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Digest of European Tort Law

Volume 4:
Essential Cases on the Limits of Liability

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Edited by the
Institute for European Tort Law
of the Austrian Academy of Sciences
and the University of Graz

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Preface

The present volume of the 'Digest of European Tort Law' series was preceded by three others: on natural causation (2007), on damage (2011) and on misconduct (2018). At the heart of the present volume is the question of how to limit tortious liability. As with the first three publications, it remains our goal to present and analyse a core concept of tort law in a comparative manner.

Continuing our method applied when preparing the previous volumes, we imagined as a starting point that a European Civil Code might be adopted in the future. According to civilian legal tradition, such a new code would presuppose that judges have three elements at their disposal: the code, scholars' comments and court decisions. Even if a uniform European Civil Code seems to be a distant prospect, it is apparent that European lawyers are increasingly interested in decisions by foreign courts. Access to these decisions often being difficult, we decided to continue our undertaking to provide scholars and practitioners with a survey of cases relevant to various areas of tort law. To this end, the present book selects, compiles, and comments on topical cases issued by the courts of 27 European legal systems.

As demonstrated by numerous references to the decisions reported in the Digest volumes by courts and academics in Europe and beyond, the series already offers valuable assistance for judges in their decision-making and for tort law scholars in their research.

As with the three previous volumes, we composed a questionnaire with the help of representatives of different European legal families. Based on the questionnaire, researchers from 27 different jurisdictions investigated their national jurisprudence and selected, summarised, and commented on relevant cases. At the supranational level, a separate report presents an analysis of important decisions of the Court of Justice of the European Union. Another report offers a comparative analysis of particular cases resolved according to the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference (DCFR). This may prove to be a test for strong and weak points in these two proposals for common European norms. Furthermore, a separate historical report examines the notion of limits of liability in former times. Finally, at the end of each section, a comparative report highlights the conceptual similarities and differences between the national legal traditions under analysis.

Whereas Digest 1 focused on the core element of natural causation, Digest 2 on the concept of damage, and Digest 3 on misconduct, a neutral term referring to both unlawfulness and fault, Digest 4 tackles the question of how to limit liability when the aforementioned prerequisites are fulfilled. Through the word 'limitation', reference is made to different means of keeping both the tortfeasor´s responsibility and the compensation awards within certain boundaries.

The underlying question is as old as tort law itself. How can the courts ensure just reparation for damage inflicted whilst simultaneously avoiding tort's colonisation of the entire legal order? Where is the equilibrium point between, on the one hand, a permis-

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sive system, which encourages unacceptable risk-taking without the threat of legal sanctions, and, on the other, an excessively restrictive approach, which hinders free action and discourages entrepreneurship?

As explained in the introduction to the questionnaire and in the comparative reports, liability is limited by various means, which are largely value-based. The present study discloses this variety but also the main commonalities of the different jurisdictions, such as: remoteness and (legal) causation; adequacy and foreseeability; in some legal systems, the protective purpose of the norm ('Schutzzweck der Norm'); third party interventions; and reduction clauses.

The cases in the present book are divided into ten fundamental categories relating to the limits of liability. Within each category, the selected facts, decisions, and comments are presented in the following manner: each category begins with an historical introduction (1), followed by the 27 country reports (almost all European Union Member States, plus England and Wales, Scotland, Switzerland, and Norway) (2–28), decisions of the European courts (29), solutions of hypothetical cases according to the PETL and the DCFR (30), and finally a comparative report (31).

This structure allows the reader interested in a specific problem, for example reduction clauses, to find the relevant information for the various jurisdictions in a single chapter (for reduction clauses, chapter 10). Readers looking for cases and solutions from a specific country will find them under the same number within each chapter (for Greece, for example, under number 5). The comparative reports (31) provide a summary of our main findings for the more hurried reader. Cross-references within the book are composed of three numbers. The first two are cited at the top of the page and indicate the category and the specific (usually country) report within that category. The third one indicates the marginal number(s) within each individual report. For example, 9/3 no 1 indicates losses and additional losses from natural events (chapter 9) in Austrian law (report number 3) and refers to the first paragraph of the facts of a specific decision (marginal number 1).

We owe our profound thanks to the staff of the Institute for European Tort Law of the Austrian Academy of Sciences and the University of Graz, especially to Dr Christa Kissling-Sereinig, Dr Katarzyna Ludwichowska-Redo, Luke Filan BCL, Donna Stockenhuber MA and Mag Kathrin Karner-Strobach for coordinating the project in Vienna and for preparing the manuscript for publication. Many thanks are also owed to Prof Elena Bargelli for having invited our group to the Università di Pisa in autumn 2019 for the launch of the research project. Further, we would like to express our gratitude to the Austrian Science Fund (*Fonds zur Förderung der wissenschaftlichen Forschung*) for their financial support.

The Editors

Overview

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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
ABGB-ON	Online-Kommentar zum ABGB (Online Commentary on the ABGB)
AC	Appeal Cases
AcP	Archiv für die civilistische Praxis
ADC	Anuario de Derecho Civil
AJ Droit pénal	Actualité juridique droit pénal
All ER	All England Law Report
All ER (Comm)	All England Law Reports (Commercial Cases)
AngG	Angestelltengesetz (Austrian Employees Act)
AP	Areios Pagos (Court of Cassation)
App	Corte d'Appello
App Cas	Law Reports, Appeal Cases (Second Series)
Arch circ sin	Archivio giuridico della circolazione e dei sinistri stradali
Arch giur circol	Archivio giuridico della circolazione e dei trasporti
ArchN	Archeio Nomologhias
Arm	Armenopoulos
Arr Cass	Arresten van het Hof van Cassatie
ATF/TF	Arrêts du Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland)
BC	Building Code
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BH	Birosagi Hatarozatok (Budapest)
BNotO	Bundesnotarordnung (Federal Ordinance for Notaries Public)
Bull	Bulletin des arrêts de la Cour de cassation de Belgique
Bull Ass/T Verz	Bulletin des assurances/Tijdschrift voor Verzekeringen
Bull civ	Bulletin civil
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BW	Burgerlijk Wetboek
c	consideration
CA	Cour d'appel
C Ap	Curtea de Apel
C civ	Code civil
C civ	Codul Civil
Camp	Campbell's Nisi Prius Cases
Cass	Corte di Cassazione
Cass	Cour de cassation
Cass 1 civ	Cour de cassation, première chambre civile (Supreme Court, First Civil Division)
Cass 2 civ	Cour de cassation, deuxième chambre civile (Supreme Court, Second Civil Division)
Cass 3 civ	Cour de cassation, troisième chambre civile (Supreme Court, Third Civil Division)
Cass com	Cour de cassation, chambre commerciale (Supreme Court, Commercial Division)
Cass ord	Cassazione ordinanza
Cass pen	Cassazione penale
CB	Chief Baron
CC	Civil Code

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CC	Código Civil
cc	civil code
CCJC	Cuadernos Cívitas de Jurisprudencia Civil
CCP	Code of Civil Procedure
CFI	Court of First Instance
Ch	Chambre
CHF	Suisse franc
Chr DS	Chronique de droit social
ChrID	Chronika Idiotikou Dikaiou
Civ	Tribunal de première instance (section civile)
CJ	Chief Justice
CJEU	Court of Justice of the European Union
CLA	Civil Liability Act
CLL	Civil Law (Republic of Latvia)
CLR	Commonwealth Law Reports
CoA	Court of Appeal
Coll	Collection of Laws of the Czech Republic
Comrs	Commissioners
Con LR	Construction Law Reports
Con Man	Revue belge du dommage corporel et de médecine légale (Consilio manuque)
Corr	Tribunal de première instance (section correctionnelle)
Corriere giur	Corriere giuridico
cp	codice penale (Penal Code)
CRA	Circulation, Responsabilité, Assurances
CRP	Constituição da República Portuguesa (Constitution of the Portuguese Republic)
CSOH	Scotland Court of Session Outer House
D	digesta
D	Recueil Dalloz
Danno e resp	Danno e responsabilità
DCFR	Draft Common Frame of Reference
DEE	Dikaio Etaireion kai Epicheirisseon
Dir giust	Diritto e giustizia
Dir prat ass	Diritto e pratica delle assicurazioni
DL	Decreto-lei (Decree-law)
DM	Deutsche Mark
DR	Diritto e Responsabilità
Dr circ	Droit de la circulation – Jurisprudence
DRdA	Das Recht der Arbeit
DULJ	Dublin University Law Journal
Dz U	Dziennik Ustaw
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ecolex	Fachzeitschrift für Wirtschaftsrecht
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEN	Efimeris Ellinon Nomikon

EKHG	Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (Austrian Motor Vehicle Liability Act)
El & Bl	Ellis & Blackburn's Queen's Bench Reports
Ell Dni	Elliniki Dikaiosini
EPC	Évaluation du préjudice corporel
EpSygkD	Epitheorissi Sygkoinoniakou Dikaiou
ER	English Reports
ERPL	European Review of Private Law
ETL	European Tort Law
EvBl	Evidenzblatt der Rechtsmittelentscheidungen in der ÖJZ
EWCA Civ	England and Wales Court of Appeal, Civil Division
EWHC (QB)	England and Wales High Court, Queen's Bench Division
Ex D	Law Reports, Exchequer Division
Fam	Law Reports, Family Division
For ass	Forum de l'assurance
Foro it	Il Foro italiano
GCC	Greek Civil Code
GDR	Greek drachma
Giur it	Giurisprudenza italiana
Giur sic	Giurisprudenza siciliana
Giust civ	Giustizia civile
Giust civ Mass	Giustizia civile Massimario
Giust pen	Giustizia penale
GOK	Greek Genikos Oikodomikos Kanonismos
HAVE/REAS	Haftung und Versicherung/Résponsabilité et Assurances
HCA	High Court of Australia
HL	House of Lords
HR	Hoge Raad (Dutch Supreme Court)
Hr	Høyesterett (Norwegian Supreme Court)
ÎCCJ	Înalta Curte de Casație și Justiție
ICR	Industrial Cases Reports
IECA	Irish Court of Appeal
IECC	Irish Circuit Court
IEHC	Irish High Court
IESC	Irish Supreme Court
IESCDET	Irish Supreme Court Determination
ILRM	Irish Law Reports Monthly
ILTR	Irish Law Times Reports
Inst	Institutiones Justiniani
Ir Jur	Irish Jurist
IR	Irish Reports
ISCR	Irish Supreme Court Review
J	Justice
JBl	Juristische Blätter
JCP G	JurisClasseur périodique – Semaine juridique, édition générale

JdT	Journal des Tribunaux
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland
JIC	Justis Irish Cases
JJP	Journal des juges de paix et de police
JLMB	Revue de jurisprudence de Liège, Mons et Bruxelles
JORF	Journal officiel de la République française
JP	Justice de Paix
JT	Journal des Tribunaux
JUR	Repertorio Jurisprudencia Aranzadi Westlaw
JuS	Juristische Schulung
JZ	Juristenzeitung
KB	King's Bench
Kbt	Közbeszerzési Törvény (Law on Public Procurement)
KC	kodeks cywilny (Polish Civil Code)
KKO	Korkein oikeus (Supreme Court)
KPC	kodeks postępowania cywilnego (Polish Civil Procedure Code)
L	Lei (Law)
LCD	Unfair Competition Act
LCR	Road Traffic Act
Legf Bír Pfv	Magyar Köztársaság Legfelsöbb Bírósága (Hungarian Supreme Court)
LFE	Act on Epidemics
LG	Landgericht (Court of first instance)
LJ	Lord Justice/Lady Justice
Lloyd's Rep	Lloyd's Law Reports
Lloyd's Rep	Lloyd's Reports
LOA	Law of Obligations Act
LQR	Law Quarterly Review
LR HL	Law Reports, House of Lords
LR Ex	Law Reports, Exchequer Cases
LR Exch	Law Reports, Exchequer Cases
LRCDN	Ley de Responsabilidad Civil por Daños Nucleares (Civil Liability for Nuclear Damage Act)
LR QB	Law Reports, Queen's Bench
LSC	Lithuanian Supreme Court
M	Macpherson's Session Cases (3rd Series)
Mass giur it	Massimario dell giurisprudenza italiana
MB	Moniteur belge
MedR	Medizinrecht
MLJI	Medico-Legal Journal of Ireland
MLR	Modern Law Review
NE	North Eastern Reporter
NJ	Nederlandse Jurisprudentie
NJA	Nytt juridiskt arkiv
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungs-Report
NLG	Nederlandse Gulden

NoV	Nomiko Vima
Nuova giur civ comm	Nuova giurisprudenza civile commentata
ÖAMTC-LSK	Österreichischer Automobil-, Motorrad- und Touring-Club – Leitsatzkartei
ÖJZ	Österreichische Juristen-Zeitung
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OJ	Official Journal of the European Union
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (Higher Regional Court)
OSNC ZD	Orzecznictwo Sadu Najwyzszego Izba Cywilna – Zbiór Dodatkowy (Decisions of the Supreme Court Civil Chamber – Supplementary Collection)
OSNC	Orzecznictwo Sadu Najwyzszego Izba Cywilna (Decisions of the Supreme Court Civil Chamber)
OSNIC	Orzecznictwo Sądu Najwyższego Izba Cywilna (Decisions of the Supreme Court Civil Chamber)
OSP/OSPiKA	Orzecznictwo Sądów Polskich (Decisions of the Polish Courts)
OUG	Ordonanță de Urgență a Guvernului
P	Law Reports, Probate
Pas	Pasicrisie
PD	Law Reports, Probate, Divorce & Admiralty Division
PETL	Principles of European Tort Law
PIGC	Personal Injuries Guidelines Committee
PiP	Państwo i Prawo
PIQR	Personal Injuries and Quantum Reports
PLD	Product Liability Directive
Pol	Juge de police/Politierechter
pr	principium
PS	Przegląd Sądowy
QB	Queen's Bench
QRTL	Quarterly Review of Tort Law
RAAERCS	Revista de la Asociación Española de Abogados Especializados en Responsabilidad Civil y Seguro
RABG	Rechtspraak Antwerpen Brussel Gent
RC	Sąd Okręgowy (Regional Court)
RCJB	Revue critique de jurisprudence belge
RDC	Revue des contrats
RDT	Revue de droit des transports
RdW	Österreichisches Recht der Wirtschaft
Rep Foro it	Repertorio del foro Italiano
Resp civ assur	Responsabilité civile et assurances
Resp civ prev	Responsabilità civile e previdenza
Rev dr santé	Revue de droit de la santé
Rev Lamy Dr civil	Revue Lamy droit civil
RGAR	Revue Générale des Assurances et des Responsabilités
RGDC	Revue générale de droit civil belge
RIDA	Revue Internationale du Droit d'Auteur

Riv civ	Rivista di diritto civile
Riv dir civ	Rivista di diritto civile
Riv giur lav	Rivista giuridica del lavoro e previdenza sociale
Riv med lav	Rivista medicina del lavoro
Riv pen	Rivista penale
RJ	Repertorio Jurisprudencia Aranzadi Westlaw (TS)
RRCS	Revista de Responsabilidad Civil y Seguro
RRD	Revista Română de Drept
RRD	Revue régionale de droit
Rt	Norsk Retstidende
RTD civ	Revue trimestrielle de droit civil
RTD com	Revue trimestrielle de droit commercial
RW	Rechtskundig Weekblad
SACL	Supreme Administrative Court of Lithuania
SAP	Sentencia de la Audiencia Provincial (Judgment of Provincial Court)
SC (HL)	Session Cases, House of Lords
SC	Session Cases
SCC	Swiss Civil Code
SCO	Swiss Code of Obligations
SEAK	Syntomi Ermineia tou Astikou Kodika
(S)ESygkD	(Synchronos) Epitheorissi Sygkoinoniakou Dikaiou
SI	Statutory Instrument
SJ	Semaine Judiciaire (Judicial Week)
SLT (S CT)	Scots Law Times, Sheriff Court Reports
SLT	Scots Law Times
SN	Sąd Najwyższy (Polish Supreme Court)
SPC	Swiss Penal Code
StGB	Strafgesetzbuch (Criminal Code)
STJ	Supremo Tribunal de Justiça (Supreme Court of Justice)
StR	Strafrecht (Criminal Law)
STS	Sentencia del Tribunal Supremo (Judgment of the Spanish Supreme Court)
StVG	Straßenverkehrsgesetz (Road Traffic Act)
StVO	Straßenverkehrsordnung (Ordinance on Road Traffic)
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen
TAVW	Tijdschrift voor Aansprakelijkheid en Verzekering in het Wegverkeer
TEC	Treaty Establishing the European Community
TfE	Tidsskrift for erstatningsrett, forsikringsrett og trygderett
TFEU	Treaty on the Functioning of the European Union
TfF	Tidsskrift for forretningsjus
Tort L Rev	Tort Law Review
TPCL	Theory and Praxis of Civil Law
TPG	Transplantationsgesetz (Transplantation Act)
Trib Sup Sec civ	Tribunalul Suprem Secția Civilă
TRLGDCU	Texto Refundido de la Ley General de Defensa de los Consumidores y Usuarios (Consolidated Text of the General Act on Consumer Protection)
Tul Eur & Civ LF	Tulane European and Civil Law Forum

UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
VersR	Versicherungsrecht
VVG	Versicherungsvertragsgesetz (Insurance Contract Act)
Wake Forest LR	Wake Forest Law Review
WJSC-SC	Web Judgments of the Superior Courts – Irish Supreme Court
WLR	Weekly Law Reports
Zak	Zivilrecht aktuell
ZEuP	Zeitschrift für europäisches Privatrecht
ZVR	Zeitschrift für Verkehrsrecht

Questionnaire Structure

Questionnaire

I. Introduction

Digests 1–3 dealt with the requirements for establishing tortious liability (causation, damage, misconduct). If all of these conditions are met, this raises the question of a limitation of the resulting liability. Imposing liability for any and every loss caused by misconduct in the sense of the *conditio sine qua non* (but for) test would often lead to an uncontrolled flood of liabilities. In all of the liability systems of Europe, instruments capable of limiting liability have therefore been developed and these form the basis of the present investigation.

Very different paths have been trod in the name of avoiding an unrestricted expansion in liability. Sometimes liability is excluded for certain (especially remote) losses at the level of causation, with this sometimes occurring by means of an explicit distinction between 'natural causation' (Digest 1) and 'legal causation'. This term alone already expresses the idea that, unlike with 'natural causation', the issue turns on a value-based limitation of liability for losses which are without doubt the causal result (in the but for/*conditio sine qua non* sense) of the misconduct of the tortfeasor. In other systems, the further limitation at the level of causation is implicit, without any express demarcation of the two causal questions. Still other systems separate the conceptual question of limiting liability entirely from the issue of causation.

In limiting liability, use is made, in particular, of the concepts of adequacy and foreseeability, the scope of the duty and protective purpose of the rule (*Rechtswidrigkeitszusammenhang*; *Schutzzweck der Norm*), lawful alternative conduct, and the 'intervention' of a further cause (*novus actus interveniens*). The latter includes in particular the misconduct of a third party or decision of the injured party. Furthermore, some European systems employ liability reduction clauses and/or caps on the maximum award recoverable.

Regardless of the respective dogmatic structures and terminology, the present study has selected the term 'limits of liability'. This is to stress clearly that the topic of concern is the (value-based) restriction of liability in cases where the prerequisites for liability analysed in Digests 1–3 (causation, damage, misconduct) have, 'in themselves', been met or have only been denied in order to avoid a proliferation of liability. Depending on the conceptualisation of the relevant legal system, a certain amount of 'overlap' between different criteria can occur here. Examples include causation (especially where this is not limited to the but for test and is implicitly used to limit liability); the remoteness of damage (which can also play a role in determining the relevant conduct norms or in establishing fault); and the irrecoverability of merely 'indirect' losses (with considerations related to protective purpose often brought to bear). The subject of the present investigation is thus fundamentally different from those covered in the previous volumes (Digests 1–3). Where those earlier studies (Digests 1–3) focused on the *requirements* for liability, Digest 4 focuses on the *limits* of that liability and an examination of the criteria and structures

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determinative of that. Some matters which are *not* within the scope of the present volume include prescription and contributory negligence. They are different independent topics which must await treatment in a future volume devoted exclusively to such questions.

The questionnaire below begins by asking for a general overview as to how the issue of limits of liability is addressed in the legal system in question (**Question 1)**. Following on from this, the extent to which liability is limited to foreseeable or adequate losses, or excluded for unforeseeable, too remote or inadequate losses, falls to be analysed (**Question 2**). The next step is then to consider the extent to which the protective purpose of the rule (*Rechtswidrigkeitszusammenhang*) is relevant in determining the limits of liability (**Questions 3–4**). Further, analysis is required as to whether a tortfeasor is also responsible for losses which would still have occurred without the relevant misconduct and in case of an alternative lawful conduct (*rechtmäßiges Alternativverhalten*) (**Question 5**). In this context, an explanation is also sought as to whether equivalent concepts, at least comparable to those of adequacy or the protective purpose of the rule, are called upon in relation to the limitation of strict (risk-based) liabilities (as for example with the doctrine of 'sufficient connection to target risk'; *Gefahrenzusammenhang*) (**Question 6**). The next group of questions address cases where consequential losses are increased or even triggered at all as a result of the 'intervening' misconduct of a third party, a choice of the injured party or another event (**Questions 7–9**). Following this, those legal systems which recognise liability reduction clauses are to be explored, along with the ways in which such clauses are concretely applied by the courts in practice (**Question 10**). Contributors are also free, at the end of their responses, to raise other issues which they consider relevant to the topic (**Question 11**).

II. Questionnaire

A. Introduction

1. General overview

Please set out very briefly (max 2 pages) how your courts deal with the issue of limits of liability, addressing the various instruments that are recognised and the functions that these instruments perform in your legal system.

In particular, we would ask you to take the following questions into account, insofar as they are relevant in your jurisdiction:

What role is played by causation in limiting liability (for losses which 'in themselves' have been caused by the misconduct in the sense of the but for test)? What perspectives are determinative for the limitation? Is the issue of a value-based or policy-based limitation of attribution discussed explicitly or is it more implicit? Is a distinction drawn between natural and legal causation, or some other subheadings of causal analysis? Is the concept of a 'break in the causal chain' (*Unterbrechung des Kausalzusammenhanges*) employed to limit liability?

Is the foreseeability of the relevant loss significant in limiting liability and is liability excluded for consequences of wrongdoing which are entirely atypical? Is the foreseeability of the relevant loss different from that employed in assessing the relevant conduct norms or the tortfeasor's fault? What concepts (adequacy; foreseeability; remoteness; proximity) are used and what criteria are relevant here? Does the seriousness of the tortfeasor's misconduct or the particular susceptibility of the injured party to harm play a role in establishing the limits of liability?

Does the protective purpose of the relevant conduct norm have any significance for the liability and the limitation of the same? For example, does any relevance attach to the purpose for which a particular legislative provision was enacted or the intentions of the legislature?

Are the same or comparable instruments employed to limit liability where that underlying liability is strict (for example, in the form that liability requires the realisation of a 'sufficient connection to target risk'; *Gefahrenzusammenhang*)?

In relation to liability and its limits, does it make any difference whether the loss caused by the misconduct of a tortfeasor would still have been caused if that tortfeasor had acted properly (*rechtmäßiges Alternativverhalten*)? If liability is denied in such cases, on what basis is this achieved (causation; scope of the duty)?

What significance does it have for the liability of the primary tortfeasor if a third party's misconduct or a choice of the injured party either contributes to the loss suffered by the claimant or contributes to additional loss? Does independent significance attach to the intervention of a foreign act (*Dazwischentreten einer fremden Willensbetätigung*) or '*novus actus interveniens*' in relation to the limitation of liability?

Does your legal system provide a special liability reduction clause to prevent liability reaching an extent which would deprive the tortfeasor of his essential means or to achieve a just 'balance' in some other respect? If this is the case, what significance attaches to such reduction clauses in the practice of the courts?

Reviewing the instruments used by your legal system to limit liability: which instruments are especially significant in practice, and which are, by contrast, of minimal or merely theoretical importance?

Does your legal system recognise any delictual limitation of the sums recoverable (liability caps)? In what cases are they applied and for what reasons? How are such maximum sums justified?

B. Foreseeable and Unforeseeable Consequences

2. Is liability limited where the consequences are unforeseeable?

Does your legal system limit liability to foreseeable consequences? If so, what degree of foreseeability is required (eg 'reasonably foreseeable'? 'likely'? 'probable'? 'very probable'? etc). Is liability limited or excluded in relation to entirely atypical consequences?

Is liability limited at the level of causation, for example by restricting recovery to 'direct' losses or by reference to a 'break in the causal chain'? Does your legal system employ instruments such as 'adequacy', 'foreseeability' or 'remoteness' to limit liability?

What criteria play a role in limiting liability in these ways? For example, is the kind of damage or loss caused relevant (personal injury vs pure economic loss), the mechanism by which the loss occurred, the extent of the loss caused, or the seriousness of the tortfeasor's misconduct? Do special rules exist to deal with cases involving a particular susceptibility of the injured party to damage? If so, does this susceptibility extend to an injured party's financial circumstances, or to damage to property which is particularly susceptible to being harmed?

Examples

Oil that is carelessly discharged from a docked ship drifts under a wharf where other ships are being repaired. Molten metal produced by welding operations on the wharf falls onto debris floating in the water and sets it alight, which in turn ignites the oil on the water. The wharf and ships moored there sustain substantial fire damage. Who is liable, the person who carelessly discharged the oil, the person who caused it to catch fire, or nobody?

A negligently allows a cow to escape from an enclosure at a cattle auction. The cow runs down a street, enters a building through an open doorway, climbs the stairs and causes a portion of the upper floor to collapse. The cow falls through the ceiling into V's shop beneath, destroying a sink which floods the shop.

In a crowd on a train station platform, A unintentionally knocks over V, who is carrying a parcel. This parcel contains explosives, which are set off by the fall. The explosion causes serious damage to persons and property.

V is seriously injured in an accident caused by A. The injuries result in the collapse of V's marriage. Under the divorce judgement, V is required to pay a sum of money to his former spouse.

A hits V lightly on the head in the course of an argument. Unbeknownst to A, from birth V has had a very thin skull. Given this condition, the blow causes V to suffer a subcranial fracture and V is left unable to work.

C. Protective Purpose of the Rule and Equivalent Concepts

3. Protective purpose of the conduct norm breached

Is the purpose of the conduct norm breached important in determining the losses to be compensated? Is the protective purpose of the rule an independent element of attribution which limits liability or is at least implicitly considered in limiting attribution? Is this concept used also in cases of tortious liability, where no specific statutory rules ex-

ist, or in cases where contractual liability is used in some systems to address questions which would be tortious in other systems?

Examples

Under a local by-law, dogs must be kept on a lead in a local park. A allows her dog to run free and the dog bites V. As made expressly clear in the minutes of the local authority's meetings, the purpose of the requirement to keep dogs on leads was only to protect the flowers planted in the park from damage by free-running dogs.

A stops her car in an area where stopping and parking is forbidden. That restriction on stopping and parking is only in place because the road is a shopping street and unrestricted access has to be maintained for delivery vehicles. V drives into A's illegally parked car. Does V, whose car is damaged, receive compensation for at least some of her losses?

V, a mountaineer who is planning a challenging climb, is concerned about the fitness of his knee. He visits A, his doctor, who negligently fails to notice that V's knee is too weak for such a climb. A tells V that he is fit to climb. V undertakes the climb, which he would not have done had A told him the true condition of his knee. V is stuck by a rock while climbing. The injury is an entirely foreseeable consequence of mountaineering but is unrelated to V's knee.

4. Exclusion of liability for 'indirect damage' or 'indirect victims'?

Does your legal system recognise an exclusion or limitation of liability for 'indirect damage' (*mittelbarer Schaden*) which is suffered by a third party (an 'indirect victim') merely as a side effect? At what level is liability thus restricted (damage; causation; misconduct; protective purpose of the rule; other concepts)?

Examples

A damages an electrical cable that supplies facilities operated by V1 and V2, causing a power cut. As a consequence, V1 suffers a loss of profits because he has to cease production. Additionally, food stored by V2 in her freezing facility is ruined by thawing. Neither V1 nor V2 owns the cable. Is A liable?

V, who is a famous opera singer, is injured by A in a car accident and is therefore unable to perform in a recital that evening. The recital is cancelled and both the owner of the opera house and the owner of the bar in the opera house claim from A profit lost due to the cancelled event.

5. Lawful alternative conduct

Is it relevant for the purposes of liability whether the damage would still have been caused if the party whose misconduct caused damage had not acted improperly

(*rechtmäßiges Alternativverhalten*)? At what level is liability excluded or limited (causation; scope of the duty)?

Example
A overtakes cyclist V without leaving enough clearance, knocks V down and injures her. If A had left sufficient clearance, the accident would still have occurred, because V was pushed in A's direction by a sudden gust of wind.

6. Doctrine of 'sufficient connection to target risk' and related concepts
Does the 'protective purpose of the rule' or any equivalent concept(s) play a role in areas other than liability founded on misconduct? Does it play a role in relation to strict (risk-based) liability, for example (the doctrine of 'sufficient connection to target risk'; *Gefahrenzusammenhang*)?

Examples
A drives his car on the motorway and, as a result of an unforeseeable technical defect, the car suddenly comes to a standstill. This causes a traffic accident in which V is seriously injured.

A parks her car illegally on a pavement. V has consequently to walk on the road, which causes him to fall and seriously injure himself.

D. Losses and Additional Losses as a Result of Subsequent Conduct or Other Event

7. Losses and additional losses resulting from the misconduct of a third party
Is the tortfeasor also responsible for any or additional losses caused by the misconduct of a third party? What if the third party's conduct does not amount to misconduct, but it nonetheless causes further losses?

Examples
A1 injures V's eye by accident. V is taken to hospital, where she is treated improperly by a doctor, A2, and as a result loses her sight.

A1 negligently crashes his car while driving through a road tunnel. A2, a police officer, arrives at the scene of the accident, but negligently fails to prevent further traffic entering the tunnel. V, a police motorcycle driver, subsequently arrives at the scene, and is ordered by A2 to return to the entrance to the tunnel, against the flow of traffic, to prevent further traffic entering the tunnel. While V is driving back to the entrance, her motorcycle is struck by an oncoming car.

8. Losses and additional losses resulting from a decision of the injured party
Is the tortfeasor also responsible for any or additional losses caused by a decision of the injured party?

Examples
A seriously injures V in a road traffic accident. V suffers serious losses (which could have been avoided with a blood transfusion) as a result of refusing an emergency blood transfusion on religious grounds.

V's leg is injured as a result of the negligence of A. During the period when V's leg is recovering, it is occasionally prone to giving way under him. V is descending a steep flight of stairs when his leg gives way. Panicking, he jumps down the remaining stairs and suffers a severe fracture.

9. Losses and additional losses from a natural event
Is the tortfeasor responsible for any or additional losses which result from a natural event, but one to which the victim (or its property) would not have been exposed had the tort not occurred?

Example
V's ship is damaged by another ship owned by A. In order for V's damaged (but still seaworthy) vessel to be repaired, it has to undertake a voyage to a shipyard. En route to the shipyard, a sudden storm occurs during which the ship sinks.

E. Reduction Clauses

10. Limitation of liability by means of statutory reduction clauses?
Does your legal system provide any statutory clauses that limit an established liability on the basis of special circumstances pertaining to the tortfeasor (eg the liability would deprive him of his essential means)? What are the criteria relevant for the application of such clauses? In what cases have the courts concretely applied such clauses?

F. Other Issues

11. Additional questions
Do questions arise in your legal system relating to the nature and function of the limitation of liability which are not addressed by this questionnaire? If so, please provide case examples by way of illustration.

A. Introduction

1. General overview

1. Historical Report

In contrast to most modern legal systems, Roman law has few mechanisms explicitly aimed at limiting liability for harm caused. To a large extent, this is due to the structure of Roman delict law. Unlike modern legal systems, which tend to recognise a general, abstract obligation on a wrongdoer's part to make good all losses caused to another by the infliction of wrongful damage of whatever kind, Roman delict law was confined to a number of clearly defined delicts under which the injured party could claim damages from the wrongdoer. As such, liability for wrongfully caused damage was *a priori* limited to those cases in which the wrongdoer's act fell within the scope of one of the statutory definitions. **1**

The earliest surviving remnants of Roman delict law are fragments from the Law of the Twelve Tables stipulating a wrongdoer's liability for a number of specific delicts mainly concerning the destruction of property and infliction of bodily harm.[1] In Classical times, these provisions were superseded by the *lex Aquilia,* a plebiscite widely assumed to have been enacted towards the end of the 3rd century BC.[2] In its first 'chapter' (section), the *lex Aquilia* stipulates that whoever wrongfully killed (*occidere*) a male or female slave or four-legged herd animal belonging to another person should be liable for its highest market value within the past year. Under the third[3] chapter, whoever wrongfully damaged another person's property by burning (*urere*), breaking (*frangere*), or wounding (*rumpere*, later extended to *corrumpere* to cover all forms of destruction of property) was held liable for the amount that 'the affair would be worth within the next thirty days'. Beyond the ambit of the *lex Aquilia*, the delicts of *dolus* (fraud), *furtum* (theft in the widest sense), *iniuria* (wrongful attack against the reputation of a person) likewise gave rise to liability claims. In addition, the so-called praetorian quasi-delicts established a type of strict liability regardless of fault for things poured or thrown out of buildings (*deiectum vel effusum*) or things dangerously positioned (*positum vel suspensum*).[4] **2**

1 Under the Twelve Tables, a wrongdoer was held liable if he was found to have injured another person's limb ('si membrum rupsit') or broken a bone by hitting with his bare hands or a club ('manu fustive si os fregit'), if he had accidentally stabbed a person to death ('si telum manu fugit magis quam iecit'), if he had wrongfully attacked another person without causing serious injury ('si iniuriam faxit'), but also for singing an evil song ('malum carmen incantare') or casting a spell to spoil another person's harvest ('qui fruges excantassit').

2 *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 7; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 953; *B Winiger*, La responsabilité aquilienne romaine: damnum iniuria datum (1997) 23.

3 The second chapter, dealing with fraud committed by the 'adstipulator' (co-creditor) against the other creditor, appears to have fallen out of use before the beginning of the Classical period; cf *Ulpian*, D 9,2,1,1.

4 A further – though fault-based – praetorian delict was that of the judge who heard his own case (*qui litem suam fecit*).

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3 The wording of the *lex Aquilia* not only limits delictual liability to specific harmful actions and outcomes but its interpretation by Roman jurists even narrowed it down further to cases of direct physical contact between the wrongdoer and the injured asset.[5] Hence, an important step towards extending the wrongdoer's liability was the granting of legal remedies for indirect causation of damage in the shape of *actiones utiles* and *actiones in factum* in analogy to the Aquilian actions. In order to supplement the narrow definition of *occidere* within the meaning of the first chapter, the concept of *causa mortis praebere*/*praestare*[6] was established to cover cases of indirect causation of death – for instance, when a midwife had provided, but not with her own hands administered, a deadly potion to the female slave she was tending;[7] when somebody had scared animals by waving a red cloth, thereby causing them to flee and fall to their death;[8] when someone had held a slave so that another man could kill him;[9] or had caused the death of slaves or animals by omitting to provide sufficient nourishment.[10] Similarly, *actiones in factum* were given to cover those cases of damage to property not covered by the third chapter, most importantly wrongful damage due to omission.[11]

4 The *actio legis Aquiliae* is generally assumed to have combined penal and reipersecutory elements; as an *actio mixta*, it aimed both at obtaining compensation for the loss sustained and at punishing the injurer.[12] Its penal nature becomes evident, especially in the way damages were calculated, to reflect the highest market value of the injured asset,[13] in the fact that liability was cumulated where several wrongdoers had jointly caused damage, so that the injured party could claim the full amount from each of them,[14] in the fact that the *actiones legis Aquiliae* could be cumulated with other penal actions[15] (but not with reipersecutory ones[16]), and in the passive intransmissibility of

5 *Ulpian*, D 9,2,7,1.

6 On the subtle difference between the two terms cf *D Nörr*, Causa ortis (1986) 10 ff; *B Winiger*, La responsabilité aquilienne romaine (1997) 69 ff.

7 *Labeo*/*Ulpian*, D 9,2,9 pr; on this text cf *D Nörr*, Causa mortis (1986) 166 ff.

8 *Ulpian*, D 47,2,50,4; cf also *Gaius*, D 47,2,51; *Neratius*, D 9,2,53.

9 *Ulpian*, D 9,2,11,1.

10 *Ulpian*, D 9,2,9,2.

11 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 983; *B Winiger*, La responsabilité aquilienne romaine (1997) 55 f (on omission also 78 ff).

12 For a detailed discussion of this point, see *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 970 ff; *N Jansen*, Die Struktur des Haftungsrechts (2003) 237 ff; *T Finkenauer*, Pönale Elemente in der lex Aquilia, in: R Gamauf (ed), Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart (2017) 35 ff.

13 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1019 f; against this view *T Finkenauer*, Pönale Elemente in der lex Aquilia, in: R Gamauf (ed), Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart (2017) 42 ff.

14 Cf *Ulpian*, D 9,2,11,2; *Julian*, D 9,2,51,1.

15 Cf eg *Ulpian*, 47,1,2; *Ulpian*, D 47,2,27,3; *Labeo* in *Ulpian*, D 47,10,15,46; *Papinian*, D 48,5,6 pr.

16 Cf *Ulpian*, D 6,1,13; *Paulus*, D 5,3,36,2; *Gaius*, D 13,6,18,1; *Paulus*, D 9,2,18.

claims.[17] The reipersecutory nature of the *actio legis Aquiliae* was likewise generally acknowledged, with a tendency to award damages that went beyond the statutory assessment method and took into account the economic loss sustained by the injured party (*id quod interest*) already evident during Classical times.[18] With this development also came decisions that limited the wrongdoer's liability and thus paved the way for the modern conception of damages as compensation for the injured party's (ascertainable) loss.[19]

Further foregrounding its reipersecutory nature,[20] the medieval *ius commune* and **5**
the *usus modernus pandectarum* continued to draw on and materially extend the *lex Aquilia*: gradually, all forms of damage – even purely patrimonial loss – came under its ambit; likewise, it was extended to cover bodily injury inflicted on free men.[21] It was this extension of the scope of the *lex Aquilia* to cover all kinds of culpably inflicted damage[22] which led jurists to focus on the details of causation – closely linked to the concept of fault – (and its role in limiting liability) especially in the course of the 19th century.[23]

In contrast, Roman sources dealing with cases under the *lex Aquilia* and its analo- **6**
gous actions rarely enter into the issue of causation when it comes to assessing liability; as already implied by the operative words of the statute (*occidere*, *urere*, *frangere*, [*cor*] *rumpere*), the causal link between the wrongdoer's conduct and the harm caused is tacitly assumed and, indeed, usually unproblematic.[24]

The notion of adequacy, although already developed in the writings of Aristoteles,[25] **7**
plays a relatively minor role in limiting liability under Roman law: a wrongdoer is held liable also for outcomes which, under modern law, might be considered inadequate, such as when a sickly slave dies from a light blow that would not have been lethal to another man.[26] Not infrequently, however, the concept of foreseeability is invoked to limit

17 Cf *Gaius*, Inst 4,112; *Ulpian*, D 9,2,23,8; *Gaius*, D 50,17,111,1; Inst 4,3,9; Inst 4,12,1.

18 *N Jansen*, Die Struktur des Haftungsrechts (2003) 242; *T Finkenauer*, Pönale Elemente in der lex Aquilia, in: R Gamauf (ed), Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart (2017) 49ff.

19 Eg *Labeo* and *Proculus* in: Ulpian, D 9,2,29,3, who decide that the liability of someone who has damaged fishing nets does not extend to the loss of the future catch forestalled by the damage.

20 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1019ff.

21 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1022ff; *N Jansen*, Die Struktur des Haftungsrechts (2003) 274ff.

22 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1035ff.

23 *B Winiger*, Verantwortung, Reversibilität und Verschulden (2013) 72.

24 *D Nörr*, Causa mortis (1986) 135; *B Winiger*, La responsabilité aquilienne romaine (1997) 55ff; *B Winiger*, Verantwortung, Reversibilität und Verschulden (2013) 61; *N Jansen*, Die Struktur des Haftungsrechts (2003) 218.

25 *B Winiger*, La responsabilité aquilienne en droit commun (2002) 74f; *B Winiger*, Verantwortung, Reversibilität und Verschulden (2013) 62.

26 *Labeo*, D 9,2,7,5: '... for different things are lethal to different people.' In German and Austrian tort law, wrongdoers have to take their victims 'as they find them'; limitations of liability are discussed only in extreme cases of 'particular susceptibility to damage' (cf eg *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 ABGB no 8; *G Schiemann* in: Staudinger [2017]

liability because it precludes *culpa*: in several cases, a wrongdoer is not held to be at fault if he could not have anticipated the harmful outcome of his actions; hence, lawful conduct only entails the taking into account of harmful outcomes that the wrongdoer could reasonably have foreseen.[27]

8 Given that Classical Roman law did not initially recognise a general provision concerning liability for wrongful damage, the concept of the 'protective purpose of the relevant conduct norm' does not, as such, play a role in assessing delictual liability: as far as the *lex Aquilia* itself is the relevant conduct norm, its breach inevitably entails the wrongdoer's liability; the same applies to other statutory delicts and the praetorian quasi-delicts.

9 Where the harm caused by the wrongdoer is exacerbated by the intervention of another – be it a third party or the injured party himself – or by chance, or where the causal chain is altered significantly by a *novus actus interveniens*, the wrongdoer is only held liable for those harmful consequences which can without doubt be directly attributed to him: if a slave is mortally wounded, but is killed by another before he dies of the wound, a number of Roman jurists hold that the first attacker is liable for wounding only;[28] likewise, if a wounded slave dies of neglect, the wrongdoer is held liable only for wounding, but not for killing the slave.[29] Even where a mortal wound has been inflicted, but the injured slave afterwards dies from accidental causes, the assailant is held liable for wounding only, since it is impossible to determine whether the original wound would, in fact, have been lethal.[30]

10 The Roman law of delict does not recognise the concept of a statutory reduction of liability in the modern sense; under certain exceptional circumstances it does, however, limit the amount of damages payable to the injured party. One such form of reduction of liability that is unique to Roman delict law is the concept of *noxae deditio*, which goes back to the Twelve Tables: under Roman law, a man was liable also for damage caused by his dependents (slaves, sons or daughters under his *patria potestas*). However, the owner of a slave or father of a son or a daughter in power who had caused wrongful damage had the choice between paying damages or surrendering the culprit to the injured party. Hence, the possibility of noxal surrender – which was open only in cases in which the *paterfamilias* had neither ordered the commission of the wrongful act nor had known of it and failed to prevent it if it was in his power to do so – safeguarded the blameless owner from having to pay more than the slave was worth.[31] Along somewhat

§ 249 BGB no 32); a similar principle underlies the 'eggshell-skull rule' in common law (cf eg *WL Prosser et al* (eds), Prosser and Keeton on Torts [5th edn 1984] 292).

27 See especially *Paulus*, D 9,2,31 and *Ulpian*, D 9,2,11 pr (below at 2/1 no 1).

28 *Ulpian*, D 9,2,11,3; *Julian*, D 9,2,51 pr; cf *N Jansen*, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 479 ff, 505 ff.

29 *Paulus*, D 9,2,30,4; cf also *Alfenus*, D 9,2,52 pr.

30 *Ulpian*, D 9,2,15,1.

31 *Ulpian*, D 9,4,2; cf also *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 41; *B Winiger*, Verantwortung, Reversibilität und Verschulden (2013) 67.

similar lines, the blameless owner of an animal which had caused harm to another person could free himself of the obligation to pay damages under an *actio de pauperie* by surrendering the animal to the injured party.[32]

2. Germany

In German law, a number of legal features can limit an otherwise actually established liability. Besides contributory negligence, which is not subject of this report, the concept of causation is one of the elements that lead to a limitation of liability as compared to the results achieved by a pure *conditio sine qua non* concept. Other such limiting legal institutes are, for instance, maximum amounts (caps) and the adjustment of benefits (*Vorteilsausgleichung*). However, causation is probably the tool most often applied and the most effective instrument to limit liability or, better, to hold liability within adequate borders. **1**

Concerning causation, the courts sometimes refer to 'natural causation' (*Ursachenzusammenhang im natürlichen Sinn*).[1] But they do not use the term as a strict contrast to 'legal causation'. Generally, there are three steps to examine causation: the *conditio sine qua non* test, the adequacy of the causal link and, in situations of difficult causal connections, the application of – further – evaluative considerations (*wertende Überlegungen*). **2**

The *conditio sine qua non* test is the necessary starting point for establishing causation. The test is fulfilled if the result would be different were the condition not present (often phrased 'if the condition is thought away').[2] But this so-called *Äquivalenztheorie* (theory of equivalance, all conditions are equivalent) functions only as a first rough filter. It is not regarded sufficient because it covers far too many conditions. The courts therefore generally apply the *Adäquanztheorie* (theory of adequacy) to filter out inadequate causal connections.[3] **3**

According to this theory, 'a condition is adequate if the event is able in general and not only under particularly peculiar, improbable circumstances which in the ordinary course of events can be disregarded to bring about a result of the kind in question.'[4] The adequacy judgement entails the normative judgement that it is not very unlikely and **4**

32 *Ulpian*, D 9,1,1.

1 See, eg, BGHZ 96, 157 (below 5/2 fn 6).

2 See, eg, BGH NJW 2017, 263 no 14 "Der erforderliche Kausalzusammenhang zwischen Unfallereignis und Gesundheitsbeeinträchtigung besteht nach der Äquivalenztheorie, wenn der Unfall im Sinne einer conditio sine qua non nicht hinweggedacht werden kann, ohne dass der Gesundheitsschaden entfiele." ('According to the theory of equivalence, the necessary causal connection between accident and injury to health is present if the accident, in the sense of a *conditio sine qua non*, cannot be thought away without the injury to health ceasing to exist.')

3 BGHZ 7, 198 (204); BGH NJW 2018, 944 no 16.

4 Continuous jurisprudence, most recently BGH NJW 2018, 944 no 16 (my translation).

unusual that a certain result was the consequence of a certain event. The probability of the result is the yardstick for adequate causation. A result, in particular damage, is probable if an optimal observer (with a broad knowledge and high degree of caution and foresight), in the shoes of the concrete author and from an ex-ante perspective, would have regarded it as not unlikely.[5] Thus, with probability also the foreseeability of the damage is essential. Legal literature has often raised the criticism that the adequacy test is not an effective filter because an optimal observer foresees almost every kind of damage.[6]

5 Therefore, in cases of difficult chains of causes, the courts take redress to further evaluative considerations (*wertende Überlegungen*). These are embodied in legal policies which, in particular, include the protective purpose of the violated norm (*Schutzzweck der Norm*) as well as the *Zurechnungszusammenhang* (the necessary attribution of the damage to the violating conduct).

6 The protective purpose doctrine applies to all kinds of norms and duties including strict liability statutes. It requires that the violated norm aims at the protection of the class of individuals to which the claimant must belong, that the norm intends the protection of the infringed right or position and that the norm aims to shield against the specific form of violation that occurred.[7] Thus, in most cases, the protective purpose doctrine performs a function that limits liability. However, in rare cases, the *Schutzzweck* can also lead to an extension of liability as compared to the result that the adequacy test would achieve.[8]

7 The *Zurechnungszusammenhang* means the following: 'The damage claimed must have an internal connection with the hazardous situation created by the tortfeasor. An "external", so to speak "accidental" connection is not sufficient. In this respect, evaluative considerations are necessary.' ('Der geltend gemachte Schaden muss in einem inneren Zusammenhang mit der durch den Schädiger geschaffenen Gefahrenlage stehen. Ein "äußerlicher", gleichsam "zufälliger" Zusammenhang genügt dagegen nicht. Insoweit ist eine wertende Betrachtung geboten').[9] The element of 'Zurechnungszusammenhang' can become particularly difficult where the conduct of a third party contributed to the damage. The author of the original act remains liable for the whole damage if his or her act created a specific danger that invited or significantly facilitated the interference by the third party. If the victim him- or herself contributed to the own damage, the situa-

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5 See, eg, BGHZ 3, 261 (266 f); BGH VersR 1972, 67 (69).

6 See, eg, *H Kötz*/*G Wagner*, Deliktsrecht (13th edn 2016) no 191ff.

7 See below 3/2 no 1ff.

8 See, eg, BGH NJW 2020, 387 no 28; *G Schiemann* in: J von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (2017) § 249 no 27f.

9 BGH NJW 2018, 944 no 20 with reference to many prior decisions of the Court to the same avail. The Federal Court regards the 'Zurechnungszusammenhang' as an element on the same level as, but separate from, adequacy (no 15 of the decision). In legal literature, some use 'Zurechnungszusammenhang', however, as synonymous with causation; see, eg, *Grüneberg* in: Palandt, BGB (80th edn 2021) Vor § 249 no 24.

tion is different. Generally, the victim's claim will be reduced then for contributory negligence. However exceptionally, the bond of causation is severed if the victim acted in an entirely unusual and unreasonable way.

A further means of limiting liability via causation is the institute of lawful alternative conduct. If the wrongdoer could have caused the same damage as happened in a justified lawful way, the courts will deny liability if the purpose of the violated norm does not contradict such a solution. **8**

Contrary to some other legal systems, German law does not contain a reduction clause. The aim of the law of damages is to compensate the victim for the total loss, irrespective of whether the author of the damage acted with intent, gross or slight negligence. **9**

For most strict liabilities, German law provides for maximum caps, generally for death and bodily injury up to € 5,000,000 and up to € 1,000,000 for property damage.[10] The caps shall balance the benefit for victims that the liability does not require proof of fault. **10**

The most relevant instrument to limit liability is the network of rules concerning causation: the adequacy test, the protective purpose of the violated norm, the *Zurechnungszusammenhang*, and evaluative considerations. The courts and in particular the *Bundesgerichtshof* use these different elements in a rather flexible way. Theoretically, liability is merely established if, first, the adequacy test is passed; if, second, the protective purpose of the violated norm or duty covers the damage; if, third, the 'Zurechnungszusammenhang' is positively established and; if, fourth, evaluative considerations militate for liability. In practice, it is rare that a court strictly follows this sequence. Instead, the court's reasoning generally addresses directly the causal 'problem' of the case, be that the purpose of the norm, the 'Zurechnungszusammenhang' or evaluative considerations. **11**

3. Austria

Austrian literature and case law recognises that a comprehensive duty to compensate all damage for which a tortfeasor's unlawful and faulty behaviour was a *conditio sine qua non* would lead to an inequitable and unreasonably boundless liability. Therefore, although the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) does not explicitly provide for such tools, in order to limit the responsibility of the liable party appropriately, value judgements are made in addition to the examination of the causal link.[1] This limitation of liability takes place via the tools of adequacy, protective purpose **1**

10 Eg, § 12 (1) Straßenverkehrsgesetz (Road Traffic Act, StVG) although with higher sums for accidents by fully or highly automated cars and in the case of professional transport of passengers.

1 See *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/1ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 6ff; in contrast *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2004) § 1295 nos 6, 13.

of the rule, lawful alternative conduct and intervening wilful act by a third party or the victim himself or herself.

2 In connection with these tools serving to limit liability, reference is sometimes made to a 'break in the causal chain' (*Unterbrechung des Kausalzusammenhanges*). However, this is not a persuasive metaphor. In the cases in question, the causal link established via the *conditio sine qua non* test (but-for test) must certainly still be affirmed where the conduct of one person constitutes a condition for another party's suffering damage. In truth, the question here is not one of causality but, as already stressed, of limiting liability for causally-related consequences on the basis of value judgements.[2]

3 A first, though coarse filter serving to limit liability for damage, which was caused by the conduct of a tortfeasor, is the adequacy theory (*Adäquanz-* or *Adäquitätstheorie*). According to this theory, liability is excluded for damage that was caused in the sense of the *conditio sine qua non* test (but-for test) but which is only the result of a purely exceptional concatenation of events.[3] Thus, the theory of adequacy precludes liability for atypical damage, which could only have arisen due to a coincidental, objectively unforeseeable combination of circumstances.[4] The criterion of adequacy constitutes a flexible limitation of liability according to the circumstances of the case.[5] Overall, however, it should be emphasised that, in practice, adequacy is rarely denied by Austrian courts.[6]

4 Alongside adequacy, limitation of liability is carried out via the theory of the purpose of the rule (*Schutzzweck* or *Normzweck*) on which liability is based. This is a result of the general rule of interpreting the law according to its purpose (*teleologische Interpretation*).[7] In tort law, the purpose of the rule is significant as regards different scopes of protection. In particular, it has to be taken into account if the infringed rule aims specifically at the protection of the victim, and if it covers the type of damage sustained.[8] The purpose of the rule is of utmost importance in the context of infringements of protective rules (*Schutzgesetze*), which can be defined as rules that require or forbid certain conduct in order to prevent damage.[9] However, the purpose of the rule is equally signif-

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2 Eg *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/6.

3 Cf *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 7.

4 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/7 with further references.

5 Eg *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/23 ff; see closer below under 2/3 no 10.

6 An example for a case in which adequacy was denied is OGH 1 Ob 247/61 in JBl 1962, 151; see below 2/3 no 1 ff.

7 *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 347 ff.

8 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/18; see in detail below 3/3 no 9.

9 Eg *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/33 ff with manifold further references.

icant in other cases of fault-based liability, ie in cases of breach of contract.[10] Furthermore, it is also applicable in the other areas of the law of damages, eg in the field of strict liability (risk-based liability, *Gefährdungshaftung*). Here, the question is whether, in a certain accident, precisely those risks, which were the reason for introducing a certain strict liability, materialised.[11] Indirect damage (*mittelbare Schäden*), which lies beyond the protective purpose of the rule on which liability is based, is not to be recovered.[12]

The adequacy theory and the protective purpose theory have to be applied side by side as they seek to apply limitations from different standpoints. The adequacy theory examines whether a specific behaviour appears to present a risk in relation to a certain damage in the eyes of an objective observer *ex ante*. The protective purpose of the rule theory, on the other hand, starts by asking what damage a particular behavioural rule reasonably tries to prevent. The dangerousness of conduct is thus subject in one case to a specific and in the other case to a general, abstract assessment.[13] **5**

The defence of possible lawful alternative behaviour (*rechtmäßiges Alternativverhalten*), which occurs when the damage caused by a wrongful act would also have been caused otherwise by lawful conduct, basically leads to a full exemption from liability.[14] As the causal link according to the *conditio sine qua non* theory (but-for test) must be affirmed in those cases, this is not seen as a question of causation, but, as already stressed, as a question of limitation of liability through value judgements. In exceptional cases, the defence of lawful alternative behaviour is not recognised when the violated behavioural rule is not directed so much at preventing the damage but rather aims at ensuring a procedure featuring specific security guarantees, especially in the context of deprivation of liberty.[15] **6**

When the consequences of damage are based on an independent decision on the part of the victim himself or herself or a third party, which was not provoked by the process providing a basis for liability (intervening wilful act, *Dazwischentreten einer fremden Willensbetätigung*), liability can be precluded as a result of a comprehensive evaluation of interests.[16] **7**

Austrian tort law does not provide for an express stipulation regarding a reduction of duties to compensate damage. However, notable authors have stressed that, in extreme cases, a reduction of damages can take place for constitutional reasons under the **8**

10 Fundamentally *E Rabel*, Das Recht des Warenkaufes I (1936) 496 ff; see in detail below 3/3 no 13.

11 Eg *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/29, 93 f.

12 Eg *KH Danzl*, Mittelbare Schäden im Schadenersatzrecht, ZVR 2002, 363; OGH 12.6.2003, 2 Ob 110/03w, where the road block due to an accident resulted in an absence of customers in a restaurant.

13 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/16.

14 OGH 11.2.1999, 2 Ob 20/99a; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 399 ff.

15 Eg OGH 1 Ob 35/80 in SZ 54/108 (deprivation of liberty without court authorisation); *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2004) § 1295 no 1b.

16 *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/99; eg OGH 2 Ob 155/97a in JBl 1999, 533.

title of the constitutional prohibition of excessiveness (*verfassungsrechtliches Übermaßverbot*).[17] Others have endorsed the implementation of an express tool providing a basis for a reduction of duties to compensate damage in exceptional cases.[18]

4. Switzerland

1 In the Swiss legal system, as in all codified legal systems, one can roughly distinguish two legal sources delimiting the scope of tort law. On the one hand, legislation, above all, the general provisions in the Swiss Code of Obligations adopted in 1911 (SCO) and selectively revised since, and, on the other hand, jurisprudence and doctrine.

2 **Legislation.** According to legal tradition in the late 19th century, only a minority of legal terms are defined in the SCO, leaving to the judge a large margin of appreciation to determine the scope of key concepts such as damage, damaging act, causation, unlawfulness and fault. The cornerstone of Swiss tort law is the general provision of liability defined in art 41 SCO. This norm stipulates, in a very broad manner, that any person who unlawfully causes damage to another, whether wilfully or negligently, has to repair it. The subsequent provisions in the SCO (arts 42–61) and approximately 50 *leges speciales* (Railway Act, Nuclear Power Act, etc) provide more information about the scope of tort law.

3 **Jurisprudence and doctrine.** They define more precisely all the key concepts of tort law, regulating thus its scope. However, these concepts are generally tightly intertwined and difficult to analyse individually. Pierre Widmer asserted that tort law is like a fondue where each piece of bread you take out of the caquelon is tied to the rest of the cheese by numerous filaments.

4 It must be added that, in Swiss law, the extension of liability is regulated to a large extent by a more or less wide definition of the five general conditions of liability (damage, damaging fact, causation, unlawfulness and fault). The narrower the definition of these concepts, the narrower liability will be.

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17 *F Bydlinski*, System und Prinzipien des Privatrechts (1996) 225ff; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/4/9ff.

18 Eg *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 8/24ff; also, the draft proposal submitted by the working group set up by the Federal Ministry of Justice for a new Austrian law of damages includes a reduction clause in its § 1318: 'In exceptional circumstances, damages can be reduced if they would be an unreasonable and oppressive burden for the tortfeasor and a merely partial compensation would be reasonable to the victim. The weight of the grounds for imputation, the economic circumstances of the victim as well as those of the tortfeasor and the benefits gained by the latter are to be taken into consideration'; see *E Karner* in: I Griss/G Kathrein/H Koziol, Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 91f.

Swiss judges emphasise the notion of adequate causation[1] primarily as a means to reasonably confine tort law.[2] Adequacy is defined as the causal outcome one can expect 'according to the ordinary course of things and the general experience of life'. This definition refers to causation, but also to the concept of predictability and reasonable foreseeability of the damage. As predictability has been closely linked to fault since Roman times, adequacy and fault are undeniably two central concepts applied to limit – or extend – liability. However, conceptually they have to be distinguished and their functions in tort law are different. 5

Another notion regulating the extension of liability is unlawfulness[3] (for limitations by unlawfulness and fault see Digest 3 on misconduct), notably through the theory of the protective purpose of the norm, which is at least partially based on unlawfulness. If a norm which does not protect the victim is violated, the act in itself is considered unlawful, but this unlawfulness will be irrelevant for the victim claiming damages. Furthermore, the distinction between direct and indirect victims, which plays an important role in Swiss tort law, can only be determined using the notions of unlawfulness and causation. If damage is considered indirect, the judge tends to admit that it was not unlawful with respect to the victim except if one of his or her absolute rights has been violated. 6

The theory of lawful alternative conduct refers firstly to causation and secondly to unlawfulness. The main purpose is to verify whether the damage would also have occurred had the author acted lawfully. If the answer is in the affirmative, the author is not liable because there would be no causal link between the act and the damage. Technically, what is sought is to deny the natural causation (*conditio sine qua non* test). 7

As we have seen in Digest 2, the notion of damage[4] can be an additional means to limit liability. One of the hot topics is pure economic loss, which only requires reparation if a specific norm protects the victim (eg provisions of the Unfair Competition Act, LCD). The reason for this is that our liberal legal systems admit that, in principle, one party can inflict economic damage on another, for example in a commercial struggle between competing parties. In general, the Swiss Supreme Court is very reluctant to protect pure economic loss. Also loss of a chance (an opportunity) is extensively discussed. Contrary to the opinion of numerous scholars, our Federal Court still denies this as reparable damage. 8

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1 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 120 ff, 144 ff; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 421 ff, at 149 ff.

2 ATF 142 III 433, 438 c 4.5 (2016); TF 6S. 155/2003 19 August 2003.

3 ATF 133 III 323, 333 c 5.2.3. *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 32 ff, 28 ff; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 273 ff, at 100 ff.

4 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 66 ff, at 61 ff.

9 It is particularly interesting that subjective factors such as the personal, or financial situation of the tortfeasor, can limit liability. According to the reduction clause of art 44 SCO, the judge may reduce damages if the payment of such compensation would leave the author of the damage in a situation of (economic) distress or financial hardship. In practice, judges use this clause with caution.

10 A specific mechanism to limit liability appears in art 43 SCO.[5] In this article, damages are fixed according to the gravity of the fault. Even if today this is a *lettre morte*, because judges order full compensation for any degree of fault, historically, the legislator adopted the principle that the author of the damage had to repair damage only proportionally to the degree of his fault. This provision, which is clearly in favour of the author, is no longer applied because, in our contemporary view, it is too disadvantageous to the victim.

5. Greece

1 According to the provision of art 914 of the Greek Civil Code (GCC) on tort, a person who unlawfully and culpably caused prejudice to another shall be liable for damages. Said damages should be, according to art 297 GCC, in money and should cover the positive damage, that is the reduction of the existing estate of the person who sustained the damage, as well as negative damage or loss of profit. According to the explicit provision of art 298 sent 2 GCC, that which can be expected as a probable profit in the usual course of events or by reference to the special circumstances, and particularly to the preparatory measures taken, is presumed as loss of profit. From the above provisions, it derives that: (a) damage and (b) a legal ground for the tortfeasor's liability are among the fundamental presuppositions required for damages to be paid.

2 It is accepted, however, in the Greek literature and case law that the existence of a legal ground does not cover all damage possibly caused, ie even the most irrelevant harm. Only damage that is the consequence of the legally recognised ground for liability can and should be compensated. This means that, between the damage and the legal ground for liability, a causal link should exist, which constitutes the third independent condition necessary for the obligation to pay damages to exist and hence a limitation on recovery. As regards the definition of the exact meaning of the causal relationship, the *conditio sine qua non* theory has long been abandoned in Greece regarding civil liability,[1] because it was considered to lead to harsh solutions for the tortfeasor.

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5 Art 43 para 1 SCO – The court determines the form and extent of the compensation provided for damage which was incurred, with due regard to the circumstances and the degree of culpability.

1 See *M Stathopoulos*, Law of Obligations-General Part (5th edn 2018) § 8 IV 3 no 121; *A Georgiades*, Law of Obligations, General Part (2nd edn 2015) § 10 no 28. The only value recognised in the *conditio sine qua non* theory is restricted to considering the but-for test as a logically necessary element for the establishment

The answer to the question when a causal relationship exists is sought on the basis of the theory of adequate causation (*causa adequata*)[2] and on the basis of the theory of the protective scope of the rule of law (*Schutzzwecklehre*). The latter tends to prevail and restricts even more, in comparison to the theory of adequate causation, the extended recognition of the obligation to pay damages. The core of the theory of the scope of the rule of law is that any obligation imposed by law (in the framework of either contractual or extra-contractual liability) has as its aim the protection of certain interests. Only if the damage is caused to such protected interests is it then attributable to the person that caused it. The answer to the question as to which are the interests aimed to be protected can be found by interpreting the spirit and the scope of the rule of the particular law. **3**

To the question whether the loss caused by the misconduct of a tortfeasor would still have been caused if that tortfeasor had acted properly (*rechtmäßiges Alternativverhalten*), the answer depends on the existence of a causal link in the particular case. If the necessary causal link does not exist between the unlawful and culpable act and the damage, ie if the damage would also have occurred if the behaviour had been lawful, then no liability is established.[3] **4**

The liability of the primary tortfeasor is not limited if there is intervention of conduct of a third party. The causal link is not excluded if a third party's misconduct contributed to the loss suffered or to its extent. Only if the intervention of the third person is due to very exceptional and unforeseeable incidents can the causal link be considered as interrupted and the tortfeasor may avoid liability.[4] **5**

The Greek legal system does not provide a special liability reduction clause to prevent liability reaching an extent which would deprive the tortfeasor of his essential means. **6**

There is no provision in the GCC on liability caps. Liability caps are only found in special pieces of legislation, usually ratifying international conventions, such as the 1969 Brussels Convention for Oil Pollution Damage, that provide for risk liability. **7**

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of liability and using it as a starting point when analysing the causal link (*Stathopoulos* [supra] § 8 IV 3 no 123; *Georgiades*, supra). Contrary to the civil law, the *conditio sine qua non* theory is the prevailing theory in Greek penal law, where penal liability is restricted through the requisite of fault (*Stathopoulos* [supra] § 8 IV 3 no 121 fn 182).

2 See below 2/5 no 7.

3 See *K Karagiannis*, Bending of the Principle 'All or Nothing' in Cases of Lawful Alternative Conduct, in: M Stathopoulos, Honourary Vol I (2010) 847 ff = TPCL 4, 594 ff, under II, with reference to AP 1063/1990 NoV 39, 1383; 619/2000 Ell Dni 42, 74; 122/2006 NoV 54, 2013; Thessaloniki Court of Appeal 2384/2005, published in NOMOS. See also *M Stathopoulos*, Law of Obligations – General Part (5th edn 2018) § 8 IV 6 no 142–143α.

4 See AP 979/1992 Ell Dni 35, 1044; *P Kornilakis*, Law of Obligations, Special Part I, § 89 8I 1I, at 523.

6. France

1 In 1996, Geneviève Viney, France's leading expert on tort law, wrote in the first volume of the book series on the Principles of European Tort Law that 'the limits of liability and compensation has not so far been a major concern neither for legal doctrine, nor for the Courts and the legislator'.[1] Almost 25 years on, this assertion is still true, especially in the field of personal injury. Over the last three decades, a wide range of alternative compensation schemes has been enacted to complete the traditional tort law system, strengthening even further the victim-centred approach of French tort law.

2 When a French tort lawyer is asked about legal instruments which are likely to limit the scope of civil liability, he or she will probably reply that causation (*causalité*) is the most adequate tool for this purpose. Whereas legal literature refers to the two main causation 'doctrines', the *sine qua non test*, also known as the equivalence doctrine (*théorie de l'équivalence des conditions*), and the adequacy test (*théorie de la causalité adéquate*), the courts do not specifically acknowledge or uphold either approach. French judges regard the issue of causation more as an adjustment variable, which makes it difficult to identify an underlying rationale or a common thread in case law. In particular, no distinction is made between natural and legal causation. This grants French judges great discretion to use *causalité* as a way to dismiss compensation claims that are, socially or economically, undesirable.

3 The French Civil Code has established the requirement of foreseeability (*imprévisibilité*) only for cases in the field of contractual liability.[2] The assessment of contractual damages requires taking into account exemption or limitation clauses, and more generally the expectations of the contracting parties. Yet, even though there is a tendency in recent case law to reaffirm this limitation in contractual cases, it is still rarely used before courts as a defence, leading some authors to remark on its 'quasi-obsolescence'. Moreover, legal writers tend to see the foreseeability of contractual harm as a requirement of contractual liability rather than a limitation.

4 Other limitation techniques, widely discussed in other jurisdictions, are unknown to French tort law and are at best mentioned in academic literature. This is true in particular of the 'protective purpose of the relevant conduct norm', well known to German tort lawyers, but almost completely absent from both legislation and case law in France. The same applies to the doctrine of 'sufficient connection to target risk' (*Gefahrenzusammenhang*) and to the figure of alternative lawful conduct, which could have provided a counterweight to the extensive approach to civil liability under French law. Due to the near universal liability insurance coverage for individuals, there is also no specific liability

1 *G Viney*, Modération et limitation des responsabilités et des indemnisations, in: J Spier (ed), The Limits of Liability. Keeping the Floodgates Shut (1996).

2 Art 1231-3 Civil Code provides that 'a debtor is liable only for damage which was foreseen or which could have been foreseen at the time of the contract'.

reduction clause which would allow courts to prevent excessive compensation duties on the grounds of equity.

Unlike the victim's misconduct, the act of a third person (*novus actus interveniens*) is not per se a defence for the tortfeasor, unless it amounts to force majeure. As for cases where the injured party contributed to the loss suffered by him or caused an additional loss, there is an ongoing debate, distinct from the issue of defences, on whether a duty to mitigate one's losses should be implemented in French tort law. 5

French law ignores reduction clauses, whereby the tortfeasor's personal situation could limit his liability. There is also no tradition of liability caps or thresholds, except for those arising from international or European legislation, especially in the field of transportation law and defective products. Unlike in other jurisdictions, the development of strict liability has not prompted the idea that, for the sake of insurability, there should be limitations on damages. However, the French legislator has enacted statutory liability exclusions for ethical reasons in medical law. The 2002 Patients' Rights Act prohibits claims on the sole basis of being born, allowing tort law-based compensation only where the child's handicap has been directly caused by a medical fault. The expenses connected to the child's disability are otherwise to be met by the state according to the principle of 'national solidarity' (*solidarité nationale*). 6

7. Belgium

In the continuation of the reform of the Belgian Civil Code[1] the extra-contractual liability regime has just been completely reformed. The Bill creating Book 6 of the new Civil Code dedicated to this matter was adopted on 7 February 2024 (MB, 1 July 2024). This Book comes in addition to Book 3 on property law, Book 5 on contract law and Book 8 on evidence law. Once its entry into force on 1 January 2025, arts 1382 to 1386bis of the old Civil Code will be replaced by 55 new articles. On the one hand, Book 6 consolidates existing case law. On the other hand, Book 6 includes some major innovations. 1

Previously, Belgian tort law was characterised by a fault-based liability contained in a few concise legal provisions (arts 1382 and 1383 of the old Civil Code). These legal provi- 2

1 The bill creating a new Civil Code came into force on 1 November 2020 (Loi du 13 avril 2019 portant création d'un Code civil et y insérant un livre 8 'La prevue', MB, 14 May 2019, 46353). Since then, the Civil Code of 1804 has been known as the 'old Civil Code'. The new Civil Code will ultimately be composed of ten books. Originally, tort law was supposed to be included in Book 5 dedicated to the law of obligations in general. It was extracted from it for clarity and political reasons and is now the subject of an entire separate book: Book 6 on extra-contractual liability. The Bill adopted on 7 February 2024 creating Book 6 of the new Civil Code dedicated to extra-contractual liability will enter into force on 1 January 2025. Regarding transitional provisions, the first paragraph of art 44 states that provisions of Book 6 will apply to harmful events which occur after the entry into force of the Law. The second paragraph specifies that it will not apply to future effects of facts which occurred before the entry into force of the Law.

sions did not define any of the required elements for someone to be held liable. Consequently, they also did not define any limits to liability – at least not explicitly. Provided that a fault is the cause of damage, the tortfeasor will have to provide full compensation for the damage. Eventually, the famous formula of art 1382 of the Civil Code dated from 1804 could be redrafted in the following way: any person who has committed any *fault* that has *caused* any *damage* is liable to fully repair the actual damage. Subject to the establishment of these three key elements, Belgian law does not allow the scope of extra-contractual liability to be easily limited, except when interpreting the fundamental concepts of such liability.

3 Belgian law does not know the instruments used by foreign laws to limit the multiplication of claims for compensation. Indeed, art 1382 makes no distinction according to whether the harmful act consists of an action or an omission; it does not define the interests that deserve protection; it does not require the prior verification of a 'duty of care' from the author of the damage, nor does it enshrine the theory of Aquilian relativity. Nor is art 1382 more restrictive regarding certain types of harm, such as consequential losses, pure economic and financial loss or moral damage. In a way, everything in the Belgian tort law system is conducive to expansion rather than limitation of liability.

4 However, it would be wrong to believe that Belgian law does not place any limits on the tortfeasor's obligation to repair the caused damage. There are limits, but these can only be identified by extensively examining the case law, in particular that of the Belgian Supreme Court.

5 When discussing fault, the condition of foreseeability of the damage makes it possible in some cases to rule out liability when the damage appears too remote from the harmful event. In art 6.6, § 2, 1°, of the new Civil Code, 'foreseeability' officially becomes one criterion among others to assess the material element of the tortfeasor's fault in the absence of a breach of an expressly formulated standard. Furthermore, when the fault results in the violation of a legal standard which imposes particular behaviour, some courts – in order to prevent a claim for damages – exceptionally refer to the protective purpose of the rule or to the persons whom the law intends to protect.

6 Then, when analysing causation, judges, under cover of an application of the theory of equivalence of conditions, use subtle means to justify the non-existence of a causal link, whereas a rigorous application of the 'but-for' test should, in principle, lead to the conclusion that causality is established. The concept of 'foreseeability' may then intervene at this level again: only causes having an objective probability of causing the prejudicial result, in the normal course of events, are considered to be causally linked. In the future, art 6.18, § 2 of the new Civil Code will expressly allow the judge to take into account 'the unforeseeable nature of the damage in the light of the normal consequences of the misconduct and the circumstance that this fact did not contribute significantly to the occurence of the damage'. The application of the lawful alternative conduct, the use of the *fraus omnia corrumpit* principle or the division of a complex accident into several successive sequences are also used to correct the unfairness of an overly mechanical application of the *conditio sine qua non* theory.

A similar tendency to limit liability can sometimes be seen when it comes to defining the damage and its extent. Although the damage caused by ricochet is in principle reparable like any other damage, the case law from the Supreme Court shows a certain attempt to prevent recourse actions being brought by a third-party payer to obtain reimbursement of all financial benefits paid in the event of an accident. Judges limit the employer's claim for damages to the gross salary paid to the victim, refusing the other disbursements, ie pensions of any kind, since it constitutes no consideration for the workforce lost because of the accident. This case law also reflects the desire to avoid excessive compensation. **7**

Of course, under Belgian law, the wrongful conduct of the victim may be invoked by the tortfeasor in order to hold the former partially liable too. Alternatively, non-wrongful conduct cannot lead to such result. Therefore, the victim's acceptance of risk is not as such a means of exoneration for the tortfeasor: it can be invoked against the victim only if he or she is at fault, which can be considered as amounting to contributory negligence. Moreover, in contrast to some foreign laws, the victim does not have an obligation to mitigate his or her damage in the interest of the liable tortfeasor, but he or she should nevertheless behave as a prudent and reasonable person would in similar circumstances. **8**

Limits therefore exist but they ultimately depend on the interpretation of the conditions of liability by the courts and it is then up to the doctrine to try to identify, categorise and clarify them. **9**

In Book 6 of the new Belgian Civil Code, the number of articles devoted to extra-contractual civil liability will be increased from 6 to 55 (arts 6.1 to 6.55). The aim of the reform is to ensure that the legal provisions are more accessible and reflect the case law more accurately. Contrary to the old Civil Code, the new Book 6 lists events which give rise to extra-contractual liability and gives a clear definition of the key elements of extra-contractual liability and its consequences. According to art 6.6, misconduct is understood as a 'failure to comply with a legal rule imposing or prohibiting a specific behaviour or from the general duty of care that should be observed in social relations'. Damage is then presented in art 6.24 as 'the economic or non-economic consequences of an infringement of a personal legally protected interest'. Finally, a harmful event is in a causal link with the damage if it is a *conditio sine qua non* of the latter, ie 'if, without this fact, the damage would not have occurred as it did in the particular circumstances present at the time of a harmful event' (art 6.18, § 1). Regarding fault, the new provisions stay aligned with the spirit of the Napoleonic Civil Code. However, regarding causation and damage, some new limits are henceforth introduced. Various legal provisions will then provide a framework for the judge's decision and give him or her some leeway to limit cases of liability: art 6.6, § 2 (criteria for assessing the misconduct), arts 6.7 and 6.8 (grounds for exemption from liability: force majeure, *erreur invincible*, state of emergency, self-defence, consent of the injured person), art 6.18, § 2 (remoteness of damage) and art 6.20 (victim's misconduct). **10**

8. The Netherlands

1 Under Dutch law, three types of limitation of liability can be distinguished. First, art 6:163 BW limits liability by addressing the scope of protection of norms (*relativiteit*). Second, art 6:98 BW provides a tool to limit the liability for a, due to the application of the but-for test, possibly lengthy causal chain. Third, several specific provisions on damages may limit liability: art 6:100 BW (collateral benefits), art 6:101 BW (contributory negligence), art 6:106 BW (non-pecuniary loss: compensation limited to categories mentioned by statute), arts 6:107, 107a, 108 BW (allowing and limiting compensation to third parties suffering losses as a result of personal injury or death), art 6:109 BW (mitigation of damages) and art 6:110 BW (limitation of damages). Except for transport law, Dutch law does not apply general liability caps.

2 From a systematic point of view, the scope of the norm should first be addressed. Article 6:163 states: 'No obligation to compensation exists when the violated norm does not extend to protect against the damage as suffered by the harmed.' According to the parliamentary explanation, this article contains three elements in relation to scope: the damage, the harmed person and the manner in which the harm was inflicted.[1] This means that either the type of harm, the person or the manner of infliction may not be protected by a certain norm. It is also possible that a norm does not extend to protect a combination or all of these factors. According to case law, the scope of protection of a norm depends upon the purpose and scope of the rule on the basis of which it must be examined to which persons, types of damage and manners of infliction the norm reaches.[2] As the parliamentary history of a norm does not provide specific information on the scope of protection that may be upheld in private law liability cases in many cases, the judge will at this point often have to make policy decisions. Article 6:162 BW (general provision on unlawful behaviour) recognises in sec 2 three categories of fault: violation of a right, an act or omission in violation of a duty imposed by law, or an act contrary to unwritten law. The issue of the scope of protection plays a different role in the various categories. The holder of a right that is violated will typically be the person protected. In the case of violation of a duty imposed by law, the issue of the scope of protection in practice plays the most important role. In the case of a violation of unwritten duties, it is held that these duties only protect the interests which the violator had to be prepared for.[3] Furthermore, arts 6:107 (claims of third parties in the case of personal injury), 6:107a (recourse action of employers for wages paid during sickness) and 6:108 (claims of third persons in the case of death) in fact secure and limit the scope of protection in the case of injury and death.

3 Additionally, art 6:98 BW explicitly provides a value- or policy-based tool to restrict the liability of a tortfeasor for consequences that are more remote to the tort committed.

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1 Parlementaire geschiedenis Nieuw burgerlijk wetboek [Parliamentary Proceedings Book 6 Civil Code] 1991, 637f.

2 Hoge Raad 7 May 2004, ECLI:NL:HR:2004:AO6012, NJ 2006/281 case note *J Hijma* (Paes/Van Duijvendijk).

3 Hoge Raad 30 September 1994, ECLI:NL:HR:1994:ZC1460, NJ 1996/196 case note *CJH Brunner* (Staat/Shell).

It states: 'Reparation of damage can only be claimed for damage which is related to the event giving rise to the liability of the obligor, which, also having regard to the nature of the liability and the damage, can be attributed to him as a result of such event.' According to this article, among other factors, the nature of the liability and the nature of the damage may provide arguments to restrict the extent of 'causal imputation' (*causale toerekening*). As the relevant factors are not mentioned exhaustively, other factors may be taken into consideration as well. Here foreseeability of the damage and the proximity or remoteness of the loss may come into play.[4] As the nature of the liability also refers to the scope of the rule, the distinction between the scope of application of art 6:163 BW and art 6:98 BW is not exactly clear. It should be noted, however, that, contrary to art 6:163 BW, art 6:98 BW applies in cases of contractual liability as well.

Article 6:109 BW provides the judge with a general competence to mitigate the obligation to pay damages in a specific case. It states: '1. If awarding full compensation under the given circumstances, among which the nature of liability, the legal relationship between parties and their financial capacity, would lead to unacceptable consequences, the judge may mitigate a statutory obligation to compensate. 2. Mitigation may not occur to a lower amount than to what the obligor's liability is covered by insurance or what the obligor was obligated to cover by insurance. 3. Section 1 is mandatory law.' Although art 6:109 BW provides the judge with a general competence, the threshold for its application is meant to be high.[5] Furthermore, art 6:110 BW provides for the legislator to limit the extent of liability in specific cases for losses that cannot be covered by insurance. It states: 'In order that the liability that may arise for damage does not exceed what can reasonably be covered by insurance, by general order[6] amounts may be determined to which liability is limited. Separate amounts can be determined depending, among others, on the nature of the event, the nature of the damage and the basis of liability.' The legislator aimed at a rare use of this competence.[7] Obsolete limits may be declared (partially) inapplicable by the court.[8] **4**

9. Italy

Under Italian Law, extra-contractual liability aims at both compensation and prevention of damage. These functions are properly fulfilled only if damages awards are **1**

4 Parlementaire geschiedenis Nieuw burgerlijk wetboek [Parliamentary Proceedings Book 6 Civil Code] 1991, 343f.

5 Parlementaire geschiedenis Nieuw burgerlijk wetboek [Parliamentary Proceedings Book 6 Civil Code] 1991, 449.

6 Algemene Maatregel van Bestuur, a statutory provision that can be applied at short notice by a simple procedure.

7 Parlementaire geschiedenis Nieuw burgerlijk wetboek [Parliamentary Proceedings Book 6 Civil Code] 1991, 1230.

8 Hoge Raad 28 May 2018, ECLI:NL:HR:2018:729, NJ 2018/376, case note *KF Haak*.

suitable to compensate the victim and induce the wrongdoer to change his or her conduct. This is why the Italian legal system, as most other legal systems, has elaborated a toolbox of solutions in order to limit liability when these functions do not operate properly, and liability would therefore be imposed on an inappropriate basis.

2 Italian scholars are particularly aware of the difficult issues relating to natural causation. Scholars are, as well, particularly aware of the need to remove abnormal links in the causal chain, to ensure that the tortfeasor shall compensate only those losses that could actually have been prevented.

3 Before we venture into more details about how to limit liability, a *caveat* is appropriate. Traditionally, the notion of 'unjust damage' mentioned in art 2043 Civil Code (cc) (which is the general provision on tort liability in Italy) served precisely to limit liability by confining it to the infringement of rights (possibly, rights with *erga omnes* effects).[1] For a long stretch of time, this conceptual device was an effective barrier keeping the metaphorical floodgate closed. Now the limits of liability are fixed by factors based on causation and remoteness of damage as well.[2]

4 Article 1223 cc provides that only the 'direct and immediate consequences' (*conseguenze dirette ed immediate*) of a wrongful event should be considered for awarding compensation. This is, undoubtedly, the main tool indicated by the Civil Code to set the limits of extra-contractual liability[3] and the functional equivalent of the notion of 'remoteness of damage' in other jurisdictions.

5 Remoteness of damage as governed by art 1223 cc is, in principle, very different from natural causation (*causalità naturale*), as natural causation governs the conditions for the existence of the tort, while the question concerning remoteness of damage is deemed to govern the measure of compensation. *Conditio sine qua non* and adequate causation (*causalità adeguata*) are the two doctrines applicable to establish *causalità naturale*, while *causalità giuridica* is assessed using other means, very often case-specific.[4] This is not, however, totally accurate, as the tools that are at work to ascertain the existence and extension of liability overlap in some cases. This obviously makes the distinction between the two above-mentioned phases revolving around the notions of *causalità naturale* and *causalità giuridica* somewhat complicated. This is why, though the vast majority of scholars[5] deem it necessary to keep the two issues concerning causation

1 This topic has been addressed by *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), in: Digest of European Tort Law, vol 2: Essential Cases on Damage (2011), § 9, 29 ff.

2 For general discussions, see: *M Bussani*, L'illecito civile (2020); *M Infantino*, La causalità nella responsabilità extracontrattuale (2012); *P Trimarchi,* Causalità e danno (1967).

3 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2004) 682.

4 See further 1/9 no 8 f below.

5 Ex multis *P Trimarchi*, La responsabilità civile: atti illeciti, rischio, danno (3rd edn 2021) 511; *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2004) 681–687.

separate, in reality this particular field of tort law is a riddle of doctrines, principles and operational rules which are not always crystal clear.[6]

6 The definition of immediate and direct cause for the purpose of adjudicating civil claims is imported into the civil liability system from the Penal Code (pc), because the Civil Code is silent on the point. Article 40 of the Italian Penal Code states that no one shall be punished if the event is not a direct and immediate consequence of the defendant's conduct.

7 Article 41 pc excludes criminal liability for supervening causes when they break the causal link: 'The concurrence of pre-existing or simultaneous or supervening causes, even if independent from the action or omission of the person at fault, does not rule out the causal relationship between the act or omission and the event. The supervening causes exclude the causal link when they were in themselves sufficient to determine the event. In this case, if the act or omission previously committed is in itself an offence, it will be punished. The same shall apply even when the pre-existing or simultaneous or supervening cause is due to somebody else's wrongdoing'. This general principle is also applied in tort law.

8 However, we have to stress here, again, that art 1223 cc on immediate and direct cause can be referred to for examining both issues of causation and remoteness of damage. It is therefore often very difficult to separate, within the case law, on which ground – whether causation (*causalità naturale*) or remoteness of damage (*causalità giuridica*) – liability is affirmed, or excluded, by the courts.[7]

9 To the main doctrine established by art 1223 cc, we can add other gatekeepers. Article 227, subsec 2, states that: 'compensation is not due for damage that the creditor could have avoided', which is expressly referred to by art 2056 on the compensation of tort damage. The application of this provision concerns the victim who has aggravated the loss or otherwise failed to take action, within reasonable limits, to reduce it. As a distinct device to narrow liability, Italian scholars include the protective purpose of the norm among the doctrines that limit liability.[8] According to this doctrine, only damage flowing from the violation of the specific protective norm is recoverable, because liability should both compensate for losses, and prevent the creation of specific risks, as designated by the legislature.

10 Although not covered by this report, it is nonetheless worth mentioning that the defendant's negligence limits liability as well. 'If the creditor's fault contributed to cause damage, compensation is reduced according to the gravity of the fault and the extent of the consequences arising from it' (art 1227, subsec 1).

11 Under Italian law, while contractual damage is generally limited to that damage which was foreseeable, except when the breach of contract was intentional, extra-con-

6 *M Bussani*, L'illecito civile (2020) 788 f.

7 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2004) 681–683.

8 *P Trimarchi*, La responsabilità civile: atti illeciti, rischio, danno (3rd edn 2021) 520.

tractual damage is not similarly limited. Actually, art 2056 cc, on the extent of damages in non-contractual cases states that: 'the damages owed to the person injured shall be determined according to arts 1223 (immediate and direct cause), 1226 and 1227 (comparative negligence).' Those Civil Code articles are contained in the general part of the Code on Obligations, and can be applied both to contract and to non-contractual sources of liability. The article dealing with foreseeability of damage is art 1225 cc, which is not mentioned in the above list. This means that tortfeasors must compensate all damage they are liable for, whether foreseeable or not, which is the result of their conduct.

12 Foreseeability is part of another doctrine that has wide application in establishing liability, namely 'adequacy of causation'.[9] According to this doctrine, the defendant is not liable for damage produced by conduct that, *ex ante,* would not have been able to provoke the loss. The fact that any damage is actually produced nonetheless – ie lacking adequate causation – is then due to a set of different and fortuitous circumstances that cannot be normatively imputed to the agent's conduct. Foreseeability, under this doctrine, is an objective prerequisite of liability, rather than a subjective one.[10]

13 According to art 1227(2), compensation is not granted for damage that the victim could have avoided using ordinary care. Case law addressing the extent of 'ordinary care' required from the victim is not copious. Judges expect a reasonable effort to avoid damage, not a burdensome activity, in personal or economic terms.[11] Any reasonable, proportionate expense incurred by the victim, in an effort to mitigate damage, is to be compensated by the tortfeasor.

14 If the tortfeasor operates with malice, or intention to inflict damage (*dolo*), liability will be extended to all losses that are usually not recovered in the case of mere lack of due care.[12]

15 Even if the conduct was intentionally aimed at causing damage, liability is excluded in the so-called additional cause scenario. The typical example is the following one. Due to the defendant's fault, the claimant's house is set on fire. There is also a second fire, originating independently and due to natural causes. Because the destruction of the claimant's house would have happened anyway, although the defendant was at fault, a claim for compensation against him shall not succeed.[13]

16 Italian law subscribes to the principle of total compensation of the losses incurred. Therefore, there are no caps to limit the amount of compensation under the general law on tortious liability.

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9 *P Trimarchi*, La responsabilità civile: atti illeciti, rischio, danno (3rd edn 2021) 517, who criticises this doctrine and rejects it. For a helpful discussion: *E Rajneri*, Case 9 – an epidemic in a town in Italy, in: M Infantino/E Zervoggianni (eds), Causation in European Tort Law (2017) 381ff.

10 *M Bussani*, L'illecito civile (2020) 645.

11 *M Bussani*, L'illecito civile 793.

12 *P Trimarchi*, La responsabilità civile: atti illeciti, rischio, danno (3rd edn 2021) 540.

13 *P Trimarchi*, La responsabilità civile 478. The rules excluding liability in this case go back to Roman law.

10. Spain

Current Spanish tort law usually links limits to liability to causation and, more specifically, to what in comparative law is generally known as 'scope of liability'. Moreover, 'scope of liability' also sometimes includes legal instruments that are usually classified as 'defences' in comparative law. 1

During the 1990s and the early 2000s, both legal scholarship and case law started replacing the traditional approach to causation, probably of French origin, with a new doctrine that distinguishes between (factual) causation and scope of liability (policy criteria). The doctrine is a legal transplant of Anglo-Germanic private law doctrines and of criminal law doctrines that were already applied at the time by Spanish criminal courts[1] and was proposed in a paper published by Fernando Pantaleón in 1990.[2] Traditional legal scholarship did not distinguish between a fundamentally factual and a fundamentally legal element. It tackled most problems regarding limits to liability with legal instruments such as the doctrine of 'adequate causation', which was understood as an alternative doctrine to the so-called doctrine of 'equivalence of conditions' or 'conditio sine qua non'. Moreover, it centred its attention on legal notions such as 'extraneous cause' (*cause étrangère)*, which was not attributable to the actor, and the idea of 'breaking the chain of causation'. 2

The intersection of these two influences, the French and the Anglo-Germanic, can still be seen today in Spanish case law and in some Spanish handbooks and other academic publications, where causation and scope of liability are dealt with shortly before or shortly after the reference made to the interference of the act of the tortfeasor by natural events (fortuitous event and force majeure), acts of third parties and with acts of the victim herself (contributory negligence). Under certain circumstances, it is considered that these interferences 'break' the chain of causation. However, there is still a great deal of confusion and quite often there are transfers from criminal to civil law or from one tradition to the other (such as, for instance, the consideration of assumption of risk and contributory negligence as a further criterion of 'objective imputation'), or the consideration of criteria related to 'objective imputation', such as the 'provocation' (*Herausforderung*) or 'prohibition of return' (*Regressverbot*) within the concept of 'intervention of the act of a third party'[3]. 3

The paper published by Fernando Pantaleón in 1990 was initially understood as a specific and personal doctrine of said professor[4] but, in fact, the paper tried to trans- 4

1 See *FA Melchiori*, Las teorías de la casualidad en el daño. Equivalencia de condiciones, causalidad adecuada e imputación objetiva en la doctrina del Tribunal Supremo (2020).

2 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889–1989, vol II (1990) 1561–1591.

3 *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual: parte general: delimitación y especies, elementos, efectos o consecuencias (5th edn 2019) 236–238.

4 In this sense, *R de Ángel Yagüez*, Tratado de responsabilidad civil (1993) 787–882, after referring to the approach prevailing at the time in Spain, introduces a new section in his treaty called 'Causation and objective imputation. Professor Pantaleón's thinking'.

plant the Anglo-Germanic approach to causation into Spanish law in two steps, one referring to factual causation and the other to scope of liability, which, in a direct translation from German, was called 'imputación objetiva' (*objektive Zurechnung*). In practice, the new doctrine went largely unnoticed until about ten years later, when it began to be adopted, gradually and piecemeal, by the Civil Chamber of the Supreme Court. Although this doctrine is not exempt from criticism, it is currently dealt with in most general tort law books sometimes even with the original German terminology together with the Spanish translation.[5] Thus, the criteria indicated in Pantaleon's paper are those referring to the ordinary risk of life ('allgemeines Lebensrisiko'), the prohibition of return ('Regressverbot'), provocation ('Herausforderung'), the protective purpose of the norm establishing liability ('Schutzweck der haftungsbegründenden Norm'), increased risk ('Risikoerhöhung') and, finally, the 'old' criterion of adequacy ('Adäquanztheorie'), which the author considers to be somewhat residual in character in order to complement the system.[6] Some legal scholars consider that these criteria are not sufficient and have resorted either to the old causation doctrine of French origin, or to modern German criminal law scholarship to complement or to broaden them.[7] By contrast, other scholars, referring also to the Principles of European Tort Law (PETL) (cf art 3:201 PETL), have pointed out that these criteria are not useful because they cannot be applied to certain cases and are never applicable when liability is strict.[8]

5 The judgment of the Spanish Supreme Court of 9 October 2008[9] summarises this new approach in Spanish case law by explaining the two-step approach, which distinguishes between 'factual causation', according to the 'conditio sine qua non' doctrine, and 'objective imputation' (scope of liability).

6 More recently, a judgment issued on 24 February 2017[10] systematises, in a somewhat picturesque way, the different criteria applied by courts to establish objective imputation or attribution when stating that '[C]urrently the First Chamber of the Supreme

5 Instead of many, *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual: parte general: delimitación y especies, elementos, efectos o consecuencias (5th edn 2019) 211ff.

6 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889–1989, vol II (1990) 1590.

7 Thus, as regards contributory negligence as an instrument of 'objective imputation', see *V Montés Penadés*, Causalidad, imputación objetiva y culpa en la "concurrencia de culpas", in: Estudios jurídicos en homenaje al profesor Luis Díez-Picazo, vol 2 (2003) 2592–2627 and *M Medina Alcoz*, La culpa de la víctima en la producción del daño extracontractual (2003) 297ff. As regards the victim's consent and the assumption of risk as an instrument of objective imputation, see *P Salvador Coderch*/*A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, and case law referring to assumption of risk (among many others, Supreme Court's judgments of 10 September 2015 [RJ 2015\4183] and 7 March 2018 [RJ 2018\1063]).

8 For instance, *M García-Ripoll Montijano*, Imputación objetiva, causa próxima y alcance de los daños indemnizables (2008) and *F Peña López*, Dogma y realidad del Derecho de daños: Imputación objetiva, causalidad y culpa en el sistema español y en los PETL (2011).

9 RJ 2008\6042.

10 RJ 2017\826.

Court resorts to the theory of "objective imputation" which, in any case, serves to exclude liability, and which has as guidelines or rules: a) The ordinary risks of life: life has its own and inherent risks, which are accepted by all. That is, "misfortunes" do exist. b) The prohibition of return: a proximate cause found; it should not go further back looking for remote causes. c) The provocation: who caused the situation? Without ruling out that it is the injured party itself because she assumed an unjustified risk. d) The protective purpose of the norm. e) The increase in the risk, or the lawful alternative conduct. If the damage would have occurred anyway, even if other conduct had been adopted. f) The competence of the victim (facts or situations that were under the control of the victim). g) And, in any case, and as a closing clause, the probability [*sic*],[11] which allows courts to exclude liability in cases of highly improbable, unforeseeable events, and that in the end remind us of the "fortuitous case"'. However, other decisions expand this list with what they consider to be other instruments of 'objective imputation' such as assumption of risk and contributory negligence.

The convergence of two different traditions and the intertwining of criminal and civil law doctrines produce duplications and inconsistencies.[12] Although case law on these topics has improved over the last few years, confusion still reigns. For this reason, the Spanish reporters will try to organise the instruments limiting liability that sometimes appear in Spanish case law and legal writing around the old approach to causation and sometimes around the new one. In so doing, we will try to fit them into each point of the questionnaire and, whenever this is not possible, they will be dealt within the final section. **7**

11. Portugal

For tort liability, the main source of law is the *Código Civil*, the Civil Code. Most limits of liability are set out in this Code, and most of the examples provided are based on articles of the Civil Code, although specific legislation is useful in this matter: an example is Law no 67/2007 (31 December) that addresses the State's non-contractual liability. **1**

Regarding causation, art 563 of the CC states that the obligation of compensation only exists in relation to damage that the injured person *probably* would not have suffered if it had not been for the injury, following, according to most authors, the theory of adequate causation (*Adäquanztheorie*), which is sensitive to the possibility of an interruption in the causal chain derived from an abnormal and unpredictable circumstance (art 505), thus limiting or excluding the tortfeasor's liability. The first step in assessing causation is, for that reason, verifying the *conditio sine qua non* followed by establishing **2**

11 That is, the adequacy criterion.

12 For a detailed analysis of the inconsistencies and contradictions of the Spanish Supreme Court case law on causation and 'objective imputation', see *FA Melchiori* , Las teorías de la casualidad en el daño. Equivalencia de condiciones, causalidad adecuada e imputación objetiva en la doctrina del Tribunal Supremo (2020) 97–142.

whether the event that caused the losses is a normal, natural or typical consequence of the event for which the tortfeasor is responsible. Despite no references being made to cases where the injured party is particularly susceptible to harm, or when the misconduct of the tortfeasor is not serious, compensation awarded may be inferior to the amount of losses suffered by the injured party when the wrongdoer acted with negligence, ie, lacking due diligence (art 494). (Also, the level of seriousness of the misconduct is relevant in art 496, which contains a general principle that a higher degree of fault will lead to a higher amount of compensation to the injured party. In the cases of joint liability [arts 513, 497/1], the amount of compensation due to be paid by each tortfeasor is established taking into consideration the degree of fault of each party and regarding the consequences for which each is responsible [art 497/2].)

3 According to art 483/1, breaching legal provisions intended to protect the interests of others results in civil liability. In order for the infringement of these norms to be relevant in a case, the losses suffered by the injured party must fall within the protective purpose of the rule, ie the set of private interests that the provision intends to protect. The concept of lawful alternative conduct is useful in cases where the legislator has opted to establish legal presumptions of fault in arts 491, 492 and 493/1 of the CC and the tortfeasor has the burden of rebutting these presumptions and may opt to prove that the losses would still have been caused had he not acted improperly.

4 Following the most recent doctrinal and jurisprudential contributions, in cases of strict liability based on risk (cases in which the tortfeasor is liable without it being necessary to evaluate fault – arts 483/2, 499 ff), the tortfeasor's liability may only be completely excluded when the injured party, third party or force majeure event are the *only* and *exclusive* cause of the losses (art 505). Article 570 is applicable if the tortfeasor is responsible for misconduct and the fault of the injured party contributed to the production or aggravation of damage. The court shall determine whether compensation shall be ordered in full, reduced or even excluded[1] (art 570/1). When the wrongdoer acted with negligence, damages will be fixed through an evaluation of the principle of equity (art 494), which takes into consideration the financial situation of the tortfeasor. For non-pecuniary damages, the principle of equity may equally be followed (art 496/4). As for maximum limits of damages to be awarded, art 508 states that in cases of road accidents where there is strict liability based on risk, the maximum limit corresponds to the minimum sum stipulated for compulsory[2] third party motor liability insurance.

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1 If the tortfeasor's fault derives from a presumption of fault, the fault of the injured party, as the exclusive contributor to the losses (progressive interpretation of the article) shall exclude any duty to pay compensation (art 570/2).

2 Since 1 June 2022, the amount is established at € 6,450,000 per accident, for personal injuries and € 1,300,000 per accident, for damage to property. Although no caps are fixed regarding damages for loss of life, after the tragic events of the 2017 Pedrógão Grande fires, the minimum value was set at € 80,000 per victim.

12. England and Wales

In English law, the question of limits of liability is complicated by the many different torts, as the limits of liability vary according to the wrong committed. Moreover, even if we focus only on the limits placed on liability in negligence (by far the most important cause of action), there is much conceptual instability, which manifests itself in the use by commentators and judges of a range of different, but often overlapping, concepts, including 'legal causation', 'remoteness of damage', 'scope of duty', 'scope of risk' and 'scope of liability'. Nevertheless, it is possible to discern in the case law a reasonably stable set of underlying principles governing the limits of liability in negligence, which for the most part accord with the outcomes of the cases, if not always with the reasoning. The two central principles are the principle of *novus actus interveniens*, which determines the enquiry into 'legal causation', and the risk principle, which dominates the enquiry into 'remoteness of damage'. It is important to note that both these principles can be determinative both of whether there is liability at all and of the extent of a liability, which is not itself in doubt.[1] 1

The *novus actus interveniens* principle bars recovery for the consequences of intervening conduct of the claimant or a third party where, in the view of the court, the intervening actor should bear sole responsibility for the damage, so that his or her conduct is regarded as the sole legal cause of it. In such cases, it is said that the conduct of the intervening actor 'broke the chain of causation' between the defendant's negligence and the claimant's injury or some of its consequences. This 'legal' causation enquiry is explicitly recognised as being normative and value-based,[2] and distinguished in that respect from the 'factual' causation enquiry as exemplified by the 'but-for' or *sine qua non* test of historical connection between fault and damage. It is important to note that the application of the *novus actus interveniens* principle to deny liability is relatively unusual, and that in most instances of intervening conduct, a different solution is adopted. In the case of claimant interventions that do not amount to a *novus actus,* responsibility is apportioned between the parties by means of the partial defence of contributory negligence.[3] And in the case of tortious third-party interventions that do not amount to a *novus actus*, the solution is to impose joint and several liability on the defendant and the third party. Assuming that both are solvent, this should also result in an apportionment of responsi- 2

1 With regard to legal causation, compare *Clay v TUI UK Ltd* [2018] EWCA Civ 1177, [2018] 4 All ER 672 (liability) (below 8/12 nos 1–3) with *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2010] PIQR P8 (extent of liability) (below 8/12 nos 4–6); and with regards to remoteness, compare *The Wagon Mound* [1961] AC 388 (liability) with *Conarken Group Ltd v Network Rail Infrastructure Ltd* [2011] EWCA Civ 644, 136 Con LR 1 (extent of liability).

2 See, eg, *Yorkshire Dale S. Co Ltd v Minister of War Transport* [1942] AC 691, 706 per Lord Wright (referring to 'ordinary moral notions of when someone should be regarded as responsible for something which has happened').

3 See, eg, *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2010] PIQR P8 (below 8/12 nos 4–6).

bility between the two, via the mechanism of contribution proceedings.[4] Whether the intervening actor should bear sole or only partial responsibility for the damage depends on the relative culpability of the defendant and the intervener and what has been described as the 'relative causal potency' of their acts (so that, for example, intentional or grossly negligent conduct is more likely to break the chain of causation than merely careless conduct).

3 The risk principle limits recovery to materialisations of the risks which made the defendant's conduct negligent in the first place. It follows that the claimant cannot recover for damage or loss that was not a reasonably foreseeable consequence of the defendant's breach of duty, since an unforeseeable risk cannot make conduct negligent. Reasonable foreseeability is therefore a prerequisite of recovery at the remoteness stage of the negligence enquiry. However, the foreseeability requirement does not tell the whole story, since even foreseeable consequences may be too remote if they are coincidental to the negligence. Furthermore, the risk principle itself does not exhaust the remoteness of damage enquiry in the negligence context but can be supplemented by other policy-based limits on the extent of a tortfeasor's liability.[5]

4 The two principles underlying the limits on negligence liability, or variations on them, are to some extent observable in other torts. Hence the principle of *novus actus interveniens* is by no means limited to negligence, and can even apply in claims for breach of contract.[6] Analogously, it is a defence to an action under the strict liability rule in *Rylands v Fletcher* to show that the immediate cause of the escape that caused the damage was the unforeseeable act of a 'stranger', meaning a person over whose actions the defendant had no control.[7] As for the risk principle, this is echoed in the rule that recovery in the tort of breach of statutory duty is limited to injury of a kind which it was the purpose of the legislative provision in question to avoid (ie, the principle of the 'protective purpose of the norm'),[8] and in the restriction of some instances of strict liability to the materialisation of the risk at which the strict liability rule in question is targeted.[9] The foreseeability requirement, for its part, has been extended beyond negligence to other unintentional torts, such as private nuisance and the *Rylands v Fletcher* rule.[10]

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4 See, eg, *Rouse v Squires* [1973] QB 889.

5 See, eg, *Pritchard v JH Cobden Ltd* [1988] Fam 22 (where wrongfully caused injuries caused the claimant to break up with his wife, he could not recover alimony payments from the tortfeasor as permitting such claims would risk confusion in the judicial process and be open to abuse).

6 See, eg, *Lambert v Lewis* [1982] AC 225.

7 *Box v Jubb* (1879) 4 Ex D 76; *Perry v Kendricks Transport Ltd* [1956] 1 WLR 85.

8 *Gorris v Scott* (1874) LR 9 Ex 125 (below 3/12 nos 1–3).

9 Hence, for example, the keeper of an animal known to possess dangerous characteristics is strictly liable only for damage associated with those characteristics, at least at common law: see *J Goudkamp*/*D Nolan*, Winfield & Jolowicz on Tort (20th edn 2020) § 17-026. The position under the Animals Act 1971 is less clear: ibid, § 17-027.

10 See especially, *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 (below 2/12 nos 5–7).

There are, however, some torts where the limits on liability are quite different from those applicable in negligence cases. It is, for example, regarded as axiomatic that 'intended consequences are never too remote', and in intentional torts, such as battery and deceit, the only effective limit on a defendant's liability is directness. Hence, for example, a fraudster is liable for all the direct consequences of his deceit, whether foreseeable or not.[11] As for the tort of defamation, a defendant will be liable for an unintended publication of a defamatory statement only if it was a 'natural and probable' consequence of his actions.[12] Finally, in the tort of conversion, it seems that the rules governing recovery of consequential losses differ according to the state of mind of the defendant, so that, for the knowing converter of goods, a test of directness applies (as in deceit), while for the innocent converter, the test is one of foreseeability (as in negligence).[13] This shows particularly clearly how the limits of liability may vary according to the seriousness of the tortfeasor's misconduct. **5**

English law does not employ any special mechanisms designed specifically either to prevent the extent of liability reaching the point where it would deprive the tortfeasor of his or her essential means or to achieve a 'just balance' between the parties in any other respect. This may be because in general tort claims are made only against defendants who are either insured or very well-resourced (eg, public authorities). Nor does English law recognise any liability caps limiting the sums recoverable in respect of tortious wrongdoing. One final point is that while in negligence cases the duty of care requirement might be characterised, in a broad sense, as a 'limitation' on liability, the matters addressed here relate to potential limitations arising at later stages of the negligence enquiry, once a relevant duty of care has been held to exist. While the courts do not always draw a clear distinction between these two different kinds of 'limitation',[14] they are best dealt with separately since the duty of care question typically concerns whether negligence liability is capable of arising in this *type of case*, while legal causation and remoteness are more fact-sensitive concepts focused on the precise circumstances of the individual case before the court. **6**

11 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254.

