also subrogate (substitute) the victim of the tort and bring action for indemnity against the tortfeasor who is liable for the materialization of the risk covered under the insurance policy or the pension. As can be inferred from the provisions of Articles 2093 and 2094 of the civil code, subrogation is possible when the instruments creating such bonds between the insurance company and the insured victim or the pension payer and the pension recipient incorporates a clause

for subrogation. Here, it is a contractual subrogation that emanates from the agreement of the parties.

- ✓ Article 683(1) of the commercial code also state: "The insurer who has paid the agreed compensation shall substitute himself to the extent of the amount paid by him for the beneficiary for the purpose of claiming against third parties who caused the damage." Although Article 2093(3) of the civil code recognized the possibility of subrogation or substitution when the insurer and the insured agreed to such effect under the insurance contract, Article 683(1) of the commercial code made subrogation mandatory. The other point of contrast between the civil code and the commercial code in relation to subrogation is that while the former makes contractual subrogation sweepingly possible in Article 2093(3), the latter makes subrogation absolutely impossible when the insurance is against a risk to persons. As per Article 689 of the commercial code "a contract for the insurance of persons shall not be deemed to be a contract for compensation. The amount insured may be freely fixed and shall be due regardless of the damage suffered by the insured person." The human person's body or life is *extra-commercium* in the sense that it cannot be subjected to market transaction and so cannot be valued in terms of market price unlike the insurance of objects. The amount fixed under the insurance contract does not indicate the market value of the risk covered by the insurance. So, when an insured person suffers injury to his person because of the materialization of the risk covered under the insurance policy, he can claim the amount fixed under the insurance policy from the insurance company. In addition, the victim can claim compensation from the tortfeasor by invoking the relevant provisions of the civil code. Since the amount paid by the insurance company is by definition not compensation, over (double) compensation cannot be raised as an issue. In this case the insurer cannot claim indemnity from the tortfeasor by substituting the insured victim (Art. 690 com. code). Sub-Article 1 of Article 2093 of the civil code seems relevant to insurance of persons.

Who May Be Sued in Tort?

1. The Author of the Damage

- ✓ A person may, by his action or inaction, cause damage to another. This person may be held liable to compensate the victim. The basis of his liability is his own faulty conduct or in exceptional circumstances his faultless activities or engagements.
- ✓ The author of the tort or wrongful damage could be one or more persons acting in concert or independently. In all circumstances the author of the wrongful damage is liable to make good the damage he caused to another by his fault or sometimes-faultless behavior regardless of whether or not there is another third party answerable under the civil law (Art.2136).However, there may be a situation where there is a difficulty to identify the wrongful author of the damage. As a pragmatic solution to this difficulty, Article 2142(1) of the civil code provides: "Where damage has been caused by the fault of one or another of several persons and it is impossible to determine which of the persons involved is the author, the court may, where equity so requires, order the damage to be made good by the group of persons who could have caused it and among whom the author of the damage is certainly to be found."
- ✓ In order to make the group liable, first the court must be certain enough that the author of the damage is found within the group identified, second it must be absolutely impossible to determine the one who caused the damage from the group, and lastly the court is expected to exercise its discretion whether or not its decision is in the interest of justice. But any member of the group should be relieved from liability if he can prove his innocence in an equivocal manner.

2. The Vicarious Defendant

- ✓ In addition to the author of the damage, the victim of the tort can also sue the vicarious defendant for compensation

jointly and severally with the author where there is a relationship recognized under the law between the author of the damage and the vicarious defendant and the damage is caused by the former during the course and within the scope of such relationship. The victim can sue the author of the tort and the vicarious defendant jointly and severally. This is what Article 2136(1) of the civil code clearly stipulates and Article 2155(1) of the same code reinforces. So, the person responsible for the tort committed by minors, the employers for torts committed by their employees, bodies corporate for torts committed by their agents, representatives and salaried employees, the state and its administrative territories and organs for torts committed by officials and civil servants of the state are respectively answerable under the civil law.

3. Heirs of the Person liable

✓ As was discussed above, heirs of the victim can sue the person liable claiming compensation for the material damage suffered by the victim. There are cases where the heirs of a deceased person may be sued for the damage caused by the latter during his lifetime. This goes with the principle that a person shall not inherit only the rights of the deceased person but also the obligations attached to such rights.