12 *Huth v Huth* [1915] 3 KB 32 (no liability for publication of defamatory statements that took place when a butler opened and read a letter addressed to the defendant's wife). Though even here the negligence remoteness regime finds an echo in the rule that a defendant is liable for loss attributable to an unauthorised repetition of the defamatory statement by a third party only where the repetition was reasonably foreseeable: *Slipper v British Broadcasting Corporation* [1991] 1 QB 283; *McManus v Beckham* [2002] 1 WLR 2982.

13 See *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 at [100]–[104].

14 See, eg, *Meadows v Khan* [2021] UKSC 21, [2021] 3 WLR 147, where under the guise of a 'scope of duty' analysis the majority conflate questions of duty and remoteness.

13. Scotland

1 The factors which in Scotland limit a party's potential delictual liability for harm wrongfully caused could, in a sense, be said to include all of the elements which constitute those required for a successful claim. So far as claims under the general action for the reparation of harm are concerned (negligence claims fall under this general action), these are: (a) the establishment of a duty of care owed by the defender to the pursuer; (b) breach of this duty in the circumstances; (c) the demonstration that, as a matter of fact, this breach of duty caused in whole or in part the harm suffered by the pursuer; (d) the attribution of sufficient significance to the defender's breach (when considered alongside the other causes-in-fact of the harm to the pursuer) such that it is deemed to attract responsibility for the harm (what has traditionally, if unhelpfully, been called 'legal causation'); and (e) harm (damage) to the pursuer's person or property of a type for which the law provides a remedy. Even if these five elements are present, the defender's liability may nonetheless be limited or excluded on account of (f) other causes of the harm (including the pursuer's own conduct) being deemed sufficiently significant to attract a portion of responsibility for that harm, thereby reducing the defender's overall liability, or (g) the availability to the defender of one or more defences to the claim. The elements necessary for liability under the nominate delicts recognised by Scots law serve a similar limiting function.[1]

2 The requirement for the presence of the above constitutive elements (a) to (e) before delictual liability may be imposed operates to limit a party's liability because, in the absence of one or more of the elements, liability is negated entirely. Moreover, in fashioning the precise scope of any liability owed, including the class of persons to whom a duty of care is owed and the type of harm to which the duty to protect against extends, a court is not only establishing liability but is also imposing limits upon such liability by excluding classes of pursuer or types of harm. Similarly, where elements (f) or (g) are present, liability may be limited (through being excluded or reduced).

3 While the above essential elements of delictual claims are distinct components of an action, it is also the case that the judicial analysis of claims often deploys the same analytical and explanatory language across a number of the separate elements: so, for instance, 'reasonable foreseeability', 'remoteness', and the notion of liability falling within or outside the 'scope' of a duty feature in judicial analysis of several of the components. This reflects the fact that the same legal conclusion as to liability can potentially be arrived at by analysing a set of facts using a variety of these components and that courts consider core analytical concepts to permeate the holistic assessment of a claim.

4 Later discussion of the limits of liability in Scots law will make reference to many of the analytical concepts which are deployed in common law legal systems, including that

1 It is not possible within the scope of the current discussion to examine the peculiarities of the limits of liability arising under any of the nominate delicts.

of Scotland's nearest jurisdictional neighbour, England and Wales. Indeed, the authorities cited before the courts – at least in cases involving negligence – are often identical. Thus, Scots law shares with England and Wales usage of the terminology of *novus actus interveniens* (a new act intervening in, and hence breaking, a causal chain) in considering whether causes later in time than the defender's conduct should be seen as sufficiently important in character to exclude the defender's earlier conduct when attributing responsibility for harm. Causal notions are integral to *novus actus interveniens*, but the underlying reality is that assessment of the relative legal significance of causes raises values- and policy-based issues which are unrelated to the considerations raised in assessing causation-in-fact.

5 The analytical concept of risk is relevant to the initial enquiry of whether any duty of care to avoid harm existed, as such a duty will only be imposed in respect of those harmful consequences which a reasonable person might foresee as a probable outcome of negligent conduct (ie as creating a probable 'risk' of occurrence). In addition, risk is one element in the determination of the overall scope of liability for the consequences of any breach of duty, though it is not for every reasonably foreseeable consequence that a defender will be held liable. Specific features of a case, including for instance the fact that the harm was caused by a third party for whom the defender is not in law responsible, may be relevant in determining that it would be inappropriate to impose liability in respect of the materialisation of certain risks, those risks being deemed to fall outside the 'scope of liability'. In assessing the scope of liability issue, Scots law (as English law) rejected an earlier preference for using a simple 'direct consequences' test to determine liability for the consequences of wrongful conduct in favour of a more nuanced approach.

6 Scots law does not have any legislative equivalent of the reduction clauses which are used in some legal systems to cap the liability of a wrongdoer of modest means. If no applicable prescriptive or limitation period operates to negate a claim, a defender found liable for harm will incur liability for the full extent of the damage for which it bears responsibility. However, once that liability has been determined by a court, the debtor may apply to the court for a time to pay direction:[2] where such an application is made, the court may permit the amount due to be paid by instalments or may stipulate that it need not be paid in full until after a specified period of time has elapsed. While this discretionary power of the court does not reduce the overall liability of the debtor, it does have the effect of reducing the immediacy of the financial burden which would otherwise fall upon the debtor.

2 See Debtors (Scotland) Act 1987, sec 1. This provision operates in relation to a variety of monetary claims, not simply for damages in delict.

14. Ireland

1 The general structure of Irish tort law comprises a variety of nominate torts, rather than overarching general conceptions of responsibility. Negligence is the only broad general tort, applicable to a wide variety of diverse situations, based on a general conception of responsibility.[1] Other nominate torts protect particular interests against certain types of interference. For example, trespass torts protect certain interests against direct interference – battery is the touching of a person without consent (protecting bodily integrity); false imprisonment is the deprivation of liberty without proper authority; trespass to land protects possession of land against unauthorised touching of the land (whether by improper entry, or remaining on land when permission has expired, or placing something on the land without permission to do so); trespass to goods protects possession of personal property against any touching of items without consent. Private nuisance protects rights in ownership or occupation of land against material damage or unreasonable interference with use and enjoyment. Overall, there are in excess of thirty nominate causes of action in Irish tort law. Each has its own individual elements (ingredients) that must be established in order to impose liability.

2 The elements of a tort can, on occasion, place a constraint on liability. The duty of care in negligence, for example, is comprised of proximity, reasonable foresight of injury and policy considerations in favour of, or militating against the imposition of a duty. Proximity focuses on the closeness of the link between the defendant and plaintiff and is used as a constraint on reasonable foresight as a determinant of a duty. While a reasonable person may foresee a wide range of risks that could materialise from their behaviour, basing a duty solely upon this would make the duty very broad. The duty is owed only in respect of persons closely affected. The proximity (closeness) may be physical, such as a fellow road user, injured in a collision. It may be relational, such as between a manufacturer of a product and the ultimate consumer of the product. The denial of a duty can be used as a means of limiting liability; sometimes the court will indicate a lack of proximity, sometimes they will say the injury is not reasonably foreseeable and at other times, they will indicate that, despite sufficient proximity and foreseeability, the imposition of a duty would be contrary to public policy.[2]

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1 Based on Lord Atkin's famous neighbour principle from the Scottish appeal to the United Kingdom House of Lords (UKHL) in *Donoghue v Stevenson* [1932] UKHL 100, [1932] AC 562. The current version of the general principle in Ireland is set out in the IESC decision in *Glencar Explorations plc v Mayo County Council (No 2)* [2001] IESC 64, [2002] 1 IR 84, noted by *R Byrne*/*W Binchy*, Annual Review of Irish Law 2001 (2002) 55 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2001 (2002) 293, no 3 ff.

2 The case of *Devlin v The National Maternity Hospital* [2007] IESC 50, [2008] 2 IR 222, discussed later in this report (4/14 no 10 ff), is an example of lack of sufficient proximity. Lack of reasonable foreseeability was used in *Breslin v Corcoran* [2003] IESC 23, [2003] 2 IR 203. Public policy concerns related to the administration of justice have been used to deny a duty in respect of the Attorney General towards a victim of crime – *W v Ireland (No 2)* [1997] 2 IR 141 and to hold that an expert witness does not owe a duty to a liti-

The standard of care in negligence is that of reasonable care in the circumstances. **3**
Setting the behavioural standard to determine whether a particular precaution against injury is necessary can provide a means of controlling liability. Other torts have varying behavioural standards. These have been addressed in a previous volume.[3]

On other occasions, scope of duty is used to limit recovery – ie if the type of damage **4**
suffered is not connected to the purpose of the duty, it can be regarded as non-recoverable. The 'duty of care' and 'scope of duty' mechanisms can be seen in particular in respect of negligently inflicted pure economic loss and negligently inflicted psychiatric injury, discussed below.[4] They are occasionally used in other circumstances also.

Apart from the individual elements or ingredients of particular torts, there are some **5**
features of liability that can apply to many different causes of action in Irish tort law, such as causation, remoteness of damage, defences and so forth. In respect of causation, Irish judges distinguish between factual and legal cause. Factual cause focuses on whether the defendant's wrongdoing played a role in the history of the events leading to the plaintiff's injury. It is usually a necessary pre-requisite to liability, but factual cause does not necessarily mean legal liability will follow.[5] Legal cause is an evaluation of whether responsibility should attach in respect of a factual cause. The legal cause element, in particular, can be used as a means of limiting liability. Remoteness of damage is also used as a limiting factor. Remoteness can be seen as a subset of legal cause, but focused just on the proximity of connection between wrongdoing and a particular item of damage claimed. The test for remoteness differs, depending on the cause of action in the case.[6]

Some concepts can be used at different phases of enquiry; eg foresight can be used **6**
in the determination of the existence of a duty of care, in determining whether there has been a breach of the standard of care applicable to a duty, in determining whether a breach was a legal cause of resulting damage or in determining whether resultant damage was too remote a consequence to be recoverable. The use and interpretation of 'reasonable foresight' at different phases of the examination of liability is not precisely the same.[7] A number of meanings will be explored in the cases that follow.[8]

Defences, such as contributory negligence, waiver and statutory authority, play an **7**
important part in constraining liability. However, they are beyond the scope of the current project. New guidelines on the quantum of damages for personal injuries were re-

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gant – *E O'K v DK (Witness: Immunity)* [2001] IESC 84; [2001] 3 IR 568. See generally, *BME McMahon*/*W Binchy*, Law of Torts (4th edn 2013) ch 6; *E Quill*, Torts in Ireland (4th edn 2014) ch 1.

3 *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2017).

4 See the cases under 3/14 no 4 ff and no 7 ff and 4/14 no 1 ff and no 10 ff.

5 There are exceptional cases where liability can arise in the absence of an ability to establish legal cause – sec 11(3) of the Civil Liability Act 1961.

6 This is discussed further in the cases considered in 2/14.

7 *BME McMahon*/*W Binchy*, Law of Torts (4th edn 2013) [3.04] at fn 5.

8 See the cases in 2/14; 4/14 no 10 ff; 6/14 & 7/14 no 1 ff.

cently introduced to reduce the cost of the tort system as a whole,[9] but this also is beyond the scope of this project. There are no common law or statutory provisions in Irish tort law permitting reduction of damages in the fashion provided by reduction clauses found in some European jurisdictions, based on special circumstances, such as hardship.

15. Malta

1 Article 1033 of the Civil Code, the general clause establishing liability for tort, provides that 'any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom'. The obligation to make good for 'any damage' caused by the tortious act implies that all forms of material damage – personal injury and death, damage to property and even pure economic loss – are to be compensated.

2 Liability for the harmful result of one's act or omission is excluded if such result was not reasonably foreseeable, or if the harmful event is not a direct result of the act or omission.

3 The factors of foreseeability and direct causal link are considered in arts 1136 and 1137 of the Civil Code:

> 1136. The debtor shall only be liable for such damages as were or could have been foreseen at the time of the agreement, unless the non-performance of the obligation was due to fraud on his part.
>
> 1137. Even where the non-performance of the obligation is due to fraud on the part of the debtor, the compensation in respect of the loss sustained by the creditor, and of the profit of which he was deprived, shall only include such damages as are the immediate and direct consequence of the non-performance.

4 Although art 1136 refers to 'the time of the agreement', thereby implying that it is applicable only to contractual obligations, these articles are under the sub-title 'Of the Effects of Obligations' and not under the separate sub-title 'Of the Effects of Contracts'. It is therefore arguable that they apply also to liability in tort and that, consequently, foreseeability should not be a requirement for liability in tort when the defendant acted maliciously. The reported cases however make it clear that the requirement of foreseeability is a necessary element for liability in tort, even when the damage is caused maliciously, although the requirement is interpreted less strictly in such case.[1]

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9 The Judicial Council, Personal Injuries Guidelines (2021), drafted by the PIGC.

1 Cf *MX on behalf of a minor child v Anthony Taylor and another*, Qorti tal-Appell (Court of Appeal) 25 October 2013.

Liability is excluded or mitigated if the causal link between the act or omission and the harm is remote or has been interrupted by a fortuitous event or by the act or omission of the victim or of a third party. If the act or omission of the defendant is not the sole cause of the harm but a contributing factor, then the defendant is liable only for such part of the damage as he may have caused if this can be ascertained. If such part cannot be ascertained, or if the defendant acted with malice, then he is liable for the whole damage jointly and severally with the other persons contributing thereto.[2] **5**

Liability is not excluded on the basis that it is not sufficiently direct merely because the victim is only indirectly affected, such as when the harm suffered by the victim is the result of harm caused by the defendant to third parties.[3] **6**

Also, liability may be mitigated but not necessarily excluded on the basis that an external cause would have been sufficient, of itself and independently of the defendant's act or omission, to cause the harm suffered by the victim.[4] **7**

Where it is an act of the victim himself which contributes to the damage, the defendant's liability is limited if the act or omission of the victim is due to negligence or if the victim is in breach of his duty to minimise the damage caused.[5] **8**

16. Norway

In Norway, a conglomerate of rules exist that make it possible to disqualify some of the consequences of a course of events as not being protected by tort law. **1**

The key argument for the limitation of liability is the principle that the foresight of a reasonable person should be able to determine a future liability. The tortfeasor is not infinitely responsible for all the consequences of his or her wrongful conduct, regardless of how remote in time and how indirect the connection to the sequence of events. One strand of argument in Norwegian law seems to be based on fairness and equity in specific cases. **2**

In international scholarship, the floodgates argument has frequently been cited as a reason for developing appropriate tools to keep liability within bearable limits. Compared to other countries, the floodgates argument appears to be less important in Norway. One reason for this might be the provision in *Skadeserstatningsloven* (the Compensatory Damages Act of 1969) sec 5-2, which states that damages may be reduced in exceptional cases if full compensation would represent an oppressive burden on the **3**

2 Arts 1049 and 1950 Civil Code.

3 See eg *S.T. Microelectronics (Malta) Ltd v Malta International Airport p.l.c. and others* – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 26 October 1997; *McNeill Ltd v Omnitec Ltd* – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 6 March 2003.

4 See, eg, *Michelina Spiteri and others v Tabib Ewlieni tal-Gvern (Chief Government Medical Officer) and another* – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 19 June 2003.

5 See, eg, *Francis Gauci v Jimmy Bugeja* – Qorti tal-Appell (Court of Appeal) 27 November 2009.

tortfeasor. In its assessment, the courts should give weight to the blameworthiness of the tortfeasor's conduct.

4 In practice, the most important rules concerning limitation of liability are the rules on adequacy, which concern the disqualification of remote consequences of a course of events if a tortious action or omission has caused a chain of damaging events.

5 The rules on adequacy have been developed since the 19th century, when a doctrine on adequacy was imported from Germany.[1] The core question in this theory was whether the harm stemmed from a cause that could naturally be expected as a consequence 'in the direction' of the danger. Taking this as their point of departure, the Norwegian courts have developed rules on adequacy based on very specific argumentation relating to specific situations. Today the rules on adequacy have a foreseeability 'test' as a starting point. A common feature is the question of whether the harm would have been foreseeable taking into account the knowledge from the perspective of a reasonable person in the same position as the alleged tortfeasor at the time the harm occurred.[2] As the case law has developed, the courts have extended the limitation of tort law liability in certain situations where the harm was foreseeable from a theoretical point of view, but where it is considered too remote and divergent from a normal course of events. Most of these cases concern harm caused to third parties, see 1/16 no 7 below. A legal question is therefore also whether the interest of the third party is concrete and proximate enough to enjoy protection.

6 The question of foreseeability involves a value-based assessment of facts seen in relation to a *legal standard*, and all the facts in a particular case must be taken into account. As the assessment of foresight contains information about the statistical chance of an event occurring and value-based evaluations of the two parties' position in the concrete situation, it should not be confused with the concepts of probability or likelihood. The chain of events must to some extent be imputable. However, the tortfeasor is liable even if the harm is more extensive than might have been foreseen, and, especially as regards the pecuniary amount of damages, the tortfeasor must take the injured party as he or she finds him or her. This principle has an especially strong position in cases involving personal injury, and it generally includes weaknesses that aggravate the harm in an unforeseeable way.

7 The value-based assessment is especially evident in cases where a third party has suffered pure economic loss, and the party's connection to a damaged property is a contract.[3] The courts will in these cases generally emphasise the expectation that the potential victim will take steps to protect him/her/itself more generally from losing supply or access to the source that has been cut off by the harm. As stated in Norwegian case law, third parties' purely economic losses enjoy less protection. It is assumed that a purely

1 See *N Nygaard*, Skade og ansvar [Damage and responsibility] (6th edn 2007) 354.

2 *AM Frøseth*, Skadelidtes egeneksponering for risiko i erstatningsretten [The plaintiff's self-exposure to risk in Tort Law] (2013) 135.

3 *N Nygaard*, Skade og ansvar (6th edn 2007) 365.

economic loss suffered by third parties is a more remote loss and by nature less foreseeable.

As expressed in the Compensatory Damages Act, sec 5-2 Norwegian Tort Law allows a more extensive liability in the case of an intentional or reckless wrongdoer. This may be for reasons of both deterrence and morality. For intentional wrongdoers, liability may not be limited to the intended consequences. The liability will extend to what is foreseeable in light of the specific act. **8**

In many cases, the assessment of foreseeability is based on the language of causation. However, foreseeability has a broader meaning than in the *conditio sine qua non* test, which qualifies the relevant causes based on facts. Historically, many of the aspects of the rules on adequacy were part of the tort of negligence. As in other countries, the courts have sometimes described a consequence as too remote because of an intervening event that is deemed to 'break the chain of causation'. If the intervening act was a natural force or the act of the victim him- or herself, the courts have historically often used the rule on compensation culpae, which is the origin of the rule on victim's contributory negligence enacted for the first time in 1902 in the Act on the Entry into Force of the General Civil Penal Code (sec 25).[4] In many cases, it is difficult to distinguish the scope of the basis for liability from the rules on limitation of liability, especially due to the language of causation used in the different sets of rules, see 1/16 no 6 above. **9**

17. Sweden

The approach to the issue concerning limits of liability in Swedish tort law can be viewed as a mixture of the grand old tradition – with various formulations of causation, foreseeability, probability, etc – and a more pluralistic point of view where different purpose-related arguments are discussed in a framework of specified type situations. The practice of discussing a range of different legal issues within a framework of causation reached its peak in the 1950s; since then, insight has gradually grown that tort law is to be regarded as an integrated part of the welfare state's protection of individuals. Especially in relation to personal injuries, it could thus be seen as almost unworldly and unrealistic to discuss important policy-based problems in terms of natural or legal causation. **1**

4 *AM Frøseth*, Skadelidtes egeneksponering for risiko i erstatningsretten [The plaintiff's self-exposure to risk in tort law] (2013) 36. See eg Rt 1896,870, where a cook on a ship fell off the deck when he threw ashes overboard. The man drowned. The captain had neglected to repair the damaged railing. The shipowner was not deemed liable. The Supreme Court noted that the cook knew about the damaged rail, and he had not asked for permission to throw the ashes overboard. The act was also not necessary for him to carry out his duties on the ship. The rule was inspired by German law, and had as a consequence that the fault on the victim's side offset the fault on the alleged tortfeasor's side.

2 Since the 1960s, the traditional theory of adequacy – and thus foreseeability – has been transformed due to tendencies to more openly discussed value-based borders of liability – even though the buzzwords ('causation', 'adequacy' and 'foreseeability') of course often appear in case law.[1] Some kind of foreseeability – in the form of the possibility to perceive the risk potential – is also part of the negligence test, so when considering this topic as a part of the limits of liability issue, a more specific view is applied. Alternatives to the adequacy theory have been discussed – for example, the protective purpose of conduct norm (often formulated as 'the typical risk' as regards strict liability) – but no new unified theory has ever 'replaced' the familiar adequacy. The important lesson nevertheless, is that these traditional or new concepts nowadays do not have any unifying common core and that is the reason why the discussion increasingly tends to deal with specified situations and their value-based border issues, instead of the previous discussions concerning a unified concept for all cases.

3 The only doctoral thesis covering the whole field of tort law's borders is *H Andersson*, Skyddsändamål och adekvans. Om skadeståndsansvarets gränser (Uppsala 1993) [The purpose of protection and adequacy. On the limits of liability in tort law]. The thesis – and the later follow-up book *H Andersson*, Gränsproblem i skadeståndsrätten (Uppsala 2013) [Border problem in tort law] – is founded on a comprehensive study of the Swedish Supreme Court practice (and comparisons to the other Nordic countries and German speaking countries) and promotes an alternative total picture, either to be discussed within the tradition of the adequacy theory – for those who prefer the older wordings – or as a more differentiated scheme of several different case situations and, accordingly and most importantly, different and concrete values, interests, etc.

4 An important theme is to observe two dualistic perspectives concerning the limits of liability, where facts and arguments concerning either the tortfeasor's side or the victim's side can be evaluated – instead of the traditional theory of adequacy which answers the question what could be foreseen, etc from the tortfeasor's perspective. The main tendency is that even the Supreme Court has developed the argumentation in favour of different kinds of typical cases and thereby varied arguments (values and interests) so that we today – perhaps as a typical post-modern phenomenon – see fewer references to abstract concepts and instead more openly discussed value issues.

5 Another way of finding limits to liability is that the duty to pay compensation can be reduced if it is unreasonably burdensome in view of tortfeasor's financial circumstances, whereby the needs of the victim also shall be taken into account (the Swedish Tort Law Act ch 6 para 2). However, this reduction clause is quite rarely used.

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1 For a general view of causation, see the leading textbook *J Hellner*/*M Radetzki*, Skadeståndsrätt (10th edn 2018) 187ff. See also *H Andersson*, Gränsproblem i skadeståndsrätten (2013) 23ff; *M Carlsson*, Arbetsskada (2008) 276 ff, 303ff; *M Schultz*, Kausalitet (2007) 27 ff, 263ff.

18. Finland

Under Finnish law, limits of liability in the meaning of this book are partly understood as elements of the causation requirement, for example the requirement of foreseeability of the causal connection between the damaging act and its consequences, and partly as independent legal mechanisms, for example the possibility for adjustment of liability because of economic circumstances of the party causing damage and the injured party by virtue of a statutory reduction provision. Some limits of liability are based on explicit provisions in law, but a considerable number of them are in force as non-statutory rules or principles that have been developed in case law and under the influence of jurisprudence. However, even in the cases where limits of liability are based on explicit provisions, those provisions are formulated in quite vague terms. Thus, case law, particularly precedents of *Korkein oikeus* (the Supreme Court of Finland), and, to some degree also legal literature, have a pronounced significance when analysing the substance of law as regards limits of liability. **1**

Vahingonkorvauslaki (31.5.1974/412), which is a general statute on extra-contractual liability for damage in Finland, does not contain an explicit provision on causation – however, the existence of such requirement comes implicitly out of the wording of certain provisions of the act, and there is no question that such requirement is a part of the Finnish legal order.[1] In any case, because of the absence of an explicit provision, the substance of the causation requirement is not very structured in Finnish law. Because of this, also the relationship between the 'core' causation requirement (*conditio sine qua non*), and different limits of liability relating to causation, such as requirements of adequacy and foreseeability of the causation, as well as their reciprocal relationship, is more or less unclear. In Finnish jurisprudence, a difference between natural and legal causation has often been made,[2] but it is unclear if this distinction has any direct normative significance. **2**

When analysing legal sufficiency of causation under Finnish law, the concept of *adequacy* is often mentioned. However, the exact content of this concept is unclear. Sometimes adequacy is understood – more or less – as a synonym for foreseeability of **3**

1 See vahingonkorvauslaki 2:1.1: 'Joka tahallisesti tai tuottamuksesta *aiheuttaa toiselle vahingon*, on velvollinen korvaamaan sen, jollei siitä, mitä tässä laissa säädetään, muuta johdu.' (emphasis by the author) Unofficial English translation: 'A person who deliberately or negligently *causes injury or damage to another* shall be liable for damages, unless otherwise follows from the provisions of this Act.' (emphasis by the author). On the website <www.finlex.fi>, maintained by the Ministry of Justice of Finland, there are unofficial English translations of a great number of Finnish acts. For a translation of Finnish Tort Law provisions see also *S Hakaletho*/*P Korpisaari*, Finland, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law. Basic Texts (2nd edn 2018) 113 ff.

2 For example, *M Hemmo*, Vahingonkorvausoikeus (2005) 109 f; *P Ståhlberg*/*J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 386; *P Virtanen*, Vahingonkorvaus. Laki ja käytännöt (2011) 339.

causation.[3] However, it may also be used as an overarching term for different legal requirements for causation, and thus containing, inter alia, requirements of foreseeability of causation and the requirement that a loss must have been within a protective purpose of the norm.[4] It has also been suggested that one should simply abandon the abstract and vague concept of adequacy and merely speak of the directly applicable rules and principles that may lead to a limitation of liability, such as the requirement of foreseeability of the causation.[5]

4 Most of the different limits of liability that are in the scope of this comparative research are recognised in Finnish law, but not all of them. As is described below 5/18 no 3 in more detail, the doctrine of lawful alternative conduct is not recognised in Finnish law as a separate limit of liability but the subject thereof is simply included in the general requirement of causation. Moreover, the doctrine of sufficient connection to a target risk is regarded as lacking any independent significance in Finnish law. The legal problems that are discussed within the said doctrine in some jurisdictions are to be assessed in Finnish law applying the requirements of foreseeability of causation and protective purpose of the conduct norm breached.[6]

5 The limits of liability are, as a main rule, applicable also outside of the scope of application of *vahingonkorvauslaki* – in other words, in situations belonging to a sphere of certain special statutes or provisions on liability for damage, and to situations where the applicability of strict liability is established in case law. However, it is possible that the content of at least some of the limits is slightly different in cases where liability is strict. For example, it has been suggested that the significance of the requirement of foreseeability of causation would be decreased when applying strict liability, because in such situations the establishment of liability is not connected to a lack of caution of any person but to a presumption that a certain activity is *typically* prone to cause certain kinds of damage.[7] The idea was subsequently accepted by the Finnish Supreme Court, which also added that it is typical for activities that are subject to strict liability that they may cause damage which is very difficult to anticipate on the level of individual cases.[8]

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3 *P Virtanen*, Vahingonkorvaus. Laki ja käytännöt (2011) 343; *P Ståhlberg*/*J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 397 f.

4 *H Saxén*, Adekvans och skada (1962) 19 f, 67; *M Hemmo*, Vahingonkorvauksen määräytymisestä sopimussuhteissa. Siviilioikeudellinen tutkimus (1994) 24 ff.

5 *M Hemmo*, Vahingonkorvauksen määräytymisestä sopimussuhteissa. Siviilioikeudellinen tutkimus (1994) 26 f.

6 *P Ståhlberg*/*J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 407 f, 423.

7 *J Häyhä*, Ankara vastuu ja vahingonkorvausoikeuden järjestelmä, Oikeustiede – Jurisprudentia XXXII (1999) 81–149, 109 ff; *P Ståhlberg*/*J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 420 ff. Cf *P Virtanen*, Vahingonkorvaus. Laki ja käytännöt (2011) 339 f, who criticises the view and emphasises the importance of the uniformity of concept of foreseeability under different liability regimes.

8 Case KKO 2016:86 of 9 December 2016 (<http://finlex.fi/fi/oikeus/kko/kko/2016/20160086?search%5Btype%5D=pika&search%5Bpika%5D=2003%3A124>), para 10.

19. Estonia

In Estonian tort law, liability for causing damage is limited, above all, by the requirement that the damage to be made good must be within the protective purpose of the rule.[1] The protective purpose of the rule is the main doctrine concerning the limits of liability. The protective purpose of the rule is linked to the test for demonstrating causation. **1**

Under Estonian tort law, a causal link is established in two stages. First, a causal link is assessed using a *conditio sine qua non* (CSQN) test (natural cause). After a causal link has been established using that test, it is assessed whether there is also a causal link in a legal sense (legal cause). To that end, the purpose of the rule theory is particularly relevant. Although the protective purpose of a rule is primarily a question of causation, in the Law of Obligations Act (LOA)[2] it is related in particular to establishing unlawfulness as well as the damage to be compensated. The LOA § 1045(3) provides, first of all, that the causing of damage by the violation of a duty arising from law is not unlawful if the objective of the provision which the tortfeasor violates is other than to protect the victim from such damage. In addition, the consideration of the protective purpose of the rule is demanded by LOA § 127(2), which stipulates that damage is not compensated for to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose. LOA § 127 (2) is the general rule for both contractual and tortious liability. **2**

The Supreme Court has noted that, in the case of torts whereby the unlawfulness of the act arises from a harmful consequence (clauses 1, 2, 3 and 5 of LOA § 1045(1)), the protective purpose of the Act within the meaning of LOA § 127(2) is usually limited to the provisions of Chapter 7 of the LOA, which regulate the scope of a claim for damages according to the type of the harmed legal interests (LOA §§ 129–132) (eg Supreme Court Civil Chamber judgment in Case 3-2-1-174-10). The Supreme Court itself has assessed the protective purpose of a rule also in cases where the victim did not rely on any protective rule but merely on the unlawfulness ground set out in LOA § 1045(1). For instance, in the judgment in Case 3-2-1-39-15, the Supreme Court noted that, in order to decide whether the defendant is liable for an increase in the victim's damage, the protective purpose of clause 5 of LOA § 1045(1) must be assessed. **3**

There are instructions on how to establish the protective purpose of a rule. It is generally a discretionary decision of the court, which allows for quite a limitation to the circle of liable persons as well as the (more remote) damage to be compensated. This is so, **4**

1 Acoording to the case law, the protective purpose of the rule is primarily relevant in the case of pecuniary damage (see the Supreme Court Civil Chamber judgment of 22 October 2008 in Case 3-2-1-85-08, para 11). The limits of non-pecuniary damage are provided in § 134 of the LOA.

2 Estonian laws are available in English at <https://www.riigiteataja.ee/en/>.

among other things, in situations where a causal chain proves lengthy.[3] In legal practice, the purpose of the rule theory is often primarily a tool used to select interests to be protected by tort law.

5 Although legal writings refer to the possibility of establishing the legal cause of damage using the adequacy theory,[4] the latter has not gained any noticeable traction in case law. However, in assessing the protective purpose of a rule, one must keep in mind, among other things, the adequacy of the consequence from the point of view of the breached obligation: as a rule, the protection of the injured person against damage that is completely atypical from the point of view of violation of the rule should not be regarded as the purpose of the rule violated by the tortfeasor.

6 The principle of foreseeability is set out in LOA § 127(3), which only applies in the event of contractual damage: a non-conforming party shall only compensate such damage which the party foresaw or should have foreseen as a possible consequence of non-performance at the time of entering into the contract unless the damage was caused intentionally or due to gross negligence. As the wording of the provision indicates, the provision only applies to breaches of contractual obligations. However, it cannot be argued that the principle of foreseeability does not have any pertinence to tort law at all: namely, if one assesses the protective purpose of a rule, the principle of foreseeability does have certain pertinence to tort law (so to say, via a back door): generally, the purpose of a rule violated by the tortfeasor is not to prevent consequences which the tortfeasor did not and did not have to foresee.[5]

7 In the case of strict liability, the determining question is whether the risk causing the damage is such that would justify the establishing of strict liability. Strict liability is not based on the violation of a specific protective rule by the tortfeasor. The protective purpose of the rule is usually limited to the provisions of Chapter 7 of the LOA (§§ 129–132)

8 No maximum amounts of damages have been established in tort law, even though LOA § 140(2) provides for such an option by stating that limits on the extent of the liability of the person who caused damage or a fixed amount of damages may be established by an Act.

9 A causal link between the tortfeasor's violation and the consequence may not need to be identified if the harmful consequence would have resulted from lawful conduct of the alleged tortfeasor. In that case, the causal link may be absent for the purposes of a CSQN test (eg in the case of 'failure to act' torts).

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3 However, the Supreme Court has held that, in order to give rise to liability, damage does not need to be the direct consequence of the breach of the obligation. See the Supreme Court Civil Chamber judgment of 18 June 2008 in Case 3-2-1-45-08, para 17.

4 *T Tampuu*, Lepinguvälised võlasuhted [Non-contractual obligations], Juura 2017, 215.

5 See also the Supreme Court Civil Chamber judgment of 26 September 2006 in Case 3-2-1-53-06, para 13.

If the conduct of a third party affects the damaging of the injured person, the initial tortfeasor and the third party become joint tortfeasors towards the injured person (joint and several debtors[6]). It has been argued in legal writing that the act of the third party breaks the causal chain (and discharges the tortfeasor from liability) only where the impact of the initial tortfeasor is fully precluded due to the acts of the third party.[7] 10

The victim's conduct may break the causal chain only where the victim acted with the intent to harm themselves. If victims intentionally puts themselves in a dangerous situation but have no intention of harming themselves, this is not enough to break the causal link.[8] 11

Overall, the protective purpose of the rule is of central importance when it comes to limiting liability. Thereby the theory of adequacy and the foreseeability of damage have a merely auxiliary significance. 12

LOA § 140(1) is a general liability limiting provision, which is based on the criterion of fairness. It reads as follows: 'The court may reduce damages where full compensation would be grossly unfair with regard to the obligated person or not reasonably acceptable for any other reason. In such an event, all of the circumstances, in particular the nature of the liability, relationships between the persons and their economic situations, including insurance coverage, must be taken into account.' This provision has been applied in case law very rarely. 13

The seriousness of the tortfeasor's violation does not usually affect the protective purpose of a rule. According to legal writing, the injured person's special susceptibility could serve as a basis for reducing damages based on LOA § 140(1).[9] 14

20. Latvia

The basic norm for civil liability in Latvia is sec 1635(1) of the Civil Law of Latvia (CLL),[1] which provides that every breach of a right, that is, every illegal act per se, shall give the victim who has suffered harm (also non-pecuniary harm), the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act. It applies to 1

6 The joint debtors are both fully liable to the victim. In relations between themselves, they are presumably liable in equal shares (LOA § 69 (1)). However, the joint debtors can prove otherwise. According to LOA § 137 (2), liability shall be divided taking into account all circumstances, in particular the gravity of the non-performance or the unlawful character of other conduct and the degree of risk borne by each person.

7 *T Tampuu*, Lepinguvälised võlasuhted [Non-contractual obligations], Juura 2017, 220.

8 Supreme Court Civil Chamber judgment of 10 April 2013 in Case 3-2-1-21-13, para 15.

9 *T Tampuu*, Lepinguvälised võlasuhted [Non-contractual obligations], Juura 2017, 227.

1 Adopted on 28 January 1937, published by Valdības Vēstnesis, No 41, 20 February 1937. See also: The Civil Law of Latvia. Translation and Terminology Centre 2001, Unofficial translation: <http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc>.

both contractual and non-contractual liability.[2] The preconditions of liability according to doctrine and case law are misconduct (wrongful act and lack of justification), losses or harm and a causal link.[3] It is sometimes argued that fault is, or should be, a precondition as well.[4] Once the preconditions of liability are established and exclusions of liability such as consent of the victim, self-defence,[5] *vis maior, casus*,[6] etc are not proved, the issue of limiting liability may arise.

2 There are certain general statutory limits of liability under CLL providing that losses are compensable insofar as the victim could not have mitigated or averted the losses by taking reasonable steps according to sec 1776[7] and others. Section 1779[1] of CLL provides that damage shall be compensable to the extent that it was foreseeable, except in cases of willful misconduct or gross negligence, but, based on the wording of the norm and case law,[8] that limitation of liability is only applicable to contractual relations. It could be argued that the limitation of liability provided thereunder may be applicable to liability in tort by analogy.[9] Other limitations of liability also exist under Latvian law for specific legal relations and liability.

3 In addition, certain limits apply to special entities. Firstly, the extent of the liability of the State and its institutions for both pecuniary and non-pecuniary harm are limited in accordance with the Law on Compensation for Damage Caused by Public Administration Institutions. Those limits of liability under the aforementioned Law[10] are also frequently applied by the courts to determine compensation for non-pecuniary harm in

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2 *K Torgāns*, Saistību tiesības. Otrais papildinātais izdevums [Law of Obligations. Second supplemented edition] (2014) 142 f.

3 *K Torgāns*/*J Kārkliņš*/*A Bitāns*, Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā [Problems of agreements and torts in the European Union and Latvia] (2017) 283, Judgment of the Supreme Court of Latvia in case No SKC-309/2012 (27 September 2012), 8, Augstākās tiesas 2014.gada tiesu prakses apkopojuma 'Morālā kaitējuma atlīdzināšana civillietās' [Summary of the Case Law of the Supreme Court of 2014 'Compensation for Moral Damage in Civil Cases'] 23–40.

4 *K Čakste*, Civiltiesības. Lekcijas. Raksti [Lectures. Articles] (Riga, Zvaigzne ABC 2011) 194; *A Bitāns*, Civiltiesiskā atbildība un tās veidi [Civil liability and its types] (Riga, AGB 1997) 120; *V Sinaiskis*, Latvijas civiltiesību apskats. Lietu tiesības. Saistību tiesības [Review of Latvian Civil Law. Property law. Law of obligations] (Riga, Latvian Lawyers' Association 1996) 230–235.

5 Sec 1636 CLL.

6 Sec 1774 CLL.

7 *K Torgāns*, Saistību tiesības. Otrais papildinātais izdevums [Law of Obligations. Second supplemented edition] (Riga, Courthouse Agency 2014) 211 f.

8 See case No C33630116, covered in 2/20 no 1 below.

9 *J Kubilis*, Kaitējuma paredzamība Latvijas deliktu tiesībās [Foreseeability of damage in Latvian tort law] Latvijas Universitātes 5. starptautiskās konferences 'Juridiskā izglītība un kultūra: pagātnes mācības un nākotnes izaicinājumi' raksti (Riga, University of Latvia 2014) 541–551.

10 Sec 14 (4) of the Law on Compensation for Damage Caused by Public Administration Institutions provides that compensation for non-pecuniary may be awarded up to € 7,000; in the case of serious non-pecuniary harm up to € 10,000; but, in the case of death or particularly serious damage to health, up to € 30,000.

other cases, often with the argument that it helps to ensure predictable and comparable awards in similar cases.[11] However, some limits have been removed: for instance, those previously applicable to vehicle owners' liability insurers to compensate non-pecuniary harm provided by a Cabinet of Ministers regulation, as they were declared unconstitutional by the Constitutional Court[12] by referring to findings of the Court of Justice of the European Union (CJEU) judgment in case C-277/12.[13] The arguments of the Constitutional Court were also later confirmed by the Supreme Court.[14]

4 There are no explicit guidelines, case law or established doctrine supporting a very clear and uniform approach to limiting liability, where no statutory limitations are applicable. The courts do not often expressly indicate the policy reasons or concrete provisions of law when limiting liability at the causation level. However, causation is often implicitly considered, and it may be concluded that the causal link between the conduct of the defendant and the losses or harm to the victim have not been proved. The general approach of the courts when dealing with potentially unpredictable, atypical or remote adverse consequences of one's unlawful act would be to either argue that the conduct may not be considered unlawful or that there is no causation, mainly relying on procedural rules of proof – the obligation of the claimant to prove the preconditions of liability and that obligation not being entirely fulfilled. In other words, it would be more common for the courts to indicate that there is a lack of relevant proof than to address the liability limits not expressly indicated by law.[15] Since the doctrine provides different views on causation and misconduct-related issues in Latvia, taking a procedural approach to limit liability may arguably be an easier choice for the courts. In fact, sometimes identifying the protective purpose of a particular norm may be a more difficult task, as the legislator does not always provide clear reasons for amending the law, leaving it up to the courts to develop a uniform interpretation of the protective scope. This, however, takes time and, to a certain extent, gives rise to unpredictability and different solutions.

5 Historically, Latvian courts have taken a rather conservative approach when deciding issues of liability in cases of multiple causes or partial causation with unknown effects. This approach has, more often than not, worked in favour of defendants rather than claimants (victims), for instance, in cases where the courts have argued that a clear

11 Judgments of the Supreme Court (Chamber of Civil Cases) of Latvia in case No C04534410 (12 December 2013), No SKC-651/2012 (29 May 2012), No SKC-258/2011 (28 September 2011), No SKC-579 (16 December 2009), Augstākās tiesas 2014.gada tiesu prakses apkopojuma 'Morālā kaitējuma atlīdzināšana civillietās' [Summary of the Case Law of the Supreme Court of 2014 'Compensation for Moral Damage in Civil Cases'] 5.

12 Judgment of the Constitutional Court of the Republic of Latvia of 29 December 2014 in case no 2014-06-03.

13 Judgment of the CJEU 24.10.2013, C-277/12, *Vitālijs Drozdovs v Baltikums AAS*, ECLI:EU:C:2013:685.

14 Judgments of the Supreme Court of Latvia in case No SKC-2/2015 (26 October 2015), No SJC-10/2015 (29 May 2015).

15 Sec 190 (1) Civil Procedure Law of Latvia requires the court to base the judgment on substantive and procedural rules of law.

causal link has not been proved and rejected the claim under an 'either-or' approach. Also, the interpretation of unlawfulness as a prerequisite for liability used to be stricter, preferring a clear breach of statutory requirements applicable to the potentially liable party in order for the claim to be satisfied. However, in cases where no particular requirements of law (obligation to act in a certain way or to refrain from certain action) were applicable to a party (such as owners' liability and other forms of liabilities for failure to ensure a certain result), where the standard of conduct is less concrete, victims have had difficulties in proving misconduct as a precondition of liability. Those few indications, among others in light of a more victim-friendly approach becoming more notable in the last decade, indicate that there has been a shift in the general attitude by the courts, extending the protection of victims in a fair and reasonable manner. Also, the amounts of compensations for non-pecuniary harm have become much more predictable in similar cases, often allowing the parties to assess the potential outcome. In addition to a few legislative amendments and adjustments increasing the protection of victims, the limits of liability could potentially be more predictable and could be explicitly examined and developed by the case law in a uniform manner if statutory prerequisites and liability limits were more clearly addressed by the legislator.

21. Lithuania

1 The Lithuanian Civil Code (CC) does not provide for specific tools aimed to limit tortious liability. It is recognised that a duty to compensate all damage for which a tortfeasor's unlawful and faulty behaviour was a *conditio sine qua non* would lead to unreasonably boundless liability. Therefore, the second stage of the causal link is used as a tool to limit liability. The Lithuanian Supreme Court (LSC), without explicit reference but closely following the wording of art 3:201 (Scope of Liability) of the Principles of European Tort Law (PETL), has consistently held that, in the second stage of the establishment of the causal link, it is necessary to consider the foreseeability of the damage to a prudent and reasonable person at the time of the activity, the nature and the value of the protected interest or right, and the protective purpose of the rule that has been violated.[1] Tools of adequacy, the protective purpose of the rule and lawful alternative conduct are not discussed and *expressis verbis* recognised in Lithuanian legal literature and case law.

2 The theory of the purpose of the rule or any similar theory has never been discussed in Lithuanian tort law. Limitations of liability based on the concept of pure economic loss have once been accepted in the case law of the LSC (see below at 3/21 nos 1–8). However, this was a one-off occasion. Later, the LSC returned to its traditional approach of limiting liability via the causal link.

1 *L B and others v Daugiabučio namo savininkų bendrija 'Medvėgalis' and UAB 'Telšių šilumos tinklai'*, LSC 26 November 2007, case No 3K-7-345/2007.

Though not expressly mentioned, the defence of possible lawful alternative conduct has been found in case law. If the damage caused by a wrongful act would also have been caused otherwise by lawful conduct, it leads to a full exemption from liability. However, the issue of alternative lawful behaviour was also seen as a question of causation. The case illustrating this approach[2] (see below at 5/21 nos 1–6) dealt with a claim whereby the plaintiff sought compensation from the State of Lithuania for the pecuniary and non-pecuniary damage suffered as a result of a failure to adopt the relevant gender reassignment legislation. According to the plaintiff, due to the lack of regulation, she (previously he) was forced to carry out gender reassignment surgery abroad and thus not only suffered emotionally, but also incurred surgery and travel expenses. The Lithuanian Supreme Administrative Court found the State in breach of its obligation to comply with its obligation to adopt a law establishing the conditions and procedure for gender reassignment and awarded non-pecuniary damages to the plaintiff. However, according to the court, the inaction of the State shall not in itself lead to compensation for personal expenses related to gender reassignment and treatment because there is insufficient ground for claiming that, if the procedure and conditions for gender reassignment were established in Lithuania, the costs of this treatment would be fully compensated by the State. **3**

The foreseeability criterion is also one of the few tools available to limit liability. The case illustrating this approach[3] (see below at 2/21 nos 1–15) dealt with the potential liability of the State for its inability to provide proper health care services to a mentally ill person whose health allegedly deteriorated after being informed that he had cancer and who shot dead the plaintiff's teenager daughter in a state of incapacity. The Lithuanian Court of Appeal (CoA) found the State and the municipality not guilty due to a lack of unlawfulness and fault. Though it was not expressly mentioned in the decision of the CoA, it may be understood from the reasoning that, according to the CoA, the worsening of the person's condition and the intent to commit a crime could not have been foreseen by the mental health institution even if its psychiatrist had consulted with him after the cancer diagnosis. Thus, the argumentation of the CoA demonstrates that the liability of the State and the municipality was not established because of a lack of foreseeability. **4**

Many of the interesting categories of this research lack cases. According to the authors, this may be explained only by the size and short span of Lithuanian jurisdiction. Modern tort law rules started to develop only after restoration of Lithuania's independence on 11 March 1990. Lithuania, with a population of approximately 2.7 million inhabitants, appears too small to develop case law in all categories that are the focus of this research. **5**

2 Lithuanian Supreme Administrative Court, 29 November 2010, Administrative Case No A-858-1452-10.

3 Lithuanian Court of Appeal, 13 February 2013, Civil Case No 2A-18/2013.

22. Poland

1 All prerequisites of tort liability contain inherent constraints which aim at shaping rational – from the perspective of the system – boundaries of liability, without hindering its tantamount function, ie compensation of losses. As regards Polish law, a number of legal constructs are recognised as playing the role of limiting the grounds of liability, or the scope of damages, all of which are known to the French and Germanic legal cultures.

2 Most important is the *theory of adequacy,* which has not only gained the greatest acceptance,[1] but also is expressly recognised in the law. It was laid down in art 157 § 2 of the Code of Obligations (1933), and then in art 361 § 1 of the Civil Code (KC) (1964) as well as in art 115 of the Labour Code (1974).[2] Article 361 § 1 KC stipulates that 'a person obliged to pay compensation is liable only for the normal effects of the act or omission from which the damage resulted'. It should be stressed that adequate causation performs a dual function in Polish civil liability law: the role of the premise of liability (causal link between the damage and the harmful event) and the role of the limitation of damages. It also applies to contractual liability, albeit this may be modified by the parties.

3 The adequate causation theory helps to select from all conditions necessary for the damage to occur, hence which pass the test of *conditio sine qua non*, those to which it attributes legal importance, and those are the conditions that increase the potential (probability) for a given result to ensue. According to a standard formula, an adequate causal link exists if the damage caused can be regarded as an ordinary consequence of certain behaviour under the general rules of experience and probability. The courts use objective criteria flowing from common knowledge and science for the establishment of adequate causation.[3] The Supreme Court declared quite early on that foreseeability of outcome is not to be taken into account when establishing causation but should be examined as part of the considerations of fault.[4] Therefore, in Polish civil law, foreseeability is not a factor to be taken into account in establishing the scope of reparable damage, but the ground of a claim arising from fault-based liability. Accordingly, if the claim is based on a rule providing for strict liability, foreseeability is put outside of the picture. This solution applies *pari passu* to contractual liability; however, in the context of modern unification tendencies during the discussions on the recodification of the Civil Code,

1 See *A Koch*, Causal link as a prerequisite for the liability for damage in civil law (1975) 116 ff, *T Dybowski* in: System of Civil Law, vol III, part 1 (1981) 253 ff; *T Wisniewski*, in: Commentary to the Civil Code, Book III, Obligations, vol I (2003) 62.

2 Art 115 of the Labour Code stipulates 'An employee is liable for damage constituting a real loss for the employer and only for the normal effects of the act or omission from which the damage resulted'.

3 Sąd Najwyższy (The Supreme Court, SN) 2 June 1956, 3 CR 515/56, OSN 1957 item 24; SN 7 June 2001, III CKN 1536/00; SN 14 March 2002, IV CKN 826/00.

4 SN 10 December 1952, C 584/52, Państwo I Prawo No 8-9/1953, 366.

the foreseeability of damage was proposed by the Codification Commission to define the extent of the debtor's liability *ex contractu*.[5]

The second role of adequacy is the limitation of damage. According to art 361 § 2 KC, **4** the scope of damage comprises *damnum emergens* and *lucrum cessans,* both of which must be established in accordance with the adequate causation test (art 361 § 1 KC). Courts examine the causal link between each component of the alleged damage and the harmful event. Adequacy becomes significant in a case of consequential economic loss. The latter belongs to the category of expected but lost profits and is usually more difficult to evaluate because a hypothetical situation must be taken into consideration.

To conclude, under Polish law, *foreseeability* does not play any role with respect to **5** the scope of the obligation to redress damage once the defendant's liability has been established.

Beside the theory of adequacy, the second theory helping to limit liability is the ta- **6** citly accepted concept known as *Schutznormtheorie,* under which, the plaintiff can only obtain compensation if the rules that have been violated were laid down for the protection of the group to which he belongs. In general, Polish law represents the 'general clause' systems in which wrongfulness (unlawfulness) is not expressly named as a separate prerequisite of liability and fault is understood to include the element of wrongfulness (unlawfulness). The latter is understood broadly, which means that it is irrelevant whether the violated duties of care are written in the statute or come from general clauses (good morals, principles of community life). Notwithstanding the broad definition of unlawfulness, the majority of Polish legal scholars[6] and court practice[7] accept the view that wrongfulness triggering tortious liability is not any conduct contrary to law, but rather conduct of a specific nature. The obligation to repair damage only arises if the tortfeasor breached a statutory norm which aimed at protecting the victim against the type of damage actually caused (ie protected specific interests), and only if the victim belongs to the group of persons whom the norm was intended to protect. This is embraced in the concept of so-called *relativity of unlawfulness* (*bezprawność względna*), which is rooted in *Ehrenzweig*'s *Normzwecktheorie* and can be translated into the 'doctrine of protective purpose of a norm'. Those scholars who do not agree with that concept argue that the scope of liability is limited in particular by the adequacy theory

5 Projekt Komisji Kodyfikacyjnej Prawa Cywilnego (2011–2015) Księga druga. Część ogólna prawa zobowiązań z 2014 r. z poprawkami z 2015 r. <http://www.projektkc.uj.edu.pl/index.php/idea-apkc>.

6 See *A Szpunar*, Comment to the judgment OSP 7-8/1959, item 197; *E Bagińska*, Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej (2006) 397–401; *M Kaliński*, Szkoda na mieniu i jej naprawienie (2014) 62 ff; *R Kasprzyk*, Bezprawność względna, "Studia Prawnicze" Nr 3/1988, 149 ff; *B Lewaszkiewicz-Petrykowska*, Wina jako podstawa odpowiedzialności cywilnej, "Studia Prawno-Ekonomiczne" Nr 2/1969, 91. See also *P Machnikowski* in: A Olejniczak (ed), System Prawa Prywatnego: Prawo Zobowiazan. Czesc Ogolna, vol 6 (2009) 379.

7 SN 21 November 2003, I CK 323/02, OSNC 6/2004, item 103; SN 13 October 1987, IV CR 266/87, OSNC 9/1989, item 142.

of causation.[8] Nevertheless, the concept of 'relative' (conditional) unlawfulness remains dogmatically controversial in strict liability cases (see under 6/22), because when liability is based on risk, it is severed from the unlawfulness of the tortfeasor's conduct. Even in those cases, however, the courts sometimes employ the language of 'protective purpose of a norm' to ensure that the liability of the tortfeasor is consistent with the scope and aim of the norm which is deemed to be infringed.

7 According to the traditional and dominant legal opinion, a tortfeasor is principally not allowed to defend himself against a claim for damages by pointing at a hypothetical cause of the damage.[9] This means that, generally, a court should disregard a successive event that would have inflicted the same harm anyway. The rule that may be recognised as currently prevailing in Polish law states that the supervening cause does not influence the establishment of the defendant's liability, but it has an impact on the extent of the damage and the amount of damages. A cause under the heading 'lawful alternative conduct' is discussed but accepted as a factor in the calculation of damages.

8 In general, under Polish law, only persons who are *directly injured* (ie by the wrongful action directed by the tortfeasor against the other's rights and interests) can claim compensation. The boundaries of tortious liability are defined through the construction of arts 415 and 446 KC. Secondary victims are thus entitled to demand compensation for their own losses only in the case of death of the primary victim (art 446 §§ 2–4 KC).[10] This rule has, however, been weakened by recent case law (see 7/22). Moreover, it is accepted in doctrine that intentional fault or gross negligence of the wrongdoer may lead to liability also towards indirectly injured parties.[11]

9 Finally, *ius moderandi* (*ad hoc* reduction) is stipulated in art 440 KC. It is a rule of an exceptional nature, as a civil court does not have the general power to reduce the amount of damages on account of a lower degree of fault of the tortfeasor, the standing of the defendant, or due to other circumstances of the case. However, under art 440 KC, in relations between natural persons, the scope of the duty to redress damage may be limited according to the circumstances of the case if, having regard to the financial circumstances of the injured person or those of the person liable for damage, the principles of community life (principles of fairness) require such limitation. This rule is inter-

8 See *M Sośniak*, Bezprawność zachowania jako przesłanka odpowiedzialności cywilnej za czyny niedozwolone (1959) 126–129; *W Czachórski*, System Prawa Cywilnego, t. III, cz. 1, red. Zb. Radwański (1981) 534; *M Safjan*, Problematyka tzw. bezprawności względnej oraz związku przyczynowego na tle odpowiedzialności za niezgodne z prawem akty normatywne, in: Księga pamiątkowa Profesora Maksymiliana Pazdana (2005) 1326 f.

9 See *A Szpunar*, Ustalenie odszkodowania w prawie cywilnym (1975) 43; *W Czachórski*, Zobowiązania (2003) 213 f; *B Lewaszkiewicz-Petrykowska*, Wyrządzenie szkody przez kilka osób (1978) 79; *M Nesterowicz*/*E Bagińska* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 524.

10 See *A Szpunar*, Odszkodowanie w razie śmierci osoby bliskiej (1973) 68; Z *Radwański*/*A Olejniczak*, Zobowiązania – część ogólna (2012) 257.

11 *M Kaliński*, Szkoda na mieniu i jej naprawienie (2014) 75.

preted strictly and applied rarely. Factors which support the reduction of damages include not only the economic position of the parties, but also the degree of the tortfeasor's fault. Article 440 KC does not permit a total release of the liable person from the legal obligation to repair damage.

23. Czech Republic*

In Czech law, the limits of tort liability are addressed in a specific provision of the Civil Code and more generally through the use of the other doctrines and rules of tort law discussed below. 1

As regards the limitation of liability, the Czech Civil Code[1] explicitly provides for a general right of the court to reduce damages in sec 2953 (reduction clause).[2] The moderation right allows the court to determine the amount of damages at a lower amount than its actual extent, so that the awarded damages express what can be fairly demanded from the wrongdoer in a particular case. This is a reasonable reduction expressing proportionality, which, taking into account the circumstances of the case and other legal grounds, is fair both in terms of the injured party's legitimate claim and in view of the wrongdoer's personal and financial circumstances. 2

Other limitations than specifically stipulated by the Civil Code are applied through tools of causation theories[3] or other conditions of imputability. In particular, liability may be effectively limited or even excluded via the theories of adequacy and protective purpose of the norm. 3

The theory of adequacy uses such a criterion that damage is regarded as the result of a wrongful activity if, besides being the condition of the damage, the wrongful activity is due to its general nature, or, in the usual course of events and experience, to a com- 4

* The autor thanks Prof. Luboš Tichý for valuable consultations and cooperation in drafting the report.

1 Act No 89/2012 Coll.

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

3 As to the causation, contemporary Czech legal theory and case law acknowledge two basic theories concerning the examination of causation: the theory of 'conditio sine qua non' and the theories of adequacy and protective purpose of norm. The theory of 'conditio sine qua non' is based on the principle that the causality between the act and the result is always given if the damage would not have been caused had the wrongful activity not taken place. The theory of 'conditio sine qua non' consequently requires legally relevant delimitation of all relevant causes. The solution to this question is provided by the theory of protective purpose and the theory of adequacy (of the causal nexus).

mon cause of the damage. However, this does not apply to cases of strict liability.[4] Non-attributable consequences are those that the wrongdoer could not foresee, because they are too extraordinary and unforeseeable (adequacy of the extent of the consequences), or which are too distant from the consequence (adequacy of causal binding).[5] In determining the adequacy of causation, the perspective taken is that of a hypothetical experienced (so-called optimal) observer, ie an imaginary person who includes all the experience of his time, regardless of whether this experience is projected to cases of strict (if applicable) or fault-based liability.

5 The theory of protective purpose of the norm is based on the fact that the wrongdoer is not liable for all the consequences of a breach of a legal obligation, but only for a breach of those interests whose protection was the purpose of the obligation in question. With regard to the protective purpose of the norm, the express wording of the obligation is not decisive but whether these interests lie materially within the scope of the obligations in question.[6]

6 As to the theory of protective purpose of the norm, it is applied both in cases of liability based on fault and strict liability. In the case of liability based on fault, the objective wrongfulness of the conduct is examined, ie the issue of whether the breach of a legal obligation falls within the scope of the relevant legal norm. In such a case, Czech theory uses the term nexus of wrongfulness. In the case of strict liability (liability without fault), those consequences are attributable in which the risk is realised, for which the relevant norm imposes strict liability. In such a case we talk about the nexus of threat.[7]

7 Legal theory emphasises the role of the theory of protective purpose of the norm, which shall apply either jointly with the theory of adequacy or as one of the basic elements of objective imputability. This approach was recently confirmed and supported by the decision of the Czech Constitutional Court I ÚS 312/05 when it stated that if the extent of the protective purpose of the norm can be determined, it is necessary to proceed according to the theory of protective purpose of the norm. If it cannot be specifically determined, then it is necessary to proceed in accordance with the theory of adequacy.[8] Other conditions of imputability are considered only by the theory but have no impact on case law.

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4 *L Tichý*/*J Hrádek*, Deliktní právo [Law of Delicts] (2016) no 253.

5 *P Bezouška* in: M Hulmák et al, Občanský zákoník, Komentář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2014) 1555.

6 *J Hrádek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník, Komenntář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2021) 905.

7 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, Sv. IX [Civil Code secs 2894–3081, Large commentary] (2018) 225.

8 *J Hrádek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník, Komenntář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2021) 905.

However, the issue is more complex and we may question this consecutive approach whereby the first check is conducted under the theory of protective purpose of the norm and only if no result is achieved will the theory of adequacy apply. The reason is that both the theory of adequacy and protective purpose of the norm are clearly not theories of causality, but rather a real limitation of the imputability of the real cause to a particular wrongdoer. **8**

Academia also opts for the application of other conditions of imputability, such as foreseeability, the basis of liability, the value of the protected interest, the extent of the ordinary risk of life and the involvement of a third person.[9] **9**

Amongst these conditions, foreseeability and its delimitation play an important role. Since the theory of adequacy is in fact a limitation of the imputability of the cause to a particular wrongdoer,[10] the damage caused must be, according to generally accepted opinion, an adequate, foreseeable consequence of an illegal act or event, ie whether the damage was foreseeable for any person acting with due care at the time of the damage in the position of the wrongdoer. Thus, this theory excludes atypical damage which may have occurred as a result of unusual circumstances and a complex series of unforeseeable facts.[11] Therefore, when considering foreseeability, we investigate the judgement of an optimal observer. What is realistically probable is foreseeable. Thus, the goal is to assess the probability of a particular act and its extent.[12] **10**

Despite these causal theories, it is nevertheless still possible to find in the case law relatively fundamental approaches to causation from the time of Socialist law. This is the theory of 'artificial isolation of facts' and the theory of 'causal gradation' and both in fact apply to the limitation of natural causation. The theory of gradation examines the extent to which the action affected the relevant consequence, ie whether it was the main and decisive cause or a secondary or minor cause.[13] The theory of artificial isolation of facts then examines what causes may be legally relevant, but only human behaviour is examined.[14] However, unlike foreseeability, there is no doctrinal approach which would objectively determine the relevance of individual facts which are arbitrarily applied and considered by the court.[15] Instead, the court has to decide based on its own free consideration, which is then reasoned by general experience (which, by the way, usually means the general experience of the judge). **11**

9 *L Tichý*/*J Hrádek*, Deliktní právo [Law of Delicts] (2016) no 247ff.

10 *J Hrádek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník, Komenntář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2021) 904.

11 *L Tichý*/*J Hrádek*, Deliktní právo [Law of Delicts] (2016) no 253.

12 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, S. IX [Civil Code secs 2894–3081, Large commentary, vol IX] (2018) 219.

13 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 208.

14 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 207.

15 *F Melzer*, Vybrané aktuální problémy práva náhrady škody [Selected actual issues of delict law] in: V Zoufalý (ed), XXVIII. Karlovarské právnické dny 2021 [XXVIII. Carlsbad's Legal Days 2021] (2021) 77.

12 The Czech Supreme Court has not yet abandoned these theories but, on the contrary, combines them with the theory of adequacy (but not with the theory of the protective purpose of the norm).[16] For example, in decision 25 Cdo 3949/2017, the Court states: 'Legally relevant causes cannot be any factual causes, far from the harmful consequence, but it is necessary to exclude (isolate) only those causes which the law associates with the emergence of liability (so-called artificial isolation of facts), which are significant for causing a consequence (so-called causal gradation) and which, according to the usual course of business and according to general experience, usually (typically) result in causing certain damage (so-called adequate causal connection).'[17]

13 Another fundamental issue strongly inspired by past theories lies in the so-called interruption of causation, which is still applied by case law. Czech law understands this situation as one where the chain of causes does not establish a causal link between the wrongdoer's actions and the damage caused when another event, independent of the wrongdoer's actions, occurs and is decisive for the damage. However, causation is also interrupted in cases of indirect damage, ie in a situation where the cause of the damage is a fact that is itself a consequence for which the wrongdoer is liable for another legal reason (eg shock damage). The problem is not the refusal of the causal nexus itself but the way the case law disregards the standard normative criteria of imputability and how Czech law deals with the issue of indirect damage. Thus, the court should abandon those incorrect theories and might focus rather on the theory of adequacy.

24. Slovakia

1 Generally, when deciding on damages, the interest is focused on whether the preconditions for liability for damage have been met, as required by private law. In examining the assumptions of liability, the standards that limit liability are also taken into account. The preconditions for liability for damage are regulated by both the Civil Code and the Commercial Code. Unlike the Civil Code, the Commercial Code expressly distinguishes between contractual and tort liability for damages. The Civil Code is *lex generalis* in relation to the Commercial Code.

2 One such criterion is the foreseeability of damage, as regulated in the Commercial Code (§ 379). There is controversy in legal scholarship as to whether this provision applies only to contractual damages or also to damages in tort. The prevailing opinion is that the foreseeability of damage is not a precondition for liability for damage, but a cri-

16 Such approach leads then to decisions which are not foreseeable, their reasoning is not objectively re-examinable and from, a dogmatic perspective, hardly understandable.

17 There are a number of other decisions where a similar co-existence of these approaches can be found: 25 Cdo 1222/2012, 25 Cdo 3285/2015 or 28 Cdo 3471/2009.

terion that excludes compensation for unforeseeable damage.[1] Such a conclusion is also supported by legal practice.[2]

It is accepted that the provisions of § 379 ff of the Commercial Code are intended to prevent unreasonable harshness, but should not 'soften' liability for breach of duty.[3] The provision of § 379 is to be interpreted as an exception to the principle of full compensation for damage caused in a causal connection with a breach of duty.[4] **3**

The Civil Code has no provisions for unforeseeable damage. Part of the legal doctrine accepts[5] that § 379 of the Commercial Code can also be applied to a breach of contract under the Civil Code, specifically in relation to a preventive duty (§ 415 CC), the contributory fault of the injured party (§ 441 CC) and moderation of damages (§ 450 CC). This conclusion can be extended to tortious liability. **4**

The Civil Code speaks of compensation for damage (§ 420 CC), without explicitly distinguishing between 'direct' and 'indirect' damage. According to the legal doctrine accepted by practice, such a distinction is relevant when deciding on whether the damage is to be compensated.[6] Apart from the cases of specifically stipulated laws (§§ 448 and 449 CC), indirect damage is not to be compensated. According to the prevailing opinion, the reason behind this exclusion would be the lack of a causal link between the unlawfulness and the occurrence of such remote damage.[7] **5**

Despite the fact that the theory of *conditio sine qua non* has long been promoted in practice, the concept of adequacy was known much earlier in legal theory. Slovak courts began to report on the theory of adequate cause only in the last decade, clearly inspired by Czech judicial practice.[8] **6**

So far, an uncommon argument within Slovak legal practice is that which refers to the protective purpose of the norm (*Schutzzweck der Norm*). It was first used by the Constitutional Court of the Slovak Republic in its resolution of 2017. In its explanation, the Court referred to an important judgment of the German Federal Court of 1958 as well as **7**

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1 *O Ovečková*, Obchodný zákonník – Komentár 2. Tretie, doplnené a prepracované vydanie (2012) 314, 316.

2 Eg Judgment of the Supreme Court of the Slovak Republic of 15 February 2008, Case no 5 Cdo 46/2006, also see Judgment of the Supreme Court of the Slovak Republic of 29 May 2008, Case no 1 Cdo V 80/2007, Judgment of the Supreme Court of the Slovak Republic of 12 December 2007, Case no 3 Cdo 113/2007 and Judgment of the Supreme Court of the Czech Republic of 22 October 2008, Case no 32 Cdo 1733/2008.

3 *I Štenglová*/*S Plíva*/*M Tomsa, et al*, Obchodní zákoník. Komentář, 13 vydání (2010) 1043.

4 See the judgment of the Supreme Court of the Czech Republic of 30 September 2015, Case no 23 Cdo 3202/2013

5 *K Csach*, Predvídateľnosť vzniku škody a jej význam (nielen) v obchodnom práve, in: Historie obchodněprávních institutů. Sborník z konference. Brno, Masarykova Univerzita (2009) 125.

6 *Š Luby*, Prevencia a zodpovednosť v občianskom práve. I. diel. Bratislava: Vydavateľstvo Slovenskej akadémie vied (1958) 281, 282. Similarly, *K Eliáš et al*, Občanský zákoník – Velký akademický komentář, 1. svazek (2008) 976.

7 See also the Judgment of the Regional Court Banská Bystrica of 20 October 2016, case no 43 Cdo/110/2016.

8 See Judgment of the Supreme Court of the Czech Republic of 24 March 2011, Case no 28 Cdo 3471/2009.

a piece of legal theory.[9] Compared to the earlier decision of the Constitutional Court of the Czech Republic,[10] however, the Slovak court clearly omits the broader context. Legal theory[11] is also tentative in this regard, regarding this concept as a foreign legal transplant without support in the text of the Slovak legal order.[12]

8 On the other hand, similar results are reached by a broader, teleological interpretation (*e ratione legis = interpreting the law according to its purpose)* as a largely accepted approach.[13] It seeks to reject an excessive formalism in the interpretation and application of legal norms.[14] The teleological interpretation is intended to find the purpose and meaning of a legal norm … it is a 'purposeful interpretation'… an interpretation that is 'of the time' in which the norm is implemented.[15]

9 The moderation of the amount of damages by the court is a long-established institute in the Slovak legal system. Moderation was already provided for by the Civil Code no 141/1950 in § 358, while this provision was taken over by the current Civil Code of 1964 (§ 450) with some modifications. The law establishes a number of criteria for the moderation of the level of damages;[16] the law does not require that all explicitly stated criteria be met. However, in all cases, the court is required to know, assess, state and explain in its judgment all relevant circumstances relevant to the reduction of damages.

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9 *K Csach et al*, Profesijná zodpovednosť (2011) 107 f.

10 Ruling of the Constitutional Court of the Czech Republic, Case no I.ÚS 312/05 of 1.11.2007.

11 *PJ Pipková*, Ochranný účel normy a jeho význam pro vymezení rozsah odpovědnosti za škodu. Právník (2013) no 9; *P Bezouška*, Příčinná souvislost jako nechtěné dítě normativnosti textu? in: M Dolobáč/Ľ Gregová Širicová (eds), Rezistencia vnútroštátneho práva a právne transplanty (2011) 85–93; *A Dulak*, Teória ochranného účelu ako spôsob určenia príčinnej súvislosti. Súkromné právo (2017) no 4, 150–153.

12 The current situation in the Czech Republic is different. By adopting the Civil Code of 2012, several German concepts of delictual liability were adopted, including the clause on the protective purpose of the norm (§ 2910 second sentence of Act no 89/2012 Cdo).

13 Web database of judicial rulings 'judikaty.info' of 18 August 2021 introduces 46 documents of the Constitutional Court of the Slovak Republic and 350 judgments of Regional Courts of the Slovak Republic. See <https://www.judikaty.info/najvyssi-sud-sr-jaspi/teleologicky-vyklad/>.

14 Resolution of the Constitutional Court of the Slovak Republic, file no IV oS 110/09 of 2 April 2009.

15 According to a Resolution of the Constitutional Court of the Slovak Republic of 9 January 2019, file no I CC 2/2019.

16 § 450: For reasons worthy of special consideration, the court shall reduce the compensation accordingly. In so doing, it shall take into account, in particular, how the damage occurred as well as the personal and financial circumstances of the natural person who caused it; it shall also take into account the circumstances of the natural person who has been injured. The reduction cannot be made if the damage is caused intentionally.

25. Croatia

The Croatian general tort liability system, contained in the Civil Obligations Act (in Croatian: *Zakon o obveznim odnosima,* hereinafter: the COA),[1] represents a rather liberal, open-ended and generally victim-oriented liability system.[2] This system does not recognise *a priori* legally protected interests, so that any pecuniary or non-pecuniary loss is considered as damage and is, in principle, compensable, regardless of the nature of the right or interest infringed by the tortfeasor's wrongful act, which enables, in principle, even a pure economic loss to be compensated. **1**

The victim-oriented character of the COA's tort law regime is further reflected in the full compensation principle, according to which, a victim must be restored to the situation in which they would have found themselves had the wrongful act or omission not taken place.[3] The full compensation principle is further elaborated in art 1046 of the COA, which provides for the definition of damage, according to which, damage is a decrease in a person's patrimony (regular damage), prevention of its increase (loss of profit) and violation of personality rights (non-material damage).[4] Hence, all these heads of damage are in principle recoverable. **2**

Furthermore, unlike some national legal systems, Croatian tort law does not adhere to the 'graded concept of liability', which means that in Croatian law, the scope of compensation, in principle, does not depend on the level of the tortfeasor's fault. Therefore, even if the damage is caused by simple negligence, the tortfeasor shall be obligated to compensate the damage in full. **3**

Finally, it is worth mentioning that Croatian tort law generally does not provide for any liability caps, except for some specific cases where such caps are provided for by the international treaties to which the Republic of Croatia or the European Union are bound, especially in the transportation sector.[5] Hence, regardless of the scope and the **4**

1 The Civil Obligations Act, National Gazette of the Republic of Croatia Nos 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021.

2 See in more detail about the Croatian general tort law regime in *M Baretić*, Tort Law, in: T Josipović (ed), Introduction to the Law of Croatia (2014) 161ff.

3 Art 1090 of the COA. Full text in English, see in *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 54.

4 Full text of art 1045 of the COA in English, see in *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 43.

5 See, eg, the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) and the Council Decision 2001/539/EEC on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), OJ L 194, 18.7.2001; the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 2002 and Regulation (EC) 392/2009 of the European Parliament and the Council of 23 April 2009 on the liability of carriers by sea in the event of accidents, OJ L 131, 28.5.2009.

extent (amount) of damage, the tortfeasor should, in principle, compensate the damage in full.

5 The above described liberal, victim-oriented tort law system does not, however, imply that in Croatian tort law 'anything goes'. Croatian tort law provides for a number of tools, which noticeably restrict liability, thus preventing the tort law system from collapsing under the burden of an unmanageable influx of cases.

6 Some of these limitations can be found among general conditions of liability, and especially causality. Croatian courts frequently use the concept of causality to limit the tortfeasor's liability to only that damage which is considered sufficiently closely connected to the wrongful act.[6] Since Croatian doctrine and courts strictly adhere to the so-called adequacy theory of causation,[7] Croatian courts will generally dismiss requests for compensation which relate to damage not considered a typical consequence of a particular harmful event. In doing so, the courts will sometimes draw a very clear distinction between natural and legal causation, attaching liability only to those situations in which 'legally relevant' causation can be established, ie when satisfied that particular damage is a typical consequence of a certain harmful event, disregarding in this way all those events and actions which more or less incidentally contributed to the occurrence of the damage in a given case, but do not typically result in such damage.[8]

7 In the course of limiting liability, courts in Croatia tend to use the concept of causality in two directions; first, to limit liability with respect to particular types of damage; and second, to limit liability with respect to particular classes of victims. In this way, causation is used to impose substantive and personal limitations to liability, so that the lack of causation is sometimes invoked by courts in order to dismiss compensation requests concerning unforeseeable damage,[9] and sometimes in order to dismiss compensation claims from indirect victims. When resorting to the concept of foreseeability, Croatian courts frequently invoke the foreseeability test in two different situations; in the context of the occurrence of a damage-inflicting act (ie a wrongful act), in which case they will dismiss the compensation request if convinced that the occurrence of a harmful event was unforeseeable,[10] and in the context of the occurrence of a particular (type of) damage, in which case they will dismiss the compensation request if convinced that the occurrence of a particular type of damage could not have been foreseen as a result of a particular harmful act.

8 Another approach quite frequently employed by Croatian courts in limiting liability is the invocation of the concept of the protective purpose of the norm. In a number of cases, the courts will invoke this concept either to limit a tortfeasor's liability, or a vic-

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6 See the Supreme Court's Judgment No Rev 813/1994-2 of 6 June 1995, and the Split County Court's judgment No Gžx-99/12 of 4 October 2012, below under 2/25 nos 1–6.

7 See *P Klarić*/*M Vedriš*, Građansko pravo (14th edn 2014) 594ff.

8 See the Supreme Court's No Rev 813/1994-2 of 6 June 1995, below under 2/25 nos 1–3.

9 See the Supreme Court's Judgment No Rev 813/1994-2 of 6 June 1995, below under 2/25 nos 1–3.

10 See the Supreme Court's Judgment No Rev 813/1994-2 of 6 June 1995, below under 2/25 nos 1–3.

tim's exposure to contributory negligence, or even to limit the application of some statutory defences available to a tortfeasor.[11]

Notwithstanding its generally open-ended, victim-oriented character, in some in- **9**
stances the COA does provide for certain explicit or at least implicit limitations to liability.

First and foremost, in some instances, the COA specifically enumerates heads of **10**
damage which victims are entitled to, such as, for example, in the case of damage caused by death or bodily injury of a direct victim, thus excluding liability with respect to all those heads of damage not specifically mentioned in the black-letter rule.[12] On other occasions, the COA excludes, either explicitly or implicitly, a possibility of awarding compensation to a particular class of victims, eg indirect victims.[13]

Another tool used by the lawmaker in limiting liability are statutory exoneration **11**
clauses, providing for exclusion or limitation of liability with respect to damage caused or contributed to by the victims themselves (art 1092 of the COA),[14, 15] the third party,[16] force majeure (art 1067 of the COA)[17] or even a natural event which does not amount to force majeure.[18]

Finally, even when all statutorily provided conditions for liability are met, liability **12**
may be limited or even excluded by virtue of specific statutory norms, for social reasons or for reasons of general fairness. Thus, for example, the COA recognises two instances in which the courts are empowered to reduce the amount of compensation for social reasons or for reasons of general fairness; the first concerns situations in which a tortfeasor who did not act intentionally or with gross negligence is indigent and a full payment of the compensation would greatly impoverish him, and the second concerns situations in which the tortfeasor caused damage whilst rendering a performance of benefit to the victim, taking into account due care demonstrated by the tortfeasor in his

11 See the Supreme Court's judgments No II Rev-73/1998-2 of 6 June 2000, and No Rev-2474/2015-3 of 4 May 2021, and the Varaždin County Court's judgment No Gž R-10/16-2 of 13 June 2016, below under 3/25 nos 1–13.

12 See the Supreme Court's judgment No Rev 869/08-3 of 30 September 2009, below under 4/25 nos 1–4.

13 See the Supreme Court's judgment No Rev-x 224/08-2 of 13 May 2009, below under 4/25 nos 6–15.

14 Art 1092 of the COA reads as follows:

(1) A victim who has contributed to the occurrence of damage or to an increase in the damage shall only be entitled to proportionally reduced compensation.

(2) Where it is not possible to determine which portion of damage can be accounted for by the victim's action or failure to act, the court shall decide on the compensation taking into account the circumstances of the case.

15 See the Supreme Court's judgments No Rev 2890/15-2 of 28 June 2017, No Rev-x 568/11-2 of 15 January 2013, below under 8/25 nos 6–16.

16 See the Supreme Court's judgments No Rev 1144/09-2 of 24 January 2021, No Rev 2955/1998-2 of 6 June 2002, No Rev 342/05-2 of 6 July 2005, below under 7/25 nos 1–18.

17 Full text in English, see in *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 49.

18 See the Supreme Court's judgment No Rev 137/09-2 of 11 May 2011, below under 9/25 nos 1–6.

own dealings (art 1091 of the COA).[19] Whereas the former exception is quite often invoked by the parties,[20] the latter is hardly ever invoked.

26. Slovenia

1 Tortious liability is the duty of the causer of damage to compensate an injured party for damage for which the causer is responsible.[1] A precondition for tortious liability to arise is the occurrence of damage, but a party is only liable to compensate the damage if other general preconditions of tortious liability are also fulfilled: a causal link between the behaviour of the causer of the damage and the damage, unlawfulness, and fault.[2] The obligation to pay damages can therefore cover only such damage as is causally related to the harmful fact.

2 The legislation does not specify the criteria according to which a causal link should be established between the harmful act and the damage and, consequently, does not specify the criteria for limiting the indemnity obligation on the basis of causality. According to the literature, court practice should therefore seek answers to this question over and over again[3] by testing different theories and by applying the logic of common sense.[4] The common denominator of these aids to finding reasonable limits on liability is, as the theory points out, the objective attributability of the damage to the risk of another.[5]

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19 Art 1091 of the COA reads as follows:
(1) The court may decide, taking into account the financial position of the victim, to require of a responsible person compensation lower than the amount of damage if the damage was not caused intentionally or by gross negligence, and if the responsible person is indigent and a full payment of the compensation would greatly impoverish him.
(2) If the tortfeasor caused damage whilst rendering a performance of interest to the victim, the court may reduce the compensation, taking into account due care demonstrated by the tortfeasor in his own dealings.

20 See the Sisak County Court's judgment No 13 Gž 1225/2014-4 of 5 October 2017, and the Varaždin County Court's judgment No Gž R-10/16-2 of 13 June 2016, below under 10/25 nos 1–9.

1 *S Cigoj*, Teorija obligacij, Splošni del obligacijskega prava [Theory of obligations, General part of tort law] (1989) 165.

2 *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 271ff; *B Novak*, Vzročna zveza, protipravnost in krivda pri odškodninski odgovornosti [Causal link, unlawfulness and fault in tortious liability], Zbornik znanstvenih razprav Pravne fakultete v Ljubljani 1997, 271, 272ff.

3 *B Strohsack*, Odškodninsko pravo in druge neposlovne obveznosti – Obligacijska razmerja III [Tort law and other non-commercial obligations – Obligational relations] (1996) 36.

4 *D Jadek Pensa* in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, splošni del, 1. knjiga [Code of Obligations with commentary, General part I] (2003) 672.

5 *A Polajnar Pavčnik*, Vzročnost kot pravnovrednostni pojem [Causality as a legally valuable concept], Zbornik znanstvenih razprav 1993, 179, 199.

The theory of natural causation (*conditio sine qua non*) is generally not applicable in **3** the process of finding a legally decisive cause,[6] since, according to this theory, any cause without which the consequence would not have arisen is already an independent cause for which the party is responsible. Because this theory does not distinguish between less and more important causes, it repeatedly fails, since it does not lead to a correct, 'reasonable' and 'fair' solution to a dispute.[7] According to the theory of *ratio legis* causality (a protective purpose of the rule), only those causes are relevant that the legal norm considers to be causes according to the protective purpose of the legal norm.[8]

Other circumstances which, together with the direct cause 'in the ordinary course of **4** things', 'usually', 'as a rule', lead to damage, are also legally important for deciding on the existence of an obligation to compensate the damage. These terms define adequate causality.[9] According to the theory of adequate causality, the relevant causes for the occurrence of damage or consequences are those circumstances that, in the regular course of events, lead to such a consequence. It is important to look for the cause of the resulting consequence in the conduct of the person causing the damage. Based on an assessment of the conduct of the person causing the damage, the court makes a decision as to whether this conduct is sufficient to cause a certain consequence, and the consequence is therefore normal and likely to occur in the regular course of events.[10] According to court practice, it must be normal consequences and not those that in any way could be considered very unusual, extraordinary or not expected by anyone.[11] The predictability (adequacy) of the consequences of the act is taken into account only in relation to the damage event when determining the causal link. The fact that the extent of the damage is greater due to the personal condition of the injured party does not break the causal link between the conduct and the damage event. With the correct application of the theory of adequate causation, the court must, therefore, assess compensation in view of all the physical limitations arising from the injury and due to which the injured party suffers mentally.[12]

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6 Judgment of the Supreme Court II Ips 101/2007, 23 December 2010, <https://www.sodnapraksa.si/> (27 November 2021).

7 Decision of the Supreme Court II Ips 588/99, 31 May 2000, < https://www.sodnapraksa.si/> (27 November 2021); Judgment of the Supreme Court II Ips 730/2005, 15 November 2007; Judgment and decision of the Supreme Court II Ips 269/2008, 15 May 2008 < https://www.sodnapraksa.si/> (27 November 2021).

8 Judgment of the Supreme Court II Ips 572/2002, 30 October 2003, < https://www.sodnapraksa.si/> (27 November 2021).

9 Decision of the Supreme Court II Ips 588/99, 31 May 2000, <https://www.sodnapraksa.si/> (27 November 2021).

10 Judgment of the Supreme Court II Ips 33572/2012, 17 May 2018, <https://www.sodnapraksa.si/> (27 November 2021).

11 Judgment of the Supreme Court II Ips 1003/2007, 17 January 2007, <https://www.sodnapraksa.si/> (27 November 2021).

12 Judgment of the Supreme Court II Ips 1094/2008, 17 April 2009, <https://www.sodnapraksa.si/> (27 November 2021).

5 Similar grounds for relieving liability for damages as in the case of culpable liability are also prescribed for strict liability, whereby the law presupposes that any damage caused in connection with a dangerous thing (or dangerous activity) also originates from it (para 2 of art 131 of the Code of Obligations[13]). The holder of a dangerous thing can be relieved of the liability imposed by law only in exceptional cases if he or she succeeds in proving one of the following reasons: (1) that the damage was caused by some external cause that could not be expected, avoided or responded to (force majeure: para 1 of art 153 of the Code of Obligations); (2) that the damage was caused exclusively by the act of the injured party or a third party, which the holder of the dangerous thing could not have expected and its consequences could not be avoided or remedied (third party: para 2 of art 153 of the Code of Obligations); (3) that the person who suffered the damage (in part) contributed to the occurrence of the damage (act of the victim: para 3 of art 153 of the Code of Obligations). Referring to reasons other than those described does not relieve the holder of the dangerous thing of strict liability.

6 The basic premise of the Code of Obligations as regards reparation is the rule of full compensation. The court awards the injured party damages in the amount necessary to make his or her financial situation what it would have been in the absence of the harmful act or omission (art 169 of the Code of Obligations). There are two exceptions to this rule: (1) the court may, taking into account the injured party's financial situation, order the responsible person to pay less compensation than the damage if the damage was not intentional or negligent and the responsible person is in a precarious financial situation and the payment of full compensation would put her or him in need; (2) the court may award lower damages if the perpetrator caused the damage while acting for the benefit of the injured party (see 10/26 below).

27. Hungary

1 The Hungarian Civil Code contains several provisions limiting or excluding tort liability and the case law also adapts the general regime on tort liability in situations justifying a limitation of liability.

2 Above all, art 6:520 of the Civil Code on unlawfulness excludes liability in the following cases: a) the damage was caused in agreement with the victim; b) the aggressor suffered damage or damage was caused to prevent an imminent illegal aggression, subject to the victim not exceeding what was necessary to prevent such damage; c) a state of necessity existed, subject to proportionality; d) the damage was caused by an act permitted by law when the act does not offend the values of other persons protected by law or the law obliges the tortfeasor to pay compensation.

13 Uradni list RS (Official Journal) Nos 97/2007, 64/2016, 20/2018.

The provisions of art 6:522 of the Civil Code on the tortfeasor's obligation to compensate provide two further limits to liability. First, art 6:522 (3) states that the court must reduce the damages in relation to the material advantages gained by the person who suffered the damage, except when this is not justified considering the circumstances of the case. Second, art 6:522 (4) stipulates that, in specific circumstances, the court may award lower damages in relation to the damage actually caused by the tortfeasor. 3

Foreseeability was admitted by the *Kúria* (the Hungarian Supreme Court) in 2008[1] in tort law. This judicial rule was confirmed by art 6:521 of the New Hungarian Civil Code (that entered into force on 15 March 2014), which states that causation may not be established for damage which was not foreseen and could not be foreseen by the tortfeasor when committing the tort. Article 6:519 does not define the concept of foreseeability. For its interpretation, art 1:4 (1) of the Civil Code should be considered. 4

Foreseeability is especially relevant in tort cases concerning the loss of a chance, this being not explicitly recognised by the Civil Code as a type of damage and, thus, it is discussed by the courts as an element in the question of causation. Previously, the courts did not admit such claims, particularly in cases concerning medical malpractice due to the fact that it is difficult to prove the healing or the life chances of a patient in cases of an erroneous diagnosis, when the medical intervention took place too late.[2] However, more recently, in such cases, the courts[3] have established the liability of the doctor or of the hospital by presuming a causal link between the tortious act and the damage.[4] 5

The condition of foreseeability breaks the causal link and serves as a tool for the court in the process of clarifying the causal link in order to determine which damage was caused by the tortfeasor.[5] Thus the condition of foreseeability is, from the point of view of substantive law, a filter within the causality assessment, a factual element that must be proved by the victim.[6] It is not a question that should be invoked *ex officio* by the court, because it is not referred to as such in either art 6:88 (1) or art 6:121(2) of the Civil Code. 6

The tortfeasor is not expected to foresee the entire causal chain; it is enough if he/she acknowledges the type and extent of damage that his/her act or omission may cause.[7] The test is an average person acting with sufficient diligence. It is argued in the literature that the requirement of foreseeability in the New Civil Code may result in a lack of consideration of the special qualities (health or psychical condition) of the person suffering the damage in tort cases.[8] 7

1 Legf Bír Pfv V 20.152/2008, BH2008.299.

2 *E Jójjárt*, Az esély elvesztése, mint kár, Jogtudományi Közlöny 2009/12, 518–533.

3 Szegedi Ítélőtábla, Pf II 20.375/2015, BDT2016.3577.

4 *Gy Wellmann* (ed), Polgári Jog. Kötelmi Jog. A Ptk. magyarázata (2021) 2476.

5 Szegedi Itélőtábla, Pf I 20.018/2018/4.

6 *Á Fugklinsky*, Kártértési Jog, HVG-Orac (2015) 274f; *Gy Wellmann*, Polgári Jog. Kötelmi Jog. A Ptk. magyarázata (2021) 2478.

7 Ibid, 2477.

8 *M Boronkay*, A deliktuális felelősség határai, Iustum Aeguum Salutare 2007/4, 198.

8 The establishment of causation would normally consist of three stages, including the identification of all causes, the selection of those causes which are relevant for the establishment of liability and finally the court should analyse the relationship among the relevant causes. However, in practice, it cannot be clearly identified what criteria are used by the courts when establishing or denying causation.[9]

9 Nevertheless, there is consent on the issue that a distinction should be made between factual and legal causation.[10] The relationship between the behaviour of the tortfeasor and the damage is a necessary but not sufficient condition for establishing liability.[11] This type of causation is defined by doctrine as the *conditio sine qua non* theory or natural causation. It is based on a selection among the causes for establishing which are the relevant and non-relevant causes, a process called legal causation, this being a question of law. In practice, the two are not always clearly identifiable in courts' reasoning, especially when the judge decides to involve experts in this process.

10 The leading causation theory in the Hungarian doctrine is that of *adequate causation*.[12] However, the courts also apply other additional criteria when establishing causation, such as general life experience, statistical probability, the relationship between the antecedents and consequences.[13] The doctrine recommends the following criteria for establishing causation: the effect test (whether the precedents had sufficient effect on the consequence), probability, objective foreseeability (the exclusion of unusual results from the perspective of a reasonable, careful typical person), increase of the risk (whether the antecedent increases the negative effect), the sphere of protection of the infringed legal provisions (whether the damage caused belongs to the scope of the legal norm infringed by the tortfeasor).[14]

11 Most court decisions consider causation as a question of fact applying the *conditio sine qua non* test, but there are also cases when it is not so obvious whether the court treated causation as a question of fact.[15]

12 The legal doctrine discusses the question of whether *events aggravating the consequences of a tort*, such as medical malpractice following a road accident, may constitute an interruption of the initial chain of causation. The question is whether the author of the initial tort may also be held liable for the consequential damage. For such situations,

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9 *L Blutmann*, Okozatosság, oksági mércék és a magyar bírói gyakorlat, Jogtudományi Közlöny 2011/6, 314, 320, cited by *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 27.

10 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 27.

11 Ibid.

12 *Gy Eörsi,* A jogi felelősség alap problémái, a polgári jogi felelősség (1961); *Gy Eörsi*, A polgárijogi felelősség kézikönyve (1966) 129.

13 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 29 f.

14 *L Blutmann*, Jogtudományi Közlöny 2011/6, 311–313.

15 *M Boronkay*, Iustum Aeguum Salutare 2007/4, 185.

general conclusions cannot be drawn from the case law.[16] The leading opinion in doctrine considers that the author of the initial tort should be accountable for the consequences.[17] In case law, we find judgments in which the liability was shared between the author of the initial tort and the author of the consequential tort, in proportion to their respective contribution, whereas in other cases which circumstances were relevant for the occurrence of the harmful result were decisive and there are also some cases when the court established joint liability in such situations.[18]

Hungarian tort law is based on a general obligation not to cause damage to others, **13**
and, from this, it has been concluded that it would be difficult to accept limitations of liability.[19]

The New Civil Code, similar to the Old Civil Code, does not contain specific provi- **14**
sions on liability for damage caused to indirect victims or on the entitlement of third persons not in a legal relationship with the tortfeasor to compensation of damage caused to the victim of the tort. Nevertheless, there are numerous cases in practice and court rulings on damages being awarded to *indirect victims* for the loss suffered due to the damage caused to the primary victims, especially for medical injuries when the direct victim passed away, or to those nursing a victim who suffered severe injuries.

It has been argued in the doctrine that since Hungarian tort law is based on the **15**
principle of full reparation, no special provisions are necessary for such cases to limit the right of relatives of primary victims to damages.[20] Although the case law considers the right of relatives of primary victims to damages as their *sui generis own rights* and *not as an accessory right of that of the direct victim*, there are no special legal provisions in Hungarian tort law stating this. Therefore the general rules on tort liability apply in such cases.

The New Civil Code provides for the possibility of indirect victims (relatives of vic- **16**
tims) to receive compensation under the heading of compensation for infringement of personality rights, namely the infringement of the right to live in a complete family. In such cases, the court will assess the impact of the tort committed against the primary victim on the life of the family members, based on the actual relationship between the direct victim and the indirect victim. There is rich case law on compensation of indirect victims of torts, such as parents, children, spouses, sisters and brothers, without any specific evidence of the actual relationship between the direct victim and such relatives in cases of medical malpractice being necessary. One can detect in case law an enlarge-

16 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 34.

17 *Gy Eörsi*, A jogi felelősség alap problémái, a polgári jogi felelősség (1961) 457, 469.

18 *Á Dósa*, A gyógyulási esély csökkentésének értékelése a kártérítési jogban, in: Nótári Tamás, Ünnepi Tanulmányok Sárközy tamás 70. születésnapjára (2010) 118 f.

19 *M Boronkay* Iustum Aeguum Salutare 2007/4, 180 referring to *Gy Eörsi*, A jogi felelősség alapproblémái, a polgári jogi felelősség (1961) 470.

20 *G Marton*, A polgári jogi felelősség (1993) 182.

ment of the sphere of indirect victims entitled to damages; for example damages were also granted to the daughter-in-law of a direct victim.[21] In a tort liability suit against a home for elderly people, the *Kúria*[22] established that the right to live in a complete family was infringed and thus the children were also entitled to compensation when their parent was placed in a home for elderly people, ie they were no longer living in the same home, but the children and the parent maintained their parent-child relationship.

28. Romania

1 The tort law reform, introduced by the New Romanian Civil Code of 2011, also impacted the limits of liability. In practice, one can detect an unprecedented increase in the types of harms for which the victims of torts may seek compensation, due to the increase of the number of new subjective rights under the New Civil Code (C civ).[1] However, the doctrine and case law react differently to such developments. The doctrine is more advanced in its search for new solutions based on the provisions of the New Civil Code, looking for foreign best practices, especially to French doctrine and case law, while the courts encounter difficulties in working with the new rules based on the new approach and sometimes prefer to operate with the former legal categories and principles.

2 The New Civil Code contains several provisions on exclusions or limitations of tort liability. Article 1.351 C civ provides that force majeure (*forță majoră*) and unforeseeable events (*caz fortuit*) may exclude liability under certain conditions. According to art 1.351 (2), force majeure is an external, objective, absolutely invincible and inevitable event. In the case of damage caused by things, it has been established by case law that the external circumstance, in order to qualify as force majeure, must be external to the good and to its characteristics.[2]

3 Article 1350 (3) C civ defines the *unforeseeable event* (*caz fortuit*) as an event which cannot be foreseen or avoided by the person held liable. In this case, unforeseeability, unavoidability and invincibility are assessed against *an average, prudent and diligent person*, with an average professional background. The event must not be external to the tortfeasor – it suffices if it is external to the field of activity of the tortfeasor.[3] The effect of an unforeseen event will be the exclusion of liability unless laws do not provide otherwise. The New Civil Code lists situations where the consequence of an unforeseen event

21 Fővárosi Ítélőtábla 7.Pf.20.337/2017/10.

22 Kúria Pfv III 20.932/2012/3.

1 *I I Neamț*, Acţiunea colectivă ca mijloc de reparare a prejudiciilor în masă. O analiză din perspectiva dreptului comparat (2017) 33f.

2 Trib Sup Sec civ Decision no 1926/89, Dreptul no 8/1990, 83; C Ap Bucuresti, Sec Civ nr IV, decizia nr 1096/2002, Culegere de decizii 2000–2002, 282.

3 *L Pop*,Tratat de Drept Civil. Obligațiile, Vol III, Raporturile Obligaționale Contractuale (2022) 284.

will not be the exclusion of liability, such as in the case of product liability, liability for ecological damage, or liability for aeronautic damage. Articles 1.375–1.380 C civ on liability for damage caused by things and animals provide that only force majeure will exonerate a party from liability.

The condition of unforeseeability of the external event concerns both the occur- **4**
rence of the event and its consequences. For example, average floods in areas along rivers at the end of autumn or early spring will not qualify as force majeure, because these could normally be foreseen.[4] However, absolute unforeseeability is not required. This will be established by reference to an average diligent person, according to the standard of the *bonus pater familias.*[5] However, when it comes to the question of invincibility and unavoidability of the event, the criteria of a *super pater familias* applies, meaning that the event or act must be absolutely invincible and unavoidable for any other persons regardless of their capabilities. Thus, if the event could have been avoided while acting with maximum diligence or precaution considering the actual state of science and research, the tortfeasor will be held liable. The effect of force majeure is exclusion of liability. Courts restrictively interpret force majeure as a cause excluding tort liability.

Article 1.352 C civ provides that the *acts of third person* or *acts of the victim* may ex- **5**
clude the liability of the tortfeasor even if it is not a case of force majeure, but only an unforeseen event. In addition, art 1.371 C civ states that in the case of a victim who contributed, by fault or by negligence, to the occurrence or escalation of the damage, or did not avoid the damage totally or partially although they could have done so, the tortfeasor will be held liable only for the damage which was caused by him or her. Last but not least, art 1.380 C civ on liability for damage caused by animals, things and the ruin of constructions provides that the damage will be not repaired by the owner or the person having them in their custody when the damage was caused by the act of the victim, the act of a third person or is the result of force majeure.

Tort law judgments are rather facts-based and less framed by the actual legal doc- **6**
trinal debates concerning the legal questions raised by the case. In practice, the questions of fact are decisive for the outcome of a case; causation operates as a limit to liability.

It is a well established principle in Romanian case law that compensation may be **7**
granted only for direct harm.[6] However, as has been clarified by the legal doctrine, direct harm does not equal harm caused directly by the tortious act – the concept is wider, including both harm which is the result of direct causation and that which is indirectly caused.[7] As a consequence, causation is missing when the harm is the result of force ma-

4 *M Eliescu*, Tratat de Drept Civil. Obligații (1970) 209*; L Pop*, Tratat de drept civil. Obligațiile. Vol.III. Raporturile obligaționale extracontractuale (2020) 441.

5 *L Pop*, Tratat de Drept Civil. Obligațiile, Vol III, Raporturile Obligaționale Contractuale (2022) 282.

6 Trib Sup Sec Civ, decision no 1734/1984, RRD no 8/1985, 68f.

7 *L Pop*, Tratat de drept civil. Obligațiile. vol III. Raporturile obligaționale extracontractuale (2020).

jeure, unforeseen human obstacles like a strike, the acts of a third person or the act of the victim.[8]

8 The Romanian tort law doctrine and the case law agree in applying the theory of *unity of causes and conditions* when establishing the causal relationship. The theory elaborated by the distinguished law professor *Eliescu* is built on the premise that usually the harmful consequence of a tort is the result of multiple acts, events and conditions, *'which, without producing the harm have indeed favoured, facilitated or aggravated the harm, making it concrete and actual, thus building an indivisible unity with the cause, these being of a causal nature in interaction with the cause'*.[9]

9 This theory explains why, in practice, the courts consider both direct and indirect causation, while compensation cannot be awarded in cases of indirect damage. The burden of proof of causation lies on the victim, except in those cases when causation is presumed. Court decisions rarely develop the causation test: judges simply establish whether or not the plaintiff could prove the causal link.

10 *Indirect victims* are compensated only in the case of personal injuries, so-called victims by ricochet. The Civil Code does not establish up to which degree of kinship damages may be claimed; the preconditions of compensation are the affectionate relationship and the suffering.

11 *Liability caps* are present in Romanian law only in the case of special liability forms regulated outside the Civil Code, by the implementing rules of EU private law, such as product liability.

12 Other limitation cases widely known in foreign jurisdictions, such as the sufficient connection to the target risk or alternative lawful conduct, are unknown in Romanian tort law.

29. European Union

1 As already mentioned in previous volumes in this series, there are at least five different varieties of liabilities in EU law, distinguished not just by their bases, but also by their origins:[1]

(1) Non-contractual liability of the European Union itself for harm caused by its institutions or servants: This is based on what is now art 340 para 2 TFEU and what was

8 Ibid.

9 *M Eliescu*, Tratat de Drept Civil. Obligații (1970) 97.

1 *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 1/28 no 3; *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 1/29 no 1. Cf *U Magnus*/*W Wurmnest,* Casebook Europäisches Haftungs- und Schadensrecht (2002) 23.

previously art 288 para 2 TEC (and art 215 para 2 TEC even before that).[2] This provision foresees an autonomous standard of liability that is 'in accordance with the general provisions common to the laws of the Member States', without specifying what such alleged common grounds should be.[3]

(2) Liability of the EU as the employer of its staff (art 270 TFEU, previously art 236 ex 179 TEC).

(3) Liability of the Member States under the *Francovich* doctrine[4].

(4) Liability based on deficiencies in the implementation of EU law via direct claims for compensation raised by citizens allegedly thereby harmed.

(5) Case law on the interpretation of EU tort law rules by the CJEU, which is charged with requests for preliminary rulings by the Member States' courts, eg on the proper implementation of the Product Liability Directive (PLD)[5] or on the interplay between domestic tort law and the regime established by the Motor Insurance Directive (MID).[6]

The first two varieties have generated case law dealing with an autonomous approach to tort law, whereas the peculiarities of State liability (option 3) and the predominantly domestic aspects of national tort law in the fourth and fifth group are perhaps less apt to serve as a basis for identifying a general ('European') understanding of tort law in general and of the limits of such liabilities in particular. Nevertheless, also in the latter categories, the courts (should) proceed from an autonomous 'European' notion of the technical terms used in order to assess the compatibility of solutions found on the Member States' level. Furthermore, the CJEU at least claims to apply the same standards of liabi- **2**

2 This corresponds to art 188 para 2 EAEC. Cf art 41 para 3 CFREU and art 34 TECSC. See also *P Machnikowski*, The Liability of Public Authorities in the European Union, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 559 (no 14), on the historic differentiation between administrative and legislative acts; cf, eg, CFI 15.4.1997, T-390/94, *Schröder et al v Commission* [1997] ECR II-501.

3 Art 340 para 2 reads: 'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

4 ECJ 19.11.1991, joined cases C-6/90 and C-9/90, *Andrea Francovich et al v Italy* [1991] ECR I-5357; see *R Rebhahn*, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) 179 (no 9/16 ff), on the evolution of this doctrine.

5 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 [1999] OJ L 141/20.

6 Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability [2009] OJ L 263/11.

lity when EU law is breached, irrespective of whether committed by an EU institution or by a Member State body.[7]

3 Identifying the afore-mentioned 'European' understanding of terminology and concepts is tricky, however, if only because of linguistic diversity: notions such as 'adequacy' or 'remoteness' may be used by the CJEU because they were presented to the court in that language, and the repetition of these terms in the court's rulings is not necessarily a deliberate endorsement from the perspective of EU law. Since the case law cited in this volume was researched in English, but was not necessarily written in that language, some specificities may have gotten lost (or added) in translation.

4 Also, cases brought to the CJEU from a Member State's court for a preliminary ruling will not be analysed in full in Luxembourg, and the choice of aspects covered depend upon the questions raised by the referring courts. Particularly when it comes to applying the ruling (and this is where most often the weighing of conflicting interests – including considering arguments limiting liability – is being done), the CJEU will leave it to the referring courts to proceed on the basis of each Member State's own legal system, with a mere caveat that 'EU law' cases should not be treated differently from domestic cases in that respect.

5 One of the key requirements of State liability is a 'sufficiently serious breach'[8] of EU law, which is technically a prerequisite of liability, but at the same includes aspects of limiting liability. It is therefore very difficult to identify separate and distinct lines of reasoning in favour of limiting liability in such cases, as the seriousness of the breach is a threshold which has inherent limiting features. Some cases focus on the degree of discretion a national legislator had, the wider it being, the more 'manifestly and gravely' the institution must have disregarded the limits of such discretion.[9]

6 Another recurring element alluding to limiting liability is the requirement of a 'direct' causal link, which seems to imply *e contrario* that 'indirect' causes will be disregarded. That in turn may tempt us to assume that concepts such as remoteness or adequacy are embedded into the liability regimes of EU law. Alternatively or cumulatively, one might believe that insisting on 'direct' causation may exclude 'indirect', ie secondary victims.[10] However, with sometimes contradictory rulings by the CJEU on that point,[11] it

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7 Starting with the *Brasserie du Pêcheur* case (below 3/29 no 1 ff).

8 Developed in cases such as ECJ 2.12.1971, 5/71, *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975 (where a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' was required). See also the comments to the *Brasserie du Pêcheur* case in *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 2/29 no 29 ff (see also below 3/29 no 1 ff).

9 *P Machnikowski*, The Liability of Public Authorities in the European Union, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) no 14 f; *R Rebhahn*, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) nos 9/6, 9/53.

10 Cf below 4/29 no 1 ff.

11 Cf below 2/29 no 1 ff.

is hard to say whether any variant of so-called legal causation is truly seen as a distinct concept established by EU case law.[12]

Due to various limitations to the development of EU tort law, if only due to the boundaries on the EU legislator's competences, the body of law is 'still in a rudimentary and fragmentary stage', and what is there will typically 'focus primarily on the conditions of tortious liability and less on its limitations.'[13] Even in the absence of the caveats already mentioned before, the substance available to draw references from in the following is rather narrow. 7

30. The Principles of European Tort Law and the Draft Common Frame of Reference

a) Principles of European Tort Law. The PETL use a variety of devices for the purpose of limiting liability. The Principles' provisions that *establish the conditions* of liability hereby also *fix limits* of liability in the event that these conditions are not fulfilled.[1] This is the case, for instance, of the Principles' rules on natural causation (art 3:101 ff)[2] or on fault-based liability (art 4:101 ff PETL). In the absence of natural causation or fault, there is no liability under the PETL. 1

In case the conditions of the *conditio sine qua non* test are met under the PETL and *natural causation* is thus established, the rule on the *scope of liability* (art 3:201 PETL) provides further criteria for the attribution of, and for limiting, liability. While some national jurisdictions address these further issues under the heading of *legal causation, adequate causation*, or *equivalent causation*, and others under a separate 'unrelated legal vehicle',[3] the Principles seek 'to avoid discussions of this kind' and distinguish 'between *conditio sine qua non* (Section 1) and the scope of liability (Section 2), which are put together in Chapter 3 (causation)'.[4] 2

According to art 3:201 PETL, 'whether and to what extent damage may be attributed to a person depends on factors such as (a) the *foreseeability* of the damage to a reasonable person at the time of the activity, taking into account the *closeness in time or space* between the damaging activity and its consequence, or the *magnitude of the damage* in 3

12 See *I Durant*, Causation, in: H Koziol/R Schulze (eds), Tort Law of the European Communities (2008) 47 (no 3/42 ff).

13 *U Magnus*, Limitations of Liability under EC Tort Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) 273 (no 12/5).

1 All emphasis in this General Overview added by the authors.

2 For further information, see *B Winiger/H Koziol/BA Koch/R Zimmermann* (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007).

3 PETL – Text and Commentary (2005) art 3:201, no 2 (*J Spier*).

4 PETL – Text and Commentary (2005) art 3:201, no 3 (*J Spier*).

relation to the *normal consequences of such an activity*'. Further factors for determining the scope and limits of liability under art 3:201 PETL include '(b) the nature and the value of the protected interest (art 2:102); (c) the basis of liability (art 1:101); (d) the extent of the *ordinary risks of life*; and (e) the *protective purpose of the rule* that has been violated'.

4 Article 4:102 PETL, the PETL's basic rule on the *required standard of conduct* for fault-based liability, is another provision that sets up conditions of liability and, at the same time, limits liability. According to this provision, the required standard depends, inter alia, on the *foreseeability of the damage*. If the damage was not foreseeable, there is no fault and hence no liability under the Principles.

5 Regarding strict liability, according to art 7:102(1) (Defences against strict liability), it 'can be excluded or reduced if the injury was caused by an *unforeseeable and irresistible* (a) *force of nature* (force majeure), or (b) *conduct of a third party*.'

6 Last but not least, in accordance with art 10:401 (Reduction of damages) PETL, if exceptionally, 'in light of the financial situation of the parties, full compensation would be an *oppressive burden* to the defendant, damages may be reduced.'

7 **b) Draft Common Frame of Reference**. The DCFR uses the criterion of 'legally relevant damage' to determine when and to what extent a person shall be responsible. Pursuant to art VI–2:101(1) DCFR, loss or injury is 'legally relevant damage' where:

(a) one of the [...] rules of this Chapter [of Book VI DCFR] so provides;
(b) the loss or injury results from a violation of a right otherwise conferred by law, or
(c) the loss or injury results from a violation of an interest worthy of legal protection.

8 Regarding lit (a), arts VI–2:201 to 2:211 DCFR define 'particular instances of legally relevant damage', such as personal injury and consequential loss; certain types of loss suffered by third persons as a result of another's personal injury or death; infringement of dignity, liberty and privacy; loss upon communication of incorrect information about another; loss upon breach of confidence; loss upon infringement of property or lawful possession; etc.

9 Once it is established that the injured person has suffered legally relevant damage (Chapter 2), the tortfeasor must be accountable for it (Chapter 3), must have caused the damage (Chapter 4), and must not have a defence for having caused the legally relevant damage (Chapter 5), such as, for example, consent of the victim, contributory fault of the injured person, self-defence, mental incompetence, and contractual exclusions or restrictions of liability.

10 For claims which are *not* within the scope of art VI–2:101(1)(a),[5] lit (b) and (c) apply a general test of fairness for determining whether the damage is legally relevant, pursuant to art VI–2:101(2) and (3) DCFR:

5 Article VI–2:101(1) lit (b) and (c) DCFR addresses rights and interests which are difficult to fit into one of the categories covered by lit (a) of the same provision. The examples provided in the Official Commentary to illustrate lit (b) include the following scenarios: X's membership in a professional association is terminated on a pretext, which in turn results in a reduction of his professional engagements, see Comment C, Illustration 1 (at 3142); X was granted custody rights to a child after divorce. The other spouse Y abducts the child and X hires a detective to find them. The cost of hiring the detective is a consequential damage

(2) In any case covered only by sub-paragraphs (b) and (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention ….
(3) In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy.

Whereas in case of non-performance of a contractual obligation the DCFR limits liability to damage that is foreseeable (art III–3:703 DCFR), the DCFR's rules on extra-contractual liability do not mention the criteria of foreseeability, contrary to the PETL. **11**

According to the Official Commentary to the DCFR,[6] the differences between contractual and extra-contractual liability may, however, be attenuated by art VI–6:202 DCFR, which stipulates: **12**

> Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.

According to this provision, a reduction of liability may thus be possible except where the damage was inflicted intentionally. As the expression 'wholly or in part' indicates, the reduction of liability to zero is possible, including liability which has already been reduced for other reasons.[7] The article may apply, for example, where there is a significant disproportion between the objectively foreseeable consequences of an activity and the extent of the damage that has been caused and where it would be contrary to the principles of fairness to burden the wrongdoer with liability for the entire damage.[8] **13**

31. Comparative Report

As already established by Digest 1: Natural Causation, the *conditio sine qua non* formula (also known as the 'but-for' test) is 'close to being common to the legal systems of the **1**

arising out of the infringement of X's right to custody, see Comment C, Illustration 2 (3143). – Lit (c) is illustrated by the following scenario: X is severely ill and expected to die soon. He and his wife nevertheless wish to have a child together. His sperm is frozen, but a laboratory by mistake destroys the tube. This damage does not fit under any category of Chapter 2, but an interest worthy of legal protection has still been violated, see Comment D, Illustration 4 (3144).

6 *C v Bar/E Clive*, DCFR, art VI – 6:202, Comment (3785).

7 *C v Bar/E Clive*, DCFR, art VI–6:202, Comment (3786).

8 *C v Bar/E Clive*, DCFR, art VI–6:202, Comment (3785); for details, see below 10/30 nos 20 and 21.

European Union'.[1] It can be considered both a condition and first 'limitation' of liability. However, the examined systems also agree, in principle, that it is by itself insufficient to limit the liability of the tortfeasor, and that further restrictions – which are the subject of the present volume – are necessary.

2 Some reports argue that requiring a cause of action[2] or legally relevant damage[3] can already be viewed as limiting liability (such as the fact that liability usually depends on some form of misconduct or the manifest restrictions placed on the protection of purely pecuniary interests in tort law). In Common Law jurisdictions,[4] the need to invoke specific torts could be seen as a further preliminary constraint of liability.[5] However, such 'limitations', achieved by observing the basic conditions of legal responsibility, are not the focus of this Digest Volume (see Digest 2: Essential Cases on Damage and Digest 3: Essential Cases on Misconduct).

3 Rather, the following reports focus on further and, therefore, more narrowly understood limitations of liability. These legal concepts are rarely laid down in statute, meaning doctrine and case law are almost always responsible for their development,[6] which can give rise to more implicit limitations.[7] Even the harmonisation proposal contained in the Draft Common Frame of Reference (DCFR) does not attempt to establish a separate regime for the limits of liability. By contrast, two very recent codifications[8] and the Principles of European Tort Law (PETL) (art 3:201) attempt to explicitly identify the relevant factors for a limitation of liability.[9]

4 Although legal sources are equally lacking in most jurisdictions, the manner in which each system structures liability reveals significant differences. The first, essential,

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1 *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 1/29 no 1.

2 Switzerland 1/4 no 6; Hungary 1/27 no 1 (see unlawfulness); England and Wales 1/12 no 6; Scotland 1/13 nos 2, 5; Ireland 1/14 no 2f (see foreseeability in the tort of negligence); European Union 1/29 no 5 ('sufficiently serious breach'); PETL (1/30 nos 1, 4).

3 Switzerland 1/4 no 8; Poland 1/22 no 4; Croatia 1/25 no 10; DCFR 1/30 no 7f.

4 For the purposes of the present broad-brush overview, Scotland (a mixed jurisdiction) will be included in 'Common Law'.

5 Scotland 1/13 no 1; Ireland 1/14 nos 1 f, 5; alternatively Historical Report 1/1 no 1, for information on delict in Roman law.

6 See, in particular Austria 1/3 no 1; Germany 1/2 no 11; Switzerland 1/4 no 3ff; Belgium 1/7 no 4; Sweden 1/17 no 3f; Finland 1/18 no 1; Latvia 1/20 no 4; Lithuania 1/21 no 1; Czech Republic 1/23 no 3; Croatia 1/25 no 6ff; Slovenia 1/26 no 2.

7 In particular France 1/6 no 2; Belgium 1/7 no 4.

8 Netherlands 1/8 no 1 and Romania 1/28 no 2. Certain legal criteria can be observed more frequently, such as: France 1/6 no 3 (restriction of contractual liability to foreseeable damage – see also Belgium 1/7 no 5; Italy 1/9 no 4 (restriction of liability to direct damage); Estonia 1/19 no 2 (protective purpose of the norm); Poland 1/22 no 2 (test of adequacy); Hungary 1/27 no 4 (liability based on foreseeability).

9 PETL/DCFR 1/30 nos 3 ff, 7ff. Nevertheless, the DCFR does still limit liability on the basis of legally relevant damage.

difference lies in the degree to which issues of *causation* are distinguished from *limitations of liability*. For example, systems rooted in the French legal tradition do not expressly separate causation and limitations of liability.[10] The consequences of tortious conduct are not merely established by viewing causation as a necessary pre-condition (*conditio sine qua non*). Instead, at least in practice, such systems tend towards a narrower and more demanding understanding of causation. They emphasise the need for a direct causal connection[11] and, consistent with that position, a causal relationship may be refuted by proof of a fortuitous intervening event.[12] Another feature of these systems, which is independent of this understanding of causation, is the explicit limitation of contractual liability to foreseeable harm.[13]

In contrast, the reports from the German, English and Scandinavian legal traditions **5** emphasise the limitation of liability on the basis of value judgements.[14] As a result, 'objective imputability', 'the scope of liability' and 'legal causation' (which must be distinguished from 'natural causation'[15]) or 'policy arguments' can influence the attribution of liability.[16] 'Natural causation' is then regularly equated with the *conditio sine qua non* formula or similar tests and forms the first stage of any test for liability.[17] The second stage involves the application of various legal concepts to substantiate the attribution of liability. This examination typically revolves around one of two concepts: the theory of the protective purpose of the norm, particularly prevalent in German law,[18] according to which liability is limited to the specific type of harm against which the rule in question was intended to protect, *or*, direct recourse to policy considerations when determining the scope of protection, which is prevalent in Common Law and Scandinavian systems.[19] Similar considerations may also be taken into account in determining whether a duty of conduct was owed, as is the case when assessing the Common Law duty of care.

The emphasis placed on value judgements and any associated categories appears to **6** have won ground in recent times. A considerable number of legal systems now take the

10 France 1/6 no 2; Belgium 1/7 no 6; Romania 1/28 no 8 f; DCFR 2/30 no 14 ff, and also Latvia 1/20 no 1 ff; alternatively see Italy 1/9 no 5 and Switzerland 1/4 no 3 ff, which are also influenced by other systems.

11 Belgium 1/7 no 7; Italy 1/9 nos 4, 7 f; Romania 1/28 no 10.

12 France 1/6 no 5 (only force majeure); Romania 1/28 no 5 ff (differs based on the cause of action).

13 France 1/6 no 5; Italy 1/9 no 11; Estonia 1/19 no 16; Latvia 1/20 no 2; DCFR 1/30 no 11. In Belgium 1/7 no 6 and Romania 1/28 no 2 ff foreseeability is even more generally relevant.

14 Austria 1/3 no 1 f; Spain 1/10 nos 2, 4; Scotland 1/13 no 1 ff; Norway 1/16 no 6 f.

15 Germany 1/2 no 2; Switzerland 1/4 no 7; Netherlands 1/8 no 1 f; Italy 1/9 no 5; Spain 1/10 nos 2, 5; England and Wales 1/12 no 1 f; Scotland 1/13 no 1 ff; Ireland 1/14 no 5; Finland 1/18 no 2; Estonia 1/19 no 2; Czech Republic 1/23 no 4; Croatia 1/25 no 6; Hungary 1/27 no 9.

16 Scotland 1/13 no 4; Ireland 1/14 no 2; Norway 1/16 no 2; Sweden 1/17 no 4.

17 See *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 1: Essential Cases of Natural Causation (2007) 1/29 no 4.

18 See Comparative Report 3/31 no 1 ff.

19 See above fn 16.

protective purpose or scope of protection into account, at the very least alongside questions of causation.[20] The Spanish legal system has consciously realigned its approach based on the protective purpose doctrine[21] and the principle has even attracted discussion in those systems where it is not generally recognised.[22] However, many systems have been subjected to various influences meaning that both the protective purpose doctrine and arguments relating to qualified principles of causation can be observed simultaneously.[23] The requirement of a 'direct' causal connection is a particularly pertinent example of this.[24] Interestingly, systems based on value judgements often share linguistic similarities with those based on concepts of causality, particularly when dealing with the question of whether the actions of an unknown third party can 'break' the chain of causation.[25]

7 Functionally, the various legal systems converge to a remarkable degree, such that certain considerations play a greater or lesser role in almost every system examined. Most tort systems limit liability based on an abstract concept of typically foreseeable harm,[26] be that through an independent foreseeability test,[27] the recognition of the theory of adequacy,[28] or occasionally without any fixed conceptual classification.[29] Similarly, the idea that the conduct of an unknown third party or the injured party themselves may absolve the defendant of all liability appears to be universally recognised.[30] Conceptually, this is viewed as an independent problem,[31] as completing the value-based attribution of liability,[32] or as a chance event that interrupts the causal chain.[33] Finally,

20 Greece 1/5 no 3; Italy 1/9 no 9; Portugal 1/11 no 2f; Croatia 1/25 nos 6, 8; Poland 1/22 no 8; Slovakia 1/24 no 7f; recognised in principle but uncertain in practice Finland 1/18 no 3 f, and Lithuania 1/21 no 1.

21 Spain 1/10 no 4.

22 France 1/6 no 4; Czech Republic 1/23 no 9; Hungary 1/27 no 10.

23 Compare Italy 1/9 nos 5, 7 f, 9; Portugal 1/11 no 2f; Sweden 1/17 no 1; Poland 1/22 no 8 and Croatia 1/25 no 8.

24 See generally, Comparative Report 4/31 no 1ff.

25 Comparative Report 7/31 no 1ff. Eg: Germany 1/2 no 7 ('bond of causation is severed'); England and Wales 1/12 nos 1, 3, ('legal causation', 'remoteness'); Scotland 1/13 no 3 f ('remoteness'); Norway 1/16 no 9. Criticism of these terms can be seen in Austria 1/3 no 2; Czech Republic 1/23 no 13.

26 See generally, Comparative Report 2/31 no 1 ff.

27 France 1/6 no 5; Italy 1/9 no 11; Estonia 1/19 no 16; Latvia 1/20 no 2 for contractual liability; generally, Belgium 1/7 no 6; England and Wales 1/12 no 3 ('remoteness'); Scotland 1/13 no 5; Slovakia 1/24 no 2ff; Hungary 1/27 no 4 ff and Romania 1/28 no 2ff.

28 Austria 1/3 no 3; Germany 1/2 no 4; Switzerland 1/4 no 5; Greece 1/5 no 3; Italy 1/9 no 12; Spain 1/10 no 4; Portugal 1/11 no 2f; Norway 1/16 no 4f; Sweden 1/17 no 2; Estonia 1/19 no 1 ff (part of the protective purpose); Poland 1/22 no 2f; Czech Republic 1/23 nos 4, 10; Slovakia 1/24 no 2; Croatia 1/25 no 8; Slovenia 1/26 no 4.

29 Finland 1/18 no 3f; Croatia 1/25 no 7.

30 Comparative Report 7/31 no 1ff.

31 Austria 1/3 no 7 ('intervening wilful act').

32 Germany 1/2 no 7; England and Wales 1/12 nos 1, 3; Scotland 1/13 no 3f.

33 Eg France 1/6 no 5; Romania 1/28 no 2ff.

liability will not arise in cases where the damage would have occurred had the defendant acted lawfully.[34] In some systems, this concept of 'lawful alternative conduct' is viewed as an independent rule,[35] whereas in others it merely forms part of the general test for causation.[36] Perhaps the greatest difference between the systems examined lies in the fact that certain jurisdictions explicitly grant the protective purpose doctrine or policy considerations a legitimate role in the limitation of liability whereas in others they are only considered implicitly or not at all.[37]

8 Using this broad common ground as a starting point, differences in the practical weighing of the individual legal concepts and arguments can be identified. For example, some reports reveal a widespread use of foreseeability or adequacy tests,[38] while in other legal systems these tests rarely determine specific outcomes.[39] Similarly the doctrine of the protective purpose of the norm has been described as the most important limitation of liability in some jurisdictions,[40] while in others it is only used sparingly.[41] However, the majority of the legal systems are unlikely to favour any one particular concept, meaning that a wide range of criteria – such as adequacy and other issues of causation as well as the protective purpose doctrine – operate on equal footing.[42] If a particular limitation only plays a minor role in a given legal system, the substantive or *actual* limitation will be provided by other, more firmly established criteria. Therefore, when weighing up the various arguments for limitation, the system of liability as a whole must be taken into consideration.

9 Some reports refer to a discussion of the problem of whether the available limitations of liability depend on the cause of action, meaning that different rules apply for different individual torts or between fault-based and strict liability. The predominant conclusion is that similar conditions prevail or that, at the very least, an extensive overlap can be observed.[43] Germanic legal systems, in particular, emphasise that the protective purpose doctrine should also be applied to strict liability rules (*Gefahrenzusammen-*

34 See generally Comparative Report 5/31 no 1ff.

35 Austria 1/3 no 6; Germany 1/2 no 8; Belgium 1/7 no 6; Spain 5/10 no 4.

36 As reported in Switzerland 1/4 no 7; Greece 1/5 no 4; England and Wales 5/12 no 1ff; Scotland 5/13 no 4; Ireland 5/14 no 1ff; Finland 1/18 no 4; Estonia 1/19 no 9; Lithuania 1/20 no 3; for more detail, see Comparative Report 5/31 no 7ff.

37 Above 1/31 no 5.

38 Switzerland 1/4 no 5; Norway 1/16 no 4f; Poland 1/22 no 2f; Czech Republic 1/23 no 6ff; Croatia 1/25 no 6; Slovenia 1/26 no 2.

39 Austria 1/3 no 3 ('coarse filter'); Germany 1/2 no 4; France 1/6 no 2 (purely academic discussion); Estonia 1/19 no 5.

40 Austria 1/3 no 4; Greece 1/5 no 3; Netherlands 1/8 no 1f; Estonia 1/19 no 1.

41 Slovakia 1/24 no 7f; Poland 1/22 no 6 (use is controversial). For more detail see Comparative Report 3/31 no 4.

42 Greece 1/5 no 3; Italy 1/9 no 9; Portugal 1/11 no 2f; Sweden 1/17 no 1f; Poland 1/22 no 8; Slovakia 1/24 no 7f; Croatia 1/25 nos 6, 8.

43 Austria 1/3 no 4; Spain 1/10 no 4 (general principles sought); England and Wales 1/12 no 4; Estonia 1/19 no 7 (modified in cases of strict liability); Poland 1/22 no 6 (controversial with regard to the protective pur-

hang).[44] This does not mean, however, that limitations on liability should be mechanically understood or that their limits will always be drawn in the same way. More subtle distinctions are also reported in the sense that a particularly weighty ground for liability generally,[45] or within particular stages of the attribution test,[46] may justify an expansion of liability.

10 The various legal systems take very different positions on ad hoc interventions in the general assessment of liability. Such interventions can take the form of statutory liability caps or the empowerment of the courts to reduce liability on a case-by-case basis. Germanic law, in particular, is fond of capping damages in cases of strict liability,[47] however this is unlikely to serve as a model for other legal orders.[48] The statutory empowerment of judges to limit liability in exceptional cases[49] can be seen primarily in the Scandinavian systems as well as in Eastern European systems.[50] Meanwhile, of the Germanic systems, only Swiss law has adopted express reduction clauses.[51] These exemption clauses consider the tortfeasor's weight of responsibility, the financial weight of liability or – in most cases – both at the same time. In those systems rooted in English and French law, there is no tradition of limiting liability in such a manner.[52]

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pose doctrine); Czech Republic 1/23 no 4f. Alternatively – weakened criteria in cases of strict liability – Finland 1/18 no 5; Slovenia 1/26 no 5.

44 Austria 1/3 no 4; Germany 3/2 no 12.

45 Italy 1/9 no 14; Malta 1/15 no 4. For examples of explicit rejection, see Estonia 1/19 no 14; Croatia 1/25 no 3.

46 Austria 1/3 no 3 (adequacy); England and Wales 1/12 nos 2, 5 ('remoteness'); Latvia 1/20 no 2 (foreseeability in cases of contractual liability).

47 Germany 1/2 no 10; see also Portugal 1/11 no 4 and, unusually, Latvia 1/20 no 3 (an analogous application can be seen in the limitation of State liability).

48 Compare Greece 1/5 no 7; Netherlands 1/8 no 2 (but see also no 4: liability caps may be implemented via a simplified legislative process); Croatia 1/25 no 4; Romania 1/28 no 11.

49 See generally Comparative Report 10/31 no 1ff.

50 Comparative Report 10/31 no 16; Portugal 1/11 no 4; Norway 1/16 no 3; Sweden 1/17 no 2; Estonia 1/19 no 13; Poland 1/22 no 9; Czech Republic 1/23 no 2; Slovakia 1/24 no 9; Croatia 1/25 no 12; Slovenia 1/26 no 6.

51 Switzerland 1/4 no 9f; see also Austria 1/3 no 8; Germany 10/2 no 1 ff (derived, in each case, from constitutional principles).

52 France 1/6 no 6; Italy 1/9 no 16; England and Wales 1/12 no 6; Scotland 1/13 no 6; Ireland 1/14 no 7; Romania 1/28 no 11f.

B. Foreseeable and Unforeseeable Consequences

2. Is liability limited where the consequences are unforeseeable?

1. Historical Report

Ulpian (Mela, Proculus) D 9,2,11 pr

Facts

A ball player accidentally throws the ball against the hand of an itinerant barber, who consequently cuts the throat of the slave he is shaving with his razor.[1] **1**

Decision

The Roman jurist Mela writes that it is the person who was at fault that is liable under the *lex Aquilia*. Proculus states that the fault lies with the barber, who should not have set up his chair where people were playing ball; Ulpian, on the other hand, points out that the slave 'has only himself to blame' for entrusting himself to a barber who was shaving in a place so patently unsafe. **2**

Comments

The case of the itinerant barber is one of the more widely discussed cases dealing with the *lex Aquilia*.[2] Among its many other facets, it serves to exemplify the role foreseeability played in allocating liability: according to Proculus, the barber is liable for the death of his customer because he should not have set up his chair where people were playing ball; according to Ulpian, however, the slave himself is to blame for his death because he should not have opted to get shaven so near the ball players. In both cases, the deciding factor is whether the person reckoned to be at fault could have foreseen the injury:[3] a barber who sets up his chair where his customers are likely to be injured acts negligently – *culpa* – in that he breaches the standard of care expected of a diligent barber; hence, he is liable for the slave's death. Along the same lines, the unfortunate slave himself is considered at fault if he in turn could have foreseen the accident, thus freeing the other parties from liability.[4] In both cases, foreseeability thus already **3**

1 For a discussion of this case see also *F-S Meissel*/*S Potschka* in: *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 109 ff.

2 *G MacCormack*, Aquilian culpa, in: A Watson (ed), Daube Noster (1974) 201 ff (215).

3 *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 216.

4 Roman law follows an all-or-nothing approach to what would nowadays be termed contributory negligence on the part of the injured party: if the victim has, by his negligence, contributed to the injury, the injurer is not held liable. On this aspect of the case, cf eg *H Hausmaninger*, Das Mitverschulden des Ver-

https://doi.org/10.1515/9783111001272-003

determines whether the injurer is deemed to have breached the requisite standard of diligence[5] and can therefore be considered at fault and hence held liable for the outcome.

4 In this context, however, the role of the ball player deserves some attention. Interestingly, none of the jurists cited in this fragment discuss in any detail whether the person who threw the fatal ball could be considered at fault (and hence liable), even though Mela's general observation can certainly be taken to extend also to the thrower. Moreover, the text explicitly states that the player threw the ball not just *vehementer* (forcibly), but *vehementius* (too forcibly), which may well point towards some degree of negligence on his part[6] – just as one might demand of a 'diligent barber' not to shave his customers where they are likely to suffer injuries from third parties, one might demand of a 'diligent ball player' that he take care not to throw the ball beyond the boundaries of the playing field with such force that it causes injuries to bystanders.

5 While it is certainly true that many Roman sports were considerably more rowdy than those of the present day,[7] and that Roman jurists tended not to allocate blame to players who accidentally injured others, this typically applies to cases where a sports injury occurs by chance rather than *culpa*[8] or in which the injured party was likewise a participant in the game and hence, by electing to take part, could be assumed to have given his (tacit) consent to the possibility of being injured.[9] On the other hand, Roman jurists had no qualms about allocating blame – and hence liability – to a person who pushed another, thus causing the one who was pushed to injure a third party.[10]

6 The text offers no explanation as to why all of the jurists involved focus on finding alternatives to the ball player's liability. However, we may speculate that this might well be connected to the fact that the accident must have been entirely unforeseeable to the person who threw the ball: the barber is unlikely to have advertised his arrival to the players; intent on the game, they in turn are unlikely to have noticed it of their own accord. The player who set in motion the fatal chain of events – while certainly being in a position to foresee that his overly forceful throw might cause some (minor) degree of damage to bystanders – could hardly be expected to anticipate that it would cause some-

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letzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift H Hofmeister (1996) 235ff; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1010ff.

5 Cf *Quintus Mucius* in D 9,2,31: 'culpam autem esse, quod cum a diligente provideri poterit, non esset provisum'.

6 Cf *C Wollschläger*, Das eigene Verschulden des Verletzten im Römischen Recht, SZ 93 (1976) 115–137 (131 f); *G MacCormack*, Aquilian Studies (1975) 53. Against this view *A Wacke*, Accidents in Sports and Games in Roman and Modern German Law, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 42 (1979) 273–287 (277).

7 On Roman ball games, see *HA Harris*, Sport in Greece and Rome (1972) 75ff.

8 Cf *Alfenus*, D 9,2,52,4; cf also *G MacCormack*, Aquilian Studies (1975) 47.

9 Cf *Ulpian*, D 9,2,7,4, below at 3/1 no 1

10 Cf *Ulpian* (*Proculus*) D 9,2,7,3, below at 4/1 no 1.

one to die of a slit throat.[11] While the player may arguably have been at fault for throwing the ball with excessive force, Roman jurists might – without, of course, extending this notion to a general rule – have shied away from holding him liable for consequences so totally beyond the scope of what he could have foreseen.

Paulus (Mucius) D 9,2,31

Facts

A pruner throws down a branch and kills a slave passing underneath the tree.[12] **7**

Decision

The Roman jurist Paulus decides that the pruner is liable for damages if he worked in a public place and failed to shout a warning so that the accident could have been avoided. Mucius, in addition, argues that an action can also be brought if the pruner was working in a private place, provided he shouted a warning too late or failed to foresee what could have been foreseen by a diligent workman. To this, Paulus adds that if the pruner was working in a place where there is no path, he can only be held liable if he acted with malicious intent, because he could not have foreseen that someone would pass underneath the tree. **8**

Comments

The key question in this passage is whether the pruner can be held liable for *occidere* under the first chapter of the *lex Aquilia*. By throwing down the branch, he can certainly be said to have directly and actively caused the death of the slave. However, the *lex Aquilia* does not sanction all forms of killing, but merely that which occurs *iniuria*, ie wrongfully. Both Paulus and Mucius argue that the pruner has acted wrongfully only if he could have foreseen that someone would pass under the tree and neglected to observe the requisite safety measures. If, however, the pruner could not have foreseen that anyone would pass underneath the tree, the pruner is not considered at fault, and hence not liable. **9**

Like D 9,2,11 pr (above 2/1 no 1), the fragment showcases why Roman law in many instances did not need the additional step of limiting liability to foreseeable conse- **10**

11 Cf also *C Wollschläger*, Das eigene Verschulden des Verletzten im Römischen Recht, SZ 93 (1976) 132, who stresses that the 'pila' – the ball reported to have been thrown in the present case – was small and made of rags stuffed with hair or feathers, and therefore unlikely to cause more harm than bruises, eye injuries, and at worst concussion.

12 For a discussion of this case, see also *F-S Meissel*/*S Potschka*, in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 406ff.

quences after all other prerequisites – damage, causation, fault – have been established: since the foreseeability of a specific harmful outcome was in many cases already regarded as a criterion for *culpa*,[13] with a lack of foreseeability typically leading to the assessment that the injurer had not breached the standard of diligence expected of him and hence had not acted wrongfully, there is no need to afterwards limit liability to harm that could have been foreseen.

2. Germany

Bundesgerichtshof (Federal Supreme Court) 23 October 1951, I ZR 31/51

BGHZ 3, 261

Facts

1 The claimant was the insurer of the barge 'Edelweiß', the defendant the owner of the barge 'HH 9'. Both ships were allowed to enter a rather narrow sluice where they lay side by side to be sluiced downstream. The sluice had a conic structure with a width of 12.77m at its top margin and 12.31m at its bottom. For this reason, the crew of the sluice was ordered not to sluice ships over 11.75m in total breadth. When asked, V, the shipper of 'Edelweiß,' had correctly stated the breadth of his ship (6.67m), while A, the shipper of 'HH 9', gave an incorrect figure (5m instead of the actual 5.87m). When the lower sluice gate was opened, both ships were pressed together and could not leave the sluice.

2 The two sluice employees – the sluice master was not present at the moment of the incident – found it a good idea to fill the sluice again with water. They closed the lower gate and started a rather rapid filling. However, the two ships were only lifted where they contacted each other. As a consequence, the 'Edelweiß' threatened to capsize. But when the employees wanted to stop the waterflow, a sudden power failure hindered them and the 'Edelweiß' sank.

3 The insurer which had compensated the loss of the 'Edelweiß' claimed the compensation sum as damages from the owner of 'HH 9', arguing that the wrong information provided by her shipper had caused the damage. The owner of 'HH 9' denied liability. In his view, the staff's incorrect handling was the sole cause of the damage.

Decision

4 The Court of Appeal had answered the question of adequate causation between A's conduct and the damage in the affirmative and thus decided in favour of the claimant. The

13 It is important to stress, however, that Roman jurists did not always equate foreseeability with *culpa*; rather it was only one among several criteria used to determine whether someone could be considered at fault (and hence liable); cf *G MacCormack*, Aquilian Studies (1975) 45; *B Winiger*, Verantwortung, Reversibilität und Verschulden (2013) 132 f.

Federal Supreme Court remitted the case because the lower court had not sufficiently established the facts for the assumption of adequate causation and had not taken all facts into consideration.

The Federal Supreme Court first exposed and confirmed the concept of adequate causation.[1] The question of adequacy 'is actually not a question of causality, but of determining the limit up to which the author of a condition can reasonably be expected to be liable for its consequences'.[2] 5

The Court further pointed to the fact that the conduct of the employees as well as the reason for the power failure had not been sufficiently explored and considered. An in-depth examination of these might reveal that the concrete course of events was unforeseeable for the defendant who then would not be liable. 6

Comments

The case is one of the earliest BGH decisions on causation after the Federal Republic of Germany was founded in 1949. The Court relied mainly on the principles which its predecessor, the former *Reichsgericht* (Imperial Court),[3] had developed. However, the BGH declared in clear words that the adequacy requirement is a corrective – in the interest of reasonable and fair solutions – in order to limit the consequences of a pure application of the *conditio sine qua non* concept.[4] Actually, the concept of adequate causation aims at a fair balance between the author's freedom to act and the protection of persons affected by such activities. 7

The primary yardstick for adequate causation is the *Wahrscheinlichkeit* (probability) with which – from the perspective of an optimal ex ante observer – certain conduct leads to certain consequences. The standard formulation for adequate causation is the following: 'A condition is adequate if the event is able in general and not only under particularly peculiar, improbable circumstances which in the ordinary course of events can be disregarded to bring about a result of the kind in question.'[5] 8

The reported decision of 1951 was the beginning of a process of developing the element of adequacy further. In the following decades, the BGH refined and expanded the considerations underlying the adequacy concept. The Court added in particular the element of the purpose of the violated norm and the *Zurechnungszusammenhang* (connection necessary for the attribution of the damage) as well as further evaluative considerations (*wertende Überlegungen*). In fact, the evaluative considerations became a third step in the examination of particularly difficult causal situations. On the other hand, German 9

1 See above 1/2 no 4.
2 BGHZ 3, 267.
3 The Reichsgericht existed from 1879–1945.
4 BGHZ 3, 267.
5 See BGH NJW 2018, 944 no 16, also above 1/2 no 4.

court practice never accepted market share liability or a similar form of apportionment of liability via causal means.

10 Foreseeability as such is not the central element for examining causation. However, in the disguise of the probability which an optimal observer would forecast, it is actually nothing else.

Bundesgerichtshof (Federal Supreme Court) 25 January 2018, VII ZR 74/15

NJW 2018, 944

Facts

11 Claimant V lived in Mallorca and owned an apartment building in Germany. She commissioned the defendant A with plumbing and heating work in the German house, which the defendant carried out in February. Three months later, a witness visited the uninhabited attic apartment of the house and found a 1 cm layer of water in the whole flat which had caused significant damage to the floor, the walls and the doors. The flooding was caused by the defective sealing of a water heater in the flat which A should have repaired. V claimed compensation primarily for the costs of the repair of the water damage.

Decision

12 The lower courts dismissed the claim with the argument that such an extended damage would be completely unusual and unexpectable as a consequence of such a minor defect, namely the defective sealing of the water heater. The courts not only denied the adequacy of the defendant's conduct for the damage but also the *Zurechnungszusammenhang*, the necessary attribution of the damage to the conduct of the defendant. The exclusive cause of the damage was, in the view of the lower courts, that V did not have the apartment inspected several times a week.

13 The Federal Supreme Court remanded the case to another senate of the Court of Appeal because the lower courts had misinterpreted the concept of adequate causation, of *Zurechnungszusammenhang* as well as of contributory negligence.

14 The BGH held that a sealing defect is generally suitable to cause damage of the kind in the case at hand. The damage through water and even the extent of the damage were not the consequence of specifically peculiar or improbable events but of A's incorrect repair. The *Zurechnungszusammenhang* could also not be denied: the damage was of a kind that could occur as a consequence of a sealing defect. The Court further held that several inspections a week, which the Court of Appeal had requested, clearly exceeded V's obligation to care for the own sphere and interest.

Comments

The case may primarily appear as a pure contract case. However, since German law allows the concurrence of contract and tort claims, V's claim was also justified in tort because A had negligently and unlawfully damaged V's property (§ 823 (1) BGB). The Court's reasoning on adequate causation and *Zurechnungszusammenhang* is therefore entirely valid for pure tort cases as well. The rules on causation are regarded as part of the general part of the law of obligations which can be applied to both contract and tort cases. **15**

Bundesgerichtshof (Federal Supreme Court) 20 September 1988, VI ZR 37/88

NJW 1989, 767 with note *E Deutsch*

Facts

V was involved in a workplace accident in which he broke the second and third fingers of his right hand. He visited the defendant doctor and self-employed practitioner, A, who applied a plaster splint. After 20 days, the second finger healed without complication while the middle-finger remained crooked. A fixed the position of this finger with a special wire but in an incorrect manner with the result that, after a further two months, V could stretch the finger straight only up to 50 %. **16**

A therefore referred V to the local hospital for hand surgery. There, V underwent an operation during which the flexor tendon of his middle-finger was erroneously severed. In four following operations, the mobility of the finger could not be fully restored. It remained stiff to 30 %. Moreover, during his last hospital stay, V contracted a hepatitis B infection. **17**

V claimed at least DM 10,000 for pain and suffering, compensation of lost earnings and the declaration that A was liable for all future damage. **18**

Decision

The court of first instance had awarded V DM 5,000 and rejected the further claims. The Court of Appeal upheld this decision because, in its view, A could not be held liable for the mistakes which occurred in the hospital.[6] **19**

The Federal Supreme Court set aside the appeal judgment and remanded the case. The final Court argued that evaluative considerations were necessary to ascertain whether A's wrongful conduct was responsible for all subsequent consequences. The Court held that the doctor who performs the initial (wrongful) treatment is in principle responsible also for wrongful treatment by a second and further doctors unless the risk **20**

6 In the first instance, V had also sued the hospital but the court rejected the claim against that defendant. V appealed to the second instance which upheld the judgment of the first instance. V then appealed to the Federal Court only in respect of the claim against A.

caused by the first treatment 'has already completely disappeared.'[7] If there is, 'under evaluative considerations only an "external", quasi "accidental" connection between the two treatments, then the first author cannot reasonably be expected to be liable to the injured party for the consequences of the second treatment.'[8] The author of the first infringement shall no longer be liable if the second treatment concerns an illness which has no 'internal connection with the cause for the first treatment'[9] or if the second doctor neglected professional medical standards to such an extraordinary extent that the damage must be exclusively attributed to his or her conduct.[10] Since the Court of Appeal did not establish the relevant facts, the case was remanded.

Comments

21 The decision is one in a series of similar cases.[11] It examplifies how the Court wants the element of *Zurechnungszusammenhang* (the necessary attribution of the damage to the conduct of the defendant) to be understood. There must be an inner connection between the conduct of the author and the subsequent consequences. Nonetheless, when such a connection is present or missing remains rather vague. In the concrete case, there was a causal link between the first and the following wrongful treatments, probably even from the perspective of the adequacy test because an optimal observer would most likely foresee that a lot, as in fact happened, can go wrong in a hospital. Evidently, the causal link in this sense shall not suffice for establishing liability. The *Zurechnungszusammenhang* shall further limit the first author's liability. In the concrete case, it can be rather safely inferred from the BGH judgment that A's liability for the second operation depended on the question of whether or not the subsequent doctors disregarded the medical standards in an extreme way. However, whether the hepatitis infection stood in the necessary inner connection with A's conduct remained open.

3. Austria

Oberster Gerichtshof (Supreme Court) 6 September 1961, 1 Ob 247/61

JBl 1962, 151

Facts

1 V applied for a victim's public pension and a maintenance assistance pension. While the former was granted, the latter was wrongly denied by the governor of Vienna. The appli-

7 BGH NJW 1989, 767 (768) [my translation].
8 BGH ibid [my translation].
9 BGH ibid [my translation].
10 BGH ibid.
11 Eg, BGH VersR 1968, 773 (774); BGH NJW 1986, 2367 (2368).

cation for a supplementary pension was also denied, as V's maintenance was not at stake. As a consequence, V sued the Republic of Austria for damages, arguing that the denial of pension caused a severe shock and led to an aggravation of his general state of health. V claimed further that the organs of the Republic of Austria had acted with gross negligence and that his life expectancy had been diminished by ten years due to the physical and mental damage he had suffered.

Decision

The Supreme Court dismissed the claim, stating that the Republic of Austria was not liable due to a lack of adequate causation. It referred to the rule that the alleged tortfeasor is not liable for all damage caused by his conduct in a logical sense, but only for damage the occurrence of which was not outside all life experience in the ordinary course of events. However, that was exactly the case here. Severe physical and mental damage are not consequences to be expected of a futile application. Apart from this, the Supreme Court held that it is not reasonable for the authority to have to deal with the personal concerns of every applicant in order to find out whether his psyche could be affected by an adverse decision. 2

Comments

See below 2/3 no 6ff. 3

Oberster Gerichtshof (Supreme Court) 12 June 1991, 2 Ob 27/91

JBl 1992, 255

Facts

V sustained serious injuries in a traffic accident, for which A was responsible. Due to these injuries, V's upper arm had to be amputated. Prosthetic treatment failed despite all efforts. Severe phantom pains led to severe depression, a significant personality change and ultimately the suicide of V. 4

Decision

The Supreme Court stated that the suicide of V, who was deprived of the free determination of his will, was an adequate, not atypical consequence of the depression and the personality change V had suffered because of the accident. A was thus held liable for the suicide. 5

Comments

6 Under the Austrian law of damages, the foreseeability of consequences is subject to the adequacy theory. Originally, this theory was understood as a theory of causation. In reality, however, it serves to limit liability based on value judgements.[1] The adequacy theory attempts to find objective criteria to determine *ex ante* if the damage caused (or which part of the damage caused) is imputable to the liable party.[2]

7 In the context of adequacy, reference is sometimes made to a 'break in the causal chain' or an 'interruption of the causal link' (*Unterbrechung des Kausalzusammenhanges*), in particular when an action of a third party has intervened. However, this is not persuasive, as in the cases in question, the causal link established via the *conditio sine qua non* test (but-for test) must certainly still be affirmed where the conduct of one person constitutes a condition for another party's damage. In truth, the question here is not one of causality but, as already stressed, of limiting liability for caused consequences on the basis of value judgements.[3]

8 The adequacy theory is presented in different variations. According to the positive version of the adequacy principle, adequacy is given when the event triggering liability increased the objective possibility of the respective type of damage in a not inconsequential way.[4] Pursuant to the negatively formulated expression of the adequacy theory, adequacy is to be affirmed when the event triggering liability was, by its very nature, not fully inapt to entail a damage of the type which occurred and the damage suffered is not only the result of a purely exceptional concatenation of events.[5] The common feature of these variations is that liability for atypical damage only arising due to a coincidental, objectively unforeseeable and improbable combination of circumstances should be excluded.[6]

9 Various authors have provided justifications for the adequacy theory. Initially, the reason for excluding responsibility for 'remote' damage was seen in the fact that, logically speaking, it cannot be considered to have been controlled by the actor in question and thus is not traceable to his free self-determination.[7] *F Bydlinski* also highlights the connection to the notion of prevention: regarding consequences of damage that could not objectively have been expected to result from certain conduct, imposing liability for this damage cannot have any motivating influence on the conduct of potentially liable

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1 See *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 59 f.

2 Thus, the subjective abilities of the damaging party play no role when it comes to this objective delimitation; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/5.

3 Eg *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/6.

4 *K Larenz*, Lehrbuch des Schuldrechts I (14th edn 1987) § 27 III b.

5 Cf *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 7.

6 *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/11 ff with further references.

7 See *K Larenz*, Lehrbuch des Schuldrechts I (14th edn 1987) § 27 III b.

parties.[8] However, as the adequacy theory serves not only to limit fault-based liability, but also to limit liability without fault (in particular strict liability, risk-based liability; *Gefährdungshaftung*), these justifications are not completely sufficient for all areas of tort law. On this account, *Koziol* adds that, as regards liability based on dangerousness, the dangerousness in respect of which liability was determined can no longer justify liability where the result of the damage seems exceedingly remote and unusual.[9]

10 In accordance with the theory of *Wilburg*, the limits of adequacy must often be set differently depending, in particular, on the protective purpose of the rule, the gravity of the wrongfulness and the degree of fault.[10] Thus, the adequacy theory allows for a flexible limitation of liability. For example, if the damaging party acted intentionally, adequacy must be extended further than in the case of negligence.

11 Applying these outlined rules regarding limitation of liability due to the adequacy theory to the above-mentioned cases concerning the pension claim (2/3 no 1 ff) and the suicide (2/3 no 4ff), this leads to the following results: the first decision concerning the pension claim is one of the very rare cases in Austrian case law where adequacy was negated. Indeed, the existing definitions of (in-)adequacy (no 8) only rarely lead to a denial of adequacy, so the adequacy theory constitutes a very rough filter.[11] Even in the reported decision concerning the pension claim, it could be questioned whether the damage was not adequately caused, or was adequately caused, but beyond the norm's scope of protection.[12] In the second reported decision concerning the suicide in consequence of the accident, on the contrary, the Austrian Supreme Court affirmed adequacy. Likewise, adequacy was affirmed by the courts in cases where grievous bodily harm led to an abuse of painkillers[13] or drug addiction.[14] In another case where a mental shock was caused by damage to a car, however, adequacy was denied.[15]

12 For the sake of completeness, it should be pointed out that in Austrian tort law, foreseeability is not only relevant for the limitation of liability, but also in other contexts of tort law and it can, above all, already play a role in establishing liability:[16] firstly, objec-

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8 *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 60.

9 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/9.

10 *W Wilburg*, Die Elemente des Schadensrechts (1941) 242ff; see also *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 62; partially critical *G Kodek* in: A Kletečka/M Schauer (eds), ABGB-ON[1.03] (2018) § 1295 no 15.

11 See, eg, the cases reported by *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 7.

12 Critical eg *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/18; for limitation of liability via the protective scope of the rule theory see below 3/3 no 7ff.

13 OGH 2 Ob 130/69 = JBl 1970, 317.

14 OGH 2 Ob 46/93 = ZVR 1995/73.

15 OGH 2 Ob 100/05b = ÖAMTC-LSK 2005/118.

16 See in more detail *E Karner* in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) no 3d/3 no 7.

tive foreseeability of a danger or damage is relevant with regard to the assessment of wrongfulness. Secondly, foreseeability of the damage can also play a role on the level of fault.

Oberster Gerichtshof (Supreme Court) 13 October 1976, 8 Ob 144/76

ZVR 1977/108

Facts

13 V sustained serious injury in a car accident caused by A. The severity of the caused injury, however, traces back to the long-term effects of a previous, self-inflicted ski accident of V. As therefore the consequences of the car accident would have been less serious without V's previous ski accident, A argues that he can only be liable for part of the damage.

Decision

14 In its decision, the Austrian Supreme Court states that the increased damage susceptibility of the victim (eg due to a previous accident) does, in general, not limit or even preclude subsequent claims for compensation of damage. This does not only apply when, without the predisposition of the victim, the injury would have been slighter, but also when the injury would not have occurred at all.

Comments

15 In accordance with this decision of the Austrian Supreme Court, it has to be emphasised that it is, in general, also within the bounds of adequacy when the damage is due to the victim's exceptional susceptibility to damage.[17] In other words, it is the risk of the tortfeasor that the effects of a damaging event differ depending on the victim's constitution; the tortfeasor has to take the victim as he or she is.[18] This was stressed expressly in the case at hand by the Austrian Supreme Court, which decided that the increased vulnerability of the victim due to the previous accident does not preclude the liability of the perpetrator. It has to be added that this is also true for physical vulnerability as well as psychological susceptibility.[19]

16 Although liability is not excluded only because the damage was due to an exceptional damage susceptibility of the victim in general, there are nonetheless limitations to

17 See already *F Bydlinski*, Vergleichsverhandlungen und Verjährung, JBl 1967, 135f; in detail *E Karner*, Der Ersatz ideeller Schäden bei Körperverletzung (1999) 140ff.

18 Eg OGH 2 Ob 155, 156/81 = ZVR 1982/271.

19 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 7 with further references to relevant case law.

this principle. In cases of extreme damage susceptibility, where a victim lacks a minimum of physical or mental resistance and therefore atypical, objectively unforeseeable damage arises, liability can be limited. This limitation takes place by application of the general, above-mentioned standards of the adequacy theory.[20] Here again, the boundaries have to be set regarding the circumstances of the individual case, also taking into account the weight of wrongfulness in question.

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 26 May 2003

ATF 129 IV 282

Facts

A five-year-old boy, along with an 18-year-old woman, were standing on the pavement waiting to cross the road, when suddenly, the boy jumped into the road. He was killed instantly by driver A who, driving at a speed of 30–40 km/h (which did not exceed the indicated speed limit) was ready to brake (*Bremsbereitschaft*; ie he had put his foot on the brake pedal without braking) but was not able to stop in time. **1**

On 9 August 2001, the public prosecutor filed a claim against A for negligent homicide. The regional courts acquitted the driver in the first and second instances. Dissatisfied with the outcome, the public prosecutor raised a federal appeal before the Supreme Court on 5 July 2002. **2**

Decision

In its judgment dated 26 May 2003, the Supreme Court set the regional sentences aside. **3**

The Court first stated that any outcome resulting from certain conduct should be at least roughly recognisable for the tortfeasor to be held liable for negligence, since, based on legal doctrine, predictability of a result (*Vorhersehbarkeit*) is the trigger for the duty of care. **4**

The question boils down to determining whether A could and should have foreseen that he endangered the boy. The answer is to be found by means of the adequacy test: Would A's behaviour, according to the ordinary course of things and the general experience of life, have led to or favoured this outcome? **5**

The Court pointed out that drivers have to be particularly cautious with regard to children, the disabled and the elderly, as they cannot rely on the fact that these vulnerable persons will behave wisely. In order to protect these high-risk groups, drivers have to take all possible measures to avoid any potential damage, notably, to slow down or **6**

20 *E Karner*, Der Ersatz ideeller Schäden bei Körperverletzung (1999) 153 ff.

stop if one of these persons wants to cross the road, even if they are accompanied by an adult.

7 As a result, A was found liable for homicide by negligence (art 117 Swiss Penal Code, SPC) in opposition to intentional forms of killing someone (eg arts 111 and 112 SPC).

Comments

8 Even if this is a penal case, the same rules are applicable in tort law.[1] The criterion of 'the ordinary course of things and the general experience of life' refers to foreseeability, as both are empirical notions allowing an evaluation of the future consequences of certain conduct.[2]

9 It is considered that the consequence of conduct is unforeseeable if it is entirely unexpected. As a legal consequence, the person is not liable for the damage which occurred.[3] That said, adequacy has to be denied only if extraordinary events, such as the intervention of unforeseeable victims or third parties or defects of material or construction, etc, interfere and if these interferences have a preponderant causal influence.[4]

10 The purpose of adequate causation is to limit liability reasonably (*eine vernünftige Begrenzung der Haftung zu ermöglichen*).[5]

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1 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 121, at 104: ‚Der Begriff der adäquaten Kausalität ist in allen Rechtsgebieten der gleiche (BGer 1A.230/2006, 5.6.2007, c 3.2), insbesondere ist er derselbe im Zivil- wie im Strafrecht …'.

2 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 122b ff ; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 15 f, at 110 ff; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 423, at 150; *I Schwenzer*, Schweizerisches Obligationenrecht, Allgemeiner Teil (7th edn 2016) no 19.03, at 137; *V Roberto*, Haftpflichtrecht (2nd edn 2018) at 75 no 06.37; ATF 138 IV 57, 61 c 4.1.3 (2011); 134 IV 255, 265 c 4.4.2 (2008); 129 II 312, 318 c 3.3 (2003); 125 V 461 c 5a, 462; 123 III 110, 112 c 3a (1997); 119 Ib 334, 343 c 3c (1993) and TF 6B_25/2012, 17.8.2012, c 1.3 (unpublished).

3 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 125 f, at 107 f; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 17, at 113 f; ATF 121 IV 286, 290 c 3 (1995); 120 IV 300, 312 c 3e (1994); 115 IV 100, 102 c 2b and 104, 3c (1989); TF 4C.45/2005, 18.05.2005, c 4.2.3 (unpublished) and 4C.248/2003, 22.12.2003, c 2 (unpublished).

4 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 136 ff, at 114 ff; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 132 ff, at 154 ff; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 2 no 457 ff, at 162 ff; *A Furrer*/*M Müller-Chen,* Obligationenrecht, Allgemeiner Teil (2018) § 10 no 73 f, at 318 f; *C Müller*, La responsabilité civile extracontractuelle (2013) no 220 ff, at 74 f.

5 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 120, at 103; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I:

In order to determine whether the conduct of the tortfeasor was objectively likely to cause such damage as occured, the judge conducts an 'objective examination ex post' from an ex ante perspective.[6] In doing so, he assumes that he deals with a 'normal person' ie a person normally capable of foreseeing in certain circumstances whether his or her conduct could cause damage.[7] **11**

In order to test adequacy, the judge must consider all the circumstances of the case. In doing so, he has to take into account the scope of the foreseeable risk and additionally, he has to verify the purpose of the law in question (*Lehre vom Schutzzweck der Norm*).[8] The question is whether the statute seeks to prevent damage of the kind that occurred (in casu to prevent the boy from suffering harm). **12**

In exercising his discretion, the judge has to adjudicate the matter in accordance with the principles of justice and equity (*nach Recht und Billigkeit*) considering all the circumstances of the case. **13**

In casu, the case was decided on the basis of the adequacy rule (ordinary course of things and general experience of life)[9]. Although A was cautious, (he was slowing down and preparing to brake), he should have focused his attention on the child. In particular, he should not have assumed that the adult was holding the child by the hand and that the child had noticed the car. Under these circumstances, A should not have assumed that the child would behave properly. A should have clarified an ambiguous situation with at least a warning signal or even a reduction of his speed so that he could have stopped his vehicle.[10] **14**

Allgemeiner Teil (5th edn 1995) § 3 no 21, at 114; *I Schwenzer*, Schweizerisches Obligationenrecht, Allgemeiner Teil (7th edn 2016) no 19.03, at 137; ATF 123 III 110, 112 c 3a (1997); 117 V 369, 382 c 4a (1991); 115 V 133,142 c 7 in fine (1989) and TF, 5C.61/2004, 26.4.2005, c 5.4 (unpublished).

6 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 122b, at 105; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 22, at 115; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 426, at 151; ATF 131 IV 145, 147 c 5.1 (2005).

7 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 122c, at 106; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 425, at 151; ATF 85 II 350, 354 c 1 (1959).

8 *R Brehm*, Berner Kommentar, Obligationenrecht, Die Entstehung durch unerlaubte Handlung, Art. 41–61 (4th edn 2013) ad art 41 no 121a; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 32 f, at 121; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 453 f, at 161f; ATF 123 III 110, 112 c 3a (1988) and TF, 5C.88/2004, 26.10.2004, c 4.1 (unpublished).

9 See c 2.1: ‚Grundvoraussetzung für das Bestehen einer Sorgfaltspflichtverletzung und mithin für die Fahrlässigkeitshaftung ist die Vorhersehbarkeit des Erfolgs'.

10 See art 26 (2) of the Swiss Federal Act on Road Traffic and arts 4 (3) and 29 (2) of the implementing ordinance OCR; *R von Werra*, Du Principe de la confiance dans le droit de la circulation routière, ZVR 4/1970,

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 19 October 2004

ATF 130 I 337

Facts

15 75-year-old X underwent cardiac surgery. After a successful intervention, he became disoriented. Despite tranquilizers administered by the medical professionals, X left his room, jumped out of a window and died. His widow V1 and daughters V2 and V3 subsequently filed a claim against the hospital arguing that the organisation had acted negligently, ie that X's supervision was insufficient. The regional court rejected the claim on 15 March 2004, and the victims appealed against this decision in front of the Federal Supreme Court.

Decision

16 The Court admitted the appeal and rejected the regional decision. The Court considered a generally accepted fact that about 20–30 % of patients undergoing this particular surgery subsequently behave in a confused and unforeseeable manner. In casu, with regard to such a probability, the Court consequently argued that the safety measures taken by the hospital were insufficient. Indeed, the medical staff should have taken greater precaution regarding X's supervision or better still, have even placed him in the intensive care unit.

Comments

17 The legal relationship between the physician and the patient is generally established by a care contract of mandate (art 394 ff Swiss Code of Obligations [SCO]).[11] Consequently, the claimant can either argue his case on the grounds of a breach of contractual law or tort law[12].

200; ATF 115 IV 239, 240 c 2 (1989); 104 IV 28, 31 c 3c (1978) and TF 6S. 721/2001, 18.2.2002, c 2b/bb (unpublished).

11 ATF 120 II 248, p 250 c 2c (1994) and references; TF, 4C.178/2005, 20.12.2005, SJ 2007 I 141, 145, c 3.1 (unpublished); *RH Weber*, Kommentar ad Art. 398, in: H Honsell/NP Vogt/W Wiegand (eds), Obligationenrecht I. Art. 1-529 OR, Basler Kommentar (6th edn 2015) ad art 398 no 25 ff; *W Wiegand*, Der Arztvertrag, insbesondere die Haftung des Arztes, in: Arzt und Recht (1985) 84, 91; *P Ducor*, L'expert médical et la causalité, in: C Chappuis/B Winiger (eds), Les causes du dommage: Journée de la responsabilité civile 2006 (2007) 179, 181; *S Bollinger Hammerle*, Die vertragliche Haftung des Arztes für Schäden bei der Geburt, Thèse Lucerne 2004, 39.

12 ATF 120 Ib 411, 414 c 4a (1994); *MW Kuhn*/*T Poledna*, Artzrecht in der Praxis (2nd edn 2007) 357 f; *A Büchler*/*M Michel*, Medizin-Mensch-Recht: Eine Einführung in das Medizinrecht der Schweiz (2014) 181.

In this particular field, the physician has a professional duty of care and is responsible for its violation.[13] These duty requirements should not be determined as a general norm but rather be defined in each individual case.[14] To determine if a duty of care has been breached (either by omission or action), the judge has to compare the tortfeasor's behaviour to that of the diligent hypothetical behaviour of an individual comparable to the tortfeasor (in the present case a careful doctor).[15] The objective foreseeability of the damage according to the ordinary course of events and the general experience of life can be used as criteria to establish adequate causation and the duty of care in the specific case.[16] **18**

In the case at hand, the Supreme Court assessed what precautionary measures the medical staff could have adopted in order to avoid the damage caused. The Court rejected the argument raised by the medical staff that the fatal event was unforeseeable, as its post-operative risk has been observed in 20–30 % of patients after surgery. Based on this probability level, a certain psychological condition leading to unpredictable behaviour should have been expected.[17] The Court consequently deemed the medical care to have been insufficient to cope with the patient's psychological confusion. **19**

In addition to the aforementioned, legal doctrine perceives the element of post-operative supervision as a compulsory component of the duty of care.[18] In cases like the one at hand, the medical staff should have foreseen that the patient's behaviour would be confused. The Court used the foreseeability argument of a particular medical duty of care as a legal basis to hold the hospital liable.[19] The case at hand shows again that, in Swiss law, fault and adequacy are two distinct, but tightly intertwined concepts. The reason for the intertwinement is the definition of adequacy as what is foreseeable 'according to the ordinary course of things and the general experience of life'. This expression is based on foreseeability, which also plays a central role in the assessment of fault. **20**

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13 TF, 6B_1065/2013, 23.6.2014, c 1.1 ; ATF 133 III 121, 124 c 3.1 (2007); 130 IV 7, 11 c 3.3 (2004); TF, 4A_48/2010, 09.07.2010, c 6.1 (unpublished); ATF 120 Ib 411, 413 c 4a (1994); 116 II 519, 521 c 3a (1990); 115 Ib 175, 180 c 2b (1989); 113 II 429, 432 f c 3a (1987); *P Ducor*, L'expert médical et la causalité, in: C Chappuis/B Winiger (eds), Les causes du dommage : Journée de la responsabilité civile 2006 (2007) 179, 181.

14 TF, 4C.345/2003, 11.01.2005, c 3.1 (unpublished).

15 ATF 116 Ia 162, 170 f c 2c (1990), JdT 1992 IV 5; 112 II 172, 180 c 2c (1986), JdT 1986 I 57; 137 III 539 (2011), JdT 2013 II 274, 278 c 5.2; TF, 4A_22/2008, 10.5.2008, c 3. On the notion of objective lack of diligence due to the circumstances, see *P Ducor*, L'expert médical et la causalité, in: C Chappuis/B Winiger (eds), Les causes du dommage: Journée de la responsabilité civile 2006 (2007) 179, 181.

16 *P Ducor*, L'expert médical et la causalité, in: C Chappuis/B Winiger (eds), Les causes du dommage: Journée de la responsabilité civile 2006 (2007) 179, 185 f.

17 C 5.3.

18 *H Landolt*, Organisationshaftung für medizinische Dienstleistungen und Produkte, in: A Böhme/F Gähwiler/F Theus Simoni/I Zuberbühler (eds), Ohne jegliche Haftung – Festschrift für Willi Fischer Beiträge zum schweizerischen Haftpflicht- und Schuldrecht (2016) 311, 328 f; TF, 4C.345/2003, 11.1.2005, c 3.1.

19 Such a way of analysing is also used in other cases, cf ATF 112 Ib 322, 329 c 4d (1986); 137 III 539 (2011), JdT 2013 II 274; ATF 120 Ib 411, 414 c 4a (1994), JdT 1995 I 557. For foreseeability as a criterion to assess causality, cf also *J Gross*, Haftung für medizinische Behandlung (1987) 190 ff and 196 f.

5. Greece

Areios Pagos (Court of Cassation) 182, 7 February 2011

ChrID 2011, 732, followed by partly dissenting remarks by *Kl Roussos*

Facts

1 V, an art collector, sold a painting of the well-known painter, MO to B, an art dealer. B, knowing that A intended to edit a book on MO's paintings, brought her the painting in order to include it in the book. During their meeting, A declared, in a categorical way, that the painting was not authentic and expressed her view with certainty, though she did not examine the painting using any scientific methods. A did not show the scientific care she was obliged to show, in view of the fact that she was known in the market as a specialist on MO's paintings. As a consequence, B reversed the sale and V had to return the price (€ 19,076). For the above reasons, V filed an action against A claiming € 43,076 (€ 19,076 as damages for the harm he sustained according to art 914 GCC and € 24,000 for compensation of his moral harm according to art 932 GCC). The Court of Appeal rejected the action as not having a legal ground and the Court of Cassation confirmed said decision by holding that the Court of Appeal correctly interpreted arts 914, 297, 298, 330, 932 GCC.

Decision

2 The Court of Cassation concluded that the expression of a false view regarding the authenticity of the painting was unlawful – as it contravened the general principle of law, which dictates that it is not acceptable in everyday transactions that a person, when acting, does not take into consideration the damage that can be caused to another person and which said person could have prevented – but it was not an adequate cause for the damage alleged by the plaintiff; the painting, as an object of art, cannot lose its value only from the expression of a view by a third person. The refusal of the defendant to include the painting in the book she was going to edit and its owner's loss of a chance to be advertised was the only negative consequence the behaviour of the defendant could have. On the contrary, any moderately prudent sociable man in the place of the defendant could not foresee, according to the dictates of common experience, that the false expression of a view for the authenticity of the painting, under the probable and usual course of events, could be the cause for the reversal of the sale's contract, without any further investigation. Moreover, from the moment the plaintiff regained the (authentic) painting, the plaintiff's damage cannot be equal to the amount he returned to the buyer.

Comments
See no 6ff 3

Athens Court of Appeal 10796, 1988
Ell Dni 34, 603, cmt by *A Kritikos*

Facts
V died after a car accident caused by A. Seven months after V's death, his wife hanged herself because of severe depression caused by said death. Her children, mother and siblings claimed damages from A for the funeral expenses they paid and compensation for the pain and suffering they felt because of V's wife's death. The Court of Appeal confirmed the decision of the court of first instance and rejected the plaintiffs' action. 4

Decision
The Court of Appeal concluded that the fact that the wife of a victim of a car accident hanged herself seven months after the death of her husband, because of severe depression caused by her husband's death, cannot be, according to the prevailing theory of adequate causation as well as according to the theory of the protective scope of the rule of law, attributed to the tortfeasor who culpably caused the death of her husband, and he cannot be held liable for damages. According to the Court, the sudden death of the victim at the road accident was capable of, and could provoke, a severe nervous breakdown for his wife and a need for therapeutic treatment or hospitalisation, the costs for which should be borne by the tortfeasor, as the wife, in such a case, would have sustained direct damage and not indirect damage.[1] In the case brought before it, however, the suicide and the damage caused to the plaintiffs were so remote from the legal ground that generated A's liability, that is from the accident that caused V's death, so as to prove an impossible consequence of the initial tort. As this consequence could not have been foreseen by an ordinary and prudent average man (A, in the case under judgment), the latter could not be held liable. 5

Comments
Under the Greek law of damages, the foreseeability of consequences is subject to the adequacy theory, which still prevails in Greek jurisprudence.[2] This theory achieves to 6

1 See also Athens Court of Appeal 3839/1978 NoV 27, 581, where it was held that the nervous breakdown of the parents of the victim constitutes direct damage of them, as a causal link between the damage event and the result exists. According to the minority of the Court, however, the said breakdown constitutes non-compensable indirect damage, given that the tortious act was directed against the son, the victim; his parents could be compensated only if the prerequisites of arts 928 and 929 GCC were met, which was not the case here.
2 See *M Stathopoulos*, Law of Obligations-General Part (5th edn 2018) § 8 IV 4 no 125.

reduce the number of cases where liability is established, as there is no liability for damage caused from an inadequate cause.[3]

7 An adequate cause is a cause that has, in general, a tendency, ie the capability to lead to the damage, according to the usual course of events, so the said damage can be attributed to a certain person, who must pay damages for it. There is no causal relationship when the damage is caused by an unforeseeable, accidental or exceptional case or which is due to the peculiarity of the specific case.[4]

8 No tort law provision of the GCC explicitly mentions foreseeability as a necessary element to hold the actor liable or adopts the theory of adequate causation. It is, however, supported in Greek doctrine[5] that the entire spirit of the law on damages and, in particular, art 298 GCC can be used as a ground for accepting said theory. Although art 298 GCC explicitly uses the criterion of adequate cause only for determining lost profit, its meaning, however, can be used more generally.[6] Thus, adopting the theory of adequate causation, the Athens Court of Appeal held that a person who causes an accident resulting in somebody's death cannot foresee that the latter's wife will commit suicide and is not liable for damage caused to the relatives of the person who committed suicide.

Areios Pagos (Court of Cassation) 1219, 25 June 2015

Published in NOMOS and ISOKRATIS

Facts

9 A, while driving a tractor near the main square of a village, violating a street sign that prohibited the entrance of heavy vehicles in the village, hit and fatally injured V, a six-year-old boy who, whilst playing in the said square, suddenly ran and crossed the street. The duty of supervision of the minor had been temporarily entrusted by the child's parents to the grandfather, who ran a cafeteria in the square, but who, during that time, was busy serving his customers.

10 The Court of Appeal found that the accident and its tragic consequence were exclusively due to the negligent behaviour of V, who did not check the street before crossing it, as well as to that of his grandfather and parents who neglected to supervise him. No element could justify any liability on A's part; on the contrary, it was proved, according to the Court, that the accident was not causally related to any negligent act or omission of A, given that he could not have foreseen and/or avoided the accident whatever care he had shown. In addition, the violation of the street sign is not causally connected to the

3 *M Stathopoulos*, Law of Obligations-General Part (5th edn 2018) § 8 IV 4 no 127.

4 See *M Stathopoulos*, Law of Obligations-General Part (5th edn 2018) § 8 IV 4 no 125, where reference is also made to the existing abundant relevant jurisprudence in fn 188.

5 See *M Stathopoulos*, Law of Obligations-General Part (5th edn 2018) § 8 IV 4 no 126.

6 For more details, see *M Stathopoulos*, Law of Obligations-General Part (5th edn 2018) § 8 IV 4 no 131.

accident, as the said sign serves other purposes and the same result would have occurred if any other type of vehicle instead of the tractor had been involved.

Decision

The Court of Casssation quashed the decision of the Court of Appeal on the following grounds: a) because it was neither sufficiently nor clearly justified why A's particular behaviour, irrespective of V's behaviour, did not create risky conditions for the safety of children and did not contribute to the detrimental consequence; and b) because the reasons for which the accident could not have been avoided, if A had respected the prohibitory sign and had not entered the village, were not mentioned; mentioning that the same risk exists from the circulation of any other type of vehicle or that the driver was driving at a speed below that permitted in a residential area (25 km/h) does not suffice, even more so when the circulation of heavy vehicles was totally forbidden on the particular road. 11

Comments

The decision of the Court of Appeal holding that the accident was not causally related to any negligent act or omission of A, given that he could not have foreseen and avoided the accident whatever care he had taken shows that foreseeability is taken into consideration by Greek courts in order to exempt or reduce liability. Also by mentioning that the violation of the street sign is not causally connected to the accident, as the said sign serves other purposes, the Court indicates that the protective scope of the rule of the law applied is also taken into consideration by courts when judging whether liability is to be established. 12

6. France

Cour de cassation, Chambre civile 1 (Supreme Court, First Civil Division) 28 April 2011, 10-15.056

Bull civ I, no 77; JCP G 2011, no 752, note *L Bernheim-Vandecasteele*; RDC 2011, 1153, note *G Viney* and 1156, note *YM Laithier*; RDT 2011, étude 9, note *M Tchendjou*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000023931088>

Facts

The claimants, living in Western France, purchased a tour package to Cuba from Paris Charles-de-Gaulle airport. To reach the pick-up point at the airport, they booked train tickets with the national rail operator *Société nationale des chemins de fer* (SNCF). Due to a technical incident, the train was delayed more than three hours, which prevented the claimants from getting to the airport in time and, eventually, from travelling to Cuba. Each claimant was later awarded a € 24 travel voucher for his or her loss. Regarding this 1

amount of compensation as ridiculous, they filed a claim against SNCF before a community court (*juridiction de proximité*) in order to get full compensation, covering the total amount of the travelling expenses related to the tour package, return tickets to their domicile and € 300 for non-pecuniary harm (*préjudice moral*).

Decision

2 The Saint-Nazaire community court awarded the claimants full compensation of their losses on the ground that 'SNCF could not argue that the total impossibility for the claimants to continue their journey and to connect with a flight as planned was entirely unpredictable when concluding the contract'. The *Cour de cassation* quashed this judgment and held that the community court 'did not explain how and why SNCF could foresee, when concluding the contract, that [the clients'] final destination was not the station of arrival of their train and that they had booked a connecting flight'.

Comments

3 Under French law, the foreseeability test does not apply to tortious liability cases. Accordingly, this case illustrates the distinctiveness of contractual liability, as unforeseeable consequences are in principle included in the scope of compensation under tort law. According to art 1231-3 Civil Code, a contracting party is liable only for those losses which were foreseen or could have been foreseen when concluding the contract, unless the contractual non-performance is due to bad faith or gross negligence. In these latter cases, he will be liable for all losses which are the 'immediate and direct consequence' of non-performance (art 1231-4 Civil Code). Both limitations only apply to contractual damages.[1]

4 Despite the rather explicit wording of art 1231-3 Civil Code, the unforeseeability defence has not always been consistently applied by the *Cour de cassation*.[2] Prior to the present case, it was quite common for French lawyers to consider this limitation as obsolete. In one of the major textbooks on the law of obligations, one can still read that 'this provision, probably somewhat forgotten by practitioners, is not relied upon very often'.[3] Yet, the 2011 judgment of the *Cour de cassation* seems to have catalysed a new trend bringing back to the forefront the limitation of contractual damages to foreseeable losses.

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1 For further details on both provisions (former arts 1150 and 1151 Civil Code), see in English *S Whittaker*, The Law of Obligations, in: J Bell/S Bayron/S Whittaker (eds), Principles of French Law (2nd edn 2008) 353f; *B Nicholas*, The French Law of Contract (2005) 228ff; *S Rowan*, Remedies for Breach of Contract (2012) 114ff.

2 The reference work on this limitation is still *I Souleau*, La prévisibilité du dommage contractuel (1979).

3 *A Bénabent*, Droit des obligations (19th edn 2021) no 425 ('cette règle, sans doute un peu oubliée des praticiens, n'est pas très souvent invoquée').

This is not totally irrelevant for tort law, however, as contractual liability has a very wide scope in French law and can apply in cases which, in almost all other legal systems, would fall under tort law. For example, it is accepted under French law that, in cases where a liability claim arises between members of a so-called homogenous chain of contracts along which the ownership of a thing has been transferred, the claim is founded in contract, not in tort.[4] It can therefore occur that a defendant will be able to rely on the unforeseeable damage defence because he is sued in contract, although he has no direct relationship with the claimant and the latter's claim would be based in tort in almost any other legal system.[5] **5**

7. Belgium

Cour d'appel (Court of Appeal) Antwerp, 29 April 2003

RW 2006-2007, 405

Facts

When maneuvering his truck, a driver collides with an oil tank not equipped with a protecting valve, causing the fuel to pour out of the tank. Almost 27,000 litres of oil thus flowed directly into the public sewerage system via the company's internal sewerage system before ending up in the sewage treatment plant located in the municipality of Ravels. The Flemish water purification company sues the oil tank's owner and the truck driver's employer for the costs of restoring the sewage plant to its correct condition. **1**

Decision

The Antwerp Court of Appeal holds both the owner of the oil tank and the victim itself (the Flemish water purification company) liable. The former is held liable for having parked a heavy oil tank in its car park without any safety measures, neither for the tank itself nor for the filling valve, and for not having called the competent services immediately after the accident. The latter is responsible according to the Court for not having carried out – after the discovery of the initial pollution – any investigation into the origin of the pollution. Furthermore, the Flemish water company should have taken measures to prevent subsequent pollution and to intercept the residual flow of oil (those **2**

4 See, eg, in English, *D Mazeaud*, Contracts and Third Parties in the Avant-projet de réforme, in: J Cartwright/S Vogenauer/S Whittaker (eds), Reforming the French Law of Obligations (2009) 223ff; *JS Borghetti*, Breach of Contract and Liability to Third Parties in French Law: How to Break Deadlock? ZEuP 2010, 279, 283ff.

5 See, eg recently, Cour de cassation, Troisième Chambre Civile (Supreme Court, Third Civil Division) 11 March 2020, 18-22.472; RDC 2020, no 3, 27, note *J Knetsch*; <https://www.doctrine.fr/d/CASS/2020/JURITEXT000042371973>.

measures were adopted only after a second, even more severe, polluting incident occurred fifteen days later).

3 In contrast, the Court of Appeal exonerated from all liability the truck driver who caused the leak. The Court observes that the general precautionary standard can only be considered as disregarded in the meaning of art 1382 of the former Belgian Civil Code *if it was foreseeable that such failure could result in damage*. In the present case, it considers that the driver could not have anticipated: first, that the oil would flow into the company's internal sewers in the event of a collision; second, that these sewers were connected to the public sewer system; and third, that the oil would end up directly in the water treatment plant of the municipality of Ravels.

Comments

4 In Belgian law, the concept of 'foreseeability' exists at two different levels: (1) at the level of the breach as in the current decision or (2) at the level of the causal link as it will be presented in the next decision.

5 Digest 3 (3d/7 nos 1–9) extensively discussed the question of whether foreseeability is necessary for establishing fault. As a reminder, a person may only be held liable if he or she could reasonably foresee that his or her conduct was likely to cause damage.[1] The conduct does not have to be dangerous per se or very likely to cause damage. It is sufficient that the person could reasonably expect any damage to occur due to his or her behaviour, even as a mere possibility.[2] The court rules by reference to the abstract standard of conduct of a reasonably prudent and diligent person. It assesses whether the latter could have foreseen damage to happen in similar circumstances.[3] The author must only foresee any damage, without having to anticipate the damage as it occurred *in concreto*.

6 In Digest 3 (3d/7 nos 1–7), we referred to a case about a child playing in a park with a plastic aeroplane using a slingshot.[4] After flying, the aeroplane landed in a walker's eye. The Supreme Court approved the trial judge's decision to attribute fault to A, even though an unhappy coincidence led to the circumstances. Indeed, if A could not have foreseen the damage as it actually occurred (the injury to the eye of a passer-by), he would have been able to foresee that some type of damage might occur due to his reckless behaviour (namely propelling a plastic aeroplane into the air with force while his view was not clear).

7 For another example, a judge decided that a neighbour's behaviour does not constitute misconduct when he leaves a box of eggs in front of a neighbouring house's door. Usually, a reasonably prudent person checks before leaving his home whether the path

1 *D Philippe*, La prévisibilité du dommage, élément constitutif de la faute, JLMB 1996, 93–95.

2 Court of Appeal of Liege, 15 March 1994, Rev dr santé 1998–1999, 151.

3 Court of Appeal of Mons, 28 June 1994, JLMB 1996, 91.

4 Cass, 9 May 1971, RGAR 1972, no 8749.

is clear, especially when moving out and carrying heavy loads. The occurrence of any damage was therefore not foreseeable for the giver of this gift.[5] Another decision rules out the liability of a fugitive who refused to comply with a police officer's command. Indeed, the fugitive could not reasonably have foreseen that the officer would hit the curb and fall while pursuing him.[6] In another case, the Court discusses the predictability of some snow falling for professional mountain guides. Contrary to the decisions mentioned above, it concluded that the detachment of some snow as a result of high temperatures was a predictable phenomenon for mountain guides. Therefore, a guide, who does not predict the consequence of intense heat on snow, which is lying on a steep slope and falls on hikers, is guilty of misconduct.[7]

8 The concept of 'remoteness of damage' does not exist as such in Belgian law. Nevertheless, the case law tends to exonerate the author of a wrongful act when the damage appears to be too remote from the fault. To support their rulings, the courts rely on the unforeseeable nature of the damage in certain cases such as the one commented upon. However, on closer inspection, the lorry driver could have been aware that damage could result from his driving error. Therefore the fact that the driver was not able to anticipate the damage as it actually occurred should have been of little importance. Without stating so, the trial judges likely considered that, regarding this chain of cascading damage, the damage which ultimately occurred was too remote from the wrongful conduct to hold its author liable.

9 Where the fault results from a breach of a statutory norm, many authors consider that there is no need to ascertain whether or not the damage was foreseeable (Digest 3, 4/7 no 7).[8] There are two reasons for this assumption. First, foreseeability is used as a criterion, among others, to determine whether a third party behaved as a reasonably prudent and diligent person. Since this abstract and general standard of good behaviour is irrelevant in the face of a breach of a legal rule that *ipso facto* constitutes misconduct, it is normal that the foreseeability condition is also 'extinguished'. Secondly, when certain conduct is imposed by law on a person in a specific context, it is precisely in order to prevent damage from occurring. The element of foreseeability is then considered as included anticipatively in this norm. One thinks, for example, of the rules of the Highway Code.

10 The new Civil Code clarifies the role of the element of foreseeability of damage. In Book 6, foreseeability is no longer a constitutive element of misconduct. It is relegated to the rank of a simple criterion, among others, enabling the material element of fault to be assessed. In this context, art 6.6 indicates that, in the absence of a breach of an expressly formulated standard, the judge may take into account, to assess the general duty of care

5 Civ Hasselt, 30 June 1987, RGAR 1989, no 11496.

6 Court of Appeal of Brussels, 12 January 2000, RGAR 2001, no 13320.

7 Court of Appeal of Brussels, 15 September 1999, RGAR 2000, no 13271.

8 *B Dubuisson/V Callewaert/B De Coninck/G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 39, no 26.

and diligence owed by everyone, 'the behaviour's reasonably foreseeable consequences' among other elements.[9]

Cour de cassation / Hof van cassatie (Supreme Court) 11 October 1989

RGAR 1992, no 12007

Facts

11 In the middle of the night, A loses control of his car and hits several vehicles parked along the street. A flees the scene of the accident. Awakened by the sound of the collision and fearing that his car may have been involved in the accident, V asks his wife to go and check on the condition of his car. When his wife announces the damage to his car, V suffers a heart attack and dies a few hours later in hospital.

Decision

12 The Brussels Court of Appeal exonerates the driver from any liability, considering that 'the reparable damage in a necessary causal link with a fault is limited to its normal repercussions according to its nature'. The foreseeable consequences of driving misconduct are damage to the vehicles involved in the accident, assault and battery to persons involved in the accident and damage caused by a collision with furniture and buildings, but not the repercussions on the health of persons who were not involved in the accident.

Comments

13 Contrary to the previous decision, the concept of foreseeability comes into play here, no longer in the analysis of the constitutive elements of the fault, but in order to assess the causal link.

14 Although this reasoning is clearly inspired by the theory of adequate causality, the Court of Cassation refused to quash the judgment of the Court of Appeal. This is a jurisprudential exception, which is difficult to explain in a legal system where only the theory of equivalence of conditions is in principle applicable (Digest 1, 1/7). Under Belgian law, the author of a wrongful act is liable to pay full compensation for any damage caused by that act, even if unforeseeable.[10] Yet, in the present case, it is obvious that, without the accident, the victim would not have died in the same way.

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9 *T Malengreau*, Les faits générateurs de responsabilité dans le projet belge, in: B Dubuisson (ed), La réforme du droit de la responsabilité en France et en Belgique – Regards croisés et aspects de droit comparé (2020) 231, no 11.

10 Cass, 15 November 2006, Pas 2006, 2336.

Rigorously applied, the theory of the *conditio sine qua non* sometimes leads to solu- **15**
tions that might seem unfair. Applying this single theory to a broad variety of situations involves the risk of extending the scope of liability in an ill-considered way, according to the complexity of the causal chain. Judges, therefore, sometimes feel the need to interrupt the chain of causation by various means.[11]

There was another interesting case ruled by the court of first instance in Verviers.[12] **16**
In this case, a traffic accident – caused by a driver's fault – leads to the hospitalisation of the victim who was slightly injured. The initial car accident is then followed by a severe therapeutic accident: a cardiac arrest occurs while the anaesthetist was wrongfully absent, resulting in irreversible cerebral and neurological damage for the victim. According to the judge's reasoning, there is a break in the causal relationship between the initial fault of the driver and the final damage on the grounds that the therapeutic accident cannot be considered as a normal consequence of the first accident.

In rare cases then, courts apply the so-called 'theory of adequacy', according to **17**
which, only events that would normally cause the damage can be considered as its causes. Under this objective approach of the normal course of events, only events with an objective probability of causing the prejudicial result, in the natural order of things or according to common experience, are to be considered as causal.[13] Since this theory of causation is not the one validated by the Belgian Supreme Court, the concept of foreseeability is less likely to be employed at the level of the causal link than at the level of the misconduct. Cases like those commented upon are quite exceptional and only arise when the outcome of the 'but-for' test proves to be too inequitable.

Hence, the Supreme Court sometimes endorses decisions which are not, or hardly, **18**
reconcilable with the 'but-for' test, without however succeeding in formulating a general criterion on the basis of which derogations may be justified. A part of the Belgian doctrine is of the opinion that all the problems of causation can be solved using the 'but-for' test alone. This theory is seen as a guarantee of legal certainty. In many other countries, after acknowledging that the misconduct is a necessary condition of the damage, an additional selection is made.[14] Trial judges will find themselves in a more comfortable situation with the adoption of Book 6. According to art 6.18, § 2, 'there is no liability if the link between the harmful event and the damage is so remote that it would be manifestly unreasonable to hold liable the person from whom reparation is sought. In that assessment, the judge shall take into account, in particular, the improbable nature of the damage in the light of the normal consequences of the harmful event and the fact that the faulty behaviour has not significantly increased the risk of the damage occur-

11 *B Dubuisson*/*V Callewaert*/*B De Coninck*/*G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 326, no 392.

12 Civ Verviers, 29 September 1999, Bull ass 2000, 103.

13 *B Dubuisson*/*V Callewaert*/*B De Coninck*/*G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 326, no 392.

14 See also PETL art 3:201, a).

ring'.[15] This provision, based on the proposals which some authors have been making for several years,[16] aims at tempering the *conditio sine qua non* theory. In this way, the trial judge will have more flexibility to deal with the wide variety of concrete situations while preserving legal certainty.[17]

8. The Netherlands

Hoge Raad (Supreme Court of the Netherlands) 25 March 1983

NJ 1984/629, case note *CJH Brunner* (Steengaassteller)

Facts

1 Stripped of all complications, the facts in this case come down to the following. A person who worked as plasterer (*steengaassteller*) received an assessment for social security contributions, because he was seen as an employer. Later, it was decided that he was not an employer and that the assessment was void. The plasterer claimed damages, because he stated that, as a result of the wrongful act of the social security institution, he had had to terminate his enterprise as a plasterer. The appellate court had left open the question whether the social security institution had acted wrongfully, and the nature of such wrongfulness, and ruled that it was not foreseeable to the social security institution that the cessation of the company of the plasterer would result.

Decision

2 The Supreme Court ruled that, for the questions of whether and to what extent damage, as a consequence of his or her conduct, may be charged against the perpetrator of the tort, significance must be attached to and what requirements must be imposed on the foreseeability of the resulting damage also depends on the nature of the conduct and the norms it violates. The appellate court should, therefore, have specified the norm that it considered violated in order to be able to weigh the relevance of that violation in relation to the foreseeability of the damage.

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15 Doc Parl, ch repr, 2022-2023, n°3213/001, p 89; *B Dubuisson*/*H Bocken*/*G Jocqué*/*G Schamps*/*T Vansweevelt*/*J Delvoie*/*B Zammito*, La réforme du droit de la responsabilité extracontractuelle (2019) 7.

16 *M Van Quickenborne*, De oorzakelijkheid in het recht van de burgerlijke aansprakelijkheid (1972); *ME Storme*, Kausaliteit in het Belgische aansprakelijkheids- en verzekeringsrecht, CRA 1990, 225; *H Bocken*, Toerekening van aansprakelijkheid op grond van de equivalentieleer (2004) 245; *M Van Quickenborne*, Oorzakelijk verband tussen onrechtmatige daad en schade (2007) 27; *W van Gerven*/*A Van Oevelen*, Verbintenissenrecht (2015) 449.

17 *B Dubuisson*/*H Bocken*/*G Jocqué*/*G Schamps*/*T Vansweevelt*/*J Delvoie*/ *B Zammito*, La réforme du droit de la responsabilité extracontractuelle (2019) 84ff.

Comments

This case illustrates the very nuanced approach the Dutch legal system takes towards the relevance of foreseeability in relation to causal imputation. As art 6:98 BW prescribes a multi-factor approach, in which the nature of the liability and of the damage suffered play an important role, foreseeability of the damage is a factor that must be considered against the background of these other factors. This means that, depending on the nature of the liability (fault or strict, contractual or tortious, degree of guilt) and the nature of the loss (personal injury, damage to goods, pure economic loss), more or less weight may be given to the question of foreseeability. In literature, it is recognised that the scope of protection of the rule of liability at stake, and not the foreseeability of the loss, is usually decisive for the attribution of the loss.[1] 3

Hoge Raad (Supreme Court of the Netherlands) 8 February 1985

NJ 1986/137, case note *CJH Brunner* (Henderson/Gibbs)

Facts

When a student fell off a float during a carnival, the police held him for a rioter. Without reason, the student was hit with a police baton and allegedly suffered headaches, loss of memory and general reduction of his intellectual capacities. The student sued the policeman for the consequences of the hitting. 4

Decision

The appellate court rejected the claim, because it found that the victim's recovery is hampered by circumstances of such a nature that the failure of his recovery cannot be attributed to the acts of the policeman. This ruling was based on the reasoning that, from the various reports of the doctors who had examined the student (and which reports essentially reached the same conclusion, namely that, shortly after the accident and on subsequent occasions, no neurological abnormalities were found, and that it was a case of 'renteneurosis', aggravation and querulant behaviour), no other conclusion could be drawn. The Supreme Court understands this last consideration as meaning that, in the court's judgment, the complex of complaints alleged by the student stems from a response to the policeman's wrongful act determined by his personal predisposition, as a result of which the consequences of the act for the student's mental and physical health, also in relation to his neurotic need to receive compensation, are more severe and last longer than would be the case in the normal course of events. The Supreme Court rules that, in the case of a tort consisting of inflicting injury, the consequences of 5

1 Eg *DA van der Kooij*, Relativiteit, causaliteit en toerekening van schade (dissertation Erasmus University of Rotterdam, 2019) no 282ff.

a response to that act determined by the victim's personal predisposition will generally be attributed to the offender as a consequence of the tort, even when that response is partly the result of the victim's neurotic need to obtain compensation and even if the consequences are for that reason more serious and longer lasting than would be the case in the normal course of events. This would only be different under special circumstances, eg if the victim had failed to make every effort on his part that could reasonably be expected from him – also taking into account his personality structure – to contribute to the recovery process. However, the Court did not establish that such special circumstances had arisen in this regard. Furthermore, the Supreme Court points out that this does not alter the fact that the personal predisposition of the victim and the risk in general for the emergence of complaints such as the present one arising therefrom may well form a factor that can be taken into account when estimating the damage.

Comments

6 This case illustrates that, although art 6:98 BW may limit the liability for certain consequences which stand in a but-for relationship to a tort, when personal injury ('nature of the damage') resulting from fault liability ('nature of the liability') is at stake, unforseeability of the damage does not bar liability. As the Supreme Court states, it may be different when such consequences are to be attributed to contributory negligence (failure to contribute to one's recovery). Furthermore, a personal predisposition may be taken into account in the assessment of damages: if it were to be expected that the predisposition would have caused the victim to lose his ability to earn money at a certain moment anyway, then the duration of his loss – and consequently the liability of the tortfeasor – may be limited. The latter is an issue of proof, which is in practice not easily met.[2] More recently, the Supreme Court has ruled that these rules on predisposition also apply in the case of damage to objects.[3]

9. Italy

Corte di Cassazione (Court of Cassation) 11 September 1998, no 9037

De Jure, online

Facts

1 A, the defendant, negligently repaired V's car tyre. As a result, the tyre burst. According to V, a jet of air originating from the exploding tyre caused a traumatic tibiotarsal distor-

2 Hoge Raad 27 November 2015, ECLI:NL:HR:2015:3397, NJ 2016/138, case note *S Lindenbergh*.

3 Hoge Raad 19 July 2019, ECLI:NL:HR:2019:1278, NJ 2020/391, case note *J Spier* (Prejudiciële vragen aardbevingsschade).

tion that he suffered with consequent illness and permanent disability equal to 10 % of the claimant's physical capacity.

Decision

The Court ascertained that the tibiotarsal distortion was caused by an anomalous movement of the leg, which caused the injury suffered by V. The injury was a consequence, not of the air jet emanating from the bursting tyre, but of an anomalous body movement that V did as a reaction to the loud unexpected sound of the bursting of the tyre. Therefore, both the lower courts and the *Corte di Cassazione* excluded the causal link between the noise, V's psychic reaction to it, the sudden movement of the body and the distortion he suffered: 'because the injury does not constitute a normal consequence, verifiable according to the calculation of statistical regularity, of a loud and sudden noise'. **2**

Comments

According to this ruling, the injury was not a foreseeable consequence of the defendant's negligence; hence he is not liable for it. The decision relies on the doctrine of objective foreseeability, according to which, only those consequences that a reasonable person could *ex ante* imagine as a typical consequence of certain conduct can establish a causal link. Subjective (un)foreseeability, on the other hand, does not limit liability. **3**

Even if not mentioned by the *Corte di Cassazione*, the case was decided by applying the 'adequacy of causation' test, according to which, the defendant is not liable for losses produced by conduct that, *ex ante*, would not have been considered adequate to provoke the loss. The fact that damage nonetheless arises is considered irrelevant by the law, being ascribed to a series of different and fortuitous circumstances that cannot be imputed to the agent. **4**

10. Spain

Tribunal Supremo (Supreme Court) 5 April 2019

RJ 2019\2487

Facts

The falling of sparks and incandescent pieces of the electrical cables of a line of low tension owned by the electric company A causes a forest fire that devastates thousands of hectares, causes serious fires in many buildings and the death of four persons. The victims, V1 to V50, claim compensation for personal injury and property damage caused by the fire. The Court of First Instance and the Court of Appeal decide for the claimants, and **1**

A files an appeal in cassation arguing, among other grounds, that case law dealing with the rules of the objective imputation of liability in the case of fires to property has been incorrectly applied since, in addition to establishing factual causation, it requires that the relevant criteria for objective imputation are met. The Supreme Court dismisses the appeal and confirms the judgment of the Court of Appeal.

Decision

2 The Supreme Court holds that whoever seeks compensation must prove that an action has caused damage, and for this it will be necessary to resolve the question about material or physical causation. The theory of equivalence of conditions is sufficient to reveal the existence of this first causal step, but the theory has been criticised for contradicting legal common sense, since the agent would be held liable for all the causes that precede the result without distinguishing between those that originated responsibility and those that should be ignored. For this reason, it is considered as unavoidable to discriminate or select from among the multiple causes, an assessment with which one leaves the area of physical causation to enter the area of legal causation, in order to delimit what damage, produced in the causal course of events, the agent is responsible for. To achieve this delimitation, the theory of adequate causation and objective imputation must be used.

3 In this case, the Court of Appeal does not find any criterion that supports the absence of objective imputation, since it considers that the conduct of the appellant, as responsible for the electrical cables and their maintenance, is the direct and efficient cause of the fire that caused the harm. Legal causation serves to prevent the negligent subject from being liable for any remote, improbable or indirect consequence that may arise from his or her conduct, but this is not the case here 'because even considering this in light of the doctrine of adequate causation, objective imputation cannot be excluded, since taking into account the circumstances of the case, the result produced, that is, the fire, could not be ruled out as extraordinarily unlikely (*ex ante* and by an experienced, sufficiently informed observer)'. Whether it is devastating, as is the case here, or more limited, is not a matter of substance, since there are no causes attributable to third parties that could contribute to it or to aggravate its result.

Comments

4 The old causation doctrine considered adequate causation to be a simple correction of the doctrine of 'equivalence of conditions' (*conditio sine qua non*), which held that all the events that preceded the production of a harm could be considered its cause. Since this doctrine led to an extremely wide scope of liability, an alternative doctrine of factual causation, known as 'adequate causation', was adopted by the courts. This doctrine held that not all the events that precede the production of damage have the same relevance. Damage must be associated with the antecedent that, according to the ordinary course

of events, has been its direct and immediate cause. All other events are peripheral and, therefore, irrelevant to the effects of the attribution of responsibility.[1]

Seen from the angle of objective imputation theory introduced by Pantaleón in 1990, **5** the new adequacy criterion is not related to factual but to legal causation. It establishes that a specific harmful event cannot be objectively attributed to the conduct of the actor causing it when the production of the said event would have been ruled out, as extremely improbable by an experienced observer. This 'experienced observer' (the German 'optimaler Beobachter') who should also possess the particular knowledge, in this case, with the particular knowledge of the actor, would have considered the question *ex ante*, at the time when the actor was prepared to carry out the conduct that led to the harmful event.[2]

Legal scholarship usually points out that there are accidents which are impossible **6** to foresee, or that occur by pure coincidence, and that their unpredictability cannot be made to rest exclusively on subjective probability, that is, on the *ex ante* perception that actors themselves have of the possible consequences of their actions. In these cases, what these scholars call the 'objective probability', ie according to the knowledge of an 'optimal observer', should also be taken into account to exclude from the scope of liability risks that are excessively costly to anticipate and to foresee.[3] For this reason, the adequacy doctrine as a criterion of objective imputation should be used in 'cases of rare, absolutely infrequent or erratic accidents'.[4] Thus, the 'old criterion of adequacy', now converted into an objective imputation criterion, 'continues to be useful for achieving solutions that seem fair in some cases of completely irregular or abnormal causal courses, which do not easily fit into the other objective imputation criteria'.[5]

Perhaps due to the residual nature that the doctrine has assigned to adequacy, it is **7** difficult to find decisions that openly solve the case raised following this criterion of objective imputation.[6] However, some judgments, when identifying adequate causation with 'efficient causation', seem to continue to refer to that ancient doctrine that saw in adequate causation an alternative to the factual causation established by the 'conditio sine qua non' test.[7] Rather often, considerations on adequate causation are also mixed

1 *R de Ángel Yagüez*, Tratado de responsabilidad civil (1993) 754 ff and, in more detail, in: Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 124 ff.

2 *F Pantaleón Prieto*, Article 1902 in: Comentario del Código Civil. Ministerio de Justicia (1991) 1987.

3 *P Salvador Coderch*/*A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, 9 f.

4 *P Salvador*/*A Fernández Crende*, InDret (2006) no 329, 9.

5 *F Pantaleón Prieto*, Article 1902 in: Comentario del Código Civil. Ministerio de Justicia (1991) 1590. Recent case law holds a similar position, see, eg, STS 24 February 2017 (RJ 2017\826).

6 See *FA Melchiori*, Las teorías de la casualidad en el daño. Equivalencia de condiciones, causalidad adecuada e imputación objetiva en la doctrina del Tribunal Supremo (2020) 107 ff and passim.

7 See, eg, STS 16.5.2001 (RJ2001\6213), 16.3.2004 (RJ 2004\3167), 11.11.2004 (RJ 2004\6898) and 27.1.2006 (RJ 2006 615), and Administrative Chamber 18.5.2010 (RJ 2010\3651). On 'efficient causation' as a synonym for

with the analysis of fault, and courts move seamlessly from one element to another without even realising it.[8]

11. Portugal

Tribunal da Relação de Guimarães (Guimarães Court of Appeal) 6 February 2020[1]

1738/17.9T8VRL.G2

Facts

1 On a motorway, a driver (A) could not decide whether he wanted to exit at a road junction into another lane. As he hesitated and finally decided not to exit and to return to the main lane, another car, driven by the injured party (V), collided with A's car, causing a rear-end crash. Moments later, unable to see the crash site due to fog, a third driver (C) crashed into V's car, rendering this vehicle unusable, with over € 70,000 worth of damage. Difficulties arose regarding establishing which party was at fault (or if it was a case of strict liability).

Decision

2 The Court decided that it was the sudden manoeuvre of A's car that caused V's collision and triggered C's crash into V.

'adequate causation', see *FA Melchiori*, Las teorías de la casualidad en el daño. Equivalencia de condiciones, causalidad adecuada e imputación objetiva en la doctrina del Tribunal Supremo (2020) 69 f.

8 This is the case, eg, in STS 16 May 2001 (RJ 2001\62), where the reckless manipulation of a gas lighter or steel tools by a relative that should not have been allowed into a booth loaded with pyrotechnic material caused its explosion. The Supreme Court points out that, since the booth's owner knew the risks that such a presence entailed, 'the causal relationship between his negligent conduct and the resulting harmful result is evident'. Similarly, both elements are used interchangeably in STS 14 February 2000 (RJ 2000\675). where the Supreme Court holds that there is adequate causation between the death of a 12-year-old girl who threw herself from a school window located on the seventh floor of the building and the inappropriate height of and lack of protection at the windows, and ends up apportioning liability on the ground of contributory negligence, or, finally in STS 6 September 2005 (RJ 2005\6745), where the Court speaks of the 'non-existence of adequate causation' between the omission of the owner of a ground-level irrigation pool on an unfenced farm that was partially full and had no protective fence and the death of a 4-year-old boy who fell into it. The court decides for the defendant on the grounds of 'exclusive fault' (100 % contributory negligence) of the child and his parents.

1 <http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/54441f1350a9718380258515003913 0d?OpenDocument>.

Comments

The Court applies both arts 483 and 563 of the Civil Code to reject the idea whereby the tortfeasor would be responsible for all the consequences that arise from a series of natural events that follow the event for which the tortfeasor is responsible. The Court explains that legal causation cannot be defined with the application of criteria which are based on the natural succession of events, ie, the mere circumstance that two events happened simultaneously – or, as in this case, one immediately followed the other – is not enough to assert the existence of a legal cause-effect relationship between the event and its consequences. Moreover, following the theory of adequate causation[2] (*Adäquanztheorie*), the Court is required to make a judgement of *ex post facto prognosis*, assessing whether the event is attributable to the tortfeasor, thus not requiring it to be exclusively attributable nor directly attributable: the tortfeasor can be liable in cases of indirect causation[3] or even in cases where multiple causes combine with the tortfeasor's cause. Nevertheless, the requirement of an *ex post facto prognosis* from the judge deciding the case sets aside the possibility of causation when the judge places himself in the position of the tortfeasor[4] and realises that the *consequences* of the event were unforeseeable, or, if they were foreseeable, they were very improbable or rare. Assessing causation is not only relevant when regarding the *consequences* of an event, but also to the *causation process* in itself. This leads to the conclusion that the Portuguese system is sensitive to situations of interruption of the causal chain that derive from an event for which the injured party or third party is responsible. In cases where there are 'chain reaction' car accidents, there is a causal link between the first collision and those that follow. Therefore, the tortfeasor created the adequate conditions for C's crash. Despite causation not being direct or immediate, it was certainly, in the Court's view, an indirect cause of this collision, the victim was not responsible for the collision and strict liability was excluded, as A's fault, as the sole and exclusive contributor to the accident, waives C's responsibility. **3**

The main article regarding liability for unlawful acts states that the tortfeasor is responsible for *losses that result* from breaching the rights of another person (art 483). The Portuguese system follows the *theory of adequate causation* (*Teoria da Causalidade Adequada, Adäquanztheorie*), which aims to narrow down the circle of losses for which the **4**

2 Note that it is relatively unanimous that this theory is not perfect in determining causation. This is why the Coimbra Court of Appeal mentions that the theory is complemented by other theories, such as evaluating the protective purpose of the rule and whether the tortfeasor is acting within an allowed risk. Coimbra Court of Appeal decision on Case no 2866/07.4TBMAI.P1, 16 December 2009, <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/127dca4d2caa309e802576af003b70dd?OpenDocument>.

3 The STJ has repeatedly mentioned that there may be an intermediary event between the tortfeasor's event and the losses. If this intermediary event is an adequate consequence of the first, the tortfeasor is liable for the losses.

4 Decision from the Tribunal da Relação do Porto (Porto Court of Appeal), 16 December 2009, in Case no 2866/07.4TBMAI.P1, <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/127dca4d2caa309e802576af003b70dd?OpenDocument>.

tortfeasor would be responsible if the theory of the *conditio sine qua non* was to be adopted (take unforeseeable or unpredictable losses). According to academics, the theory of adequate causation can be formulated from a positive or negative perspective, and the Portuguese legislator is not clear on which should be adopted, leaving the decision between either one to the courts, who should take into consideration the circumstances of the case. The positive formulation requires the event that produces the losses to be abstractly *suitable* to produce the losses suffered, ie, causation is affirmed when, according to the rules of experience and the normal consequences of events, the event that causes the losses is a normal, natural or typical consequence of that event. The negative formulation widens the scope of responsibility of the tortfeasor (therefore, according to some authors, should not be used in cases of strict liability): the act or omission that was the cause of the damage is not considered as the adequate cause only if exceptional, abnormal or extraordinary causes contributed to the damage. Following this theory is art 563 of the Civil Code, which states that the obligation to pay compensation only exists in relation to damage that the injured person *probably* would not have suffered if it were not for the injury.

12. England and Wales

Jolley v Sutton London Borough Council, House of Lords, 18 May 2000

[2000] 1 WLR 1082

Facts

1 The claimant was aged fourteen when he and a friend set about repairing a derelict boat which had been abandoned on amenity land near where they lived. The land was owned and occupied by the defendant local authority. The boys jacked up the boat, using a car jack and some pieces of wood, and the claimant began working on its underside. However, the rudimentary support failed, and the boat landed on the claimant's back, causing him serious spinal injuries. The claimant sought damages from the defendant, which conceded that it had breached the duty of care it owed him under sec 2 of the Occupiers' Liability Act 1957, since its employees had been aware of the boat's existence and of the danger it posed to children. However, the defendant argued that it was not liable because the only foreseeable risk created by its negligence was of children climbing on the boat and falling through the rotten planking.

Decision

2 Reversing the decision of the Court of Appeal, the House of Lords held that the trial judge had been correct in finding that the injury suffered by the claimant had not been too remote a consequences of the defendant's admitted negligence. Lord Hoffmann characterised the question in the case as whether the claimant's injury fell within the

scope of the defendant's duty, with the scope of the duty being determined by asking whether the injury fell within a description which could be said to have been reasonably foreseeable. This description was to be 'formulated by reference to the nature of the risk which ought to have been foreseen'.[1] As to the appropriate characterisation of the risk on the facts, Lord Hoffmann considered that a broad formulation – children meddling with the boat at the risk of some physical injury – should be preferred to a narrow one – children climbing on the boat and being injured when the rotten planking gave way beneath them – in part because the ingenuity of children 'in finding unexpected ways of doing mischief to themselves and others should never be underestimated'.[2] Lord Steyn arrived at the same conclusion, but on the basis that the trial judge had been entitled to find that the specific risk of the boat being propped up by a child and collapsing had been reasonably foreseeable. As to the governing legal principles, he emphasised that neither the precise manner in which the injury occurred nor its extent had to be foreseeable, and said that the exact test to be applied could be determined only 'in the context of an intense focus on the circumstances of each case'.[3]

Comments

Lord Hoffmann's focus in this case on the foreseeability of the risk that materialised is a **3** clear endorsement of the 'scope of the risk' approach to the remoteness enquiry.[4] This is consistent with the requirement that the type or kind of damage suffered by the claimant must have been reasonably foreseeable, a requirement established in the seminal remoteness decision of the Privy Council in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)*.[5] However, Lord Hoffmann's analysis is helpful in illuminating the principle that underlies the foreseeability requirement as laid down in the earlier case.

This case also illustrates the challenges of applying the risk principle in practice, for **4** when it comes to identifying the risk or risks that made the defendant's conduct negligent, or (put differently) how to frame the foreseeability enquiry in a remoteness case, consensus is often hard to come by. Nevertheless, this kind of indeterminacy is perhaps unavoidable, and, as this case shows, the tendency has been to adopt a relatively broad-brush approach to this question.[6]

1 [2000] 1 WLR 1082, 1091.

2 [2000] 1 WLR 1082, 1093.

3 [2000] 1 WLR 1082, 1090.

4 See also *Roe v Minister of Health* [1954] 2 QB 66, 85 per Denning LJ; *M Stauch*, Risk and Remoteness of Damage in Negligence (2001) 64 MLR 191.

5 [1961] AC 388.

6 See, eg, the recent decisions in *Lear v Hickstead Ltd* [2016] EWHC 528 (QB), [2016] 4 WLR 73 and *Royal Opera House Covent Garden Foundation v Goldscheider* [2019] EWCA Civ 711, [2019] PIQR P15 at [46].

Cambridge Water Co Ltd v Eastern Counties Leather plc, House of Lords, 9 December 1993

[1994] 2 AC 264

Facts

5 The defendant leather manufacturer used a chemical solvent in its tanning process, and there were regular spillages of small amounts of the solvent onto the floor of the tannery. This solvent seeped through the floor into the soil below and thence into the underground strata. Eventually, this led to the contamination of the water which the claimant water company extracted from a borehole more than a mile away, with the result that the water no longer complied with the minimum standards for use as drinking water, so that the claimant was obliged to develop a new source of supply, at considerable cost. The claimant sought recovery of that cost from the defendant under (inter alia) the rule in *Rylands v Fletcher*, which imposes strict liability for damage caused by the escape of dangerous things. The trial judge found that the defendant could not reasonably have foreseen that the spillages of the solvent would produce any perceptible effect on water taken down-catchment, or indeed that they would lead to any environmental hazard or damage at all.