Immunities

✓ According to Article 2137 of the civil code, "No action for liability based on a fault committed by Him may be brought against His Majesty the emperor of Ethiopia." The wording of this provision reflects the prevailing political reality of Ethiopia in the 1960s. The absolute immunity granted to the Emperor goes in line with the then saying "Negus Aykesess Semay Aytaress"

✓ As per Article 2138 of the civil code, ministers, members of parliament and judges are also legally immune from tort liability. Accordingly, "No action for liability may be brought because of facts connected with their office against:" (a) a member of the Imperial Ethiopian Government; or (b) a member of the Ethiopian Parliament; or (c) a judge of the Ethiopian courts."

✓ The phrase "members" of the Imperial Ethiopian Government under 2138(a) seems to refer to ministers. But has to be construed broadly in line with the currently prevailing governmental system to include not only "ministers" or "members of the cabinet of ministers" operating at the federal level but also the top executive officials in the respective regional states of Ethiopia.

✓ As per Article 2139 of the civil code, if any person protected under Article 2138 of the code has been criminally convicted under the penal code he would be personally liable to the civil damage caused to another because of such criminal act. The immunity from personal liability in this case operates in so far as the injury causing conduct of the person(s) is connected with their respective office and such conduct is not condemned under the penal code.

✓ It has to be noted here that the purpose of the legal immunity granted under the provisions discussed above is not to render the victim helpless. The victim of the tort may bring action for compensation against the state in appropriate cases by invoking the pertinent provisions of the law dealing with vicarious liability of the state for the tort of its officers.

Period of Limitation

✓ As per Article 2143 of the civil code, there are two types of period of limitations within which an action for compensation may be instituted before the court of law. The first one is the two years period that is stipulated under sub-Article 1. And the second is the period of limitation provided under the penal code for the particular criminal offence that gives rise to civil claim, tort (Art. 2143(2)). Where the period of limitation prescribed under the penal law for the particular offence is less than two years, then the period of two years provided under Sub-Article 1 of Article 2143 becomes operative. Whereas

when the period of limitation set under the penal law for such criminal offence is longer than two years, this period becomes operative to the advantage of the victim of the tort. However, in order for the longer period of limitation prescribed under the penal code to operate, the tortfeasor has to be convicted criminally for the same act that gives rise to tort liability.

PART IV

Chapter XV: Unjust Enrichment

Doctrinal Foundation

- ✓ The law of unjust enrichment, also known as restitution, is a fundamental part of our laws although neglected by legal scholars and practitioners. Some authorities labeled this law as the third branch of civil liability along with contract and torts. But some other authorities treat the law of unjust enrichment as a 'gap filler', that is, a law that only comes into operation when the laws of contract, property and tort fail to provide appropriate remedy for one or another reason in their respective province. Accordingly, they subordinate the law of unjust enrichment to other areas of private law, namely contract, tort and property laws.
- ✓ The law of unjust enrichment is built upon the basic maxim of the doctrine which prescribes "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Based on this fundamental tenet, the law of unjust enrichment, which is inappropriately named as "unlawful enrichment" under the civil code, is recognized as a separate ground of civil action in Ethiopia.

General Provisions Applicable to Unjust Enrichment

- ✓ Article 2162 of the civil code sets the general principle as follows: "Whosoever has derived a gain from the work or property of another without a cause justifying such gain, shall indemnify the person at whose expense he has enriched himself to the extent of the latter's impoverishment, and within the limit of his own enrichment." This governing principle has incorporated many elements in it.
  - 'Whosoever…' this is an indication that the principle applies to any person be it physical or legal person regardless of any difference on whatsoever ground;
  - '…derived a gain…' this also refers to some positive material benefits obtained by the person made accountable;
  - '…from the work or property of another…' this qualifies that the gain or benefit obtained must be from the work or property of another be it work of the mind or labour, be it tangible or intangible property of another;
  - '…without a cause justifying such gain…' this indicates that no legal justification can be provided in support of the gain derived from the work or property of another. When there is cause justifying the gain, there is no liability. For example a person may employ another person or hire the property of another for gainful purpose. But the gain derived from this kind of relations is not only justifiable but also encouraged and usually protected by the law.
  - '…shall indemnify the person at whose expense' the gain is derived. This presupposes that there is some impoverishment or loss caused to the owner of the work or lawful holder of the property because of the other person's unjustifiable intervention. So such impoverishment or loss has to be quantified and indemnified by the person liable. Being a claim for indemnity, the liability of the person made accountable shall not exceed the impoverishment caused to the right holder because of the gainful invasion.
  - '…and within the limit of his own enrichment.' This phrase implies that the gain derived from the work or property of another without cause justifying it could be less than, equal to or greater than the impoverishment caused to the right holder. In this case when the gain is equal to the impoverishment caused to the right holder, there is no problem as all such gain has to be restituted to the right

holder. But the problem is when the gain derived is less than or greater than the impoverishment. As to the law, it is clear and simple; where the gain derived by the defendant is greater than the impoverishment caused to the right holder, the liability of the former is limited to the extent of the latter's impoverishment. But where the gain derived is less than the impoverishment caused to the right holder, the liability of the defendant is limited to the actual gain he derived.