Decision

6 The House of Lords held that the finding that the damage had not been reasonably foreseeable meant that the claim must fail, since foreseeability of the type of damage that had occurred was a prerequisite of liability under both private nuisance and the *Rylands v Fletcher* rule. As far as the latter was concerned, this conclusion was based on two main considerations. First, the language used in the foundational case of *Rylands v Fletcher* indicated that liability was originally envisaged as being limited to foreseeable harm.[7] And second, the strict liability rule was best understood as an offshoot of the tort of private nuisance, and since recovery of damages in private nuisance was conditional on foreseeability of the relevant type of damage, the requirement ought logically to be extended to liability under *Rylands v Fletcher*. As for private nuisance, Lord Goff commented that if, in ordinary circumstances, recovery for personal injury was conditional on the foreseeability of the damage, then it was difficult to see why a claimant should be in a stronger position in a case of damage to his land.

Although these are personal injury cases, the same broad-brush approach is discernible in property damage actions: see *The Carnival* [1994] 2 Lloyd's Rep 14.

7 See *Fletcher v Rylands* (1866) LR 1 Ex 265, 279, 280 per Blackburn J (referring to 'anything likely to do mischief if it escapes', and to liability for the 'natural and anticipated consequences' of an escape).

Comments

This case illustrates how the requirement of foreseeability has been extended beyond negligence to other causes of action, including in this instance a rule of strict liability. It has subsequently been clarified that the test to be applied in a *Rylands* case is whether it was reasonably foreseeable that, in the event of an escape, damage of the relevant type would occur.[8] It follows that the escape itself need not be foreseeable, but only the harm that results. The requirement of foreseeability must also be understood in the context of a general judicial tendency to restrict the scope of the rule, the effect of which has been effectively to emasculate *Rylands v Fletcher* as a cause of action in the modern era. The case also makes clear that foreseeability of the damage is a prerequisite of recovery of damages in private nuisance, in practice a much more significant cause of action than the *Rylands* rule.[9] **7**

Smith v Leech Brain & Co Ltd, High Court (Queen's Bench Division) 17 November 1961

[1962] 2 QB 405

Facts

The claimant's husband suffered a burn on his lip when he was struck by a piece of molten metal while working in the defendant's ironworks. Although the burn itself was minor, he subsequently developed cancer of the lip, from which he died some three years later. At the trial of the claimant's action for damages, findings were made that the burn was caused by the defendant's negligence in not providing adequate protection from the spitting of the molten metal, and that, on the balance of probabilities, the burn had triggered a cancerous growth in tissue which was already in a pre-malignant condition owing to the deceased's exposure to tar in a previous job. **8**

Decision

Lord Parker CJ held that the death of the claimant's husband was not too remote a consequence of the defendant's negligence. Because the defendant could reasonably have foreseen the initial burn, it was liable for all the damage that flowed from it, whether foreseeable or not. The test was not whether the defendant could reasonably have foreseen that a burn would cause cancer which would kill the deceased, but whether it **9**

8 See, eg, *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 at [33]; *Stannard v Gore* [2012] EWCA Civ 1248, [2014] QB 1 at [67].

9 See *J Goudkamp*/*D Nolan*, Winfield & Jolowicz on Tort (20th edn 2020) §§ 15–037. Note, however, that where the defendant is an occupier who did not create the nuisance, a more restrictive remoteness rule applies, whereby both the type *and the extent* of the damage must have been foreseeable: *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836.

'could reasonably foresee the type of injury he suffered, namely, the burn'.[10] This was an application of the 'eggshell skull rule', which had not been affected by the decision in *The Wagon Mound (No 1)*[11] to adopt foreseeability in preference to directness as the test of remoteness of damage in negligence.

Comments

10 This decision shows that in personal injury cases[12] the *Wagon Mound* test of reasonable foreseeability[13] applies only to the initial injury and not to its consequences. This 'eggshell skull rule' predates *Wagon Mound*,[14] but before this case it was not clear whether it would survive it. The rule itself is much misunderstood and frequently misapplied, largely because it is frequently said to mean that the defendant must 'take his victim as he finds him', a proposition which is manifestly false if taken literally.[15] The rule applies to psychiatric harm as well as to physical harm, so that provided some psychiatric illness was foreseeable, the claimant can recover even if the illness he or she suffers is more serious than was foreseeable because he or she was particularly susceptible to such injury.[16] Finally, in this case Lord Parker CJ confirmed that where the type of injury suffered is foreseeable, a defendant is liable for the full extent of it, whether foreseeable or not. Although this is sometimes said to be an application of the 'eggshell skull rule', it is perhaps more helpful to see it as another, distinct, qualification of the *Wagon Mound* foreseeability requirement.

10 [1962] 2 QB 405, 415.

11 [1961] AC 388.

12 The rule as such applies only to personal injuries, though it has been argued that it should be extended to property damage: see *M Jones* (ed), Clerk & Lindsell on Torts (23rd edn 2020) §§ 2–177.

13 See above 2/12 no 3.

14 See, eg, *Dulieu v White* [1901] 2 KB 669, 679 per Kennedy J.

15 The most important mistake made about the rule is its extension to the claimant's initial injury, the reasoning being that where the initial injury occurred only because of an unforeseeable pre-existing susceptibility of the claimant, it is not considered to be too remote. This extension of the rule is not the law: where no damage at all was reasonably foreseeable to a person of normal sensitivity and the claimant's abnormal sensitivity was unknown to the defendant, there is no liability. Not only is the damage in this case 'too remote', but there is probably no duty of care either, or (if there is) no breach of it.

16 See *Brice v Brown* [1984] 1 All ER 997.

13. Scotland

Hughes v Lord Advocate, House of Lords, 21 February 1963

1963 SC (HL) 31, 1963 SLT 150, [1963] AC 837

Facts

In order to undertake repair work, A, employees of the Post Office (for whose conduct the defender was responsible in law), had accessed underground telephone cables via a manhole. To protect their work, a canvas shelter had been erected over the open manhole by the employees and they had placed four paraffin warning lamps around the works. During a break from their work, the employees left the site of the works unguarded, having removed a ladder from the manhole and left it lying next to the shelter. V, an eight-year-old boy, and a ten-year-old companion decided to explore the shelter, taking with them the ladder and one of the paraffin lamps (attaching it to the end of a rope). After V had explored the manhole using the ladder, and while he was exiting the manhole, the lamp fell into the hole. This caused a violent explosion, knocking V off his feet and into the hole, where he suffered severe burns. **1**

V raised a claim in damages against A's employer, arguing that A had not taken adequate precautions to prevent an injury of the sort which had occurred, and that this was in breach of a duty of care owed to V. A's employer argued, amongst other points, that the presence of children playing near the works was unforeseeable and furthermore that, even had their presence been reasonably foreseeable, the explosion they caused as a result of their explorations was unforeseeable. At both first instance and on appeal to the Inner House of the Court of Session, V's case was unsuccessful. V further appealed to the House of Lords. **2**

Decision

The House of Lords upheld V's appeal, finding that: (1) the presence of children at the site of the works was not unforeseeable: works of this sort were likely to attract the attention of inquisitive children. That being so, to leave a manhole uncovered and unguarded was a breach of a duty of care owed to V to protect him from suffering harm as a result of the danger created by the works; and (2) while the mechanism by which the injuries were sustained (an explosion) might have been unforeseeable, the type of injuries sustained (burns) was not unforeseeable, given the presence at the site of the paraffin lamps. **3**

Comments

The decision of the House of Lords in this case is a good example of the practical application of the limiting nature of the duty of care doctrine, particularly in relation to the requirement that both (i) the harm caused and (ii) the class of person harmed must have **4**

been reasonably foreseeable at the time when the defender ought to have been considering the possible ramifications of its conduct. On the facts of this case, harm to children who might explore the works was foreseeable, one of the judges of the House of Lords noting that it was 'within common experience and knowledge that children may be allured by and tempted to play and meddle with objects which for others would have no special attraction'.[1]

5 The trickier question was whether it was foreseeable that children might cause an explosion through meddling with the works. Counsel for A argued before their Lordships that, while a minor burning injury caused by a lamp might be foreseeable, an explosion was not, noting that experts found it very hard to produce an explosion from this lamp. However, their Lordships were not persuaded that the precise mechanism by which burning was caused by a known source of danger (the lamp) had to be foreseeable, noting that 'the distinction drawn between burning and explosion is too fine to warrant acceptance'[2] and that 'it could reasonably have been foreseen that a boy who played in and about the canvas shelter ... might in some way burn himself. That is just what happened. The pursuer did burn himself, though his burns were more grave than would have been expected'.[3]

6 In its willingness to focus on the *type* of injury as that which had to be reasonably foreseeable, rather than on the *mechanism* by which the injury was caused, the court was able to reach a decision favouring the claim of a young boy harmed through the allurement of an unguarded and obviously dangerous workmen's site. However, the way in which the type of injury ought to be formulated may not always be clear cut. Moreover, the approach taken is somewhat difficult to reconcile with the later decision of the English Court of Appeal in *Doughty v Turner Manufacturing*,[4] where an explosion was caused by an accidental knocking of an asbestos lid into a cauldron of molten metal. In *Doughty*, the court focused not on the harm sustained by the plaintiff (burns) but rather on the mechanism (the explosion), holding the injury to have been unforeseeable. The result of these differing approaches is that, when assessing the limits of liability, the relative importance which should be accorded to the type of harm when compared with the mechanism by which it is caused is not wholly clear (albeit that a Scottish court might well prefer to follow the analysis of the higher court, the House of Lords, and favour a focus on the foreseeability of the type of harm).

1 See the speech of Lord Morris of Borth-y-Gest, 1963 SC (HL) 31 at 42.

2 Per Lord Jenkins at 42.

3 Per Lord Morris of Borth-y-Gest at 43f.

4 [1964] 1 QB 518.

Cameron v Hamilton Auction Marts Ltd, Sheriff Court, 13 June 1955
1955 SLT (S Ct) 74

Facts

A cow had been sent to be sold at A's cattle auction. It escaped from its holding pen through an unsecured gate, ran down a street, entered a building through an open door, and climbed a set of stairs to the first floor of the building. Its weight caused the floor to give way and, in falling into the ground floor shop premises below, it caused a tap to turn on, flooding the shop. V, the owner of the shop, raised an action in damages against A, arguing that it had negligently allowed the cow to escape from its auction pen. A argued that, even had it been negligent (which was denied), the damage caused by the cow was not such that a reasonable person could have contemplated it as a natural consequence of any negligence: it was too remote. The judge at first instance agreed with A, holding that the damage caused was not such as could reasonably and probably have been anticipated as a result of any negligence on the part of A. V appealed. **7**

Decision

On appeal, the decision at first instance was upheld. The appeal court held that a defender is not liable for all the direct consequences of negligence, even if they were unforeseeable (expressing the view that the 'direct consequences' approach to liability, taken in the earlier English case of *In re Polemis*, was not the law of Scotland), but only those probable results that might have been foreseen by a reasonable person. The harm caused by the escaping cow was not reasonably foreseeable: as the appeal judge said, 'a gate-crashing, stair-climbing, floor-bursting, tap-turning cow is something *sui generis,* for whose depredations the law affords no remedy unless there was foreknowledge of some such propensities'. **8**

Comments

It is hard to imagine a more unforeseeable chain of events than the facts of this case. A number of consequences might reasonably be foreseen if cattle are allowed to escape and run amuck in a high street, and those consequences might include damage caused to others' property (including conceivably the sort of damage to goods caused by the proverbial bull in the china shop). But damage to the fabric of a building caused by a cow falling through the ceiling above, and a flood resulting from the cow's struggles turning on a tap, fall well outside the scope of reasonably foreseeable consequences. Not only was the type of harm caused in this case (the destruction of an upper floor as well as a flood) unforeseeable, but the mechanism by which the harm was caused (the fall of the cow through a ceiling) was almost fanciful in nature. But the caveat in the quoted comment of the judge on appeal '…unless there was foreknowledge of some such propensities' is worthy of note: the implication is that, had A been aware that the cow's tempera- **9**

ment made it prone to creating unexpected hazards, there might have been liability for not taking extraordinary precautions to keep it safely in its pen.

10 The decision predates the influential *Wagon Mound*[5] decision of the Privy Council, in which the direct consequences test for liability for remote harm was rejected in favour of a reasonably foreseeable consequences test, but already at the date of this decision (1955), the Scottish courts were showing themselves unwilling to apply a direct consequences approach to the limits of liability for harm. Such a direct consequences approach offers a very poor means to limit liability for consequences which, while causally related (on a *sine qua non* basis) to an act of negligence, are so unlikely in character that the interests of justice and fairness favour relinquishing the wrongdoer from responsibility for those consequences.

Simmons v British Steel plc, House of Lords, 29 April 2004

[2004] UKHL 20, 2004 SC (HL) 94, 2004 SLT 595

Facts

11 V was employed by A at their steel-making plant. V was working with a torch on a table used for burning steel when his legs became tangled in the tubes attached to the torch. He fell, injuring himself when he hit his head against a metal bar. After the accident, V experienced a worsening of a pre-existing skin condition and became severely depressed at the turn of events.

12 At first instance, A was found to have been negligent in relation to the circumstances of the accident and V was held entitled to damages for the initial head injury but not for either of the later injuries. The judge held that he was not persuaded that V had proved that the consequential injuries had been caused by the first injury: rather he thought that V's anger at his head injury had triggered the later injuries. On appeal to the Inner House of the Court of Session, the appeal bench allowed V's claim for the consequential injuries. A appealed to the House of Lords.

Decision

13 A's appeal was dismissed, the House of Lords holding that: (1) a defender is not liable for a consequence of a kind which is not reasonably foreseeable; (2) while a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a *novus actus interveniens* or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable; (3) subject

5 *Overseas Tankship v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388, [1961] 2 WLR 126, [1961] 1 All ER 404.

to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen; (4) the defender must take his victim as he finds him; and (5) subject again to the qualification in (2), where personal injury to a pursuer was reasonably foreseeable, the defender is liable for *any* personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing.

Applying these principles to the facts of the case, their Lordships took the view that **14** one of the things directly caused by the accident was anger on the part of V at having been injured and that this anger had been a material cause of the exacerbation of his skin condition and of his depressive illness. It did not matter whether those developments were not reasonably foreseeable or whether a psychologically more robust individual would have recovered from the accident without developing either condition.

Comments

While the first two reported cases in this section emphasise reasonable foreseeability as **15** the principal test for liability for harm caused, this test exemplifies the further point that, where liability is established for some initial personal injury (in this case, the head injury suffered by V), the defender will be liable for *all* of the personal injuries resulting from the harm caused even if some of those further injuries might not individually have been reasonably foreseeable.[6] That is so even where, as in this case, some of those injuries derive from the angry reaction of V at having suffered the initial personal injury. A defender must 'take his victim as he finds him', even where that means accepting liability for consequences which would not have occurred in relation to a more mentally robust (and less angry) victim.

Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso Bernicia) House of Lords, 6 October 1988

[1989] 1 AC 463, [1988] 3 WLR 730, [1989] 1 All ER 37, 1988 SLT 874

Facts

A ship (the Esso Bernicia) owned and operated by V was being berthed at an oil and gas **16** terminal. A coupling on one of the tugs assisting with the berthing operation failed, causing the vessel to catch fire. The tug cast off her line. Shortly after being cast off, the Bernicia successively struck two jetties, causing damage to her hull and the escape of over 1,000 tonnes of bunker oil from her hold. She then struck a third jetty, causing damage to her propeller, the jetty, and underwater piles. The following day, an attempt was

6 The principle is equally applicable to damage to a victim's property, which may on occasion be more extensive (or of greater value) than what might have been foreseen.

made to contain some of the escaped oil. However, this attempt was unsuccessful when booms deployed for the task failed. Oil pollution affected the shoreline near the terminal, causing loss to crofters (farmers of small holdings).

17 V raised an action in damages against A1, the manufacturer of the tug, alleging that they knew the uses to which the tug would be put, that its coupling had been negligently fitted, and that such failure could reasonably have been expected to cause a fire necessitating the casting off of its line. They also sued other parties, including A2, the owners and operators of the tug, and A3, the operators of the booms. The sum claimed in damages by V included amounts paid by them to third parties (farmers) who had suffered loss as a result of the oil pollution, such amounts having been paid out because of an agreement entered into by major oil companies, which were tanker owners, that they would indemnify those suffering loss in such circumstances. V argued that they had been subrogated to the rights of the parties indemnified or, in the alternative, that these consequential economic losses were part of their own losses, which should also have been foreseen by A1.

18 At first instance, the judge considered that at least some of the damage caused was reasonably foreseeable and ordered a proof before answer (a trial of the facts before an assessment of legal arguments) to be held. The parties appealed against this decision to the Inner House of the Court of Session, which excluded some of the claims of V. The parties further appealed to the House of Lords.

Decision

19 The House of Lords held (among other findings) that: (1) affirming the analysis of the Lord President in his judgment in the Inner House of the Court of Session, the damage caused to the Esso Bernicia by the fire and the subsequent damage caused by the oil spillage could not be said to have been unforeseeable to A1, given that the tug had been specifically designed and built for the purpose of berthing vessels at the oil terminal; but (2) the amounts paid by V to the farmers were irrecoverable as damages, whether claimed on the basis of V having been subrogated to the rights of the farmers (that would have required V to have sued in the farmers' names, which they had not) or on the basis that such payments counted as their own losses (both because the payments were unforeseeable and because there was a rule that an indemnifier cannot sue for damages arising from its own contractual liability to persons indemnified for damage to their property).

Comments

20 The issues raised by this claim were complex and not all are narrated in the facts and decision above. For present purposes, the issue of most immediate relevance relates to the reasonable foreseeability of the fire and the consequential damage (to the vessel, the jetties, and to neighbouring farmers whose land was polluted). In this action, that question was not considered primarily in relation to the position of the owners or operators of

the tug but in relation to that of its manufacturer (A1). Neither the Inner House of the Court of Session nor the House of Lords thought that the damage caused to the vessel and the jetties (as well as that suffered by the crofters as a result of the oil spillage) was beyond the realm of reasonable foreseeability: as the Lord President put it in his opinion at the stage of the appeal to the Inner House of the Court of Session, the tug had been 'specially designed and built to berth large tankers' at the refinery, that 'the immediate and inevitable consequence of the tug suddenly being incapacitated would be the withdrawal of its control over the tanker being berthed', and that the reasonable and probable results might extend to damage of this sort.[7] Unsurprisingly, among the authorities referenced during the course of the appeals was the famous Privy Council judgment concerning damage caused by oil which leaked into a harbour, *The Wagon Mound*.[8]

The court's conclusion on this first issue seems a reasonable one on the facts, but so **21**
also does its further conclusion that A1 could not have foreseen that, by virtue of a contractual agreement to pay damages to parties such as the nearby crofters, V would itself have suffered losses constituted by paying such damages. The simple point is that the specific contractual agreement in place between the oil companies to this effect was completely unknown to A1 and that, without such knowledge, the damages paid by V under such an agreement could hardly have been foreseen. More foreseeable might have been a damages claim by the crofters themselves against the party directly responsible for causing the pollution (A1), a claim which the House of Lords considered not to have been discharged by the voluntary payments made by Esso to the crofters.[9]

This judgment is a good example of the use of a reasonable foreseeability approach **22**
to limit liability for the consequences of harmful conduct.

14. Ireland

O'Mahony v Henry Ford & Son Ltd, Irish Supreme Court, 7 March 1960

[1962] IR 146

Facts

V was employed by A and his work included the operation of drilling and riveting ma- **1**
chinery. Both involved leaning his chest against the machinery to apply pressure and both generated significant vibrations. He developed swelling on the left side of his chest (where he mainly placed the machinery) and was diagnosed with scirrhus carcinoma of the left breast. He sued A for breach of the duties to provide reasonably safe and suitable equipment and to maintain a reasonably safe system of work. The jury in the IEHC failed

7 See judgment of Lord President Emslie, 1988 SLT 33 at 40.

8 *Overseas Tankship v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388, [1961] 2 WLR 126, [1961] 1 All ER 404.

9 See the remarks of Lord Goff to that effect, 1988 SLT 874 at 878.

to agree a verdict, after the trial judge refused an application by A to withdraw the case from the jury.[1] A appealed.

Decision

2 The IESC allowed the appeal by a two to one majority. Lavery J, for the majority held:

> The risk of injury in this case, which on the evidence might be held to have been foreseeable, was a physical injury such as bruising of the chest – I shall use the term, 'physical injury,' in this sense. I distinguish between such an injury and the causation of the disease by repeated vibration of the tools which was on the evidence not foreseeable and therefore not a risk which the employers had a duty to guard against.[2]

3 The evidence did not support a finding of any physical injury of the type described above. Although it would be possible to find that the vibrations caused the cancer, this 'could not have been foreseen by careful and prudent employers.'[3] Liability could not be imposed if the injury caused was not of a type that could be anticipated to result from the defendant's behaviour, even if that behaviour could be considered to be negligent in respect of some other form of injury.

4 Maguire CJ, dissenting, supported the use of the direct consequences rule from *In re Polemis and Furness, Withy & Co*,[4] so that it would have been permissible to impose liability even if the precise form of injury was not reasonably foreseeable.

Comments

5 The reasoning of the majority is consistent with the principle subsequently identified by the Privy Council in the *Wagon Mound (No 1)*.[5] The latter decision was subsequently approved in Ireland by the IESC in *Burke v John Paul & Co Ltd*.[6] The approach taken by the majority in *O'Mahony* is a 'scope of duty' approach; it focuses on the nature of the duty and the particular type of risks embraced. Damage falling outside that risk is treated as not giving rise to a duty. Foreseeability is used to determine the risks falling within or without the duty; while the Court does not specifically use the term '*reasonable* foreseeability', the discussion is premised on the standard of the 'reasonable man' used in negligence cases. Subsequent case law and commentary generally treat this principle under

1 IEHC jury trials were subsequently abolished for most personal injury cases by sec 1 of the Courts Act 1988.

2 [1962] IR 146, 156.

3 Id, 158. O Dálaigh J agreed with Lavery J.

4 [1921] 3 KB 560.

5 *Overseas Tankship v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388, delivered on 18 January 1961.

6 [1967] IR 277.

the concept of remoteness of damage and the criterion is generally articulated as reasonable foreseeability.[7] Once the type of damage is reasonably foreseeable, it is recoverable in full, even if the extent of damage is greater than expected.[8] This approach applies in respect of the tort of negligence cases and public nuisance.[9] Reasonable foreseeability of damage is a constituent ingredient of the tort of passing off.[10] The position with respect to a number of other torts is unclear.

McCarthy v Murphy, Irish High Court, 10 February 1998

Unreported, [1998] Lexis Citation 6608

Facts

V suffered a minor physical personal injury in a road traffic accident caused by A's negligent driving. That soft tissue injury triggered depression and an irrational fear of pain. The latter consequences were due to V's frail personality. The fear of pain led her to withdraw from various social and sporting activities. **6**

Decision

McCracken J permitted V to recover damages for the psychological effects of the accident, even though the accident was very minor and such injuries were unforeseeable. He specifically identified the eggshell skull principle (or thin skull), as discussed in *Burke v John Paul*,[11] as supporting recovery. Once the soft tissue injury was a reasonably foreseeable consequence of A's negligence, he was liable for the additional injury caused by that initial injury, 'as he has to take the Plaintiff as he finds her.' **7**

7 ***BME*** *McMahon/W Binchy*, Law of Torts (4th edn 2013) ch 3; *E Quill*, Torts in Ireland (4th edn 2014) 425ff.

8 *Burke v John Paul* [1967] IR 277; *Reeves v Carthy & O'Kelly* [1984] IR 348 (both dealing with personal injuries that were unforeseeably more extensive versions of reasonably foreseeable types of injury; recovery allowed in full). *Egan v Sisk* [1986] ILRM 283 applies the principle to recovery of lost profits that were much greater than anticipated.

9 *Wall v Morrissey* [1969] IR 10, per Walsh J at 15, Budd J concurring at 16; *Connolly v South of Ireland Asphalt Co Ltd* [1977] IR 99, per Kenny J at 107 f and 110.

10 See *BME McMahon/W Binchy* Law of Torts (4th edn 2013) [3.10] ff; *E Quill*, Torts in Ireland (4th edn 2014) 287ff. It is used as a threshold liability condition, rather than as a remoteness test (it is often expressed as 'calculated' to injure, but foresight, rather than intent is used to determine the issue). Passing off is an intellectual property tort, similar to trade mark violation, but without the requirement of having a registered mark (see *McMahon/Binchy*, Law of Torts (2013) ch 31; *Quill*, Torts in Ireland (2014) 277ff.

11 [1967] IR 277.

Comments

8 The thin skull principle had been accepted in earlier Irish cases,[12] but those cases had involved injuries of the same type as the reasonably foreseeable injury, so they were really only examples of the extent of injury being greater than foreseen and did not need to resort to the thin skull principle; strictly speaking, the statements on the thin skull principle in the earlier cases can be treated as *obiter*. In this instance, the reasonably foreseeable injury combines with the plaintiff's personal weakness to cause a distinct type of injury – a classic example of the thin skull principle, where the foreseeable injury triggers an unforeseeable injury to which the plaintiff is more susceptible than the average person, due to some inherent frailty.[13] If the plaintiff had not suffered the threshold foreseeable injury, then the principles governing negligently inflicted psychiatric harm would have precluded a claim. The thin skull principle does not apply at the duty of care phase of enquiry; it is only a remoteness of damage principle.[14] If, unlike *McCarthy*, the victim suffers an unforeseeable psychological condition and a physical personal injury, the thin skull rule does not apply if the psychological condition arises independently of the physical injury, as opposed to being triggered by the physical injury.[15] There is no financial equivalent of the thin skull rule, but if the victim's susceptibility to financial losses is reasonably foreseeable, then losses triggered by tortious damage combining with such financial frailty can be recovered.[16]

Northern Bank Finance Corp v Charlton, Irish Supreme Court, 21 July 1978

[1979] IR 149

Facts

9 Three Vs and two others sought to buy a controlling shareholding in a public company. The bank, A, provided them with advice on the acquisition and agreed to act as their agent. The scheme involved the use of a holding company and a mixture of financing from the five promoters and A. Prior to purchase of the shares, one of the five, C, withdrew three-quarters of his contribution. A failed to disclose this to the others and also gave false answers to direct questions on the matter. The Vs decided to buy out C and A financed this buy-out, again providing a false answer to a direct question on C's indebt-

12 See fn 7. *McCarthy* was applied in *Djadenko v Dunnes Stores* [2017] IEHC 11.

13 See, eg, the English decision in *Smith v Leech, Brain & Co Ltd* [1962] 2 QB 405 discussed in 2/12 nos 8–10. See also *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) [3.36] ff; *E Quill*, Torts in Ireland (4th edn 2014) 430 ff.

14 *Harford v Electricity Supply Board* [2021] IECA 112, noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, no 18 ff. See *Kelly v Henessey* below 4/14 nos 11–14.

15 *Fogarty v Hannon* [2011] IEHC 13.

16 *Doran v Delaney (No 2)* [1999] 1 IR 303, 311 ff per Geoghegan J (IEHC). See *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) [3.43] ff; *E Quill*, Torts in Ireland (4th edn 2014) 433 f.

edness to A. The Vs defaulted on repayment of the buy-out loan and A sued. The Vs counterclaimed that both transactions resulted from fraudulent misrepresentations. Vs' argument in the IEHC focused on rescission, rather than damages. The IEHC dismissed A's claim and upheld Vs' counterclaim. A appealed to the IESC.

Decision

The IESC dismissed the appeal and remitted the case to the IEHC for an assessment of damages. In setting out the applicable principles, the IESC held that the direct consequences test for remoteness of damage applies in respect of deceit.[17] **10**

Comments

This decision highlights the fact that there are areas of tort where the reasonable foreseeability approach does not apply as a limiting factor on recoverable damages. The case itself only provides a rule in respect of the tort of deceit. There is a lack of authority in respect of many causes of action in tort. The position in respect of the trespass torts is uncertain. Part of the reasoning process behind the reasonable foreseeability rule in *Wagon Mound* was that reasonable foreseeability was relevant to determining the existence of liability (forming part of the duty and standard of care enquiries) and so should also be relevant to determining the scope of liability. If one applies that logic to trespass, then the trespass torts were historically based on directness, not on foresight, so the direct consequences rule of remoteness should apply. While English law has moved away from directness as a defining feature of trespass, the Irish courts have not definitively reconsidered the matter, though some have noted that the matter is undetermined in Irish law.[18] The position with respect to the appropriate approach to remoteness of damage for the strict liability principle in *Rylands v Fletcher*[19] is also undetermined.[20] **11**

17 [1979] IR 149, per O'Higgins CJ at 187 (Butler J concurring at 213), citing Lord Atkin in *Clark v Urquhart* [1930] AC 28, 68; Henchy J at 198 (Parke J concurring at 213), citing *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; Griffin at 210 briefly mentions V's entitlement to damages 'directly flowing' from the fraud.

18 See *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) [22.01] ff & [23.32] ff; *E Quill*, Torts in Ireland (4th edn 2014) 164 ff & 436.

19 (1868) LR 3 HL 330.

20 See *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) [3.50]; *E Quill*, Torts in Ireland (4th edn 2014) 435 f.

15. Malta

Cesare Garcin v Francesco Borg and another – Qorti tal-Appell (Court of Appeal) 11 November 1906

Collected Judgments, Vol XIX, Part II, 96

Facts

1 A mare belonging to the plaintiff escaped its owner. Attempts to recapture it on the day of its escape proved unsuccessful. On the following day, the defendants, acting on their own initiative and not on the plaintiff's instructions, chased the mare in an attempt to capture it and claim a reward. To avoid the defendants' pursuit, the mare threw itself into the sea. The defendants recovered it and returned it to the plaintiff. The mare died a few days later. Blaming the defendants for the mare's death, the plaintiff sued them for damages.

Decision

2 Experts appointed by the court reported that the mare had died of pneumonia contracted as a result of its immersion in the sea. They also reported that mares are 'of their nature' averse to the sea and would not willingly throw themselves in seawater.

3 The first instance court held that the defendants could not have foreseen that, against its nature, the mare would throw itself into the sea. The event was not a foreseeable result of the defendants' actions and they could not be held responsible therefor. The plaintiff's claims were therefore dismissed. The Court of Appeal adopted the reasoning of the first instance court and dismissed the plaintiff's appeal.

Comments

4 Either this particular mare did not share the aversion of its kind to the sea or it was driven by panic to act contrary to its nature. The court apparently adopted the first hypothesis and, moving away from the 'take your victim as you find him'[1] rule, it held that this particular mare's idiosyncrasy was a determining factor in the event, which could not have been foreseen by the defendants.

5 This somewhat restrictive interpretation of the requirement of foreseeability is indicative of the courts' *favor debitoris* attitude at the time. The court did not even consider the more likely hypothesis that the mare was constrained to act against its nature driven to panic by the over-enthusiastic chase by the defendants, who were perhaps motivated more by the hope of reward than by considerations relating to the mare's safety.

1 Cf *John Saliba v Joseph Farrugia*, Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 7 November 1997.

Annunziato d'Amato and another v Joseph Camilleri and another – Qorti tal-Appell (Court of Appeal) 3 March 1958

Collected Judgments, Vol XLII, Part I, 74

Facts

The defendants were engaged in scraping the bottom of a vessel at sea. To do this, they turned the vessel while afloat on its side and, by applying heat, set fire to the tar and other encrustations stuck to the bottom. Some burning tar which had become detached drifted close to a floating patch of fuel oil and set it on fire. The defendants attempted to extinguish the fire by dousing it with sea water, but to no avail. The fire spread and caused substantial damage to the plaintiffs' fishing trawler, which was moored close by. An additional factor was that a military vessel had intervened and attempted to extinguish the flames by hosing water on the oil. Since the water was under pressure, it had the unintended effect of pushing the burning oil closer to the plaintiffs' vessel. The plaintiffs sued the defendants for the damage caused to their vessel and for lost earnings. They argued that the patch of oil was visible from the defendants' position and, under the circumstances, it was highly imprudent for them to work as they did. The defendants pleaded that they were not to blame since the accident was due to a fortuitous event. **6**

Decision

The first instance court rejected the plaintiffs' claim. Evidence had shown that the sea in the area where the work was carried out was more often than not covered with a film of oil. The defendants had often worked under such circumstances before without adverse results and there was nothing to show that things would be different on the day of the accident. It was only on rare occasions that burning tar would fall off and drift on the surface and, in those instances, the defendants always doused it with water, which they kept in drums for the purpose, as a precaution. In any case, the patch of oil was visible not only to the defendants but also to the plaintiffs themselves, but they still chose to moor their vessel close to where the defendants were already working. If the plaintiffs thought that it was imprudent for the defendants to work in those conditions, they ought not to have moored their vessel close by. Moreover, the evidence had shown that, on that particular occasion, the oil was mixed with a volatile fluid which made it more easily inflammable, and the defendants had no way of knowing about this fact. It was because of this that their usual precaution of dousing the burning tar with water did not work. An additional factor was the intervention of the military vessel, which aggravated the situation. **7**

Under the circumstances, since they could not foresee the accident and they had taken the usual precautions, the defendants were making use of their rights within the proper limits when carrying on with their work and therefore they were not liable for any damage which may have resulted therefrom. The cause of the damage was not the **8**

defendants' action in allowing burning tar to fall in the water but the particular circumstances which made the fire spread uncontrollably.

9 The plaintiffs appealed. The Court of Appeal upheld the appeal and overturned the judgment. The court explained that for an agent to be held at fault for negligence, it must be shown that the consequences of his actions were foreseeable. Foreseeability is of the 'essence' of negligence: if the consequences are actually foreseen, there would be *dolus*; if they are neither foreseeable nor foreseen, there would be *casus*. The question in the present case therefore is whether the defendants could have foreseen the harmful consequences of their actions.

10 The court then noted the following considerations which led it to conclude that the defendants were indeed negligent: (i) the defendants were dealing with fire, which, of its nature, is 'inherently dangerous' and which was rendered much more dangerous by the presence of fuel oil on the surface; (ii) they knew that there was a chance that burning pieces of tar might fall onto the surface of the sea; (iii) they also knew that there were patches of fuel oil floating close by; (iv) they ought to have known that keeping drums of water as a precaution against fire was not sufficient; (v) they did not warn others in the vicinity to keep to a safe distance because of the danger. The intervention of a third party (the military vessel) was not deemed to have broken the chain of causation.

11 The fact that the defendants had followed the same practice for several years without harmful results was not evidence that such harmful results were not foreseeable, and did not excuse the failure to take proper precautions. On every occasion where they used the same method, the defendants were in effect creating a danger and on every occasion they should have been prepared for the worst.

12 Turning then to the argument that what was foreseeable for the defendants ought to have been equally foreseeable for the plaintiffs, the court observed that one would be guilty of contributory negligence if one fails to take reasonable care of one's own safety and that of one's belongings. However, one is justified in assuming that whoever undertakes an activity will properly perform his legal duties by taking proper care and precautions to avoid causing damage to others. The fact that no warning of danger was given strengthens this assumption. One cannot be charged with contributory negligence if the other fails to take proper care; one is not expected to foresee that others will be negligent and to take precautions against such negligence.

Comments

13 This judgment singles out foreseeability as a determining factor of negligence. The test is to be applied less stringently when the defendant's activity is in itself dangerous, in the sense that such an activity creates a stronger duty to take proper precautions against possible harm even if the likelihood of a harmful event actually occurring is relatively low because, in the past, such activity did not result in harmful consequences. The measure of the adequacy of such precautions is the degree of danger created and not past events.

Moreover, the fact that such a harmful outcome should have been equally foreseeable to the victim is no defence. The victim is entitled to assume that whoever undertakes a dangerous activity will take all necessary precautions to avoid harming others, and the victim is not obliged to change his own behaviour because others choose to undertake a dangerous activity. 14

MX on behalf of a minor child v Anthony Taylor and another – Qorti tal-Appell (Court of Appeal) 25 October 2013

Facts

The plaintiff claimed to have suffered severe psychological harm and post-traumatic stress disorder as a result of being the victim of repeated sexual abuse by the first defendant, which began when she was a nine-year-old schoolgirl until she was 15. When the plaintiff reached the age of 11 and started to attend secondary school, the first defendant developed an elaborate scheme in order to gain access to her without revealing this to her parents or the school authorities: he coerced the plaintiff into visiting his apartment every Monday morning on her way to school, threatening that he would inflict severe harm on her grandfather if she were to fail to turn up. In order to justify the plaintiff's absence from school, the first defendant, on at least two occasions, relied on a medical certificate issued by the second defendant, a physician, which he obtained directly from the said physician and which he compelled the plaintiff to present to the school authorities. Following criminal proceedings in which the first defendant admitted responsibility for the sexual abuse, the plaintiff sued both defendants in tort in order to obtain compensation for the damage, consisting primarily in permanent psychological scars inflicted upon her as a result of the abuse. 15

Decision

The first instance court held that both defendants were jointly and severally liable to compensate for the damage suffered by the plaintiff. It held that the delictual liability of the first defendant was clear from his testimony in the course of the criminal proceedings and from the fact that he did not contest the plaintiff's allegations in the civil case. As regards the physician, the court held that he had acted negligently and unprofessionally insofar as he had: (i) issued at least two medical certificates justifying the plaintiff's absence from school on medical grounds, despite the fact that he had never conducted a medical examination of the plaintiff, nor even having met her; (ii) that, this notwithstanding, at least one of these certificates attempted to retrospectively justify the plaintiff's absence on four previous dates and (iii) that these certificates were released directly to the other defendant, although the physician knew that he was not the plaintiff's father or guardian and yet he never contacted her parents in order to verify that the first defendant was acting as their representative when soliciting the issue of the certificates. 16

17 The physician's heirs appealed (the physician himself having passed away during the pendency of the proceedings). The Court of Appeal overturned the finding of the first court on the physician's responsibility on the ground, firstly, that he had not been proved to be in *culpa*. The court pointed out that *culpa* is identified with the failure to observe the diligence of an average prudent man and is present when the tortfeasor voluntarily chooses certain conduct while failing to foresee the harmful effects of such conduct when such effects were foreseeable. The court further observed that this foreseeability test is only satisfied if the harmful consequences which one should have foreseen are reasonably probable and not highly remote. In this light, the court held that the uses to which the first defendant would put the medical certificates could not reasonably have been foreseen by the physician. It was quite a common practice for certificates to be issued with retrospective effect and thus the request for such a certificate would not have aroused any suspicions on the part of the physician. There was therefore no fault on his part.

18 Moreover, the court observed that, in any case, even if the physician had been at fault, the causal link between the damage suffered by the plaintiff and his conduct had not been adequately proven by the plaintiff. Unless this causal link was also proven, separately and independently from fault, there could not be any liability on his part in tort. The court held that the proximate cause of the harm suffered by the plaintiff was not the conduct of the physician but that of the first defendant. It observed further that, while it was possible for multiple causes to contribute to the same harm, each of these causes must satisfy the 'but-for' test by showing that the harm would not have been incurred had it not been for the defendant's negligent conduct. In this case, the court concluded that the physician's conduct in issuing the medical certificates in question had not caused the harm suffered by the plaintiff, as the plaintiff had been sexually abused by the defendant for several years before the certificates in question had been issued.

Comments

19 The Court of Appeal considered both the factor of foreseeability and that of causation, taking a somewhat conservative attitude in both instances.

20 On the matter of foreseeability, it is certainly most unlikely that the physician could have foreseen the actual use to be made of the certificates. Possibly, considering that he knew that the first defendant was not the child's parent or guardian and that he did not have the parents' consent to issue the certificate, the physician could have foreseen that some improper use could be made; however, this was not deemed sufficient to attach liability because the likelihood of the actual consequences taking place was considered as being too remote.

21 The Court of Appeal judgment may perhaps be criticised for making a very mechanical and restrictive application of the requirement of foreseeability. The test should be not whether an average reasonable man could have foreseen how the medical certificate would be used, but whether a reasonable physician could have foreseen this. It was

certainly naïve of the physician not to consider the possibility that a third party with no legitimate connection with the child and no written authority from the parents might require the certificate for nefarious purposes. The actual use might possibly not have been foreseeable, but the fact that some questionable use was being contemplated was not such a far-fetched possibility.

In assessing the test of foreseeability, the Court of Appeal did not take into account **22**
that the degree of foreseeability should be conditioned by the extent of blameworthiness. The physician was objectively at fault in knowingly issuing a medical certificate to an unauthorised person; it was not a case of mere negligence and the test should not be identical when the agent acted wilfully and when he acted merely negligently.

Under the circumstances, a less stringent test of foreseeability could possibly have **23**
been applied. It is not unreasonable to suspect that if, without bringing the child to be examined, the first defendant asks for a medical certificate in respect of that child, over whom it is known that he has no authority, then possibly he is not doing so for a proper, or at least for a normal, purpose. The danger of an improper use of the certificate, even if not the actual use which was made of it, was not unforeseeable.

The question of causation is more straightforward concerning the abuse that took **24**
place before the certificates were issued: there is no question that the physician contributed in any way to the harm caused then. However, in saying that the proximate cause of the harm suffered by the plaintiff was not the conduct of the physician but that of the first defendant, the court seems to imply that liability in tort requires the plaintiff to prove that the defendant's conduct was the *single* most proximate cause of the harm. The reasoning behind the 'but-for' test applied by the court is that, since the harm would still have been caused even if the physician had acted diligently, then his conduct cannot be considered to have caused the harm. This is so, but the question is not only whether the harm would still have been caused but also whether it would have been prolonged in time or whether it would have attained the same level of severity without the physician's help. The physician's wrongdoing was certainly a substantial factor in this.

16. Norway

Høyesterett (Norwegian Supreme Court) 2 February 2007

Rt 2007, 172

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2007-294-a?searchResultContext=3254&rowNumber=1&totalHits=1>

Facts

A 32-year-old electrician, A, was injured when a lift he was sitting in fell while he was **1**
working on light appliances several metres above ground. He broke his back and injured his arm, but suffered no damage to his head. At the time of the accident, A lived together with a woman. He was active in sports and leisure activities, and he played darts at a re-

latively advanced level. After the accident, A had to terminate his employment as an electrician and he was unemployed for two years. He tried to start his own business, but he did not succeed. Hence, he had to live from his social security payments. During the years after the accident, he developed a severe psychiatric illness and was diagnosed as a paranoid schizophrenic. The medical experts found that there was a causal connection between the accident and the illness or the consequences of the illness.

Decision

2 The Supreme Court found that the insurance company covering labour injuries was liable according to the Act on Insurance for Accidents at Work (*yrkesskadeforsikringsloven* 16 June 1989 no 65, ysfl § 11). Thus, the basis of liability was strict liability. The Court found that the accident was a *conditio sine qua non* for the illness.

3 The main question in the case was whether there was adequate causation. The court found, after an assessment of the concrete merits of the case, that the causal connection was not proximate (adequate). The Court pointed to the fact that such physical accidents very rarely result in psychiatric illness. The medical experts had also not concluded that the illness stemmed directly from the accident. The illness was a result of the *consequences* of the accident, namely, the fact that the victim became unemployed, had to give up his leisure activities, and the fact that his recovery programme was not successful, but these were not a substantial part of the initial harm. The Court also added that the fact that his partner had left him also played a part in the development of his illness. Apparently, this was a cause that was in no way connected to the accident. Consequently, A's claim for compensation was dismissed.

Comments

4 The argumentation in this case is typical for Norwegian tort law reasoning on limiting liability. The court applies a combination of arguments based on the fact that the kind of damage seldom occurs as a consequence of a specific harm and the fact that there are several links in the causal chain between the alleged cause and the final damage. Hence the consequence of the harm is not foreseeable, and it may also be considered as a remote consequence of the initial harm. It is also possible to understand the formulations of the Supreme Court as statements of the fact that the fall was one among several causes behind the schizophrenia. When looking at the whole picture of causes in play, the fall was a minor cause that was not substantial enough to lead to a finding of liability.

5 In principle, a psychiatric illness generated by physical injuries may qualify for compensation.[1] This is so even if the dominating cause of the illness is the victim's genetic constitution.

1 See for instance Rt 2001, 320.

The assessment is concrete and related to the merits of the case. Scholars have tried to rationalise the test in many ways, but no one has really succeeded. A leading scholar, N Nygaard, has stated that one must realise that it is not possible to capture the test in a concrete formula.[2] One must instead resort to vague guidelines. Nygaard, as well as other authors, have outlined a set of arguments at play, such as the degree of foreseeability and remoteness, to which degree the plaintiff is capable of protecting himself against damage, how coincicidental the loss seems to be, etc. 6

Høyesterett (Norwegian Supreme Court) 25 April 1933

Rt 1933, 475

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/rt-19nn33-475-132?searchResultContext=3293&rowNumber=1&totalHits=1>

Facts

A farmer was in the process of stretching a steel wire across a wooden rack for drying hay that he had harvested from his field. The steel wire suddenly snapped, with the consequence that the part of the wire that the farmer was holding flew up into the air due to the static energy created by tightening the wire. The wire came into contact with a high voltage electric cable seven metres above the ground. The electric current passed through the wire and through the farmer´s body. The farmer suffered severe personal injury as a result of the incident. He sued the owner of the electricity cables, the Norwegian state. 7

Decision

The question for the Supreme Court was whether the accident was covered by the uncodified strict liability basis, which evolved in Norway since a breakthrough case was decided in 1905.[3] The requisite for such liability is that the damage is the result of a continuous risk, distinctive for the device or enterprise it stems from, and that the materialisation of such a risk represents an extraordinary event from the plaintiff's point of view. Hence, the condition for liability, namely strict liability, was met. The court has, in several other cases, acknowledged that electricity cables are within the area of 'dangerous activities' which qualify for the uncodified strict liability under Norwegian tort law. The Supreme Court found, however, that the damage was a result of such an unforeseeable and unique event caused by forces of nature, referring to the recoil of the wire, that it was not within the reasonable sphere of responsibility of the owner of the electricity cables. The reasoning in the decision is rather brief. 8

2 *N Nygaard*, Skade og ansvar [Damage and responsibility] (6th edn 2007) 353.

3 Rt 1905, 715.

Comments

9 The reasoning of the Court gives an example of 'the double adequacy test' at play. Nordic scholars have suggested that the requirements of strict liability and an adequacy test might be inextricably connected. In principle, the damage may still be considered too remote a consequence to qualify for compensation, as in the referred case above.[4]

10 One scholar, N Nygaard, has shown how the reasoning of the Supreme Court in the wire case is based upon two perspectives: firstly, the judges elaborate on whether the course of events was foreseeable from an ex ante perspective. Secondly, the approach is rather retrospective: looking back at what happened, what was the dominating cause of the injuring event? Nygaard generalises and combines these two perspectives, in an attempt to make them valid for most considerations based on the adequacy test.[5]

11 Nygaard's approach probably overestimates the relevance of the language of causation. However, one may find the two perspectives present in many cases regarding a limitation of liability. It is, for example, also present in the schizophrenia case mentioned at 2/16 no 1 above (Rt 2007, 172). It is therefore true, as Nygaard points out, that the two perspectives are relevant. The perspectives do not, however, qualify as a rule or mandatory guideline. It is just a matter of concrete reasoning based on fairness and equity in the specific case.

17. Sweden

Högsta domstolen (Supreme Court) 16 October 1996

NJA 1996, 564

Facts

1 A professional horse trainer took care of a race horse. The horse managed to get the door to the horsebox opened a little, whereupon it trapped its head in the girder. This caused the door to be lifted from its hinges which in turn led to the door being hung around the horse's neck. Being frightened, the horse ran out of the box to the open space outside the stable, where it fell with the door around its head, leading to injuries.

Decision

2 The trainer was considered negligent since he had not ensured that a lock had been installed on the door which could not be opened by the horse. Apropos the risks, the Court stated: 'The risk assessment shall not only focus on the harm that actually occurred, but in-

4 See, eg, *P Lødrup*, Luftfart og ansvar (1966) 253; *B Askeland*, Erstatningsrettslig identifikasjon (2002) 110 f.

5 *N Nygaard*, Skade og ansvar (6th edn 2007) 333.

stead relate to the risk of injuries of the same kind.' This negligence test did not focus on the foreseeability of the 'combination of circumstances that in this case led to the damage', but on the issue of whether the trainer had created 'a risk for the horse to get out of the box and thereupon or later be harmed'. The actual damage occurred due to a series of coincidental circumstances, but the Court nevertheless found the trainer liable for the negligence he had shown when not equipping the door with a sufficiently secure lock.

Comments

The judgment highlights the relationship between the concepts of negligence (*culpa*) and the classical theory of adequacy (foreseeability and probability: see above 1/17 no 1). The focus of the negligence issue relates to whether the human conduct is safe enough, not if the specific result as such is foreseeable, etc.[1] The negligence test deals with the risk potential of the conduct, not the actual damage or actual causal sequence. When evaluating negligence in this case, it was considered as a risk that the horse could somehow get out of its box and that it could somehow injure itself. When discussing negligence in this way – focusing on how some concrete risks and their potential can 'somehow' develop – it becomes clear that the test of foreseeability (adequacy) will very seldom exclude cases within the normal scope of risk development. **3**

Högsta domstolen (Supreme Court) 17 April 2014

NJA 2014, 272

Facts

Auditor A was (undisputedly) negligent when delivering an audit report without remarks to company C. Later, C was acquired by the buyer B for a sum equivalent to the amount of € 200 million. Since the share price of C thereafter fell catastrophically, B claimed compensation from A, arguing that the deal would not have been made if the erroneous audit report had not been submitted. A's failure consisted of not discovering and remarking on two specific items, namely, (1) a goodwill post was evaluated at € 900,000, but B asserted that the correct sum was € 400,000; and (2) a post concerning income of € 100,000 should have been marked as a risk, since a repayment obligation could arise (later the repaid sum was determined at € 90,000). **4**

1 Regarding negligence (*culpa*) and its relation to adequacy, see *H Andersson*, Ansvarsproblem i skadeståndsrätten (2013) 63 ff; *J Hellner*/*M Radetzki*, Skadeståndsrätt (10th edn 2018) 123 ff.

Decision

5 The Supreme Court highlighted three themes in relation to the floodgate argument: foreseeability as seen from the tortfeasor's point of view; the issue concerning the problem of disproportionality between the tortious event and the extent of liability and the difficulties in dealing with liability issues when a large circle of victims can be involved. To establish causality and liability, it must be determined that the wrongful event, in a relevant way, influenced the actual decision – ie in such a situation it could be considered as motivated to seriously consider another decision. Thus, the erroneous audit report must have created information deficiencies which would typically be relevant in a case of this type. When considering these factors, the Supreme Court found that the questionable valuation of the (1) goodwill post could not be considered to have had such characteristics that B, *ceteris paribus*, would seriously have considered refraining from the business deal. And as regards the (2) post (approx € 100,000) with the repayment risk, the Court found that this factor was not at all sufficiently significant to, in any way, justify questioning a transaction of € 200 million. Therefore no damages were awarded to B.

Comments

6 The issue of foreseeability in this judgment was intertwined with other related issues and, actually, that is the most common way the concept is used in Swedish tort cases – the classical question concerning what can be foreseen from the tortfeasor's perspective is often 'mixed' with other evaluations. In all causality cases, we have to deal with the hypothetical issue of whether the effect that occurred would have been absent if the cause had not been present. In some situations where we cannot give an answer to this question – due to the impossibility of proving factors in the sphere of the tortfeasor – this party has to bear the risk. But in this case, the problematic issue was not to prove factors, but rather to evaluate the possible thoughts and hypothetically chosen action of the claimant. In such situations, tort law practice cannot give the claimant the advantage of a presumption that he, in all circumstances, would have chosen another business deal if he had obtained the correct facts from the auditor's report. Instead, we have to make an objective evaluation as regards what kind of factors that, in a relevant way, had an impact on the decision to make this or that business deal.

7 When considering the relatively minor mistakes as regards incorrectly estimated figures (about € 600,000 in a transaction of approx € 200 million – ie approx 0.3 %), these wrongful facts could not be seen as typically relevant factors for the decision. In other words, if the figures had been correct (and shown a € 600,000 'worse' situation for the company), this would not have seriously motivated alternative conduct. In short, this clarifying judgment shows us that we, in a concrete way, must evaluate the normative borders of liability – even though we often, due to tradition, use the classical wordings of 'foreseeability', etc. Certainly there are high quality demands on professionals such as auditors, but the alleged victims of their advice must be more concrete as regards the

impact of the advice, the report and so on. Every single insignificant mistake cannot lead to a winning narrative concerning professional liability.

18. Finland

Korkein oikeus (Supreme Court) 13 November 2012, KKO 2012:94
<https://finlex.fi/fi/oikeus/kko/kko/2012/20120094>

Facts

A punched V in the head once, causing V an extensive intracranial haemorrhage. Also excessive usage of anticoagulant by V contributed to the said severe consequence. The prosecutor demanded punishment for A as well as obliging them to pay compensation to V for their injury.[1] 1

Decision

The Supreme Court sentenced A for assault and battery. However, A was not found as having caused V's intracranial haemorrhage and the consequential brain injury intentionally, because they were regarded as injuries which were too unpredictable. In any case, A was regarded as having caused these injuries negligently, because as A had punched V in the head, A should have known that such a blow can cause even severe injuries. The follow-up question was whether A's liability should be adjusted because an external circumstance, ie V's excessive use of an anticoagulant, of which A had not been aware, had contributed to V's injury. The Supreme Court first noted that A's liability for the entire loss could be favoured with the additional fact that, after punching V, A had delayed almost a day before taking V to a hospital, which had aggravated V's injury. However, the effect of the anticoagulant and its excessive use on V's injury was regarded as being so essential and unforeseeable to A that the Supreme Court ultimately adjusted A's liability to two thirds of the entire loss. 2

Comments

Case KKO 2012:94 touched upon two limits of liability analysed in this book: 1) the requirement of foreseeability of causation and 2) the influence of an external circumstance on the emergence of the damage (*casus mixtus cum culpa*). The latter question be- 3

1 In Finnish law, a prosecutor who has brought a charge is, as a main rule and upon a request of the injured party, obliged to pursue a civil claim of the injured party against the accused in the criminal case (ch 3 sec 9 of laki oikeudenkäynnistä rikosasioissa 11.7.1997/689).
A prosecutor is, as a rule, obliged to initiate an action for damages on behalf of the injured party. See ch 3 sec 9 of laki oikeudenkäynnistä rikosasioissa (11.7.1997/689).

longs to the sphere of ch 6 sec 1 of *vahingonkorvauslaki* (31.5.1974/412), which is introduced in 7/18 nos 3–6 below.

4 According to an established non-statutory rule, a party's liability for damage does not cover, as a main rule, such losses whose occurrence was unpredictable to the liable party. Predictability, or foreseeability, of losses may be based either on the fact that the risk of certain damage materialising is regarded as objectively predictable, for instance, an unsupervised campfire may cause a forest fire, or on the liable party's subjective awareness of the risk. The decisive factor is not merely what the liable party knew but also what they ought to have known.[2]

5 Prior to case KKO 2012:94, there had been a discussion in the legal literature on whether there is a special rule in Finnish law for cases where the consequences of a personal injury have become unpredictably severe because of particular vulnerability of the injured party. The conventional outlook in legal literature was that a tortfeasor has to 'take their victim as they are', in other words, a tortfeasor is also liable for unpredictable injuries of the injured party.[3] However, M Saarikoski in his dissertation criticised this view as weakly reasoned and proposed a balanced solution as being that a tortfeasor may be liable for the other's unpredictable injuries only when they have caused the loss when committing a criminal offence, intentionally or showing gross negligence, whereas in other situations liability is limited to foreseeable losses.[4]

6 Nevertheless, case KKO 2012:94 shows that neither the conventional nor Saarikoski's view fully reflects the law in force. As established, in the case, A was not held liable for V's unpredictable injury although the initial damaging act, the punch in the head, was purely intentional. The outcome indicates that there is not a special doctrine on personal injuries, while also these situations are, at least as a main rule, subject to ch 6 sec 1 of *vahingonkorvauslaki* and the principle of *casus mixtus cum culpa* enacted therein. According to this provision, 'if a circumstance external to the act giving rise to the injury or damage has also been involved, the damages may be adjusted as is reasonable'.

7 Although the case was decided formally by virtue of ch 6 sec 1 of *vahingonkorvauslaki*, it is clear that the unpredictable nature of V's injury was a key feature that rendered V's special vulnerability as appearing 'a circumstance external' in the meaning of the said provision. Thus, the case can also be seen to reflect the rule that liability does not cover unforeseeable consequences.

2 See, eg, *M Hemmo*, Vahingonkorvausoikeus (2005) 135 f.

3 *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 429 f.

4 *M Saarikoski*, Uhrin erityinen vahinkoherkkyys henkilövahingossa (2009) 429 ff.

Korkein oikeus (Supreme Court) 17 January 1997, KKO 1997:3
<https://www.finlex.fi/fi/oikeus/kko/kko/1997/19970003>

Facts

V owned shares in a housing company, which entitled him to occupancy of a certain leasehold flat. V had planned to build a sauna in their flat and applied for a permit from the board of the company for this alteration work. V had also concluded a preliminary agreement on the sale of the shares with a third party under the condition that, if the permission for the alteration work were not obtained by a certain date, the preliminary agreement would be cancelled. The board of the company had delayed in deciding the issue, which led to the cancellation of the agreement, and furthermore, economic loss to V, because the agreed sales price was higher than what they gained from a subsequent sale. V claimed damages from the housing company. **8**

Decision

The Supreme Court held that the board had neglected its duties when delaying its decision as regards the application without justifiable reason. However, the damages claim was rejected, because V had not even alleged that the board had been aware of the preliminary agreement. Thus, the company could not have anticipated V suffering damage due to the decrease in the value of their shares. **9**

Comments

The Supreme Court did not express what the normative basis for the company's potential liability was. However, most probably the basis was *vahingonkorvauslaki* (31.5.1974/412), as expressed by the District Court in its judgment, because the applicable act on housing companies, *laki asunto-osakeyhtiöistä* (30/1926), contained no provisions on liability of the company. The legal relationship between a company and its shareholder is understood under Finnish law as being a company law relationship by nature, which is not contractual, and because of this, *vahingonkorvauslaki* as the general statute on extra-contractual liability, is applicable there. Another issue is that pure economic loss, such as V's loss in the case, is not generally recoverable under *vahingonkorvauslaki* but only under special conditions (ch 5 sec 1), but this did not become an issue in the case, because V's claim was dismissed already because of the unpredictability of their loss.[5] **10**

The case KKO 1997:3 is a clear-cut example of the application of the requirement of foreseeability of causation. V's loss could not have occurred without the special circum- **11**

5 The District Court, which decided the case in favour of V, regarded the board's procrastination in the case as being 'a particularly weighty reason' enabling compensation of pure economic loss by virtue of ch 5 sec 1 of vahingonkorvauslaki.

stance that there had been a preliminary agreement between V and the potential buyer. The existence of such a risk of damage is clearly not generally known, and V had not even alleged that the company had even been informed of the agreement. Had the shareholder informed the company in advance of the agreement and the damage risk relating to its cancellation, the outcome of the case could have been different.[6]

Korkein oikeus (Supreme Court) 1 December 2017, KKO 2017:81

<https://www.finlex.fi/fi/oikeus/kko/kko/2017/20170081>

Facts

12 A representative (A) of an insolvent employer had been ordered to pay a pecuniary criminal penalty because of a failure to issue testimonials and payslips to former employees (together: V). V also claimed damages[7] from A alleging that, because they did not receive the testimonials and payslips, they were not able to apply for compensation for the lost wages from the wage security authority (a type of guarantee by the state in favour of employees in a situation where an employer goes bankrupt). A objected to the claim, pointing out that applying to the wage security authority did not require possession of the documents that A had failed to issue, and, furthermore, V never actually applied for the wage security. Thus, A's criminal offence had not caused V's alleged loss.

Decision

13 All five Justices of the Supreme Court dismissed the claim, but they dissented on the exact reasoning therefor. According to the majority (3–2) reasoning, A's failure to issue the testimonials and payslips may have affected V's decision not to apply for the wage security. Furthermore, those documents would undoubtedly have been relevant in assessing whether V would have been entitled to wage security – but only providing that they actually applied for it. Because this had not been the case, A's criminal offence was not regarded as being, in a judicial sense, a cause of V's loss.

14 The minority reasoning noted that, in a factual sense, A's omission had caused V's loss, because, according to the minority, it was plausibly shown that, had V received the documents, they would have applied for the wage security and been granted it. However, because presentation of these documents was not a legal requirement to apply for wage security, the failure to apply was an unforeseeable consequence of A's omission.

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6 Accordingly, *M Hemmo*, Vahingonkorvausoikeus (2005) 137.

7 Commission of a criminal offence gives, under Finnish law, rise to a civil claim in damages, providing that the offence has caused recoverable loss.

Comments

The Supreme Court did not express what was the normative basis for A's potential liability, which is normal in cases where the loss is caused by a criminal act. In such situations, *vahingonkorvauslaki*, the general statute on extra-contractual liability, enables full compensation of different types of loss, including, pure economic loss (ch 5 sec 1). It is worth noting that A's omissions could also be regarded as a breach of the employment contract with V, enabling liability for damage also by virtue of *työsopimuslaki* (26.1.2001/55, the Employment Contracts Act). However, most likely the Supreme Court simply regarded the criminal nature of A's omissions as the core of the damaging act in this case, and perceived the liability as being based on *vahingonkorvauslaki*, thus paying no further attention to the potentially concurrent contractual liability. **15**

The case illustrates the conceptual ambiguity of the requirements of causation and its foreseeability under Finnish law.[8] The majority rejected the case on grounds of a lack of causality – assumedly meaning judicial causality[9] – whereas the minority held the requirement of factual causality as being met but not the additional requirement of the foreseeability of the causality. Of these two opinions, the present author regards the minority opinion as being more accurately and aptly reasoned.[10] In my opinion, the factual causality between A's omission and V's loss was as such plausible. However, V's decision not to apply for wage security because of not having received certain documents – which were not even required for the application – was unpredictable to such a degree that it would have been unreasonable to oblige A to compensate the loss. **16**

On a more general level, the case demonstrates that, when the occurrence of certain harmful consequence is dependent on decisions and acts of the injured party – in the present case, V's decision not to apply for the wage security – this weakens the causality of the consequence in question and may prevent its recoverability. At the same time, the case illustrates that losses that are genuinely unforeseeable from the viewpoint of the liable party – the party did not know and cannot even reasonably have been expected to know of the risk – are not compensated even though they are *de facto* caused by an unlawful act of the liable party. This holds true, as the case implicates, even if the act as such would be regarded as subject to criminal punishment. Obviously, the situation is different if causing such type of loss is the purpose of the damaging party. **17**

8 See above 1/18 nos 2–3.

9 In the doctrine, a distinction has often been made between a) factual and b) judicial causality. Factual causality between events A and B means that, without A, there would not have *de facto* been B. Judicial causality between events A and B means that A is regarded as being, not only on the level of facts but also in a judicially relevant sense, a precondition for the occurrence of B. Generally, on the distinction between factual and judicial causation, see for example, *M Hemmo*, Vahingonkorvausoikeus (2005) 109f; *P Ståhlberg* /*J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 386; *P Virtanen*, Vahingonkorvaus. Laki ja käytännöt (2011) 339.

10 *O Norros*, KKO 2017:81 – Työnantajavelvoitteiden rikkomisen syy-yhteys varallisuusvahinkoon, in: P Timonen (ed), KKO:n ratkaisut kommentein II:2017 (2018) 294f.

19. Estonia

Tallinn Ringkonnakohus (Talinn Court of Appeal) 19 December 2008

Case No 2-06-8084

All Estonian cases are available at <www.riigiteataja.ee>

(in Estonian)

Facts

1 Twelve claimants were the shareholders of the same company. One of the shareholders made an offer to all of the other shareholders to sell their shares to him. The claimants accepted the offer. The sales price was supposed to accrue to their accounts by 18 January 2006. The accrual of the sales price to the claimants' accounts was impeded until 14 March 2006 because, in another court case initiated by the defendant where the defendant was the claimant, the court had, at the defendant's request, prohibited the transfer, encumbrance and any other disposal of all of the shares in the given company for the purpose of the interim protection of the claim. The interim protection of the claim subsequently proved groundless. As a result of the groundless interim protection of the claim requested by the defendant, the claimants suffered pecuniary damage. The claimants argued that the usual interest had to be compensated to the extent of the interest rate established in § 94 of the LOA (2.25 % per annum). The claimants' tortious claims amounted to between € 14 and € 271. The district court denied the claims.

Decision

2 The court of appeal upheld the district court's judgment. The court of appeal held that § 391 of the Code of Civil Procedure (CCP) was not applicable to the claimants' claim because the rule governed compensation for damage caused to the other party by the interim protection of the claim. In fact, the claimants were not parties to the proceedings in the court case in which interim protection was granted. However, this does not preclude the claimants having a claim for damages against the defendant based on tort law provisions.

3 The claimants argued that the suffered pecuniary damage was the lost profits because they could have deposited the money to be received for the shares for a fixed term in a bank. The court of appeal held that there was a causal link between the defendant's act and the claimants' damage because, without the defendant's request, the court would not have granted interim protection to the claim, which prevented the conclusion and performance of contracts of sale of the shares and, as a result thereof, the receipt of the money and the earning of interest income.

4 The court of appeal referred to LOA § 127(2) and noted that, in the case of an activity prohibited by an Act, one must, in establishing the protective purpose of such a prohibition, take into account how foreseeable the harmful consequence was to a reasonable person. The court of appeal held that it was not foreseeable to a reasonable person that all of the claimants planned on putting the money they would have received in a fixed-

term bank deposit. In the statement of claim, the claimants also did not rely on the fact that they all in fact placed the money that they received two months later in a fixed-term deposit. Instead, some of the claimants explained that they intended to use the money to make major purchases.

While a person's act may constitute the cause of another person's damage, it does not statutorily always mean that a claim for damages should be granted where a causal link exists. For the above reasons, the court of appeal took the view that being deprived of the opportunity to earn interest income is, being pure economic loss, not subject to compensation in the case of tortious liability. 5

Comments

In the LOA, the foreseeability requirement is established in § 127(3) (the provision is referred to in the Introduction). It clearly follows from the wording of the provision that the provision only applies to compensation for contractual claims for damages. Thus, LOA § 127(3) does not apply to tortious claims. 6

Usually, Estonian courts do not assess the foreseeability of damage and do not mention it in judgments when dealing with tortious claims. There are individual cases where the courts have raised the issue of the foreseeability of damage via substantiating the protective purpose of a rule (LOA § 127(2)). Such an approach seems justified: generally, the protective purpose of a rule should not be aimed at preventing damage which the tortfeasor could not have foreseen. Thus, using the criterion of the foreseeability of damage is generally justified in establishing the purpose of a rule. The extent to which the damage was reasonably foreseeable is relevant. Thus, it is possible to preclude the obligation to compensate completely atypical damage arising from certain activities. Thereby the seriousness of the tortfeasor's conduct or the level of damage do not have any relevance in the case of an assessment made on the basis of LOA § 127(2). 7

In the present case, too, the court of appeal held that the claim cannot be granted because it was not reasonably foreseeable to the person (who seeks the securing of the claim in another court case) that the claimants would suffer damage, ie that the claimants would have put the money in a fixed-term bank deposit. Taking account of these considerations, the court of appeal took the view that the purpose of the rule allegedly violated by the defendant (under clause 5 of LOA § 1045(1), the damage is unlawful where it has been caused by violation of the victim's ownership or a similar right or possession) is not the protection of the claimants against the harm for which they sought damages. 8

Riigikohus (Supreme Court) 6 June 2018
Civil Case No 2-16-14655

Facts

9 In an online forum owned by the defendant, third parties published comments containing incorrect information and improper value judgements. In the framework of the preliminary collection of evidence, the defendant submitted to the court the data (IP address) of one commentator. Based on that information, the claimant filed a claim for non-pecuniary damages against the commentator. However, in court proceedings, it became evident that the given comment had not been written by the person against whom the claimant had brought a claim. The claimant waived the claim against the person.

10 Thereafter the claimant brought a claim for damages against the defendant who had provided the information based on which the claimant had brought a claim against the wrong person. The claimant considered the legal costs of the earlier court proceedings (€ 3,840 in total) as their damage.

11 The defendant requested that the claim be denied, arguing that the defendant did not act unlawfully because the defendant gave incorrect information due to a human error, not intentionally. The district court granted the claim and the court of appeal upheld the district court's judgment.

Decision

12 The Supreme Court set the judgment of the court of appeal aside and remanded the case to the same court of appeal for reconsideration. The Supreme Court took the view that the courts had incorrectly applied clause 8 of LOA § 1045(1), which establishes tortious liability for damage caused by acting against good morals. The Supreme Court was of the opinion that, given the circumstances established by the court, the defendant's act cannot be considered intentional conduct against good morals.

13 The Supreme Court found that it cannot be precluded that, in the circumstances established by the courts, the defendant's act may be unlawful under clause 7 of LOA § 1045(1), which states that damage is unlawful where it has been caused by conduct violating a statutory duty. The defendant may have violated a duty arising from CCP § 279(2), which states that, where a person possesses data of importance in deciding a case, the person must, at the court's request, prepare a document based on the data and submit it to the court. When interpreting CCP § 279(2) in a purposeful manner, the provision establishes a person's duty to submit to the court a document drawn up on the basis of correct data.

14 The protective purpose of CCP § 279(2) includes protecting the victim against damage which typically arises from filing a claim against the wrong person based on incorrect data submitted to the court, including reasonable legal costs related to filing the claim and the other party's legal costs, which the claimant has to bear due to a justified waiver of the claim. In establishing the scope of damage to be compensated, the need to take into account the purpose of the duty or provision as a result of whose violation the

obligation to compensate damage emerged stems from LOA § 127(2) and, in the event of violation of a statutory duty, also from LOA § 1045(3). Thereby, upon determining the protective purpose of the rule, one must take into account, among other things, how foreseeable the harmful consequence was to a reasonable person. Granting damages for a consequence that has an excessively remote link to the act has, among other things, been limited on the basis of these provisions.

Comments

It is debatable whether the given rule (CCP § 279(2)) can be considered a protective rule of tort law.[1] **15**

As noted above, LOA § 127(3), which sets out the requirement of the foreseeability of damage, is not applicable to tortious claims for damages. Nevertheless, it is possible to take into account the foreseeability of damage in establishing the purpose of a protective rule under LOA § 127(2) and LOA § 1045(3). In the present decision, the Supreme Court clearly stated that, in establishing the protective purpose of the rule, one must take into account, among other things, how foreseeable the harmful consequence was to a reasonable person. Given the wording of the Supreme Court judgment, the courts should, when establishing the protective purposes of rules, take into account, among other things, the foreseeability of damage to a reasonable person. Thus, atypical losses can be left uncompensated. Following the Supreme Court judgment, damage having a too remote causal link to the act may be left uncompensated. **16**

In view of the above, one can argue that, in Estonian tort law, the principle of the foreseeability of damage is (at least indirectly) a criterion by means of which it is possible to limit liability. **17**

Harju Maakohus (Harju District Court) 22 May 2017

Civil Case No 2-16-13226

Facts

Buildings and other property owned by the claimant were destroyed in a fire that started from a short circuit in a power line owned by the defendant. The claimant demanded that the defendant compensate the costs of restoring the buildings and the value of the destroyed movables. The short circuit was caused by an apple tree that fell on the power line at the defendant's immovable. The fire was started by sparks that flew **18**

1 The contested rule (CCP § 279(2)) reads as follows: 'Where a person possesses information relevant to the adjudication of a case, the person must, at the demand of the court, prepare a document on the basis of the information and submit it to the court. A person may refuse to prepare a document for the same reason as the person may refuse to submit a document.'

onto the claimant's buildings from the power line as a result of the apple tree falling on the power line. The claimant argued that the defendant could have prevented the accident if the latter had cut the branches of the apple tree that were hanging within the protection zone of the power line. The defendant argued against the claim submitting that the defendant was under no duty to fell the apple tree that grew outside the protection zone of the power line. The defendant also submitted that the theory of adequacy precluded the defendant's liability due to the unusual, unique and reasonably unforeseeable course of the events.

Decision

19 Harju District Court granted the claim. The district court established that an apple tree growing on the defendant's immovable had fallen on the power line due to strong wind. The sparks flying off the power line lit the grass and from there the fire spread to the claimant's building, which caught fire. From there, the fire spread to other buildings of the claimant which were all destroyed as a result of the fire. The district court held that there was a causal link between the failure to cut the branches of the apple tree that grew in the protection zone of the power line running through the defendant's immovable, the lighting of the fire and the destruction of the claimant's property (ie the damage suffered by the claimant). Had the defendant cut the branches located in the protection zone, the claimant would not have suffered the damage. The reasons for the fire are not attributable to the acts of the claimant or third parties. Failure to cut the apple tree branches that had grown above the protection zone of the power line considerably increased the objective possibility of a fire because it is always foreseeable that such an omission could, as a rule, lead to a consequence that did in fact materialise.

Comments

20 In arguing against the claim, the defendant raised the issue of an adequate causal link, submitting that the defendant's liability was precluded because it was an unusual incident. First, the district court established natural causation between the defendant's omission (failure to cut the branches of the apple tree) and the claimant's damage and thereafter established legal causation, noting that the defendant's failure to act increased the likelihood of a fire and was foreseeable as a cause of the claimant's damage. The district court did not explicitly mention any theory that it applied to arrive at such a conclusion but it is clear that the district court first established natural causation and thereafter legal causation. As mentioned in the Introduction, the adequacy theory has not gained any significant application in case law. However, in assessing the protective purpose of a rule, the adequacy of the consequence from the point of view of the breached obligation must be considered.

20. Latvia

Rīgas apgabaltiesa (Riga Regional Court) 29 October 2018, No C33630116
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/389590.pdf>

Facts

A1 performed his duties as a member of the board in V (a company), which is subject to rules and regulations of State and municipality owned companies. As the chairman of the board of the company, A2 ordered the payment of a bonus to A1 in the amount of € 1,707. The State Audit Office of Latvia, performing an audit of V, found that the premium paid to A1 was unlawful, because, at the time of paying the bonus, the V had a personal income tax and natural resources tax debts, thus violating the law. V brought a claim against both A1 and A2 claiming the compensation of damage in the amount of € 2,118 consisting of the net bonus and applicable taxes. Both defendants argue that the claim is not founded. A2 in particular submitted that the employee of the claimant informed A2 that the company had no tax debts when the decision on the bonus in question was made. In addition, A1 herself was responsible for the execution of the decision and it was A1, a member of the board, who had to verify the existence of the tax debt before the order was executed. 1

Decision

The first instance court awarded compensation for damage in the claimed amount from A1, but the claim against A2 was rejected completely as the court applied the provisions of sec 1779^1 CLL providing that damage to the extent reasonably foreseeable at the time of the transaction may only be compensated, except in cases of wilful misconduct or gross negligence. Both A1 and V appealed the decision. 2

The court of appeals awarded damages in the claimed amount from both A1 and A2. The court argued that the liability limitations do not apply to A1 or A2. The limitation of recoverable damage to the extent that the victim himself could not mitigate or avert is not applicable since the management board of the company themselves are in charge of such duties acting on behalf of V. Further, the court argued that the limitation of liability based on foreseeability was incorrectly applied as the claim is based on breach of law (tort). Thus, both defendants are jointly and severally liable for the damage to the claimant caused by the payment of the bonus to A1. 3

Comments

One of the liability limits applied in both contractual and non-contractual liability is based upon the obligation of the victim to mitigate and prevent losses. This duty is specified in sec 1776 CLL, by providing a right to the liable party to request a reduction of compensable losses to the extent that the victim was able to prevent by exercising due care, except for cases of wilful harm, and a right to the victim to claim damages only in- 4

sofar as they could not have been mitigated. Therefore, the omission and passiveness of the victim may also be regarded as a cause of damage and, thereby, reduce the liability of the tortfeasor, insofar as mitigation of losses was possible under the circumstances of each particular case. It is questionable if that rule is applicable to board members as they are the individuals generally representing and acting on behalf of a limited liability company and a company acts through its management.

5 The approach to limiting the liability of A1 by the first instance court based on foreseeability considerations is in vast contrast with the approach taken by the court of appeals. The latter view has also been expressed in other cases even more explicitly,[1] following the path of the legislator and arguing that the liability limitation under sec 1779[1] of the CLL only applies to contractual relations and not to liability in tort. The liability limitation in question was introduced into the CLL in July 2009, providing that a party shall indemnify the loss to the extent that the loss could reasonably have been foreseen at the time of the conclusion of an agreement as the expected consequences of the non-performance, unless the non-performance was due to malicious intent or gross negligence. This approach has not been frequently thoroughly considered or applied by the courts.

6 It would be possible to argue that the limitation of liability under sec 1779[1] of the CLL could analogously be applied to non-contractual liability. Although it would be useful to limit the liability for unforeseeable consequences expressly in the law, the intention of the legislator does not indicate that it would not be possible to apply the liability limitation in question to non-contractual liability without such amendments of the law, namely, by analogy. Thus, a person who has caused damage would be liable for it to the extent that, at the time the damage was caused, it could have been foreseen by a reasonable person as an expected consequence of the unlawful act, except in cases of a tortfeasor's wilful misconduct or gross negligence. Thereby it would be possible to adjust the results of the but-for test to a legally relevant cause – one that the damage can be attributed to. This would also be in line with art 3:201. (a) of the Principles of European Tort Law defining the scope of liability and the attributability of damage.

7 In circumstances such as in the present case, it would, however, not be likely that the aforementioned liability limitation would apply. Section 169 (1)-(3) of the Commercial Law provides that a member of a management and supervisory board must perform its duties as a prudent and diligent manager (*bonus pater familias*) and they shall be jointly and severally liable for the damage they have caused to the company. According to the case law, a board member would be exempted from liability only if he or she proves that he or she acted as a prudent and diligent manager in the particular circumstances, ie, the board member has not performed his or her duties as a board member, even slightly negligently.[2]

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1 Judgment of Latgales apgabaltiesas (Latgale Regional Court) in case No C31307715, 30 January 2018, which has come into force as the Supreme Court refused to initiate cassation proceedings.

2 Judgment of the Supreme Court of Latvia in case No SKC 25/2012 (25 January 2012); judgment of the Supreme Court of Latvia in case No SKC-291/2018 (23 November 2018); decision of the Supreme Court of Latvia in case No SKA-172/2019 (17 April 2019).

The fact that employees and other officers act imprudently and negligently does not generally serve as an exemption from liability in board member liability cases under Latvian law.

21. Lithuania

Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) 13 February 2013, Civil Case No 2A-18/2013

<http://liteko.teismai.lt/>

Facts

The twelve-year-old daughter of the plaintiff was shot dead by the defendant, a paranoid schizophrenic (A1), in 2004. The girl was mortally wounded when she entered the apartment of her stepfather, who was about to sell a gun to A1. A criminal investigation established that A1 was mentally incompetent at the time of his action. 1

The girl's mother filed a claim for compensation of pecuniary and non-pecuniary damage from the Republic of Lithuania, represented by the Ministry of Health (A2) who is responsible for the State health care system, and the Vilnius City Municipality (A3), which is the organiser of mental public care services within its territory and was the owner of the public clinic which provided health care services to A1. 2

The plaintiff pleaded that improper health care services were rendered to A1 and the mental care institutions failed to control the treatment of A1. The last record at the public clinic of A1's mental health treatment was three years before the murder. A1 had expressed his intention to the public clinic to switch to another institution but never showed up anywhere. The plaintiff pleaded that the worsening of A1's mental condition was caused by A1 being diagnosed with cancer approximately one month prior to the tragic event. The plaintiff argued that A1 should have been treated by a psychiatrist after he was given this diagnosis. 3

The clinic which treated A1 three years before the tragic event argued that, under the Law on Mental Health Care, a mentally ill patient has the right to choose his or her doctor, health care institution, and scope of medical services and at any time may terminate treatment, except in the case of involuntary hospitalisation. However, a person may be involuntary hospitalised only under certain preconditions, which were absent in this case. Since 1997, the patient had been treated conservatively in the clinic where he had been prescribed medical treatment. As his mental health improved, the diagnosis was changed to a milder form of mental disorder in 2000. A1 lived on his own, was unemployed, and had no close relations. Therefore, no one informed the health care provider or public institutions about the alleged worsening of A1's condition. Moreover, it was established that, before the murder, not one of the few persons who had contact with the mentally ill A1, including the doctors who were treating his cancer, noticed a worsening of his mental condition. 4

5 The court of first instance awarded LTL 4,000 (€ 1,158) in pecuniary and LTL 150,000 (€ 43,443) in non-pecuniary damages from A1 and dismissed the claims against the State and the municipality. In 2009, the CoA essentially agreed with the reasoning of the district court; however, it reduced the amount of non-pecuniary damages to LTL 10,000 (€ 2,896).

6 In 2010, the LSC returned the case for retrial in the appellate instance, ordering the court to assess whether the legal regulation on treatment and observation of a psychiatric patient's condition was sufficient to notice in time the possible worsening of mental health which could pose a danger to the public.[1]

Decision

7 The CoA in essence agreed with the decision of the district court.

8 The CoA noted that the legislative framework regulating procedures and control of mental health care is clear and harmonised with legislation of the European Union; neither medical and legal doctrine nor the public opinion expressed reasonable proposals to change the regulation. Under the Law on Mental Health Care, a mentally disordered person may be detained in hospital against his wishes, if: 1) his/her illness is severe, and he/she refuses hospitalisation and 2) there is real danger that, by his/her actions, he/she is likely to commit serious harm to his/her health and life or to the health and life of others. According to the CoA, the regulation in force is sufficient and ensures not only public safety, but also rights to those with mental illnesses. The CoA also analysed the legislation, which regulates in which situations and under which procedure the person's legal capacity is limited and a guardian is appointed and concluded that the regulation in force is appropriate. Therefore, the CoA did not establish unlawfulness in the acts (omission) of the Ministry of Health.

9 The CoA agreed that, under the applicable legislation, it is the function of a municipality to organise individual and public health care. However, the municipality is not the public health care service provider and is not under a duty to control the process of treatment of individual patients. In view of this, the CoA dismissed the claim against the Vilnius City Municipality.

10 Although the claimant did not sue the health care institutions which treated A1, as instructed by the LSC, the CoA analysed *ex officio* whether the medical treatment institutions had met their duty of due care, observing that A1's mental condition did not deteriorate to the point of posing a danger to the public. The CoA observed that there were no recorded suspicions regarding a worsening of A1's mental illness. The CoA also took note of the fact that several months before the crime, A1 was treated in two hospitals, where his status was observed by various medical specialists. The doctors had no suspicions of his capacity, which means that A1 was legally capable several months before the

1 The commented decision is a continuation of a case which was decided in 2010 by the LSC. In 2010, the LSC returned the case for retrial in the appellate instance ordering the court to assess whether the legal regulation on treatment and observation of a psychiatric patient's condition was sufficient in order to notice in time the possible worsening of mental health, which could pose a danger to the public.

crime. Consequently, the CoA held that there were no violations committed in the treatment of A1's mental illness.

The CoA held that the failure to involuntary hospitalise A1 was also not proven, because involuntary hospitalisation should be justified by a real danger that, by his/her actions, the mentally ill person is likely to commit serious harm to his/her health and life or to the health and life of others, which had not been established prior to the occurrence of the wrongdoing in this case. 11

Comments

The CoA stated that it is common knowledge that murders, or injuries committed by persons suffering from mental illnesses, occur only rarely. It may only be regretted that this statement lacks any reference.[2] 12

Although it was not expressly mentioned in the decision of the CoA, it may be understood from the reasoning that, according to the CoA, the worsening of A1's condition and the intent to commit a crime could not have been foreseen by the mental health institution even if its psychiatrist had consulted A1 after the cancer diagnosis. Thus, the argumentation of the CoA demonstrates that the liability of the State and the municipality was not established because of a lack of foreseeability. 13

Under Lithuanian tort law, foreseeability is one of the criteria that is considered in the second stage of assessing the causal link, which is understood as an instrument for limiting the scope of liability. Since 2007, the LSC has accepted the criteria-based approach to legal causation suggested by art 3:201 PETL. Without explicit reference to PETL, the LSC stated that, when establishing a causal link, it is necessary to consider the foreseeability of the damage to a prudent and reasonable person at the time of the activity, the nature and the value of the protected interest or right and the protective purpose of the rule that has been violated, the basis of liability and the ordinary risks of life.[3] Such understanding allows for a flexible limitation of liability. For example, if the tortfeasor acted intentionally, foreseeability must be extended further than in the case of negligence. 14

Considering the above, it may be stated that Lithuanian tort law applies lack of foreseeability as a limit to liability within the notion of causation. 15

2 On criticism that the CoA did not do what it had been instructed to do by the LSC, see *Selelionytė-Drukteinienė/Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law 2013 (2014) 387, no 86.

3 *L B and others v Daugiabučio namo savininkų bendrija 'Medvėgalis' and UAB 'Telšių šilumos tinklai'*, LSC 26 November 2007, case No 3K-7-345/2007.

22. Poland

Sąd Najwyższy (Supreme Court) 7 December 2017, II CSK 87/17
<www.sn.pl>

Facts

1 V claimed compensation for moral damage caused by the conduct of A1 and A2. A1 and A2 acted aggressively when drunk during a river rafting social event, and, at one moment, decided to throw their friend X into the river for fun. While V was running to X's rescue, she stepped on someone (A1, A2 or X) and broke her leg in the resulting clash. The second instance court dismissed V's claim on the basis that A1 and A2's conduct was not targeted at V, so the defendants could not have foreseen that V would go to X's rescue. Therefore, there was no adequate causal link between the conduct of A1 and A2 and V's injury. V appealed against this decision to the Supreme Court.

Decision

2 The Supreme Court upheld the complaint in favour of V. Causation is an objective premise of liability, independent of fault and foreseeability. There must be a *conditio sine qua non* between the event causing the damage and the damage. If A1 and A2 had not started carrying X to the river, V would not have rushed to help her and there would not have been a physical encounter between them. There is an objective correlation between the defendants' aggressive conduct and the damage caused to V, which is a normal consequence of that event. The adequate causal link is supported by the direct temporal link between the conduct of A1 and A2 and the harm. The atypicality of the consequences does not exclude the causal link.

Comments

3 Typically, Polish courts discuss causation in the statutory language (art 361 KC), ie they call the prerequisite of causation 'adequate causation', even when they discuss *conditio sine qua non*. Adequate causation is principally not different from causation that exists in reality, but it links liability only with the ordinary consequences of events (or phenomena) that make up its basis. The following train of thought is employed: as long as the likelihood of the consequences increases each time the event occurs when compared to the state when the event did not occur, the consequences are within an adequate causal link with the event.[1] The scope of normal consequences extends to direct as well as indirect results of the event, as long as, in the chain of causation, no external event

1 *M Kaliński* in: A Olejniczak (ed), System Prawa Prywatnego: Prawo Zobowiązań. Część Ogólna, vol 6 (2009) 130.

which is beyond the defendant's control (*nova causa interveniens)* intervened.[2] Neither ex ante nor ex post foreseeability is a factor to be taken into account, as the foreseeability factor as such is irrelevant in establishing causation. The cases under the heading 'foreseeability' are thus not treated as such by Polish courts (see intro no 3).

The case illustrates that the kind of damage which was caused is not of great significance to the application of the theory. It can, however, be observed that the courts tend to be more lenient in establishing causation in personal injury cases. **4**

Reference can also be made to the case reported in 7/22 nos 1–5. **5**

Sąd Najwyższy (Supreme Court) 24 February 1962, II CR 363/61

OSN 1963, item 124

Facts

A mentally ill patient, V, jumped out of a psychiatric hospital window and was severely injured. He claimed that he had become stressed by the news of his planned transfer to another ward of the same hospital that would enable him to undertake temporary work. The window had no bars installed. The psychiatric hospital was one of the most modern public facilities in Poland at the time. However, there was a lack of personnel, because only five nurses took regular care of 110 patients during the day and only one nurse was on duty at night. V had neither shown any suicidal inclinations nor attempted to kill or injure himself. V sued the State (A) for compensation, invoking liability in tort for negligent omission of supervision and the failure to restrain him physically.[3] At first instance, V was awarded partial compensation, as some of the elements of the damage were not grounded. No contribution to the damage was established. Both parties appealed to the Supreme Court. **6**

Decision

The Supreme Court held that, although V had not shown any suicidal inclinations or injurious inclinations, such tendencies in the behaviour of mentally ill patients were foreseeable and A should have implemented general appropriate preventive measures, such as proper monitoring of the patient and the control of all possible exits, including windows. The lack of personnel did not absolve the hospital from taking preventive measures, such as better monitoring of patients and removing the handles from unbarred windows. These findings have significance for the establishment of fault of the State (hospital). **7**

2 *E Bagińska*/*M Tulibacka*, Poland, in: I Boone (ed), International Encyclopaedia for Tort Law (2014) no 258.

3 This is a tort case, because the patient used the public health care sector. Medical liability is only contractual in Polish law when the patient contracts for private medical services.

8 V, on the other hand, was not at fault because, although he may have been aware of his actions, he could not, being mentally sick, comprehend its consequences. In the Court's opinion, non-negligent conduct might still be seen as contributing to the damage. In consequence, the court found A (the State) liable in tort for V's damage and that V contributed to the damage to 50 %.

Comments

9 In cases of omission, the plaintiff is required to establish that the harmful effects would have been excluded or diminished by a positive action (the *conditio sine qua non* test) and that those effects are normal (adequate) consequences of the omission. The standard of proof in Polish law is 'high probability bordering on certainty', which means the judge must be convinced beyond reasonable doubt. Over the past decades, the standard has shifted to 'sufficient degree of probability'.

10 This case shows the interrelationship between fault (where the foreseeability factor matters) and adequate causation (where it does not). The finding of fault indeed affects the establishment of an adequate causal link between the fault and the damage. The wide interpretation of adequacy has been followed in other similar cases, for example in a case where a patient in a psychiatric hospital, after having left the hospital premises without permission, committed suicide on railway tracks,[4] or in a case of a sailor who became severely depressed while at sea and, despite the care and assistance given by the captain of the ship, the crew and the doctors, succeeded in killing himself during a transfer to another ship at one port.[5]

Sąd Najwyższy (Supreme Court) 21 June 1976, IV CR 193/76

OSPiKA 1977, item 106

Facts

11 A mandatory blood test performed on V when she was a 15-year-old student of a commercial school (before an externship in groceries shops) indicated a venereal disease that, in fact, was non-existent. The doctor informed the girl about the test results in a very tactless and insensitive manner, implying that her condition was due to her sexual relations, demanded information on the intimate contacts supposedly leading to the source of infection, and required details about a child V had allegedly given birth to. The doctor refused to believe the girl's explanations. This caused her severe depression and led to her suicide. The minor's parents (Vs) sued the Dermatological Clinic (the State Treasury), which employed the doctor, for compensation.

4 SN 16 December 1967, [1968] OSN 167; 19 November 1969, [1970] OSPiKA 249.

5 SN 26 February 2001, II UKN 225/00, OSNP 2002, item 471.

Decision

The Regional Court ruled for V and the Supreme Court dismissed the defendant's appeal. **12**
The Supreme Court held that, in the case of minor patients, physicians should exercise particular care and sensitivity. The doctor's conduct was negligent also because she exercised psychological influence in order to gain some information about the minor's sexual contacts, which, allegedly, may have been the source of the venereal disease. The wrongful and reprehensible conduct of the doctor caused a psychological breakdown, which induced a suicide.

If there are no reasonable bases to connect the suicide with mental abnormality of **13**
the victim, the physician's conduct, which threatens the personality of the minor, may be deemed to be in a normal causal relation with the minor's attempt at her life. The Court held that that lacking any evidence of mental illness, an adequate causal link existed between the victim's suicide and the conduct of a doctor who wrongfully infringed the dignity and reputation of the victim, thereby threatening her personal integrity.

Comments

A medical diagnosis, even if erroneous, does not usually entail a result such as a pa- **14**
tient's suicide. In the case at hand, however, it was a *conditio sine qua non* of the effect. The fact that this effect was not a direct consequence of the physician's conduct is irrelevant. According to the Supreme Court, damage and an event are causally linked if the event indirectly brought about the conditions assisting or facilitating the arrival of another fact or a chain of facts, of which the last element became a direct cause of the damage.[6]

In 'suicide cases', once the influence of the conduct of the tortfeasor on the victim's **15**
life is established, the courts decide to ignore the victim's own conduct and the role of her alleged 'intent' in causing injury to herself. Thus, there is no such rule that a suicide constitutes a break in a causal chain (*nova causa interveniens*). See also comment to Case no 1 above (citing cases concerning adult victims of unsound mind).

According to the dominant view of the jurisprudence, a special susceptibility of a **16**
victim's psyche or body to an injury is not to be taken into account as a factor exempting the tortfeasor from liability. Hence, a unique feature of a victim does not exclude the possibility of accepting adequate causation between the final loss and the event for which the tortfeasor is responsible.

As the case illustrates, the assessment of 'normality' of results is performed using an **17**
objective approach *ex post*, ie from the point of view of the court at the time of adjudication, and not from the point of view of the defendant or any other observer. The approach allows both usual and unusual consequences of a particular event to be included in the scope of adequate causal connection. Furthermore, such an approach includes

6 SN 21 January 1946 (CI 318/45), PiP 1946, no 7, 114; SN 10 December 1952 (C 584/52), PiP 1953, no 8-9, 366.

cases where victims suffer particularly severe injuries because of certain peculiar sensitivities (which is a Polish equivalent of the eggshell skull rule).

18 'Normal consequences' are generally understood in case law and doctrine as usually occurring in the given circumstances ('ordinary' consequences). However, the Supreme Court sometimes uses the phrase '*typically* occurring consequences'.[7] This phrase is contested by some legal writers and courts[8] that stress that normal consequences do not necessarily have to be 'typical', and they might also be rare. The normal (adequate) causation model permits the establishment of liability even if a specific harm is statistically caused in 49 % or less of cases. The leading authority on causation, A Koch, argues that while determining the sphere of 'normal consequences' of an event, the emphasis must be put on the relative *increase in probability* of occurrence of the consequence and *not* on the *statistical frequency* of its actual occurrence.[9] The courts have generally followed this approach, which has proved particularly useful in medical malpractice cases.

19 The standard for evaluating normal consequences is objective. In borderline cases, judicial intuition can be decisive.[10]

23. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 29 November 2018

25 Cdo 3156/2017

Facts

1 The claimant, as a future seller of a car, entered into a preliminary contract of sale for the car at a certain time with the future purchaser. It was agreed in the contract that it would be terminated in the case of destruction or damage to the car, such as an accident. In a traffic accident, the car, driven by the claimant's employee, collided head-on with an oncoming vehicle, which was driven by the respondent who breached the traffic rules. The car was repaired, but the claimant could no longer sell it under the preliminary contract and he sold it instead to another seller for a lower price. The respondent's liability insurer reimbursed the claimant an amount corresponding to the costs of repairing the vehicle, towing the vehicle and 'depreciation of the vehicle compared to the condition before repair', but the difference between the unrealised sale price stipu-

7 See SN 20.5.2004, IV CK 395/03; SN 8.12.2005, III CK 298/05.

8 See, eg, SN 12.11.1970, I CR 468/70; SN 15.1.1970, I CR 522/69, *M Kaliński*, O normalności powiązań kauzalnych, Przegląd Sądowy 11-12/2007, 25.

9 See *A Koch*, Causal link as a prerequisite for the liability for damage in civil law (1975) 137 f.

10 See SN 18.4.2002, II CKN 1216/00, OSNC 4/2003, item 58.

lated under the preliminary contract and the purchase price actually gained from another purchaser remained unpaid.

The courts of first and second instance dismissed the action on the grounds that if the claimant concluded the preliminary contract with such a clause, the claimant should not have operated the car on the road at all in order to avoid any such accident. In addition, the respondent was not a party to the preliminary contract, so it could not foresee the consequence in the form of lost profits, since it could not assume that the claimant had concluded the mentioned preliminary contract and what could result from such a contract. The claimant appealed the decision of the court of second instance. 2

Decision

The Supreme Court concluded that, even though, in the opinion of the court of second instance, the claimant breached a duty of caution because he used the car as part of his business as a show car, such conduct is quite normal and corresponds with the usual way of dealing with one's property and reasonable requirements for sufficient prudence and foresight of every person in society. Any owner intending to sell a thing cannot be restricted in its normal use in the pre-transfer period unless special circumstances exist that would justify such a course of action. 3

The Supreme Court further stated that, although the liable person cannot foresee all the damage details and nuances caused by their conduct, it is quite common and in accordance with settled case law to compensate any cost of a substitute vehicle or lost profit for the period of repair when it was not possible to use the car for a gainful activity. There is therefore no reason why the injured party should not be entitled to compensation of any proven lost profit derived from the reduction in the purchase price if it was caused by the damaging event. 4

Comments

For comments see below. 5

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 15 August 2017

25 Cdo 3285/2015

Facts

The claimant sought compensation from the Czech Republic for damage caused to him by the fact that, in 1992, the respondent breached restitution laws (Act No 87/1992 Coll, on Out-of-court Rehabilitation), and transferred the ownership of a real property (co-ownership shares) not only to an entitled party but also to a person who had no rights. Based on this, the action was declared partly invalid and as a result, the claimant, who 6

purchased these immovables in 1995, did not acquire ownership to the extent of the share transferred by the State to the unauthorised person. Moreover, the person who sold the property to him became insolvent in the meantime and was unable to reimburse the paid purchase price.

7 The courts of first and second instance concluded that there was no causal link between the damage caused by the lost purchase price paid by the claimant and the respondent's breach of laws. Due to the invalidity of the purchase contract, the claimant was entitled to a refund of part of the purchase price from the seller. However, the fact that that company became insolvent and did not refund part of the purchase price to the claimant cannot be regarded as being a consequence of the respondent's breach.

8 The claimant appealed to the Supreme Court.

Decision

9 The Supreme Court stated that when considering the foreseeability of the occurrence of damage, it is always a matter of assessing the facts that are, to a certain extent, potential and coincidental at the time of the unlawful act or damaging event.

10 The immediate cause, without which there would be no loss of receivables from the non-refunded purchase price, was the insolvency and liquidation of the contracting partner of the claimant. The restitution of the ownership rights to an unauthorised person, followed by a series of other transfers, is so far from the damage in substance and time that the damage cannot be considered an adequate consequence of this action. From the point of view of the criterion of foreseeability, it can therefore be concluded that the fact that future buyers of an improperly restituted property will not recover the funds paid under an invalid legal title was unforeseeable for the State at the time of the breach of laws.

Comments

11 The theory of adequacy is based on the fact that the purpose of liability based on fault for damage is to order compensation for damage where the wrongdoer caused the damage, although it could have acted differently with no negative consequences. The point of view of the person acting shall be considered ex ante.[1] It therefore presupposes that it was possible for the wrongdoer to foresee that the conduct in question could result in the damage in question. The basic criterion on which the theory of adequacy is based is therefore the predictability of the harmful consequence. This is very similar to another presumption of subjective liability for damage, namely the criterion of fault, more precisely negligence. They differ only in the entity according to which the predictability of the consequence is measured. In the case of fault, it is the acting entity itself (typified), while, in determining

1 *L Tichý/J Hrádek*, Deliktní právo [Law of Delicts] (2016) no 253.

the adequacy of the causal link, the criterion is a hypothetical experienced (so-called optimal) observer, ie an imaginary person who has all the current experience. This optimal observer thus personifies current knowledge and experience (I US 312/05).

Therefore, when considering foreseeability, we investigate the judgement of an optimal observer. What is realistically probable is foreseeable. Thus, the goal is to assess probability and its extent.[2] As to the term optimal observer, this term was used for the first time by the Constitutional Court in decision I US 312/05, however, we believe that the same qualification is used by the term 'reasonable' or 'average', which were used by the case law of the Supreme Court.[3] **12**

Beside the question for whom the consequence should be foreseeable, we have to also investigate what scope of probability shall be relevant for foreseeability. In general, indirect proportions can be taken, so the more serious the risk of harm, the lower the probability that must be required.[4] **13**

At the same time, however, it is essential to distinguish between the aspect of predictability within causality from the aspect of predictability within fault. As part of the assessment of fault, the wrongdoer may prove that he did not cause the damage. However, the wrongdoer's specific characteristics, abilities and knowledge at the time of the action are crucial for the assessment of fault. The foreseeability examined in the context of fault is thus subjective in nature and it is examined whether, in the light of its circumstances, the wrongdoer had or could have foreseen the occurrence of damage. An important impact on foreseeability may also be the fact that similar consequences occurred already in the past or that the acting person has specific skills or knowledge.[5] On the contrary, within the causal context, we examine, based on the generalisation of the course of business, whether the average observer could have predicted the harmful consequence. Such an assessment cannot be understood subjectively, but objectively, since it determines the imputability of the conduct to the consequences in the context of the examination of general causation.[6] **14**

This conclusion of the legal theory fully corresponds with the facts of both cases decided by the Supreme Court. **15**

As regards the first case, every reasonably behaving person, ie optimal average observer, knows that vehicles intended for resale, ie often vehicles operated by businesses in the course of their business activities, normally move on the roads. This person must also anticipate that a vehicle damaged in an accident will be sold at a lower price and the **16**

2 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, S. IX [Civil Code sec 2894–3081, Large commentary, vol IX] (2018) 219.

3 *P Bezouška* in: M Hulmák et al, Občanský zákoník, Komentář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2014) 1555.

4 Ibid 1555.

5 *L Tichý*/*J Hrádek*, Deliktní právo [Law of Delicts] (2016) no 285.

6 *M Štefek*, Předvídatelnost škody v novém občanském zákoníku [Foreseeability of damage in the new Civil Code], Jurisprudence 5 (2014) 31.

dealer will make a lower profit. For such damage to be foreseeable for the wrongdoer, they do not need to be aware of the existence of a specific contractual relationship between the injured party and their contractual partner.

17 This conclusion precisely summarises the conclusion on foreseeability within the concept of 'ordinary use of a thing' and the core approach of the theory of adequacy. If there is an item which is used in normal daily life, everybody has to anticipate that damage to such item or even its destruction will result in damage suffered by the owner. If defined in the negative, such damage would not have occurred if there had not been a road traffic accident. Moreover, if the item is used for business purposes, the usual consequence of such damage may result in a loss in the business activity of the injured party. A reasonably behaving person must take this into account and also take preventive measures, including insurance, in order to protect themselves against negative results of damaging the item.

18 Foreseeability is also relevant with respect to the unlawful restitution proceedings carried out by the State. We must agree that, from the point of view of the criterion of foreseeability, the fact that the restituent will sell its property and potential other acquirers of an improperly restituted property will not get back their funds paid under an invalid legal title is unforeseeable. The most important fact for unforeseeability is the series of transfers within a short period of time as well as the bankruptcy of purchasers and sellers attached to the transfer chain.

19 However, this conclusion relates only to remote consequences. The closer the time gap between the unlawful action and the damage is, the higher the standard for foreseeability must be. A similar conclusion must also be drawn as regards the seriousness of the potential risk or protected value, ie the scope of probability relevant for the foreseeability of damage is higher if the potential risk or protected values are greater. Applying this approach to the present case, another expectation of foreseeability will be required if a property in a city centre rather than in the suburbs is transferred.

24. Slovakia

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) 31 July 2012
Case no 6Cdo/89/2011

Facts

1 In 2007, V claimed the sum of € 22,704 as compensation for the impairment of her social well-being as a result of the psychological damage to her health she sustained in a road traffic accident back in 1992. In her application, she stated that the liability of A1 (driver) and A2 (operator) was already established by the judgment of 1994, which awarded her compensation for the permanent consequences of the accident (total immobility). Almost fifteen years after the accident, she was diagnosed as suffering from a psychological impairment – depressive disorder of moderate severity and post-traumatic stress disorder.

The injured party justified the award and, at the same time, the increase in the compensation for the impediment to her social mobility on the grounds of these other permanent consequences of the accident and the negative change in her quality of life, emphasising that, at the time when the accident took place, she 'had her whole life ahead of her'.

The district court dismissed the action on the ground that the claims had already been decided by the court in 1994, and that the compensation awarded at that time provided for the consequences and limitations in all areas of her social life, while the present manifestations of her mental illness and the present limitations could not be regarded as the direct consequences of the accident but as the consequences of the injuries sustained as a result of the accident. 2

The regional court, as court of appeal, modified the judgment by ordering the defendants to pay part of the amount claimed. In its judgment, the court of first instance stated that, in connection with the original accident, the victim had developed a further illness (dysthymic disorder, a depressive disorder of a milder degree), which had caused further difficulties in her social life. The victim feels inferior, experiences anxiety, is worried about her son's upbringing, avoids participating in children's activities, avoids contact with her surroundings, suffers from sleep disturbances, nervous outbursts, irritability, is unable to live a full life even with medication and the awareness of the consequences of the accident has a negative impact on her psyche. 3

The intervener (the insurer Allianz) appealed against the judgment on the ground that the causal link between the applicant's psychological problems and the injuries sustained in the 1992 accident had not been clearly established in the proceedings. It stated that the applicant's diagnosed dysthymic disorder was not directly related to the accident but resulted from the consequences of the damage to her health, that is to say, it was a 'consequence of a consequence.' 4

Decision

The Supreme Court concluded that the appeal was not well founded and confirmed the regional court's decision. 5

Causation is established when the injury is an adequate consequence of the wrongful act according to the general nature, ordinary course of affairs and experience. 6

In the Supreme Court's view, the very nature of V's other illness and its specific manifestations were sufficient to conclude that there was an adequate causal link between the applicant's recent mental illness and the physical injury sustained many years ago in the accident. A causal link cannot be ruled out by the fact that the diagnosable psychiatric consequences of V's injuries did not begin to affect her until later, when she became aware of the irreversibility of the consequences of the physical damage to her health. On the contrary, no evidence was produced in the proceedings which would have demonstrated that the mental illness, with its specific manifestations, would have occurred even without the physical injury sustained. 7

Comments

8 The concept of adequate causal connection adopted by the Supreme Court is taken from the judgment of the Constitutional Court of the Czech Republic, file no Cdo I. SC 312/05, specifically from the part where it is stated that 'in order for liability for damage to occur, it is not necessary that the occurrence of certain damage is specifically foreseeable for the actor (offender), instead, it is sufficient that, for an optimal observer, such damage occurring is not highly unlikely.' At other times, an adequate causal link is perceived as follows: 'A causal link is given if, according to the general nature of the normal course of action and experience, the damage is an adequate consequence of the unlawful act. It must simultaneously be proved that the damage would not have occurred without the cause.' An example of this argument would be the resolution of the Constitutional Court of the Slovak Republic (file no II. SC 261/2014-08). In addition, the Constitutional Court noted that 'it must always be a direct cause'[1] in the sense that the relationship between cause and effect cannot only be indirect. As a result, when determining the causal link, it is necessary to examine whether, in consideration of all the facts available, there is a factual state that can be associated with liability for damage by law (SC judgment 3Cdo/32/2007). This notion of (adequate) causality is repeatedly found in several judgments of the Supreme Court of the Slovak Republic.[2]

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) Resolution of 28 December 2020

Case no 2Obdo/10/2018

Facts

9 In the court of first instance, the victims claimed damages from A (Mol Hungarian Oil and Gas Public Limited Company), which they incurred as minority shareholders of the issuer, Slovnaft. On 28 March 2003, A's share exceeded 66 % of the shares of the issuer Slovnaft and was entitled, pursuant to sec 118(1) of Act No 566/2001 Coll as amended (hereinafter also referred to as the 'Securities Act'), to make a mandatory takeover bid for all listed shares of the issuer Slovnaft. According to the claim, A submitted a mandatory tender offer to the Financial Market Authority on 31 March 2003, but the Authority rejected the tender offer due to its contradiction with the law. A submitted a new offer several months later (28 October 2003). According to the action, the delay in the offer for

1 Constitutional Court: 'It must always be a direct cause as regulated by legal practice', while not referring to any such judgment.

2 Resolution of the Supreme Court of the Slovak Republic in proceedings labelled under Case no 6Cdo/89/2001, 6MCdo/11/2010, 6MCdo/7/2013.

sale made it impossible for the victims to sell the shares of the issuer Slovnaft and further increase the value of the financial means gained.

The district court held that A breached its duty. A should have submitted a bid on time and with a price determined in accordance with the law. A failed to do so because, despite knowing the minimum price of the mandatory tender offer per share, it proposed that the Authority approve the mandatory tender offer at a lower price per share. 10

According to the court, if the injured party seeks damages in a lawsuit, it has the burden of proof and the burden of establishing the prerequisites for liability for damages. If the offender defends themselves by claiming that they are not obliged to compensate the damage or a certain part thereof by reference to the fact that the injured party violated the preventive provisions of secs 382[3] and 384(1)[4] of the Commercial Code, it has the burden of proof to show that the injured party, taking into account the circumstances of the case, failed to take the measures necessary to avert or mitigate the damage. 11

The regional court reversed the district court's decision, holding that the court had not acted properly in determining the amount of lost profits. However, the regional court agreed with the legal opinion that A had breached a legal duty. The court also agreed with the assessment of the foreseeability of lost profits (§ 379 CC). The regional court also agreed with the argument that A could have foreseen – with the exercise of ordinary care – that one V had concluded option contracts and that he had suffered damage as a result of the impossibility of exercising them. 12

The appellate court also agreed that the injured party had not breached their duty of prevention under §§ 382 and 384 of the Commercial Code. According to the court, A failed to prove that the injured shareholders had an actual opportunity to realise the transactions that would have mitigated the damage. 13

On remand, the district court, by interlocutory judgment, held that the basis of V's claim against A was meritorious and that the amount of the claim would be decided in a final judgment. The regional court, sitting as an appellate court, upheld the correctness of the interlocutory judgment. 14

A appealed against the decision of the district court. 15

3 § 382 reads: The injured party shall not be entitled to compensation for that part of the damage which has been caused by his failure to comply with an obligation laid down by legislation enacted for the purpose of preventing the occurrence of damage or limiting the extent of such damage.

4 § 384(1) reads: The person threatened with damage shall, having regard to the circumstances of the case, take the measures necessary to avert or mitigate the damage. The person liable shall not be obliged to compensate for damage caused by the injured party's failure to fulfil this obligation.

Decision

16 The Supreme Court of the Slovak Republic, as an appellate court, overturned the decision of both the court of appeal and the court of first instance.

17 Claims of lost profits cannot be based on hypothetical possibilities of what business would have been carried out, or what business would have been theoretically possible. It must be demonstrated that the transactions in question would actually have taken place if it were not for the harmful event, ie the offender's breach of duty. Otherwise, one would be speaking of a fictitious basis for compensation for loss of profit.

Comments

18 The commented decision is based on sec 379 of the Commercial Code, which excludes unforeseeable damage from the obligation to compensate damage. More specifically, compensation is not provided for damage exceeding the amount which the debtor envisaged, or could have envisaged, as a possible result of the breach of its obligation.

19 The Supreme Court agreed with the other courts' conclusions, which defined the concept of abstract lost profits as meaning that 'instead of actual lost profits, a person injured by an offender's breach of duty under the Securities Act may seek compensation for profits that would have been earned in the ordinary course of fair dealing (or in a fair manner), under conditions analogous to those under which the injured party was injured following the offender's breach of duty under the Securities Act and, therefore did not consider the loss of profit as an unforeseeable consequence.[5]

Okresní soud Nitra (Regional Court of Nitra) 15 November 2017

Case no 5Co/723/2016

Facts

20 In a claim for damages in relation to an injury caused to her dog, V alleged that A breached his duty of care as a driver of a motor vehicle and caused harm as a result. The court of first instance dismissed the action and the county court upheld the judgment of the court of first instance.

Decision

21 The court started from observing that the obligation to prevent the occurrence of damage laid down in § 415 CC does not impose an obligation to foresee every possible future occurrence of damage. It is a binding legal obligation for everyone to observe not only

5 Judgment of the District Court Bratislava I of 26 March 2009, file no 27Cb/106/2007-815, resolution of the Regional Court in Bratislava of 16 March 2010, file no 2Cob/225/2009.

the obligations imposed by law and obligations assumed contractually, but also – even without a specific rule of conduct – to act with sufficient prudence to ensure that the act or omission does not cause harm to others or to oneself.

Applying this principle to the facts of the case, and on the basis that the harm was not reasonably foreseeable, the court therefore upheld the decision of the court of first instance. **22**

Comments

Under the general prevention expressed in sec 415 of the Civil Code, everyone is obliged to act in such a way as to prevent damage to health, property, nature and the environment. Judicial practice uses this provision to establish the prerequisites for liability for damages in cases where it cannot be ascertained with certainty what specific duty the offender has breached.[6] **23**

Case law interprets the rule as meaning that everyone is obliged to act with such care (attention, consideration) according to the conditions of a particular situation as not to cause damage to health, property, the rights of another, nature or the environment, which means that he or she is obliged to exercise a degree of care, attention and consideration in his or her actions with respect to particular conditions, that is (objectively assessed), always capable of preventing the occurrence of the damage in question.[7] **24**

In order to assess the liability of the actor, it is important to assess the conduct of the actor prior to the occurrence of the damage, the intensity of the conduct and the foreseeability of the damage in the particular case. For example, in a sporting activity, an experienced player must or should know that certain conduct in a particular or standard situation generally results or is likely to result in negative consequences for other teammates: in such a case, it cannot be argued that the harmful consequences of the conduct were not foreseeable in that situation. **25**

The evidence in this case established that the collision occurred as the claimant was walking two dogs near the roadway. One of the dogs was on a leash, the other (not on a leash) ran out of the grass onto the road where it was hit by the defendant's vehicle. According to V, A should have exercised a higher degree of caution, knowing that there were no pavements in the town. **26**

Both courts took the legal view that the defendant had not breached any legal obligation. A acted prudently when he manoeuvred around V and the leashed dog. A did not breach a duty of caution as he was unaware that V had another smaller dog with her which was in the grass close to the road; the dog was not visible and the defendant could not have foreseen how the dog would react to him driving around V, or that the dog **27**

6 See the judgment of the Supreme Court of the Czech Republic of 16 May 2002, Case no 25 Cdo 1427/2001.
7 See R 16/1980, R 5/1981, R 12/1986, R 9/1992.

would run out of the grass directly onto the road. A therefore could not have influenced his conduct as the driver of the motor vehicle so as to prevent the damage in question.

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 6 June 1995, No Rev 813/1994-2

<https://www.iusinfo.hr/sudska-praksa/VSRH1994RevB813A2>

Facts

1 V was sitting on a passenger seat in a truck, which ran over and killed a pedestrian. A few minutes after the accident, V died from a heart attack. V1, V2 and V3, V's spouse and children, filed a claim against A, the insurance company which insured the vehicle which was involved in the accident, and requested to be compensated for non-material damage caused by V's death. V1, V2 and V3 claimed that V died from a shock caused by the traffic accident he witnessed. In the course of the proceedings, the lower courts established that V suffered from atherosclerosis and that the accident caused him a shock, which led to a heart attack and consequently, his death. The lower courts also established that V sustained no physical injuries in the accident.

2 The first instance court and the appellate court both sustained V1's, V2's and V3's claim, ordering A to compensate them for the non-material damage they sustained due to the death of their close relative.

Decision

3 The Supreme Court reversed the lower courts' decisions and dismissed V1's, V2's and V3's claim. The Supreme Court reasoned that a causal link between the wrongful act and damage is one of the basic conditions necessary for tort liability to arise. The Supreme Court further reasoned that not any natural causation will suffice, but so-called 'legally relevant' causation must be established in order for tortious liability to arise. In this respect, the Supreme Court held that only that event which typically results in certain damage can be considered causally linked to this damage. Hence, the requirement to establish legally relevant causation will, therefore, exclude liability for any damage which is a result of some atypical and unexpected circumstances. Applying this rationale to the case at hand, the Supreme Court established that the death of a co-driver from shock caused by a traffic accident he witnessed is not a typical consequence of a traffic accident and, therefore, the person liable for the traffic accident cannot be held liable for damage sustained due to this atypical and unexpected circumstance.

Comments
See below 2/25 nos 7–12. 4

Presuda Županijskog suda u Splitu (Judgment of the County Court in Split) 4 October 2012, No Gžx-99/12
<https://www.iusinfo.hr/sudska-praksa/SE714B99S12D20121004>

Facts
V's car was damaged when stormy wind knocked over a tree at a public car park. V's car was properly parked at the public car park when the tree fell onto the car. V sues the City of Split (A1) and the local communal services provider (A2) responsible for taking care of public areas, including public car parks. 5

Decision
The Split County Court established that a tree planted at the public area in conditions of stormy weather represents a dangerous object and, therefore, A1's and A2's liability should be assessed based on the rules of strict liability concerning dangerous things.[1] The Split County Court further established that local communities and local communal services providers are bound by law to permanently perform communal activities, which include maintaining public areas, including vegetation planted there. The Split County Court found A1 and A2 liable for the damage caused to V's car based on the position that stormy winds in November in the city of Split (when the accident took place) is a well-known fact and therefore a stormy wind which knocked over a tree can be considered a foreseeable circumstance and not a(n) (unforeseeable) natural disaster. 6

Comments
As is evident from the above-presented cases, courts in Croatia frequently invoke foreseeability in establishing tort liability and deciding on the scope of damages to be awarded, regardless of whether liability is strict or fault-based. However, the above-presented cases also clearly demonstrate that the foreseeability test is frequently invoked in two different situations: in the context of the occurrence of a damage-inflicting act (ie a wrongful act) and in the context of the occurrence of a particular (type of) damage. 7

In determining whether a tortfeasor should be held liable for a particular type of damage, the courts will normally assess whether this particular type of damage is a fore- 8

1 Art 1045, para 3 of the COA reads as follows:
(3) Where damage results from things or activities representing an increased risk of damage to their surroundings, liability shall be imposed regardless of fault.

seeable consequence of a particular wrongful act. As clearly demonstrated in cases Rev 813/119-2 and Rev 3097/2015-2, the causal link is a principal tool employed by the courts in assessing whether a particular type of damage is foreseeable or not. If particular damage stands in a legally relevant causal relationship with a certain wrongful act, then the courts will normally arrive at the conclusion that this damage was a foreseeable consequence of this wrongful act and will consequently hold a tortfeasor liable for it. When determining whether a particular type of damage is a foreseeable consequence of the wrongful act, hence whether a causal link between the wrongful act and a particular damage can be established, the courts will employ the so-called adequacy theory, the principal doctrinal concept for determining causality in Croatian jurisprudence and case law.[2] According to this theory, a causal link between a particular wrongful act and particular damage can only be established if this wrongful act typically, normally results in this particular damage. If, on the other hand, particular damage is not a typical consequence of a particular wrongful act, a causal link will not be established. In such cases, Croatian courts will normally establish that this particular damage was not a foreseeable consequence of a given wrongful act and will dismiss the claim.

9 Based on the foregoing, it is safe to conclude that Croatian courts obviously distinguish between natural and legal foreseeability. Natural foreseeability, ie whether the occurrence of particular damage could have been foreseen in a given case, is not decisive in deciding on liability. Accordingly, as clearly established by the Supreme Court in case Rev 3097/2015-2, even subsequent damage whose occurrence could not have been foreseen at the time of adjudication, (eg subsequent deterioration of the victim's health) will be relevant, ie compensable, if established that it belongs to a type of damage which regularly stems from a given wrongful act. In this respect, it could be concluded that the decision as to whether or not naturally unforeseeable damage will be compensated, depends on whether or not it can pass the causality test. If a particular type of damage (eg subsequent deterioration of the victim's heath) is a typical consequence of a particular wrongful act, this damage will be compensated, even if unforeseen at the time the wrongful act occurs.[3] If, on the other hand, a particular type of damage is not a typical consequence of a particular wrongful act, (eg a heart attack caused by the shock provoked by a traffic accident), this damage will not be compensated for not being causally related to a given wrongful act. In this respect, it is safe to conclude that Croatian courts tend to equate legally relevant foreseeability with causality.

10 Notwithstanding the fact that the concept of (un)foreseeability is commonly associated with establishing the fault of the tortfeasor, as previously mentioned, this concept is also often employed by Croatian courts in the context of establishing unlawfulness of the tortfeasor's actions (misconduct, ie the objective element of unlawfulness). Thus, for

2 See *P Klarić*/*M Vedriš*, Građansko pravo (14th edn 2014) 594ff.

3 What is typical will sometimes be decided based on statistics (if available), sometimes based on the opinion of an expert witness, and sometimes the courts will base their decision on their own discretion, ie own understanding of what is 'typical' in a given case.

example, in the above-described case Gžx-99/12, the Split County Court established that a tortfeasor cannot be freed from liability if the occurrence of a certain damage-causing event was foreseeable. Even though the Split County Court was not particularly articulate in this respect, it seems that the concept of foreseeability was employed here in order to assess whether the tortfeasor's actions were unlawful. In this particular case, the Split County Court established that a tree planted at a car park in conditions of stormy weather represents a dangerous thing and, accordingly, decided to apply the rules of strict liability for dangerous things to this case. The Court further established that the tortfeasors were bound by law to maintain public areas, including vegetation planted there. Hence the Split County Court obviously held the tortfeasors liable for damage sustained by an object under their control. The Split County Court specifically noted that stormy winds in November in the city of Split (where the accident took place) is a well-known fact and therefore it should be foreseeable that a stormy wind could knock over a tree. Moreover, the Split County Court rather clearly implied that the very same event would not be imputed to the tortfeasor had it been caused by an unforeseeable consequence, as, for example, a natural disaster of some unforeseeable origin.

11 In case Gžx-99/12, the Split County Court resorted to the concept of (un)foreseeability in order to draw the line between damage for which a person should be responsible under the rules of strict liability for dangerous things and should not be held liable; if a damage-inflicting event was foreseeable, the tortfeasor should be held liable. If, on the other hand, the damage-inflicting act was unforeseeable, the tortfeasor should be freed from liability. In this respect, the Split County Court obviously took the position that failure to prevent an objectively foreseeable event should be treated as unlawful conduct, whereas failure to prevent an objectively unforeseeable event should not.

12 Regardless of whether they employ the foreseeability test in the course of assessing causation or unlawfulness, Croatian courts tend to understand it as an objective test. Whether the occurrence of a particular wrongful act or particular damage was foreseeable or not shall be assessed based on objective criteria. Hence, the courts will not examine whether the occurrence of a particular wrongful act or a particular damage was foreseeable for a concrete tortfeasor, but whether they were objectively foreseeable. Furthermore, Croatian courts do not elaborate on the degree of required foreseeability. However, bearing in mind that the (un)foreseeability test will only be met if it is established that particular damage or an event was objectively unforeseeable, it could be concluded that the threshold is rather high, and that this threshold will be met only if established with certainty, ie beyond a reasonable doubt that a particular event or damage was unforeseeable, which will often require specific professional expertise, as is the case with medical consequences of particular injuries.

13 Finally, the above-analysed cases also clearly suggest that Croatian courts will not distinguish between specific kinds of damage (material/non-material, personal injury/pure economic losses, etc) when assessing the foreseeability of particular damage. Any kind of damage which is objectively foreseeable will be compensated.

26. Slovenia

Vrhovno sodišče (Supreme Court) 16 September 2004, II Ips 537/2003

<https://www.sodnapraksa.si/> (27 November 2021)

Facts

1 In a car accident on 28 March 1998, there was a collision between the plaintiff V as a moped rider and a motorist A, who had liability insurance cover with the defendant. V suffered numerous injuries in the car accident, which resulted in three operations and twelve months on crutches. He fell while walking with the crutches, breaking a plate that had been inserted in an operation on a broken femur two months earlier in the car accident. V also claimed compensation for the non-pecuniary damage caused to him by the repeated fracture of his femur while using crutches. The courts of first and second instance granted his claim.

Decision

2 The Supreme Court confirmed the previous decisions, arguing that the position of the insurer as applicant, according to which the occurrence of damage due to the use of crutches is unusual, is incorrect. It pointed out that it is not uncommon in case law for a fall because of the use of crutches, leading to a re-fracture of the bone, which had previously undergone surgery.

Comments

3 In the present case, the Court established liability for damages by means of the criterion of the normal nature of the consequences of damage. It considered that a re-fracture of the treated femur while using crutches was not an uncommon and unpredictable event in the treatment of such injuries following traffic accidents. The Court usually resorts to the theory of adequate causality when arriving at its decision. According to the theory of adequate causality, only a circumstance is considered to be a cause that leads to such a consequence in the regular course of events. Only consequences that are not completely outside of what is considered to be a possible consequence of an event in life experience come into play. Based on the assessment of the conduct of the perpetrator, the Court decides whether this conduct is appropriate to cause a certain consequence, or whether a certain consequence is normal, expected and in accordance with the regular course of events. If, in the given circumstances, something extraordinary is the result, then such a consequence is not adequate and therefore not legally decisive (see also Judgment of the Supreme Court II Ips 33572/2012, 17 May 2018 and Judgment of the Supreme Court II Ips 87/97, 14 May 1998).[1]

1 Both judgments can be found at <https://www.sodnapraksa.si/> (27 November 2021).

Vrhovno sodišče (Supreme Court) 25 October 2005, II Ips 457/2005

<https://www.sodnapraksa.si/> (27 November 2021)

Facts

In a car accident caused by a car driver A on 9 November 1998, the plaintiff V suffered a blow to his left hip. After the injury (18 November 1998), V was radiologically diagnosed for the first time with initial degenerative change of the left hip (initial arthrosis), which was clinically unmanifested, undiagnosed and without perceived subjective problems for V. A blow to the left hip in a car accident was the factor that caused 38-year-old V to have a premature clinical manifestation of osteoarthritis of the hip, which would otherwise have manifested with clinical signs only in later years if V had not been injured in the car accident. In assessing compensation for physical pain, the courts of first and second instance, following an expert opinion, took into account that only 75 % of this pain was due to the injury from the car accident (25 % due to the non-manifested disease identifiable at the time of the accident) and that V was only entitled to this proportion of the appropriate compensation for bodily pain. In assessing compensation for mental pain due to reduced life activity after the car accident, the courts took into account that only 50 % of this was due to the car accident and 50 % to V's pre-existing personal health condition and that V was therefore only entitled to 50 % of the compensation sought for this form of non-pecuniary damage. **4**

Decision

The Supreme Court considered revision of V's claim in this part to be justified. It considered that there was no material legal basis to limit the liability for damages due to the possible greater extent of damage caused by the personal condition of the injured party. **5**

Comments

According to established court practice,[2] only a person's conduct can be considered to be a cause of the damage, not a condition of the injured party. If the extent of the injury is unusually great due to the personal condition of the injured party, this has no effect on the assessment of the existence of a causal link between the conduct and the damage event as one of the necessary elements for the occurrence of an obligation to award compensation for non-pecuniary harm, since the predictability (adequacy) of the consequences of behaviour in the establishment of a causal link is judged only in relation to **6**

2 For example, Judgment and Decision of the Supreme Court II Ips 133/2016, 16 November 2017; Judgment of the Supreme Court II Ips 1094/2008, 17 April 2009; Judgment of the Supreme Court II Ips 616/2008, 15 December 2011; Judgment and Decision of the Supreme Court II Ips 178/2017, 16 September 2007; Decision of the Supreme Court II Ips 387/2007, 16 December 2009; Judgment of the Supreme Court II Ips 313/2003, 27 November 2003 – all decisions can be found at <https://www.sodnapraksa.si/> (27 November 2021).

the damage. As regards the damage caused, adequacy is understood by an average experienced observer, whereby it can also be expected that not all people have the same personal characteristics and conditions. However, there is no substantive legal basis to limit the amount of damages to only the amount of compensation that is normal for a certain type of loss event, which would even be contrary to the principle of full compensation.

27. Hungary

Kúria (Curia of Hungary) Pfv III 21.585/2018/14
BH.2021.45

Facts

1 In January 2016, a local bus on its regular route, swerved at night in front of the applicant's home and hit an electricity pillar that fell on the front wall of the applicant's house. In the period when buses continued to take this route (from January 2016 – November 2016), the applicant could not use his bedroom, being afraid that a similar accident may occur. The applicant filed an action against the bus company (defendant no 1) and the insurer of the bus company (defendant no 2), claiming from them jointly compensation of HUF 500,000 on the ground that they infringed his personality rights to health, a personal life and the right of inviolability of one's home. He claimed that defendant no 1 infringed his personality rights while operating a hazardous activity causing him psychical problems due to the threat of similar events occurring and he was in addition forced to sleep in another room, which affected his health and negatively influenced his daily activity. Defendant no 1 rejected the claim, arguing that *the accident was not foreseeable,* thus there is no causal connection between the immaterial harm of the victim and the accident. Defendant no 2 (the insurer) also challenged the claim on the ground that it compensated the applicant for the material damage caused to its property and that his fears cannot serve as a basis for compensation.

Decision

2 The court of first instance ordered defendant no 1 to pay compensation of HUF 100,000 for infringing the personality rights of the victim on the ground that the fears of the victim after the accident has harmed his health, the fears being causally linked to the accident, this being *foreseeable harm*. Both parties challenged this decision and on appeal the court increased the amount of the compensation to HUF 200,000 confirming the finding of the court of first instance that the defendants infringed the victim's personality rights to health, to rest and to a private life. The second instance court took into account when establishing the increased amount of compensation the extreme trauma, the continuous nature of the disadvantages and of the psychical consequences which the victim

suffered for several months. The court also established that defendant no 1 could not successfully exonerate itself from liability under art 6:533(1) of the Civil Code. Defendant no 1 filed a recourse action against this decision invoking the infringement of procedural rules and of art 2:52 of the Civil Code on compensation.

In the recourse action, the *Kúria* established that the lower courts had interpreted and correctly applied the requirement of foreseeability as a condition for the establishment of tort liability provided for in art 6:521 of the Civil Code and confirmed the judgment of the court of second instance. In reaching this conclusion, the *Kúria* argued that *damage is foreseeable when it could be reasonable foreseen in the given circumstance* and rejected the defence raised by defendant no 1 that, in connection with its activity, only trauma related to passengers or persons hit by a bus or those witnessing an accident could be foreseen. The *Kúria* stressed that *because the route of the bus passed homes, it was commonsense to foresee that accidents may affect the bodily and psychical health of those living in those homes*. In the Court's view, defendant no 1 could not have foreseen the phobia which the victim developed as regards possible similar accidents, but could have foreseen that persons could suffer health problems as a consequence of their homes being affected by accidents. 3

The *Kúria* also emphasised that *in case of an infringement of the personality rights to bodily integrity and health (including one's psychical health), the requirement of foreseeability should not be interpreted narrowly.* The *Kúria* found that the second instance court correctly established the amount of compensation by considering the gravity and duration of the disadvantage caused to the victim, its impact on the victim and his environment and other circumstances connected to the accident. Concerning the procedural complaint of defendant no 1, the *Kúria* established that, in a recourse action, it cannot review issues of fact, except when these led the lower court to reach erroneous conclusions, which was not the case here. 4

Comments

Foreseeability was admitted by the *Kúria* in 2008 as a limit to causation in tort law and thus as a limit of liability. This judicial rule was confirmed by the New Hungarian Civil Code in its art 6:521 stipulating that causation may not be established for damage which was not foreseen and could not be foreseen by the tortfeasor when committing the tort. Article 6:519 of the Civil Code does not define the concept of foreseeability. For its interpretation, art 1:4 (1) Civil Code should be considered. 5

The requirement of foreseeability breaks the causal chain in situations when liability would be without limits. This continues to be the subject of judicial assessment, being an issue of fact and an issue of law at the same time.[1] What the tortfeasor actually fore- 6

1 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 274.

saw (factual foreseeability) is a question of fact, while what the tortfeasor could foresee (the expected foreseeability) is a question of law and the subject of judicial assessment.[2]

7 Article 6:521 of the Civil Code does not oblige courts to deal with foreseeability on its own motion. From this it has been concluded in the tort law literature that it is for the victim to prove that the damage was foreseeable, hence the burden of proof concerning the other elements of liability lies on him/her.[3] Concerning expected foreseeability, it has been suggested that this should be *what could be foreseen by a sufficiently careful person at the moment when the tort was committed*.[4]

8 Article 6:521 of the Civil Code does not provide guidance concerning foreseeable damage, namely whether the tortfeasor must foresee the possibility of any damage, or of the concrete damage, occurring. It is for case law to elaborate the necessary criteria on this issue.

9 Article 6:521 of the Civil Code has not established what heads of damage do not fall under the obligation to compensate the victim; foreseeability concerns all types of damage.

10 It is interesting to mention an exception from the requirement of foreseeability. Article 6:529 (1) of the Civil Code provides that the tortfeasor is liable to pay damages also when the consequence of its acts was not foreseeable.

Kúria (Curia of Hungary) Pfv VI 20.880/2019/4

BH.2020.365

Facts

11 The applicants noticed a massive reduction of their bee population in April 2011 and they presumed as a possible cause the use of a pesticide, chlorpyrophos, in the neighbourhood, which in high doses may cause the death of bees. Upon their request, the authority for animal health diagnosis took samples from the neighbouring orchards (from the leaves of apple trees and soil vegetation) as well as from the bees and established that the substance used in the orchards did not reach the concentration which could be deadly for bees. However, the tests carried out on the bees revealed the presence of another much more lethal substance in the dead bees.

12 The applicants sought compensation from the owners of the orchards for their material loss resulting from the destruction of their bee population because of the use of chlorpyrophos. The applicants based their claim on the provisions of the old Civil Code on liability for hazardous activities, governed by art 345 (1).

2 Ibid.

3 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 275.

4 Ibid.

Decision

Based on an expert opinion, the court of first instance rejected the claim for lack of conclusive evidence concerning the causal link between the use of chlorpyrophos and the death of the bees. According to the court, it could not be excluded that chlorpyrophos and other pesticides (such as clotianidin) were also used in other agricultural areas in that period in such high doses that could cause the death of the bees. 13

The applicants challenged the decision and the court of second instance confirmed the findings of the lower court. This court argued that it is possible that the death of the bees was solely caused by the use of chlorpyrophos in the neighbouring orchards or because of the interaction of chlorpyrophos with other substances, or those other substances in isolation. 14

On appeal, the *Kúria* dismissed the claim of the applicants for lack of conclusive evidence establishing the causal link between the use of chlorpyrophos in the neighbouring orchards and the death of the bees and established that *tort liability for damages cannot be built on hypothetical (presumed) causation or alternative causation.* 15

Comments

The leading opinion in the Hungarian legal doctrine rejects compensation based on *hypothetical causation*. Hypothetical causation is defined as the situation when the causation chain leading to the damage starts with the act of the tortfeasor, but the damage ultimately occurs due to another cause, or when the damage occurs due to the act of the tortfeasor, but in the meantime another causation chain starts, which, with certainty, would have caused the same damage.[5] In practice, such situations may cause numerous difficulties, thus this question is largely dealt with in the legal literature. 16

It has been argued that although the preventive function of tort law would argue for compensation of the victim in such situations, this would be against the idea of the reparatory aims of tort law, namely that the victim should be put in the situation they would have been if the damage had not occurred.[6] In support of rejecting compensation, it has been argued that this would lead to the unjust enrichment of the victim.[7] 17

Others suggest that *equity considerations* and *the particular circumstances of the case* need to be considered in such situations.[8] An exclusion of liability would be especially justified by the lack of causation when the claim itself is hypothetical, for example, when it relates to future losses or costs that may be incurred in the future. It has also been argued that hypothetical causation may only be considered as a ground to limit liability when the concurrent causes are independent from each other, they have no common cause, and 18

5 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 43.

6 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 257.

7 Ibid.

8 *M Boronkay*, Hipotetikus okozatosság a kártérítési jogban, Jugtudományi Közlöny 2008/3, 121–124, 128.

when the causes are unrelated human acts.[9] Nevertheless, isolated cases are reported in legal literature when the court established liability based on hypothetical causation.[10]

19 Another critical group of cases relate to *alternative causation*, when the solution is the joint liability of the tortfeasors if it cannot be established who exactly caused the damage. However, there is no consensus in the legal literature on the issue as to whether this rule only applies to the damage caused *at the same time* by several tortfeasors[11] or whether this is not a condition.[12] Nevertheless, the doctrine also summarises the criteria which should be considered when establishing liability in cases of alternative causation: the only unknown element is which of several tortfeasors caused the damage, thus the other elements must be proved by the victim; the victim will be not totally freed from the burden of proof concerning causation: he/she will be obliged to prove that somebody from the group of persons committed the tort; the very possibility of causing the damage will not suffice: the victim will have to prove a certain degree of certainty (there must be temporal and spatial closeness of the acts); any of the potential tortfeasors may prove that they did not cause the damage, thus the presumption of liability based on art 6:524 (4) is a relative and not an absolute presumption.[13]

20 This case concerns the inability of the victim to prove that the defendant was the factual cause of the harm. The case seems to demonstrate that some act (cause A) might be a foreseeable cause of the harm, but if there are other foreseeable causes of the harm (B, C, etc), and if it is not clear which foreseeable cause of the harm actually caused the loss, cause A does not give rise to liability.

29. European Union

European Court of Justice, 4 October 1979, joined cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 P, Dumortier frères, S.A., et al v Council

ECLI:EU:C:1979:223

Facts

1 All joined cases concern the temporary abolition of production refunds for maize gritz (groats and meal) intended for the brewing industry and the damage sustained by claimant maize producers (Vs) in the interim. Such refund had been abolished by EC legislation with effect from 1 August 1975 but was sustained for the production of maize starch. This

9 *L Blutmann*, Jogtudományi Közlöny 2011/6, 149 f.

10 *L Blutmann*, Jogtudományi Közlöny 2011/6, 159.

11 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 329.

12 *M Boronkay*, Felelősség potenciális károkozásért: gondolatok az alternatív okozatosságról, in: Z Csehi/A Koltay/B Landi/A Pogácsás (eds), (L) ex Cathedra et Praxis, Ünnepi Kötele Lábady Tamás 70. születésnapja alkalmából (2014) 54.

13 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 330 f.

was deemed in violation of the principle of equality by an earlier ruling of the ECJ[1]. Subsequent EC legislation reintroduced the refund for gritz, but only from the date of said judgment onwards. Vs essentially seek compensation for their losses sustained in the period between the abolition of the refund and the entry into force of the amended legislation.

Such damage was argued not only to include the unpaid refunds for the quantities of **2** maize used for the production of gritz in the period complained of, but also a further loss resulting from a reduction of subsequent sales due to the fact that Vs' customers were forced to change over to the purchase of starch instead of gritz and have continued to use starch ever since. A third item of damage allegedly suffered resulted from an increase in the price of maize due to the abolition of the refund which, as such, could not be passed on in full to customers via the selling price. Some Vs also sought compensation of the losses sustained due to the closure of gritz factories or their insolvency, which allegedly became necessary because they could not convert them to the production of starch instead of gritz due to the already fierce competition amongst starch producers in their respective area.

The defendant, inter alia, denied that the alleged losses were caused by the tempor- **3** ary abolition of the refund, pointing in particular to increased prices for gritz during that period which the Council argued fully passed on the damage to the customers of the claimants, who in turn did not increase their selling prices accordingly, so it was rather the breweries who were ultimately affected rather than the gritz producers. However, apart from a short initial period immediately after the abolition of the refund, this was unfounded. Furthermore, the Council essentially claimed that the general market conditions at the time were responsible for the financial difficulties of some of the claimants and not the abolition of the refund.

Decision

The first question addressed was whether the unlawfulness of the abolition of the re- **4** fund as already decided in 1977 could render the Community liable under art 215 para 2 ECT.[2] The Court pointed to settled case law that this would require such legislative measure to constitute 'a sufficiently serious breach of a superior rule of law for the protection of the individual'. In areas where the Community had a wide discretion, it would be necessary that it 'manifestly and gravely disregarded the limits on the exercise of its powers' (para 9). This was the case here, according to the Court, pointing inter alia to the particular importance of the principle of equality and the lack of justification for the different treatment of gritz and starch producers. The damage sustained by Vs 'goes beyond the bounds of the economic risks inherent in the activities in the sector concerned' (para 10).

1 ECJ 19.10.1977, joined cases 124/76 and 20/77, *SA Moulins & Huileries de Pont-à-Mousson et al v Office national interprofessionnel des céréales* [1977] ECR 1795.

2 Now art 340 para 2 TFEU.

5 The Court denied compensation for damage caused by an alleged fall in sales, though, pointing to the fact that the selling prices for gritz were not increased despite the lack of refunds, which is why this could not have been the reason for reduced demand.

6 When it comes to the losses allegedly sustained because some Vs were forced to close their factories, the Court argued 'that even if it were assumed that the abolition of the refunds exacerbated the difficulties encountered by those applicants, those difficulties would *not be a sufficiently direct consequence* of the unlawful conduct of the Council to render the Community liable to make good the damage. In the field of non-contractual liability of public authorities for legislative measures, the principles common to the laws of the Member States … cannot be relied on to deduce an obligation to make good every harmful consequence, *even a remote one*, of unlawful legislation.' (para 21, emphasis added).

Comments

7 See the comments to the following case at 2/29 no 16 ff below.

European Court of Justice, 15 June 1999, case C-140/97, Walter Rechberger and others v Austria

ECLI:EU:C:1999:306

Facts

8 The plaintiffs (Vs) had received a letter from a newspaper to which they had subscribed informing them that they would receive free trips for their loyalty (save for airport taxes). Persons accompanying the subscribers would have to pay a certain fee, though, as would single travellers. The trips were organised by Arena-Club-Reisen (in the following: Arena), to which all those taking advantage of the offer would have to pay a deposit of 10 % of the relevant charges in advance. The offer was far more popular than expected, ultimately causing Arena to go bankrupt. By that time, Vs had already prepaid the travel costs to Arena for trips which were subsequently cancelled. Some payments were made before 1 January 1995, some after that day.

9 Austria implemented the 1990 Package Travel Directive (hereinafter PTD)[3] by way of several legislative measures. Art 7 PTD, which requires that holiday organisers must provide 'sufficient evidence of security for the refund of money paid over … in the event of insolvency', was transposed into Austrian law by a regulation, which was to be applied for all packages booked after 1 January 1995 (the day on which Austria was required to implement the PTD) with a departure date of 1 May 1995 or later.

3 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158, 59 (in the meantime replaced by the new Package Travel Directive 2015/2302).

However, some Vs had made bookings already in 1994, while for others the trip was scheduled to depart already in April 1995, so that only the payments of the remaining Vs were covered by the Austrian regulation. Even those did not receive full reimbursement since the bank guarantee provided by Arena as security was insufficient to cover all claims. 10

Vs sued the Republic of Austria for failure to properly transpose art 7 PTD in good time and in full. The first instance court submitted several questions to the ECJ about the scope of the PLD and its proper implementation. 11

Decision

The Court first confirmed that the trips in question indeed fell within the scope of the PTD, even if offered mostly for free by a newspaper, to be performed by a third party. The PTD should have been implemented to all trips starting on or after 1 January 1995, according to the Court, so that the Austrian limit starting as late as 1 May 1995 was incompatible with the Directive, although contracts concluded before 1995 were properly excluded. 12

The key question was whether such improper implementation of the PTD constituted a sufficiently serious breach of Community law; thus, whether Austria 'manifestly and gravely disregarded the limits on the exercise of its powers'. Since the Court found that the date of implementation in the PTD left no margin of discretion to Austria, the introduction of a later starting date was indeed a sufficiently serious breach (para 51). 13

The Court further agreed that the details of calculating the mandatory extent of cover for potential harm triggered by insolvency as foreseen by Austria was inadequate, leading to less protection of consumers than envisaged by the PTD. 14

Also, the Court was asked 'whether, where there is a direct causal link between the conduct of the State which has only partially transposed the directive and the loss or damage suffered by individuals, that causal link might not render that State liable if it shows that there was imprudent conduct on the part of the travel organiser or that exceptional or unforeseeable events occurred' (para 67). After all, Austria had argued that Vs' losses were merely the 'result of a chain of wholly exceptional and unforeseeable events' (para 69). The Court did not agree and argued that art 7 PTD foresaw an obligation of result with its guarantee to package travellers. 'Such a guarantee is specifically aimed at arming consumers against the consequences of the bankruptcy, whatever the causes of it may be.' (para 74). Therefore the Court held that neither fault within the sphere of the travel agency nor 'exceptional and unforeseeable events' could preclude the Member State's liability for failure to properly transpose the PTD. 15

Comments

16 The ruling in *Dumortier*[4] is often cited as the key precedent in the case law of the ECJ supporting the concept of legal causation, denying compensation for harm if the cause was 'too remote'.[5] Since case law otherwise insists on a 'direct cause' in order to trigger liability, it seems at first sight 'that "indirect" can be equated with "too remote"'.[6]

17 However, such limitation of liability does not apply in all settings before the Court, particularly not when the breach of an obligation of result is at stake, such as in *Rechberger*, where the Court confirmed causality for the losses incurred because of the failure to reach the result even if 'exceptional and unforeseeable events' were given, as the sole focus was on the outcome of the wrong (the lack of protection against bankruptcy). The grounds for the insolvency are completely irrelevant in such a case, as the intended protection was not limited to certain causes of bankruptcy, however unforeseeable the insolvency in retrospect may have been. The reasons for the failure to properly implement the protection against bankruptcy were not thematised by the parties and consequently also not by the Court, eg whether it would still exceptionally deny liability if events occurred that were truly beyond reasonable expectations and only for that reason prevented the defendant State from achieving the intended result, ie designing and implementing an effective protective shield against bankruptcy as owed under the Directive.

30. The Principles of European Tort Law and the Draft Common Frame of Reference[1]

Facts

1 *First scenario*. In the middle of the night, A loses control of his car and hits several vehicles parked along the street. He illegally leaves the scene of the accident. Awakened by the sound of the collision and fearing that his car may have been involved in the accident, V asks his wife to go and check on the condition of his car. When his wife announces the damage to his car, V suffers a heart attack and dies a few hours later in hospital.[2]

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4 Above no 1ff.

5 Cf, eg, *I Durant*, Causation, in: H Koziol/R Schulze (eds), Tort Law of the European Communities (2008) 47 (no 3/42).

6 *I Durant*, Causation, in: H Koziol/R Schulze (eds), Tort Law of the European Communities (2008) no 3/42 (at 64).

1 See already *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 3d/30/1ff (477–479) with comments by *T Kadner Graziano*.

2 See the Belgian case: Cour de cassation/Hof van Cassatie (Supreme Court), 11 October 1989 RGAR 1992, no 12007, with comments by *E De Saint Moulin* and *B Dubuisson*, above 2/7 nos 11–18; see also the Greek case: Athens Court of Appeal 10796, 1988 Ell Dni 34, 603, with comments by *E Dacoronia*, above 2/5 nos 4–8: V died after a car accident caused by A. Seven months after V's death, his wife hanged herself be-

Second scenario. A lorry runs over a pedestrian and kills him. V is sitting in the pas- 2
senger seat of the lorry when the accident happens. A few minutes after the accident, V dies from a heart attack. He had suffered from atherosclerosis and the accident caused him a shock, which due to his medical conditions led to a heart attack and consequently to his death.[3]

Solutions[4]

a) Solution According to PETL. In the first example, had the accident not occurred, V 3
would not have died. The accident was thus a *conditio sine qua non* for V's death in the sense of art 3:101 PETL. However, the attributing of the damage to the person that caused it depends on further criteria, set out in art 3:201 PETL.

According to art 3:201 (scope of liability) PETL, 'whether and to what extent damage 4
may be attributed to a person depends on factors such as (a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity.'[5] Further elements to be taken into account when establishing, and limiting, liability include:

(b) the nature and the value of the protected interest (art 2:102);
(c) the basis of liability (art 1:101);
(d) the extent of the ordinary risks of life; and
(e) the protective purpose of the rule that has been violated.

These elements 'are … borrowed or inspired by national case law.'[6] They may not neces- 5
sarily point in the same but 'may well point in different directions'.[7] Under the PETL, '[a] person cannot be held liable for a consequence of her behaviour if, notwithstanding all due caution, she was not able to foresee it'.[8] The damaging consequences must have

cause of severe depression caused by her husband's death. Her children, mother and siblings claimed damages from A.

3 See the Croatian case: Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) No Rev 813/1994-2 of 6 June 1995, with comments by *Marko Baretić*, above 2/25 nos 1–3 and 7–12. V's spouse and children sought compensation from the insurer of the lorry including compensation for non-material damage caused by V's death.

4 In both scenarios, the damages claims were brought by secondary victims, see fn 2 and 3. The following analysis focuses on liability towards V (the person who died, ie the primary victim). The reason is that, if the tortfeasor were not liable towards the primary victim, he would not be liable towards a secondary victim either.

5 Emphasis added.

6 PETL – Text and Commentary (2005) art 3:201, no 6 (*J Spier*).

7 PETL – Text and Commentary (2005) art 3:201, no 9 (*J Spier*).

8 PETL – Text and Commentary (2005) art 4:201, no 11 (*P Widmer*).

been foreseeable 'to a reasonable person at the time of the activity'.[9] 'The yardstick is an objective one (unforeseeable instead of unforeseen)'[10] and foreseeability has to be considered *ex ante*.[11] Among all criteria mentioned in art 3:201 PETL, '[f]oreseeability probably is the most important and most applied factor. …'[12] 'As a rule of thumb, liability will not easily be established if the damage was not reasonably foreseeable at the time of the activity'.[13]

6 In the *first scenario*, pursuant to art 3:201(b) PETL, the level of protection of the injured interest is to be taken into consideration when determining the scope, and limits, of A's liability. As a consequence of the accident in which A damaged V's car, V suffered a heart attack and lost his life. He was thus injured in the interest that enjoys 'the most extensive protection' under art 2:102(1) and (2) PETL. However, according to art 3:201(a) PETL, it also needs to be taken into account whether the precise damage, ie the loss of V's life, was foreseeable 'to a reasonable person […] taking into account in particular […] the magnitude of the damage in relation to the normal consequences of such an activity.'

7 The foreseeable consequences of A's negligent driving, and of his hit-and-run, included property damage to the cars involved in the accident, possibly loss of income suffered by their owners for the time necessary to repair the cars; it further included damage to potential passengers of these cars, pedestrians in the vicinity, etc. On the other hand, it may very well be argued under the PETL that the loss of the life of a person who was not present at the scene of the accident exceeded the *magnitude of the damage* that was *foreseeable* to a reasonable person in the position of the tortfeasor as the normal consequences of property damage caused to his car (except if V presented particular medical conditions, see the second scenario below) – just as it was decided by the Belgian courts in this case.[14] The case may thus provide an example in which lit (a) and lit (b) of art 3:201 PETL point in different directions and the criterion of *foreseeability* ultimately prevails.

8 In the *second scenario,* the passenger of the lorry who had witnessed the event suffered a shock which, due to his suffering from atherosclerosis, led to a heart attack and consequently to his death. Here again, the high value of the injured interest (art 3:201 (b) PETL), and the foreseeability of the damage and its magnitude in relation to the normal consequences of such an accident (art 3:201(a) PETL) must be balanced against each other.

9 The text of the PETL does not prescribe an unambiguous result for this second scenario. It may thus again be argued that the death of V, a witness to the accident, ex-

9 PETL – Text and Commentary (2005) art 4:201, no 11 (*P Widmer*).
10 PETL – Text and Commentary (2005) art 3:201, no 13 (*J Spier*).
11 PETL – Text and Commentary (2005) art 4:201, no 11 (*P Widmer*).
12 PETL – Text and Commentary (2005) art 3:201, no 13 (*J Spier*).
13 PETL – Text and Commentary (2005) art 3:201, no 7 (*J Spier*).
14 Above 2/7 no 12.

ceeded the magnitude of the damage which was foreseeable to a reasonable person in the position of the tortfeasor as the normal consequences of that accident.

However, according to the Commentary to the PETL, 'in cases of (serious) personal injury a liberal attribution [of the damage] may well be required to meet the demands of justice'.[15] The Commentary refers to victims who are particularly susceptible to damage due to their physical constitution.[16] The underlying idea is the widespread concept in national tort law systems that the tortfeasor has to take the victim as he finds him or her, including his or her medical conditions. This is so even if the particular delicate constitution of the victim, and thus the magnitude of the damage, was unforeseeable for the tortfeasor. According to this line of reasoning, under the PETL, the tortfeasor may very well be liable for the damage resulting from the death of the lorry's passenger, caused by the witnessing of a particular severe, mortal accident. 10

The outcome in both scenarios is thus not necessarily the same under the PETL since *witnessing* a severe *personal injury* suffered by a third party (the second example) is more likely to cause a heart attack than *hearing* about damage to one's own *property* (the first example). 11

b) Solution According to the DCFR. Article VI–3:205 DCFR provides a specific basis of accountability for damage caused by a motor vehicle. According to this provision, the 'keeper' of the motor vehicle is accountable for personal injury and consequential loss and for damage to property suffered in a road traffic accident which results from the use of the vehicle. This liability '(i) is strict, and (ii) lies with the keeper of the vehicle'.[17] The damage to the car and the resulting heart attack of the car's owner in the first scenario and the shock, heart attack and death of the lorry's passenger in the second, as well as resulting consequential loss, is, in principle, legally relevant damage under art VI-2:201 ff DCFR. 12

Further, in both scenarios, the damage results from road traffic accidents caused by the defendants' cars and there is *natural* causation between the accidents and the victims' death under art VI–4:101 DCFR. 13

The Official Commentary to art VI–4:101 DCFR states that this 'provision does not distinguish between a cause in fact and a cause in law' and 'rather leaves it for further discussion whether and to what extent such distinction will stand up in theory and … lend itself to be being put in practice'.[18] 14

However, according to the Commentary, the DCFR 'does not reduce the test for causation to a "but for" or "*conditio sine qua non*" test.' Instead, 'the decisive factor is 15

15 PETL – Text and Commentary (2005) art 3:201, no 7 (*J Spier*).

16 PETL – Text and Commentary (2005) art 3:201, no 8 and 16 referring to the so-called 'egg shell-cases', also called 'thin skull-rule' (*J Spier*).

17 *C v Bar*/*E Clive*, DCFR, art VI–3:205, Comment A (3523 f). Strict liability only concerns personal injury and property damage. 'For all other damage, only in the case of intention or negligence on the part of the person acting is the damage legally relevant and thus recoverable', (at 3524).

18 *C v Bar*/*E Clive*, DCFR, art VI–4:101, Comment B (3570).

whether there is a link of cause and effect between intentional or negligent conduct or a source of danger on the one hand and legally relevant damage on the other'.[19] There is no conclusive list of factors to be considered. As the Commentary specifies, 'aspects of probability and foreseeability come into play but so too do the type of attributive cause and the type of damage. Also relevant are the protective aim of the norm of social behaviour which has been infringed and (occasionally) general policy considerations'.[20] The result will therefore depend 'on the circumstances of each particular case'.[21]

16 In the *first scenario*, under the DCFR it could, for example, be argued that it was probable, and thus foreseeable for the driver A, that his conduct would result in property damage to the cars parked along the road, and consequential loss resulting from such damage, including costs of repairs, loss of value, or costs of temporary replacement cars. On the other hand, it was improbable and hardly foreseeable for A that his negligent behaviour would lead to a heart attack and death of the damaged car's owner, not present at the scene.

17 In the *second scenario*, the lorry's driver caused an accident killing a pedestrian and leading to a shock of the lorry's passenger V, who eventually suffered a heart attack and died. Victim V was present at the scene. His emotional shock due to witnessing a particularly severe accident causing the death of a pedestrian may be regarded as still being reasonably foreseeable damage.

18 In this assessment, it shall be disregarded that V suffered from atherosclerosis which, combined with the shock, led to his death. Article VI–4:101(2) DCFR stipulates: 'In cases of personal injury or death the injured person's predisposition with respect to the type or extent of the injury sustained is to be disregarded'. The DCFR thus adopts the widely accepted rule that 'the tortfeasor must take the victim as he finds him'. It hereby precludes 'the argument that the injury is in reality attributable to a condition or affliction from which the victim already suffered and not the conduct of the wrongdoer'.[22] The driver cannot therefore rely on the argument that the injury and death of the victim was caused by the latter's pre-existing vulnerable condition, rather than by the accident.

31. Comparative Report

1 All the reports contain cases for this category except Romania. In the following, we will draw some major conclusions from the significant points raised in the reports. Minor points will be neglected.

2 *General remarks*. The criterion of foreseeability was developed already in Roman law, mentioned in a famous case by the jurisconsult Mucius (2nd century BC). According

19 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3570).

20 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571).

21 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571).

22 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3570, 3573).

to the first known definition, 'a fault is what has not been foreseen while it could have been foreseen by a diligent'.[1] Since then foreseeability has been tied to fault in the occidental legal systems. The term of diligence used in the definition was quickly juxtaposed to its contrary which is negligence. In its further evolution, Roman law closely associated foreseeability, fault, diligence and negligence. Today, these terms form a kind of 'bundle' and are often hard to clearly distinguish and delimitate.

Extensive or restrictive effect of foreseeability on tort law. As foreseeability is a widely used concept in the legal systems under analysis, it is obvious that it contributes to regulating the extension of tort law. However, though a number of reports mention a restrictive effect,[2] reporters rather show how it is used than to comment on its extensive or restrictive effect. The Dutch and Swedish reports might well give a good picture by saying that foreseeability must be considered against the background of multiple other factors.[3] It seems that it is a flexible instrument to find equilibrated decisions. **3**

Explicit or implicit use of foreseeability. The element of foreseeability is astonishingly particular in the sense that, in many legal systems, it is a central element of tort law despite the fact that it is often not mentioned in the codes or statutory norms. Some reports note that foreseeability does,[4] does not[5] or should[6] appear in legal texts. In certain systems, foreseeability is explicitly mentioned by courts[7] or excluded as a criterion in certain situations.[8] In others, its use seems rather implicit or encapsulated in other concepts.[9] In particular: the French and Latvian reports underline the different roles foreseeability plays in contract and tort.[10] **4**

1 *Paulus*, Digest of Justinian, 9.2.31.

2 Switzerland 2/4 nos 9–11, England and Wales 2/12 no 7, Scotland 2/13 nos 4, 6 and 10; restrictive effect in a first instance decision reversed by the upper instances in Malta 2/15 nos 5, 10 ff and 21; conservative attitude on foreseeability and causation in Malta 2/15 no 19; Estonia 2/19 no 17; in Latvia 2/20 no 6, possibly restrictive effect; Lithuania 2/21 nos 14 and 15; Hungary 2/27 no 5; in the European Union 2/29 no 17, a restricting effect of adequate causation and foreseeability are not observed in all cases.

3 Netherlands 2/8 no 3; Sweden 2/17 no 6.

4 France 2/6 nos 3 and 4 for contract law; in the new Belgium Civil Code – 2/7 no 10 – foreseeability is relegated to a simple criterion among others; see also Netherlands 2/8 no 3; Lithuania 2/21 no 14; PETL/DCFR 2/30 no 4 f.

5 Greece 2/5 no 8; Hungary 2/27 no 7, however see also no 10.

6 Latvia 2/20 no 6.

7 Historical Report 2/1 nos 2, 3, 6 ff; Austria 2/3 no 12; Switzerland 2/4 nos 5 and 9; Greece 2/5 nos 5 and 12; in France – 2/6 nos 2 and 3 – distinction on the foreseeability test between contract and tort law; Belgium 2/7 no 3; Netherlands 2/8 no 2; probably Italy 2/9 no 3 on objective foreseeability; Latvia 2/20 no 3; Lithuania 2/21 nos 13 and 14; Czech Republic 2/23 nos 9–11; Slovakia 2/24 no 18 f; in Croatia – 2/25 no 7 – foreseeability frequently mentioned by the courts; Slovenia 2/26 no 3; European Union 2/29 no 15.

8 Ireland 2/14 no 11.

9 Germany 2/2 nos 6 and 10; in Spain – 2/10 no 7 – references to objective imputation and ex ante perspectives in some rare decisions only; Estonia 2/19 nos 7, 8 and 16 accepted some cases where foreseeability is mentioned together with the protective purpose of a rule; Poland 2/22 nos 3, 7, 16.

10 France 2/6 nos 3–5; different solution for statutory norms in Belgium 2/7 no 9; Latvia 2/20 nos 5 and 6.

5 *Fault, standard of diligence/care and foreseeability.* Numerous reporters establish various links between these concepts,[11] which go back to Roman law. Already at this time, fault played a central role, together with foreseeability (see also above no 2). To some extent, fault contained *in nuce* even what we call today the standard of diligence. This modern concept was, of course, never mentioned in the Roman fragments but shined through in practice when it came to the question of whether certain behaviour was faulty.[12] To some extent, one might say that the links in modern law between these concepts are variations of a common Roman inheritance. In particular: the report on England and Wales describes the extension of foreseeability as going '... beyond negligence to other causes of action, including in this instance a rule of strict liability'.[13] Also concerning risk, the Swedish report reports on a case where negligence was not established on the basis of foreseeability but on the question of whether the author had created a risk.[14] As to legal influences on the lawmaker, in Lithuania the legislation has been modelled on art. 3:201 Principles of European Tort Law (PETL), obliging the judge to consider foreseeability.[15]

6 *Adequate causation and foreseeability.* Unsurprisingly many reports establish a link between these two concepts.[16] In particular, the German report explains that adequate causation is admittedly one of the main instruments to delimit liability, notably from the

11 Germany 2/2 no 21; Switzerland – 2/4 nos 18 and 20 – where fault and adequacy are tightly intertwined; Greece 2/5 no 2; Belgium 2/7 nos 4, 6, 7 and 9; England and Wales 2/12 nos 1–3, about the scope of the risk approach and remoteness; Scotland 2/13 no 3; Ireland 2/14 no 5; for a link between foreseeability and negligence see in particular Malta 2/15 nos 9, 10, 12 and 17; foreseeability as determining factor of negligence Malta 2/15 nos 13 and 21; foreseeability and blameworthiness Malta 2/15 no 22; Finland 2/18 no 9; Estonia 2/19 nos 13 and 16 passim; Latvia 2/20 no 7; Lithuania 2/21 no 14; Czech Republic 2/23 nos 3, 4 and 11; Slovakia 24/2 no 24; Croatia 2/25 no 10.

12 Historical Report 2/1 no 12; Italy 2/9 no 3; Spain 2/10 nos 5 and 7; Portugal 2/11 nos 3 and 4, on legal and adequate causation and foreseeability in an ex post facto prognosis.

13 England and Wales 2/12 nos 7 and 9.

14 Sweden 2/17 nos 2 and 3. On risk see also Austria 2/3 nos 9 and 15.

15 Lithuania 2/21 no 14; Greece 2/5 no 11; Belgium 2/7 no 18; Spain 2/10 no 6; England and Wales 2/12 nos 2 and 3; Norway 2/16 no 8; Sweden 2/17 nos 3–5.

16 Austria 2/3 nos 6, 8 and 12; Switzerland 2/4 nos 4, 5 and 19 f; Greece 2/5 nos 2, 5, 6, 8 and 10; Belgium 2/7 no 4; on foreseeability and causation in general, see also Belgium 2/7 nos 8, 13, 16 and 17; on 'conditio sine qua non' Belgium 2/7 nos 15 and 18; Netherlands 2/8 no 3, on causal imputation; Italy 2/9 nos 2 and 4; Spain 2/10 nos 2, 3–5, on material and adequate causation and objective imputation in an ex ante perspective; Scotland 2/13 no 7; Malta 2/15 nos 10 and 18; Norway 2/16 nos 3 f and 8; no 9 f, on the double adequacy test; Sweden 2/17 no 3, on negligence (culpa), adequacy and probability; Finland 2/18 no 3; Finland 2/18 nos 11, 13, 14 and 16, underlining in no 16 the conceptual ambiguity of causation and foreseeability; Poland 2/22 nos 2, 3, foreseeability is irrelevant to establish causation; Poland 2/22 nos 9, 17 and 18, adequacy taken in the sense of 'normal'; Poland 2/22 nos 10 and 13, interplay of adequacy, damage and fault; Czech Republic 2/23 no 10; adequacy and predictability Czech Republic 2/23 no 11, and Slovenia 2/26 no 6; Slovakia 24/2 no 8; Croatia 2/25 nos 3 and 8, adequacy as 'typical consequence'; Hungary 2/27 no 19 on alternative causation; European Union 2/29 no 16; PETL/DCFR 2/30 no 15.

perspective of fairness,[17] together with the so-called 'context of imputation' (*Zurechnungszusammenhang*). However, contrary to the situation in many other countries, in Germany, foreseeability as such is only indirectly an instrument for the examination of adequate causation. Adequacy refers to the criterion of probability which, in turn, supposes an *ex ante* evaluation based on foreseeability.[18] According to the Swiss report, an outcome which is entirely unexpected is considered as non-foreseeable, and thus not an adequate cause. In Switzerland, the function of adequate causation is to 'reasonably' limit tort law.[19] The report on England and Wales describes the relationship between the 'scope of the risk' approach and the remoteness enquiry[20] and the Scottish report explains that foreseeability of an initial harm can have as a consequence liability for subsequent, unforeseeable consequences of the initial harm.[21] In Finland, foreseeability and causation can be analysed under the double perspective of objective and subjective predictability.[22] In Estonia, 'the adequacy theory has not gained any significant application in case law'.[23] The Czech report underlines the role of probability in connection to foreseeability.[24] Croatia distinguishes between natural and legal foreseeability, the former concerning the question of whether the damage could have been foreseen, while the latter refers to the question of whether the damage was a typical consequence of an act.[25]

Life experience, the ordinary course of life and foreseeability. According to some reports, these concepts and foreseeability are sometimes used as criteria to establish adequate causation.[26] Technically, one has to project everyday experience based on how things happen normally[27] to the future possible consequences of an act. **7**

Protective purpose of the norm and foreseeability. Foreseeability as such is an uncontoured and wide concept. In order to delimit it, courts have developed different means, **8**

17 Austria 2/3 nos 6 and 9, adequacy is a value judgement linked also to prevention. On adequacy and Wilburg's flexible system, Austria 2/3 no 10; Switzerland 2/4 no 13, concerning the principles of justice and equity.

18 Germany 2/2 nos 7–10; 21 concerning foreseeability and 'Zurechnungszusammenhang' see also Germany 2/2 nos 15 and 21; on imputation, which is close to the 'Zurechnungszusammenhang', see Austria 2/3 no 6.

19 Switzerland 2/4 nos 9–11.

20 England and Wales 2/12 nos 2 and 9; see also Ireland 2/14 no 8.

21 Scotland 2/13 no 15.

22 Finland 2/18 no 4.

23 Estonia 2/19 no 20.

24 Czech Republic 2/23 no 13.

25 Croatia 2/25 no 9.

26 Austria 2/3 no 2; Switzerland 2/4 no 8; Greece 2/5 no 7; Spain 2/10 nos 4 and 5; see also Scotland 2/13 no 4; Czech Republic 2/23 no 16; Slovenia 2/26 no 3, 'normal nature' of a consequence.

27 On normality as criterion Belgium 2/7 nos 12, 16 and 17; Netherlands 2/8 no 5; Italy 2/9 no 2; Portugal 2/11 no 4; Poland 2/22 nos 2, 9, 13 and 17; Slovenia 2/26 no 3.

one being the protective purpose of the norm which may be used as an additional criterion to limit liability.[28]

28 Austria 2/3 no 10; Switzerland 2/4 no 10; Greece 2/5 nos 7 and 10; Netherlands 2/8 no 3; Estonia 2/19 nos 4, 7, 14, 16 and 20.

C. Protective Purpose of the Rule and Equivalent Concepts

3. Protective purpose of the conduct norm breached

1. Historical Report

Ulpian, D 9,2,7,4

Facts

1. A free man kills another in the *colluctatio* (wrestling), in the *pancratium* (free style) or in a public boxing match.[1]
2. The victim is a slave rather than a free man, or
3. The victim is a son in power.
4. Someone wounds a contestant (presumably a slave) who has already thrown in the towel.
5. Someone wounds a slave who was not taking part in the contest.

Decision

In the first case, the *lex Aquilia* does not apply, because the damage 'was seen to have been done in the cause of glory and valour and not for the sake of inflicting unlawful harm.' If the victim is a slave, however, his master can sue for damages because 'only freeborn people compete in this way'. This does not apply, however, when a son in power is wounded. If someone wounds a contestant (presumably a slave) who has already given up, the *lex Aquilia* likewise applies; the same holds true if the victim is a slave who is not taking part in the contest, unless he has been entered for a fight by his master. **2**

Comments

Given the very narrow scope of the *lex Aquilia*, Roman law – unlike modern tort law – had no need of a further corrective in the shape of the 'protective purpose of the conduct norm breached'. In this fragment, Ulpian sets out at some length the limits of Aquilian liability: if a free man kills or injures another, the *lex Aquilia* does not apply; its purpose is to prevent injury to property, at that time of course also including slaves. However, it did not cover physical harm inflicted on free Romans.[2] **3**

1 For a description of these types of combative sport, see *A Wacke*, Accidents in Sports and Games in Roman and Modern German Law, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 42 (1979) 281f.

2 For later developments to include injuries to freemen, cf eg *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1022ff; *N Jansen*, Die Struktur des Haftungsrechts (2003) 274ff; see also above at 1/1.

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4 The reason for this lies – to some part at least – in the way damages were calculated under the *lex Aquilia*: under the first chapter (*occidere*), the plaintiff was awarded damages equivalent to the highest value the killed slave or herd animal had had within the past year; under the third (*urere*, *frangere*, [*cor*]*rumpere*), he received the amount that the affair cost him within the first thirty days after the harmful event. Under both chapters, the injured object thus had to be assigned a specific value – something that Roman jurists held to be impossible when it came to the body of a free man.[3] Hence, that the combative sports mentioned in the excerpt are undertaken 'for the cause of glory and valour' and that damage inflicted on a co-contestant is not considered unlawful are merely additional considerations when it comes to harm sustained by free Roman citizens; the main cause for the exclusion of liability for injuries inflicted on them lies in the fact that they were not covered by the protective scope of the statute.

5 The same applies to injuries inflicted on sons in power:[4] although under their father's *potestas*, they likewise possessed the *status libertatis*, ie were free Roman citizens. That the text mentions them explicitly may be connected with a tentative extension of the protective scope of the *lex Aquilia* evidently advocated by the Roman jurist Julian already during the Classical period to cover injuries inflicted on sons in power, presumably since they could entail the same economic losses (medical costs, lack of income) for their father as if one of his slaves had been injured.[5]

6 Conversely, injuries inflicted on slaves – presumably in private fights or during practice bouts, since only free people competed in public[6] – were covered by the *lex Aquilia*. The justification that the injury was inflicted in the pursuit of glory and valour does not apply here, since this applied only to fights between free Roman citizens. Especially if the slave had already thrown in the towel or was not an active participant in the fight at all, the injurer was held liable. The wrongdoer's liability was limited, however, to cases in which the slave took part without his master's consent: if the *dominus* had himself entered the slave into the fight, he was held to have consented to having his

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3 Cf *Gaius*, D 9,3,7: ... liberorum corpus nulla recipit aestimationem – the body of a free man is not susceptible of valuation. See also *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1015.

4 For a different interpretation see *A Wacke*, Accidents in Sports and Games in Roman and Modern German Law, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 42 (1979) 282 f, who (unconvincingly) interprets the text to mean that injuries to sons in power fell under the 'lex Aquilia' if the contestant had already thrown in the towel. Grammatically, however, the phrase 'si cedentem vulneravit' appears to collocate with 'servum' in the same sentence, rather than with 'in filio familias vulnerato' in the preceding one.

5 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1015 f. The main source for this assumption is *Julian*/*Ulpian*, D 9,2,5,3, in which a father is granted compensation under the 'lex Aquilia' for medical expenses and loss of income because the shoemaker to whom he had apprenticed his son had knocked out the youngster's eye with a shoe-last.

6 *A Wacke*, Accidents in Sports and Games in Roman and Modern German Law, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 42 (1979) 282.

property damaged and hence could not claim compensation if the slave was injured or killed.[7]

Ulpian, D 19,2,11,4

Facts

Lessor and lessee agreed that the lessor would not be permitted to store hay in the city villa he had rented. He nevertheless stored hay there, which one of his slaves later set on fire. **7**

Decision

The Roman jurist Labeo decides that the lessee is liable for the damage under the lease agreement because he had brought in hay against the terms of the contract. **8**

Comments

The text is interesting in that it once again extends rather than limits liability, taking into consideration the action which can be said to be the one farthest removed, while still causally connected, to the damage: rather than dealing with the question whether the lessee can be held liable for the misconduct of his slave under an *actio legis Aquiliae*, Labeo traces the chain of causation back one step further and decides that the lessee can be held liable under an *actio conducti* because he has violated the terms of the contract.[8] **9**

This extension of liability, which deprives the lessee of the 'cheaper' option of noxally surrendering the offending slave, is clearly based on considerations closely connected to the modern concept of the 'protective purpose of the norm': the protective purpose of the provision that prohibits the storing of hay in the villa is to prevent fires (an ever-present threat in Rome); it is precisely because the lessee has violated this 'contractual norm' (*lex contractus*) – and by so doing has indirectly caused a fire – that he is held liable to the largest possible extent. **10**

2. Germany

Bundesgerichtshof (Federal Supreme Court) 20 May 2014, VI ZR 381/13

BGHZ 201, 263 = NJW 2014, 2190

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7 *A Wacke*, Accidents in Sports and Games in Roman and Modern German Law, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 42 (1979) 283.

8 *D Nörr*, Causa mortis (1986) 161; *R Robaye*, L'obligation de garde dans le droit Romain des contrats III (1987) 546 f.

Facts

1 V was married to W with whom she had two children (born in 1994 and 1999). At the beginning of 2011 W, unknown to V, was diagnosed with Chorea Huntington, an incurable, fatal, hereditary disease. In February 2011, the couple was divorced, evidently for other reasons. On 31 March 2011, W asked and allowed his doctor, the defendant A, to inform V of the disease. A informed V and told her that her children had inherited the genetic disposition for this disease with a probability of 50 %. An examination of the children with respect to Chorea Huntingdon was not possible under German law. V developed a reactive depression and was unable to work from 1 April 2011.

2 V sued A and claimed at least € 15,000 as compensation for pain and suffering as well as the declaration of his liability for her pecuniary and non-pecuniary damage. Her cause of action was based on a negligent violation of her health and her general personality right, which allegedly included a right not to know about hereditary dispositions of her children.

Decision

3 The first instance court had dismissed V's claim, the Court of Appeal had accepted it. The Federal Supreme Court set aside the lower decision and dismissed the claim. Although A had infringed V's health in the sense of the *conditio sine qua non* test, the purpose of the breached norm (§ 823 (1) BGB)[1] did not cover this injury. This provision does not protect against risks which are usual in daily life and which therefore belong to the victim's own sphere and his or her normal risk of life (*Lebensrisiko*):[2] 'The fact that a serious illness of one parent – though possibly also relevant for the health of their joint children – is recognised and becomes known to the other parent is a fate that can happen to parents at any time. It belongs to the general risks of life, but does not fall within the scope of the dangers which § 823 I BGB seeks to protect. The provision does not aim at protecting a … parent from the psychic stress associated with becoming aware of a genetic disease of the other parent and the consequent risk that their joint children may also be carriers of this disease.'[3]

4 The Court further held that the general personality right of V did not found a basis for her claim either. This right, which the courts have developed, includes a right to know but also not to know about one's own genetic predispositions. The latter right protects a person from obtaining knowledge – against his or her own will – of genetic information which may be relevant for his or her future.[4] However, this right solely concerns

1 § 823 (1) BGB is the central tort provision of German law. It states that the negligent and unlawful violation of a person's life, body, health, freedom, property or other absolutely protected right makes a party liable to compensate the ensued damage. According to the courts, the other rights include the general personality right.

2 BGH 201, 263 = NJW 2014, 2190 no 10.

3 BGH ibid no 11.

information about one's own predispositions, not of that of other persons, as here: of her children.

Comments

The decision describes in general terms and like in a textbook manner the conditions which must be examined when the institute of the protective purpose is applied. First, the protective purpose as a doctrine of the law of damages is applicable to any kind of provision or obligation, even in contract law. Secondly, three aspects must always be examined and affirmed: (i) Does the norm in question intend to protect individuals (or merely the public at large) and does the claimant belong to the circle of protected persons? (ii) Does the norm intend to protect the infringed right or position? (iii) Does the norm intend to protect specifically against the kind of infringement that has occurred?[5] **5**

The doctrine of the protective purpose of the violated norm often leads to stricter limits of liability than the application of the adequacy test would achieve. The present case is an example. But the solution under both institutes can also be identical. In particular in contract cases, the doctrine of protective purpose can even result in an extension of liability.[6] **6**

Bundesgerichtshof (Federal Supreme Court) 26 February 2013, VI ZR 116/12

NJW 2013, 1679

Facts

On an icy road, the car of A slid against V's car, which had to stop at a priority road. The front bumper of A's car got caught with the trailer coupling of V's car without doing any damage to the vehicles themselves. After the accident, V left his car and walked around the vehicles to inspect the damage. Even before reaching the pavement, he slipped on the icy road and suffered a fracture of the right shoulder joint. **7**

V claimed compensation for pain and suffering as well as the declaration that A was liable for future pecuniary and non-pecuniary consequences of the accident. **8**

Decision

Both lower courts had dismissed the claim. The Court of Appeal had denied the *Zurechnungszusammenhang* (the necessary attribution of the damage to the author's conduct). The Federal Supreme Court remanded the case. **9**

4 BGH ibid no 14.

5 BGH ibid no 10.

6 BGH NJW 2020, 387 no 28.

10 The BGH first stated that the Court of Appeal was right in assuming negligent driving of A, who was either too fast or too close to V's car or was simply careless. But, contrary to the lower courts' opinion, V's following injury stood in the necessary *Zurechnungszusammenhang* with A's conduct. V's fall was not only the consequence of the general danger which everybody ran on an icy road. Because of the accident, V had to get out of his car and to inspect the cars and their damage. In his fall, the specific risk realised which A had created.[7]

11 Furthermore and again contrary to the lower courts' opinion, the BGH held that the consequences of the accident fell within the protective scope/purpose of the provisions which A had violated. The relevant provisions of the *Straßenverkehrsordnung* (Road Traffic Ordinance, StVO), in particular § 1 StVO, intend to avoid traffic accidents and the damage which follows from them. The protection also covers injuries sustained after the accident, for instance, in the course of rescue measures or of investigating the accident if they were due to the traffic dangers at the accident site.[8]

12 The Court of Appeal was also wrong in denying V's claims under the strict liability regime of § 7 (1) *Straßenverkehrsgesetz* (Road Traffic Act, StVG). Under this provision, the keeper of a motor car is – irrespective of fault – liable for damage caused to a person or to property 'during the operation' of the vehicle. For this liability it is necessary that the dangers emanating from the vehicle (the so-called *Betriebsgefahr*) had an effect on the damage which, under evaluative considerations, must have been sufficiently influenced by the operation of the vehicle. Further, the kind of damage must be such as the provision is designed to protect against. In addition, a close temporary and spatial connection between the operation of the car and the damage is necessary. The BGH held this to be the case. Not the fact that all roads were icy led to V's injury but the accident, which forced V to leave his car and led to his fall.

13 The Federal Supreme Court remanded the case in order that the lower court should assess the amount of compensation for pain and suffering (*Schmerzensgeld*).

Comments

14 The decision confirms that the doctrine of the protective purpose is also relevant in the field of strict liabilities. With respect to § 7 (1) StVG, the Federal Supreme Court's reasoning is rather brief and merges the two aspects of *Zurechnungszusammenhang* and protective purpose. The protective purpose of this provision is that traffic victims should be awarded compensation without the need to prove the fault of the keeper of the car. The Court's final result is certainly convincing. However, the Court's actual justification that the two elements were present in the concrete case is little more than the statement that

7 BGH NJW 2013, 1679 no 10 f.

8 BGH ibid no 3.

the accident forced V to leave the car and that V's fall would therefore not have occurred without the accident.

3. Austria

Oberster Gerichtshof (Supreme Court) 3 February 1960, 5 Ob 29/60

EvBl 1960/127

Facts

A, a dog owner, operates a small shop. Although in this village, a local police regulation (*ortspolizeiliche Verordnung*) forbids dog owners from allowing their dogs to run around unattended, A lets his dog do so freely in front of his shop. The dog had been gentle until the incident and had often played with the children attending the nearby school. However, one day the dog bit V, a five-year-old child. In his defence, A argues that the local police regulation which stipulates the mandatory leashing of dogs had been passed in order to protect the local public green spaces and not to prevent dog bites. 1

Decision

The Supreme Court found in favour of V. A was therefore held liable for the damage his dog caused due to a violation of the local police regulation, which is to be qualified as a 'protective rule' (*Schutzgesetz*; § 1311 sentence 2 case 2 ABGB). Such protective rules prohibit the endangerment of rights and interests by specific proscribed behaviour and hence their violation entails liability for damage. The fact that the reason for introducing the mandatory leashing of dogs was to protect the local public green spaces cannot exempt A from his liability. Therefore, the protective purpose of the regulation comprises all kinds of damage caused by unattended dogs roaming freely, without limitation to that damage which was the direct inducement to pass the regulation. 2

Moreover, it is also against the general supervisory responsibilities to allow unattended dogs to run around, as even if a dog is not vicious, it can constitute a danger for road traffic and children. Also on this basis, A could be held liable. 3

Comments

See no 7ff. 4

Oberster Gerichtshof (Supreme Court) 16 December 1965, 2 Ob 392/65
ZVR 1966/151

Facts

5 A was a summer guest at the farm where V was employed. A asked V to let him drive a tractor during harvest. Although A did not have a driving licence, he was a very good driver with experience. V consented and in return, he convinced A to let him stand on the trailer coupling while A was driving the tractor. When A had difficulties in shifting from second into first gear, V jumped from the vehicle and injured himself. V claimed for damages against A.

Decision

6 The Supreme Court dismissed the claim. It states that the provisions on granting and withdrawing driving licences are to be qualified as protective rules (*Schutzgesetze*; § 1311 sentence 2 case 2 ABGB). However, under the heading of the protective purpose of the rule, liability is excluded when a certain damage would also have occurred in the case of compliance with the protective rule. This is precisely the case here, as A was an experienced driver and the accident would have happened equally had he possessed a valid driving licence.

Comments

7 Alongside adequacy, limitation of liability also arises via the protective purpose of the rule on which liability is based (*Schutzzweck* or *Normzweck*). Older literature, above all *Ehrenzweig*, wanted to take the protective scope of the rule into account by reference to a certain 'relativity of wrongfulness'. As, however, the assessment of wrongfulness is based on human conduct[1] and this can only be either wrongful or legitimate, it seems better not to speak of wrongfulness being relative. Instead, it is preferable to say that wrongful behaviour only leads to liability for such damage caused as is covered by the protective purpose of the rule prohibiting such conduct.[2]

8 The limitation of liability according to the purpose of the rule, ie according to the aim and meaning of the provision imposing liability, arises from the general requirement of interpreting the law teleologically, according to its purpose (*teleologische Interpretation*).[3] When the question arises as to which consequences of damage can be im-

1 *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/1/3ff with further references; see also *E Karner* in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) no 2/3 no 3.

2 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/15.

3 For this method of interpretation in general see, eg, *F Bydlinski*, Juristische Methodenlehre und Rechtsbegriff (2nd edn 1991) 453ff; in the context of determining the protective purpose in the field of tort

puted to the liable party, therefore, it is always necessary to examine the motivation behind the rule imposing liability in order to identify which damage the purpose of the law targeted in imposing a duty to compensate.[4]

The purpose of the rule is significant in different scopes of protection.[5] Firstly, the **9** rules must aim specifically at the protection of the victim (personal scope of protection, *persönlicher Schutzbereich*).[6] Secondly, the purpose of the rule must also cover the respective type of damage (subject matter protective scope, *gegenständlicher Schutzbereich*).[7] Thirdly, in the way the damage occurred, a risk covered by the rule materialised (modal protective scope, *modaler Schutzbereich*).[8]

In the first decision concerning the dog bite (no 1 ff), the subject matter protective **10** scope was correctly affirmed regardless of the fact that the reason behind the introduction of the regulation was to prevent types of damage other than that which occurred. This follows from a teleological interpretation of the regulation at stake, which in general forbids allowing unattended dogs to run freely without a leash.

On the contrary, in the second decision concerning the tractor accident (no 5 ff), the **11** modal protective scope was denied. The protective purpose of the provisions on granting and withdrawing driving licences is to ensure that only those people who have the necessary skills and knowledge participate in traffic. Hence, as the defendant was a very good driver with experience, the violation of the provisions regarding driving licences was not decisive for the injury.

The purpose of the rule is of utmost importance in the context of infringements of **12** so-called protective rules (*Schutzgesetze*, see § 1311 sentence 2 case 2 ABGB), which prohibit the endangerment of rights and interests by specific proscribed behaviour in order to prevent damage.[9] Both of the decisions reported above, of which the first concerned the dog bite (3/3 no 1 ff) and the second the tractor accident (3/3 no 5 ff), dealt with such protective rules.

However, the protective purpose of the rule has to be considered correspondingly in **13** other cases of fault-based liability, in particular in cases of breach of contract. Originally, the theory of the protective purpose was even developed in this context.[10] When it comes to breach of contract, it has to be asked if the violated interests lie in the direction and within the scope of the assumed duties.[11]

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law *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 347 ff; *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 63 f.

4 See on the methodology of determining the protective purpose in more detail *R Welser*, Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 43 ff.

5 See already *M Rümelin*, Die Verwendung der Causalbegriffe in Straf- und Civilrecht, AcP 90, 304 ff; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 339 f.

6 Cf OGH 1 Ob 679/86 = SZ 60/2.

7 Cf OGH 7 Ob 53/82 = SZ 56/80.

8 Cf OGH 1 Ob 22/92 = SZ 66/77.

9 See above all *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 337 ff.

10 See *E Rabel*, Das Recht des Warenkaufes I (1936) 496 ff.

14 The protective purpose of the rule is likewise important in the field of strict liability (risk-based liability, *Gefährdungshaftung*), see in detail below 6/3 no 3ff.[12]

15 Concerning the relation between the protective purpose theory and the adequacy theory (2/3 no 6 ff), it has to be emphasised that they are to be applied side by side as they seek to effect limitations from different standpoints. The adequacy theory examines whether a specific behaviour seems to present a risk in relation to a certain damage in the eyes of an objective observer *ex ante*. The protective purpose of the rule theory, on the other hand, starts by asking what damage a particular behavioural rule reasonably tried to prevent. The dangerousness of conduct is thus subjected in one case to a specific and in the other to a general, abstract assessment.[13]

16 Again, it must be stressed that the protective purpose of the rule – just as the adequacy theory – does not create rigid boundaries either, but, as *Wilburg* expounds, where the boundaries have to be drawn depends on the weight of all factors involved in establishing liability.[14] Thereby, in particular, the gravity of wrongfulness and the degree of fault have to be taken into account. If negligence is very slight, for example, adequacy and the purpose of the rule have to be interpreted in a rather narrow way. If, on the other hand, the tortfeasor acted wilfully, also remote harm has to be compensated. As a result, often a core area of damage, which is in any case covered by the protective scope as well as a periphery, which can be covered by the protective scope under certain circumstances, can be determined.[15]

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 16 April 1998

ATF 124 III 297

Facts

1 Plaintiff V concluded a contract with enterprise A, according to which, A had to provide V with a new IT system. When the system broke down, V suffered pecuniary damage and filed a claim against A before the regional court based on the Unfair Competition Act (LCD). V requested that A should be required to pay compensation. On 20 August 1997, the court denied the defendant the right to be a party to the proceedings and dismissed

11 Eg *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 9; therefore, the level of remuneration is of importance, eg OGH 4 Ob 521/87 = JBl 1987, 720.

12 Eg *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/29, 93f.

13 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/16.

14 *W Wilburg*, Die Elemente des Schadensrechts (1941) 242ff; see also *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 62.

15 *W Wilburg*, Die Elemente des Schadensrechts (1941) 245; *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/20f.

the action notably because the LCD could not be applied. V appealed the judgment before the Federal Supreme Court.

Decision

The Federal Supreme Court upheld the lower court's decision and confirmed A's lack of tort liability. 2

Among others, V claimed that A had repeatedly assured V that the project was advancing as planned, while knowing that the computer programme was not functioning properly, was untested and had already caused problems with other customers. V qualified this behaviour as a violation of the LCD and consequently as unlawful according to art 41 of the Swiss Code of Obligations (SCO) (general tort law provision). 3

The Court rejected this argument because the LCD (in its arts 2 and 3) regulates conduct influencing the relationship between competitors or between provider and buyer. LCD does not generally protect the principle of good faith; it is only deemed to protect fair competition. Unlawfulness in the sense of the LCD only concerns behaviour relevant to competition and the market. As the contract between V and A had already been signed, the behaviour during the execution of the contract was no longer relevant with regard to fair competition. 4

Comments

It must be reiterated that in Swiss law the claimant who is linked to the defendant by contract has the choice of claiming damages on the basis of contract or delict, provided that the conditions of both are fulfilled. In the present case, the claimant's argument was that the defendant had violated the LCD, that he had acted unlawfully and was thus liable in tort. 5

Today, the dominant doctrine, like that of the Federal Supreme Court, follows the objective concept of unlawfulness.[1] One of the two components of this concept is known as the unlawfulness of conduct.[2] It can be defined as the violation of a standard of conduct intended to protect the injured party from the damage which occurred, notably a 6

1 According to § 823 BGB, only damage resulting from an act infringing an absolute right or an act in breach of a norm protecting injured interests can be repaired; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band 1: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 278, at 102; ATF 123 II 577, 581, c 4c (1997); ATF 133 III 323, 329-330, c 5.1 (2007); TF, 4A_653/2010, 24.06.2011, c 3 (unpublished); *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 33 and no 33c; ATF 119 II 127, at 128 f c 3 (1993), JdT 1994 I 298; *G Etier*/*B Stäuli*, Les grandes notions de la responsabilité civile et pénale, in: C Chappuis/B Winiger (eds), Responsabilité civile – Responsabilité pénale: Journée de la responsabilité civile 2014 (2015) 46.

2 *R Brehm,* Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 34.

purely economic damage such as that suffered in the present case by the claimant.[3] Such standards of conduct permeate the entire Swiss legal system (private, administrative or criminal law).[4] However, these standards of conduct are regarded as a means to protect the injured party if three conditions are met: the injured person belongs to the group of persons protected by the norm, the standard of conduct violated is intended to protect the legal interest at stake and, the damage qualifies as the concretisation of the damage which the norm violated by the offender was meant to prevent.[5] Therefore, the protective purpose of the behavioural standard is the most important limitation of that concept.[6]

7 In the presence of purely economic damage, which is recoverable only if the victim is protected by a specific norm, an omission[7] is unlawful if the author has violated a written standard of protection.[8] The Court endeavoured to determine whether or not there was a written standard of protection.[9] The Federal Supreme Court analysed art 2 and more particularly art 3(b) LCD (RS 241) as a ground for wrongfulness of conduct.[10] It reasserted the scope of this law by specifying that, according to the general clause (art 2), facts of unfair competition always presuppose conduct that influences relations between competitors or between suppliers and customers. Thus, if it is unfair to make incorrect or misleading statements about its products, works or services (art 3 lit. b), the

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3 *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 4 no 04.103, at 40: ‚Schutzzweck der Verhaltensnorm' oder von der ‚Normzwecklehre'; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 2 no **302**, at 110; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad 41 no 38b; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 2 no 299, at 109.

4 ATF 116 Ia 162, at 168 f, c 2c, (1990), JdT 1992 IV 52; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 33c.

5 *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 4 no 04.104, at 40; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 2 no 302, at 110; with regards to that last condition, German doctrine has developed a similar theory, the so-called ‚Theorie vom Rechtswidrigkeitszusammenhang'.

6 *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 2 no 04.26, at 29. For another example see ATF 79 II 424 (1953), in an extensively motivated decision, the Federal Supreme Court admitted the State's liability considering that the judge had acted with *culpa lata* since he had not analysed the submitted claim with the necessary care and had omitted basic verifications.

7 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad 41 no 35c, 42 and 56b; ATF 126 III 113, c 2a/aa.

8 *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 4 no 44, at 183; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 56b; ATF 117 II 315, 317-318, c 4d (1991): unauthorised inaction.

9 C 5b; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 4 no 41, at 181f; ATF 119 II 127, 128 f, c3 (1993).

10 C 5d.

purpose of the LCD is generally not to protect good faith, but only to protect fair competition (art 1). Only behaviour that is objectively likely to influence competition can qualify as unlawful.[11] In the present case, V's allegations were made in the context of the execution of a contract and were not likely to affect market conditions. Therefore, V was not harmed by such an unfair influence.[12]

As a result, in this decision, the Court limited the normative purpose of the LCD to market-relevant behaviour and rejected the general protective function of the law on unfair competition.[13] Behaviour outside of this restrictive field is irrelevant in respect of the LCD. **8**

Such a standard of protection cannot be deduced from art 2 Swiss Civil Code (SCC). Even if the principle of good faith, within the meaning of art 2 SCC, is occasionally used to establish unlawful conduct,[14] the Federal Supreme Court argues that it can only be used in exceptional cases.[15] **9**

As the claimant considered that the defendant had misled him intentionally when hiding known IT problems, the Court finally analysed the existence of intentional immoral damage within the meaning of art 41 para 2 Swiss Code of Obligations (SCO) (liability in the case of *dolus* and *contra bonos mores*).[16] The scope of its protection only covers behaviour that is exclusively aimed at harming others.[17] The fact that A did not clarify the allegedly foreseeable IT problems may constitute a breach of contract, but it is unlikely that the persons in question were only interested in causing such damage to V. **10**

Consequently, there is no possible action for damages arising from A's unlawful conduct since the requirement of liability for wrongfulness or immorality is not met. As plaintiff V's argument was exclusively based on tort law, the court did not analyse further possible contractual liability. **11**

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11 ATF 120 II 76, 78-79, c 3a (1994).

12 The situation is thus fundamentally different from that of the criminal judgment in ATF 124 IV 73, 74 s, c 1a (1998), where advertising competitions intended to promote the sale of goods were called into question.

13 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 38b; protection also denied: ATF 106 Ib 357, 362, c 2c (1980); ATF 117 II 259, 269-270, c 3 (1991), JdT 1992 I 559.

14 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 53a.

15 C 5c: ‚Wo jemand weder nach Vertrag noch nach Gesetz zu einem bestimmten Verhalten verpflichtet ist, kann eine solche Pflicht höchstens in eng umgrenzten Ausnahmefällen aus dem Grundsatz von Treu und Glauben abgeleitet werden'; ATF 108 II 305, 311 s, c 2b (1982), confirmed in ATF 116 Ib 367, 376, c 6c (1990) et ATF 121 III 350, 354, c 6b (1995); *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 53; ATF 108 II 305, 311, c 2b (1982): ‚höchstens in eng umgrenzten Ausnahmefällen'.

16 C 5e.

17 C 5e: ‚Dieser Haftungsgrund ist nur ausnahmsweise und mit grösster Zurückhaltung als gegeben anzunehmen'.

5. Greece

Areios Pagos (Court of Cassation) 1787 and 1788, 13 November 2006

Published in ISOKRATIS

Facts

1 In a contract concluded between the Greek State and the joint venture 'OM', the latter undertook to construct the Athens underground ('metro'). Said contract was ratified by L 1955/1991, thus having the force of law. From the date said Law entered into force, the Greek State was substituted in all its rights and obligations by the company 'AM SA', which coordinated the entire works. According to arts 31 and 32 of the above contract, all of the above were obliged to ensure the unimpeded approach of cars to immovables which fronted onto the worksites.

2 The plaintiff, usufructuary of an immovable located in Athens and rented to third parties as a car repair shop, filed an action against the above defendants alleging that the works undertaken were in violation of the above articles, which were also intended to protect her personal interests, as they restricted the access to her immovable from the main road for 17 months, thus causing her both positive and negative damage amounting to Greek Drachmas (GRD) 14,400,000 (approx € 42,260).

Decision

3 The Court of Cassation held that the Court of Appeal, which rejected the claim, did not violate the law when, among others, it considered that, according to art 914 GCC, the damage caused to a victim by an unlawful act is unlawful when the tortfeasor's act violates a private right of the victim, or at least an individual interest of them, which was intended to be protected by the provision breached. The Court of Cassation stressed that, in the case of violation of an individual interest, it is required that the provision culpably breached aims at protecting the violated individual interest or, at least, such provision aims at protecting, among other interests, the violated individual interest as well. In the particular case, however, although the provisions invoked indeed aimed at protecting individual interests as well, the defendants did not breach them in terms of acting unlawfully in the meaning of art 914 GCC, as the access to the immovable of the plaintiff was possible, from secondary streets, through deviations which the defendants arranged. The decision of the Court of Appeal was confirmed.

Comments

4 See in detail 3/5 no 10 f below – Here the Court of Cassation found, without, however, giving any reasons for its approach, that the provisions in question aim at protecting, among other interests, the violated individual interest as well but in the particular case there was no violation of said provisions that could justify an action for damages.

Areios Pagos (Court of Cassation) 175, 31 January 2005

ChrID 2005, 616 = Ell Dni 2006, 432 = Diki 2005, 843

Facts

A went swimming with her dog at a beach in Lavrio and, although both V and a harbour official asked her to refrain from doing so, she obstinately refused, thus obliging V to abstain from swimming. V filed an action seeking compensation for his moral harm amounting to GRD 100,000 (approx € 293) claiming a violation of his personality right. The Kallithea Court of the Peace with its decision no 43/2001 found for V and decided that A had to pay V the sought amount. The Athens multi-member court of first instance, judging as Court of Appeal, quashed the decision of the Court of the Peace on the basis that art 230 § 1 of the General Regulation of Lavrio Harbour, which provides that animals are not allowed in swimming areas, only applies to organised beaches and, thus, A did not commit an unlawful act. On an auxiliary basis, V's action was rejected by the multi-member court of first instance, because, according to the Court, the violation of the said provision does not objectively constitute an unlawful violation of the personality right of other persons swimming in the area. After said decision, V filed a recourse claim before the Court of Cassation. **5**

Decision

The Court of Cassation held that the multi-member court of first instance falsely interpreted and applied art 230 § 1 of the General Regulation of Lavrio Harbour in combination with arts 57 and 914 GCC. According to the Court of Cassation, art 230 § 1 of the above Regulation aims at protecting not only the public interest, but the private interest of swimmers as well; accordingly, its violation constitutes a tort according to art 914 GCC, provided that the other conditions set by the said article are fulfilled. The Court acknowledged that the said provision, in view of its general purpose to protect people from animal-spread diseases, applies to all of the swimming areas in Lavrio and not only to those where organised swimming facilities exist. Accordingly, the decision of the Athens court of first instance was squashed and the case was again referred to it to be judged by other judges. **6**

Comments

See in detail 3/5 no 10 f below – The Court of Cassation in this particular case had to interpret whether the provision of a regulation, which provides that animals are not allowed in swimming areas, aims at protecting not only the public interest by imposing measures to avoid animal-spread diseases but also the private interest of each individual, in which case, the latter can seek compensation for the moral harm sustained. The Court of Cassation replied in the affirmative, without, however, giving any grounds for this particular interpretation, as is usually the case. **7**

Areios Pagos (Court of Cassation) 698, 4 May 2017
Published in NOMOS

Facts

8 The defendants, despite not having a building permit, built a house adjacent to that of the plaintiffs, which, due to its height, blocked the plaintiffs' view to the sea. As a result, the latter filed a claim based on the provisions of tort, alleging that, because of the defendants' unlawful and culpable behaviour, the commercial value of their property, which amounted to € 440,205 had decreased by at least 10 % (€ 44,021) and that, additionally, they had suffered moral harm. Accordingly, the plaintiffs claimed that the defendants should pay: a) damages amounting to € 44,021 for the harm sustained because of the loss of their seaview and b) € 14,674 to each of them as compensation for the moral harm suffered.

Decision

9 The Court of Cassation quashed decision no 9/2007 of the Court of Appeal, which rejected the claim as non-legally founded, on the ground that the plaintiffs' interest, ie the view to the sea, does not fall under the protective scope of the rule of law violated. More particularly, according to the Court of Appeal, it derives from the provision of art 24 § 1 of the Greek Constitution for the protection of the natural and cultural environment that the provisions of the General Building Regulation (in Greek *Genikos Oikodomikos Kanonismos*, GOK) also protect, apart from the public interest, the private interests of owners of adjacent properties, but only those related to the need for sufficient solar exposure, ventilation and lighting in order to assure the best possible living conditions of the area's inhabitants; the view of the properties does not fall under the protective rule of GOK. The Court of Cassation, on the contrary, held that also the view from the properties falls under the protective rule of GOK and referred the case once again to the Court of Appeal for a new judgment of the case.

Comments

10 Repeatedly the Court of Cassation, adopting the theory of the protective scope of the rule of law, mentions in its decisions[1] that it derives from the provision of art 914 GCC that a

1 See, among others, AP 1768/2009 ChrID) 2010, 521 = TPCL 7, 725 =, Ell Dni 51, 684 = DEE 2010, 576; 1787/2006, published in ISOKRATIS (for a brief summary of the facts of AP 1787/2006 and the judgment of said decision in English, see *E Dacoronia*, Greece, in: H Koziol/BC Steininger (eds), European Tort Law 2006 (2008) 237 nos 17–20); 1788/2006, published in ISOKRATIS; 175/2005 ChrID 2005, 616; 508/2003 ChrID 2003, 709, 710; 900/2003 Ell Dni 44, 1276 = ArchN 55, 76, cmt by *C Nikolaidis* (for a brief summary of the facts and the judgment of the last three decisions in English, see *E Dacoronia*, Greece, in: H Koziol/ BC Steininger (eds), European Tort Law 2005 (2006) 306, nos 9, 10 and *eadem* in: H Koziol/BC Steininger (eds), European Tort Law 2003 (2004) 212, nos 6–9 respectively).

person is liable for damages not only if he has unlawfully and through his fault caused prejudice to another by offending a private right, such as ownership, but also by offending a private interest. However, in order for a claim for damages to succeed when a private interest has been violated, the provisions of the law that are violated should be, according to their phrasing or the purpose of the legislator, protective of the offended private interest or at least protective of that interest as well. Consequently, the violation of a provision that is exclusively intended, according to the legislator, to protect the public interest does not give rise to a right to damages. even if a private interest is also indirectly served through the said provision.

The issue of whether a provision of law only protects the general interest or it also protects a private interest can be answered only after an interpretation of the law in question.[2] That no firm criteria for such an interpretation exist can also be seen from the present case where the Court of Cassation and the Court of Appeal arrived at two completely opposing conclusions without giving any justification for this, ie without providing the grounds for which they considered that the private interest of having an agreeable view does or does not fall under the protective scope of GOK. **11**

6. France

Cour de cassation, Troisième Chambre Civile (Supreme Court, Third Civil Division) 2 July 1974, 73-10.858

D 1975, 61, report *E Franck*;

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006992869>

Facts

V, the owners of a villa in Nice, claimed that T, one of their neighbours, had infringed the city planning by-law (*règlement d'urbanisme*) by adding two extra storeys to his villa, blocking the owners' view on the *Château du Mont-Boron* (also known as the Englishman's Castle). However, both buildings were not adjacent, but separated by a road and a distance of approximately 50 metres. V sought an order for demolition and damages based on liability in tort. **1**

2 See relatively *P Filios*, Law of Obligations – Special Part , vol II (7th edn 2011) § 165 βΑ,π 312; *A Georgiades*, Law of Obligations – General Part (2nd edn 2015) § 60 no 20; *idem* in: A Georgiades/M Stathopoulos (eds), Civil Code (1982) art 914 nos 50 and 54; *G Georgiades*, SEAK I, art 914 no 18; *P Kornilakis*, Law of Obligations, Special Part I, § 84 3 II, at 487, with reference also to the relative German literature in fn 12; *M Stathopoulos*, Law of Obligations – General Part (5th edn 2018) § 15 IV no 37.

Decision

2 V were not successful before the courts. The *Cour de cassation* confirmed the position of the Aix-en-Provence appellate court, deciding that the 'urban planning's easement, whose violation was alleged by V, was not meant to protect neighbours' views'. The lower court had rightly pointed out that V could not 'invoke a direct and personal loss', since, according to the court, there was 'no causal link between the alleged violation of the easement and the invoked loss regarding the claimants' views'.

Comments

3 In this (relatively old) case, the *Cour de cassation* limits the right to obtain the demolition of a building erected in breach of urban planning rules to those cases in which the violated rules explicitly seek to protect the claimant. Although the wording of this 1974 decision could suggest that French courts should systematically consider the purpose of the norm of conduct that was breached, this is clearly not the case.[1] In general, the protective purpose is at best implicitly taken into consideration by judges when they justify the dismissal of a claim by referring to a lack of causation. Indeed, in more recent cases, the *Cour de cassation* reaches the same solution as in the present case but without referring to the legislative purpose of urban planning rules, and the missing causal link appears to be the only (apparent) justification for it.[2]

4 Until 2008, the *Cour de cassation* took a similar stance in a specific field of commercial litigation. In some cases, the clients of investment banks tried to engage the liability of financial intermediaries on the basis that the obligation to guarantee the market operation in advance (*obligation de couverture*) had not been complied with. On several occasions, the commercial division held that 'the guarantee obligation (*obligation de couverture*) (…) was enacted in the interest of the intermediary and market security and not in the interest of the client making an order'.[3] In 2008, the *Cour de cassation* aban-

1 On the so-called doctrine of 'Aquilian relativity' ('relativité aquilienne'), which is the French translation of the German 'Lehre vom Schutzzweck der Norm', see in English *G Viney*, Tort Liability, in: GA Berman/E Picard (eds), Introduction to French Law (2008) 248. See in French *J Limpens*, La théorie de la 'relativité aquilienne' en droit comparé, in: Mélanges offerts à René Savatier (1965) 561; *O Berg*, L'influence du droit allemand sur la responsabilité civile française, RTD civ 2006, 59.

2 See, eg, Cass 3 civ, 3 March 1981, 79-16.684; Bull civ III, no 44; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007007360>; Cass 3 civ, 19 February 1992, 89-21.009; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007027977>.

3 Cass com, 5 November 1991, 89-18.005; Bull civ IV, no 327; Bull Joly bourse 1993, 292, note *F Peltier*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007027883>; Cass com, 8 July 2003, 00-18.941; D 2003, 2095, note *V Avena-Robardet*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007048899>. See also Com, 14 December 2004, 02-13.638; D 2004, 495, note *V Avena-Robardet*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007050276>.

doned its position, enabling the clients to claim damages from the intermediary in case the guarantee obligation had not been performed by the bank.[4]

Cour de cassation, Chambre criminelle (Supreme Court, Criminal Division) 12 March 2019, 18-80.911

AJ Droit pénal 2019, 396, note *C Lacroix*; Procédures 2019, no 5, 15, note *AS Chavent-Leclère*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000038265039>

Facts

Shortly after the 2016 Nice terrorist truck attack, which caused 86 deaths and injured 434 people, the public prosecutor (*ministère public*) launched a criminal investigation. According to the rules of criminal procedure, the investigation was subsequently taken over by a board of investigative judges (*juges d'instruction*). The municipality of Nice decided to bring a claim as a 'civil party' (*partie civile*) in order to obtain damages under tort law, on the ground that the terrorist attack made the city of Nice less attractive for tourists and investors, resulting in non-economic and economic losses. **5**

Decision

The designated investigative judges first accepted the municipality's attempt to join the criminal proceedings. The Paris appellate court overturned the decision, holding that the pecuniary and non-pecuniary harm invoked by the city of Nice 'neither present a direct causal link with the investigations initiated, nor correspond to the protective purpose of the criminal offences with which the prosecuted individuals were charged'. The *Cour de cassation* affirmed the appellate court's decision and confirmed this restrictive approach to the eligibility of legal persons to join criminal proceedings as a *partie civile*. **6**

Comments

Although there is no official doctrine under French law that imposes taking into account the protective purpose of the norm of conduct that was breached, an illustration of this reasoning can be found in the case law on the admissibility of so-called 'civil actions' (*actions civiles*) before criminal courts. Unlike many other legal systems, French law allows the victim of a criminal offence to initiate criminal proceedings by constituting himself as a 'civil party' and claiming damages from the suspect.[5] He may also join a prosecution **7**

4 Cass com, 26 February 2008, 07-10.761; D 2008, 776, note *X Delpech*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000018204059>. Cass com, 13 December 2011, 10-10.103; RTD com 2012, 156, note *M Storck*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000024988180>.

5 See *J Bell*/*S Boyron*/*S Whittaker*, Principles of French Law (2nd edn 2008), 368ff; *V Malabat*/*V Wester-Ouisse*, The quest for balance between tort and crime in French law, in: M Dyson (ed), Comparing Tort

already triggered by the public prosecutor or an investigating magistrate. In both cases, the victim will be considered a full party to the criminal proceedings and the criminal court will assess his claim for damages in accordance with the ordinary rules of tort law.

8 However, this 'triangulation' of criminal procedure (involving the prosecutor, the accused person and the victim) is subject to the proof that harm was directly caused by the criminal offence. In the present case, the *Cour de cassation* explicitly states that the existence of a direct causal link is uncertain: the 'civil party' has to establish that his harm is the result of an infringement of the legal interest protected by criminal law.[6] It must be noted, however, that this criterion is not assessed on the level of substantive law, but as a procedural precondition.

7. Belgium

Cour de cassation / Hof van cassatie (Supreme Court) 28 April 1972

Pas 1973 I, 797

Facts

1 A farmer makes use of his pre-emptive right of purchase under a farm lease. The law reserves this right to the tenant in the event of the sale of the leased rural property[1] in order to enable him to continue his farming activity (but not for the purpose of real estate speculation). Therefore, the law forbids the lessee who makes use of his pre-emptive right from selling the property for five years from the date of acquisition. In case of infringement, the lessee will be liable to the vendor for compensation equal to 20 % of the sale price[2]. In this analysed case, the farmer quickly sells the property to a third party, in defiance of the legal prohibition. The latter is then sued for damages, not by the lessor, but by another potential buyer he had evicted to avail himself of the right of pre-emption.

Decision

2 The Supreme Court rules that the violation of the legal prohibition of asset disposal – intended to protect the lessor/seller – may constitute a fault causing the ousted purchaser

and Crime: Learning from across and within Legal Systems (2015) 78ff. See also most recently *M Dyson*, Crime, Breach of Legislative Duties and Fault, in: JS Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019) 102ff.

6 On this issue see *J Alix*, Bien juridique protégé par les incriminations terroristes et recevabilité des constitutions de partie civile, Lexbase Pénal 2019, no 15.

1 Loi du 4 novembre 1969, Code civil – Livre III, Titre VIII, Chapitre II, Section 3: Des règles particulières aux baux à ferme, art 47, MB, 25 November 1969, 11304.

2 Loi du 4 novembre 1969, art 54.

a prejudice for which the latter may obtain compensation. Even if the objective of the breached legal provision is not to protect the personal interests of the ousted buyer, he may have his prejudice recognised simply because of the unlawful act committed by the lessee.[3]

Comments

In contrast to other legal systems, Belgian law on civil liability appears to be particularly flexible in that it does not list, in an exhaustive manner, the interests worthy of protection. There is no requirement that an interest protected by law must be at stake to obtain reparation. Belgian law does not give any priority to one interest over another. There is no hierarchy of interests and courts do not take into account the nature of the damage (loss of a chance, pure economic loss, damage by repercussion, etc) when deciding on the merits of the action. As shown in the above judgment, the theory of Aquilian relativity, according to which, 'an action for reparation belongs only to the person whom the rule [of law] protects and extends only to the damage against which the rule offers protection'[4] is not applicable as such in Belgian law. However, some decisions seem to come close to this theory. **3**

In this respect, in a decision of 9 February 2017, the Supreme Court limited the category of conduct norm whose breach may lead to a finding of misconduct on the part of the public authorities. According to this ruling, only the violation of an international treaty with direct effect, to the exclusion of treaties without such effect, may constitute an extra-contractual fault.[5] The Supreme Court did not give the reasons for its decision. If it were to be considered that only those individuals who are protected thanks to the direct effect of the treaty could invoke the fault of the State, because only these individuals would be allowed to invoke the violation of this treaty, one would then come closer to the theory of Aquilian relativity. Indeed, this would limit the category of persons who could claim compensation *on the basis of the purpose of the treaty*, notwithstanding the State's misconduct.[6] **4**

3 *J-L Fagnart*, La causalité – vol 1, in: idem, Responsabilités – Traité théorique et pratique (2009) 20.

4 *J Limpens,* La théorie de la relativité aquilienne en droit comparé, in: Mélanges René Savatier (1965) 560.

5 Cass, 9 February 2017, JT 2019, 33, cmt *F Auvray*.

6 *F Auvray*, La violation d'un traité est-elle une faute? Incidence de l'absence d'effet direct sur la responsabilité extracontractuelle de l'Etat, JT 2019, 21 ff, 28, no 31.

Cour de cassation / Hof van cassatie (Supreme Court) 29 September 2008
Chr DS 2009, 8

Facts

5 The Public Centre for Social Action (PCSA) of Woluwe-Saint-Pierre refused, on erroneous grounds, to take care of a person whose condition required immediate health care.[7] Indeed, being territorially competent, the local PCSA is legally obliged to provide help to its citizens. Later, the health care institution which took care of the patient relied on arts 1382 and 1383 of the former Civil Code in order to obtain damages from the PCSA. The claimant sought to obtain the payment of the health care services provided to the person who should normally have benefitted from the social assistance.