- ✓ The law of unjust enrichment comprises three basic elements. These elements are:
  - (a) Benefit acquired by the defendant
  - (b) At the plaintiff's expense (from the plaintiff's resource)
  - (c) In an unjust manner (injustice)
- ✓ Where these cumulative elements are met, the person who has been impoverished by the unjustified act of another can successfully institute an action for restitution based on the law of unjust enrichment.
- ✓ Article 2163 of the civil code under the title "Loss of enrichment" provided in Sub-Article 1 that: "Restitution is not due to the extent to which the defendant can show that he is no longer enriched at the time of the claim for restitution." This means, even if the plaintiff proved that the defendant enriched himself at his expense, the defendant would not be liable to indemnify the plaintiff if he succeeded to prove that the benefit or enrichment had already gone from him. But this defense cannot stand valid where the defendant has parted with the enrichment in bad faith or where, at the time of parting with it he should have been aware that he was bound to make restitution (Article 2163(2)). So the defendant can raise Sub-Article 1 as a defense validly only if he has parted with the benefit in good faith before the time when a claim for restitution is brought before the court. But proof of his objective or subjective knowledge of the fact that he knew or should have known that he was bound to make restitution to the right holder when he was parted with the enrichment is a strong indication for absence of good faith. Where the unjust enrichment has been transferred gratuitously to a third person, the claim for restitution may be brought against the latter (Article 2163(3)).

Grounds of Unjust Enrichment

A. Undue Payment

- ✓ Article 2164(1) of the civil code states: "Whosoever had paid what he did not owe may claim restitution of it." In order to clarify this provision, it seems important to quote Article 2165 of the code which reads: *"Restitution is not admitted where a person cognizant of the facts pays voluntarily what he knew he did not owe."* This provision qualified the scope of application of Article 2164(1). The cumulative reading of these two provisions implies that when a person paid what he did not owe due to a mistake or the wrong appreciation of facts, he can claim restitution of such payment including the increments of the thing, or the legal interest on the money starting from the date of payment, where the payee acted in bad faith. Conversely, even if the person does not owe payment, if such payment is made voluntarily with full knowledge of the facts, restitution of such payment may not be claimed. The same is true when the payment is made in the performance of a prescribed or moral obligation unless the payer lacks capacity to alienate gratuitously (Art. 2166(1) (2)). Another provision related to restitution of payment worth noting is stated under Article 2167 of the civil code. Sub-Article 1 of this provision relieved the receiver of the undue payment from the obligation to return what he has received if, due to such payment, he has in good faith destroyed or cancelled his title, relinquished the security for his claim or allowed his action against the true debtor to lapse. When this happens, the person who made the undue payment may recourse against the true debtor only (Art. 2167(2)).

As discussed earlier, restitution is a remedy that may be sought by a person on the basis of unjust enrichment. Literally, the term restitution may be defined as the 'action of giving something that was lost or stolen back

to its proper owner.' Technically speaking, restitution is a remedy that may be sought from the court to order the defendant to return things which have been taken improperly and its increments to the right holder. In a nutshell, it is an act of returning the thing itself and its increments to the right holder. Restitution as a remedy can be sought not only for an unjust enrichment; it can also be sought as a remedy in law of contract when a contract is cancelled or invalidated for one or another reason, and in tort laws in appropriate cases.

Where the thing required to be restituted has deteriorated, lost or where restitution of the thing in kind to the person entitled becomes impossible for various reasons, the defendant may be obliged to pay the value of the thing in the form of indemnity, having regard to its market value at the time when it becomes impossible to return it in kind. This is true even if the deterioration or loss of the thing is caused by force majeure, if at the time when this occurred the defendant knew that he had no valid contractual or legal right to the thing (See Article 2175 through Article 2177). These provisions should have been incorporated under the section that deals with undue payment as alternative or supplementary remedies to restitution.