Decision

6 At the first instance, the court excluded the liability of the PCSA because the misconduct 'was only committed towards the beneficiary, the person entitled to urgent medical care, being in the case the ill person'. The Supreme Court quashed the judgment and stated that 'it is not required, for a person seeking reparation caused by the fault of the PCSA – which refused, in breach of the law, to provide assistance to a patient whose condition required immediate health care – to benefit from a similar right to assistance within the meaning of Article 58'.

Comments

7 This more modern decision confirms the rejection of the theory of Aquilian relativity in Belgian law. Any person who has suffered damage caused by a fault is entitled to claim damages, even if he or she is not one of the persons whom the rule of law aims to protect.

8 Other decisions (below 4/7, no 11) seem to occasionally make a disguised application of this theory (Digest 1, 5/7, no 18f; Digest 3, 3b/7 no 6). Indeed, when the fault results in the violation of a legal standard which imposes particular behaviour, the judge investigates the aim, the *ratio legis* behind the conduct norm and the particular interest or persons it is intended to protect. By doing so, he will be able to assess the lawfulness of the disputed conduct. Furthermore, he will have to verify whether the author of the misconduct was indeed the person upon whom the duty was imposed. In other words, before ruling on liability, it will be necessary to define the category of interests protected by the legal provision at stake. Only to this extent can one find some similarities between Belgian civil liability law and the theory of Aquilian relativity.

7 Loi organique du 8 juillet 1976 des centres publics d'action sociale, art 58, MB, 5 August 1976, 9876 (in its version prior to its modification by law of 22 February 1998).

A decision handed down by the Supreme Court on 10 April 2014 provides an interesting application of it. In this case, the college of the mayor and aldermen did not issue a decision about a planning permit within the time limit[8] set by law. The Court of Appeal considered that the failure to comply with the deadline did not constitute a wrongful act on the part of the public authority. The Supreme Court dismissed the appeal, holding that it is for the trial judge to assess whether the failure to meet a deadline, imposed by the legislator without any sanction being attached to it, in itself constitutes an unlawful act by reason of the nature and purpose of that deadline, taking into account, in particular, the terms on which the obligation is imposed, its scope and purpose.[9] Searching for the *ratio legis* 'hidden' behind the adoption of the rule ultimately equates to verifying the protective purpose of the conduct norm breached. **9**

8. The Netherlands

Hoge Raad (Supreme Court of the Netherlands), 13 April 2007

NJ 2008/576, case note *JBM Vranken* (Iraanse vluchteling)

Facts

A political refugee from Iran applied for refugee status, which was denied. After five years of proceedings, the denial was decided to be unlawful and the refugee claimed compensation of loss of income during the five years she could have worked, had the refugee status been permitted correctly. The appellate court ruled that the right to work is an interest that is also protected by admission as a refugee. It argued that the admission as a refugee also serves to enable the refugee to build a new life and it also referred to art 17 of the Refugee Convention, which grants lawfully residing refugees the right to perform paid work. **1**

Decision

The Supreme Court ruled that the right to perform paid work in the Netherlands arises from admission as a refugee and only arises after one has been admitted as a refugee in the Netherlands. Admission is based on humanitarian reasons, in order to protect the refugee from persecution in the country of origin. It does not serve to protect any patrimonial interests of the refugee. The interest of the refugee to be able to earn income from work plays no role in the assessment of admission as a refugee and the State should not take this into account in its decision regarding whether or not to admit an individual as **2**

8 Seventy-five days as prescribed in art 52, § 1er of décret du 22 octobre 1996 relatif à l'aménagement du territoire, MB, 15 March 1997, 6105.

9 Cass, 10 April 2014, Pas 2014, 949.

a refugee. If the State has violated a procedural rule in the admission procedure, the applicant has access to the court to have the violation remedied. In principle, however, this violation does not entitle an individual to compensation for damage as claimed here: the interest to earn income from paid work is not protected by the norm violated.

Comments

3 This case is a clear illustration of limiting liability on the basis that the norm breached does not aim, or is extended, to protect the interest at stake. In this case, it was clear the person of the claimant was protected by the norm, but it was ruled that the *interest* to earn money was not. Article 6:163 BW provides for this distinction.[1]

Hoge Raad (Supreme Court of the Netherlands), 19 July 2019, ECLI:NL:HR:2019:1278

NJ 2020/391, case note *J Spier* (Prejudiciële vragen aardbevingsschade)

Facts

4 Due to gas extraction in the area of Groningen over decades, the area came to suffer from earthquakes. Many inhabitants suffered damage to their houses and stress. Article 6:177 BW holds mining companies liable for damage resulting from mining. The mining company may, however, also be liable on the basis of fault (art 6:162 BW). A district court asked preliminary questions (*prejudiciele vragen*) of the Supreme Court. One of the questions raised was whether the strict liability of art 6:177 BW differs in scope from tortious liability (art 6:162 BW).

Decision

5 Article 6:177 BW contains a strict liability of the operator of a mining work. For the application of art 6:177 BW, it is irrelevant whether the loss resulted from unlawful and imputable behaviour of the operator. The nature of liability is one of the factors to be taken into account when determining the extent of the obligation to pay damages. However, it cannot be inferred from this that the scope of an obligation to compensate damage based on strict liability is generally smaller or greater than that of an obligation to compensate damage based on art 6:162 BW. The consequences for the scope of the obligation to compensate damage that is based on strict liability depends on the nature and scope of the strict liability at stake. The nature and scope of art 6:177 BW mean that, in the case of liability based on that provision, a broad attribution of damage on the basis of art 6:98 BW takes place, even if the liability cannot also be based on art 6:162 BW.

1 See above 1/8 no 1ff.

Comments

In the light of earlier cases[2], it was argued that the scope of protection of strict liability is, in general, smaller than the scope of liability based on fault and that the chain of causal attribution (art 6:98 BW) would be limited to 'typical consequences' of an event covered by such strict liability. In this case, the Supreme Court takes a much more nuanced approach: what the scope of protection is depends on the nature of the strict liability in question. Depending on the specific provision of strict liability, it may have a broad scope of protection, justifying broad attribution in the sense of art 6:98 BW. This case illustrates the relevance of the nature of liability for causal attribution. It also illustrates the close relationship between art 6:98 BW (causal attribution) and art 6:163 BW (scope of protection). **6**

9. Italy

Corte di Cassazione (Court of Cassation) 22 November 2013, no 26239

Dejure, online

Facts

In an accident between a car driven by C and a moped driven by A, the claimant V, who was being illegally transported on the moped, suffered personal injuries. V sues A, the driver of the moped (and the car driver C, not relevant here). **1**

Decision

According to the *Corte di Cassazione*, the driver of the moped is not liable for the injuries suffered by V, who was sitting, illegally, on the rear part of the moped. This decision is in accordance with the consolidated principle that a failure to comply with the traffic laws (*Codice della Strada*), although involving administrative sanctions, is not in itself sufficient to establish liability for the harmful event, where this is not causally linked to the violation. **2**

Comments

According to the *Corte di Cassazione*, a violation of traffic laws which relate to the number of people who can travel on a moped is not causally connected with the injuries that the person who was actually being transported in violation of the traffic laws suffers in the case of an accident. Despite several cases that tackle these issues, scholars stress that the doctrine of the purpose of the protective norm is very fact-specific and that it is dif- **3**

2 Eg Hoge Raad 13 June 1975, ECLI:NL:HR:1975:AC3080, NJ 1975/509, case note *GJ Scholten* (Amercentrale).

ficult to elaborate a broader operative theory, which should go beyond the specific facts of each case.[1]

4 One doubt that is not clarified by the Court still remains: what is the precise purpose of the norm that prohibits two persons from riding on one moped?

10. Spain

Tribunal Supremo (Supreme Court) 17 May 2007

RJ 2007\3542

Facts

1 A1 was a guard of a private security company, A2, and since A2 did not have a gun cabinet or safe deposit box, A1 usually took home the revolver he used for work. A1 had problems with his partner, V, and one day A1 lost control, shot V dead with his working revolver and injured V's sister. In criminal proceedings, A1 was convicted, but A2 was acquitted of subsidiary civil liability in accordance with the provisions of the Criminal Code dealing with civil liability. However, V's next of kin filed a civil lawsuit against A2 on the grounds of the general clause of liability for fault (art 1902 CC). The First Instance Court ordered A2 to compensate V's relatives for fatal and V's sister for the personal injuries they had suffered, and the Court of Appeal confirmed the judgment. A2 filed an appeal in cassation arguing that the judgment of the Court of Appeal infringed case law on causation and several criteria regarding scope of liability (such as adequate causation or *novus actus interveniens*). The Supreme Court rejected A2's appeal and confirmed the judgments of instance.

Decision

2 Of these various criteria, some of which are listed by the first instance and appeal judgments, the so-called 'protective purpose of the norm grounding liability' and 'increased risk' justify the existence of legal causation. If the defendant company had complied with the regulations, it would have prevented the availability of the weapon and the increased risk derived from the possibility that it could be issued privately. Article 10.4 of Royal Decree 6291/1978, of 10 March, on surveillance and security (which was in force when the damage was caused) provided that 'the entities or companies will purchase weapons that will be of their ownership, and will be delivered to and collected from the guards at the beginning and end of their service, being, as long as they are not used, in safes or gun cabinets that meet sufficient security conditions, in the opinion of the *Guardia Civil*, who, in any case, may set the minimum conditions. In no case may the guard

1 *M Bussani*, L'illecito civile (2020) 652.

carry the weapon, which has been assigned to him, outside his service hours, and the companies or entities for which they work will be responsible for fulfilling this obligation'. Therefore, there has been an omission of the duty of care that operates as a causal contribution, and with sufficient importance, so that the employee's action does not exclusively absorb the causation, and this amounts to the exclusion of the doctrine of the 'prohibición de regreso' (*novus actus interveniens*) quoted in the motive.

Comments

Spanish case law and legal writing connect the criterion of the protective purpose of the rule with liability for fault easily when there is a specific statute or regulation ordering or prohibiting certain conduct which has been violated by the tortfeasor. However, it is much more difficult to relate it to general cases of fault liability[1], where there is no such rule, and to strict liability. In the latter case, some authors also contend that the notion of the protective purpose of the rule is not yet part of the usual Spanish legal toolbox when dealing with strict liability.[2] **3**

When liability for fault is at stake, and a norm establishes the standard of care, its infringement, in principle, gives rise to fault. In this case, the doctrine of the protective purpose of the rule allows the defendant to prove that the victim, or the legal interest infringed, does not belong to the class of victims or interests that the provision intends to protect. Therefore, one cannot invoke the infringement of a norm, whose purpose is not to protect a particular type of victim or legal interest in order to attribute the harmful result to the agent. Even if the rule contemplates more than one risk, it never covers all possible risks.[3] **4**

In cases of a lack of specific protective rules or regulations, some authors point out that the criterion of the protective purpose of the rule works relatively well for criminal law since the principles of legality and typicity govern it, but that its application in the **5**

1 *R de Ángel Yagüez*, Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 254.

2 *X Basozábal*, Responsabilidad extracontractual objetiva: parte general (2015) 108.

3 *P Salvador Coderch*/*A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, 15f. The issue has been discussed at length in the context of auditors' liability, where sometimes they have not been held liable because the cause of the harm on which the trial court had based the conviction went far beyond the scope of protection of the rules infringed by the auditor (STS 9 October 2008 [RJ 2008\6042], commented on by *J Ribot*/*A Ruda*, Spain, in: H Koziol/BC Steininger (eds), European Tort Law 2008 (2009) 597, nos 6–15), whereas in other cases it was considered that this criterion of imputation was met because the protective purpose of the Audit Act 1988 was 'to protect third parties, whether they are shareholders or creditors of the company' (STS 5 March 2009 [RJ 2009\1631]). See also STS 21 November 2009 (RJ 2009\1631), dealing with defective labelling of an insecticide where 'the purpose of the norm concerning the missing warnings aimed at avoiding poisoning by contact, inhalation or ingestion, not the risk of inflammation of the substance, which was indeed included in the warnings and was the one that materialised'.

field of civil liability is much more complicated. Civil liability does not aim to forbid typified conduct and, in most cases, the wrongful conduct simply violates the general '*alterum non laedere*' rule.[4] Against this opinion, it can also be argued that, in these cases, fault does not operate in a vacuum and that the standard of conduct to which a reasonable person must conform always seeks to protect specific interests from suffering certain types of damage. Therefore, whenever a duty of care is established, one should ask what types of harm the rule is trying to prevent.[5]

6 Legal writing considers that the criterion of the protective purpose of the rule plays a more significant role in strict liability, as it works as a tool to 'filter' the issue of liability, since the key point here is to decide whether the harm lies within the scope of protection of the norm.[6] (see 6/10 below, 'Sufficient connection to the target risk').

11. Portugal

Tribunal da Relação de Lisboa (Lisbon Court of Appeal) 10 September 2019[1]

922/15.4T8VFX.L1-7

Facts

1 V was diagnosed with legionella. As he worked and lived in an area where several enterprises operated with chemicals in its facilities where refrigeration towers are prone to legionella outbreaks, he tried to take legal action against the company to whose refrigeration tower the outbreak was linked, in order to obtain damages for the losses resultant from his prolonged hospitalisation, loss of income and non-pecuniary damage.

Decision

2 Legal proceedings by the injured party V were underpinned on the alleged fact that the business had not followed legal recommendations set by the Government to avert environmental losses such as propagation of infectious bacteria. V invoked that the legal norms that contained these recommendations were legal provisions intended to protect the interests of others. Breaching these legal provisions, according to the Portuguese Civil Code, results in civil liability (art 483/1). That being said, the Court found that the interests the provision aimed to protect were not the interests concretely infringed upon

4 *R de Ángel*, Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 254.

5 In this sense, *S Cavanillas Múgica*, Comentario de la STS 11 de marzo de 1988, CCJC 17 (1988) 379–388.

6 *X Basozábal*, Responsabilidad extracontractual objetiva: parte general (2015) 81ff.

1 <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/585bea543fc4f68180258479003567a0?OpenDocument>.

by the company in the specific case at hand. Therefore, although admitting that the losses suffered could have been averted had the company adopted stricter policies (to which, under the law, it was not required to), the Court determined that no legal provision had been issued at the time to protect injured parties such as V, and the company could not be deemed liable in this case.

Comments

Violation of legal provisions intended to protect the interests of others is one of the three **3** main sources of unlawfulness[2] that lead to non-contractual liability and is set out in art 483/1 of the Civil Code. When this body of laws refers to legal provisions, it does not limit this category to legal norms in a technical sense – strictly to parliamentary laws and government issued laws – but extends its meaning to hierarchically inferior regulations and decrees. Also, these legal provisions are not necessarily contained in civil law ordinances: very often they are public law norms[3] (administrative and criminal law provisions). One of the characteristics of these provisions is the fact that they contain, as the name would suggest, a specific purpose of protection of private interests. This protection has to be conferred directly by the norm, and it may not derive indirectly from its content, if it is to be labelled as a *norma legal de proteção*. As the doctrine[4] describes, in order for unlawfulness to be derived from violation of these provisions, three conditions have to be met: firstly, a circle has to be drawn to clearly delimit the perimeter of private interests protected by the provisions; secondly, the violation of the provision has to arise from the fact that the tortfeasor did not follow the rule contained in the norm, and, most importantly, the losses suffered by the injured party must fall within the circle of private interests that the provision intends to protect. This is the most difficult precondition to apply: in the case before us, the injured party resorted to provisions included in Decree-law no 79/2006 (4 April). According to the Court, the articles invoked are concerned with the health and well-being of those who work or live in facilities with these refrigeration devices. References made to the external environment were mostly related to air quality and pollution. The same goes for DL no 118/2013, which replaced DL no 79/2006: no references to public health, epidemics or legionella[5] are made in either of the ordinances. This resulted in the Court deciding that unlawfulness could not be established from a violation of these provisions.

2 This source of unlawfulness was a new addition in the Civil Code of 1966 and thus, considerations regarding its nature and applicability are relatively recent in the Portuguese legal framework.

3 *F Albuquerque Matos*, Ilicitude Extracontratual (umas breves notas), in: Novos Olhares Sobre a Responsabilidade Civil, Centro de Estudos Judiciários (2018) 11ff.

4 *Antunes Varela*, Das Obrigações em geral, vol I (2000) 536–542.

5 This has since changed: Law no 52/2018 (20 August) is currently in force and lays down the measures for the prevention and control of legionella.

Tribunal da Relação do Porto (Porto Court of Appeal) 25 October 2018[6]

1565/11.7TBSTS.P1

Facts

4 The claimant, V, was seriously injured as he exited his apartment building's lift. The lift, having reached V's apartment floor, came to a halt. As V exited, he tripped and fell, as the lift had stopped above the landing.

Decision

5 Companies responsible for lift maintenance are required by law to ensure that lifts are equipped with mechanisms that avert situations where they stop above or below landings (ensuring that the door may not be opened in these instances), which were not installed in this case. The Court deemed that such provisions are aimed at protecting the private interests of those who ride the lift, and therefore this was a clear case of non-contractual liability for a violation of the general provision contained in art 483/1. The tortfeasor (maintenance company) was liable for damages, despite there not being a specific law it had violated: according to art 486 of the Civil Code, omissions give rise to an obligation to make reparation for damage where, regardless of any other legal requirements, there was a duty, by law or by virtue of a legal act, to take the action which was omitted.

Comments

6 The Court confirms doctrinal and jurisprudential orientations on the matter: in order for a tortfeasor to be liable for breaching conduct norms, the Court has to ascertain whether the conduct norm breached has the specific purpose of protecting the private interest harmed by the tortfeasor, thus subjecting the norm to a teleological interpretation. It is interesting to note that, according to scholars,[7] there has not been much jurisprudence on violations of legal provisions intended to protect the interests of others in Portugal. Whilst in both cases presented the legal provisions amounted to laws and decree-laws, which do not raise questions as to their authority, as they are the direct product of elected institutions, some authors take a strict view regarding the nature of these provisions, requiring that they are formally and materially laws, which would imply that they must necessarily be issued by organs of the State.

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6 <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/d092eb97619b4b1c80258377005602d7?OpenDocument>.

7 *A Menezes Leitão*, A Responsabilidade Civil por violação de normas de protecção no âmbito do código de valores mobiliários, in: Responsabilidade Civil – Cinquenta anos em Portugal, Quinze anos no Brasil, vol II, Instituto Jurídico FDUC (2018) 7–16.

12. England and Wales

Gorris v Scott, Court of Exchequer, 22 April 1874

(1874) LR 9 Ex 125

Facts

The defendant shipowner agreed to transport the claimant's sheep from Hamburg to Newcastle. The sheep were carried on the deck of the ship and during a storm many of them were washed overboard and lost. The claimant sued the defendant, relying on the breach of an order made by the Privy Council in pursuance of the Contagious Diseases (Animals) Act 1869. This order required that when sheep or cattle were brought to Britain by sea, the place on the ship occupied by the animals must be divided into pens of certain dimensions and the floors of these pens furnished with battens or footholds. It was assumed, for the purposes of a demurrer (an application to strike out the claim) that if the defendant had complied with the order, the sheep would not have been lost. **1**

Decision

The Court of Exchequer held that the claim as pleaded disclosed no cause of action because the purpose of the order had been to prevent overcrowding, and thereby the spread of contagious disease, and not to protect animals against perils of the sea. According to Kelly CB, the action might have been maintainable 'if it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard', but it was clear that 'there was no purpose, direct or indirect, to protect against such damage'.[1] The damage complained of being 'something totally apart from the object of the Act'[2] the action could not be maintained. **2**

Comments

This case is taken to stand for the proposition that in a breach of statutory duty action, one of the purposes of the legislative norm that has been violated must have been to protect against the kind of damage or loss for which the claim is brought.[3] In a later case, for example, it was held that a worker who suffered frostbite in his toes could not recover damages from his employer for failing to comply with a statutory duty to provide him with steel-capped boots because the duty was aimed at the risk of damage by crushing, not cold.[4] **3**

1 *Gorris v Scott* (1874) LR 9 Ex 125, 129.

2 (1874) LR 9 Ex 125, 129.

3 *J Goudkamp/D Nolan*, Winfield & Jolowicz on Tort (20th edn 2020) §§ 8-017.

4 *Fytche v Wincanton Logistics plc* [2004] UKHL 31, [2004] ICR 975.

South Australia Asset Management Corporation v York Montague Ltd, House of Lords, 20 June 1996

[1997] AC 191

Facts

4 In three cases, the defendant valuers had provided valuations of properties on the security of which the claimant commercial lenders had subsequently made loans. The defendants had considerably overvalued the properties, and the loans would not have been made if the valuations had been accurate. The borrowers defaulted on the loans, and in the meantime the property market had collapsed, which greatly increased the losses sustained by the claimants. The claimants successfully sued the defendants for negligence and breach of contract, and were awarded damages for all the losses they had suffered as a result of entering into the loans, including those attributable to the market fall. The defendants appealed to the House of Lords.

Decision

5 The House of Lords held that the defendants were not liable for the losses caused by the fall in the property market. Where a person was under a duty to take reasonable care to provide accurate information to help another person to decide what course of action to take, the former was, if negligent, responsible not for all the foreseeable consequences of the course of action taken, but only for the foreseeable consequences of the information being wrong. It followed that, in the instant cases, the measure of damages was limited to the loss attributable to the valuations being wrong, in other words the loss the claimants suffered because they had less security than the valuations suggested they would have. According to Lord Hoffmann, it must be shown in any claim for breach of a legal duty that it was a duty in respect of the kind of loss suffered by the claimant, with the scope of the duty being determined by the purpose of the rule imposing it. Where the duty was to take care in providing information, the purpose of the duty was to ensure that the information was accurate, and hence the liability was limited to losses arising from the fact that it was not. By contrast, if the duty breached was to take care in advising the claimant as to what course of action to take, then the defendant would be liable for all the foreseeable loss which was a consequence of that course of action having been taken.[5]

5 For such a case, see *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All ER (Comm) 929. The distinction between 'information' and 'advice' cases is not always obvious.

Comments

Although the facts of the three appeals in this case were complex, the underlying principle applied by the House of Lords was simple, namely that, in general, 'the law limits liability to those consequences which are attributable to that which made the act wrongful'.[6] Lord Hoffmann illustrated that principle by means of the following example: **6**

> 'A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering, but has nothing to do with his knee.'[7]

Applying the usual principle, Lord Hoffmann said, the doctor is not liable, because the injury would have occurred even if his advice had been correct. The reasoning in the case which has come to be known by the acronym *SAAMCO* has been attacked by some commentators,[8] but it accords with the risk principle, since what made the valuations negligent was the risk of the claimants lending money with inadequate security, not the risk of a market fall. A challenge to *SAAMCO* was recently rebuffed by the Supreme Court, with Lord Sumption commenting that the decision had 'often been misunderstood, not least by the writers who have criticised it'.[9] It has also recently been held by the Supreme Court that the *SAAMCO* principle applies in the medical negligence context.[10] **7**

Chester v Afshar, House of Lords, 14 October 2004

[2005] 1 AC 134

Facts

The defendant neurosurgeon negligently failed to warn the claimant patient of an inherent risk of nerve damage in a proposed surgical procedure. The claimant went ahead with the procedure, which was conducted with due care, and the risk in question eventuated, with the result that the claimant was left disabled. The claimant sought damages **8**

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6 *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191, 213.

7 Ibid, 213.

8 See, eg, *J Stapleton*, Negligent Valuers and Falls in the Property Market (1997) 113 LQR 1.

9 *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599 at [34].

10 *Meadows v Khan* [2021] UKSC 21, [2021] 3 WLR 147. A doctor negligently failed to refer a patient for a test to establish whether she was carrying the haemophilia gene. Had the doctor done so, the patient would have realised that she was carrying the gene, and taken steps to avoid having a child with the condition. When the patient later had a child who suffered from both haemophilia and autism – the two conditions being unrelated – the doctor was liable only for the loss associated with the haemophilia, and not for the loss associated with the autism.

in negligence for her disability. The trial judge found that, if the claimant had been warned of the risk, she would have taken longer to reach a decision, but there was no finding that, if warned, she would never have agreed to the procedure. As there was only a 1–2 % likelihood of nerve damage on any given occasion, and as the risk would have been the same regardless of the timing of the procedure, it could be assumed that, on the balance of probabilities, the risk would not have materialised had the procedure taken place at a later date. The claimant succeeded at trial and in the Court of Appeal. The defendant appealed to the House of Lords.

Decision

9 The House of Lords held by a 3:2 majority that the claimant could recover damages for her disability. The difficulty with her claim was identified in the dissenting speech of Lord Hoffmann. He said that the purpose of the doctor's duty to warn of a risk inherent in a proposed procedure was to give the patient the opportunity to avoid or reduce that risk. It followed, he argued, that if the evidence showed that the patient would not have taken that opportunity, then he or she could not logically complain about the consequences of the risk materialising. However, according to the majority, since the injury fell within the scope of the defendant's duty to warn and represented the materialisation of the very risk of which she should have been warned, a 'narrow and modest'[11] departure from traditional causation principles was necessary to vindicate her autonomy interest and give appropriate recognition to her right to make an informed choice. According to Lord Hope, if this were not done, the duty to warn would be rendered hollow: it would have 'lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence'.[12]

Comments

10 Applying orthodox remoteness principles, as set out in the *SAAMCO* decision discussed above, the claim should have failed, for the reasons given by Lord Hoffmann. This was not denied by the majority, but, in their view, a departure from those principles was appropriate in this scenario. The reasoning in this case is replete with references to 'causation', even though causation in fact (the 'but-for' test) was clearly satisfied, and there was no suggestion of any *novus actus interveniens*. This demonstrates the tendency of English judges to elide questions of causation and remoteness. The case also shows that the courts are willing to depart from conventional principles governing the limits of liability where they deem it appropriate to do so, although the decision is controversial, and commentators have questioned whether it was justified by the autonomy interests

11 *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [24] per Lord Steyn.
12 Ibid, [87].

at stake.[13] In particular, it has been argued that if the purpose of imposing liability in such a case is to provide adequate protection to those interests, then it would be more appropriate to award the patient a modest *solatium* for the infringement of his or her autonomy – an idea Lord Hoffmann floated in his dissenting speech, albeit without much enthusiasm – rather than damages for the physical injury sustained.

13. Scotland

Grant v National Coal Board, House of Lords, 8 March 1956

1956 SC (HL) 48, 1956 SLT 155, [1956] AC 649

Facts

A small railway truck carrying miners along a stretch of track derailed when it struck a piece of stone which had earlier dislodged from the roof of the mine and landed on the track. V, one of the miners travelling in the truck, was injured by the derailment. He raised an action against A, his employers, based upon their alleged breach of sec 49 of the Coal Mines Act 1911. That section provided that, in relation to mines, 'the roof and sides of every travelling road and working place shall be made secure'. At first instance, the judge found for V. That judgment was overturned on appeal to the Inner House of the Court of Session. V further appealed to the House of Lords. A argued that sec 49 was only intended to protect miners against injuries sustained directly from rock falling from the roof. **1**

Decision

The House of Lords reversed the judgment of the Inner House, finding in favour of V. It held that: (1) where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish two things, first that the breach is intended not only to attract a penalty but also to ground civil liability to a class of persons of whom the pursuer is one, and secondly, that the injury was one against which the legislation was designed to protect the pursuer; (2) the first of these tests was undoubtedly satisfied in this case, it being accepted that, in order to safeguard employees' welfare, a civil action for damages can be based upon a breach of sec 49 of the 1911 Act; and (3) there was no discernible intention on the part of the legislator to limit liability for injuries caused through breach of the provision to those caused by a specific mechanism. As no *novus actus interviens* separated A's breach of the provision from the harm caused, they were responsible for V's injuries. **2**

13 See, eg, *T Clark*/*D Nolan*, A Critique of *Chester v Afshar* (2014) 34 OJLS 659.

Comments

3 The principal issue raised in this case was similar to that raised in the English case of *Gorris v Scott*, discussed in the English and Welsh section in this volume.[1] As in *Gorris*, the fundamental question was: what was the purpose for which the statutory provision had been enacted, or – to put it another way – what kinds of injury had been intended to be covered by the protective scope of the provision? The House of Lords distinguished the outcome in *Gorris*, on the basis that the injury suffered in that case (livestock being washed overboard) was quite different to the type of injury intended to be caught by the provision (the spread of disease). In this case, the type of injury envisioned by the statute had indeed materialised, it was merely the mechanism by which the injury had been caused (a derailment rather than the direct striking of the victim by rock) which differed.

4 The approach of the House of Lords was, as in other cases concerning the interpretation and application of a statutory provision, to attempt to ascertain the 'intention of Parliament' in passing the section in question. Their Lordships' view was that, given the overall purpose of the section was to safeguard the welfare of mineworkers, there was no reason to impute to Parliament any intention to limit liability to personal injury caused by some sorts of mechanism but not others. That seems a sensible and reasonable interpretative approach, consistent with a societal and parliamentary desire to encourage safe working practices and workplaces. It might also be said that the lack of concern shown by the court to the precise mechanism by which the injury was caused is consistent with the approach taken in the earlier discussed case of *Hughes v Lord Advocate*.[2]

Bristol & West Building Society v Rollo Steven & Bond, Court of Session (Outer House) 3 April 1997

1998 SLT 9

Facts

5 V, a financial institution, undertook to loan to a third party a sum of money to enable the third party to purchase a house. V instructed A, a firm of lawyers, to act on their behalf in connection with the loan transaction and the granting of a security over the property. The contract between V and A included a stipulation that, should the third party default on repaying the loan, V would be able to obtain vacant possession of the property. Following the provision by A of a report on the property, V decided to make the requested loan to the third party. When the third party defaulted on the loan, V was unable to obtain vacant possession of the house because it discovered that a sitting tenant (not the

1 *Gorris v Scott* (1874) LR 9 Exch 125, discussed at 3/12 nos 1–3.

2 See earlier discussion of this case at 2/13 nos 1–6.

third party) was in possession of it. Eventually, V negotiated a sale of the property to the sitting tenant, though the sale proceeds did not cover all of V's claimed losses.

V raised an action for breach of contract and in delict for negligence against A, ar- **6**
guing that A ought to have informed V of the sitting tenant in the property report. The parties were in dispute as to the scope of the duty which A was under – whether a duty to provide information for the purpose of enabling V to decide upon a course of action *or* a duty to advise V as to what course of action it should take – and thus as to the extent of the losses falling within the scope of that duty for which A might be liable.

Decision

The court found for V, holding that A's duty had been to advise what course of action to **7**
take: 'they must have known that, as a result of their report, the pursuers would immediately release the loan funds to the borrower. This ... was not simply providing advice: it was, in effect, advising the pursuers to take a certain course of action, namely to lend a certain sum to the borrower on the security of the property'.[3] The judge found that all of the financial losses claimed were reasonably foreseeable consequences of V's being placed by A in the predicament of having to attempt to realise their security in a property where there was a sitting tenant with security of tenure.

Comments

This judgment exemplifies the point that the nature of the delictual duty which a party is **8**
under (or, to use the language of this section of the report, what the protective purpose of the duty was) will determine what losses can be recovered in the event of breach of the duty. In this case, the ability of V to recover all of the forms of consequential financial loss claimed – not simply the difference between the sum lent and the sale proceeds of the house, but also a sum representing the loss of use of the sum lent (which would have been profitably diverted elsewhere had it not been advanced to the third party) as well as buildings insurance costs and legal and estate expenses – depended upon the success of the argument that A had breached a duty to advise V on a particular course of action (to lend the sum to the third party): if that were so, all of the losses claimed could be attributed to the breach of a duty having that specific scope. That argument was successful before the court, none of the losses claimed being viewed as merely coincidental losses, unrelated to the breach of duty.

In his judgment, the judge made reference to the analysis of the scope of liability **9**
question advanced by Lord Hoffmann in his speech in the House of Lords' decision in *Banques Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (otherwise referred to as *South Australia Asset Management Corp v York Montague Ltd*), discussed in the English

3 1988 SLT 9 at 12.

and Welsh section of this volume.[4] Lord Hoffmann's speech in that case is the source of the famous example of the injured mountaineer, through which example his Lordship developed an analysis of liability for consequences of a breach of duty which are unrelated to the risks which the duty is intended to guard against. Lord Hoffmann's view was that the manifestation of risks unrelated to the scope of the broken duty ought not to give rise to liability. In this Scottish judgment, the same approach was taken: happily for V, it was held that *all* of the losses were recoverable, given the nature of those losses and the scope of the duty which had been broken.

Robb v Salamis (M & I) Ltd, House of Lords, 13 December 2006

[2006] UKHL 56, 2007 SC (HL) 71, [2007] 2 All ER 97

Facts

10 The pursuer, who worked on an oil rig, was injured when a ladder suspended from the side of his bunkbed became dislodged while he was climbing down it. He claimed damages from the defenders, his employer, arguing that they were in breach of the Provision and Use of Work Equipment Regulations 1998. These regulations provided that every employer should ensure that work equipment was (i) so constructed or adapted as to be suitable for the purpose for which it was used or provided; (ii) used only for operations for which, and under conditions for which, it was suitable; and (iii) stabilised by clamping or otherwise where necessary for purposes of health and safety.

11 At first instance the judge found that the defenders were not in breach of the Regulations and that, in any event, the accident had been caused wholly or partly by the pursuer's own fault. On appeal to the Inner House of the Court of Session, the court upheld the finding that the defenders had not breached the regulations, adding that, even if they had, the pursuer had been 50 % responsible for his own injuries. The pursuer further appealed to the House of Lords.

Decision

12 The House of Lords allowed the appeal on the point of the defenders' breach of duty, finding that: (i) the aim of the regulations was to ensure that work equipment which was made available to workers could be used by them without impairment to their safety or health; (ii) an employer had to anticipate situations which might give rise to accidents by carrying out an assessment of risk before work equipment was used or provided; (iii) carelessness in the replacement of ladders after use was one of the risks that had to be anticipated and addressed before the defenders could be satisfied that the suspended ladders were suitable and that fixing of the ladders to the bunks by clamping or some

4 [1997] AC 191, [1996] 3 WLR 87. See further, 3/12 nos 4–7 of this volume.

other mechanism was unnecessary; and (iv) the ladder was not suitable for the purpose for which it was used and provided, because its design was such that a person replacing it might not replace it properly due to carelessness and because a fall from an improperly replaced ladder was likely to cause injury. Given these findings, the defenders were in breach of their duty under the regulations. Their Lordships did not overturn the finding that the pursuer had been 50 % contributorily negligent.

Comments

In this case, the House of Lords examined the nature of the risks which the statutory rules under consideration were intended to prevent materialising. They concluded that the risks which ought to have been foreseen given the purpose of the rule in question (to ensure that injuries were not caused by unsafe work equipment) included the risk which had materialised on the facts of this case. As such, even though the court did not frame the matter in precisely this way, this judgment can be described as one where recovery was permitted because the harm fell within the protective purpose of the rule. The outcome might well have been different had, for instance, the pursuer slipped on some oil or grease which had not been cleaned from the ladder: in those circumstances, while such an injury might have been encompassed by a protective purpose related to the cleanliness of the ladder, it would be unlikely to have been sufficiently connected to a purpose concerning the equipment's suitability for use, the operations for which it could be used, or its stability. **13**

14. Ireland

Kennedy v Hughes Dairy Ltd, Irish Supreme Court, 22 July 1988

[1989] ILRM 117

Facts

V was employed by A as a forklift driver and his job included carrying crates of bottles and tidying up broken bottles. This posed a risk to V that his hands or forearms might get cut. The provision of a pair of gauntlets would have protected him, but were not provided. The plaintiff's forearm was injured by broken glass when he stepped on the neck of a broken bottle, fell and dropped the crate of bottles he was carrying. The trial judge in the IEHC withdrew the case from the jury on the basis of insufficient proof of negligence. V appealed. **1**

Decision

The IESC, by a two to one majority, allowed the appeal and ordered a retrial. The majority found that there was sufficient evidence to allow a finding that A was negligent and **2**

that the injury suffered was within the range of foreseeable consequences,[1] but the reasoning of the two judges differed. Hederman J felt there was sufficient evidence for a jury to regard the injury as a cut to the arm, which was within the class of injury that was foreseeable and which a gauntlet would have protected against.[2] McCarthy J felt there was sufficient evidence on which a jury could regard injury by falling as reasonably foreseeable and that the hands and forearms were most vulnerable to injury in such a case and could be easily protected. He expressly declined to express any opinion on situations where the injury differed from that which the defendant was required to protect against.[3] Finlay CJ, dissenting, drew a distinction between injury by falling and injury by handling, finding the former was the one which occurred and was not reasonably foreseeable. He noted that the injury by falling could have affected any part of the plaintiff's body and that it was merely coincidence that the part affected would have been protected if precautions had been taken against a different type of injury. He also felt that whole body protection or upper body protection would not have been reasonably expected of the employer.[4]

Comments

3 All three judges took account of whether the injury that occurred fell within the protective purpose of the precaution suggested by V, but each took a different view of what the protective purpose was and how it related to the injury suffered. Only one of the three, McCarthy J, considered that it might be possible to extend liability to an injury not covered by the protective purpose, but which would have coincidentally been avoided by the protective measure. This possibility has not subsequently been developed by the Irish courts. In *Dunleavy v McDevitt* the IESC rejected the idea of recovery for an injury differing from the protective purpose of the precautionary measure. Finlay CJ stated:

> I am satisfied that the existence of a reasonable precaution … for the purpose of avoiding one potential though eventually non-existent problem cannot properly be a ground for holding that there was negligence on the part of a surgeon, causative of a totally different danger.[5]

1 The negligence issue was determined in accordance with common law principles on employers' liability, as set out in Bradley v Córas Iompair Éireann (the Irish Transport Company) [1976] IR 217. No statutory provisions on workplace safety equipment were considered.

2 [1989] ILRM 117, 122.

3 [1989] ILRM 117, 123-4.

4 [1989] ILRM 117, 119.

5 IESC, 19 February 1992, 1992 WJSC-SC 371, [1992] 2 JIC 1902. Finlay was delivering the judgment of a unanimous full court of five justices. The omitted piece in the quote refers to doubt in the evidence as to whether the precaution was even needed for the potential risk that did not materialise.

Rosbeg Partners v LK Shields Solicitors, Irish Supreme Court, 18 April 2018
[2018] IESC 23, [2018] 2 IR 811, [2018] 2 ILRM 305[6]

Facts

A acted as solicitors for V when purchasing a property in 1994. After the purchase, A failed to complete the necessary steps for the registration of the plaintiff's title to a portion of the land. V was offered € 10 million for the property in 2007 by C, but the defect in title registration was discovered. The defect was fixed in October 2008, but C reduced his offer to € 6 million. V and C failed to agree and the sale fell through. V sued A for economic loss caused by professional negligence; the IEHC ruled in favour of V in 2013 and awarded just over € 11 million in damages.[7] A appealed; the IECA upheld the trial judge's finding of liability and did not address the amount of damages.[8] A appealed to the IESC.[9] **4**

Decision

The IESC reduced the award to € 5,246,500.[10] The *prima facie* measure of damages was the difference in value between the intended sale that was disrupted by the discovery of the defect and the value at the time when the error 'could reasonably have been remedied'.[11] A's negligence may have been a factual cause of the further losses due to the impact of recession, but was not a legal cause. The scope of the duty was to secure V's title to the property and did not extend to market forces, such as the recession, nor V's decision not to sell at € 6 million. **5**

Comments

The IESC engaged the *SAAMCo* principle on scope of duty,[12] that liability only attaches to losses connected to the purpose or scope of the defendant's duty and any ancillary losses connected to those losses. Losses of a type falling outside the scope of duty that would in- **6**

6 Noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2018 (2019) 299, no 16 ff.

7 *Rosbeg Partners v LK Shields (A Firm)* [2013] IEHC 494 (Peart J). € 8.5 million for the fall in value from 2007 to the time of trial and the remainder for increased tax liability and interest on a bank loan that would have been discharged if the 2007 sale had been completed.

8 *Rosbeg Partners Ltd v LK Shields (A Firm)* [2016] IECA 161.

9 Leave to appeal was granted in *Rosbeg Partners v LK Shields (A Firm)* [2016] IESCDET 143.

10 € 4 million for the difference in price between the higher and lower offers (no other evidence of market value was available) and pro-rata adjustments to the tax and interest.

11 At [34], per O'Donnell J, delivering the judgment of the Court.

12 *Banques Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* (also known as *South Australia Asset Management Corp v York Montague Ltd*) [1996] UKHL 10, [1997] AC 191. The IESC also cited Lord Sumption in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599, at [20]; O'Donnell J, at [33], noted the IESC was using a similar methodology, but not necessarily endorsing the precise methodology of Lord Sumption. See also England and Wales 3/12 no 7 and Scotland 3/13 no 9.

cidentally have been avoided, if the duty had been fulfilled, are not recoverable. This principle was also used by the IEHC in the earlier case of *ACC Bank PLC v Johnston*.[13] That case involved a solicitor's failure to obtain security for a bank in respect of a loan to fund a property transaction. Clarke J held that damages should be confined to the value of the security that should have been in place, less any associated costs the bank would have incurred in realising the security. The bank was not entitled to the full losses incurred in the transaction, as the solicitor's obligation was only to provide security, not to advise on the suitability of the transaction as a whole.

McAnarney v Hanrahan, Irish High Court, 16 July 1993

[1993] 3 IR 492

Facts

7 A, an auctioneer, assumed a duty of care to prospective purchasers of leasehold premises. The auctioneer made negligent misrepresentations about bids received at a failed auction and the cost of acquiring the freehold. V1 and V2 purchased the lease and spent a significant amount on renovating the premises. Some years later they purchased the freehold, but it cost ten times as much as had been represented. The Vs ultimately sold the premises for € 10,000 less that they had spent on acquiring it. The Vs claimed the difference between the freehold price represented and that actually paid, the amount spent on renovations and mental distress.

Decision

8 Costello J held that the normal measure of damages for negligent misrepresentation was the difference between the price paid for the property and the market value, not damages for loss of bargain – ie the purpose of the law was not to put the plaintiffs in the position they would have been in had the representation been true. The loss was assessed as £ 5,000, being the difference between the price paid for the leasehold interest and its market value at the time.[14]

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13 *ACC Bank PLC v Johnston practicing as Brian Johnston & Co Solicitors* [2011] IEHC 108, noted by *E Quill*, Ireland, in: K Oliphant/BC Steininger (eds), ETL 2011 (2012) 316, no 13 ff. See also *KBC Bank v BCM Hanby Wallace* [2013] IESC 32, in this instance, the borrowers would have been unable to provide security, so the IEHC held that it was a 'no transaction case' and the defendant was liable in full. The defendant did not appeal this aspect of the case, but appealed on the issue of contributory negligence. The IESC noted the relevance of the SAAMCO principle to contributory negligence, but found the present risk was within the range of risks that the plaintiff's alleged negligence exposed itself to.

14 Reliable evidence of market value was not available, so Costello J used the price the plaintiffs had been willing to offer before the misrepresentations occurred.

Comments

This may also be seen as a form of 'scope of duty' limitation on recoverable heads of damage. The normal purpose of the obligation to be truthful (or, perhaps more accurately, not to mislead) is to avoid inducing V to pay more than the premises was worth. While the present case concerned a misrepresentation and *Rosbeg* involved the performance of a service, both were aimed at assisting the Vs with acquisition of property and the ordinary scope of duty in such cases is focused on the value of the property at least matching the price paid by V. There may be exceptional cases, where V can show that if there had been no breach of duty, they would not have entered into the transaction at all; in such situations, the measure of damages may be broader, as a wider range of losses can be considered to be within the scope of the duty.[15] **9**

The renovation costs in the present case could not be recovered, as they would have been incurred anyway and so, were not consequential to the initial loss. This aspect of the case (renovation) is a straightforward factual cause issue. On the final head of damage in the present case, Costello J accepted in principle that damages for mental distress could come within the scope of the duty, but found that such distress could not 'be measured in any meaningful way' on the evidence presented.[16] Mental distress has been considered to come within the scope of duty in some pure economic loss cases, such as defective buildings cases.[17] Reasonable foreseeability and general justice considerations are taken into account in such instances. **10**

15. Malta

Joseph Galdes v Victor Micallef – Qorti tal-Appell (Court of Appeal) 20 January 1964

Collected Judgments, Vol XLVIII, Part I, 60

Facts

The plaintiff purchased a lotto ticket from the defendant, a lotto receiver duly appointed by the government-run Public Lotto Department. The defendant entered on the ticket issued to the plaintiff the numbers chosen by the plaintiff on which to place his bet but negligently entered different numbers on the counterfoil retained by him and subsequently forwarded to the department. The applicable regulations stated that it is the responsibility of the staker to ensure that the numbers shown on the counterfoil are correct and correspond with those shown on the ticket. **1**

15 The issue is discussed in *Cantrell v Allied Irish Banks Plc* [2020] IESC 71; the case itself is concerned the limitation of actions (prescription).

16 Ibid, 500.

17 *Doran v Delaney (No 2)* [1999] 1 IR 303, 320 per Geoghegan J (IEHC); *Leahy v Rawson* [2004] 3 IR 1, 23 ff per O'Sullivan J (IEHC).

2 The numbers chosen by the plaintiff were extracted in the draw but when the plaintiff presented his winning ticket to claim the prize of £25, his claim was rejected on the basis that the ticket and counterfoil did not match.

3 Claiming that it was due to the defendant's negligence that his claim was rejected, the plaintiff sued the defendant for the equivalent of the prize which he would have won. Acknowledging his mistake but claiming that the plaintiff was equally at fault for failing to ensure, as required by the regulations, that the ticket and counterfoil correctly corresponded, the defendant offered to pay the plaintiff £12 10s, half the prize money.

Decision

4 The first instance court observed that the requirement that the numbers on the winning ticket should correspond with those shown on the counterfoil was intended to safeguard against fraud. In placing the burden on the staker to verify the ticket and counterfoil, the regulations only regulated the relationship between the staker and the department by placing the responsibility for any disparity solely on the staker. However, the regulations were intended solely to protect the department and could not be relied upon by the defendant. The present case was therefore to be decided solely on the basis of normal tort law principles. The court therefore found for the plaintiff and ordered the defendant to pay the total amount of the prize.

5 The defendant appealed.

6 The Court of Appeal observed that it was doubtful whether this was a case of negligence in tort or of non-performance of a contractual obligation between the parties. However, since the question was whether there was contributory negligence on the part of the plaintiff, and this is governed by the same principles in contract as well as in tort, it saw no need to pronounce itself on this issue.

7 Turning to the merits of the appeal, the court agreed with the first instance court that the lotto regulations were a special law intended solely to protect the Public Lotto Department and could not be interpreted as imposing any obligation on the staker in favour of the receiver. Therefore the defendant could not argue that the plaintiff was in breach of an obligation imposed on him by the regulations. The appeal was therefore dismissed.

Comments

8 Provisions of law intended to protect specific defendants may not be availed of by other defendants. In this particular case, the 'privileged' defendant protected by the relevant regulations was a Government Department; the lotto receiver, being a private citizen, could not avail himself of the same protection. The present case was a straightforward application of the principle.

9 Moreover, the court was not averse to inferring the protective purpose of the regulations even though the regulations themselves did not specifically state that they were to apply only in the context of a dispute between the staker and the department.

M (a pensioner) v Social Security Department – Qorti tal-Appell (Court of Appeal) 17 October 2008

Facts

As a result of an amendment to the Social Security Act, which came into force on 6 January 1996, the plaintiff was entitled to a substantial increase in her Social Security Pension with effect from that date. However, since the increase was to be worked out with a somewhat complex formula and also due to a heavy workload, the Social Security Department continued paying the pension at the old rate and it was only in April 2000 that it calculated the new pension. The difference between January 1996 and April 2000 was paid as a lump sum on 15 April 2000. **10**

That same year, the Inland Revenue Department changed its policy on the assessment of tax on payments of arrears: whereas before 2000 arrears were taxed on a 'when earned' basis, with effect from 2000, they started being taxed on a 'when paid' basis. As a consequence, the arrears paid to the pensioner in 2000 were charged to tax as income for that year rather than spread out over five years, and were consequently charged at a higher marginal rate. The plaintiff's overall tax liability on the arrears increased substantially as a result. **11**

The plaintiff therefore sued the Social Security Department claiming, as damages, the extra tax she had paid. She argued that, had the department started paying her pension at the increased rate when such increase was legally due, ie in 1996, she would have paid tax at a lower rate, because the increase in pension, taken year by year and not as a lump sum for five years, would not have increased her income sufficiently to fall within a higher tax bracket. The Social Security Department claimed that it should be nonsuited because the issue before the court was one of taxation, which fell within the remit of another Department. **12**

Decision

The Magistrates' Court found for the plaintiff. It held that the Social Security Department was guilty of maladministration in taking over four years to assess and pay the proper pension due to the plaintiff; it should therefore compensate the plaintiff for the consequences suffered as a result of administrative mismanagement. The Department appealed. **13**

The Court of Appeal, in confirming the judgment of the Magistrates' Court, observed that this was a straightforward action in tort and the issue was therefore whether: (i) the plaintiff had suffered damage, (ii) whether the defendant had, by his acts or omissions, violated the general principle of *neminem laedere*, 'harm no one', and (iii) whether there was a causal link between the defendant's act or omission and the damage suffered by the plaintiff. There was no doubt that the defendant's failure to observe an express provision of law – payment of the increased pension on the due date – was a wrongful act, and that there was a clear causal link between the defendant's wrongful act and the damage suffered by the plaintiff. **14**

Comments

15 The defendant's plea that the plaintiff's claim relates to taxation, not to social security, and that, therefore, matters relating to different departments should not mix, may be interpreted as a plea that the norm breached by the department – payment of pension on the due date – is intended for social security purposes, ie to ensure that pensioners who depend on their pension cheque should not be left indigent because of late payment, and is not intended as a tool for tax planning purposes. This argument was rejected. In line with the *Galdes v Micallef* case discussed at 3/15 no 1 above, where the protective purpose rule was invoked to defeat the defendant's defence, the judgment shows that the courts do not look favourably on the protective purpose principle as a means of avoiding liability: if the defendant, in conducting himself in a way which is against the law, causes damage to others, he will have to make good that damage irrespective of the purpose of that law.

Valle del Miele Ltd v Raphael Aloisio and others – Qorti tal-Appell (Court of Appeal) 9 July 2020

Writ no 1902/2001

Facts

16 The defendants, an auditing firm, produced an unqualified statutory auditors' report in terms of the Companies Act on the accounts of a company running a supermarket chain (the debtor company). The plaintiff supplied poultry products to the supermarket chain, which was, however, falling behind in its payments to the plaintiff. The debtor company requested a further extension of credit, and the plaintiff, after consulting its financial advisor, agreed to the extension of credit, allegedly relying on the defendants' report.

17 The debtor company eventually defaulted on its payments and became insolvent. Alleging that the company's accounts and defendants' report thereon did not paint an accurate picture of the true financial position, the plaintiff sued the defendants for damages; it claimed that it would not have incurred additional losses by extending the debtor company's credit had it been aware of the company's true financial situation which was not accurately reflected in the unduly 'optimistic' auditors' report.

18 The defendants pleaded inter alia the lack of any legal relationship between them and the plaintiff, and that they owed no duty to the plaintiff.

Decision

19 The first instance court dismissed the defendants' plea, on the basis that the plaintiff's action was not based on contract but on tort. On the merits, the court found that although the defendants had indeed acted negligently in compiling the auditors' report, there was no proximate causal link between the defendants' negligence and the loss suffered by the plaintiff. It therefore dismissed the plaintiff's demands

Both parties appealed: the plaintiff appealed the rejection of its demands and the defendants appealed the dismissal of their plea of the lack of legal relationship between the parties and also the finding of negligence. **20**

The Court of Appeal dealt first with the question of the legal relationship between the parties. It referred to art 179 of the Companies Act, which, at the relevant time, provided that the statutory auditors' report is to be presented to the company's members, and to art 180, which provided that a copy of the audited accounts is to be sent to every member of the company, to every holder of the company's debentures and to all those who are entitled to receive notice of general meetings. This would imply (i) that creditors of the company who are not also debenture holders are not entitled to be sent a copy of the audited accounts, (ii) that the auditors' report is not therefore addressed to them and (iii) that the auditors owe no duty to them. **21**

The Court of Appeal, however, noted further that art 183 of the Companies Act provided that a copy of the accounts and auditors' report is to be registered with the Registrar of Companies who, in terms of art 401, is to provide a copy to whoever requests it. The defendants, being familiar with the affairs of the debtor company, were aware that the plaintiff was a major creditor and they ought to have foreseen that the plaintiff would have a special interest in perusing the accounts and report. Under the circumstances, therefore, the defendants did have a duty also to the plaintiff to ensure that their report was not misleading. **22**

The judgment was therefore confirmed insofar as it had dismissed the defendants' plea of lack of a legal relationship between the parties. **23**

On the merits, the court found that the report did indeed fail to highlight certain particulars in the debtor company's financial situation, which put creditors at risk. It therefore confirmed also that part of the first instance judgment. **24**

Turning then to the question of the causal link between the defendants' negligence and the plaintiff's loss, the Court of Appeal, unlike the first instance court, found that the audited accounts and report had indeed been one of the factors determining the plaintiff's decision to extend further credit to the debtor company. However it held that the plaintiff was also partly at fault, as, before taking the decision to accept the debtor company's request for extended credit, it ought to have made it a condition that the debtor company authorise the defendants as its auditors to provide further information instead of relying solely on the published accounts. **25**

The court therefore overturned the first instance judgment insofar as it had dismissed the plaintiff's claim for damages; however, in view of the plaintiff's contributory negligence, the court ordered the defendants to pay only 25 % of the plaintiff's loss. **26**

Comments

The relevant part of this judgment for our purposes is that which dismissed the plea of lack of a legal relationship between the parties. In effect, the Court of Appeal used the argument of the protective purpose of the rule to extend rather than to limit liability. It ad- **27**

dressed the concern that such an interpretation would create 'a liability in an indeterminate amount ... to an indeterminate class'[1] by expressly stating that the plaintiff belonged to a restricted class, namely existing major creditors, whose interest was known to the defendants at the time when the report was being drawn up. On this reasoning, creditors who entered the scene after the publication of the audited accounts would possibly have failed in pursuing a claim even if, like the plaintiff, they would have relied on the report in granting credit to the debtor company. Although the liability of the auditors is still limited in line with the protective purpose of the statutory requirement of reporting on the accounts, nevertheless that purpose is not interpreted as restrictively as a strict reading of the law would imply. The judgment again seems to suggest that the courts are not likely to give the defence of protective purpose a very favourable interpretation insofar as it serves to limit liability.

16. Norway

Høyesterett (Norwegian Supreme Court) 1 June 1994

Rt 1994, 681

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-1994-50-a?searchResultContext=9132&rowNumber=1&totalHits=1>

Facts

1 An owner of a residential property was very distressed by an offensive smell and the presence of rats from neighbouring premises, which were owned by the municipality. The municipality used the premises to process household waste from the municipality's residents from 1982–1987 and 1988–1992. After some years, the municipality bought the neighbour's property, and the price was not reduced because of the nuisance from the neighbouring premises. The owner was therefore paid compensation for the reduced value of his property. However, the owner claimed compensation for the economic loss due to psychological distress and stress caused by the proceedings against the municipality concerning the offensive smell. As a consequence of the psychological distress, he was paralysed and not able to manage his own affairs. He also had to move from the residential property for some years. As a consequence of his psychological state, the owner was unable to handle his financial affairs in an adequate way for four years – from 1984 to 1987 – which resulted in economic loss.

1 *Ultramares Corporation v Touche*, 174 NE 441 (1932).

Decision

The Court of Appeal decided that the municipality was liable for the psychiatric harm. It noted that the psychiatric harm must be regarded as a foreseeable consequence if a residential property becomes uninhabitable due to an offensive smell. The Supreme Court was of another opinion, and the claim was dismissed. The Court pointed to the preparatory works to the Act relating to the Legal Relationship between Neighbours, and stated that it is doubtful whether the law and the tolerance limit implicit in the basis for liability covered personal injuries at all. The solution had to be found in the ordinary rules on adequacy, also for practical reasons. If the rules on adequacy led to a limitation of liability, it would not be necessary to discuss the tolerance limit in relation to the basis for liability in the Act relating to the Legal Relationship between Neighbours. **2**

According to the Court, there had not been any circumstances in connection with the proceedings that the municipality could be criticised for when the injured party complained to the municipality about the nuisance. Since the psychological harm appeared to stem from a complex interplay of different factors, and the proceedings against the municipality seemed to be an important cause of the injured party's overall condition, the Court considered that the municipality could not have foreseen that the smell in itself would lead to psychiatric injury. The Court also pointed out that the injured party had moved to other premises for a number of years. The length of time the owner had been exposed to the nuisance therefore also seemed to play a role in the Court's overall assessment. Despite this, the Court acknowledged that the injured party had suffered great disadvantages and a significant nuisance in the years he had lived on the premises. **3**

Comments

Personal injury usually enjoys strong protection under Norwegian tort law, stronger protection than other categories of harm. In principle, psychiatric injury is protected to the same degree as other types of personal injury. In this case, however, the basis for liability is the statutory law on nuisance, which implicitly points to damage to property and pure economic losses as core interests worthy of protection. Based on this point of departure, and due to the specific way in which nuisance from neighbouring premises is regulated by the law, personal injury is characterised as indirect harm. Still, the harm might be considered foreseeable if the nature of the nuisance has been statistically proven to cause personal injury. Another point of departure for the foreseeability test could therefore have been to evaluate the capability of the disadvantages – the smell and nuisance – to cause personal injury on a more general level. However, the rules on adequancy in Norwegian tort law require that the alleged cause does not seem too divergent from a normal course of events. In this way, the nature of the psychological distress seemed to influence the assessment of foreseeability regarding the economic loss. One could suggest that the claim would have had a stronger basis had the victim's loss been a consequence of his disability to work instead of his inability to handle his financial affairs. **4**

Høyesterett (Norwegian Supreme Court) 30 October 2018

RT-2018-2080-A

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2018-2080-a?searchResultContext=9092&rowNumber=1&totalHits=1>

Facts

5 A 15-year-old boy with Down's syndrome, who also could not speak, was hospitalised because he had stomach pains and was vomiting. The doctors diagnosed diaphragmatic hernia. He was taken to another hospital in an ambulance and his mother accompanied him. During the journey, the boy accidentally pulled out the gastric tube the doctors had inserted via the boy's gullet to his stomach to prevent pressure on the boy's lungs and heart. The doctor who accompanied the ambulance explained to the nurse and doctor who received him at the second hospital that it was of vital importance to put the gastric tube back in place. The health care personnel never put the tube back, and the boy was put to bed with some analgesic medicine to make him sleep before surgery the next day. His mother slept next to him in a bed.

6 The next morning, the mother woke up and found that the boy was not breathing. He was blue in his face. She immediately called the health personnel, who attempted resuscitation, but without success. It was later ascertained that the boy had died from an acute heart attack due to the diaphragmatic hernia. A medical report concluded that his death could have been prevented had the gastric tube been replaced when the boy arrived at the hospital after the journey in the ambulance. After the incident, the boy's mother suffered from anxiety, depression and a sleep disorder. Due to her health problems, she suffered economic loss. She claimed compensation from the Norwegian System of Patient Injury Compensation, which is enshrined in the Patient Injury Act of 21 June 2001. The organisation processes compensation claims from patients who believe that they have sustained injuries caused by a failure of care by either a private or public health service.

Decision

7 The parties agreed that there was a basis for liability and that the Patient Injury Scheme was strictly liable for the boy's death. Furthermore, the parties agreed that there was a relevant and sufficient causal connection between the failure to replace the gastric tube and the boy's death. It was also accepted that the mother's illness would not have occurred had the boy not died as a consequence of such an extraordinary situation. However, the mother was a third party, and previously the courts had been very restrictive regarding compensation for psychiatric injury in the aftermath of an accident causing a child's death. Compensation had only been awarded in one case from 1960, where the child's death was caused by an extraordinary accident, which exposed the next of kin to exceptional torment. In the specific case, the fault of the tortfeasor had also been

grave.[1] The question before the Supreme Court was therefore whether the mother's psychiatric illness and financial loss were unforeseeable because the harm was too remote and far removed from the normal course of events.

8 Pursuant to the Patient Injury Act and the preparatory works, the ordinary non-statutory rules on adequacy shall apply in cases of patient injury. The Supreme Court noted that public knowledge about psychiatric illnesses, including complex grief reactions, had dramatically increased in the last 50 years. The medical tools for making diagnoses have also become more advanced. Hence, complex grief reactions should be considered more foreseeable than they would have been a few decades ago, also when the reaction is a consequence of a less extraordinary situation, as long as the harmful event has caused psychiatric harm to a next of kin. The Court cited the principle that the tortfeasor must take the injured party as he or she finds him or her, and pointed to the fact that courts should take due regard of the principle, especially in cases concerning the relationship between a parent and a child. The Court argued that legal scholarship on tort law in Norway had, for nearly 40 years, opposed the strict approach that the Supreme Court had developed in cases of psychiatric illness caused by harm to an individual's next of kin. The rules on adequacy – and thereby the foreseeability test – had been applied with less flexibility in this area and thus provided a narrower scope for liability than in other areas of tort law.

9 Pursuing this avenue, the Court emphasised, however, that the type of harm in question called for specific tools for limiting liability, and the Court had to consider the context of the specific field of law. The Patient Injury Scheme is based on longstanding and well-established case law on the rules on adequacy and this practice was of vital importance when the Norwegian parliament decided to fund the schemes for compensating patient injuries and when the scope for determining liability based on statutory rules was later expanded. The draft statutes have drawn the line for the basis of liability against this legal background of ordinary non-statutory rules. Hence, the Court pointed out that the protected category of next of kin should still be a narrow one – an inner circle of next of kin.

10 Still, the Court stated that the time had come for some adjustments, especially as regards the type of situation that caused the injury. However, there had to be some circumstances relating to the harm or the nature of the personal injury suffered by the direct victim that represented a particular burden for the next of kin. Proximity between the psychiatric harm suffered by a parent and the harmful event would be a relevant factor in this assessment. The Court found that the requirements were fulfilled in the specific case, and compensated the mother for the loss due to her psychiatric illness.

1 See Rt 1960, 357.

Comments

11 The case law on nervous shock inflicted on third parties due to injuries suffered by their next of kin has been under debate since the early 1930s. The discussion has always been rooted in the rules on adequacy and not the rules on the assessment of damages as in many other countries. The case law on the protection of this type of harm – nervous shock suffered by a next of kin – has resulted in more concrete criteria upon which to base the assessment of foreseeability than the courts usually apply in most other areas where the rules on adequacy have been found applicable. The case illustrates the strong legislative connection and dependence between the general conditions of liability and the legal tools developed for limiting liability. The connection is especially strong as regards the statutory basis for liability and the ordinary rules on adequacy. The line between the two set of rules is blurred, as the courts sometimes formulate a basis for liability based on what a person in the alleged tortfeasor's position would hypothetically have contemplated. The Court's reasoning shows that the protective purpose of the scheme for patient injury compensation is an independent element of attribution that limits the liability and the tempo at which the scope of the tools limiting liability might be widened in this area of law.

17. Sweden

Högsta domstolen (Supreme Court) 6 February 2008

NJA 2008, 100

Facts

1 Salmonella had spread over a large number of farms, all of which had purchased contaminated feed from a specific producer. The Agriculture Authority ordered (according to the Animal Disease Act) farmers to slaughter their pigs. With the application of the Animal Disease Act, the Authority paid a sum equivalent to € 85 million in compensation for the costs and losses due to this extensive slaughter. The State claimed that the feed producer should pay this sum to the State, because the producer had caused the damage due to the emergency slaughter. The fundamental issue was whether the State had a right of recourse or if the expenses should be seen as having been incurred in the public interest, and therefore not recoverable (such a recourse action presupposes that the producer is liable in the first place). The concept of protective purpose is thereby relevant as a tool to evaluate the combination of norms on the side of both parties.

Decision

2 The Supreme Court emphasised that the control of salmonella is a State matter, but that the compensation provisions regarding victims/farmers cannot mean that the State, in principle, is obliged to cover all costs that the farmers incur because of the Authority's

intervention. The rules in the Animal Disease Act are 'to be regarded as public law in favour of individuals'. According to the Court, compensation for salmonella control may be seen as taken in the public interest, and therefore a task that the State has taken upon itself. The Court referred to a 'general principle' of tort law, namely that the costs of measures that authorities are required to perform may be considered to be of such nature that they are not, without specific legal grounds, to be recoverable. Therefore, the State was denied a right to recovery for the payments to the farmers.

Comments

The interesting aspect of this and similar cases is that the 'purpose issue' must be handled in a dualistic way: not only the conduct norm (for the tortfeasor) but also the purpose of rules on the victim's side must be examined in order to reach a conclusion.[1] Instead of simply focusing on the conduct norm, the wider issue can be discussed as 'the protective purpose of tort law', thereby combining purpose-related values, interests, etc of the parties concerned. There is a general principle that some public spending will remain the responsibility of the State, even in cases when there is a liable individual.[2] The activities in question can, in some sense, be regarded as the protection of public interests, and, therefore, the costs should remain with the State, even in cases where claims could otherwise have been directed against a tortfeasor. In a way, such rules even 'protect' a tortfeasor, and thereby a liability that would otherwise arise does not. When the Supreme Court decided that compensation issues regarding the salmonella control could be seen as 'in the public interest', this can be read as a tendency to extend the area of what can be considered as public interests. Combatting the spread of diseases which can affect the public is undoubtedly a public interest, but the Court indicates that also the compensation arrangements for such measures is a general interest, although this is support for the individual farmers affected by such action (ie the demands upon them to slaughter their farm animals). The interesting point is, however, that in judicial interpretations of security interests, etc, there is a tendency that such interests only seldom entail restrictive readings; this means that argumentation concerning the argument that a specific rule of conduct does not protect this or that interest is almost impractical. Thus, in other cases, the Court can reach the conclusion that the State has a right to recourse claims or claims in tort if the actions or expenditure are related to measures that are of a different nature than the protection of the public interest – and this issue was brought to the Supreme Court some years later in the two cases at 3/17 no 4 below (NJA 2011, 331 I–II). **3**

1 For a presentation of such an analysis of the dualistic perspectives as regards the tortfeasor and the victim, see *H Andersson*, Skyddsändamål och adekvans (1993) 233 ff, 344 ff, 452 ff. Se also *H Andersson*, Gränsproblem i skadeståndsrätten (2013) 52 ff, 140 ff, 276 ff.

2 Concerning this principle, see *H Andersson*, Gränsproblem i skadeståndsrätten (2013) 280 ff; *H Andersson*, Skyddsändamål och adekvans (1993) 529 ff.

Högsta domstolen (Supreme Court) 9 June 2011

NJA 2011, 331 I–II

Facts

4 This joint judgment of two cases (I) and (II) examined the argumentation regarding limitations concerning possible claims of the State when costs incurred in the public interest have been borne by authorities due to a tortfeasor having injured public property. As in NJA 2008, 100, the traditional purpose issue here is discussed in a dualistic frame concerning both parties' protective purposes in a tort law case.

5 In the first case (I), a tanker truck overturned on a bridge and the contents of the tank caught fire, whereby the bridge, as well as an adjacent bridge, were damaged. The cost of repairs amounted to a sum equivalent to € 2.5 million. There is an obligation on the Road Authority to keep roads (and bridges, etc) in a satisfactory condition through maintenance, repair and other measures. The traffic insurer argued that the Authority had an obligation regarding the maintenance of the road, and that compensation therefore should be excluded (ie it was argued that this obligation should protect the tortfeasor).

6 In the second case (II), a car hit a road sign in a town. The municipality incurred costs (a sum equivalent to € 100) to replace the sign with a new one. Similarly to case (I), the objection was put forward that the Authority had an obligation concerning traffic safety, and since the sign regulated the speed limit (and thereby related to traffic safety), it was argued that no compensation claims could be made.

Decision

7 In both cases, the claims led to full compensation. Or in other words – since this analysis focus on the limits of liability and the argumentation against liability – in both cases, the defendants' objections were dismissed. Nevertheless, the Supreme Court maintained the principle that, when the State and other public authorities have duties concerning safety measures as regards society and its members, it ultimately has to bear the costs. The costs for various safety measures that will lead to a reduction of the State's compensation claims are those which 'aim to moderate the direct consequences of an accident or to prevent further accidents because of the increased risk due to the traffic accident'. If the costs have not been incurred as a 'direct result' of such required security measures, the case 'should normally be regarded as a compensable property damage' case.

8 In the (I) bridge case, the Authority had claimed compensation for 'reparation of the bridges, and not for the protective measures due to the accident'. Therefore the Authority had a right to full compensation for the repair costs.

9 In the (II) road sign case, the municipality had claimed compensation for replacing the damaged sign with a new one. The Supreme Court stated that 'the claim cannot be understood as such a safety measure that the Authority in principle is responsible for'; this rationale will below be referred to as (a) 'the nature of the measure'. The Court then

added that this outcome was valid 'whatever the purpose or function of the particular road sign had been'; this rationale will below be referred to as (b) 'the purpose of the measure'. Therefore, the municipality had a right to full compensation for the costs it incurred.

Comments

In these two cases, the borders of the State's claims were brought to the fore. The issue at stake was whether it is the purpose of the combining rules (in tort law and State law) to compensate such costs which the Authorities would otherwise incur. In several earlier cases, claims by different Authorities were denied because the costs in question could be regarded as having been incurred to protect public interests, which the community at large has to bear (see 3/17 no 1 above – NJA 2008, 100). From these two judgments, we can interpret some new nuances as regards the principle in question – ie the above mentioned elements (a) and (b). The Court emphasises that the right to compensation is limited when the Authority has an obligation as regards (a) safety measures in the interest of the public. This means that not all obligations of the State will result in denied compensation claims, but only those measures which relate to the protection of public interests. Moreover, the measures taken in the specific situation should be (b) immediately required in relation to the elimination of acute emerging threats. The purpose of the relevant measures shall therefore not only be related to the above-mentioned (a) safety interest, but must also be undertaken in order to avoid an (b) emergency situation. Such measures which aim at reducing the effects of risks and the imminent risk of further damage are among those which are relevant. As examples of such direct risk reducing measures, the Court mentioned 'cleaning up fuel leakage from a road, removing such items from the road which can give rise to new damage in a collision and fixing temporary road signs'. In all these traffic situations, the Road Authority has to pay for the measures without any possibilities to bring tort claims against the driver who caused the accident. This (b) immediate purpose can be interpreted as a general criterion even outside the traffic example. **10**

With the above proposed categorisations, we can say that if the (a) nature of the measure is not related to safety and if it does not have (b) the purpose of immediate action against risks, the arguments concerning restrictions of claims lose their persuasive power – and thereby the ordinary protective purpose of tort law is a strong argument. And then we only have the 'normal' situation with the usual costs, which applies to all victims (not only the State and the municipalities according to their safety duties) who have to repair the damaged property. As such, we do not view the Authority in its specific role of public safety provider in everyone's interests, but we rather see the role of an ordinary victim who has to repair the property that someone has damaged. **11**

In comparison to the (I) bridge case, it is at least possible in the (II) road sign case to discuss the obligation as a (a) safety measure. A sign indicating the maximum speed can in some sense be said to ensure safety on roads. However, in any case, the placing of a **12**

new permanent sign could not qualify as having (b) the immediate purpose of counteracting risks due to the collision. It would have been another state of affairs if traffic safety worsened, so that the Authority had to manage the situation by installing temporary signs. Such measures with sign positioning – to avoid new accidents – would easier fulfil the requirements of the (b) criterion concerning the avoidance of immediate risks. In case of an impending traffic danger, therefore, the costs for coning off a section of the motorway, for warning signs, etc can be part of the duties that the Authority has to fulfil, ie the costs incurred to implement such an immediate risk avoidance measure would not – according to criterion (b) – pave the way for a tort claim by the Authority in question. In other words, regardless of whether the purpose of a particular road sign was related to road safety, the erection of a new permanent sign at the place of the damaged sign is not a measure to mitigate the direct consequences of an accident. Therefore no arguments against full compensation could be approved.

18. Finland

Korkein oikeus (Supreme Court) 16 October 1996, KKO 1997:49
<http://finlex.fi/fi/oikeus/kko/kko/1997/19970049>

Facts

1 A widow succeeded in concealing her husband's death from his heir so long that the heir's right to inherit had become time-barred. The concealment had succeeded partly because a district court had neglected its statutory duty to oversee that an inventory of the estate with the probate court was filed and the estate inventory deed was served to the court within the statutory time limit. The heir claimed compensation from the state for the loss of heritance, alleging that, had the district court fulfilled its supervisory duty and required a filing of the estate's inventory with the probate court, the claimant would have learnt of their father's death in time in order to claim their share of the inheritance.

Decision

2 The Finnish Supreme Court regarded it as obvious that, had the district court fulfilled its statutory duties, the claimant would have been able to claim their share of the inheritance in time. Thus, there was a factual causal connection between the court's omission and the claimant's loss. However, according to the Supreme Court, this factual causality was not as such sufficient to establish the liability of the state but it was also required that one of the purposes of the neglected rule was to ensure that heirs obtain information of a deceased's death. According to the Supreme Court, the purpose of the supervisory duty of a district court is to secure the payment of inheritance tax and to protect the rights of possible creditors of the deceased. Ensuring that heirs are aware of the de-

ceased's death was not regarded as a purpose of the supervisory duties of a court. Thus, the omission of the district court was not regarded as a legal cause for the claimant's loss, and the claim was rejected.

Comments

According to an established doctrine in the Finnish law of damages, an infringement of a certain rule of conduct may have a legally relevant causal connection to a loss only providing that the prevention of such types of loss is at least one of the purposes of the neglected rule.[1] However, the practical significance of this rule is not so great compared to the restriction that only foreseeable losses are recoverable, and the number of Supreme Court cases applying the former rule is limited. It has been even questioned whether the doctrine of protective purpose of a norm is even necessary in Finnish law.[2] **3**

Case KKO 1997:49 is perhaps the most well-known and clear-cut example of the application of the rule on the protective purpose of a norm.[3] In this case, factual causation between the infringement and the claimant's loss was obvious as such, but the claim was rejected because the loss did not fall within the protective purpose of the norm. Another question is whether V's loss could even have been regarded as foreseeable from the viewpoint of the damaging party, that is, the district court. If the answer were in the negative, V's claim could have been rejected also on that ground. In any event, as V's loss clearly was not within the protective purpose of the infringed norm, this was the most straightforward way to reject the claim simply on that ground. **4**

Korkein oikeus (Supreme Court) 20 November 1973, KKO 1973 II 84

<https://www.finlex.fi/fi/oikeus/kko/kko/1973/19730084t> (only the summary)

Facts

According to regulations of municipality A, residences are only allowed to be connected to the local sewer network if their pipe system is built by an authorised plumber. However, A had also accepted into the sewer network property that did not fulfil the said requirement. Moreover, A failed to ensure that only authorised plumbers were allowed to undertake repair work in the estates already connected to the network. An authorised plumber V claimed compensation from A, alleging that if the municipality had followed its own regulations, V would not have been compelled to compete with unauthorised plumbers, and their income would have been greater. **5**

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1 For example, *M Hemmo*, Vahingonkorvausoikeus (2005) 140; *P Ståhlberg*/*J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 407f; *A Savela,* Vahingonkorvaus osakeyhtiössä (3rd edn 2015) 313.

2 *P Virtanen*, Vahingonkorvaus. Laki ja käytännöt (2011) 342.

3 Thus, *M Hemmo*, Vahingonkorvausoikeus (2005) 140.

Decision

6 The Finnish Supreme Court rejected the claim, stating that the regulations of A could not have restricted the number of plumbers in the town or otherwise affected their mutual competition in the market. Because of this, A was not liable for V's alleged loss of income.

Comments

7 Case KKO 1973 II 84 is quite similar to the more recent case KKO 1997:49 analysed above (3/18 no 1), albeit the laconic reasoning of the older case leaves the *ratio decidendi* somewhat unclear. As the Supreme Court stated that the municipal regulations could not even have affected the market situation of plumbers, this indicates, as read to the letter, that the Supreme Court would not have recognised even factual causation between A's neglect and V's loss. However, if this was what the Supreme Court meant, one may ask why the claim was not rejected simply as unsubstantiated. In the legal literature, the case has been understood as a manifestation of the doctrine of protective purpose of a norm.[4] From this perspective, the point of the case may be understood as being that even though the municipality had failed to follow its own regulations and weakened the market conditions for authorised plumbers, securing the profitability of their business never was, and even could not have been, the purpose of the ignored regulations.

Korkein oikeus (Supreme Court) 25 June 2012, KKO 2012:65

<http://finlex.fi/fi/oikeus/kko/kko/2012/20120065>

Facts

8 A member of the board of a limited company, who also was the sole shareholder of the company, neglected their statutory duty to take measures to place a company in liquidation after the shareholder's equity had been lost. The company then continued its business, which increasingly led to a worsening of the financial situation of the company and eventually bankruptcy. The bankruptcy estate claimed compensation from the board member for the loss they had caused to the company.

Decision

9 The Finnish Supreme Court stated that a board member's liability to the company requires that negligent or intentional acts or omissions of the board member have a sufficiently individualised causal connection to the company's loss. According to the Supreme Court, in the present case, the question was whether the purpose of the rules on

4 *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 408.

liquidation of a company may be regarded as being to prevent such types of loss which the company had suffered in this case.

10 The Supreme Court held that the primary purpose of the infringed rules was to protect the company's creditors whose right to payment could be increasingly jeopardised if the company continued its loss-making business without any restraints. In addition, the rules were of significance to shareholders by enabling them to gain information on the company's financial situation and take measures when necessary. However, in the present case, the company's loss was not regarded as having a causal connection to an infringement of the rules on liquidation, because the defendant was the sole shareholder of the company and thus could – and most probably would – have continued the business regardless of whether or not the board would formally have proposed placing the company in liquidation. On these grounds, the Supreme Court rejected the claim.

Comments

11 In this case, the applied liability norm was ch 15 sec 1 of the former Companies Act (*osakeyhtiölaki* 734/1978). However, as regards application of the doctrine of the protective purpose of a norm, the case has been understood to reflect general principles of the law of damages in Finnish law, and not just a special feature of liability in the context of companies.[5] The liability of a board member towards the company, ie the subject of this case, is understood in Finnish law as statutory liability and thus a special kind of extra-contractual liability.[6] If there is an explicit contract between the board member and the company, it has been held as possible that a board member could be held liable towards the company also on grounds of principles of contractual liability. However, the main rule has been regarded as being that unless otherwise explicitly agreed, the parties are presumed to rely merely on the statutory rules on a board member's liability.[7]

12 The case regarded a board member's liability towards the company itself, even though it was the bankruptcy estate which pleaded the case in the court. Because of this and even though a bankruptcy estate in a sense represents the interests of the creditors, the possible indirect loss caused to the creditors because of A's negligence was not relevant in this case.

13 The case illustrates both the application of the rule on the protective purpose of a norm as well as the requirement of factual causation. Even though protecting the company itself and its shareholders was clearly not the core purpose of the norms on placing the company in liquidation, this did not directly lead to a rejection of the liability, as the Supreme Court also analysed whether the loss was sufficiently within the sphere of the

5 See case KKO 2017:81 (see above 2/18 no 12), the dissenting opinion of the Supreme Court Justice Antila; see also *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus. (7th edn 2020) 409.

6 *A Savela,* Vahingonkorvaus osakeyhtiössä (3rd edn 2015) 1f.

7 *A Savela,* Vahingonkorvaus osakeyhtiössä (3rd edn 2015) 399 with reference to the first edition of the book, where the interpretation is reasoned in more detail. See *A Savela,* Vahingonkorvaus osakeyhtiössä (1999) 20.

secondary purposes of the infringed norm. In theory, this could have been the case, as the norms in question were regarded as intended to also protect shareholders of a company, but, in the present case, such causation simply did not exist because of the special circumstance of the case, that is, the board member and the shareholder being one and the same person.

19. Estonia

Riigikohus (Supreme Court) 6 June 2018
Civil Case No 2-15-4981

Facts

1 A mortgage had been taken out on three flats in favour of the claimant bank. The defendant was obliged to be subject to an immediate compulsory enforcement at the claimant's demand. In 2011, the compulsory enforcement to sell the mortgaged property was initiated on the basis of the claimant's application. The defendant filed a claim against the claimant, seeking the establishment of the impermissibility of the compulsory enforcement, asking the court to, among other things, suspend the compulsory enforcement by way of interim protection.

2 The interim protection lasted for 830 days (from 1 July 2011 to 7 October 2013), as a result of which the claimant was unable to sell the mortgaged property during that period. If the defendant had not requested interim protection, the enforcement agent would have sold the flats and the claimant would have been able to use the money in its ordinary economic activities (granting interest earning credit). During that period, the interest rate on commercial loans was 3.93 % per annum, as a result of which the claimant lost profits in the amount of € 75,393 due to the defendant's actions.

3 The district court granted the claimant's claim for damages in full. The court of appeal upheld the district court's judgment.

Decision

4 The Supreme Court set aside the courts' judgments regarding the claim for damages and denied the claim to that extent by its own judgment. The Supreme Court noted that, under clause 1 of CCP § 391(1), the party seeking the interim protection of a claim must compensate damage caused to the other party once a court decision refusing to grant or hear the protected claim becomes final. Clause 1 of CCP § 391(1) is a special provision of compensation for damage. This means that the prerequisites for the application of clause 1 of CCP § 391(1) are exhaustively regulated in this provision.

5 Interim protection should not result in such a high risk that the court will grant interim protection to the claim but deny the claim afterwards. If, in the event of denial of the claim, the entire damage that is causally linked to the securing of the claim should be

compensated based on clause 1 of CCP § 391(1), it would intensively affect the right of the person seeking the securing of the claim to defend their rights in court. Therefore, the loss of profit for the purposes of LOA § 127(2) is not covered by the protective purpose of the obligation arising from clause 1 of CCP § 391(1).

Comments

The protective purpose of a rule is one of the most important criteria for limiting liability in Estonian law. This purpose must be assessed every time the claimant relies on a violation of a protective rule by the defendant. Under LOA § 127(2), damage does not have to be compensated for to the extent that the prevention of the damage was not the purpose of the duty or provision as a result of a breach of which the obligation to compensate the damage emerged. **6**

As mentioned above, the Supreme Court has noted that, in the case of torts whereby the unlawfulness of the act arises from a harmful consequence (clauses 1, 2, 3 and 5 of LOA § 1045(1)), the protective purpose of the Act within the meaning of LOA § 127(2) is usually limited to the provisions of Chapter 7 of the LOA, which regulate the scope of a claim for damages according to the type of the harmed legal interests (LOA §§ 129–132) (eg Supreme Court Civil Chamber judgment in Case 3-2-1-174-10)[1]. The Supreme Court itself also assessed the protective purpose of a rule in cases where the victim did not rely on any protective rule but merely on the unlawfulness ground set out in LOA § 1045(1) (the judgment in Case 3-2-1-39-15). **7**

In the present decision, the Supreme Court did in fact limit the awarded damages based on LOA § 127(2), finding that compensating the bank for the loss of profit is not covered by the protective purpose of clause 1 of CCP § 391(1). **8**

CCP § 391(1) stipulates that 'the party who applied for interim protection of the claim must compensate for the harm caused to the other party and a third party by such protection where: 1) a court decision on denial or dismissal of the claim whose interim protection was ordered enters into force, or where proceedings in the case are terminated on any other grounds except due to the approval of a compromise of the parties; 2) it becomes evident that no claim for interim protection or no cause for such protection existed at the time the interim protection was ordered; 3) an order on interim protection which was issued before the court claim was filed is set aside due to the reason that the court claim was not filed on time.' **9**

As is evident, it does not follow from the referred rules that only direct pecuniary damage is subject to compensation. **10**

1 In this case, the defendant's employee caused the car accident in which the claimant's wife was injured. The claimant was taking care of his wife and lost his income as a result. The claimant sought compensation for the loss of income. The Supreme Court, in principle, denied the claim. For more details on this case see question 4 ('Exclusion of liability for "indirect damage" or "indirect victims"?').

11 This was a debatable decision where three of the seven justices who adjudicated the case offered a dissenting opinion. To date, the Supreme Court has indeed revised its position: in its judgment of 30 April 2020 in Case 2-17-2152, the Supreme Court took the view that direct pecuniary damage as well as the loss of profits can be compensated based on CCP § 391(1).

Riigikohus (Supreme Court, Administrative Chamber) 7 Ocober 2015

Case No 3-3-1-11-15

Facts

12 The victim is the owner of a hydro power plant located in the rural municipality of Jõelähtme. The victim submitted to the administration of the rural municipality of Jõelähtme an application for the construction of an underground transmission line. Since in the victim's view it took the municipality an (unlawfully) unreasonably long time (nearly five months) to issue a building permit, the victim filed a claim for damages against the municipality. The victim argued that due to the municipality's failure to act, the victim lost € 412,557 in profits, including renewable energy support in the amount of € 182,905 and € 29,443 of lost profits from the sale of carbon dioxide allowances. Due to having to amend loan agreements and conclude new contracts, the victim also suffered direct losses in the amount of € 163,224.

13 The administrative court granted the victim's claim in part and ordered the municipality to pay the victim € 203,659. The court of appeal reduced the awarded damages to € 119,028.

Decision

14 The Supreme Court set the judgment of the court of appeal aside and in its own judgment denied some of the victim's claims and in part remanded the case to the court of appeal for reconsideration. The Supreme Court noted that the profits which the complainant would have earned by selling electricity are covered by the freedom of enterprise and, thus, by the protective purpose of the violated rule (Building Code (BC) § 23(8)).[2]

15 Under the Electricity Market Act, a producer is entitled to support from the transmission network operator for electricity generated from a renewable source. It is support granted for the purpose of promoting environmentally friendly technology and diversifying the energy supply in the public interest. The Chamber found that the entitlement to the renewable energy fee does not stem from the freedom of enterprise and is not therefore

2 BC § 23(8) read as follows: The issuer issues a building permit or refuses to issue it within 20 days after the submission of a building permit application and building design documentation and, where a respective requirement exists, the day of submission of an expert assessment of the building design documentation.

covered by the protective purpose of BC § 23(8). Thus, the respondent does not have to compensate the complainant for the renewable energy support lost in April 2009.

Similarly to the renewable energy support, the purpose of the carbon dioxide allowance scheme is not the ensuring of income for entrepreneurs or the protection of the freedom of enterprise but the global reduction of greenhouse gas emissions in the public interest. Thus, it is not profit the earning of which would be covered by the protective purpose of BC § 23(8). For this reason the respondent does not have to compensate for the loss of profits from the sale of the carbon dioxide allowances not received for electricity not produced in April 2009. **16**

As its direct pecuniary damage, the complainant argued that the interest payments increased due to the amendment of the loan agreements and that costs were incurred to amend the loan agreements. The Supreme Court admitted that the need to amend the loan agreements may have been caused to some extent by the respondent's delay in processing the transmission line building permit, but the link remains too remote to admit the coverage of the losses by the protective purpose of BC § 23(8). **17**

Comments

Although it is an administrative case, the protective purpose of the violated rule must, under § 7(4) of the State Liability Act, be assessed based on LOA § 127(2) when establishing the damage to be compensated in the case of claims for damages brought in administrative cases. **18**

In the present case, the Supreme Court considerably reduced the victim's claim based on the protective purpose of the rule because the Supreme Court did not consider the direct pecuniary damage suffered by the victim as damage to be compensated as opposed to what the victim demanded. **19**

Tallinn Ringkonnakohus (Tallinn Court of Appeal) 1 June 2017

Civil Case No 2-13-38143

Facts

According to the statement of claim, the claimant rented a bus for transporting people from a bus rental company. The bus was involved in a traffic accident where the bus driver was forced to drive onto the hard shoulder in a dangerous situation (a passenger car was approaching and the road was too narrow for both vehicles). The hard shoulder did not meet the requirements established by law (it was too soft) and the bus slid into a ditch. As a result of the traffic accident, the claimant suffered damage in the form of bus repair costs paid to the bus owner, bus towing costs, replacement bus rental costs and pecuniary compensation paid to the bus passengers for their unused ferry tickets. In order to be awarded damages, the claimant filed a claim against the Republic of Estonia as the owner of the road. The district court granted the claim. **20**

Decision

21 The court of appeal upheld the judgment of the district court but presented its own reasoning. The court of appeal took the view that the defendant, as the owner of the road, culpably violated provisions of the Road Act (§ 10(1) and § 25(2) of the Road Act), which obligated the defendant to ensure that it were possible to travel on the road safely and that the road complied with the requirements for the condition of the road. These provisions can be considered protective rules for the purposes of clause 7 of LOA § 1045(1) and LOA § 1045(3). Although the claimant was not the owner of the bus and the claimant's losses were purely economic, it follows from the protective purpose of the provisions violated by the defendant that the damage caused to the claimant must be compensated.

Comments

22 In this decision, the court of appeal granted compensation to the claimant for pure economic loss. This was only possible because the defendant had culpably violated the protective provisions and the damage suffered by the claimant was, in the appellate court's opinion, covered by the protective purpose of the protective rules violated by the defendant. Based on other provisions of tort law, the claimant's damage would not have been subject to compensation. The court of appeal referred to the opinion of the Supreme Court that the tortfeasor is not usually liable for pure economic loss on the basis of tort law provisions (see the Supreme Court judgment in Civil Case 3-2-1-36-15; judgment in Civil Case 3-2-1-64-05, para 20; judgment in Civil Case 3-2-1-123-05, para 24). At the same time, the Supreme Court has decided that, by way of exception, pure economic loss may be subject to compensation on the basis of tort law provisions if the defendant is liable for a violation of a provision with a protective purpose (clause 7 of LOA § 1045(1)) one of the purposes of which under LOA § 127(2) and § 1045(3) is to protect the victim against the very pure economic loss for which the victim is seeking compensation (see the Supreme Court judgment in Civil Case 3-2-1-19-11).

20. Latvia

Augstākā tiesa (Senāts) (Supreme Court [Senate]) 11 July 2019, No SKC-140/2019
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/386865.pdf>

Facts

1 A lease agreement was concluded between V (a company) as lessee and A (a company) as lessor. A fire broke out in the leased premises, as a result of which, an entire hangar building was almost completely destroyed, including property belonging to V. V brought an action against A for damages in the amount of € 51,360, alleging that A had not in-

stalled a fire alarm in the hangar and had not taken other preventive measures to prevent the further spread of fire and smoke. Thus, the defendant had not complied with the requirements specified in regulatory enactments regarding the timely detection and restriction of fire.

Decision

The first and second instance courts partially satisfied the claim and the Supreme Court reversed the judgment, after which, the second instance court reviewed the claim on its merits again and rejected the claim completely, arguing that sec 1084 of CLL does not provide for strict liability of the owner of a building. Also, losses incurred by a tenant and any third parties as a result of misconduct by an owner of the building or structure are subject to the rules of general civil liability for misconduct. It was not proved that the defendant had breached any statutory provision, which caused the fire to start and which led to the subsequent damage to the premises and property. The decision of the second instance court was once again appealed to the Supreme Court. **2**

The Supreme Court reversed the judgment of the court of appeals once again and argued that Latvian civil law contains a principle that an owner is responsible for the technical condition of the building they own and for safety (reflected by sec 1084 of CLL). Maintaining one's property in a safe condition for use is an obligation imposed upon an owner by law and a breach of that obligation is considered to be an illegal omission, which gives the injured person the right to compensation for damage. As it was not disputed that the cause of the fire in the defendant's hangar was a short circuit in the wiring or weak contact at the junction of the wires, this means that the owner had not ensured that the electrical installation in his property is such that it could not cause a fire. The implementation of certain preventive measures specified in regulatory enactments cannot per se guarantee the safety of property. In addition, maintaining the building in a safe condition for the benefit of a user is a permanent, continuous obligation imposed upon the owner by law while the choice and implementation of appropriate measures to ensure that is the sole responsibility of the owner. **3**

Comments

Interestingly, the action was brought by the claimant as a tort claim rather than based on a breach of contractual obligations, which would be possible in case the leased premises had not been equipped with the required fire safety, detection and prevention systems as required by the law or stipulated by the lease agreement terms and conditions. Non-compliance with safety obligations could generally also be considered a cause of the damage. **4**

One of the main arguments for liability and reasons for reversing the judgment of the second instance court yet again was related to an interpretation of sec 1084 of CLL. **5**

The norm in question is not a part of the Law of Obligations, but Property Law[1] in CLL and it was argued by the court of appeals reviewing the case for the second time that strict liability would not apply to the owner of the building and a breach of a specific rule of law would be required in accordance with the basic civil liability rule for pecuniary damage in sec 1779 CLL. The argument is quite a common defence used in similar cases, arguing that sec 1084 of CLL is not intended to provide a specific liability regime, but rather to generally define the obligation to look after and take care of property. Further, the placement of sec 1084 of CLL in subsection, 'Restrictions on the Right to Use Property' and its complete wording[2] interpreted in context and in light of other norms of that subsection, lead to the conclusion that its original aim was not to address liability issues between building owners and third parties, which would be subject to general rules of civil law. It has also sometimes even been submitted that the norm is a norm of public law and its purpose is to protect society in general, not particular individuals. This rather narrow interpretation of sec 1084 of CLL was not supported by the Supreme Court in the present case as well as in its later decision taken by an extended panel of judges.[3] Since sec 1084 of CLL has not been amended, it would be correct to argue that its initial scope of protection has been extended over time. This is best reflected by the line of arguments used by the Supreme Court in a case between two private companies, V and A.

6 The commented Supreme Court judgment has also effectively clarified sec 1084 of CLL in respect of possible defences an owner of a building might want to raise. He cannot exculpate himself claiming that he did not breach any statutory provision, which imposes an obligation to perform certain actions to ensure the safety of the building. Instead, the owner has to prove that he has chosen and implemented appropriate safety measures and taken reasonable steps in order to ensure the safety of a building that he owns. An owner of a building shall not be liable for risk but would be liable for the slightest negligence (*levissima culpa*). Although it remains to be clarified by the case law or by the legislator, one could argue that, once a victim proves that they have incurred damage or personal injury due to the unsafe state of an immovable, the burden of proof is then shifted to the defendant (owner). At least regarding situations when a building

1 The CLL has an Introduction and four parts – Family Law, Inheritance Law, Property Law and Obligations Law.

2 Sec 1084 of CLL has three parts providing the following:
In order to protect public safety, every owner of a building must keep its building in such a condition that it cannot cause harm to neighbours, passersby or its users.
If there is a dispute over the right to property in respect of a building which is in danger, the steps necessary to eliminate that danger must be taken immediately and before the end of the proceedings by the person in possession of that building at that time, with the right to claim costs at a later date.
If the owner or possessor of the structure, contrary to the request of the relevant authority, does not eliminate the imminent danger, the relevant authority shall, depending on the circumstances, restore the structure or demolish it at the expense of the owner.

3 See decision of the Supreme Court (Senate) in case No SKC-8/2022, 4 October 2022, available: <https://www.at.gov.lv/downloadlawfile/8606>.

has collapsed, the Supreme Court, in its later decision, supported the view that the burden of proof concerning compliance with obligations to maintain a building in a safe condition lies with the owner of the building.[4]

Augstākā tiesa (Senāts) (Supreme Court [Senate]) 5 March 2015, No SKC-250/2015

<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/205634.pdf>

Facts

V was a passenger in a bus, owned by a municipality transport company, A. In order to avoid a collision with an unidentified car, which was manoeuvring from the left lane to the right lane, the bus driver suddenly hit the brakes, causing V to fall down in the cabin. As a result of the road traffic accident, V hit the wall of the bus and lost consciousness as a result of the impact. V was taken to hospital, where she underwent surgery due to an unstable fracture of vertebrae. After surgery, V suffered pain and discomfort and the recovery period was difficult and long. V has become a disabled person in the second degree. V filed a claim against A, arguing that A, being a passenger carrier, did not ensure a safe journey in its bus, which resulted in V's personal injury. V claimed compensation for non-pecuniary damage and loss of earnings (approx € 260,000 in total) as V had had two jobs until the accident, which was no longer possible. **7**

Decision

The first instance court satisfied the claim partially, awarding V compensation of approx € 11,383. The second instance court rejected the claim completely, indicating that A is not liable for the road traffic accident. The bus is an object associated with increased risk (the basis for strict liability),[5] but it was proved that the traffic accident was caused by another vehicle breaking the Road Traffic Regulations of Latvia. Also, the claimant had already received an insurance indemnity for non-pecuniary losses, the necessary medical treatment, and the difference between the claimant's income before the accident and V's current income. **8**

The Supreme Court upheld the second instance court decision and addressed, inter alia, the civil liability of the owner of the vehicle within the meaning of sec 2347 (2) of CLL (liability for increased risk)[6] and whether the defendant, which did not cause the accident, must compensate the victim for non-pecuniary damage caused as a result. Further, the Supreme Court argued that the intention of the legislator was not to impose an obligation to compensate moral damage on the possessor of a source of increased **9**

4 See decision of the Supreme Court (Senate) in case No SKC-8/2022, 4 October 2022, available <https://www.at.gov.lv/downloadlawfile/8606>.

5 See 3/20 no 10 at fn 7.

6 See ibid (next footnote).

danger. With the judgment in question, the Supreme Court changed its case law, according to which, it was concluded that the liability of the possessor of a source of increased danger also includes liability for non-pecuniary damage.

Comments

10 As the cause of the road traffic accident was an unknown vehicle acting in breach of law without justification and the defendant's bus driver was trying to avoid an accident and potentially more extensive damage and injuries of other passengers, the exclusion of liability could have been invoked under the special liability regime of sec 44 (2) of the Road Traffic Law, sec 40 (6) of the Road Transportation Law and sec 2347 (2) of CLL. Thus, liability could be reduced (or excluded) at the causation level. In particular, sec 2347 (2) of CLL,[7] which the Supreme Court extensively analysed in the judgment in question, provides a liability exclusion if the act of the possessor of a source of increased risk was induced by a third party acting unlawfully, which arguably was possible in this case.

11 Furthermore, the conclusion that liability under sec 2347 (2) CLL excludes liability for non-pecuniary harm based on its protective scope and intention of the legislator is highly questionable. There are several counter-arguments possible that the Supreme Court did not seem to have taken into account. The whole purpose of imposing liability for objects of increased risk and ultra-hazardous activities is increased protection for victims by limiting liability exclusions and often providing a reversed burden of proof. Limiting compensable damage to only pecuniary loss would be contrary to the general aim of such liability to ensure increased protection for victims (and thereby an increased preventive effect for the possessor, owner, user of objects of increased risk). In such cases, the victim may be more inclined to argue that the activity was in fact not one of increased risk and the potentially liable person, the opposite, because otherwise liability for non-pecuniary harm may be excluded altogether, which is quite contrary to the aim of providing a strict liability regime for certain cases. Furthermore, sec 2347 (2) of CLL was not included in the CLL initially in 1937 but was taken from the Civil Code of the Latvian Soviet Socialist Republic and included in the CLL only by amendments in late 1992, coming into force in March 1993: it has not been amended since. Until amendments to sec 1635 (1), expressly mentioning non-pecuniary harm as compensable damage, came into force in March 2006, it was argued that non-pecuniary harm was not to be compensated, but such rights could have been derived from sec 92 of the Constitution of the Republic of Latvia. Section 2347 (1) of CLL was in fact amended only once, specifically to include a reference to non-pecuniary harm as compensable damage. Section 2347 of CLL is

7 A person whose activity is associated with increased danger to others … must compensate for the damage caused by the source of increased danger if he does not prove that the damage was caused by force majeure or the victim's intentional act or gross negligence. If the source of increased danger has left the possession of the owner, possessor or user without his unjustifiable conduct, but as a result of unlawful actions of another person, that person shall be liable for the damage caused … .

also placed in a subsection of the Law of Obligations, under the heading, Compensation for Bodily Injuries.

Thus, given the historical background of sec 2347 (II) of CLL, its placement in the law, it may not be reasonable to base the conclusion of the Supreme Court on the intention of the legislator and the wording of the norm especially since it was enacted at a time when the CLL did not provide for compensation of non-pecuniary harm at all. Moreover, the fact that the legislator did not include a reference to non-pecuniary harm as compensable damage in sec 2347 (II) of CLL does not limit the applicability of sec 1635 (1) of CLL, which is the basic norm for civil liability in general and has contained a reference to compensation of non-pecuniary harm since 2006. Therefore, one may argue that the conclusion reached by the Supreme Court on the purpose of the norm in the present case may be questionable. **12**

The conclusions of the Supreme Court raise another issue associated with whether or not vehicles and means of public transport can be considered objects of increased risk. In accordance with art 5:101 PETL, an activity is abnormally dangerous if it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and it is not a matter of common usage. However, it is questionable whether passenger vehicles and public transport in normal circumstances in the 21st century may be considered objects of increased risk since the risks associated with using them could be considered well known and manageable to a certain degree. Furthermore, since special rules of liability exist for vehicle owners and possessors (see 3/20 no 10 above) and liability insurance is mandatory under the Civil Liability Insurance of Owners of Motor Vehicles Law, referring to, and analysing, sec 2347 (II) of CLL in cases of road traffic accident may become redundant. **13**

Rīgas apgabaltiesa (Riga Regional Court) 6 November 2020, No C30458515
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/445875.pdf>

Facts

V1 was the son of V2 and the former enrolled in a pilot school to obtain a commercial pilot licence and other licences. V1 participated in several training flights and was entitled to take the exam. The examiner who supervised V1 was entitled to give direct instructions and was obliged to take over control of the aircraft, even in the event of minimal risk, by using the dual controls of the aircraft. During the examination flight, an accident occurred with the aircraft – it crashed to the ground. As a result of the plane crash, V1 and the examiner died from their injuries instantly. V2 brought a claim against the certified pilot school, company A, that, among other things, undertook to provide the test flight by inviting an examiner. V2 sought compensation for pecuniary and non-pecuniary losses from A and the insurer of the aircraft and liability of A as well as other defendants. **14**

Decision

15 The first instance court satisfied the claim in part, ordering the insurer to pay € 344,858 and rejecting the remaining part of the claim. The second instance court rejected the claim completely. The Supreme Court reversed the judgment insofar as the claim was rejected against the insurer and A.

16 The court of appeals terminated the proceedings against the insurer and awarded V2 compensation of € 30,000, but rejected the claim for compensation of pecuniary losses entirely, consisting of compensation for V2's own medical expenses, the funeral expenses for his deceased son V1, including funeral and funeral meals, the costs for a grave, V2's travel expenses to fetch his son's belongings and remains, the tuition fees paid to A, his son's salary for three years if he had worked as a pilot and received a salary, his son's salary for three years if he had not worked as a pilot. The court concluded that the pecuniary losses had already been partially compensated by A voluntarily and certain damage is too remote and hypothetical to be compensated and others are not compensable at all for indirect victims based on the scope of protection of the relevant norms of law. The court interpreted several grounds of liability for damages in cases of wrongful death of another, limiting the liability of A. The judgment of the second instance court was upheld as it was appealed once again to the Supreme Court, which refused to initiate cassation proceedings.

Comments

17 According to sec 2350 of CLL, the person liable for wrongful death of another shall reimburse the heirs of the deceased for the costs of medical treatment and their funeral. The Court argued that the compensable medical treatment costs referred to by the norm are only those incurred by the deceased person – V1, whose death occurred at the time of the accident. Therefore, V2 is not entitled to claim reimbursement of the costs of medical expenses, which she herself incurred as a result of the health problems caused by her son's (V1's) death. Although the rule of law does not specify whose medical expenses are to be compensated, the protective purpose of the norm may not be extended to indirect victims of the injury and death of another (relative or a close one).

18 By referring to doctrine and case law, the Court further argued that, when determining the reimbursement of funeral expenses, their reasonableness as well as their proportionality to the deceased's financial means must be taken into account. Section 2350 of CLL does not provide for a limitation of liability, but the reasonableness and necessity of such costs should certainly be among the criteria to determine if such costs are compensable. Accordingly, the Court concluded that V2 would not be reimbursed for the cross and plaque installed by her at the scene of the plane crash, as such marking of the place of death of the person does not comply with the burial traditions established in Latvian society as such expenses are not necessary for a traditional burial of deceased persons.

Furthermore, the Court concluded that the claim partially related to compensation **19**
of unearned salary according to sec 2348 of CLL:[8] however, V2 is not entitled to receive such compensation as sec 2348 of CLL is applicable only to living victims who are unable to earn an income. To further support that conclusion, the Court referred to sec 1787 of CLL, which is applicable to general claims for compensation of lost profit and provides that, when determining lost profit, one may not use only probabilities, but there must be no doubt, or at least it must be proved by reliable evidence, that such lost profit has in fact been incurred. In such cases, the claimant may claim compensation due to the loss of a family breadwinner under sec 2351 of CLL, but such a claim was not brought by V2. The line of arguments used by the Court that loss of working capacity is a ground for a claim that may not be brought by heirs but only by victims (having to continue to live and cover costs of everyday life with reduced working capacity) is in accordance with the protective purpose of the norm despite sec 1778 of CLL[9] as a general rule.

Compensation for the loss of earnings of a victim or deceased is also not a head of **20**
damage that a family member would normally be entitled to receive due to the personal nature of such claim. However, the reference to sec 1787 of CLL is debateable as the victim's unearned profit in the case of bodily injury should be distinguished from the loss of profit within the meaning of sec 1787 of CLL and other norms relating to damage to property, because, in the case of loss of earning capacity as a result of personal injury, a person may acquire the right to compensation regardless of the right to claim any particular amount from an employer at the time of the injury. Also, due to the individual and relatively unpredictable circumstances affecting the injured party relating to the possibility to earn a particular amount as salary in the future, it may not ever be possible to determine the amount of compensation for loss of earning capacity with great precision. Therefore, the lost profit in the case of damage to a person's property is substantially different in comparison with the loss of income of a person in the case of bodily injury and the Court should not have referred to sec 1787 of CLL since the fact that sec 2348 of CLL is not applicable to the claimant would have been sufficient ground to reject the claim in the respective part.

8 If such an injury renders the victim permanently unable to continue his or her career and deprives him or her of the opportunity to earn otherwise, the offender must also reimburse him or her for any further loss of profit.

9 Both the victim and his heirs may claim damages.

21. Lithuania

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) 27 January 2015, Civil Case No 3K-3-8-916/2015

<http://liteko.teismai.lt/>

Facts

1 The case was initiated by the plaintiff, the previous owner of a plot of land and administrative building in the centre of the city of Vilnius, against the Vilnius city municipality. The plaintiff argued that, due to the alleged illegal construction of an overhead road, linking two roads, the value of the property decreased, and he had managed to sell it at a lower price than established by the property assessor. The difference between the price established by the property assessor and the price at which the plaintiff sold the plot of land and administrative building was approximately 3% and amounted to € 157,699. In the plaintiff's view, this amount must be regarded as a loss suffered by him and the result of an unlawful construction permit, since the distance of the overhead road from the administrative premises is less than in the urban plan.

2 The courts of lower instance dismissed the claim. They decided that the plaintiff failed to prove illegal actions and damage. According to the courts, there was no evidence that the Vilnius city municipality issued the permit illegally. Moreover, the value established by a property assessor does not necessarily coincide with the sales price.

Decision

3 The LSC upheld the decisions of the lower instance courts; however, it supplemented their motives. For the first time in Lithuanian case law, the LSC relied on the concept of pure economic loss established by art 2:102 of the Principles of European Tort Law, which has been analysed once in Lithuanian legal literature.[1]

4 Having referred to art 2:102 PETL, the LSC stated that interests of a purely economic nature lie at the bottom of the scale of protected interests. Thus, their defence may be more limited in scope. In the Court's view, life, health, and liberty enjoy the most extensive protection. Property rights are of lesser importance compared to the above mentioned, however their defence is still superior to the defence of pure economic interests.

5 On the other hand, the fact that the interest infringed is at the bottom of the scale of the values protected by tort law does not in itself justify the conclusion that this value should not be defended. In deciding whether compensation for pure economic loss is to be awarded, it is necessary to establish a balance between the interests of the victim and

1 *S Selelionytė-Drukteinienė*, Grynai ekonominio pobūdžio žala kaip specifinė žalos kategorija Lietuvos Respublikos deliktų teisėje [Pure economic loss as a special kind of loss in Lithuanian tort law] Jurisprudencija 2009 no 4 (118) 123–146, commented by *H Gabartas*/*L Šaltinytė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2009 (2010) 374, nos 59–62.

those of the infringer. According to the LSC, liability for pure economic loss could arise only if the intentional form of fault of the infringer, the economic interest of the infringer, and the importance of the financial loss for the victim were established. In this case, these elements were not established. The municipal administration did not pursue and did not have an economic interest in organising the construction of the overhead road. On the contrary, it met the needs of society – improving transport connections. Thus, the fault of the defendant was not established. In addition, the plaintiff, who sold the property at a price only approximately 3% lower than the market value established by the property assessor, did not prove that there was a sufficient legally significant causal link between the defendant's actions, namely the construction of the overhead road, and the decrease of sales price. The LSC also noted that the property is located in the central part of the city, in an area of heavy traffic, thus, the property owner must be prepared for the restrictions that result from necessities of a modern city.

Comments

The LSC based its decision on the purely economic nature of loss even though the CC establishes no such category of loss. Thus, there is no general principle that pure economic loss is not recoverable in tort. In this decision, the LSC has attempted to accept the concept of pure economic loss in tort law and use it as a tool to limit liability. **6**

There are no cases of protected purpose of the conduct norm breached, but a similar result was reached in this case on a more general level. Based on the reasoning of the LCS in this case, it was decided to report this case under this category, even though this case does not fully fit it. **7**

However, until now, the concept of pure economic loss has not gained significance in case law. Nevertheless, the statutory definition of causal link established in art 6.247 CC sets the nature of damage as one of the factors to be taken into account when establishing a causal link. Article 6.247 CC sets out: only damage that is connected in such a way to the actions (omission) that made the debtor liable, that it, in regard to the nature of his liability and of the damage caused, can be attributed to him as a consequence of these actions (omission), is eligible for compensation.[2] Thus, causation shall serve as a tool to limit tortious liability for pure economic loss. **8**

2 The rule resembles art 6:98 of the Dutch Civil Code, although it actually uses the term 'damages' (nuostoliai), not 'damage' (žala): 'Only damage that is connected in such a way to the event that made the debtor liable, that is, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation', see <http://www.dutchcivillaw.com/civilcodebook066.htm>.

22. Poland

Sąd Najwyższy (Supreme Court) 13 February 2009, II CNP 67/08

<www.sn.pl>

Facts

1 V received money sent by a court bailiff by postal orders. The postman gave some of the postal money orders to V's mother-in-law and his stepson, who did not pass them on to V, even though V had stipulated that the money should be paid to him personally. V sued the postal operator.

Decision

2 The Supreme Court found in favour of V. Article 26 sec 2 item 3 of the Act of 12 June 2003 on Postal Law provides that delivery of a postal money order to the addressee takes place at the address indicated in the order, and, if the addressee is not at home, the amount of money order may be delivered to an adult person residing with the addressee, unless the addressee makes a stipulation that the money is to be paid to them personally.

3 Non-performance or improper performance of the postal order contract therefore constitutes a tort (art 415 of the civil code – based on fault) and does not exclude the concurrence of claims.

4 According to the Supreme Court, the case should be decided in the light of the theory of relative unlawfulness, according to which, only the violation of a legal norm, the purpose of which is to protect the injured party, constitutes a tort. However, the Court interpreted the Postal Law provision as aiming to protect the interests of all addressees of postal money orders. Hence, the conduct was wrongful and thus tortious.

Comments

5 See below comments to case I CSK 315/06 (3/22 no 6 ff).

Sąd Najwyższy (Supreme Court) 1 December 2006, I CSK 315/06

OSN 11/2007, item 169

Facts

6 The parties concluded a contract for auditing a balance sheet. Corporation V sued the auditing company A for losses sustained due to the negligent breach of professional standards of chartered accountants and breach of the rules of proper auditing. The balance sheet proved to be incorrectly calculated in view of an assessment by the taxation office, which questioned the rate of VAT used by V in its business. V claimed compensa-

tion for the loss consisting of the due tax with interest, which V had had to pay as well as the reimbursement of the contractual fee. The defendant's insurer intervened in the lawsuit.

The trial court dismissed the action because the contractual claims were time- **7**
barred (two years) and no basis for the tort liability of A was established. The court of appeal reversed, holding A liable in tort for negligent auditing (art 415 KC), and awarded compensation for the loss consisting of the due tax with interest. The other claim was dismissed. Both A and the insurer appealed to the Supreme Court.

Decision

The key problem was whether, and under what conditions, a breach of contract may **8**
constitute a tort and justify the choice of the legal regime of claims for compensation of damage (art 443 KC). In Polish law, a breach of contractual obligations does not per se constitute a tort, but can do so when the debtor is in breach of generally binding norms (duty of care).[1]

The Court underlined that, pursuant to the contract, the audit was to be performed **9**
according to the requirements of the Accounting Law (1994) and the standards set by the National Council of Chartered Accountants. Thus, the standard of care was established by both the contract and envisaged in the provisions of law. A chartered accountant is obliged to examine the balance sheet as to its formal requirements as well as to its merits. The control of the merits includes the way in which the company applies taxation rates.

The Court stated that the rules of accounting law are addressed to accountants, and **10**
not to the public, thus they are not to be considered as generally binding legal standards of proper and careful conduct. However, the Court agreed with the court of appeal that a breach of professional standards contained in the statutes and deontological rules may, under the given circumstances, justify a claim in tort. The Court argued that chartered accountants are entrusted with a public function and they must perform their duties pursuant to the rules of law and the rules of professional conduct. If an auditor has prepared an opinion and an audit report on the annual financial statements of an entity in breach of these principles, such conduct, insofar as it has caused damage, may be regarded as a tort. The verdict was reversed.

Comments

Both reported decisions illustrate how the protective purpose of the norm helps to qua- **11**
lify a contractual breach as a delictual conduct. This is possible in a system which permits the *cumul* of regimes of liability. The argument of protective purpose thus operates in these cases to establish liability in tort.

1 SN 28 April 1964, II CR 540/63, OSPiKA 1965, 197; SN 10 October 1997, III CKN 202/97, OSN 3/1998, item 42.

12 The first case shows that the concept of relativity of wrongfulness, behind which the doctrine of protective purpose of the norm is 'hidden', is not fully and consistently understood in court practice. In many typical cases involving personal injuries or damage to property, rights are protected by norms establishing unconditional (absolute) rights. In these situations, a breach of a right is automatically unlawful in the sense required for a tort claim, unless a defence excluding unlawfulness can be raised. The decision is nevertheless correct.

13 The second case shows the other situation arising out of a contractual relationship. There was no doubt that the interests of A's client were protected by the norms of accounting law addressed to accountants. In fact, the contract between A and V obliged A to follow the rules. The Court made it clear that the rules were not addressed to the general public, and no absolute rights are at stake. However, as the contractual claims were time-barred, V argued that the accountant committed a tort (art 415 KC). In order to accept such a conclusion, V had to persuade the Court that A not only failed to diligently perform his contractual obligations, but at the same time he breached a legal rule to which he is bound, regardless of the existing relationship between the parties. In the tort regime, it is arguable whether a lack of professional diligence should be identified with wrongfulness or with subjective fault, albeit it has little practical significance as art 415 KC refers to fault and not to unlawfulness and fault. The decisive factor was the recognition of a public function of an auditor and thus the Court did not exclude holding the auditor liable in tort for damage caused to his client.

Sąd Najwyższy (Supreme Court) 20 December 2012, III CZP 94/12
OSNC 7-8/2013, item 85

Facts

14 V, a prior owner, sued the State for compensation for the nationalisation of private woods. The decision was not found to have been illegal. V based her claim on art 7 of the Act of 2001 on the Preservation of the National Character of the Country's Strategic Natural Resources (hereafter, 'the Act').[2] This rule stipulates that the claims of natural persons – owners and their successors – stemming from deprivation of ownership of surface waters and woods will be settled through a pecuniary indemnity paid from the State budget on the basis of specific legal provisions. The said regulations were enacted by Parliament, but vetoed by the Polish President. The second, alternative ground for V's action was State liability for legislative omission (art 417^1 § 4 KC[3]).

2 Law of 6 July 2001 – ustawa o zachowaniu narodowego charakteru strategicznych zasobów naturalnych kraju, Dz U no 97, item 1051.

3 'If the damage resulted from omission to issue a legal act, where there is a legal duty to issue such act, the court hearing the claims for compensation determines the illegality of the omission'.

The regional court dismissed the case. The court of appeal filed a preliminary question, asking whether art 7 of the Act creates a claim for damages and, should the answer be in the affirmative, whether the failure to issue specific regulations concerning the procedure and amount of compensation creates liability for a legislative omission. 15

Decision

The Supreme Court held that V's claim fails on both legal grounds. 16

First, art 7 of the Act cannot be read as conferring on individuals a directly enforceable individual right to indemnity. The legal provision does not embrace all necessary elements of a claim that can be enforced against a specific person. Apart from indicating the State Treasury as the debtor, the Act fails to precisely define the circle of persons entitled and the nature of deprivation of the woods (its legal ground, and whether the deprivation had to be lawful or unlawful). The scope of compensation for nationalised property may not be inferred from the Act. The use of the word 'pecuniary indemnity' (*rekompensata*) implies the intention to preclude the application of the civil law rules on damages to the said payments. 17

As regards liability for normative omissions, in general, it only arises in situations where there is a legal duty to issue a normative act. Article 7 of the Act is a declaratory provision that does not create a duty to legislate. 18

Finally, in the light of established case law, it is required that the liability for legislative omissions arises when the rights of individuals, granted unconditionally and unambiguously by the legislator, cannot be enforced due to the failure to pass a relevant normative act.[4] In this case, this condition was not satisfied by art 7 of the Act. The Court rejected the functional interpretation of art 7 that was previously accepted in its decision of 29 June 2012.[5] Liability for legislative omission protects existing rights and cannot be used in relation to an omission to create new rights and to define the scope of rights. Courts might not interfere with the competence of the legislator through the construction of statutes. Article 7 should be read as a declaration of political will with no normative meaning. The normative contents of the rights would have been created had the 'sibling' act on re-privatisation been simultaneously agreed upon and enacted. 19

4 SN 4 August 2006, III CSK 138/05, OSN 4/2007, item 63.

5 I CSK 547/11, OSP 12/2012, item 121, reported in *E Bagińska*, Poland, in: K Oliphant/BC Steininger (eds), European Tort Law 2012 (2013) 519, nos 43–47.

Comments

20 In academic writings, the concept of relativity of unlawfulness (conditional unlawfulness) is either expressly rejected[6] or supported[7] in cases of public authorities' liability for normative wrongs. However, we can observe that this concept plays an important, limiting function in such cases and is increasingly present in judicial decisions.[8]

21 The commented decision is but one example of the application of this doctrine. In order to limit the scope of public authorities' liability, the Court has held that liability of the State for losses caused by legislative omissions arises solely when the rights of individuals, granted unconditionally and unambiguously by the legislator, cannot be enforced due to the failure to pass a relevant legal act.[9] Although art 77 of the Constitution does not introduce such a constraint, it was applied in the sphere of legislative wrongs.[10] The approach recalls the European Court of Justice's concept, permeating the principles of Member State liability for breach of EU law, that the rule infringed must be 'for the protection of individuals' or 'confer rights on individuals'. Notwithstanding the position of Polish law, it should be observed that the Court of Justice rejected the understanding of the condition that the rule infringed must be 'for the protection of individuals' or 'confer rights on individuals' in accordance with the *Schutznorm* doctrine because, in practice, this would make it impossible or extremely difficult to obtain effective reparation for damage resulting from a breach of EU law by the legislature.[11]

23. Czech Republic

Ústavní soud České republiky (Constitutional Court of the Czech Republic)
15 December 2015
I ÚS 1587/15

Facts

1 The respondent, as the driver of a vehicle, hit the claimant's two children at a pedestrian crossing. As a result of the respondent's conduct, both children suffered serious injuries with permanent impairment of health.

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6 *M Safjan*, Problematyka tzw. bezprawności względnej oraz związku przyczynowego na tle odpowiedzialności za niezgodne z prawem akty normatywne, in: Księga pamiątkowa Profesora Maksymiliana Pazdana (2005) 1326 f.

7 *E Bagińska*, Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej (2006) 397–401.

8 SN 14 January 2005, III CKN 193/04, OSP 2006, 7–8, item 89; SN 24 September 2008, II CSK 177/08, unpublished.

9 SN 4 August 2006, III CSK 138/05, OSN 4/2007, item 63; SN 24 November 2005, III CZP 82/05, OSP 9/2006, item 106.

10 SN 21 November 2003, I CK 323/02, OSNC 2004, no 6, item 103.

11 CJEU 5.3.1996, C-46/93 and C-48/93, *Brasserie du Pêcheur* ECLI:EU:C:1996:79, paras 69–72.

The courts of first and second instance blamed the father of the children for his breach of parental responsibility, ie the duty of a parent to take care of his children. As a result of the court's consideration, the father was held partially liable, jointly and severally with the driver of the vehicle. 2

Decision

The Supreme Court decided that, in the case of parents, the obligation to supervise a child arises from parental responsibility, which also includes the protection of the child (see sec 858 of the Civil Code[1]). This obligation is clearly a protective norm, the purpose of which is to protect the individual interests of a child who has not acquired full legal capacity yet. 3

A breach of this protective norm may then lead to liability for harm caused to the child under the general liability for breach of a legal obligation set forth in sec 2910 of the Civil Code. To establish liability for damage under this provision, it is necessary to prove that the person who supervises the child in the given situation has culpably breached their obligation and the damage caused to the child is causally related to the breach of this obligation. However, under the current Civil Code, it must be concluded that, in the case of a protective norm, the assessment of a breach of a legal obligation, ie stating the general illegality of the supervisor's actions, is not sufficient to incur liability for the damage. It is also necessary to always examine the protective purpose of the norm which the wrongdoer allegedly violated. 4

The Supreme Court finally stated that only if we conclude that the protective purpose of such a norm, namely personal, material and modal, ie determining who will be protected, against what damage and in what way, affects the facts of the case, liability for damage can arise under sec 2910 of the Civil Code. According to this concept of liability, liability arises only for damage that falls within the protective purpose of the norm, ie harm that the protective norm is intended to prevent. 5

Based on this, the Supreme Court refused the father's liability with the reasoning that if a child who is being supervised acts fully in accordance with the laws and behaves in a given situation in a way that an average person would behave, and yet suffers harm in traffic, then it cannot be concluded that the child's harm falls within the protective purpose of the norm. The purpose of the norm is to protect children from harm 6

1 Parental responsibility includes rights and duties of parents consisting in caring for the child, including, without limitation, care for his health, his physical, emotional, intellectual and moral development, the protection of the child, maintaining personal contact with the child, ensuring his upbringing and education, determining the place of his residence, representing him and administering his assets and liabilities; it is created upon the child's birth and extinguished upon the child acquiring full legal capacity. The duration and extent of parental responsibility may only be changed by a court (translation available at: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf>).

caused by negligence in traffic, which would not occur in the case of a fully developed person.

Comments

7 For comments see below.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 31 October 2019
25 Cdo 535/2018

Facts

8 The respondent caused a traffic accident in which the claimant's employee was injured and his employment had to be terminated due to permanent consequences excluding him from the ability to carry out his given job. As Czech labour law requires that compensation be awarded to the employee, the claimant (the injured party's employer) paid him, as a result of the job's termination, a severance payment of CZK 223,668 (approx € 8,950).

9 Upon payment, the claimant sought damages from the respondent in the amount originally paid to its employee.

10 The courts of first and second instance concluded that unless absolute law (ie rights with the effect *erga omnes*, such as personality rights, ownership right, etc) is breached, only damage which falls within the protective purpose of the norm, ie damage which the norm seeks to prevent, is to be compensated. Since the respondent infringed the traffic rules and the claimant was not directly injured by the traffic accident, the conditions are not met.

Decision

11 The Supreme Court stated that, from the point of view of a causal connection, it must be pointed out that the driver's unlawful conduct infringed the absolute rights of the injured party, ie the claimant's employee (causing injury to his health), not the employer's rights. The payment of severance is the consequence of the damage to the employee's health, ie the consequence of the respondent's unlawful conduct. However, to establish the right to a severance payment, other conditions contained in the Labour Code also had to be met, such as the impossibility of the employee to find another job. As a result, the unlawful act of the respondent was caused by the claimant's behaviour, which was fully independent of the first cause and whose connection caused the duty to provide the severance payment.

12 The Supreme Court further stated that, as to the protective norm whose breach could establish a duty to compensate the severance payment, pursuant to sec 1 of the Road Traffic Act, the purpose of this law is to regulate the rights and obligations of road

users, the rules for road traffic and the administration of road traffic management by the State. The protective function of the norm ensures only the smooth functioning and safety of traffic on roads, the protection of life, health and property of road users, and guarantees compensation for any interference in these values caused by immediate breaches of road regulations. However, this function cannot be disproportionately extended beyond the protection of traffic safety by replacing it with the protective function of other legal norms.

Thus, the Supreme Court concluded that the respondent infringed the rights of the victim of the road accident, who was the claimant's employee, not the rights of the employer. 13

Comments

For comments see below. 14

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 4 May 2021

25 Cdo 1131/2019

Facts

The respondent carried out construction work on his land (adjacent to the claimant's land) without having a relevant zoning decision or building permit, despite repeated requests from the building authority to suspend the construction work immediately and the court's preliminary injunction, which ordered the immediate cessation of construction work. Consequently, the claimant sought compensation for non-material damage pursuant to sec 2971[2] of the Civil Code consisting in the disturbance caused by the construction work. 15

The respondent alleged that there is no breach of an important legal obligation designed to protect a specific right which was affected by the breach of his obligation (the so-called nexus of wrongfulness must be met). The obligation to build only with a building permit is not intended to protect the specific rights of individuals and, therefore, it does not have the nature of a protective norm. Only the particular construction rules have this character (eg rules on maintaining the distance between buildings). 16

2 If so justified by special circumstances under which the wrongdoer caused damage by an illegal act, particularly if the wrongdoer breached, by gross negligence, a major legal duty, or if the wrongdoer has intentionally caused the damage because of his desire to destroy, to cause harm or on the basis of another especially despicable motive, the wrongdoer shall also provide compensation for immaterial harm to any person who legitimately feels such loss as a personal misfortune that may not be otherwise redressed.

Decision

17 The Supreme Court stated that sec 2910 of the Civil Code[3] requires anyone who has culpably breached a legal obligation to compensate the injured party for what he has caused. In the case of an infringement of an injured party's absolute right, such as ownership rights, personality rights, etc, the wrongdoer is liable for the damage caused even if the breached legal obligation does not serve to protect the infringed right of the individual (sentence of the first cited provision). However, if the wrongdoer interferes with rights of the injured party other than the absolute right, he is liable for such damage only if he violated the legal obligation established to protect the violated 'other' right. Such an interpretation reflects the difference between the meaning of absolute rights and other rights and corresponds to the intention of the legislator according to the explanatory memorandum to the Civil Code.[4] A contrary interpretation would conflict with the express wording of the Civil Code, its obvious meaning and the clear intention of the legislator arising from the cited explanatory memorandum.

18 Due to the conclusion that the claimant's absolute right was breached, the Supreme Court upheld the claim.

Comments

19 In Czech laws, the theory of the protective purpose of the norm is a legally significant way to limit legally relevant causes of certain harm. Czech theory uses the term limitation of 'legal' causation, but this approach is clearly not a theory of causality, but rather a real limitation of the imputability of the real cause to a particular wrongdoer.[5] The theory of the protective purpose of the norm was, to some extent, already acknowledged in Czech law during the period of validity of the ABGB, but at that time it was not so pronounced and was connected with the theory of adequacy.[6]

20 The theory of the protective purpose of the norm is based on the fact that the wrongdoer is not liable for all the consequences of a breach of a legal obligation, but only for the breach of those interests whose protection was the purpose of the obligation in question.[7]

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3 A wrongdoer who through his fault breaches an obligation set by law and in doing so interferes with an absolute right of the injured party shall compensate the harm he causes by doing so. The duty to provide compensation also applies to a wrongdoer who interferes with another right of the injured party by breaching through his fault a duty established by law for the protection of that right.

4 'The draft is based on the distinction between cases where an absolute right is affected by a breach of a legal obligation and where another right is affected. This division is justified by the nature of the rights in question: absolute law, whether personal or property, affects everyone, while relative rights affect only between the parties.'

5 *L Tichý/J Hrádek*, Deliktní právo [Law of Delicts] (2016) 247.

6 *J Sedláček* in: F Rouček/J Sedláček, Komentář k československému obecnému občanskému zákoníku [Commentary of Czechoslovak General Civil Code – ABGB] (2013) 683ff.

7 *L Tichý/J Hrádek*, Deliktní právo [Law of Delicts] (2016) 251.

This conclusion was already reached by the Supreme Court of Czechoslovakia in a decision of 27 February 1924, Rv I 1758/23, when the respondents, as owners of a chemists, sold white phosphorus to a 14-year-old claimant although this was prohibited by a specific regulation. The claimant intentionally mixed this purchased phosphorus with potassium chlorate and carbon disulphide bought at another shop. During further handling, the mixture resulted in an explosion, which seriously injured the claimant. If white phosphorus is sold despite its sale being prohibited, as it is a poison, and if the buyer caused an explosion by mixing phosphorus with other substances, the seller is not liable to the buyer for the damage suffered. On the other hand, in the case of poisoning of the claimant, the seller would be held liable. **21**

This theory was expressly accepted by case law for the first time by the Constitutional Court in decision I ÚS 312/05.[8] **22**

When we talk about the protective purpose of a norm, the purpose of such a norm must be to protect the interests of individuals.[9] The Czech Civil Code uses the term 'act-based obligation established to protect the right'. In this respect, however, it is not only an obligation stipulated by an act, but also an obligation stipulated by other laws, eg by a bylaw or a decision of a public authority. The protective purpose is then the criterion based on which it is defined (whether at all), and if so, to what extent the damage caused by the conduct violating this protective norm is to be compensated.[10] The analysis of any norm should be made by a teleological interpretation. **23**

Melzer[11] defines the relationship between the protective norm and objective foreseeability, which Czech law rather applies to the scope of the theory of adequacy. He takes the positive view that if a legal norm prohibits certain conduct, it can be assumed that the aim of the norm is to prevent only the normal and therefore foreseeable consequences of that conduct. Objective foreseeability is therefore a criterion applicable in the case of the breach of a protective norm. However, the Constitutional Court views the given hierarchy rather as two separate theories. **24**

8 *P Bezouška* in: M Hulmák et al, Občanský zákoník, Komentář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2014) 1556.

9 There are only few academic texts on the issue of the protective norm. The most complex work is presented by Pipková (*P Pipková*, Ochranný účel normy a jeho význam pro vymezení rozsahu odpovědnosti za škodu (k § 2910 NOZ) [Protective purpose of a norm and its importance for determination of the scope of liability for damage (on sec 2910 of the New Civil Code)], Právník 9 (2013) 879 ff), who divides the protective scope of the norm into three levels: personal, material and modal. The personal protective purpose defines the entities that are to be protected by a given norm. The material purpose of the norm determines which protected goods are included in the norm and therefore also protected. The modal scope then defines the mode of action from which the norm offers protection. The harm will therefore not be compensated if the damage is caused by other actions.

10 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, S. IX [Civil Code secs 2894–3081, Large commentary, vol IX] (2018) 302.

11 *F Melzer* in: Melzer/Tegl et al, Občanský zákoník § 2894–3081, Velký komentář IX 304.

25 As to the aforementioned cases, they clearly show that there is a strong tendency to apply the theory of the protective purpose of the norm.

26 The current understanding of the protective purpose of the norm is clearly described in all mentioned cases and shows that the courts try to interpret the norms breached and, in a teleological interpretation, define their personal, material and modal scope. Unfortunately, the conclusions of the courts are generic and do not specifically deal with theoretical aspects and limitations of the norms in question.

27 Another perfect example is the decision of the Czech Supreme Court 25 Cdo 535/2018, in which the Court did not hold a car driver liable for damage suffered by an employer which had to pay a severance payment, ie remuneration following termination of the employee's contract. The protective function of the road traffic norm ensures only the smooth functioning and safety of traffic on roads and, as a secondary function, the protection of life, health and property of road users. As a result, the norm guarantees compensation for interference in these values caused by direct breaches of road regulations. However, a severance payment is based on newly arisen reasons for the employment relationship between the employer and injured employee and cannot be deemed a result of a breach of traffic rules.

28 It is further very positive that the court did not apply the theory of interruption of causation, as established in Czech case law in Socialist times (see 4/23), but rather the theory of the protective purpose of the norm, which represents a new approach to causation under Czech law.

29 Criticism should be raised against the conclusion in case 25 Cdo 1131/2019, in which the Supreme Court decided on the relevance of the protective norm in the case of a breach of absolute rights, such as ownership rights or personal rights. In light of the current concept of the Civil Code, which, in the case of sec 2910, is inspired by sec 823 of the BGB, it was necessary to determine whether the protective purpose of the norm should apply to both the protection of relative and absolute rights. While in the case of relative rights the Civil Code explicitly refers to the 'legal obligation established to protect the violated "other" right', in the case of absolute rights, we must infer such a relationship by interpretation.

30 Contrary to the Supreme Court, however, we believe that the theory of protective purpose of the norm will also be relevant in cases of interferences with absolute rights. This is because even a breach of absolute rights requires a breach of a specific obligation and such an obligation can either be the duty of care (*Verkehrspflicht*) or a direct rule intended to safeguard that absolute right.[12]

12 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 299 ff.

24. Slovakia

Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic) 9 May 2017

Case No II ÚS 295/2017[1]

Facts

V (a cooperative farm) went bankrupt, while the members of the cooperative farm, who used the services of a bonds trader, lost their savings. The cooperative farm claimed compensation for damage from the National Bank, which they claimed was a result of the National Bank's erroneous bank supervision. The court of first instance, as well as the appellate court, dismissed this claim with the justification that the complainant failed to prove the National Bank's legal negligence. **1**

V appealed the court of appeal's decision to the Constitutional Court complaining a breach of basic rights – the right to judicial protection under art 46(1)[2] and the right to compensation for damage caused by an unlawful decision of a court, other State or public authority or by maladministration under art 46(3)[3] of the Constitution of the Slovak Republic. **2**

Decision

The Constitutional Court dismissed the complaint. **3**

The State's liability for damage caused by maladministration requires that the damage suffered must be the result of the maladministration. This is the case if the official procedure or the result of that procedure was intended to protect not only the general interests of society, but also the injured party against the occurrence of that injury. **4**

Comments

The decision of the Constitutional Court shows that Slovakian courts are hesitant to use the 'protective purpose rule' but nevertheless tend to refer to a 'teological interpretation of legal norms'. **5**

In its statements, the National Bank pointed out that V, as an investor, must have known that investing in the performance of a cooperative farm would carry certain **6**

1 Available at: <https://www.ustavnysud.sk/docDownload/8bf6d7c8-4181-4295-8160-2c3ef71e565c/%C4%8D.%2062%20-%20II.%20%C3%9AS%20295_2017.pdf>.

2 46 (1): Anyone may assert his or her rights in accordance with the procedure established by law before an independent and impartial court and, in the cases provided for by law, before any other body of the Slovak Republic.

3 46 (3): Everyone has the right to compensation for damage caused by an unlawful decision of a court, other state authority or public administration body or by an incorrect official procedure.

risks, and that State authorities can only monitor proceedings in the limits defined and controlled by the law. The regional court (acting as an appellate court) challenged the evidence presented to support the cause of inflicted damage (the damage only arose after the complainant's claim was not satisfied within the bankruptcy proceedings of the cooperative farm), and the causal connection.

7 The Constitutional Court stated that there is no subjective right or claim to 'correct' or 'accurate' lawful bank supervision, which would then create a right to claim compensation when such supervision fails. Basic bank supervision is a conceptual and rather (economically) political activity – not a traditional administrative activity that Act No 514/2003 Z z has in mind. In its argumentation, the Court explicitly referred to the German concept of the protective purpose of a legal norm (*Schutzzweck der Norm*) and the court ruling of 22 April 1058 (BHBZ 27, 137), as well as the ruling of the European Court of Justice in the case ES. C-222/02.

8 According to this Constitutional Court ruling, damage does not have to be repaired as long as the purpose of the legal regulation surrounding it was not to protect from such damage. On the other hand, the damaged party is to convincingly argue that the purpose of the breached regulation is not only to protect public interests, but also to protect an individual from the type of breach that occurred in this case.[4]

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) 31 January 2012

Case No 6MCdo/11/2010

Facts

9 In its claim for damages, V, which is engaged in the production and distribution of alcoholic beverages, pointed out that, following an inspection carried out by the Customs Office in its warehouses, bottles of alcohol marked with false bands (stamps) were seized. V alleged that the decision was unlawful and that it was improperly handled in such a way as to prevent it from disposing of the goods. This caused its insolvency, the cessation of production and the loss of profits and all income.

10 The district court held that the claim for damages was well founded. The court of appeal upheld the decision. The Attorney General lodged an extraordinary appeal against the decisions.

11 In the Attorney General's appeal, it was argued that it remained disputed whether the damage was caused by the customs authorities' decision-making. The evidence showed that V's warehouse had been marked with police tapes and sealed prior to the decision of the customs authorities. That would suggest that the reason for the inability

4 *K Csach*, Glosa k uzneseniu Ústavného súdu sp. zn. II. ÚS 295/2017. z 9. 5. 2017 (ochranný účel normy zodpovednosť za bankový dohľad), Súkromné právo (2017) no 5, 221.

to dispose of the goods was not the decision of the customs authorities but the action and decisions of the police. According to the Attorney General, the courts' failure to address the authenticity of the control tapes in relation to the claim for damages is also faulty.

Decision

The Supreme Court of the Slovak Republic, as an appellate court, overturned the decision of the court of first instance. The Supreme Court of the Slovak Republic concluded that no causal link had been established in the previous court proceedings, which would establish the State's liability for the damage caused. 12

According to the Supreme Court, it is necessary to prove a causal link between the inability to dispose of the goods and a number of causes, such as an unlawful decision of the customs office, the sealing of the warehouses by the police authorities, as well as the marking of the alcohol with counterfeit tapes. 13

According to the Court, the sealing of the warehouse by the police authorities prevents the later decisions by the customs authority from being taken as the reason for the impossibility of disposing of the goods. The sealing of the warehouse by the police led to the impossibility of trading in the goods; after the sealing of the warehouse by the police, the injured party would not have been able to dispose of the goods even if no later decision by the customs authorities had been made. Thus, the question of whether the police decision was in accordance with the Criminal Procedure Code was not even relevant; important was only the fact that the bottles of alcohol were marked with counterfeit control tapes. 14

The Court reasoned that the sole cause of V's damage was the marking of the goods with counterfeit tapes. That fact would have had an effect, according to the Court, even if the forgeries had not been detected. V's inability to trade in such goods would have arisen even in the absence of a decision by the customs authorities to seize the goods or a prior decision by the police authorities to seal the warehouse. 15

Comments

By means of a teleological interpretation of the purpose of the legal norm, the Court dealt with the purpose of the legal obligation to mark alcoholic beverages with counterfeit tape. According to the Court's reasoning, the law requires that such goods be marked with counterfeit tape since the sale of unmarked goods is prohibited. The reason for such an approach (usually prohibition) may be based on important public interests, such as the interest in protecting health or preventing tax evasion, but also on moral considerations. Goods not marked or marked with a counterfeit tape are exempt from legal circulation (*res extra commercium*) and therefore cannot be traded 16

Unmarketability is also given by the very nature of the forgery, which is based on untruth and bad faith and is fundamentally contrary to good morals and thus to objective law. The essence of a forgery is illegality. By affixing the fake inspection tape on the 17

bottle, a bottle of alcohol became a fake commodity. This transferred the consequences of the illegality to the consumer packaging of the alcohol.

18 The decisive fact which led to V's inability to trade in the goods was the fact that the bottles of alcohol were marked with counterfeit tapes. The Court thus rejected that the cause of the damage was 'an unlawful decision by the customs authorities' or 'the sealing of the warehouses by the police authorities'.

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 4 May 2021, No Rev-2474/2015-3

<https://www.iusinfo.hr/sudska-praksa/VSRH2015RevB2474A3>

Facts

1 The case involves a lawsuit brought by V1, mother, and V2 and V3, sisters of V (direct victim) who died in a traffic accident, against A, insurance company which insured the vehicle involved in the accident.

2 The accident took place on a steep and winding road. A truck was moving downhill and V was going uphill on a motorcycle. Instead of stopping when noticing that the motorcycle was approaching, the truck continued driving downhill, at an unadjusted speed and without paying attention to the conditions on the road, as the rear end of its trailer swerved, crossed to the opposite lane and hit V. At the time of accident, V did not have a driving licence, and although occasionally crossing into the opposite lane, at the time of collision he was in his lane.

3 The first instance court assessed that A contributed to damage to 80 %, and V to 20 %. The appellate court partially upheld A's appeal, partially reversing the first instance decision by apportioning V's contribution to his own damage to 40 %.

Decision

4 The Supreme Court upheld V1's, V2's and V3's application for revision, dismissed A's appeal on the merits and quashed the second instance decision, confirming the first instance court's decision.

5 The Supreme Court disagreed with the appellate court's conclusion that V's contribution to his own damage should also reflect the fact that he was driving a motorcycle without a driving licence. According to the Supreme Court, the fact that a driver does not have a driving licence does not necessarily and automatically imply their contribution to their own damage. In each particular case, the courts should establish whether damage or a certain portion of it originates from some action of a victim, reasoned the Supreme Court, and it is for the tortfeasor, who invokes a victim's contribution to furnish proof in this regard. Applying this rationale to the case at hand, the Supreme Court concluded that nothing sug-

gests that the traffic accident, and the damage which resulted therefrom, originated from V not having a driving licence. Therefore, the Supreme Court opined that V contributed to his own damage only by his somewhat unusual driving style (which was established by the expert witness), but not by not having a driving licence.

Comments

See below 3/25 nos 14–17. 6

Presuda Županijskog suda u Varaždinu (Judgment of the County Court in Varaždin) 13 June 2016, No Gž R-10/16-2

<https://www.iusinfo.hr/sudska-praksa/ZSRH20161B0A2>

Facts

V was employed with A, a construction company, as a construction worker and was injured while at work. The first instance court found A liable for V's damage and ordered it to compensate V for the damage sustained. In its appeal, A argued, among others, that the first instance court failed to apply provisions of art 1091, para 1 of the COA, according to which, the court may decide, taking into account the financial position of the victim, to require of a liable person compensation lower than the amount of damage if the damage was not caused intentionally or by gross negligence, and if the responsible person is indigent and a full payment of the compensation would greatly impoverish him. 7

Decision

The County Court in Varaždin, acting as an appellate court, rejected A's appeal and confirmed the first instance decision. 8

Responding to A's argumentation regarding the first instance court's alleged failure to apply provisions of art 1091, para 1 of the COA, the County Court in Varaždin, invoking the earlier position of the Supreme Court of the Republic of Croatia, opined that this provision is construed as a social category, and as such, it is intended to alleviate the social hardship a tortfeasor, who acted only with simple negligence, could be exposed to by paying the full amount of compensation. Being a social category, this provision can only be applied to natural persons as tortfeasors, and not to legal persons since, as opined by the County Court in Varaždin, the financial status of a legal person cannot be observed in the context of a social category. 9

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 6 June 2000, No II Rev-73/1998-2

<https://www.iusinfo.hr/sudska-praksa/VSRH1998IIRevB73A2>

Facts

10 A and V entered into a sales contract regarding various goods. Under this contract, A also undertook an obligation to demolish some prefabricated building for V and to transport, without consideration, some of V's construction machinery from a construction site. A undertook to remove V's machinery from a construction site by 18 October 1993, but failed to perform this obligation. V subsequently called A to fulfil its obligation on several occasions, but A ignored that request. On 13 April 1994, V's machinery was stolen from the construction site and the perpetrator was never found. V files a lawsuit against A and claims, among others, damage caused by the theft of the machinery, consisting in the value of the machinery, arguing that the theft would not have happened had A performed its contractual obligation as agreed.

11 The first instance court and the appellate court dismissed V's compensation claim.

Decision

12 The Supreme Court of the Republic of Croatia dismissed V's application for revision on the merits and confirmed the lower courts' decisions.

13 The Supreme Court acknowledged that A failed to fulfil its contractual obligation, but nonetheless concluded it cannot be held liable for damage caused by the theft of the machinery. Substantiating this position, the Supreme Court noted that damage caused by theft of the machinery is not causally connected to A's failure to fulfil its contractual obligation. In this respect, the Supreme Court reiterated the well-established position of Croatian judiciary that certain damage can be in a legally relevant causal link only to that wrongful act which typically results in such damage, obviously holding that this was not the case here. The Supreme Court also added that A could be potentially held liable for some other (types of) damage which typically stem from non-performance of a contractual obligation to remove machinery from a construction site such as, for example, V's expenses for transportation of the machinery, inability to use the machinery for some time, and the like, but not damage caused by the theft of the machinery.

Comments

14 Croatian laws extremely rarely, if ever, explicitly define the purpose of a particular statutory norm. This is, however, not to say that the concept of the protective purpose of a particular statutory norm is irrelevant altogether in the Croatian legal system. Applying laws to a given case, Croatian courts are frequently called to interpret a particular norm, including by defining the scope of application of a norm, and in the course of this exercise, they will be compelled to determine the intended purpose (*raison d'être*) of that

norm. In this respect, as presented in the above-analysed cases, Croatian courts will often, explicitly or implicitly, resort to the concept of the protective purpose of a norm in order to distribute damage among all the actors involved, either by limiting a tortfeasor's liability, or a victim's exposure to contributory negligence, or even to limit the application of some statutory defences available to a tortfeasor.

15 Thus, for example, in case II Rev-73/1998-2, the Supreme Court dismissed the victim's claim to be compensated for the damage caused by the theft of an object, obviously holding that such damage falls outside the protective ambit of rules on contractual liability in general, and art 342, para 2 of the COA in particular,[1] which the court applied in this case. It is true that the Supreme Court dismissed V's compensation claim for lack of causation. However, it is also true that the reasoning supporting this judgment clearly reveals that the Supreme Court was of the opinion that the damages sought by the victim (ie the value of a stolen object) does not belong to a type of damage normally recoverable under the rules of contractual liability. In this respect, the Supreme Court clearly expressed its understanding of the statutory norm providing for contractual liability as not protecting from incidental, atypical damage, ie damage which typically does not result from failing to perform a contract as agreed.

16 Likewise, in case Rev-2474/2015-3, the Supreme Court refused to assign a certain portion of damage to the victim, holding that his misconduct (ie not having a valid driving licence) did not contribute to the occurrence of the accident. A statutory provision requiring that drivers of motor vehicles possess a valid driving licence, as well as many other norms regulating road traffic, undoubtedly contribute, at least indirectly, to reducing the incidence of traffic accidents and damage stemming therefrom. However, the Supreme Court's decision in this case clearly reveals that this Court holds that reducing the incidence of traffic accidents is not a primary purpose of that statutory norm, ie that this norm is not primarily intended to protect persons participating in traffic from damage likely to result from traffic accidents, but has other purposes, such as ensuring that all those participating in traffic obey traffic rules, thus enabling the smooth operation of traffic. Hence, the mere fact that a driver involved in a traffic accident did not possess a valid driving licence should not automatically, on its own, lead to a conclusion of their liability for damage caused thereby. In order to hold someone liable for damage caused by a traffic accident, the existence of a concrete action or omission on the side of a tortfeasor that caused the damage has to be demonstrated. In fact, it does not seem exaggerated to assert that Croatian courts generally tend to take a somewhat unorthodox position that traffic regulation rules serve predominantly administrative (public law) purposes, rather than protecting people from damage, although, one cannot entirely rule out the protective purpose of those norms. Thus, for example, in an older case, Gž-4589/79 of 16 December 1976, the Supreme Court held a traffic rule prohibiting pedes-

1 Art 342, para 2 of the COA provides that when a debtor fails to perform their contractual obligation or is late with performance, the creditor is entitled to claim compensation for damage sustained therefrom.

trians from walking on the right hand side of the road to be relevant only in an administrative sense (as a rule of traffic regulation), but not necessarily in the course of determining tort liability. Consistent with what the Supreme Court held in case Rev-2472/2015-3 described above, in case Gž-4589/79, the Supreme Court held that a violation of such a traffic rule cannot be held against a pedestrian if no causal relationship exists between the violation of the traffic rule and the damage occurrence.[2]

17 Finally, the concept of the protective purpose of the norm is sometimes invoked by Croatian courts in the course of deciding whether to apply statutory provisions providing for some specific defences, as is demonstrated by the judgment of the County Court in Varaždin in case No Gž R-10/16-2. Article 1091, para 2 of the COA provides for a specific defence, which allows the court to reduce the overall compensation if damage was not inflicted intentionally or with gross negligence, and if, due to their indigence, a full payment of the compensation would greatly impoverish the liable person. The wording of art 1091, para 2 of the COA undoubtedly suggests that this provision was indeed intended to protect natural persons from being existentially endangered by paying compensation in full, hence, as a social category, as accurately observed by the County Court in Varaždin. In this respect, it is only natural that legal persons cannot avail themselves of the protective ambit of that norm as, again, accurately observed by the County Court in Varaždin. Hence, the County Court in Varadžin denied A's request to have V's compensation reduced by resorting to the concept of the protective purpose of art 1091, para 2 of the COA, concluding that this norm was not intended to protect legal, but only natural persons from being impoverished by paying compensation.

26. Slovenia

Vrhovno sodišče (Supreme Court) 23 December 2007, II Ips 101/2007

<https://www.sodnapraksa.si/> (27 November 2021)

Facts

1 The plaintiff claimed compensation for the non-pecuniary damage he suffered as the defendant's employee at his workplace on 12 April 1996, when he and his colleagues lit a fire during their lunch break in the woods and a mine exploded, which severely injured plaintiff V. The trial court rejected the claim in its entirety. It held that the facts established did not give rise to either objective or culpable liability on the part of defendant A. The court of second instance dismissed the applicant's appeal and upheld the judgment of the court of first instance.

2 *V Gorenc/L Belanić/H Momčinović/A Perkušić/A Pešutić/Z Slakoper/M Vukelić/B Vukmir*, Komentar Zakona o obveznim odnosima (2014) 1706 f.

Decision

The Supreme Court dismissed V's appeal as unfounded. With regard to V's allegation of the culpable liability of A, that the damage event would not have occurred if the workers had not lit a fire during their lunch break, the Supreme Court drew attention to the fact that the defendant's conduct, allowing employees to light a fire in the woods, may violate regulations on forest protection, but the *ratio legis* of these norms is not to deter the danger posed by potentially unexploded mines in the forest, but to protect forests from fire. Since, according to the protective purpose of the norm, the damage event cannot be attributed to an omission of A's duty (omission of duty to prohibit burning fires), A cannot be held liable for the damage event, even under the provisions on culpable liability. 2

Comments

The theory of natural causation (*conditio sine qua non*) is not useful here in the process of finding the legally decisive cause. There must be a natural causal link between the fact of damage and the consequence of the damage, because, if certain conduct from the point of view of natural causality cannot be the cause of particular damage, then there can be no legal causation (the exception applies in the case of failure to act, where the law itself determines the presumption that there is natural causality). However, not every natural cause is also legally relevant. According to the theory of *ratio legis* causality, only those causes are relevant that the legal norm considers to be causes according to the protective purpose of the legal norm. 3

27. Hungary

Legf Bír (Supreme Court of Hungary) Pfv III 22.409/2006

BH.2007.226

Facts

The placement of a mobile telephone transmission tower in a residential area caused unnecessary inconvenience to the people living in that area and also reduced the commercial value of their immovable properties. The owners sought damages from the mobile telephone company that erected the transmission tower. 1

Decision

The court established that the placement of a mobile telephone transmission tower in the residential area caused unnecessary inconvenience to the people living in that area and negatively affected the value of their immovable properties despite the fact that the company possessed the necessary permits for the erection of the tower and thus placed it legally, serving the public interest. 2

Comments

3 The court established the liability of the constructor based on art 6:520 (d) of the Civil Code. The provision is based on the principle that *causing damage by a legal activity does not automatically exclude tort liability, because the concepts of unlawfulness in different legal fields are independent from each other*. Accordingly, the sanctions of different legal fields should be assessed according to the autonomous criteria of each legal field.

4 Damage caused by a legally permitted activity will not lead to liability of the author of that activity if two alternative conditions are fulfilled: a) compensation is provided by the law or b) a value protected by law was not infringed.[1] The first condition means that the damage caused by a legally allowed activity was compensated under a special law. The second condition is fulfilled when the legally allowed activity did not harm a value of other persons protected by law and, thus, it *falls outside the protective purpose of the law*.

5 Article 6:518 prohibits the unlawful causation of damage, whereas art 6:520 establishes when an act causing damage is unlawful or lawful, ie when the tortfeasor does not have an obligation to pay damages to the victim. Furthermore, *art 6:564 establishes the right to compensation in cases of lawful causation of damage only when this is provided for by legislation*. This is considered a civil law question, while it is a constitutional law matter when the legislation allows the interference with personality rights without an obligation to compensate.[2]

Fővárosi Ítélőtábla (Budapest Court of Appeal) Pf 20.276/2021/5

Facts

6 The plaintiffs sought damages based on art 6:519 of the Civil Code from the Hungarian State basing their claim on State liability for an infringement of obligations resulting from Regulation 2006/2004 EC[3]. The travel agency with which the plaintiffs concluded travel contracts went bankrupt and could not reimburse to its clients the full cost of the trips paid in advance. This could happen because the initial Hungarian implementing law of Regulation 2006/2004/EC, in place when the plaintiffs contracted with the travel agency, was not in full compliance with the EU Directive, which requires travel agencies to set up a guarantee fund from which they could fully reimburse their clients in case of payment difficulties. In the meantime, Hungary has amended the implementing law of

1 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 59.

2 *A Menyhárd*, A kártérítési felelősség általános szabálya és közös szabályai, in: Z Csehi/B Tőkey/B Bodzási (eds), A Polgári Törvénykönyvről szóló 2013. évi. V. törvény kommentárja (2021) 2242.

3 Regulation (EC) No 2006/2004 or the European Parliament and of the Council of 27 October 2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L 364/1.

Regulation 2006/2004/EC and, thus, when the plaintiff sued the Hungarian State for damages, this law was in line with the requirements of EU law. The central question for the courts in this case was whether the plaintiff can seek damages if, at the time of the lawsuit, the challenged implementing law subsequently complied with the requirements of the EU and whether a civil law court may award damages for State liability without having the challenged national legislation declared unconstitutional by the Hungarian Constitutional Court or by the CJEU as infringing EU law. Regulation 2006/2004/EC has also been replaced in the meantime by Directive 2015/2303/EU[4], which was used as an argument by the Hungarian State in its defence that the earlier Hungarian case law on State liability should not apply for Directive 2015/2023/EU.

Decision

The court of first instance accepted the claims and awarded the plaintiffs the sought damages and litigation costs upon establishing that the guarantee provided for by the Hungarian implementing law of Regulation 2006/2004/EC, namely the setting up of a guarantee fund consisting of 12 % of the net profit of the companies, was not sufficient to cover the claims of the clients of bankrupt companies. **7**

The court rejected the defence that damages cannot be awarded until the CJEU has declared the disputed Hungarian legislation as violating EU law, recalling in support of its position C-430/13[5] of the CJEU. It also *rejected the argument advanced by the defendant that the damage was not foreseeable,* because it was expected from the State that it investigate and design all possible scenarios relating to payment difficulties of travel agencies and the designing of legislation on guarantees in such a way to ensure the full protection of consumers when travel agancies experience payment difficulties. *It also stressed that the scope of the old directive and the new directive are the same – the granting of effective consumer protection* – thus the previous Hungarian case law on similar situations (BDT2017 3632) also applies for the new directive. **8**

The Hungarian State appealed and challenged the applicability of decision C-430/13, arguing that as the national legislation was amended, the Hungarian State cannot be accused of tortious activity and cannot be held liable on the basis of previous legislation without having a decision declaring that law void before a constitutional court (which did not happen in this case). It also claimed the necessity of a preliminary ruling establishing that the Hungarian legislation infringed EU law. **9**

4 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326/1.

5 CJEU 16.1.2014, C-430/13, *Ilona Baradics and Others v QBE Insurance (Europe) Ltd Magyarországi Fióktelepe and Magyar Állam*, ECLI:EU:C:2014:32.

10 The appeal court rejected the claim of the Hungarian State as ungrounded. The court clarified that art 267 TFEU provides lower courts with the possibility to refer questions to the CJEU and not with an obligation to do so. For this reason, a second instance court cannot order a first instance court to seek the constitutional control of a national law or to suspend the litigation and refer questions to the CJEU under the procedure of preliminary ruling.

11 Thus, the appeal court confirmed the finding of the first instance court rejecting the argument of the Hungarian State that the defendants cannot claim damages for 'defective' legislative activity before having first declared the challenged law either unconstitutional or as infringing EU law, because, in the case before it, the defendant infringed the subjective rights of the entities protected under EU law; the case directly concerns EU law and this is not an issue for constitutional control.

Comments

12 In Hungary, the Civil Code does not contain a special form of liability for damage caused by legislative activity to private persons and, thus, for such cases the general rules of tort liability apply. The same is true for damage caused by administrative authorities, prosecutors and public notaries. Such situations differ from the liability of the State for damage caused during the exercise of public authority governed in arts 6:548 and 6:549 of the Civil Code.

13 This decision reinforces the earlier Hungarian case law on State liability for 'defective' legislative activity (decision BDT2015.3283) and clarifies that in cases of State liability based on infringements of subjective rights granted under EU law, previous constitutional control or a preliminary ruling on the challenged piece of legislation is not necessary, as established in case BDT2017.3632.

14 In a subsequent case EBH2019.P.1 (Pfv III 20.308/2018), the *Kúria* established for damage caused by legislative activity – except cases concerning the infringement of subjective rights granted under EU law – only then is it possible to submit a civil law claim based on the general rules on tort liability, when previously the Hungarian Constitutional Court established the unconstitutionality of the challenged legislation or the infringement of the Constitution by the Parliament when enacting the legislation. This is because, according to art 26 (1) of the Hungarian Constitution, judges are bound by laws and art 28 of the Constitution establishes that judges are empowered to interpret the laws but not to assess the correctness or incorrectness, the validity or invalidity of the laws while enforcing them, nor to establish their compatibility with the Constitution. However, this does not mean that civil law courts are not competent to decide damages cases once the Constitutional Court has established the nullity of the law.

15 In cases when there are no special provisions on liability, art 6:520 of the Civil Code will apply. Nevertheless, *the decision of the Constitutional Court will not serve as a legal basis for civil litigation; this only establishes the illegality of the legislative activity*. In or-

der to grant compensation under a civil law claim, the fulfilment of the conditions of liability established in arts 6:519–6:534 of the Civil Code is also required.

29. European Union

European Court of Justice, 5 March 1996, joined cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others[1]

ECLI:EU:C:1996:79

Facts

Germany's prohibition on importing beer containing additives was held incompatible with Community law by the ECJ.[2] Brasserie du Pêcheur was one of the producers who were prevented from exporting beer to Germany while the ban was in force and therefore sued for compensation of the economic loss incurred. The German BGH submitted several questions to the ECJ for a preliminary ruling, focusing inter alia on the requirements under which a Member State may be held liable for its own legislation if incompatible with Community law, in particular whether national law may insist on fault as a prerequisite of such liability. **1**

The claimants in the second case complained of a British registration requirement which effectively prevented claimants from fishing with certain boats. Parts of that registration system were held contrary to Community law. Before addressing which types of losses are compensable,[3] the Divisional Court also asked the ECJ under which conditions a Member State may be held liable for an infringement of Community law by legislation. **2**

Decision

The ECJ repeated by way of reference to its *Francovich* ruling[4] that 'the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law' (para 20). This is not only true in the case of a Member State's failure to (properly) implement a directive as in **3**

1 This case was already presented with a different focus in *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 6/28. Because of the fundamental importance of this ruling, its actual language will be quoted extensively below.

2 ECJ 12.3.1987, 178/84, *Commission v Germany* [1987] ECR 1227.

3 See *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 6/28.

4 Above 1/29 fn 4.

Francovich, but also if Community law directly confers a right upon individuals which is impeded by national legislation.

4 Proceeding from the rule of non-contractual liability of the Community contained in art 215 ECT at the time (now art 340 TFEU), the Court concluded that there was a 'general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused' (para 29). The State shall be liable, irrespective of whether the breach of Community law originated in its legislature, judiciary or executive.

5 While it is therefore clear that States can be held liable under Community law, the conditions thereof 'depend on the nature of the breach of Community law giving rise to the loss and damage', which has to be assessed with an eye to the 'full effectiveness of Community rules and the effective protection of the rights which they confer' (para 38 f). On the one hand, the 'general principles common to the laws of the Member States' have to be considered, on the other, due regard is to be had not only to the margin of discretion granted to the Member States in implementing and applying Community law, but also to the 'complexity of the situations to be regulated' and to the 'difficulties in the application or interpretation of the texts' (para 42 f). If the discretion granted to the national legislator is very wide, liability can only arise if 'the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers' (para 45).

6 In the instant case, both the German as well as the UK legislature were held to have had a wide discretion. Therefore, these Member States could only be held liable if the rule of Community law concerned was intended to confer rights upon individuals, if the breach was 'sufficiently serious', and if there was a direct causal link between such breach and the damage complained of (para 51).

7 Factors to be considered when establishing liability include, inter alia, 'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law' (para 56).

8 As far as the German case was concerned (the issue was not addressed in the English case), the Court inter alia held that 'it would be difficult to regard the breach … as an excusable error' in light of the manifest incompatibility of the national rules with Community law (para 59).

9 Finally, the ECJ had to respond to the question whether liability can be made dependent upon fault. The Court first admitted that 'the concept of fault does not have the same content in the various legal systems' (para 76). However, 'certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious'. Apart from that overlap of relevant factors in assessing fault, on the one hand, and a 'sufficiently serious breach' on the other, fault cannot become a se-

parate and distinct requirement of liability (para 77 ff): 'Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.' (para 79).

Comments

Member States can, inter alia, be held liable if their domestic legislation is found to be incompatible with EU law. However, this requires a 'sufficiently serious' breach thereof, which in turn depends upon various factors enumerated in this ruling. The ultimate goal is to ensure that the effectiveness of EU law is maintained. The more Member States are (or should be) aware of limits they need to observe, particularly if already addressed by CJEU case law (para 57), the more likely will their legislation be deemed flawed from an EU perspective. In turn, the fewer restrictions EU law imposes upon Member States and the more discretion they therefore retain in law-making, the less likely will this trigger liability. The latter in particular shall honour that the 'exercise of the legislative function must not be hindered by the prospect of actions for damages', in particular if superior legitimate interests require the enactment of rules that may adversely affect the interests of some individuals. This notion not only shields the EU from liability for its own legislation (para 45), but must correspondingly apply to Member States as well. **10**

The protective scope of this basis of liability is therefore stronger when it comes to EU law that limits the discretion of Member States,[5] but also preserves the latters' margin of discretion when legislating in areas not specifically pre-determined by EU rules. One could therefore argue that EU law which limits the discretion of Member States by requiring that they achieve a certain particular result or by imposing expressly how they should implement EU policies thereby reveals its protective purpose vis-à-vis individuals who might be harmed by Member States' legislative action. They will not be compensated if the enactment complained of remains within the boundaries set more or less strictly by EU law. **11**

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

First scenario. A1 is employed as a guard by private security company A2. Company A2 does not have a gun cabinet or safe deposit box on its premises, contrary to the applicable safety standards. A1 therefore usually takes home the revolver he uses for work. Having continuous problems with his wife V, A1 loses control one day and shoots V dead **1**

5 Cf ECJ 15.6.1999, C-140/97, *Walter Rechberger and others v Austria*, [1999] ECR 3499 (above 2/29 no 8 ff).

with the revolver provided by his employer. V's next of kin file a civil lawsuit against A2 based on the general provision on fault-based liability in tort.[1]

2 *Second scenario*. Farmer A1 leases farmland from the owner of the land. When the owner intends to sell the farmland to V, the farmer makes use of his pre-emptive right of purchase under the farm lease. The law reserves this right to the tenant in the event of the sale of the leased rural property in order to enable him to continue his farming activity. To avoid real estate speculation, the law forbids the lessee who has made use of his pre-emptive right from selling the property for five years from the date of acquisition. In case of infringement, the lessee is liable to the former owner for compensation equal to 20 % of the sales price. In defiance of this legal prohibition, A1 quickly sells the property to third party A2. V, whom A1 had prevented from purchasing the land by exercising his right of pre-emption, sues A1 and A2 for damages.[2]

Solutions

3 **a) Solution According to PETL.** Article 3:201 PETL on 'Scope of Liability' provides that '[w]here an activity is a cause [of the damage], whether and to what extent damage may be attributed to a person depends on factors such as [...] (e) the *protective purpose of the rule* that has been violated.'[3] When attributing damage under the PETL, the protective purpose of the rule that has been violated is thus a factor to be taken into consideration, alongside other elements such as the foreseeability of the damage, the nature and the value of the protected interest, the basis of liability, and the ordinary risks of life, see lit (a) to (d) of art 3:201 PETL.

4 According to the Commentary to art 3:201(e) PETL, 'the protective purpose of the rule plays a rather important role in relation to the scope of attribution. If a rule clearly aims to protect against a specific loss, that loss will only exceptionally not fall within the scope of art 3:201. If a rule explicitly aims to protect *only* specific interests, other losses will not fall under the scope of art 3:201.'[4]

5 In the *first scenario*, the applicable safety standards[5], requiring employers to store weapons such as firearms safely on their premises, serve to protect public safety. The objective of the rules is to avoid employees taking them home and using them when they are off duty, which protects the potential victims of a misuse of such arms. In the case of firearms in particular, there is a considerable risk of fatalities, making it foreseeable to employers who violate this duty that the misuse of an unsafely stored firearm may cause

1 Inspired by the Spanish case Tribunal Supremo (Supreme Court) 17 May 2007, RJ 2007\3542, with comments by *M Martín-Casals* and *J Ribot*, above 3/10 nos 1–6.

2 Inspired by the Belgian case: Cour de cassation/Hof van Cassatie (Supreme Court) 28 April 1972, Pas 1973 I, 797, with comments by *E De Saint Moulin* and *B Dubuisson*, above 3/7 nos 1–4.

3 Emphasis added.

4 PETL – Text and Commentary (2005) art 3:201, no 21 (*J Spier*).

5 Or, in the absence of specific regulations, the employer's general duty of care.

damage to a primary victim, killed with the arm, and also consequential damage to their next of kin, ie secondary victims. The employer should thus have ensured that the firearm was not available at the employee's home. The purpose of the safety standard is to protect against *any* misuse of the arm, including intentional misuse by the employee.[6]

In the *second scenario*, if an owner intends to sell rural land leased to a farmer, the farmer has a right of pre-emption. This right serves the purpose of enabling the farmer to continue his farming activity. This rule thus protects the interests of farmers as well as the public interest in maintaining farming activities. On the other hand, if farmers exercise a right of pre-emption, they are prohibited from selling the farmland within five years. This prohibition ensures that farmers do not exercise their right of pre-emption for the purpose of speculating with real estate, rather than for continuing their farming activities. The purpose of this prohibition is to avoid misuse of the right of pre-emption. As a sanction for such abuse, part of the sales price received by the farmer (20 %) is allocated to the former owner. The interests of potential buyers of the land, such as V in the example, lie outside the protective purpose of the prohibition. Under the PETL, V's loss would consequently be outside the purpose of the rule that was violated. It would thus not fall within the scope of liability as defined by art 3:201(e) PETL. **6**

b) Solution According to the DCFR. Under the DCFR, the *protective purpose* of the rule that was breached plays a role (a) when determining fault and (b) when determining causation. **7**

Article VI–3:102(a) DCFR on 'Negligence' provides that: 'A person causes legally relevant damage negligently when that person causes the damage by conduct which: (a) does not meet the particular standard of care provided by a statutory provision whose *purpose is the protection* of the person suffering the damage from that damage …'.[7] **8**

As set out above,[8] according to the Commentary to the general rule on 'Causation' in art VI–4:101, the DCFR 'does not reduce the test for causation to a "but-for" or "*conditio sine qua non*" test.' Instead, there is no conclusive list of factors to be considered. As the Commentary specifies, 'aspects of probability and foreseeability come into play but so too do the type of attributive cause and the type of damage. Also relevant are the *protective aim of the norm of social behaviour which has been infringed* and (occasionally) general policy considerations'.[9] The result will therefore depend 'on the circumstances of each particular case'.[10] All these criteria are, however, not explicitly mentioned in the text of the DCFR, but only in the Commentary. **9**

In the *first scenario*, V's death (and consequential loss for his next of kin) is legally relevant damage under art VI 2:201 ff DCFR. The company employing the guard acted negligently by failing to comply with the applicable safety standards and by not provid- **10**

6 This reasoning is fully in line with the Spanish ruling in this case, see above 3/10 no 2.

7 Emphasis added.

8 2/30 no 15.

9 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571), emphasis added.

10 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571).

ing a safe deposit box for its employees' firearms. The lack of safe storage and of internal policies for employees instructing them to leave their guns at the workplace made it possible for the guard to take the gun to his home after the end of his shift. The *purpose* of the required safety standards and duties of care was precisely to prevent damage caused by firearms to persons situated outside the company's premises, such as the damage that the employee caused by using the gun to kill his wife in a domestic conflict at home. Following this line of reasoning, company A2 would be liable in tort for V's death.[11]

11 In the *second scenario*, the rule that prohibited A1 from exercising the right of pre-emption for the purpose of speculating with the farmland, and the prohibition for him to resell the farmland within five years, was not intended to protect the interests of another potential buyer like V. Even if A1 and A2 acted intentionally knowing that V was interested in purchasing the land, V's interests would not fall within the protective scope of the legal norm violated by A1. V's damage would thus not be within the scope of art VI–3:102(a) DCFR on 'Negligence' and of art VI–4:101 DCFR on 'Causation'. His interests are not to be considered 'legally relevant damage ... worthy of legal protection' under the DCFR.

31. Comparative Report

1 All the reports, with the exception of Romania, contain cases for this category. In the following, we will draw some major conclusions from the reports. Minor points will be neglected.

2 *General remark.* The present question has old and deep roots. Since the Roman *lex Aquilia,* liability requires damage, a damaging act, causation, unlawfulness and fault. As these concepts, which we inherited in our legislation, are very broad, the question of unlawfulness arose, namely, whether it is the breach of any norm that would lead to an obligation to repair damage or whether this breach had to be linked more specifically to the norm protecting the victim. If my doctor erroneously diagnosed me as fit and if I suffered damage which would have occurred even if I had really been fit, should the damage be repaired (see Lord Hoffmann's example in category 3 of the Questionnaire[1])?

3 *Interpretation* (see also below no 6). Some reports mention a link between the protective purpose and the interpretation of the infringed norm. These interpretations are sometimes guided by thoughts on the *ratio legis,*[2] the analysis of the legislator's intent[3]

11 The same analysis would apply had it been the wife who, during a dispute with her husband, took the gun and mortally shot him. The employer would be liable for exposing the employee to such a risk by forcing him to take the firearm to his home.

1 Also explained in England and Wales 3/12 no 5 and Scotland 3/13 no 9.

2 Austria 3/3 no 8; Belgium 3/7 no 8; Slovenia 3/26 nos 2 and 3.

3 Scotland 3/13 no 4, possibly nos 12 and 13; Norway 3/16 no 2; Latvia 3/20 no 9.

or the historical background.[4] Without a doubt, the formulation of the law plays a role. As the Historical Report points out, the narrower the wording of the norm, the less the need to revert to the concept of its protective purpose.[5] Thus, the fact that most European countries regulate liability in general tort law provisions (eg art 1240 CCF, §§ 1293–1295 ABGB, § 823 BGB, art 41 CO) largely favours the use of the principle of the protective purpose of the norm. If the general wording favours recourse to the concept of the protective purpose, it does not offer an exhaustive explanation. The common law traditions show (England and Wales, Scotland, Ireland) that the phenomenon is not limited to the civil law countries.

Explicit and implicit references. As expected, certain reporters indicate that their courts (or legal texts[6]) refer explicitly to the protective purpose of the norm breached,[7] while others report that its use is rather implicit.[8] While certain reporters explain that the protective purpose of the norm is a main means to limit the scope of liability,[9] for others 'there is no requirement that an interest protected by law must be at stake to obtain reparation'[10] or, between these two positions, reporters state that courts are hesitant to use this concept.[11] However, despite this statement indicative of a lack of support for the approach referring to the protective purpose, the same report reveals, in another case, traces of the principle.[12] In general, the courts seem to be flexible. If in certain decisions the protective purpose may be referred to explicitly, in other decisions of the same legal system it may only be applied implicitly.[13] **4**

Tightening or extending liability. Although the theory of the protective purpose of the norm was likely conceived as a means to limit liability, the reports highlight that it may be applied in order to achieve two opposing goals. Some reporters indicate that it results in a tightening of liability.[14] On the contrary, the Historical Report explains that **5**

4 Latvia 3/20 no 12.

5 Historical Report 3/1 no 3.

6 PETL/DCFR 3/30 nos 4, 7.

7 Notably Germany 3/2 no 3; Austria 3/3 no 6; Switzerland 3/4 nos 4, 6 and 8; Greece 3/5 nos 3, 6, 9 and 10; probably Netherlands 3/8 nos 2 and 3; doubting doctrine in Italy 3/9 no 3; Portugal 3/11 no 2 f where it is one of the main sources to limit liability; see also no 6; England and Wales 3/12 nos 5 and 9; Scotland 3/13 nos 2 and 3; Malta 3/15 nos 7 and 8; Finland 3/18 nos 2–4, 7, 10 and 13; one of the most important criteria in Estonia 3/19 nos 6 and 14, also in administrative law, no 18; Poland 3/22 nos 4, 17 and 18 and 20 f; Czech Republic 3/23 nos 12, 17 and 19–24; Slovenia 3/26 no 2; rather explicit Hungary 3/27 no 4.

8 Historical Report 3/1 no 10; France 3/6 no 3 'at best implicitly', but see also nos 7 and 8; England and Wales 3/12 nos 3 and 6; Scotland 3/13 no 8; Croatia 3/25 nos 14 and 17.

9 Eg Austria 3/3 no 12, in particular in so-called 'Schutzgesetze'; Portugal 3/11 no 3.

10 Belgium 3/7 no 3.

11 Slovakia 3/24 no 5.

12 Belgium 3/7 no 8.

13 Eg England and Wales 3/12 nos 3 and 5.

14 Switzerland 3/4 no 6; Germany 3/2 no 6 'doctrine of the protective purpose of the violated norm often leads to stricter limits of liability than the application of the adequacy test would achieve'; and 7; Netherlands 3/8 no 3; Norway 3/16 no 11; Latvia 3/20 no 5; Czech Republic 3/23 no 19.

the effect may be to extend it.[15] According to the Maltese report, 'the courts do not look favourably on the protective purpose principle as a means of avoiding liability' using it even to enlarge the scope of liability.[16] A third solution is, as we have seen, that the principle of the protective purpose of the norm is not accepted court practice.[17]

6 This twofold function to either limit or extend liability is linked to the double-edged role of the interpretation (see above no 2).[18] It is obvious that the courts have a certain understanding of the norms and that their decisions are based on this understanding. The broader the interpretation, the larger the field covered by the norm. Thus, a tight interpretation of the norm permits a limiting of the field of liability, while a broad interpretation widens it. However, courts have an additional possibility. They can also decide not to use the extent of the interpretation to define the scope of liability. This would have as a first consequence that any unlawful act of the tortfeasor, even totally disconnected from the norm protecting the victim, could be considered as a basis for liability. The second consequence would likely be that the courts use other means, such as causation or fault, to regulate the extent of liability.

7 Concerning techniques of interpretation, the Swedish report underlines an aspect which might also be true for other legal systems. The judge has to handle the problem in two respects. On the one hand, they have to take into account, on the author's side, the conduct norm and, on the victim's side, the protective purpose, forming together as a whole the 'protective purpose of tort law'. The judge asks the broader question of 'purpose-related values, interests, etc' of the parties,[19] examining what the general intent of the norm at stake is. Is it to protect individual interests? Or rather to charge a party (eg the State) to protect public interests, etc? As a result, liability is imputed according to the role assigned by law to the parties.[20] The report on the European Union adds that other factors of imputation are 'clarity and precision of the rule breached, the measure of discretion left by that rule …, whether the infringement and the damage caused was intentional or involuntary', etc.[21]

8 *Interplay with other concepts.* The protective purpose of the norm should not be seen as an isolated means to define the extension of tort liability. It is generally used in the interplay with other instruments and concepts. An obvious additional – or sometimes alternative – concept is causation, as shown by Lord Hoffmann's case of the ill knee. If my damage is not related to the erroneous medical advice, one could say that the conditions of adequate causation are not fulfilled. Some reports indeed mention (indir-

15 Historical Report 3/1 no 10; see also Ireland 3/14 no 3.

16 Malta 3/15 nos 15 and 27.

17 Belgium 3/7 no 3.

18 Among others, Greece 3/5 no 11, mentioning the absence of firm criteria in interpretation; stressing the importance of interpretation Latvia 3/20 no 5.

19 Sweden 3/17 no 3.

20 Sweden 3/17 nos 3 and 10 and 11; see also European Union 3/29 no 6.

21 European Union 3/29 no 7.

ect) causation as alternative or complementary means.[22] The German report sticks to the interplay with the 'context of imputation' (*Zurechnungszusammenhang*) close to the idea, in other legal systems, to adequacy[23] and the English and Welsh report evokes the connection with the remoteness principles.[24] Other concepts, also close to (adequate) causation, are foreseeability,[25] the theory of the interruption of the causal link,[26] the duty of the parties[27] and unlawfulness.[28] The Spanish report stresses the link between the protective purpose and fault, in particular if the norm is part of a specific statute or regulation ordering certain conduct[29] and the Polish report a link between the protective purpose and the concept of relativity of wrongfulness,[30] the former being described as hidden behind the latter.[31] The CJEU takes into account the seriousness of the breach of the legislation[32] and the Lithuanian report the balance between the opposite interests of the parties.[33]

Strict liability. Certain reports explicitly mention that the protective purpose of the rule plays also a role in the field of strict liability.[34] **9**

PETL. The Lithuanian reporters explain that their Supreme Court referred to art 2:102 PETL and its hierarchy of values between life, health, and liberty, which enjoy the most extensive protection, and other, lower ranked interests, such as property rights and economic interests.[35] The Supreme Court combined this hierarchy with a balancing of the tortfeasor's and victim's respective interests. However, despite this hierarchy approach, which is an explicit expression of the protective purpose principle, the final decision has been taken on another, more principle-based ground. As explained in the comment, 'there are no cases of protected purpose of the conduct norm breached, but a similar result was reached in this case on a more general level'.[36] **10**

Conclusion. The protective purpose of the norm is a widespread concept in both civil and common law. Generally used to restrict the scope of tort liability by means of a restrictive interpretation of the norm protecting the victim, it may also be used in the op- **11**

22 Germany 3/2 no 6; Italy 3/9 no 2; Malta 3/15 no 25; Sweden 3/17 no 7; Finland 3/18 no 4; Croatia 3/25 no 15; Croatia 25/3 nos 5 and 13; Slovenia 3/26 no 3.

23 Germany 3/2 no 3; Norway 3/16 no 2; more generally on causation Malta 3/15 no 14.

24 England and Wales 3/12 no 10; Latvia 3/20 nos 16 and 17.

25 Scotland 3/13 nos 7 and 12; Norway 3/16 nos 7–9 and 11; Finland 3/18 no 3; Czech Republic 3/23 no 24; PETL/DCFR 3/30 no 4.

26 Denying Czech Republic 3/23 no 28.

27 Ireland 3/14 nos 6 and 9.

28 Hungary 3/27 no 3 f.

29 Spain 3/10 nos 3 and 4; Malta 3/15 no 25; reluctant European Union 3/29 no 9.

30 Belgium 3/7 no 3, but see also 8.

31 Poland 3/22 nos 12 and 20.

32 European Union 3/29 no 10.

33 Lithuania 3/21 no 5.

34 Germany 3/2 no 14; Austria 3/3 no 14; Netherlands 3/8 nos 5 and 6; Spain 3/10 no 6; Estonia 3/19 no 21.

35 Explicitly denying a hierarchy of interests, Belgium 3/7 no 3; Lithuania 3/21 nos 3, 4 and 5.

36 Lithuania 3/21 no 7.

posite sense in order to widen the scope, by an extensive interpretation of these norms. Among the reports showing that the protective purpose plays a role, none state that it is the exclusive means to regulate the extension of tort liability but rather one of several instruments of regulation.

4. Exclusion of liability for ‘indirect damage’ or ‘indirect victims’?

1. Historical Report

Ulpian (Proculus) D 9,2,7,3

Facts

One person pushes another, who consequently harms or kills a slave. 1

Decision

Neither of the two is liable under the *lex Aquilia*: the person who was pushed because he did not act unlawfully; the person who did the pushing because he did not directly cause the damage. However, an *actio in factum* will be given against the person who pushed. 2

Comments

As already outlined above,[1] the *lex Aquilia* applied only to cases of active, direct killing or injuring. In order to prevent wrongdoers who otherwise inflicted harm from escaping scot-free, Roman jurists extended the scope of the statute by proposing to the praetor to introduce so-called *actiones in factum* and *actiones utiles*, which could be brought where an injurer had culpably caused harm, but could not be held liable under the narrow interpretation of the *lex Aquilia*.[2] One example is the case of the person who pushes another, who then causes harm to a slave. Clearly, the person who was pushed cannot be held liable because he acted – if he can be said to have acted at all – without fault.[3] In order to allocate blame and liability where they can be said to belong – ie with the person who set the chain of events in motion by pushing another – an *actio in factum* in analogy to the *actio legis Aquiliae* is granted to the owner of the slave.[4] 3

1 Cf above at 1/1 no 2ff.

2 Cf eg, *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 37ff.

3 *N Benke*/*F-S Meissel,* Römisches Schuldrecht, Das Schadenersatzrecht der lex Aquilia (9th edn 2019) 337.

4 See above at 1/1 no 3.

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Ulpian (Celsus) D 9,2,7,6

Facts

4 1. A man administers poison instead of medicine.
2. A man holds out a sword to a mad slave (who subsequently kills himself or another slave with it).

Decision

5 In both cases, the wrongdoer cannot be held liable under the *lex Aquilia*, because his action did not constitute direct, active killing (*occidere*) of the victim. Instead, an *actio in factum* can be brought against him.

Comments

6 Celsus stresses that it matters a great deal whether someone kills (*occidere*) or simply furnishes a cause of death (*mortis causam praebere*), since only in the first case can the wrongdoer be held liable under the *lex Aquilia*. However, the limited scope of Aquilian liability can be extended by means of *actiones in factum*, allowing the injured party to claim damages also in cases in which the injurer cannot be said to have actively and directly killed his victim.[5]

Ulpian (Proculus, Julian) D 9,2,11,5

Facts

7 A man annoys a dog so that it bites a slave.

Decision

8 Proculus decides that the wrongdoer can be held liable under the *lex Aquilia*. Julian, in contrast, argues that this only applies if he held the dog while it was attacking the slave (or possibly the slave while the dog was attacking him; see below); otherwise, an *actio in factum* must be brought.

5 *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 15; cf also *D Nörr*, Causa mortis (1986) 166 ff.

Comments

The case gives a good indication of the narrow scope of the *lex Aquilia*, both first and third chapters of which were initially interpreted to demand direct contact between the wrongdoer and the injured party. While Proculus advocates an *actio legis Aquiliae* against the person who annoyed the dog, Julian differentiates: the man who annoyed the dog can only be held liable under the *lex Aquilia* if there was some degree of physical contact between himself and the bitten slave, ie if the wrongdoer held either the dog (and therefore used it as a sort of weapon) or possibly the slave so that the dog could bite him.[6] **9**

2. Germany

Bundesgerichtshof (Federal Supreme Court) 10 December 2002, VI ZR 171/02

NJW 2003, 1040

Facts

V and her sport partner M were an internationally successful and renowned figure skating pair. In 1997, M was considerably injured in a traffic accident for which A was solely liable. For some time after the accident, the pair could not exercise their sport nor participate in national and international competitions. Consequently, both skating partners lost income. A's insurer paid M DM 300,000 as compensation. V claimed equal compensation from A, with the argument that, to earn income, she necessarily depended on the participation of her skating partner. **1**

Decision

All three court instances dismissed V's claim. The Federal Supreme Court confirmed the principle that, under tort law, only those persons whose absolutely protected rights have been infringed are entitled to compensation. Indirect victims have generally no right of **2**

6 The Latin text can be interpreted both ways: 'Item cum eo, qui canem irritaverat et effecerat, ut aliquem morderet, quamvis eum non tenuit, Proculus respondit Aquiliae actionem esse: sed Julianus eum demum Aquilia teneri ait, qui tenuit et effecit ut aliquem morderet: ceterum si non tenuit, in factum agendum'. *U von Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 152 interprets 'tenere' as referring to the slave; *G MacCormack*, Juristic Interpretation of the lex Aquilia, in: Studi in onore di Cesare Sanfilippo I (1982) 277 and *D Nörr*, Causa mortis (1986) 144 take it to refer to the dog. Cf also *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 16 fn 33; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 980 fn 190. For general remarks on the case cf also *N Jansen*, Die Struktur des Haftungsrechts (2003) 251.

claim even if they suffer pecuniary loss.[1] In the present case, none of V's rights were violated. It was merely M who was bodily injured.

3 Even if the activities of a figure skating pair could be qualified as an operating business – the Court left this open – so that the right of an established and operating business[2] could have been infringed, this would not help. For, to entitle to compensation, the infringement of that right must be specifically directed against the business and its operation (so-called *betriebsbezogener Eingriff*).[3] In the present case, M's injury was not specifically directed against M's and V's skating activity. The accident and A's involvement in it had nothing to do with the figure skating. A wrongdoer who accidentally injures an employee of a business does not infringe special duties which he or she is obliged to observe towards the business.[4]

4 The Federal Supreme Court also declined to develop an extra-legal exception under which business people could claim compensation for indirect pecuniary damage while non-business people would not be likewise entitled.

Comments

5 German tort law generally compensates all indirect or consequential damage, however, only if the damage is the consequence of an infringement of an own absolutely protected right of the claimant. § 823 (1) BGB protects insofar life, health, freedom, property, the general personality right and the right of the established and operating business and very few other rights. Mere pecuniary income (*Vermögen*) is not protected by § 823 (1) BGB.[5] Claimants are not entitled to request compensation for the infringement of rights of other persons even if they suffer indirect financial or economic loss through that infringement. Such loss is not regarded as recoverable damage. The underlying reason is the common opinion that otherwise liability would be extended too far and the freedom of activity of the author much too much restricted. That the tort infringes a person's ability to fulfil his or her contractual obligations is generally not a basis for a compensation claim unless this is done with intent and in violation of good morals as, for instance, in cases of unlawful competition.

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1 An exception is the claim of a dependent person when the individual who was legally obliged to maintain the former has been killed, see § 844 BGB.

2 This is an absolutely protected right in the sense of § 823 (1) BGB.

3 See, eg, BGHZ 29, 65 (74); BGH NJW 1983, 812 (813).

4 BGH NJW 2003, 1040 (1041).

5 Pure financial or economic loss as such is only compensable if the tortfeasor acted with intent and against good morals (§ 826 BGB) or violated a provision, generally of the Criminal Code, which specifically protects the economic interests of the victim (eg deceit). The respective provisions of the Criminal Code also require intent.

3. Austria

Oberster Gerichtshof (Supreme Court) 6 September 1972, 1 Ob 176/72

JBl 1973, 579

Facts

A, a construction firm, damaged an electricity cable in the course of building work leading to several hours of power failure and a production downtime for V, which demanded compensation therefor. 1

Decision

A was not held liable. To avoid a proliferation of liability, the Supreme Court holds the opinion that a distinction has to be made between direct and indirect damage under tort law. Indirect damage occurs as a side effect in a sphere of interest not protected by the prohibition. As V was not the owner of the electricity cable, A did not violate any absolute right of V. The applicable provisions, however, are not intended to protect everybody that has a mere obligatory relationship with the electricity provider. The damage is hence outside the norm's scope of protection and therefore not recoverable. 2

Comments

See below 4/3 no 6 ff. 3

Oberster Gerichtshof (Supreme Court) 12 June 2003, 2 Ob 110/03w

ZVR 2004/47

Facts

The defendant, a professional driver, caused a mass accident when violating the road traffic regulations. As a result of this accident, the motorway had to be closed for several weeks. For this reason, no customers could reach the claimant's motorway restaurant, which led to a complete loss of sales for the claimant. 4

Decision

The Supreme Court rejected the claim on the ground that the road traffic regulations do not aim at preventing the kind of damage the claimant sustained. In fact, the purpose of the road traffic regulations is to ensure the safety of road users and to prevent property damage. Their purpose is not, however, to prevent third parties from suffering pure economic losses due to traffic obstructions because of an accident. 5

Comments

6 As already expounded above, the duty to recover damages is limited to that damage which lies within the respective rule's scope of protection.[1] Consequentially, there is no liability for damage located beyond the protective purpose of the rule – be it beyond the personal, the subject matter or the modal protective scope of the infringed provision.

7 In Austrian literature and case law, damage which lies beyond the protective scope of the violated rule and thus cannot be recovered is often referred to as indirect damage (*mittelbare Schäden*), in contrast to so-called direct damage (*unmittelbare Schäden*).[2] The idea of this language is that damage that is not covered by the protective scope of a violated rule constitutes indirect damage because it is normally not to be recovered even though it has been caused by a conduct in violation of this rule.[3]

8 In both of the two above-mentioned decisions, the Austrian Supreme Court had to address the question of whether or not a certain loss was to be compensated because it constitutes a mere indirect damage, ie a damage lying beyond the infringed rule's scope of protection.[4] In the first decision concerning the mains failure due to the damage of the electricity cable (4/3 no 1ff)[5] as well as in the second decision, where the road closure due to an accident resulted in an absence of customers in a restaurant (4/3 no 4 ff), the Supreme Court states that the claimants are beyond the infringed rule's scope of protection. There is no doubt that this is to be endorsed as the infringed rules solely intend to protect absolute rights (which include, in general terms, personality rights such as life, physical integrity or honour, rights *in rem* and intellectual property rights).[6] However, both of the claimants in the above-reported decisions did not suffer a violation of an absolute right, but merely a loss in revenue, which hence lies beyond the norm's scope of protection.

9 This is based on a general principle of Austrian tort law, according to which, pure economic losses (*reine Vermögensschäden*) are, apart from in exceptional cases, not recoverable in tort.[7] However, when absolute rights of third persons themselves are

1 See in detail 3/3 no 8f.

2 Eg *KH Danzl*, Mittelbare Schäden im Schadenersatzrecht, ZVR 202, 363ff; in detail *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/55ff.

3 Thus, the language of directness or indirectness of a damage does not address a question of causation, but – again – of limiting liability for causally-related consequences of a certain conduct on the basis of value judgements; see, eg, the references to the pertinent Austrian case law at *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/27.

4 See already *E Karner* in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) no 3b/3 no 3ff.

5 See for this very decision also *E Karner* in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) no 3b/3 no 3ff.

6 See, eg, *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15f.

7 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 2; fundamental *H Koziol*, Schadenersatz für reine Vermögensschäden, JBl 2004, 273ff.

violated, they have also suffered damage directly and are hence entitled to compensation.[8]

Oberster Gerichtshof (Supreme Court) 24 March 1994, 2 Ob 21/94

DRdA 1995, 44

Facts

B, who is employed by V, was injured in a traffic accident and was thus incapable of working for several weeks. A had wrongfully caused the accident in which B was injured. At the time of the accident, A had been considerably intoxicated, had been driving at excessive speed, and, in addition, did not even have a driving licence. Due to the pertinent labour law provision in § 8 of the Austrian Employees Act (*Angestelltengesetz*, AngG), V had to continue paying B's remuneration during his temporary incapacity to work due to the accident. For these payments, V seeks compensation by A. **10**

Decision

The Supreme Court held A liable for V's damage. It stated that when a road user is injured in a traffic accident and subsequently suffers a loss of earnings, this damage of the injured is a typical consequence of his incapacity to work, which lies within the scope of protection of the respective road traffic regulations. If the injured is an employee whose remuneration continues to be paid by his or her employer, the damage is shifted to the latter. This employer's duty to continue paying the employee's salary, as provided for in § 8 AngG, should guarantee the employee's income. However, it does not have the purpose of relieving a tortfeasor, who has wrongfully caused the employee's incapacity to work, from liability. Thus, in the present case, where the damage is merely relocated to the employer because of a transfer of risk provision, A, the tortfeasor has to compensate the damage shifted from B to V. **11**

8 *E Karner* in: B Winiger/E Karner/K Oliphant (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) no 3b/3 no 4; *R Welser*, Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 42. Astonishingly, Austrian case law deviates from this general principle precisely in cases of damaged electricity cables: here, against general rules, even third persons whose absolutely protected property is damaged and who have hence suffered damage directly in the outlined sense are not, according to the courts, entitled to compensation. Therefore, the courts do not award compensation to a claimant whose products had spoilt due to a culpably caused power cut or whose electrical devices had been damaged due to culpably caused overvoltage, cf eg OGH 2 Ob 11/19k = Zak 2020/81. However, the courts do not provide a persuading reason for this divergence from the general principle.

Comments

12 As already outlined above, in order to avoid an opening of the floodgates, damage which lies beyond the protective scope of the infringed provision is not to be recovered according to Austrian tort law.[9] Consequently, as a rule, indirect victims (*mittelbar Geschädigte*) cannot receive compensation for their damage.[10] Under certain circumstances, however, an application of this rule would lead to inappropriate and highly problematic results. This is the case where a transfer of risk provision leads to a relocation of the damage (*Schadensverlagerung*) so that the damage is, as a result, not sustained by the person who should have been protected by the infringed rule, but by a third person (the indirect victim) instead.[11]

13 In such constellations, Austrian literature and case law exceptionally award compensation to a person who is actually not within the protective purpose of the infringed rule. Provided that there is merely a relocation of the original damage, in these cases a so-called third party damage liquidation (*Drittschadensliquidation*) can take place. Considering that the respective transfer of risk provisions, such as the already mentioned § 8 AngG in the case reported above, do not have the purpose of relieving the tortfeasor,[12] this seems highly appropriate. Furthermore, the duty to compensate damage that was merely shifted from one to another person does not entail the risk of an over-extension of liability. Thus, the crucial reason for the tools which limit liability, such as the protective purpose of the rule theory, does not contradict a finding of liability in the respective cases.

14 The decision reported above provides an example for a very important group of cases where damage is shifted due to a transfer of risk provision: an employee is injured by a tortfeasor and thus incapacitated for work, but as the employer is obligated to continue paying the employee's remuneration, the employee does not suffer a loss of earnings. The economic harm is rather borne by the employer due to his or her duty to continuously pay the wages.[13] Of course, a similar relocation of damage can also occur with contracts other than employment contracts. For example, when an object, which their owner has already promised to give as a gift to another person, is destroyed, the detriment is in principle borne by the person to whom the object was promised, who can then no longer acquire the good (§ 1447 ABGB).[14] In such a case, the promisee instead of

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9 See in detail 3/3 no 7ff.

10 See 3/4 no 6ff.

11 *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no D/4/4ff.

12 In detail *P Apathy*, Drittschadensliquidation, JB 2009, 69ff; see also *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 17 with further references.

13 See also OGH 8 Ob 118/04t in SZ 2005/18 = ecolex 2005, 535 (*M Leitner*), where the damage was further shifted to a fourth person.

14 *I Griss*/*P Bydlinski* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1447 no 1ff.

the owner can obtain compensation according to the aforementioned principles, although the promisee is merely an indirect victim.[15]

However, once more it has to be stressed that, in the cases under discussion, the duty to compensate the third party is restricted to the (part of the) damage which was shifted to the third party from the person who should have been protected by the infringed rule. Conversely, additional damage suffered by the third party is not to be compensated. When, for instance, an employer misses out on a profitable transaction because his or her employee was injured by a tortfeasor and thus incapacitated for work, the employer cannot obtain compensation for this damage from the tortfeasor. **15**

Lastly, it should be emphasised that third party damage liquidation does not depend on a statutory provision as a basis for the transfer of risk rule that leads to a relocation of the original damage. Even an employer's obligation to continue to pay an employee's wages during his or her incapacity to work could, for instance, have its basis in a collective labour agreement.[16] Besides, the transfer of risk provision, which leads to a relocation of the original damage to an indirect victim, who is then entitled to damages, could be based merely on an individual contract.[17] **16**

4. Switzerland

Tribunal federal Suisse (Federal Supreme Court of Switzerland) 2 March 1976

ATF 102 II 85

Facts

On 26 February 1973, in the course of performing excavation works, an employee of the construction company A broke an underground electric cable owned by a public energy provider. As a consequence of the breakage of this high-voltage cable, companies V1 and V2 were deprived of any electricity for several hours. **1**

V1 and V2 filed an action against A for approx CHF 30,000 (approx € 27,500). In its judgment dated 3 November 1975, the regional court held that the defendant had to answer for the damage suffered by the plaintiffs. A raised an appeal against the regional decision. **2**

Decision

On 2 March 1976, the Federal Court rejected this appeal and confirmed the regional decision. **3**

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15 Eg, *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 17.

16 See, eg, *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no D/4/5.

17 Eg *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 17.

4 Article 239 SPC (Swiss Penal Code) not only intends to protect the public interests, but also to protect the private interests of subscribers receiving electricity. Therefore, V1 and V2 can naturally invoke the breach of the above-mentioned legal rule that protects them regardless of whether the damaging act has been committed intentionally or by negligence.

5 For the Court, the break of the cable ensuring the supply of electricity to V1 and V2 is an unlawful act in that the personal right of the plaintiffs to be supplied with electric power was affected by the interruption of the distribution service.

6 Since the breakage of the cable affected the interests of V1 and V2, they are the direct victims of an unlawful act and thereby may seek from the defendant compensation for the damage they have suffered.

Comments

7 For the general theory, cf at 4/4 no 11 below ATF 138 III 276 (2012).[1] The Swiss legal doctrine calls these cases the *Kabelbruchfälle* (ie cable break cases).

8 This case represents an exception to the principle that there is no liability for indirect damage, this being defined as B's (indirect) consequence of A's primary damage.[2] In this sense, the application of art 239 SPC does not restrict, but rather extends liability.

9 In order to achieve this result, the Court examined whether the plaintiff – the company – is a directly injured party. This is tantamount to examining whether it can allege the violation of a standard designed to protect it. According to the Court, if the plaintiff can invoke the breach of a norm that protects him, he then becomes a direct victim. Consequently, he is entitled to compensation.

10 In practice, the question of whether the victim of damage is directly or indirectly harmed overlaps with that of the unlawfulness of the act committed. Some legal authors criticise the reasoning of the Court in the sense that it does not offer any clear dogmatic reasoning, which raises questions in terms of legal security and foreseeability.[3]

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1 See also *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 3b/4, nos 7–15, at 280 ff.

2 See notably *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 74a.

3 See *P Giovannoni*, Le dommage par ricochet en droit suisse, in: Développements récents du droit de la responsabilité civile (1991) 239 ff, 246; *E Kramer*, "Reine Vermögensschäden" als Folge von Stromkabelbeschädigungen, recht 1984, 128; *F Werro*, La responsabilité civile (2017) no 144, at 49; Basler Kommentar – Strafrecht II (2019) ad art 239 SPC no 2; for another example, see ATF 101 Ib 252 (1975): the Court considered that the factory was a direct victim of the subsequent interruption of its water supply because of the damage caused by a city-owned water line.

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 7 February 2012
ATF 138 III 276

Facts

Driver A killed a 17-year-old man in a traffic accident. Because of their son's death, the young man's parents V1 and V2 developed long-lasting depression. They filed and won a claim against A's insurer for recovery of their medical costs, loss of income and moral harm. The insurer appealed this judgment before the Swiss Supreme Court. **11**

Decision

The Court confirmed the cantonal judgment. **12**

The insurance company argued that the parents' damage was indirect and refused to pay damages. The Supreme Court rejected this argument. Based on judgments going back to the late 19th century, the Court confirmed in this decision the distinction between indirect damage, which is not reparable, and direct damage, which is reparable. **13**

'Shock damage' (*Schockschaden*, *dommage de choc*) is considered direct damage, even if the victim was not directly involved in the accident but has suffered a nervous shock. This is a common occurrence when close relatives such as parents learn about the accidental death of their children and have suffered physical or psychological damage. This kind of shock is considered an unlawful violation of the victim's physical integrity and, as such, a direct consequence of the damaging event. **14**

In the same decision, the Court summed up dogmatic discussions on how to limit liability and indicated that adequate causation is considered by scholars as a main means to limit tort liability. **15**

Comments

The Court and the literature distinguish between direct and indirect damage.[4] Indirect damage (also called *Reflexschaden*/ *dommage réfléchi*/ *dommage par ricochet*) is defined as a (often purely economic) damage suffered by a third person.[5] In principle, indirect damage is not reparable[6] and thus this concept is a means to limit liability. This kind of **16**

4 ATF 112 II 118 (1986); 138 III 276 (2012) ; 142 III 433 (2016); *C Müller*, La responsabilité civile extracontractuelle (2013) 37 f; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band 1: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen der OR, ZGB und PrHG (2012) no 136 ff, at 56 ff; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (7th edn 2016) no 14.21, at 90.

5 ATF 112 II 118, 127 c 5e (1986); 138 III 276, 279 c 2.2 (2012).

6 ATF 138 III 276, 279 c 2.2 (2012); 112 II 118, 124 c 5b (1986); 99 II 223 (1973); 82 II 38 (1956); 127 III 403, 407 c 4b/aa (2001), JdT 2001 I 482.

indirect damage occurs for instance when there is no absolute norm protecting a third person's purely economic loss.[7]

17 However, art 45 para 3 Swiss Code of Obligations (SCO) (loss of support) and art 47 SCO (moral damage) acknowledge the reparation of so-called 'indirect' damage in the case of a relative's death.[8] The Court considers that these rules cannot be interpreted in an extensive manner.[9]

18 On the other hand, the judge admits another exception if the third party victim's injury is protected by a specific norm.[10] It is recognised that the determination of indirect or direct damage is linked to the question of unlawfulness.[11] Particularly, if the third party victim is protected by an absolute norm – ie life, physical or psychological integrity according to art 122 Swiss Penal Code (SPC) or specific protective norms in the Civil Code (eg art 28 SCC) – the latter should be considered to have been directly affected by the tragic event.[12]

19 Likewise, the Court has developed a specific exception to the principle in the case of psychological shock resulting from a relative's death. Albeit there is in fact distant causality, it is admitted that psychological or physical damage and the costs suffered by a third person, closely related to the direct victim, are reparable if these types of damage are protected by a specific absolute norm.[13] Shock damage infers that the third person experiences 'a sudden catastrophic or extremely devastating event causing a shock'.[14]

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7 ATF 112 II 118, 125 c 5b (1986); 101 Ib 252, 255 c 2c and 2d (1975).

8 ATF 138 III 276, 279 c 2.2 (2012).

9 ATF 82 II 39 (1956); 112 II 118, 124 c 5b (1986).

10 ATF 138 III 276, 280 c 2.2 (2012); 112 II 118, 125 c 5b (1986); *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band 1: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen der OR, ZGB und PrHG (2012) no 145, at 59; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (7th edn 2016) no 14.27, at 87; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 2 no 76, at 95; *W Fischer*, Vorbemerkungen zu Art. 41-61 OR, in: W Fischer/T Luterbacher (eds), Haftpflichtkommentar, Kommentar zu den schweizerischen Haftpflichtrechtbestimmungen (2016) no 52, at 67 f.

11 ATF 138 III 276, 279 c 2.2 (2012); 131 III 306, 310 c 3.1.1 (2005); 127 III 403, 407 c 4b/aa (2001); 126 III 521, 522 c 2a (2000); 125 III 86, 89 c 3b (1999).

12 ATF 138 III 276, 280 c 2.2 (2012); 112 II 118, 128 c 5e (1986); *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band 1: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen der OR, ZGB und PrHG (2012) no 146, at 59; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (7th edn 2016) no 14.21, at 90.

13 ATF 112 II 118, 127 c 5e (1986); 138 III 276, 279 c 2.2 (2012); 142 III 433, 435 c 4.1 (2016); *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band 1: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen der OR, ZGB und PrHG (2012) no 146, at 59; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (7th edn 2016) no 14.21, at 90.

14 *H Landolt*, Ersatzpflicht für 'Schockschäden', in: F Lorandi/D Staehlin (eds), Innovatives Recht, Festschrift für Ivo Schwander (2011) 361, 361 f fn 1.

This psychological trauma can trigger further damage like depression, loss of working capacity, medical costs, etc.[15]

It is interesting to note that the Court reaffirmed in this case that adequate causation is a central means to limit liability.[16] Technically, adequate causation, defined as what has to be expected according to the 'ordinary course of things and general experience of life' is one of the possible means to consider damage as direct or indirect. **20**

5. Greece

Areios Pagos (Greek Court of Cassation) 243, 17 February 2011

Published in NOMOS

Facts

V had to be hospitalised following a car accident caused by A. V's wife paid the hospital expenses and filed an action against A for damages. **1**

Decision

The Court of Cassation once again reiterated in this decision that direct damage is a prerequisite for the establishment of liability pursuant to art 914 GCC. In particular, it states that it derives from arts 297, 298, 914 and 930 § 3 GCC that only the person who has been directly prejudiced, ie only the subject of the right or of the protected interest that has been offended by the tort, may seek reparation. In the case of personal injury, the subject of the offended right is the person against whom the tort is directed and this person is entitled to damages, ie only the direct subject of the offence is the party who can claim damages. More particularly, according to the Court, hospitalisation causes damage, as it entails expenses, but this damage reduces the assets of the victim, even if the latter has in reality no assets. This accidental fact does not alter the fact that the person injured is the subject of the right offended. Third persons, even those belonging to the family of the direct victim, who sustain damage to their pecuniary interests (payment of hospital expenses, etc) from the tort committed against the direct victim, are indirectly and not directly prejudiced[1] and are not substituted to the damages claim of the victim nor do they **2**

15 *A Studer*/*I Juvet*/*U Zanoni*, Schockschaden – eine herausfordernde Zurechnungsfrage, HAVE/REAS 3/2019, 219, 221.

16 'Das Bundesgericht deutete dabei an, im Einklang mit der Lehre eine solche vernünftige Haftungsbegrenzung mithilfe der Adäquanztheorie sicherstellen zu wollen' cf ATF 142 III 433, 438 c 4.5 (2016).

1 See also AP 1918/2005 Ell Dni 47, 429, where, though the expenses for the hospitalisation were paid by the parents of the victim who was a minor, the latter and not his parents was entitled to damages for said expenses.

themselves acquire a direct claim for damages, because their indirect damage does not fall under the protective field of arts 914 and 929 sent 1 GCC. Indirectly prejudiced third persons fall under the protective scope and can claim damages for their indirect damage only in exceptional cases provided in arts 928 sent 2 and 929 sent 2 GCC,[2] which cannot be applied by analogy.

Comments

3 This approach of the jurisprudence is not approved by Greek literature,[3] where it is mentioned that any persons (spouse, parent) obliged to pay the hospital expenses of the victim should be compensated for the expenses incurred and not the victim.

4 It has to be recalled here that the Court of Cassation also follows the above mentioned approach for the compensation of moral harm.[4] According to the Court, it derives from art 932 GCC that only the person who directly suffered the injury is entitled to compensation for moral harm; other persons, who usually belong to the close family of the victim, are considered, as a rule, third persons, indirectly damaged, and are not entitled to such compensation, even if they suffer mental pain from the unlawful act against their relative. The said third persons are outside the ambit of protection of the violated rule of law. If the victim dies, the members of his or her close family have a personal right to seek compensation for their bereavement according to art 932 GCC sent 3.

5 By way of exception, compensation for moral harm has been awarded by the Greek courts to the wife of a victim for the mental pain and grief she suffered and she would suffer for her entire life because of her husband's impotency caused by the accident, on the ground of her having suffered and continuing to suffer direct moral damage[5] or through application of art 932 GCC by analogy.[6] Also an amount of €14,673 was awarded

2 Art 928 sent 2 GCC: 'The tortfeasor is also obliged to pay damages to the person who is entitled by law to claim maintenance or the performance of services by the victim'.
Art 929 sent 2 GCC: 'Damages must be also paid to the third party who was entitled by law to claim the performance of services by the victim and is now deprived of them'.

3 *A Georgiades* in: A Georgiades/M Stathopoulos (eds), Civil Code (1982) art 929 no 15; *P Kornilakis*, Law of Obligations, Special Part I, § 103 5II, at 627; *A Kritikos*, On Compensation of Expenses and Damage of Persons Close to the One Directly Infringed, EEN 43, 88ff.

4 See ia AP 648/2002 ChrID 2002, 504, 505; 752/2005, published in ISOKRATIS and AP 243/2011, published in NOMOS and ISOKRATIS, as well as Piraeus Court of Appeal (General Division) 372/2010 NoV 58, 1716. For a brief summary in English of the facts and the judgments of the said decisions, see *E Dacoronia*, Greece, in: H Koziol/BC Steininger (eds), European Tort Law 2002 (2003) 231, nos 39 f, 46f; European Tort Law 2005 (2006) 306, nos 52, 54; European Tort Law 2011 (2012) 278, no 41, and European Tort Law 2010 (2011) 247, no 21 f respectively.

5 Athens Court of Appeal 6055/1989 ArchN 41, 776; 3496/2001 ArchN 54, 67; Athens Single Member Court of First Instance 5017/2000 EpSygkD 2000, 286; Patras Court of Appeal 149/2014.

6 Athens Single Member Court of First Instance 2288/2004 ChrID 2005, 620.

as moral damages to the wife of an injured person who had remained a so-called 'vegetable' after an accident.[7]

Though no reference is made to the Principles of European Tort Law (PETL) or to the Draft Common Frame of Reference (DCFR), these decisions are in line with the provision of art 10:301(1) sent 3 PETL, which stipulates that non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim[8] suffering not only a fatal but also a very serious non-fatal injury. and with the provision of art VI.–2:202 (1) DCFR, which, using a similar wording, stipulates that non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if, at the time of injury, that person was in a particularly close personal relationship to the injured person.[9] **6**

Areios Pagos (Greek Court of Cassation) 1661, 29 June 2007

DEE 12/2007, 1325, followed by an approving note by *V Oikonomidis*, DEE 13, 1325–1327

Facts

V, a company limited by shares, lessee of a car under the system of financial leasing, filed an action against the Auxiliary Fund for damages amounting to € 21,857 for the decrease in the commercial and technical value of the car. This decrease in value was a result of a collision with another car. A, the driver of this latter car, was found exclusively liable for the collision. The Court of Appeal, reversing the decision of the court of first instance, held that V, being the user and not the owner of the car, is not entitled to damages for the decrease in the value of the car. **7**

Decision

Areios Pagos overruled the above decision of the Court of Appeal by holding that the legal position of the lessee in a financial leasing resembles the position of the buyer who has acquired ownership. Consequently, in the case of damage or total destruction of the thing due to the fault of a third party, the lessee who has the possession of the thing is entitled to file a claim for damages and not the lessor, who is merely the owner. **8**

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7 Patras Court of Appeal 798/1999, EpSygkD 1999, 625.

8 According to the EGTL, as close relationship is meant any relationship 'which bears at least some resemblance to a "family" one' (See *WV Rogers* in: European Group on Tort Law, Principles of European Tort Law, Text and Commentary [2005] 175).

9 For an analysis of art VI.–2:202 (1) see *C von Bar*/*E Clive* (eds), Principles, Definitions and Model Rules of European Private Law, DCFR, Full edn, vol 4 (2009) 3225, 3226.

Comments

9 I. According to the legal opinion given by Emeritus Prof Dr I Spyridakis on this case[10] while it was pending before the Court of Cassation, only direct damage can be restored in the Greek legal system with the exception of arts 928 sent 2 and 929 sent 2 GCC, according to which, third parties mentioned therein, who have sustained indirect damage, are entitled to damages.[11] In the traditional case of the lease of a movable, direct damage for the decrease in the commercial and technical value of the thing is suffered only by the owner of the thing, who also has a relevant claim. This is not the case, however, in financial leasing, where the lessee suffers direct damage because of the said decrease in value as the beneficiary of: a) the conditional right for the acquisition of ownership and b) the right to sublease. For the same decrease in value, the lessor also suffers direct damage as the owner of the thing. In order to avoid multiple court actions, the lessee may file an action for both his own damage and the damage of the lessor; in such a case, how the amount of damages to be awarded by the court is to be distributed is a matter of settlement between the two parties (lessor and lessee).