B. Expenses

- ✓ The other important part of the law of unjust enrichment worth discussing deals with the deduction of expenses. This part is no more concerned with restitution of benefits (enrichments) from the acquirer to the person at whose expense such benefit is acquired. Rather it is concerned with the rights of the person bound to make restitution of the thing in controversy to demand reimbursement for some expenses he has made to preserve the thing and/or the right to retain increments made on the thing. Since the purpose of the law of unjust enrichment is to rectify injustice, it would be unjust to require the person who is bound to make restitution of the thing to surrender all the investments he has made on the thing and/or to deny him the deduction of expenses he has made in good faith to preserve the thing subject to restitution.
- ✓ Article 2168 sets a general rule as follows: "Where a person is bound to return a thing which has been in his possession for some time, his rights and obligations arising out of any modifications he may have made to such a thing are, unless otherwise provided by law, or contract, subject to the following provisions." According to Article 2168, where there is contrary stipulation provided by law or in the agreement of parties to a contract, the provisions subsequent to it will not be operative.

Reimbursement of necessary Expenses: Article 2169 of the civil code states: "Whosoever is bound to make restitution shall be reimbursed of the expenses he has incurred in preventing the loss or deterioration of the thing, unless such expenses were not useful, or were rendered necessary by his own fault." As per this article, the person who is bound to make restitution is entitled to reimbursement of the expenses he has incurred in preventing the loss or deterioration of the thing to be restituted unless:

- Otherwise provided by law or contract (Art. 2168);
- Such expense were not useful;
- Such expenses were rendered necessary by his own fault.

However, the person bound to make restitution is not entitled to any indemnity for the cost of maintaining the thing or for the taxes he has paid because of possessing it, save contrary stipulation under the law or contract (Art. 2170 cum Art. 2168). As this person is entitled to retain the increments he has collected in good faith from the thing to be restituted (Art.2178 (1)), it is deemed rational to make him responsible to bear the expenses of maintenance. In fact, it does not necessarily mean that the person bound to make restitution of the thing is always entitled to the increment of the thing. If at the time of taking possession or control of the thing this person had clear knowledge of the fact that he did not have valid contractual or legal right to the thing, he is not entitled to

the increment of the thing. Where restitution of the increments becomes impossible for one or another reason, the defendant shall pay to the plaintiff their fair market value in terms of money (Art.2178 (2) cum Art. 2164(2)).

Reimbursement of Expenses or Investments made on the Thing: Where the person bound to make restitution is able to prove that he has made expenses or investment on the thing in good faith and because of such expenses or investment the value of the thing has increased, he is entitled to the reimbursement of the cost of such investment within the limit of the value added to the thing because of such expenses (Art.2171 civil code). In order to succeed in his claim for reimbursement, the person bound to make restitution needs to establish three things: firstly, he has to prove the expenses he has incurred on the thing. Secondly, he has to show the increment in the value of the thing and a causal relationship between the expenses incurred by him and the value added on the thing. Lastly, he has to prove the existence of such increment in value of the thing at the time when restitution was claimed.

However, the fact that the above three elements are established does not necessarily imply success to the person bound to make restitution. Although the existence of good faith in incurring such expenses may be and should be presumed, a proof adduced to the contrary by the plaintiff can nullify the person's claim for reimbursement fully or partly. If the plaintiff demanding restitution of the thing successfully proves that the defendant knew or should have known of his duty to return the thing at the time he had incurred such expenses, it could be well taken to refute the latter's claim for reimbursement wholly or partly on the ground of absence of good faith or the existence of its antonym, bad faith, when the court finds it necessary in the interest of justice.

As an alternative to reimbursement, the person bound to make restitution may before restitution of the thing remove anything he has joined to it, if it can be separated without appreciable damage to the thing (Art. 2173). The plaintiff can also raise this in order to avoid payment of indemnity to the person required to restitute the thing.

Right of Retention: As a security for the payment of his claims for indemnity and until the plaintiff (person claiming restitution) effected such payment or produced a security to such effect, the law grants the defendant (person bound to make restitution) to retain the thing (defer restitution of the thing). But it has to be noted that a person who has taken control of the thing illegally, like theft, or a person who, at the time when he took possession of the thing, knew that he had no valid contractual or legal right to the thing cannot exercise this right of retention (Art. 2174) as he does not have any right to claim restitution from the very beginning.