10 II. In the note under the decision, V Oikonomidis mentions that this is the first time that the Court of Cassation has dealt with the issue of whether the lessor or the lessee in a financial leasing in terms of L 1665/1986 is entitled to damages in the case of damage to the movable (car) because of a traffic accident. He notes that the Court of Appeal, in its overruled decision no 3759/2006, was consistent with a string of decisions of the Court of Cassation according to which, and after interpretation of arts 297, 298, 914, 936 and 974 GCC, it derives that the person who uses and exploits a thing on the basis of a legal relation is entitled to damages for repairing the thing that has been damaged because of a tortious act. The said person, however, is not entitled to damages for the decrease in the commercial value of the thing; the relevant claim can only be brought by the owner of the thing. These decisions, however, did not tackle the issue of financial leasing and of the position of the lessor and the lessee as regards damages in the case of a tort. The commentator finds the decision of the Court of Cassation on the issue convincing, as the legal position of a lessee in a financial leasing resembles the position of the owner and he provides grounds for such view. In his concluding remarks, he points out that this decision of the Court is in total harmony with the economic aims of the modern forms of contracts and with the needs of the contracting parties.

10 DEE 13, 1268–1270.

11 For the text of arts 928 GCC sent 2 and 929 GCC sent 2, see 4/5 no 2 above (fn 2).

6. France

Cour de cassation, Chambre civile 1 (Supreme Court, First Civil Division) 14 June 2018, 17-20.046

RTD civ 2018, 908, note *P Jourdain*; D 2018, 1784, note *JS Borghetti*; RDC 2018, 375, note *A Bénabent*;
Rev Lamy Dr civil 2018, no 165, 35, note *M Dugué*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000037098216>

Facts

During the 2010 French football championship, a man placed bets on the results of four- 1
teen matches. Whereas thirteen of them turned out to be accurately foreseen, the four-
teenth did not match the better's forecast because of an offside goal scored in extremis
by a player of the Lille soccer club, OSC. This single wrong forecast prevented him from
winning the very substantial sum (more than € 1million) promised to those making four-
teen correct forecasts. Deeply disappointed, the man claimed damages both from the
football player who had scored the goal and from his club on the basis of unlawful mis-
conduct (*faute*).

Decision

The Riom appellate court rejected the bettor's claim for compensation of the lost profit. 2
The judges held that 'the mere violation of a sports rule … cannot, on its own, constitute
a civil fault of such a nature as to give rise to an action for liability brought by a dissatis-
fied bettor'.

The bettor did not want to stop there and appealed to the *Cour de cassation*, arguing 3
that the player's misconduct on-field constituted at the same time a civil fault which had
caused his economic loss. In order to reject the appeal, the First Civil Chamber ruled that
'only a fact whose purpose is to deliberately undermine the sports betting's inherent
hazard is apt to give rise to the player's and, where applicable, his club's civil liability
with regard to the bettor'.

Comments

The present case has put a considerable damper on the expectations of dissatisfied bet- 4
tors, hoping that sports clubs and their insurance companies could replace the lottery
operator. The present decision only accepts civil liability in cases where players, their
clubs or even referees rig matches. In practice, the attitude referred to as 'deliberately
undermin(ing) the sports betting's inherent hazard' should be more or less equivalent to
the offence of passive bribery (*corruption passive*), criminalised under art 455-1-1 of the
French Criminal Code.

The decision is remarkable, as it clearly, though somewhat implicitly, expresses the 5
Cour de cassation's intention to limit liability. The easiest way for the Supreme Court to

turn down the bettor's claim would have been to endorse the appellate court's reasoning, which was perfectly orthodox from a French law perspective, and which was that the football player's foul was not serious enough to be regarded as a fault from the perspective of tort law. By putting forward another justification, the *Cour de cassation* makes it clear that the solution here is not based on the particulars of the case and on the details of the player's foul, but is a matter of principle.

6 However, even though the solution adopted by the *Cour de cassation* can be considered adequate, the legal basis for the restrictive approach (from a French perspective!) taken to *faute* liability is not clear. In particular, the judges did not explain why the normal requirements set out by art 1240 Civil Code, ie that a simple *faute* caused a loss of any kind, did not apply to the present case. One can only speculate as to the dogmatic reasons of the *Cour de cassation*'s self-restraint. Some authors point out the fact that the bettor's claim was for compensation of a pure economic loss (*préjudice économique pur*) and that the present decision could be seen as a first step towards a more restrictive approach to this type of damage. Others see the present case as an inclination towards the theory of 'Aquilian relativity' (*relativité aquilienne*), ie the French equivalent to the German *Lehre vom Schutzzweck der Norm*.[1]

7 More simply, one could argue that the dismissal of the compensation claim is due to the remoteness or indirectness of the claimant's loss, although the *Cour de cassation* does not mention considerations of causality in the present case. It is highly regrettable that the limitation put forward is not text-based or, at least, in accordance with a comprehensive theoretical framework.

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 24 February 2005, 02-11.999

RTD civ 2005, 404, note *P Jourdain*; D 2005, 671, note *F Chénedé*; Resp civ assur 2005, no 5, 14, note *S Hocquet-Berg*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007052699>

Facts

8 Due to a car accident, a man suffered serious injuries that left him disabled for life. His three children, born several years after the accident, submitted a compensation claim against the insurer of the car driver who had been found liable for the accident with the aim of obtaining damages for non-pecuniary harm. They claimed that their father's handicap and his daily suffering prevented them from building a normal father-child relationship.

1 Reference to Part 3.

Decision

The Riom appellate court decided to grant compensation to the children of the victim of the car accident on the ground that '(his) handicap prevented (them) from sharing with him the amenities and joy of everyday life'. The *Cour de cassation* quashed this judgment, ruling tersely that 'there was no causal link between the accident and the invoked loss'. 9

Comments

The present case illustrates the traditional approach to indirect losses under French law. Without referring to any of the causation doctrines, the *Cour de cassation* dismissed the compensation claim on the basis of lack of causation between the accident and the non-pecuniary harm suffered by the direct victim's children. Although the outcome of the case seems appropriate, especially in light of the time which had lapsed between the accident and the birth of the children, one can only reiterate the regret that the Court does not indicate more clearly the substantive reasons for its decision. An explicit reference to the adequacy test (*théorie de la causalité adequate*) would have provided a stronger legal basis for the solution. It is likely that the type of non-economic loss whose compensation was claimed in this case also played a role in the Court's decision. While it is well established that the loss of an ordinary parent-child relationship is eligible to compensation under French tort law,[2] it would be going too far to allow people not yet born at the time of the initial harm to claim damages for not being able to establish a 'normal' relationship with the direct victim later on. It is to be hoped that the announcement made by the *Cour de cassation* to extend the motivation (*motivation enrichie*) of its most important decisions[3] will clarify the judicial reasoning in the field of causation. 10

7. Belgium

Tribunal de première instance de (Court of First Instance of) Liège, 30 March 2012

RGAR 2012, no 14879

Facts

While riding his bicycle, V was hit by A's vehicle and died instantly. For the parents, the death of their son caused them such great pain that they claim damages for pathological mourning, with repercussions on a personal, domestic and economic level. 1

2 On the assessment of 'préjudice d'affection' in cases where the direct victim has survived, see *G Mor*/*L Clerc-Renaud*, Réparation du préjudice corporel 2021-2022 (3rd edn 2020) no 163-26.

3 See in English *E Steiner*, French Law. A Comparative Approach (2nd edn 2018) 147.

Decision

2 According to the designated expert, the mother's grief results in melancholic depression, major social withdrawal and significant clinophilia (staying in bed all day long). The father, on the other hand, experiences disabling anxiety and depression. Consequently, the Court admits a personal permanent disability for both of them (55 % for the mother and 15 % for the father), a permanent incapacity to do housework of the same rate for the mother and a total economic disability for two years for the father. A need for psychological and medical care and, in addition, disruptions in their sexual relations also give rise to a right to compensation.

Comments

3 In fact, in this case, the primary victim no longer suffers any damage personally, but his relatives suffer personal damage as a consequence of the death of the primary victim. When proved, pathological bereavement[1], which is defined as psychological damage by repercussion that the death may cause to the relatives of the direct victim, is recognised under Belgian law.[2] The extent of the suffering linked to mourning can then result in personal, housework and/or economic incapacity, in addition to various other types of damage and the need for constant medical care and costs.

4 Under Belgian law, the liability of the author of a fault is established even if the fault is only an indirect cause of the damage.[3] There is no limitation to the right to compensation for 'indirect damage' or 'indirect victims'. Regarding 'indirect damage', the remoteness of the damage is irrelevant: as soon as the misconduct constitutes a *conditio sine qua non* for the occurrence of the damage, full compensation is due. There is then no time limit, apart from the limitation period, and as long as the causal link remains certain. This rule also applies where subsequent damage is suffered by a person other than the primary victim, to the extent that there is a causal link between the damage and the damaging event. In order for the victim by repercussion to obtain compensation, he or she must nevertheless demonstrate that there is a sufficiently close legal relationship (employment contract, legal cohabitation, etc) or affectionate bond between him or her and the direct victim (see art 6.27 of the new Civil Code). Persons who are economically dependent on the direct victim may also seek reparation.[4] For further details on this issue, we refer to the volume dedicated to reparable damage, in which the concept of damage by ricochet is discussed in more detail (Digest 2, 5/7 nos 1–10). In the meantime, the above case

1 *N Soldatos*/*J De Mol*/*S Graber*, L'indemnisation d'un préjudice particulier: le deuil pathologique, in: Préjudice, indemnisation et compensation (2012) 123 ff.

2 For related case law, see, eg, Pol Neufchâteau, 14 June 2013, CRA 2015, 48; Civ fr Bruxelles, 19 September 2016, Con Man 2016, 209; Corr Luxembourg, div Neufchâteau, 19 July 2016, RGAR 2017, no 15371.

3 Cass, 28 May 1991, Pas 1991 I, 843.

4 *N Estienne*, Le préjudice par répercussion en cas de décès ou de blessure, in: B Dubuisson (ed), Le dommage et sa réparation (2013) 191.

clearly shows that there is no limit to obtain reparation, regardless of whether one is a direct or indirect victim, or whether material or moral damage is at stake.

Cour de cassation / Hof van cassatie (Supreme Court) 24 January 2013

Pas 2013, 230

Facts

A liable tortfeasor caused the death of a civil servant of the European Union. The European institution brings a direct action against the insurer of the tortfeasor for reimbursement of the orphan's and survivor's pensions paid to the right-holders of the deceased civil servant.[5] **5**

Decision

The Court of Appeal declares the European Union's direct action unfounded on the grounds that these payments were not made 'as compensation for the services of the agent who the European Union was deprived of' but constitute payments that 'are not strict consideration for the work performed'. **6**

The Supreme Court approves the reasoning of the Court of Appeal. It considers that, strictly speaking, orphans' or survivors' pensions are not paid in return for working hours which it would have benefitted from absent the accident. Consequently these sums paid by the European Union may not be considered as reparable damage within the meaning of arts 1382 and 1383 of the former Civil Code. **7**

Comments

Pure economic loss is fully reparable under Belgian law. We already had the opportunity to analyse the judgments of the Supreme Court handed down on 19 and 20 February 2001 (Digest 1, 5/7 no 10 and Digest 2, 5/7 nos 11–17). According to these, the public employer may bring a direct action against the liable tortfeasor in order to obtain full compensation for the damage he suffers as a result of the death or incapacity for work of one of his agents. **8**

However, after having welcomed this decision widely, the Supreme Court has since sought to restrict access by adopting a more restraining position as to the damage for which the public employer may claim compensation.[6] Currently, it seems that 'the only **9**

5 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, art 85bis, § 4, OJ 45, 14 June 1962, 1385.

6 *N Estienne*, Le dommage réparable: quelques questions d'actualité, in: A Cataldo/A Putz (eds), Trois conditions pour une responsabilité civile: sept regards (2016) 62.

damage which the latter could claim under art 1382 of the former Civil Code is that he was forced to pay the gross salary without benefitting in return from his employee's work'.[7] The other disbursements which the public employer grants to its staff member (permanent incapacity pension[8], invalidity pension[9]) or to his relatives (pension to the deceased staff member's spouse[10], orphan's or survivor's pension[11]) do not, in the view of our Supreme Court, constitute reparable damage.

10 *De lege ferenda*, this difference in treatment between 'expenses of remuneration' and 'other expenses necessitated by the damaging event' is difficult to justify in a system where damage is understood as the loss of a simple advantage or the breach of an interest, provided that this is a legitimate interest.[12] In the words of the Advocate General, T Werquin, 'only a judgement of value on which interests deserve protection under the law can explain that the remuneration paid by the public employer to the victim of an accident constitutes the only compensable damage'.[13] According to some authors, the current interpretation of our Supreme Court regarding the direct action of the public employer may be seen as a certain application of the theory of Acquilian relativity.[14]

8. The Netherlands

Hoge Raad (Supreme Court) 1 July 1977

NJ 1978/84, case note *GJ Scholten* (Van Hees/Esbeek)

Facts

1 Due to digging activities, a pipeline for transmission of natural gas was damaged. As a result of this, the gas supply of a nearby stone factory was cut off and the company suffered damage because of the cessation of its production process. The appellate court granted the claim.

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7 *B Dubuisson*, L'inflation des recours directs fondés sur l'article 1382 du Code civil ou la transfiguration des tiers payeurs, in: La rupture du lien causal ou l'avènement de l'action directe et le déclin du recours subrogatoire? (2007) 63. See Cass, 7 February 2011, RGAR 2011, no 14773; Cass, 18 November 2011, RGAR 2012, no 14880.

8 Cass, 9 January 2006, Pas 2006, 95; Cass, 12 November 2008, RGDC 2009, 519; Cass, 2 March 2012, RGAR 2012, no 14886.

9 Cass, 26 May 2009, Pas 2009, 1308; Cass, 19 June 2015, Pas 2015, 1617.

10 Cass, 24 January 2013, Pas 2013, 203.

11 Cass, 24 January 2013, Pas 2013, 230.

12 *N Estienne*, Le dommage réparable: quelques questions d'actualité, in: A Cataldo/A Putz (eds), Trois conditions pour une responsabilité civile: sept regards (2016) 64.

13 Av gén T Werquin, opinion under Cass, 24 January 2013, Pas 2013, 203.

14 *N Estienne*, Le dommage réparable: quelques questions d'actualité, in: A Cataldo/A Putz (eds), Trois conditions pour une responsabilité civile: sept regards (2016) 65.

Decision

The Supreme Court ruled that, in the case of excavation works, there is, precisely in view of their obvious interest in a continuous gas supply, a duty of care to prevent damage to a gas pipeline, also towards customers depending on that supply. This is not altered by the mere circumstance that a wide range of obligations to pay compensation could thus arise for those who are liable for the error committed. With respect to causal attribution, the Supreme Court reasons that the dependence of the factory on a continuous gas supply does not stand in the way of liability, but actually adds to the proximity of the relationship between the parties involved. **2**

Comments

This case illustrates that 'indirectness' does not preclude liability. The Supreme Court rules that this aspect does not stand in the way of accepting a duty of care towards a party involved, nor of causal attribution. It also illustrates that the Supreme Court is not afraid of a possible cascade of claims in this type of cases. It is, however, argued that 'third- or fourth-degree' victims are probably excluded.[1] Practice under Dutch law illustrates that a cascade of claims has not materialised since this case was decided. **3**

Hoge Raad (Supreme Court) 29 April, ECLI:NL:HR:2011:BQ2935

NJ 2011/191 (Bouwcombinatie/Liande)

Facts

While a contractor was digging trenches, he damaged electricity cables, resulting in an extensive power failure. The company responsible for the electricity grid reimbursed consumers for their losses resulting from the power failure and seeks compensation from the contractor. The appellate court upholds the claim because it considers the loss to be a foreseeable consequence of the damage to the cable. **4**

Decision

The Supreme Court ruled that the appellate court rightly judged that there was a causal link (*condicio sine qua non*), as the network owner would not have been obliged to compensate the consumers had the cables not been damaged. The appellate court argued that the loss can be attributed to the wrongful act of the contractor because the damaging of the cable led to a massive power failure and that the loss can be considered a foreseeable consequence of this damaging of the cable. According to the Supreme Court, that judgment of the appellate court does not show an incorrect interpretation of the law. **5**

1 Case note *GJ Scholten* under 4/8 no 1.

Comments

6 This case can be seen as an illustration that the losses of indirect victims may be attributed to the tortfeasor as well. It also highlights that, as far as 'cable cases' are concerned, the duty of care and causal attribution are not limited to the (loss of) the 'first' party that suffered the loss.

7 It must be noted that, under Dutch law, claims of indirect victims in the case of personal injury or death are systematically limited to the provisions of art 6:107 BW (third party losses in the case of personal injury) and art 6:108 BW (losses in the case of death).

9. Italy

Corte di Cassazione, Sezioni Unite (Court of Cassation, Joint Divisions) 26 January 1971, no 174

Foro it 1971, I, I, 342, with note by *F Santosuosso*; Giust civ 1971, I, 199; Riv dir civ 1971, II, 199, with note by *G Cian*; Giur it 1971, I, 1, 679 with note by *G Visintini*

Facts

1 While crossing the street, a 24-year-old professional football player (Luigi Meroni, hence this case is generally called 'the *Meroni* case'), who was a star of the Torino football team, was hit by two different cars. He died shortly afterwards in hospital.

2 The Torino football club, C, claimed compensation from the driver of the first car, A. The claimant maintained that, by causing V's death, A had negligently infringed the football club's rights to the player arising from the employment contract with him.

Decision

3 The *Corte di Cassazione* awarded compensation, holding that A's careless conduct directly infringed the contractual relationship between the football club and the player, depriving the club of the right to take advantage of the player's performance.

Corte di Cassazione (Court of Cassation) 16 September 2008, no 23725

Arch giur circol 2009, 3, 224; Giust civ 2009, 12, I, 2714

Facts

4 Following a motor accident that caused the death of V, who was travelling in A's vehicle, C claimed compensation from both A and their insurer for the damage suffered because of V's death.

5 The Court of Appeal of Trieste, partially reversing the first instance decision, held that C could not recover any damages from A and their insurer, because she was neither the spouse of the deceased nor living with him *more uxorio.*

Decision

The *Corte di Cassazione* upheld the decision, because C's simple declaration that she had been living with V as husband and wife and the fact that they had not registered their partnership were not sufficient to prove that the deceased V had contributed to C's living expenses on a permanent and ongoing basis. 6

In the opinion of the Court, the petitioner C had failed to prove the existence of a stable relationship between herself and V, akin to that of a husband and wife, and of a relationship of mutual material and spiritual assistance between them. As the same Court had previously stated in a number of cases (including its decision no 2988 of 28 March 1994, commented on in Volume II on Damages of this series), both elements are required to extend the victim's right of compensation to third parties 7

Comments

The Italian Civil Code does not distinguish between damage suffered by the direct or primary victim and consequential damage suffered by a secondary victim. Therefore, to ascertain whose damage is to be compensated, the provisions of art 1223 cc are generally applied. According to this article: 'The assessment of damage arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay'. Hence, the concept of 'direct and immediate' consequence is regularly used by Italian courts to limit the liability of tortfeasors, whenever there are valid reasons to do so. On this basis, Italian courts used to reject compensation claims brought by those whose rights were only indirectly infringed, ie because they stood in the position of a creditor vis-à-vis the primary victim, in civilian language they only had a relative right (*diritto relativo*) toward the primary victim) 8

The first case mentioned above was the first occasion on which the *Corte di Cassazione* reversed these interpretative rules. In the *Meroni* case, the traditional exclusionary rule applied to claims for damages for losses suffered by indirect victims, holding a relative right toward the primary victim, like the football club which was the victim's employer, was eventually abandoned, to the dismay of older and more traditional scholars.[1] In that case, the Court clearly stated that the right to compensation does not only arise in cases of infringement of an absolute right, but also for the infringement of relative rights, such as the right that an employer has to a worker's performance. 9

The *Meroni* case put an end to the rule affirmed by the same Court with its decision no 2085, of 3 July 1953, concerning the death in a plane crash of a number of players of 10

1 See, eg, the note to the case of *AC Jemolo*, Allargamento di responsabilità per colpa aquiliana, Foro it 1971, I, 1285.

the Torino football team, holding that only an infringement of absolute rights could be compensated under Italian law.[2]

11 The line of reasoning adopted by the Court in the *Meroni* case is today so well rooted in Italian case law that infringements of rights typically arising from contractual relationships (labelled under Italian law as *diritti relativi*) are also normally considered as sources of liability. The second case is a clear example of this second set of cases, although, in that case, compensation was denied because C failed to prove that she had been economically dependent on V.

12 For a long time, Italian case law has held tortfeasors liable not only for the compensation of damage suffered by close family members of the deceased or injured person, but also for the negative economic consequences suffered by those cohabitants who were in a stable economic and romantic relationship with the victim.[3]

13 This interpretative rule, elaborated by Italian courts, was incorporated into Law no 76 of 20 May 2016, on same sex civil unions. Article 1, sec 49, of that law explicitly provides the person living as a registered cohabitant with a right to obtain compensation of damage suffered as a consequence of a third party's illicit action, under the same rules provided for married couples, if C, the claimant, was in a stable, romantic union and in a relationship of mutual moral and economic assistance with V.[4]

14 Obviously, non-registered cohabitants can still claim compensation in a similar situation on the basis of prior case law of the Italian courts on the issue, provided that they can prove not only cohabitation, but also the existence of a stable, romantic union and a relationship of mutual moral and economic assistance with V.

10. Spain

Tribunal Supremo (Supreme Court) 26 June 2008

RJ 2008\4271

Facts

1 V claims from a savings bank, A, the amount that X owes him, on the grounds of a contract for the building of several houses with the supply of materials signed between V and X. The grounds for this claim against A is a contract between X and A, whereby A granted a loan to X in which it was stipulated that the purpose of such a loan was to pay for the materials used and labour employed in the dwellings. Since this stipulation had been breached, V considers that in the contract between A and X, there is a stipulation

2 Cass 4 July 1953, 2085, Foro it 1953, I, 1085.

3 Eg Cass 29 April 2005, no 8976, Dir giust 2005, no 27, 18; Cass 28 March 1994, no 2988, Resp civ prev 1994, I, 1849.

4 For a first introduction to the issue: *G Iorio*, Il danno risarcibile derivante dal decesso del convivente di fatto, Resp civ prev 2017, 4, 1092.

or contract for the benefit of a third party and requests compliance from the lender. The Court of First Instance considers that there is no stipulation in favour of a third party, because this third party has neither been nominally designated in the contract, nor has this third party accepted the benefit (these being contracts for the benefit of third parties). However, it considers that damage suffered by V, consisting in not having received the payment for his building works, can give rise to A's liability in tort. The Court of Appeal agrees with the Court of First Instance on the issue of lack of stipulation in favour of a third party in the contract between A and X. Still, it considers that for A's liability in tort to arise, all the requirements for tort liability (action or omission, fault, damage and causation between action/omission and damage) must be met. Since the requirement of A's fault is missing, it dismisses the claim.

V appeals in cassation and the Supreme Court confirms the judgment of the Court of Appeal. **2**

Decision

According to several assertions made by the Court of Appeal, with which the Supreme Court agrees, it must be concluded that this is a case of indirect damage. The first assertion is that a precise connection between the loan obtained by the building company and the obligations of the financial institution has not been established in this case. There is neither a stipulation in favour of a third party, nor any acceptance of a specific duty, since the contractual clause that has been invoked (agreed between the developer and the bank) aims solely to protect the interests of the financial entity. The second one is that the savings bank's knowledge of the contractual provisions between the developer and the building company has not been proven. Therefore, in principle, the savings bank cannot foresee the consequences of its conduct. The third assertion is that the movements of funds do not reveal serious negligence or fault on the part of the financial entity, since neither the waste of money that the claimant reports nor that the funds were spent for purposes other than the building's works have been proved. **3**

To extend the duties of conduct, assumed within a specific contractual relationship, to the protection of interests of third parties when this has not been agreed, or beyond those cases in which the infringement of the obligation results from intent or direct action against the fulfilment of the performance due to the creditor (such as cases of deterioration or impairment of the thing that is due, attack on the debtor's personality, complicity in the reduction of his solvency, the violation of a negative obligation such as an exclusive agreement, etc) would excessively expand the scope of the obligations assumed in the contract and, consequently, the liability of the debtor. **4**

Comments

Since the Spanish tort law system is based on a general clause (art 1902 CC), both traditional legal scholarship and case law consider that it is an expression of the *neminem* **5**

laedere principle, which orders that no harm should be caused to anyone, and, therefore, it allows compensation to be obtained for any pecuniary and non-pecuniary loss suffered, without it being necessary to analyse whether there has been an infringement of a protected interest or not. However, to find out whether there is any limitation to cases that may give rise to tort liability, and to try to demarcate those cases in which there is recoverable damage from those where there is not, Spanish legal scholarship has imported two foreign doctrines.

6 The first one, a French import, draws a distinction between direct/indirect damage and direct/indirect victim.[1] The second one, with Italian flavour, is the so-called 'tutela aquiliana del diritto de credito' or tort law protection of rights *in personam.*[2] Following the first one, Spanish authors speak of 'direct damage' when the person claiming compensation is precisely the person who has directly suffered the harm to his person or property, and of 'indirect' or 'rebound damage' (in a crude translation of the French 'préjudice par ricochet'), when damage is indirectly suffered by other people (indirect victims) as a consequence of the damage to the physical integrity or patrimony of the former (or 'direct victim').[3] As a general rule, this terminology is used to refer to cases where damage is recoverable, in spite of the fact that damage or victims are 'indirect', as is the case of damage suffered by certain relatives and close persons of deceased or seriously injured 'direct' or primary victims[4] or the non-pecuniary loss suffered by parents in cases of wrongful birth.[5] Following the second doctrine, Spanish legal scholarship usually indicates that the protection offered by art 1902 CC is not limited to absolute rights or rights *in rem*, but it also extends to rights *in personam* and builds groups of cases[6]. In our opinion, both doctrines are of little use for delving into the real problem of the scope of non-contractual liability in a general clause system. The fact that the damage is direct or indirect does not say much about the reason why it must be compensated for in one case and, generally, not in the other. For its part, the doctrine of the tort law protection of rights *in personam* does not give a clear answer to all cases. Some are regulated by specific norms and the only general criterion that can be extracted from case law for those cases which lack specific regulation comes close to the solution given by § 826 BGB, ie there will be no doubt that there is liability when the third party has infringed the creditor's right with intent and in an anti-social way. For this reason,

1 *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual (5th edn 2019) 188 f; *E Vicente Domingo* in: LF Reglero (ed), Tratado de responsabilidad civil (3rd edn 2014) 393 ff.

2 *M Yzquierdo Tolsada*, Responsabilidad extracontractual objetiva: parte general (2015) 122 f; *C Vattier Fuenzalida*, La tutela aquiliana de los derechos de crédito, algunos aspectos dogmáticos, in: Homenaje al profesor Juan Roca Juan (1989) 845–857: *A Fernández Arévalo*, La lesión extracontractual del crédito (1996) and especially *MJ Pérez García*, La protección aquiliana del derecho de crédito (2005).

3 *M Yzquierdo Tolsada*, Responsabilidad extracontractual objetiva: parte general (2015) 188 f; *E Vicente Domingo*, in: LF Reglero (ed), Tratado de responsabilidad civil (3rd edn 2014) 393 f.

4 STS 8 April 2002 (RJ 2002\2534).

5 STS 23 November 2007 (RJ 2008\24).

6 See, in detail, *MJ Pérez García*, La protección aquiliana del derecho de crédito (2005) 133–405.

we believe that the notion of 'pure economic loss' and the constellation of cases built around it could lead to a more satisfactory analysis[7].

7 In practice, what the courts usually analyse is whether all the requirements for tort liability have been met or not, and, as a general rule, they do it with more rigour than in ordinary tort law cases. Thus, in this judgment, the Court finds that the contract between A and X is not a contract for the benefit of a third party or that it includes a stipulation in favour of V. Spanish law does not recognise the figure of the contract with protective effects to third parties, so, if V deserves any protection, it must come from a claim in tort. To see whether non-contractual liability is appropriate, and after indicating that indirect damage is involved, the court confines itself to analysing whether the usual conditions for tort law are in place. It begins by analysing fault and, finding that there has been no fault on the part of A, it does not need to proceed any further.

Tribunal Supremo (Supreme Court) 19 October 1992

RJ 1992\8081

Facts

8 V, the organiser of a show, brings a claim against A, Spanish Television SA, for the damage caused by the broadcast on an informative regional programme of the false news that the performance of singer X, announced for the following day, had been suspended. According to V, this false news gave rise to lower public attendance to the show. Both the Court of First Instance and the Court of Appeal ruled in favour of the defendant and dismissed the claim. V filed an appeal in cassation, and the Supreme Court confirmed the decisions of the Court of Appeal.

Decision

9 The Supreme Court considered that the existence of damage was a fact that had to be established by the Court of First Instance and the Court of Appeal and, according to it, the damage had not been proven. Moreover, even if it had been proven, 'it would not seem logical to attribute it to the mistaken information broadcast by Television Española SA (Regional Centre of Aragon), as its efficient cause, when it appears as proven that, without that information, at the concerts held on the previous 10th and 13th of August ... with the participation of other rock singers or groups, not many people attended'. The Court considered that what was decisive for the public not attending the concert was that, due

7 *M Martín-Casals*/*J Ribot*, 'Pure Economic Loss': La indemnización de los daños patrimoniales puros, in: S Cámara Lapuente (ed), Derecho Privado europeo (2003) 883–920. See also Compensation for Pure Economic Loss under Spanish Law in *WH van Boom*/*H Koziol*/*CA Witting* (eds), Pure Economic Loss (2004) 62–76.

to the specific characteristics of local celebrations coinciding with these concerts, people were more inclined to celebrate private parties.

Comments

10 The judgment under comment also shows, even more clearly, the legal devices that Spanish law most commonly uses to shut the floodgates in a general clause system that, in theory, has no limits. The Court focuses on analysing whether damage has been proven and, even if this is the case, whether there has been a factual causal relationship between the defendant's actions and the damage allegedly caused. Since in the case both conditions are not met, it concludes that there is no liability of the third party for the erroneous information it provided.

11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 26 May 2009[1]

3413/03.2TBVCT.S1

Facts

1 C, wife of V, demanded compensation for non-pecuniary losses suffered by her, as a party to the tort case, after the injuries suffered by her husband in a traffic accident, which rendered him impotent and incapable of having a normal sexual life, ultimately leading to the couple not being able to naturally conceive a second child.

Decision

2 Despite compensation for this damage not being expressly contained in the Civil Code, the Court saw no difficulties in a progressive interpretation of the law. This more broad interpretation had already been supported in various other Supreme Court of Justice decisions and promoted by leading authors on the subject. In fact, the Court deemed the wife's losses serious, and a direct product of the accident: she was awarded € 50,000 in damages.

3 C was awarded damages for being deprived – at the age of 25 – of leading a normal sexual life (which is within her right to sexuality) with her husband as well as for not being able to naturally conceive a second child.

1 <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/dda829b22a91e69a802575ca002f61bf?OpenDocument>.

Comments

Regarding awarding compensation for *non-pecuniary damage to third parties*, not all authors[2] and jurisprudence see eye to eye on the matter. Traditionally, the right to this type of compensation was available to the immediate family (art 496/1, 2, 3) only in cases of death of the victim.[3] Some academic commentators[4] subsequently accepted the admissibility of a more extensive interpretation of said articles (by authority of art 9 of the CC) contrary to a well-known decision of the STJ in 1970, which did not award damages for non-pecuniary losses suffered by the parents of a minor injured in a traffic accident. That being said, in 2005, progress was made on this topic: the wife of a 27-year-old, injured in a traffic accident and who was rendered impotent, was awarded damages. The Court ruled that the right to fully live her marital life was indeed a personality right, which had been illicitly constrained by the tortfeasor. Other situations such as these were recorded in the following years: when the injured parties' spouses were deprived of their right to sexual freedom, they were compensated, although we notice that, in most cases, such as this one, this Court considers these losses as being a direct cause of the accident, and not indirect, or reflex, or suffered by a third party. **4**

There was a similar decision in 2009,[5] where the STJ clearly stated that these types of losses are suffered at the same time by both spouses, as a married couple, rather than one being an indirect victim of the tortfeasor. In several cases though, third parties do not receive compensation due to the limit imposed by art 496/1, which requires non-pecuniary damage to be serious, in order to be compensated[6]. Also, non-pecuniary damages may only be awarded to the categories of people[7] described in art 496/2. **5**

2 *Abrantes Geraldes*, Ressarcibilidade dos danos não patrimoniais de terceiro em caso de lesão corporal, in: Menezes Cordeiro/Menezes Leitão/Costa Gomes (eds), Estudos em Homenagem do Professor Inocêncio Galvão Telles, vol IV – Novos Estudos de Direito Privado (2003) 263–289.

3 *Antunes Varela*, Comentário ao acórdão do Supremo Tribunal de Justiça de 25-05-1985, Revista de Legislação e Jurisprudência, Ano 123, 185–192, 251, and 278–281.

4 *Vaz Serra*, Anotação ao Acórdão do Supremo Tribunal de Justiça de 13-01-1970, Revista de Legislação e Jurisprudência, Ano 104, 14ff; *Ribeiro de Faria*/*Pestana de Vasconcelos*/*Teixeira Pedro*, Direito das Obrigações, vol 1 (2020) 501ff.

5 Supremo Tribunal de Justiça (Supreme Court of Justice), Case no 2733/06.9TBBCL.S1, <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/271a2ef31a3821898025762e00306a4a?OpenDocument>.

6 An example of this is provided in a 2013 case decided by the Supremo Tribunal de Justiça (Supreme Court of Justice): <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/dc55dd629c6ed31480257b20004b6713?OpenDocument&Highlight=0,compensa%C3%A7%C3%A3o,por,danos,reflexos>.

7 This idea is clear in a 2018 decision by the Tribunal da Relação de Coimbra (Coimbra Court of Appeal), which clearly states that a goddaughter may not be awarded compensation for non-pecuniary damage resulting from her godmother's death: <http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/ac8ed31230f46f778025837d0051376d?OpenDocument>.

Supremo Tribunal de Justiça (Supreme Court of Justice) 16 January 2014[8]

6430/07.0TBBRG.S1

Facts

6 In a collision of two vehicles, V was severely injured, which led to him having a leg amputated and triggered several other illnesses. Confined to a wheelchair, he completely lost his autonomy and became depressed, which deeply saddened his wife, C. V's wife was greatly affected by his suffering, and she had to dedicate her life to nursing her husband, as she was economically unable to hire help.

Decision

7 The Court ruled that the losses suffered by the wife of the injured party warranted awarding her compensation for non-pecuniary damage (€ 15,000).

8 The Court did not state whether the losses in this case should be considered direct or indirect/reflex – since it perceives such an evaluation to not be relevant to the decision in the case – but explains that *direct* non-patrimonial losses occur when there is a very close connection between the unlawful conduct and the losses suffered by a third party. Two examples are provided: a case where the person – who has profound affection for the victim – witnesses a very severe unlawful conduct perpetrated against him/her and the cases where a member of a couple is deprived of a normal sexual life with his/her partner, the victim.

Comments

9 In a ruling intended to standardise all following jurisprudence, the STJ once again made clear the necessity of updating the interpretation of art 496, considering that it is admissible to award damages for non-patrimonial losses to people other than the victim in cases which do not involve the victim's death.

10 The Court, however, did not intend to extend the range of third parties to a limitless group of people: in fact, although the Court itself does not catalogue which people may be entitled to this compensation, it is reasonable to expect that they will not fall beyond the categories of immediate family contained in art 496/2. Once again the Court concurs with academics, denying the possibility of compensation being awarded for losses that are not 'serious' (art 496/1).

8 <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/7bc174e495442fb180257cd8005c93a9?OpenDocument>.

In 2019, a new case reached the STJ:[9] the three claimants were the children of a victim of a severe traffic accident, in which their father (V) suffered severe trauma to the head, which meant he could not talk or interact with his children and, since the accident, their father requires assistance for every daily activity. The children therefore claimed damages from the insurance company for non-patrimonial losses, following the reasoning behind the above-mentioned STJ decision. The injured party had not passed away, but the children suffered losses from the incident, being deprived of a normal interaction with their parent. The Court in this case refused the claim, arguing that the CC does not expressly allow for these losses to be compensated and that the updated interpretation of art 496 established following the 2014 decision[10] was not applicable in this case, as the impact on the wife's life (turning into her husband's caregiver) was not comparable to the impact on the children's life, who, undeniably affected, could resume their daily activities and routines unlike the situation in the 2014 decision. **11**

Supremo Tribunal de Justiça (Supreme Court of Justice) 3 November 2016[11]

6/15.5T8VFR.P1.S1

Facts

The case concerns a vehicle collision in which V was killed. The widow and their children claimed the right to compensation (€ 39,000) for the loss of future income that V would have earned in the following 13 years of his working life, on the basis of art 495/3.[12] **12**

Decision

The STJ decided that the fact that the claimants (wife and children of V) were dependent on V's income was not proved. All children were employed and lived separately from the **13**

9 Supremo Tribunal de Justiça (Supreme Court of Justice) decision in Case no 1082/17.1T8VCT.S1, 17 October 2019, <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e24f18b934cd2a1580258497005482d6?OpenDocument>.

10 This decision has been followed in other cases, regarding non-patrimonial losses suffered by a wife, in cases where the husband did not die following the accident. For example, see, from the same year, Supremo Tribunal de Justiça (Supreme Court of Justice) decision in Case no 1120/12.4TBPTL.G1.S1, 28 March 2019, <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/de3578116fd62faf802583cc0033f317?OpenDocument>.

11 <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/8bb15e0632dbc07b80258061003b31bd?OpenDocument&Highlight=0,6%2F15.5T8VFR.P1.S1>.

12 Article 495 deals with compensation for third parties in the event of death or bodily injury. Article 495/3 states the following: 'The right to compensation shall also be available to those entitled to receive maintenance from the injured party and to those to whom the injured party paid maintenance in fulfilment of a natural obligation'.

parents. As for the wife, it was proved that V worked only part time, making around € 250 a month, which reinforced the idea that he could not have been contributing much to the household's expenses and that his widow was receiving an equivalent amount from a Social Security pension after his death.

14 The wife was awarded compensation for non-pecuniary losses (€ 30,000) on the basis of art 496/2 and € 1,500 in damages to cover the expenses of repairing the vehicle, which was registered in her name (her own pecuniary losses). Under art 495/3, no damages were awarded.[13]

Comments

15 For indirect pecuniary damage suffered by third parties, art 495 of the Civil Code provides a solution much less difficult to interpret, according to authors and jurisprudence. Portuguese tort law is based upon the general principle that only the injured party should be awarded damages for losses suffered. That being said, art 495/1 of the same Code establishes that, in the case of death of the injured party, the tortfeasor is required to pay compensation for the costs incurred in seeking to save the injured party, and all other expenses, including funeral expenses. In cases limited to events of bodily harm, including cases of death, the right to compensation is extended to those who volunteered help to the injured party as well as to hospitals, doctors or other persons or entities that took part in treating or assisting the victim (art 495/2). Third parties are granted further support when they were entitled to receive maintenance from the injured party (art 495/3). Despite this provision, the Court establishes that this right to damages is not a direct and automatic outcome for every situation, and a relevant factual background has to be proved in the case, demonstrating that these third parties were in fact dependent on the injured party, which further limits the tortfeasor's liability.

12. England and Wales

Baker v Bolton, Nisi Prius, 8 December 1808

(1808) 1 Camp 493, 170 ER 1033

Facts

1 The claimant and his wife were travelling on top of the defendant's stagecoach when it overturned. Both were hurt, and the claimant's wife later died from her injuries. The claimant brought an action for negligence, and sought damages, inter alia, for having 'been deprived of the comfort, fellowship, and assistance' of his wife. It appeared that

13 The wife also inherited damages that were awarded to the victim (under art 496/1) such as damages for loss of life and other non-pecuniary losses.

the claimant's relationship with his wife had been very close and that she had been a great help to him in his business as a publican.

Decision

The jury was instructed that the claimant could not recover for any losses he had suffered as a result of his wife's death. According to Lord Ellenborough, in a civil court 'the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence'.[1] **2**

Comments

The rule set out by Lord Ellenborough in this case came to be known as 'the rule in *Baker v Bolton*', and was taken to mean that, at common law, no damages could be awarded in a tort action for loss caused by the death of another person.[2] The judgment in the case was very brief and no authorities were cited for the rule, the origins of which are controversial.[3] Parliament subsequently passed the Fatal Accidents Act 1846, which gave the close relatives of a person who was wrongfully killed a claim for loss of financial dependency against whoever would have been liable to that person had he or she survived.[4] However, where losses caused by the wrongful death of a third party are not recoverable under the legislation – as, for example, in the case of an employer of the deceased[5] – the rule in *Baker v Bolton* still operates to bar recovery. It can be understood as an early example of the common law's reluctance to permit claims for 'relational' losses, ie, losses caused by an injury to a third party. **3**

Cattle v Stockton Waterworks Co, High Court (Queen's Bench Division) 5 July 1875

(1874–75) LR 10 QB 453

Facts

The claimant was employed by K on a lump sum basis to make a tunnel under a road which passed through K's land on an embankment. The defendant's water main ran under the road, and when the tunnelling began, it became apparent that a leak in the main had saturated the embankment. This led to the claimant's workings being flooded, **4**

1 *Baker v Bolton* (1808) 1 Camp 493, 493; 170 ER 1033, 1033.

2 The rule was affirmed by the House of Lords in *Admiralty Commissioners v SS Amerika* [1917] AC 38.

3 See, eg, *W Holdsworth*, The Origin of the Rule in *Baker v Bolton* (1916) 32 LQR 431, arguing that the rule arose out of a misunderstanding of the principle that where a wrongful act amounted to a felony, the right to sue in tort was suspended until the felony had been prosecuted.

4 The original Act was later replaced and the current legislation is the Fatal Accidents Act 1976.

5 See, eg, *Osborn v Gillett* (1873) LR 8 Ex 88.

which resulted in delays and additional costs. The claimant's contract was less profitable as a result and he sought to recover his losses from the defendant.

Decision

5 The court held that, even if K could have recovered from the defendant for the damage to his land (a question the court left open), the fact that the leak made the claimant's contract with K less profitable gave him no right of action against the defendant. Blackburn J pointed out that while the leak had damaged the property of K, it had not damaged any property of the claimant. And while it might rightfully be said to be just to give the claimant compensation for his loss, the courts should not allow themselves to transgress the bounds which the law in its wisdom had imposed on itself of 'redressing only the proximate and direct consequences of wrongful acts'.[6] There was also no precedent for the right to maintain an action in such a case.

Comments

6 This decision is an early indicator of the reluctance of the English courts to permit recovery of indirect losses. In *Murphy v Brentwood District Council*, Lord Oliver said that:

> '[I]n an uninterrupted line of cases since 1875, it has consistently been held that a third party cannot successfully sue in tort for the interference with his economic expectations or advantage resulting from injury to the person or property of another person ... .'[7]

The date which Lord Oliver gives for the inception of this rule is a reference to the decision under discussion, although the earlier case of *Baker v Bolton*[8] (discussed above) is also an example of the rule's operation. Nowadays, the exclusionary rule in question operates at the duty of care stage of the negligence enquiry, where it serves to bar recovery for 'relational' economic loss, ie, pure economic loss suffered as a result of damage to the person or property of a third party.[9] However, the purely financial nature of the claimant's loss is not emphasised in *Cattle v Stockton Waterworks Co*, and the quoted words from Blackburn J's judgment suggest that, in his view, the claimant's losses were simply too remote a consequence of the defendant's alleged negligence. This shift from a remo-

6 *Cattle v Stockton Waterworks Co* (1874–75) LR 10 QB 453, 457, quoting from the judgment of Coleridge J in *Lumley v Gye* (1853) 2 El & Bl 216, 118 ER 749.

7 [1991] AC 398, 485.

8 (1808) 1 Camp 493, 170 ER 1033.

9 For a classic example of the operation of this no-recovery rule, see the 'cable case' of *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, where Lord Denning MR said that the inability of an indirect victim to recover pure economic loss could be explained either on the ground that it was owed no relevant duty of care or on the ground that the loss was too remote. See *B Winiger|E Karner|K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 295ff.

teness analysis in the earliest case law to a duty of care analysis in later authorities is also observable in the law governing liability for negligently inflicted psychiatric injury, or 'nervous shock',[10] where the courts have also proved reluctant to allow recovery by so-called 'secondary victims', namely those who suffer mental trauma as a result of the death, injury or imperilment of a third party.[11]

13. Scotland

Dynamco Ltd v Holland and Hannen and Cubitts (Scotland) Ltd, Court of Session (Inner House) 15 July 1971

1971 SC 257, 1972 SLT 38

Facts

V claimed that A had negligently interrupted the supply of electricity to V's factory by damaging an electric cable owned by a third party (an electricity company) whilst carrying out excavation works. V claimed for lost profits caused by loss of production at their factory resulting from the approximately 15½ hours' loss of electricity supply. At first instance, V's claim was dismissed. **1**

Decision

On appeal, the First Division of the Court of Session affirmed the decision at first instance, holding that the damage caused was too remote from the negligent act and that accordingly no damages could be claimed by V. In his judgment, Lord Migdale remarked: **2**

> 'The law of Scotland has for over a hundred years refused to accept that a claim for financial loss which does not arise directly from damage to the claimant's property can give rise to a legal claim for damages founded on negligence.'[1]

Comments

In this case, the court's conclusion was strongly influenced by the fact that V had suffered no physical damage to its property as a result of the power failure, merely a loss of production (pure economic loss). It should be noted, however, that in the more recent **3**

10 Compare *Victorian Railways Comrs v Coultas* (1888) 13 App Cas 222 (remoteness) with *Bourhill v Young* [1943] AC 92 (no duty).

11 See, further, *J Goudkamp/D Nolan*, Winfield & Jolowicz on Tort (20th edn 2020) §§ 5–076 ff.

1 1971 SC 257 at 265.

case of *Coleridge v Miller*,[2] even though physical damage to property had been caused following a power cut, the court was still unwilling to allow a claim for negligence, citing the lack of any duty of care owed by the defender to the pursuer.

4 In this case, the loss suffered was both purely economic as well as indirect, the direct physical damage having been caused to the power line owned by the third party. In reaching its conclusion, the Inner House referred to the famous so-called 'grand rule' on the recoverability of damages which had been laid down by the Court of Session in *Allan v Barclay*:[3]

> 'The grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer.'

5 An argument was made by counsel for V that someone who negligently cuts a power cable ought reasonably to foresee losses caused through interruption of business caused to nearby premises as much as potential physical damage to property. However, the appeal court was unwilling to countenance the idea that the economic losses caused were foreseeable as a 'reasonable and probable' consequence of the harm, Lord Cameron noting that:

> 'No doubt a reasonable man might with some reason surmise that, if a cable were fractured, this might lead to industrial dislocation or even financial loss, but equally it might not.'[4]

6 Such a finding can be described, as it was by the court, as meaning that the losses claimed were 'too remote and indirect to be relevant to found a good claim'.[5] In addition, the court doubted whether any duty of care not to cause such losses was owed by A to V. The reasoning of the court was thus based both on a failure to establish a duty of care owed to V as well as on the losses caused being held indirect and hence too remote.

7 It is clear from the judgments that the court was in part motivated by concerns at the potential number of pursuers in a case of this sort (the common 'floodgates' concern), it being noted that 'remoteness may be determined by considerations of practical expediency or even of public policy'.[6]

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2 1997 SLT 485.

3 1864 2 M 873, per Lord Kinloch at 874.

4 Ibid, per Lord Cameron at 272.

5 Ibid, per Lord Cameron at 269.

6 Ibid, per Lord Cameron at 272.

Quin v Greenock and Port-Glasgow Tramways Co, Court of Session (Inner House) 3 March 1926

1926 SC 544, 1926 SLT 313

Facts

V, a woman whose son had been killed in an accident which was alleged to be the fault **8**
of A, a tram company, raised an action for damages against A. V's claim included a sum representing the profits of a family business managed by her deceased son, which profits had been paid to her and had provided her with an income. She claimed that her son had been the only member of the family competent to run the business, which would be adversely affected by his death. At first instance, the judge declined to determine the legal question of whether these lost profits could be claimed, without first appointing a trial by jury to determine the facts. V appealed.

Decision

The Inner House of the Court of Session held that the portion of the damages claim relat- **9**
ing to the lost business profits should be excluded. The appeal bench described this claim as 'an indirect claim in respect of alleged injury done to the business'[7] and as 'too remote'.[8]

Comments

As in the decision in the immediately preceding case, this claim for lost profits was an- **10**
other instance of a claim for pure economic losses said to be suffered by one party as a result of a harm done to another. In this case, had the mother suffered a direct loss of financial support previously provided to her by her deceased son, a claim would have been possible in Scots law. But, because of the 'indirect' nature of the loss (the direct loss having been sustained by the business, with only a subsequent indirect loss being suffered by V), the claim was disallowed. As such, the judgment is a very clear example of an economic loss being excluded on the explicit ground of its being only indirectly caused by a wrongdoer.

7 1926 SC 544, per Lord President Clyde at 547.

8 Ibid, per Lord Blackburn at 548.

14. Ireland

Irish Paper Sacks Ltd v John Sisk & Son (Dublin) Ltd, Irish High Court, 18 May 1972

Unreported[1]

Facts

1 V's factory had to close for two days due to a loss of electricity supply, caused by damage to an underground cable. V alleged the insulation on the cable was negligently damaged by A's bulldozer driver when digging a trench some months earlier and that water damage eventually caused the cable to fail. A denied negligence, but also argued that a claim for indirectly caused pure economic loss could not succeed.

Decision

2 O'Keeffe P found for A on both grounds. In respect of the economic loss argument, he accepted the principle of English law set out in the cases cited by A.[2]

Comments

3 The precise parameters of the rule adopted is not entirely clear, as O'Keeffe P did not specify which of the potential interpretations of the cases was being relied on. At the very least, the cases support the view that economic loss arising through damage to third parties' property, where there is no damage to the claimant's property, cannot be recovered (sometimes referred to as relational economic loss).[3] The IEHC departed from this approach and expanded liability to include relational economic loss in the 1990s,[4] however, the IESC introduced a broad exclusionary rule for pure economic loss in *Glencar Explorations plc v Mayo County Council (No 2)*.[5] While the IESC noted that there were limited circumstances in which pure economic loss was recoverable, such as negligent

1 An extract from the judgment is available in *BME McMahon/W Binchy*, Casebook on the Irish Law of Tort (3rd edn 2005) 239 f.

2 *Weller v Foot and Mouth Disease Research Institute* [1966] 1 QB 569; *Eliott (Trading as Arlington Books) v Sir Robert McAlpine & Sons Ltd* [1966] 2 Lloyd's Rep 482 and *SCM Ltd v WJ Whittall & Son Ltd* [1971] QB 337. The similar case of *Spartan Steel & Alloys v Martin & Co* [1973] 1 QB 27 was not cited, but the outcome is consistent with it.

3 See *E Quill*, Torts in Ireland (4th edn 2014) 54 ff.

4 *McShane Wholesale Fruit & Vegetables Ltd v Johnston Haulage Ltd* [1997] 1 ILRM 86, noted in *R Byrne/W Binchy*, Annual Review on Irish Law 1996 (1997) 573 f; *Irish Equine Foundation Ltd v Robinson* [1999] 2 IR 442.

5 [2001] IESC 64, [2002] 1 IR 84, noted by *R Byrne/W Binchy*, Annual Review on Irish Law 2001 (2002) 55 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2001 (2002) 293, no 3 ff.

misstatement and defective buildings cases, relational economic loss was not identified as a surviving exception.

AG v Ryan's Car Hire Ltd, Irish Supreme Court, 11 December 1964

[1965] IR 642

Facts

V, a member of the Defence Forces, was injured in a road traffic accident, caused by the negligence of A's employee. V was hospitalised in a civilian hospital and then transferred to a military hospital. He remained on full pay while in hospital, bar a small deduction related to his time in the military hospital. Other than that deduction, his care in the military hospital was provided for free. V settled his claim with A. C, on behalf of the State, brought an action against A seeking to recoup the salary paid to V while incapacitated and the cost of care in the military hospital. C was successful in the IECC; A appealed to the IEHC, where Henchy J stated a case to the IESC to clarify the applicable law. **4**

Decision

The IESC, after an extensive review of Irish and foreign authorities, held that the action *per quod servitium amisit* (for loss of service) is not applicable to public servants. The action itself, arising out of the master and servant relationship, was considered to be anomalous and that it would be better to restrict, rather than extend, the action.[6] **5**

Comments

The action *per quod servitium amisit* is of medieval origin, thought to be based on the idea of a master having a proprietary right in his servants.[7] The availability of the action in respect of the modern employment relationship is uncertain. The last reported successful claim was *Chapman v McDonald*,[8] where O'Keeffe P indicated that the action was only available in respect of domestic service and not in respect of employment more generally.[9] **6**

The same approach has not been taken to the action for loss of consortium (loss of domestic services and intimate relations); traditionally this action allowed a husband to claim damages suffered as a result of tortious injury to his wife. In *McKinley v Minister* **7**

6 [1965] IR 642, 664 per Kingsmill Moore J for the Court.)

7 For consideration of the action, see *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) [32.04] ff.

8 [1969] IR 188.

9 He was influenced to take this approach by the IESC decision in *AG v Ryan's Car Hire Ltd*. See also a dictum of Finlay CJ in *Ryan v Ireland* [1989] IR 177, 180; *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) [34.10].

for Defence,[10] the IESC extended the action to a wife in respect of tortious injury to her husband on the basis of the constitutional guarantee of equality. In theory, equality could have been attained by holding that the action was no longer available to husbands, but the action was so long established that the IESC did not consider it appropriate.

8 There is a statutory action for dependants in fatal injuries cases. Where a person is killed in circumstances that would have amounted to a tort against them had they survived, the qualifying dependants have a collective action against the tortfeasor.[11] While the action is a single action for all dependants, the loss of each dependant is calculated in reaching the award.[12] This action is not available if V successfully pursued an action (including settlement) against A for the wrong during their lifetime or if the limitation period for the action expired prior to death.[13]

9 There are examples of awards of damages being made to relatives for expenses incurred visiting seriously injured victims in hospital (where the hospital is located far from their home) and for providing gratuitous care to victims with long term injuries, but there is no principled discussion of the basis for these awards.[14]

Devlin v The National Maternity Hospital, Irish Supreme Court, 14 November 2007

[2007] IESC 50; [2008] 2 IR 222[15]

Facts

10 V's daughter died and a post-mortem was carried out by A. Organs were removed and retained without V's consent. When V discovered this sometime later, she suffered post-traumatic stress disorder and sued A. Those proceedings were dismissed by the IEHC and the plaintiff appealed.

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10 [1992] 2 IR 333, noted by *G Hogan* (1992) 14 DULJ 115, focusing on the constitutional aspects of the decision; see also *Coppinger v Waterford County Council* [1996] 2 ILRM 427, applying the decision. For consideration of this action and other actions in respect of interference with family relations, see *McMahon/Binchy*, Law of Torts (4th edn 2013) ch 33; *E Quill*, Torts in Ireland (4th edn 2014) 382ff.

11 Secs 47–51 of the Civil Liability Act 1961 (as amended); see *A Kerr*, The Civil Liability Acts (5th edn 2017); *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) ch 42; *E Quill*, Torts in Ireland (4th edn 2014) 501ff.

12 Sec 49, Civil Liability Act 1961. There is a € 35,000 limit on the combined awards of all the dependants for non-pecuniary loss, sec 2 of the Civil Liability (Amendment) Act 1996 and The Civil Liability Act 1961 (Section 49) Order 2014 SI No 6 of 2014), noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2014 (2015) 263, no 1.

13 *Mahon v Burke* [1991] 2 IR 495; some anomalies in respect of the calculation of damages during V's lifetime arose in *Morrissey v Health Service Executive* [2020] IESC 6, noted by *R Byrne/W Binchy*, Annual Review on Irish Law 2020 (2021) 747f; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 302, no 3ff. The IESC indicated that it was a matter for the legislature to resolve.

14 Technically, these relatives (usually parents) are not even parties to the action. In *B v C* [2011] IEHC 88, a wife's income loss, plus the costs to her business of hiring cover for her while she cared for her injured husband, were included in the damages for the husband's action.

15 *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2007 (2008) 352, no 12ff.

Decision

The IESC rejected the appeal. The main principles applicable to negligently inflicted psychiatric harm are set out in *Kelly v Hennessy*.[16] One of those principles requires V to show that their psychiatric injury resulted from the perception of injury or risk of injury to oneself or another person. V's injury in this case resulted from the communication of information in respect of the retention of organs after her child was already dead and so did not result from the perception of an actual or apprehended injury to V's daughter and so the relevant criterion was not satisfied. The IESC also refused to expand the circumstances in which a claim could be made. **11**

Comments

The courts use the duty of care principle to restrict liability for negligently inflicted psychiatric injury. The principles are not confined to indirect victims, though many of the cases do actually involve indirect victims. The *Kelly v Hennessy* principles are as follows: **12**

(i) the plaintiff must suffer a recognised psychiatric illness;
(ii) the illness must arise by way of 'shock';
(iii) it must be foreseeable that the initial event could cause psychiatric injury: foreseeability of general personal injury is not enough;
(iv) the illness must result from the perception of actual injury, or a risk of injury to oneself or another person;
(v) if harm results from perception of the aftermath, there must be a close personal relationship between primary victim and plaintiff;
(vi) there are no public policy limits on recovery where the plaintiff establishes sufficient proximity and foreseeability by fulfilling the above conditions.[17]

Workplace injuries, including occupational stress, are not covered by the *Kelly v Hennessy* principles, but may still be excluded on policy grounds in some circumstances.[18] The IESC in *Devlin* refused to develop any other categories of claim to be dealt with out- **13**

16 [1995] IESC 8, [1995] 3 IR 253.

17 For detailed consideration of Irish law on negligently inflicted psychiatric injury, see *B O'Hanlon*, PTSD and the Law [2020] 4(2) Irish Judicial Studies Journal 79; *BME McMahon*/*W Binch*y, Law of Torts (4th edn 2013) ch 17; *E Quill*, Torts in Ireland (4th edn 2014) 57ff; *G Kelly*, Post Traumatic Stress Disorder, Mental Injury and the Law (2nd edn 2008); *P Casey*/*P Brady*/*C Craven*/*A Dillon*, Psychiatry and the Law (2nd edn 2010) ch 9.

18 *Fletcher v Commissioners of Public Works* [2003] IESC 13; [2003] 1 IR 465, noted by *P Handford* (2003) 11 Tort L Rev 61; *R Byrne*/*W Binchy*, Annual Review on Irish Law 2003 (2004) 526ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2003 (2004) 245, no 4ff. The plaintiff in this case feared for his own health, but the claim was rejected on the basis that the fear was irrational. Despite the fact that this case indicated that *Kelly v Hennessy* principles were not applicable in workplace cases, the principles were used to reject an employee's claim arising out of a near miss incident in *Harford v Electricity Supply Board* [2021] IECA 112, noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, no 18ff.

side the *Kelly v Hennessy* principles. Despite the apparent openness of the final point in the *Kelly v Hennessy* principles, the preceding five criteria restrict the ability of indirect victims to recover. In particular, the IESC in *Kelly* held that the perception criterion was not satisfied by being informed of the injury or death of a close relative by telephone. The plaintiff only succeeded because she travelled to the hospital and saw her injured husband and children.[19] The *Devlin* decision represents a further narrow reading of the principles, excluding a claim with some clear merit.

14 In one possible extension to the principles, the IECA recently allowed a claim where V witnessed a deceased victim, when she came upon the scene of a fatal road traffic accident moments after it had happened.[20] The circumstances were not considered to be an aftermath situation of the type in *Kelly v Hennessy* and other such cases – involving persons coming to hospital some hours after the original event to see the initial victim. Here V's car was hit by debris from the collision, so she was physically put at risk and she was at the scene of the accident at the time it occurred – though she did not see the collision, she heard it and was within 100 metres of the point of collision when it occurred. Her circumstances differ from prior successful claimants; V had no personal relationship with the deceased – he was a total stranger; she did not perceive the injury in accordance with the reasoning in *Devlin*, because the victim was dead when she saw him;[21] she was in physical danger, but it was not the danger to herself that triggered the psychiatric injury. While it may be difficult to fully align the decision with prior authorities, the imposition of liability here seems more appropriate than a narrow parsing of principles to exclude the claim. It does demonstrate that predicting the parameters of the precise limits of the principles in this area is extremely difficult.

15. Malta

S.T. Microelectronics (Malta) Ltd v Malta International Airport p.l.c. and others – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 26 October 2004

Facts

1 The first defendant – the company running the airport – had commissioned contractors – the second and third defendants – to excavate land at the perimeter of the airport. Prior to the commencement of the works, the first defendant asked the electric utility – the fourth defendant – for information about underground power cables in the area where

19 The IEHC had allowed the claim on the basis that V had become ill immediately on being informed over the phone of the injuries to her family. The IESC held that she only succeeded because she went to the hospital and saw the injuries.

20 *Sheehan v Bus Éireann/Irish Bus* [2022] IECA 28. The deceased was the wrongdoer, A.

21 Though, arguably, the manner of death was perceived here, whereas in *Devlin* the objectionable behaviour was removal of organs after death.

the works were to be carried out. The utility replied that, although there were no cables in the area indicated in the request, there were power cables in the vicinity, and therefore no works should be carried out outside the indicated area without first informing it.

Subsequently the first defendant instructed the second and third defendants to uproot some trees outside the area. Believing that the trees could be uprooted without excavating the land, the first defendant did not inform the utility about these new works. **2**

In the course of the works, damage was caused to high tension cables supplying power to the plaintiff's factory. As a result, the plaintiff lost production for several hours until power was restored. It then sued all four defendants for damages. **3**

Decision

In a preliminary judgment on liability, the court found that the first defendant – the airport company – was at fault in failing to follow the utility's specific instructions that no works should be carried out outside the indicated area without first informing it. The works carried out outside the indicated area were the direct cause of the damage and the first defendant was therefore liable. **4**

The second defendant – one of the contractors – pleaded that it was merely following the first defendant's instructions, as it was bound to do by contract. The court dismissed this plea, holding that, as the one materially carrying out the works, the contractor had a duty to ascertain that permits for works to be carried out at that site had been duly issued by the utility; this was also in any case a requirement under the applicable regulations. The contractor's contractual obligations towards the first defendant were immaterial to the plaintiff, which was not a party to the contract. The second defendant also was therefore liable. **5**

The claim against the other contractor – the third defendant – was dismissed because that contractor had not carried out any works on the site in question. **6**

The claim against the utility was also dismissed. The utility had clearly stated that no works were to be carried out on the site without its prior approval. The works had been carried out without its knowledge and consent, and there was therefore no fault on its part. **7**

The case was adjourned to a later date for the plaintiff to produce evidence on the quantum of damages. However, the parties reached a compromise agreement before then and no judgment was delivered on the damages. **8**

Comments

This is a clear case of damage caused to an indirect victim. Actual physical damage had been caused to the electric utility, which was the direct victim. The plaintiff only lost production due to the interruption of the power supply. **9**

Since the matter of damages was settled by agreement, it is not known whether the plaintiff was compensated solely for actual losses, namely wages paid to idle workers **10**

and damage to equipment due to the power cut, or also for lost profits. This issue possibly remains open (see *McNeill Ltd v Omnitec Ltd* reported under 4/15 no 12 below); although art 1045 of the Civil Code provides that both actual loss as well as loss of future earnings are to be compensated, it has not been established that the same reasoning applies in the case of indirect victims.

11 Incidentally, although the plea was not raised by the electric utility because the relevant legislation was not in force at the time, the liability of the utility in cases such as this is limited by the provisions of art 8 of the Enemalta (Transfer of Assets, Rights, Liabilities and Obligations) Act (Chapter 536 of the Laws of Malta), which provides as follows:

> 8. A distribution system operator shall not be liable for any loss or damage, whether material or consequential, to any person or property, for any cessation of the supply of energy, which may be due to unavoidable accident, fair wear and tear or overloading due to unauthorised connection of apparatus, or to the reasonable requirements of the electrical system, or to the defects in any electrical installation not provided by the distribution system operator.

McNeill Ltd v Omnitec Ltd – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 6 March 2003

Facts

12 The defendant company was engaged by third parties to conduct works on electrical installations on the third parties' premises. While carrying out these works, the defendant damaged a power cable belonging to the power utility which supplied power to the plaintiff company's factory. The plaintiff lost production for several hours as a result and it had to pay for overtime work by its employees in order to recover lost production. It then sued the defendant to recover those extra costs.

Decision

13 The defendant pleaded that it could not reasonably be expected to know that a cable was running under the site of the works. The court, however, held that the purpose of the the applicable regulations, which require that before such works are commenced the electric utility is to be informed and its permission obtained, is to avioid such accidents. Due to its failure to follow the correct procedure, the defendant was unaware that a power cable was running under the site, with the result that the cable was hit and damaged. The defendant was therefore liable for any damage caused thereby to the plaintiff.

Comments

14 As in the *S.T. Microelectronics* case, the plaintiff was an indirect victim; the direct victim was again the electric utility.

In view of the injured party's duty to minimise damages, this judgment leaves open the question whether, had the plaintiff not directed its employees to work overtime and it consequently incurred loss of production and of profits, it would still have been able to recover its economic loss. Had it failed to take the steps which it took to minimise its loss, the plaintiff might have jeopardised its chances to recover damages. Moreover, by paying overtime in order to avoid loss of profits, the plaintiff sidestepped the issue whether it can recover damages for lost profits in addition to actual loss. The question whether an indirect victim can recover lost profits in addition to actual loss thus remains open. **15**

The judgment is relevant also in the context of foreseeability. One cannot plead lack of foreseeability if, by following the correct procedure, one can ascertain in advance the consequences of one's actions. Had the defendant informed the utility before commencing works, it would have been made aware of the cable. It cannot therefore be said that it could not foresee that a cable was running under the site. **16**

16. Norway

Høyesterett (Norwegian Supreme Court) 9 September 1955

Rt 1955, 872

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/rt-1955-872-96b?searchResultContext=4740&rowNumber=1&totalHits=1>

Facts

A ship had engine problems and it was forced to lower its anchor, which damaged an electricity cable at the bottom of the sea. An adjacent factory was dependent on the supply of electricity from the cable and suffered losses because of work stoppage due to the supply being cut off. The captain of the ship was aware that the cable might be damaged, and that the factory might lose electricity and suffer loss. He still decided to lower the anchor in order to save his ship. **1**

Decision

The Supreme Court found the ship owner to be liable for damage to the cable and the loss of the factory. The basis of liability was the special base of 'right in the face of imminent need', which presently has a legal basis in the Compensation for Damage Act sec 1-4.[1] **2**

1 The legal basis is an equivalent to the Germanic institute of 'Notrecht'. A damaging act may be perceived to be rightful in the face of the harmdoer's dire situation and need, yet he has to compensate the victim.

3 At the time of the case, the prevailing doctrine of adequacy clearly distinguished between obligatory rights and rights based on other rights to a thing. The distinction also pertains to a distinction between personal and real rights. The Court acknowledged that the factory owner only had an obligatory right to the delivery of electricity, and thus was barred from claiming compensation according to the old doctrine. The Court deemed, however, his status as a third party not to be decisive. The Court instead established a new criterion for the adequacy test. This may very well be regarded as a change of view as to which interests are protected under Norwegian law.

4 The new test was based on the criterion of proximity between the interest of the third party and the act or event for which the tortfeasor was responsible. The economic interest of the factory was deemed to be sufficiently 'concrete and closely connected' to the damage to the cable and hence an adequate loss. The ship owner was held liable in damages.

Comments

5 The criterion of a 'close and concrete interest' is important in the Norwegian doctrine on adequacy and it has since been applied in many cases. The criterion replaced, as mentioned, the previous rather blunt distinction between claims based on physical damage and claims based on obligatory rights. The new principle that followed from the cable case was that third parties who base their claim on a contractual right may have a claim in certain cases even when considered a third party. The requirement is that the interest of the third party is close and concrete and that it is connected to the damaged goods belonging to the primary victim.

6 Some scholars have emphasised that a part of the reasoning for liability in this case was the base of liability: damage stemming from an act of rescue – 'Notrecht'. When acknowledging that a person caused damage in order to avert a threatening danger, it is logical to also find the damage adequate and not subject to limitiation.[2] The extrinsic relationship between certain criteria for liability and the rules on adequacy is also emphasised by another scholar and developed further in a more general manner.[3] Another example of such extrinsic relationship is that the liability is extended to cover remote consequences whenever a grave fault has been committed.

2 *N Nygaard*, Skade og ansvar [Damage and responsibility] (6th edn 2007) 367 f.

3 *AM Frøseth*, Erstatningsrettslig vern for pårørendes personskade – særlig på pasientskaderttens område [Personal injury damage suffered by the next of kin – in the area of patient injury compensation], TfE 2015, 102 ff.

Høyesterett (Norwegian Supreme Court) 10 November 1973

Rt 1973, 1268

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/rt-1955-872-96b?searchResultContext=4740&rowNumber=1&totalHits=1>

Facts

An airplane owned by the state of Norway flew into electric cables in the air, and damaged the cables, causing the electricity supply to a wide range of customers to be cut off. One of the subscribers of electricity was a fish farmer who depended on this electricity supply in order to keep the sea water in the water tanks where the fish were kept sufficiently warm. Due to the loss of electricity, large amounts of fish died. The fish farmer consequently suffered an economic loss. The fish farmer sued the state for damages. **7**

Decision

The Supreme Court found that the state was not liable in damages, even though there was a basis for liability. The Supreme Court explicitly applied an adequacy test in order to explain how and why the state was exonerated from liability for the loss of the fish farmer. First of all, the Court repeated the criterion developed in the cable case mentioned above, contrasting the facts from the case at hand. In the 'cable case', the victim had a 'concrete and closely connected interest' in the cable. The situation was different for the fish farmer, for whom the connection to the electricity cable led to a rather abstract and unpredictable loss. The Court concluded that the loss seemed too remote and therefore lacked sufficient proximity to the damaging act to be a basis for liability. **8**

The mentioned reasoning was reinforced by two additional lines of argumentation. Firstly, reference was made to the consequences of liability in such cases, and that such a precedent would be potentially disastrous in financial terms for many tortfeasors. Secondly, the issue of balancing the interests of the parties involved was raised. In terms of this issue, the majority of judges put weight on the fact that the fish farmer should reasonably have taken into account the general possibility of a temporary lack of electricity supply. The risk of damage due to a temporary loss of supply could have been prevented with simple means. The farmer could have arranged for a reserve generator to produce electricity under such circumstances. **9**

One dissenting judge found that the state was liable and that the suffered loss was adequate. **10**

Comments

The criteria mentioned above which gives protection for claimants with a 'close and concrete interest' in the injured property or a lack of performance as a consequence of a damaging event, represent important milestones in the doctrine of adequate causation **11**

under Norwegian tort law. The criteria have also been applied to other areas of tort law, such as personal injury cases, even though such transitions seem rather forced.

12 The mentioned lines of argumentation from the airplane case have become the point of departure in all new cases on adequacy. The balancing of interests on each party's side has also been applied to other cases, such as the case referred to in Rt 2004 p 1816. In this case, the court dismissed a claim from a company against a traffic insurer for loss stemming from the fact that a key worker in a company had been injured in a traffic accident and was unable to work, which greatly damaged the revenue of the company. The Court found that the company should bear the general risk of employees' inability to work due to their health condition. The foreseeable risk that a keyworker might become unable to work is considered a risk within the plaintiff´s sphere of risk in the same way as the risk of a power cut is considered a risk within the fish farmer´s risk.

13 The Court's reference to a danger of financially ruining the tortfeasor and the argument of unpredictable consequences if the liability is not limited have been perceived as an expressed fear of 'opening the floodgates'. This perspective may explain the different results in the airplane case as contrasted to the cable case. The airplane case has since served as a precedent for floodgate reasoning under the Norwegian adequacy test. N Nygaard has pointed out that the enactment of a general reduction clause in 1985 has reduced the importance of this judgment in practice.[4] One may, however, argue that the floodgate argument still plays a role when limiting liability for third party's losses as a group. The reduction clause presupposes, on the other hand, a more individually based assessment that takes into consideration the economic strength of both the tortfeasor and the victim. The interplay or coordination between limitation based on questions of adequacy and reduction of damages based on a broader spectrum of reasons on both parties' side has been addressed by the Supreme Court.[5] The mentioned precedent illustrates how different legal tools to limit liability should be, or could be, applied within Norwegian tort law.

Høyesterett (Norwegian Supreme Court, Hr) 19 January 2010

Rt 2010, 24

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2010-102-a?searchResultContext=2002&rowNumber=1&totalHits=1Facts>

Facts

14 Whilst repairing a tunnel, the Norwegian Public Road Administration negligently caused part of the ceiling in the tunnel to fall. A road had to be closed over several miles for several months, first in one direction and later in the other direction. The road clo-

4 *N Nygaard*, Skade og ansvar (6th edn 2007) 370.

5 Rt 2006, 690.

sure caused a loss of income to a company that owned fast food restaurants located on both sides of the road. The company also had a contract with the state to maintain a picnic area adjacent to the road and the restaurants. Even though the profit from the fast food restaurants fell considerably during the period of the closure, the company incurred expenses in order to maintain the picnic area. The company claimed compensation from the state for the loss suffered in the period when the road was closed.

Decision

The Court unanimously found that the repair of the tunnel had been conducted in a negligent manner and thus that there was a basis for liability. The majority of the Court found, however, that there was not an adequate connection between the negligent act on the part of the state and the loss suffered by the company. The connection between the negligent construction work and the interest of the company in making a profit from sales at the fast food restaurants was too tenuous. The causal connection lacked the proximity and the direct immediacy required by the rule of adequacy. **15**

The minority of the Court found that the state was liable for the company's loss. It was emphasised in particular that the state had caused the primary damage (the damage to the tunnel) itself. The case should therefore not be dealt with pursuant to the doctrine of adequacy as developed in connection with cases involving a tortfeasor, a primary victim and victims as a third party. **16**

Comments

The majority of the Court was quite restrictive in this decision. A probable reason for this attitude is that the majority was worried about 'opening the floodgates'. The physical distance (6 km) involved and the weak connection between the rights and obligations under the contract and the loss suffered seemed to play a part in the reasoning on adequacy. The contract concerned the right to serve the people travelling the road, but not specifically any right warranting the tunnel to be kept open. **17**

It may be inferred from the case that a purely delictual claim, where there is no contractual relationship or other sufficient relationship of proximity, has little chance of succeeding. An example of this is where faulty behaviour causes a road accident that temporarily prevents many people from getting to work or fulfilling other kinds of contractual obligations. Losses stemming from such hindrances will probably not be considered to fall within the limits of adequacy. **18**

The disagreement between the majority and the minority of the Court shows that it is relevant whether there are one or two links between the tortious act and the damage. The state was actually responsible for the damage to its own tunnel, hence there was no primary victim other than the company. The minority therefore inferred that the state should be liable, whereas the majority did not reason along the lines of third party loss. **19**

20 The fact that the loss may be considered pure economic loss indirectly played a role. The economic loss stemming from contractual obligations is often considered not sufficiently close when applying the 'sufficiently concrete and closely connected test' (see the tendency described in the introduction, chapter 1). There is, however, with regard to adequacy, fomally no special regime for pure economic loss under Norwegian law such as that under German or Swedish law.

17. Sweden

Högsta domstolen (Supreme Court) 4 April 1966

NJA 1966, 210

Facts

1 An electricity cable was damaged. The cable was owned by an electricity company (who was the 'direct' victim); this company belonged to a group of companies where the other companies were industries whose electricity was supplied from the first company's cable. These latter companies claimed damage as regards the standstill losses during the time before the cable was repaired (in Swedish tort law, these companies are seen as 'third parties' to the direct victim who owned the property that was damaged).

Decision

2 The Supreme Court gave the third parties a right to compensation. It was stressed that the cable was used exclusively to transmit electricity to these companies and that it was essential for them that the electricity supply was not disrupted. Further, it was noted that the situation with a group of companies – the power company was a subsidiary company of one of the industrial companies – meant that the third parties had a dominant influence over the handling of the electricity cable. These companies thus had had 'concrete and closely related interests' to the damaged cable.

Comments

3 In Swedish tort law, third party losses are defined as 'economic damage as a result of another direct victim's personal or property damage' and the main rule is that third parties – ie other than the party who directly has suffered personal or property damage – are not entitled to compensation for consequential damage.[1] This case indi-

1 For a general survey of third party losses, see *H Andersson*, Gränsproblem i skadeståndsrätten (2013) 345 ff, 402 ff; 23 ff *H Andersson*, Trepartsrelationer i skadeståndsrätten (1997) passim.

cates an exception. The requirement for such an exception is that the third party has 'concrete and closely related interests' as regards the injured property (or person) and in legal theories, this has developed into a more subtle pattern of different decisive factors. As can be seen from the case NJA 1988, 62 (4/17 no 4 below), the exception was later interpreted narrowly; however, then the discourse climate changed, and in the case NJA 2009, 16 (4/17 no 7 below), the Supreme Court opened up for more exceptions from the main rule. The whole argumentative pattern cannot be described in this short text. Nevertheless, an underlying theme seems to be to qualify the third party's position in two ways: partly autonomy as regards other third parties, so that the specific interest can be seen as close and individual (and not opening up the path for a floodgate of claims); partly autonomy as regards the direct victim, so that the third party can be seen as in the first party's place concerning the interest in the property.

Högsta domstolen (Supreme Court) 7 March 1988

NJA 1988, 62

Facts

An electric cable was damaged just outside a company's industrial plant. The cable was used only to supply electricity to this company. As a result of the standstill, the company suffered economic loss as well as property damage since the material, which was under production, was discarded due to the interruption. **4**

Decision

The property damage was compensated, but not the economic loss due to the standstill. Since the company was not the owner of the cable, it was to be regarded as a third party, and in this case, the Supreme Court did not find any reason for an exception from the main rule of no compensation for third parties. **5**

Comments

The case shows that the main rule concerning third party consequential losses was upheld. In this case, there were no specific qualifying circumstances that could be used as an argument for the third party's interest. In comparison to the case NJA 1966, 210 (4/17 no 1 above), the qualification regarding the autonomy to the direct victim was lacking. The industrial plant had no influence over the handling of the cable; on the contrary, it was just an ordinary recipient of electricity. Since the damage to the property was compensated, we can observe that the crucial issue is not foreseeability or related concepts, but the indirect effect of the consequential damage. According to established Swedish concepts, the loss suffered by the third party due to a standstill is not regarded as pure economic loss, since there was, initially, property damage (the cable) but this property **6**

damage (ie to the cable) did not affect the party who is actually claiming compensation – therefore he is a third party.

Högsta domstolen (Supreme Court) 2 February 2009

NJA 2009, 16

Facts

7 A co-operative housing association hired a construction company to replace wastewater facilities in the association's building. The contractor caused damage to the floor and underlying joists in one of the flats, when hot water leaked out onto the floor. It was undisputed that the contractor was liable for the association's property damage (to the floors and other parts of the building) and the flat owner's damaged furniture. The case deals with the issue of whether the contractor was also liable for the costs that the flat owner incurred for substitute housing during the repair work. Regarding this economic damage, the flat owner was considered a 'third party', since the property damage was caused to the building, which was owned by the association (which, therefore, was considered the 'direct victim').

Decision

8 The Supreme Court referred to the main rule – no compensation for third party losses – but clarified that solutions cannot be based on a single general criterion. Instead of such general guidelines, the Court stated that a piecemeal development could be made with regard to the interests that can be asserted with varying degrees of strength in different types of cases. Among the reasons in support of awarding compensation, it was mentioned that the flat owner had partly taken over the interest that can be attached to the capital value of the direct victim's property (ie the building). The Court declared that if the flat owner in such circumstances were awarded compensation, it cannot be seen as an extension of liability that would lead to unforeseeable or otherwise unjustifiable consequences. Since this third party in many respects occupied an 'ownership-like position' with respect to the flat, this is similar to ownership of real property. The possible negative, unpredictable and wide implications regarding compensation for third parties were commented on and rejected, since compensation in cases such as this would not lead to confusion as regards liability, and such liability was not considered excessive or difficult to grasp. Compensation was thus awarded.

Comments

9 It appears that the terms 'third party' and 'third party damage' are occasionally used in all sorts of contexts where longer chains of causation are involved. Certainly, definitions in themselves do not provide solutions, but we can at least avoid some unnecessary pro-

blems with the following definition of third party damage: 'Economic damage as a result of another direct victim's personal or property damage.' The main rule is that only the direct victim – not an indirectly injured third party – is entitled to compensation. However, when discussing a 'main rule', there are always 'exceptions'. When legitimising exceptions to the general rule, a distinction is to be made between various interests of third parties. An expression that is often used is that the third party should have a 'concrete close interest' linked to the damaged property. Thus it can be concluded that the Supreme Court gave a clear indication that third parties are entitled to compensation in some situations of right of use and enjoyment of property. Since the Court deliberately avoided setting up general third party formulas, it demonstrated that legal development must be achieved through practical considerations of purpose, reasons and interests. The judgment shows that a broad survey of the general reasons as well as the specific case scenarios is likely – in the future – to generate clearer indications about different third party situations.

10 The current case is a typical situation where the third party's loss depends on a contract with the direct victim and where the damage occurs to the object of the contract. The characteristics of such cases are that the owner is giving the other party an opportunity to use the former's real or movable property. If the agreement is called rent, lease or otherwise does not play a fundamental role; instead, the specificity of the concrete situation is decisive. If property is damaged, it is natural that someone who is entitled to use it often has at least as much interest in the property's utility value as the owner. Due to the specific details of the contractual relationship, the degree of independence of the user's (the third party's) interest – in relation to the interest of the owner (the direct victim) and to other third parties – can vary. A rule of thumb is that the third party gets an even better chance of receiving compensation as his position displays more similarity to the position of an owner of that kind of property. That compensation may exceed the value of the property itself cannot be used as a principled argument against awarding third parties compensation, since the property could also have been used in the same profitable way in the owner's hand without any disputed compensation. In the discussion of third party losses, the permanent possession of the property is a strong argument for compensation; in such cases, it could be argued that the third party is 'in the owner's position'. The relevant time of use cannot be determined generally, but must be adjusted according to the various objects related to the use: it takes different lengths of time to get 'in the owner's position' as regards, for example, real property and movable property. Such a flexible approach is more appropriate than an absolute requirement for 'permanent use' or the like.

11 With this recognition from the Supreme Court of the need to tailor arguments to suit different situations – since a general principle does not provide guidance in specific cases – a moderate extension of third party compensation can be discussed in the future, without imposing a total rejection of the negative main rule.

18. Finland

Korkein oikeus (Supreme Court) 12 December 2003, KKO 2003:124
<http://finlex.fi/fi/oikeus/kko/kko/2003/20030124>

Facts

1 Just for fun, A shot a small-bore rifle at a power transmission line, causing the line to break and consequently a power cut to certain factories nearby. The power cut caused physical damage to certain equipment in the factories as well as disruption of production. The factories, which neither owned the broken line nor had any kind of usufruct of them, claimed compensation from A for the physical and economic damage caused to them.

Decision

2 The Supreme Court stated, referring to its previous case law, the main rule as being that only the party prima facie injured by the damaging act has a right to compensation but not any consequently injured third party. According to the Supreme Court, the main rule was reasonable also in the context of indirect losses caused by a breakage of a power line, because such breakage may cause unanticipated and excessive losses to a large group of injured parties, and the tortfeasor's liability of those losses would often put them into an unreasonable economic situation. Moreover, power cuts may be caused by different circumstances and, according to the Supreme Court, in particular parties who use power in their production or corresponding purposes may be required to prepare themselves for power cuts.

3 In the present case, the claimants neither owned the broken power lines nor had a usufruct of them, while their right to receive power was based merely on a contract with the owner of the power lines. On these grounds, the majority (4–1) of the Supreme Court rejected the claim.

4 The minority of the Supreme Court came to the opposite conclusion, noting that, unlike in some previous cases of the Supreme Court, where corresponding claims had been rejected, in the present case the claimant's damage was caused by an intentional criminal offence. Because of this, balancing the interests of the tortfeasor and the injured third party may lead to a different outcome than in a situation where damage is caused in some activity that is as such beneficial for society as a whole. Thus, the nature of the act as an intentional criminal act did not formally lead to a different categorisation of the claim as such, while the minority of the Supreme Court took the nature of the damaging act into account as a real argument in favour of sustaining the claim.

5 In the present case, the broken power line was not directly next to the claimant factories, but, according to the minority of the Supreme Court, A must have known that in the region there were large industrial plants which needed power. Thus, A had taken a deliberate risk of causing a power cut and consequently damage to parties which are de-

pendent on power. On these grounds, the minority held A liable to the claimants, but, because of the excessive amount of the total loss, adjusted A's liability to a reasonable sum.

Comments

The majority's stand in case KKO 2003:124 has been criticised in legal literature. The majority's reasoning has been condemned for uncritical reliance on previous case law, its unwillingness to openly weigh arguments *pro et contra*[1] and for paying too little attention to the circumstance that the damage was caused by a deliberate and purely harmful act.[2] It has been also suggested that one should approach consequential loss of a third party from a wider and more general perspective as one type of pure economic loss, not through the narrow-scoped and rigid rule of non-compensability of such loss.[3] However, as the main rule in Finnish law is that pure economic loss is not recoverable on extra-contractual grounds, apart from in the case of certain exceptions, abandoning the special doctrine on third party losses would not necessarily lead to a significant growth in compensability of such loss. The benefit of such a reform would be that the criteria for assessing such loss would become more flexible and accordant with other forms of pure economic loss. **6**

Another peculiarity in case KKO 2003:124 is that one of the factories suffering damage because of A's act had suffered not only loss of profit but also property damage. In legal literature, it has been held that if a certain act causes physical damage to one party and consequentially other physical damage to another party, compensability of the latter damage must be assessed applying the normal rules on causation. In other words, the doctrine on non-compensability of third party losses should be applicable only to pure economic loss as well as non-physical loss, such as anguish because of the death of a close person, of a third party.[4] **7**

However, the majority of the Supreme Court paid no attention to this viewpoint in case KKO 2003:124. The minority briefly noted that there was also property damage, but as the minority ended up favouring recoverability of all the loss, albeit adjusting the compensation to a reasonable amount, the distinction between property and pure economic loss did not become independently relevant. **8**

In any event, the Supreme Court leaned to the line of reasoning reflected in KKO 2003:124 in a subsequent case KKO 2016:86, without giving any indication that their **9**

1 *B Sandvik*, Tredjemansskada, sakskada eller renförmögenhetsskada? Några kommetarer med anledning av HD 2003:124, JFT 2004, 75–88, 88.

2 *M Hemmo*, KKO 2003:124 – Tahallisuus ja kolmannelle aiheutuneen vahingon korvaaminen, in: P Timonen (ed), KKO:n ratkaisut kommentein II:2003 (2004) 530.

3 *L Sisula-Tulokas*, Ren ekonomisk skada (2012) 46 ff.

4 *B Sandvik*, Tredjemansskada, sakskada eller renförmögenhetsskada? Några kommetarer med anledning av HD 2003:124, JFT 2004, 82 ff; *H Saxén*, Skadeståndsrätt (1975) 63; *L Sisula-Tulokas*, Sveda, värk och annat lidande (1995) 234 ff.

standing on the question would have changed – even though the circumstances of case KKO 2016:86 (see 4/18 no 10 below) led to an opposite outcome. In other words, regardless of the scholarly critics, case KKO 2003:124 still seems to reflect the law in force.

Korkein oikeus (Supreme Court) 9 December 2016, KKO 2016:86

<http://finlex.fi/fi/oikeus/kko/kko/2016/20160086>

Facts

10 A 12-year-old boy was vaccinated against swine flu, as a result of which he fell ill, suffering from narcolepsy and cataplexy. These illnesses caused him to occasionally behave aggressively and unpredictably, which led to property damage when he was being cared for at home. The boy's father claimed compensation for damaged household effects from the state that was responsible of running the vaccine campaign. The state had admitted to being strictly liable for the personal injuries caused to the boy,[5] but refused to pay compensation for the property damage.

Decision

11 The Supreme Court first referred to the traditional main rule that consequential damage caused to a third party is not compensable. Because of this, property damage caused to a third party by the behaviour of a party suffering from a personal injury is, as a main rule, not within the sphere of liability of the party who caused the personal injury.

12 However, the Supreme Court noted that when assessing an individual case, attention must also be paid to the special provisions in ch 5 of *vahingonkorvauslaki* (31.5.1974/412) – the general statute on extra-contractual liability – which allows even a third party to claim compensation for consequential damage relating to personal injury of another party in certain special situations. Such a right provides that the third party is, depending on the type of loss, either entitled to maintenance or otherwise *de facto* dependent on maintenance from the injured person, or is a parent, child or spouse of the injured person or otherwise correspondingly close to that person.

13 According to ch 5 sec 2d, certain parties who are particularly close to a party who has suffered personal injury, may, under special circumstances, be entitled to reasonable compensation for costs and loss of earnings caused to them when taking care of the injured party. The Supreme Court noted that even though the provisions of *vahingonkorvauslaki* are not directly applicable when applying strict liability, the principles that they reflect apply also in the context of strict liability.

5 State's strict liability for illness caused by a vaccine campaign was established by the Finnish Supreme Court in case KKO 1995:53.

The Supreme Court held that damage to household effects in the present case is comparable to costs incurred by a close person because of taking care of the injured party under ch 5 sec 2d of *vahingonkorvauslaki*, although property damage is a non-typical cost for taking care of someone. However, on the other hand, as the Supreme Court noted, also the illness caused to the boy because of the vaccine was exceptionally severe. On these grounds, the Supreme Court held the state liable for the property damage caused to the father. **14**

Comments

First, case KKO 2016:86 shows, with previous case KKO 1994:94, that the main rule of non-compensability of consequential loss of a third party applies also to strict liability, not only liability under *vahingonkorvauslaki.* Second, the case illustrates that non-compensability of such loss is to be considered merely a main rule, and case-specific circumstances play a great role when deciding the outcome. This also means that the outcome and the reasoning behind case KKO 2016:86 may not be directly applicable in any other kind of case. Third, the case shows that, if there are sufficiently special circumstances, special provisions on compensability of consequential loss of third parties may be interpreted even extensively, at least in a case where they are not applied directly but merely as reflections of general principles. Nevertheless, the main rule must be understood as being that such special provisions are, as exceptions to the main rule, to be interpreted narrowly.[6] **15**

19. Estonia

Riigikohus (Supreme Court) 9 March 2010

Civil Case No 3-2-1-174-10

Facts

The defendant's employee caused a traffic accident as a result of which the claimant's passenger car was destroyed and the defendant's spouse (the victim) suffered health damage and was hospitalised. Subsequently, the victim needed daily assistance, care and attention as a result of being immobilised due to a broken leg. Due to taking care of the victim and the destruction of the claimant's passenger car in the traffic accident, the claimant was unable to perform the claimant's contract for work, which had been concluded before the accident, and the claimant was forced to terminate it. As a result of this termination of the contract for work, the claimant suffered pecuniary damage in the **1**

6 Accordingly *J Norio-Timonen*, KKO 2016:86 – Ankara vastuu ja kolmannelle aiheutuneen esinevahingon korvaaminen, in: P Timonen (ed), KKO:n ratkaisut kommentein II.2016 (2017) 328.

amount of € 2,492. The claimant asked the court to order the defendant to pay the lost profits in the amount of € 1,944 plus default interest.

2 The district court granted the claim and held that if the traffic accident caused by the defendant had not happened, the claimant would not have had to take care of his spouse and would have been able to perform the contract for work. The court of appeal set the district court's judgment aside and passed a new judgment in which it denied the claim.

Decision

3 The Supreme Court set the judgment of the court of appeal aside in part, upholding the district court's judgment regarding the awarding of € 666 (because the defendant did not contest the district court judgment to that extent). The Supreme Court noted that, in the case of torts whereby the unlawfulness of the act arises from a harmful consequence (clauses 1, 2, 3 and 5 of LOA § 1045(1)), the protective purpose of the Act within the meaning of LOA § 127(2) is usually limited to the provisions of Chapter 7 of the LOA, which regulate the scope of a claim for damages according to the type of the harmed legal interest (life, health, ownership) (LOA §§ 129–132).

4 LOA § 130, which limits claims for damages in the event of causing bodily harm or health damage to a person, is of relevance in resolving the disputed case (clause 2 of LOA § 1045(1)). Under LOA § 130(1), the injured person is compensated for costs arising from health damage or bodily injury, including costs arising from the increased needs and damage arising from total or partial incapacity for work, including damage arising from a decrease in income or deterioration of the future economic potential. This provision allows only the injured person, ie the person who suffered a bodily injury or other health damage, to claim the costs resulting from the harm and the losses arising from the incapacity for work (see Comments below). The law does not, in a situation where one person suffers health damage or a bodily injury, entitle another person to claim compensation for pecuniary damage caused to them by the same incident. Thus, the district court should have denied the claim under LOA § 130(1).

Comments

5 An important position has been taken by the Supreme Court, according to which, in the case of harming absolutely safeguarded legal interests, the protective purpose of the law is usually set out in rules that regulate the scope of compensation for damage. LOA § 130 (1), which regulates compensation for damage in the event of harming a person's health, does not provide for compensation for third parties (indirect victims) who may also suffer damage due to the harming of the victim's health.

6 A respective claim of an indirect victim could, hypothetically, be possible if they founded their claim on a violation of a protective rule by the defendant (clause 7 of LOA § 1045(1) and some provision of the Traffic Act for instance). In the case of these grounds of unlawfulness, the court can substantiate the protective purpose of the rules sepa-

rately in accordance with LOA § 127(2) and LOA § 1045(3) (for a related comparison, see the Tallinn Court of Appeal judgment of 1 June 2017 in Civil Case 2-13-38143), ie broader than provided in LOA § 130(1). It cannot be precluded that, where causing a bodily injury or health damage to a person constitutes intentional conduct against good morals as an unlawful act within the meaning of clause 8 of LOA § 1045(1), the pure economic loss suffered by indirect victims may be covered by the protective purpose of clause 8 of LOA § 1045(1) under LOA § 127(2). In the given case, the claimant did not rely on the fact that the defendant violated a rule with a protective purpose or caused damage by intentional conduct against good morals.

The solution in this case is compatible with a general principle stating that third parties are not compensated, in general, in cases of personal injuries. 7

20. Latvia

Rīgas apgabaltiesa (Riga Regional Court) 14 December 2017, No C33327912
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/354939.pdf>

Facts

V1 was run over by a car driven by A on a pedestrian crossing. As a result of the road traffic accident, A caused serious injuries to V1 leading to his death. The traffic accident occurred due to gross violations of traffic rules and, as a result, A was found guilty and convicted in criminal proceedings. V2 (spouse of V1) and V3 (son of V1) brought a claim against A (the driver) requesting compensation of non-pecuniary harm in the amount of approx € 28,000 and € 21,000 respectively. V2 was already awarded approx € 7,000 in the criminal proceedings, but V3 had not received any compensation. 1

Decision

The first instance court awarded € 3,500 to V3 and rejected the claim in the remaining part. The court of appeals rejected the claim completely. The Supreme Court reversed the judgment of the second instance court. 2

The court of appeals reviewing the claim for the second time rejected V2's claim and satisfied V3's claim partially, awarding him € 4,000. The court argued that, despite the fact that V2 indicated she is unable to reconcile with the death of her husband, with whom she was happily married for 47 years, because of her health condition, she is affected by her husband's death more severely than a healthy person and at her age she is no longer able to improve the quality of life, unlike young people who may re-marry, have children, work, etc, the compensation for non-pecuniary harm she was awarded in the criminal proceedings is not disproportionate, insufficient and inadequate taking into account the suffering of V2. When determining the compensation sought by V3, the court took into account the compensation already awarded to V2 and the fact that he 3

lived separately from his father and mother, that he had his own family, and that V2 and the deceased V1 had much closer ties, so that his moral suffering due to his father's death was less severe than that of his mother, V2. The Supreme Court refused to initiate cassation proceedings and the judgment of the second instance court came into force.

Comments

4 The arguments used by the court to reject the claim of V2 as an indirect victim of the traffic accident causing the death of V1, her husband of 47 years, are debateable. The court referred to the fact that it was not proved that the compensation already awarded in criminal proceeding would be insufficient and inadequate. The claimant in such cases however, arguably cannot prove their pain and suffering and the facts of the case allowed the presumption that V2 was severely affected by the wrongful death of her husband. The case law already established at the time that compensation for non-pecuniary harm shall not exceed the limits of State liability[1], which normally would be from € 28,000 to € 30,000. Although, some of the health issues indicated by V2 in fact may not have been caused by A, the compensation awarded to her was only approx 25 % of what can normally be awarded in cases of wrongful death.

5 According to the case law at the time, it was established that the compensation for non-pecuniary harm in cases of wrongful death is to be awarded to the family and the compensation of a separate family member is limited by what has already been received and the compensation awarded to a single family member shall be considered as compensation to the whole family.[2] It may be debateable if this is a fair approach from the perspective of victims who may have a large family, with close personal ties and who have been severely affected by the death of a family member. On the other hand, the tortfeasor may argue that the number of potentially affected individuals is not something that was foreseeable at the time of the unlawful act and their liability should not be unjustifiably increased due to circumstances they did not know about or which they could not change. Notwithstanding the necessity for limiting the scope of liability and the notion of family and what group of close persons may fall under that term, it could not be reasonably stretched so far as to include neighbours, friends and colleagues, who may also be entitled to bring claims against the tortfeasor, substantiating the harm suffered as a result and that group of more distant potential claimants should not be put in a better position (not being part of the victim's family and therefore subject to the liability limitation in question). One may argue that such strict limitation of liability in the case of many family members should not be applied and rather the non-pecuniary harm should be evaluated individually to the extent possible, taking the already awarded

1 In accordance with sec 14 of the Law on Compensation for Damage Caused by Public Administration Institutions.

2 Summary of the Case Law of the Supreme Court of the Republic of Latvia 'Compensation for Moral Damage in Civil Matters' (2014) 109 f.

amounts into account. It must be noted that, in the present case, the total award for the family of the deceased V1 was less than 50 % of what would normally be awarded in the case of wrongful death.

In the present case, the liability of A towards V3 should have been limited taking into account the compensation awarded to V2; however, the criteria for determining the compensation may be quite controversial. The court indicated that the amount of compensation for V3 should be lower as he lived separately and had less close ties with V1 as his son, compared to his mother V2. Claimant V3 indicated to the court that he had had a close relationship with his father. He lived very close to his parents and met his father often and spent time with him. He could always count on his father's emotional support in difficult situations in life. One may argue that the relationship between V1 as a father and son (V3) and V1 as husband and his spouse (V2) are substantially different and not comparable and the fact that V3 (having reached a certain age) did not live with his parents is normal and not necessarily an indication of a distant relationship. Furthermore, if the court was of the opinion that there was a lack of reliable evidence of harm suffered by V3, the compensation amounts awarded in similar cases would have been a more suitable criterion to determine compensation to be awarded to V3 and the fact that the court assessed the harm of V2 in a certain way should not have been the decisive criterion for determining the amount of compensation for V3. **6**

Vidzemes apgabaltiesa (Vidzeme Regional Court) 12 December 2016, No C39085215
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/297941.pdf>

Facts

V1 was the son of V2. V1 suffered a very serious injury while working at the factory of company A with robot Berta. V1 almost lost his life and was severely mutilated as a result of the accident, suffered third degree facial and arm burns, fractures of the facial bones, severe eye trauma, traumatic shock, damage to the cerebral cortex, among others. V1 brought a claim against A for compensation of non-pecuniary harm and the case was subsequently settled, A undertook to pay compensation to V1. Approximately two years later, V2 brought a claim against A claiming compensation for non-pecuniary harm in the amount of € 35,000. The claimant argued that, as a result of her son's accident, her health condition substantially deteriorated, she was severely affected by the accident and its consequences to her son, and V2 constantly worried about him and how to ease his suffering. The claimant indicated that she was forced to leave her job in Germany and go to Latvia to take care of her son. V2 could not find work in Latvia due to the financial crisis at the time. **7**

Decision

The first instance court rejected the claim. The second instance court also rejected the claim, arguing that compensation for non-pecuniary damage had already been received **8**

by V1 himself based on a settlement with the defendant, and that it should not be awarded to other persons, including V2. If compensation is provided to the victim of the accident, then it essentially provides satisfaction to the family members of the person who suffered non-pecuniary harm. The judgment of the second instance court has come into force, as it was not appealed by V2.

Comments

9 The judgment clearly indicates a liability limitation towards an indirect victim – the mother of a person suffering a grave personal injury at work that did not result in V1's death. While Latvian law does not provide an explicit right for indirect victims in the case of an injury of another[3] to claim compensation, the reasoning the court used to support its rejection of the claim may be questionable. It would have been possible to argue that the law does not provide indirect victims with a right to compensation following an injury of another, except in cases of wrongful death, but the court chose to apply a different set of arguments.

10 The court argued that it was theoretically possible that a certain degree of physical or mental suffering could also have been experienced by another person in addition to V1. However, compensation for non-pecuniary harm was received by the victim himself and, therefore, there is no reason for other persons to receive it. However, that naturally provokes a question: would the outcome of the case have been the same if V1 had not settled the case and/or had not brought a claim against A at all? It most probably should not be different, unless V2 was claiming compensation on behalf of V1, who had not filed a claim at all. Therefore, the decisive aspect is not whether or not V1 received compensation, but whether or not V2 is entitled to claim compensation for non-pecuniary harm caused to her as a result of the accident injuring her son, V1. The response to that would likely not be in the affirmative based on current case law in Latvia either, because the law does not expressly and generally protect indirect victims in the case of any non-lethal injury of another and claimants in such cases would find it hard to prove causation between the non-pecuniary harm or deterioration of health and the injury of a close relative grounding their claims with a reference to the basic norm of civil liability (sec 1635 (1) of CLL), for instance.

11 In the present case, the court referred to the fact that compensation was awarded to a family member and this allegedly provides satisfaction to the whole family. While that notion in the case law is indeed relevant in cases of the death of a family member, one may argue that it has very little relevance in the present case as the compensation is awarded to the victim for their own injury and suffering. The compensation of V1 should not, and most probably would not, be any different if he had no relatives or had many

3 An exception would be the case of a breadwinner's injury which leads to permanent loss of working capacity, according to secs 2348 and 2351 of CLL.

relatives. The court should not determine the amount of compensation for non-pecuniary harm caused to and suffered by victim to others due to the personal nature of such claims. Such claims are not assignable and inheritable according to the case law of Latvia and it would not be justifiable that others could not be awarded compensation for the pain and suffering inflicted upon a certain person that remains alive and who may or may not choose to pursue a claim against the liable party.

On a side note, the argument that V1 received compensation for non-pecuniary harm may not have been entirely correct, since it was established that V1 concluded a settlement with defendant A. According to Latvian law, a settlement terminates the disputed legal relationship and establishes a new and certain one based on the settlement.[4] It must be noted that the amount of settlement may be determined based on various considerations between the parties concluding it (including medical costs, compensation for loss of working capacity and other pecuniary losses that were not even claimed by V1 in the first court proceedings) and may not necessarily reflect what the compensation for the non-pecuniary harm could have been, had V1 refused to settle and continue litigation against A. The award could have been hypothetically higher or lower. Furthermore, the conclusion of a settlement may not affect the rights of third parties (not party to it) according to sec 1888 of CLL. Therefore, it may not have been accurate to argue (as the court did) that V1 had received compensation for non-pecuniary harm because the conclusion of a settlement does not imply liability of any party and for that reason the settlement amount is not to be construed as compensation to V1. **12**

22. Poland

Sąd Najwyższy (Supreme Court) 26 March 2014, V CSK 284/13
OSNC 3/2015, item 37

Facts

V conducted investment activities consisting in purchasing or acquiring shares in companies, mainly in the information and computer sector, and listing them on the stock exchange. V was the largest shareholder in JC, a company which conducted business in the field of the production and distribution of computer hardware. V brought a claim for redress of indirect damage corresponding to the loss of value of his shares held in the company JC. V claimed that the loss was due to the company being forced into bankruptcy as a result of several immediately enforceable unlawful taxation decisions, for which the State Treasury was held liable much later. On the basis of non-final decisions, a debt, corresponding to almost half of the book value of the company's capital, was collected. **1**

4 Secs 1881–1891 of CLL.

The court of appeal awarded V over PLN 28 million as compensation. The Supreme Court revoked the first verdict on 12 June 2012, but on appeal, the compensation was awarded again. The State appealed again to the Supreme Court.

Decision

2 On the question of law, a shareholder is generally entitled to claim compensation from the State for unlawful decisions regarding a company. The concept of liability for so-called indirect damage is a subject of controversy and, in the case law of the Supreme Court, it is basically accepted only for personal injury for loss of maintenance and non-pecuniary loss (art 446 KC). The view that a shareholder may claim compensation for his own damage suffered as a result of acts against the capital company is also debatable. Noting the general divergence of views on the issue in question, the Court confirmed the obligation to repair damage to patrimony (pecuniary loss) caused to entities (shareholders) whose rights and interests were subject to indirect violations resulting from unlawful action by public authorities.

3 A claim for compensation for damage caused to a shareholder indirectly may take two forms – as a claim supplementary to a claim for damages by the company itself, or as its own claim for damage caused by an indirect infringement of its rights and interests, exceeding the damage to the company. The Court of Appeal followed the second interpretation, which can be approved of. However, issuing a defective and unlawful administrative decision constitutes only one of the prerequisites for the State Treasury's liability for damages and does not release V from the burden of proving the damage and the normal causal link between the issuance of the decision and the damage. The shareholder bears the risk related to the activity of the company whose shares he holds and cannot transfer this risk to other entities. The expert opinions indicated that the tax decisions were only one of the main reasons for the company's bankruptcy. The company could have avoided bankruptcy if it had reduced the scale of its operations in a more decisive manner. Hence, adequate causation was not properly established. Also, the fact that the State Treasury returned to the company the enforced amount with interest cannot be ignored as this sum constituted at least partial redress of the damage suffered by the company. Therefore the verdict was reversed.

Comments

4 The jurisprudence of the courts has been evolving in a 'twisted' way; moreover, the approach seems to depend on the kind of damage caused.

5 In the first Supreme Court judgment rendered on the facts of this case (the judgment of 22 June 2012, not reported here), the Court held that not only direct damage, but also indirect damage is subject to compensation if it remains in an adequate causal relationship with the unlawful conduct of the tortfeasor. In that first decision, the Court questioned the concept of relativity of unlawfulness, what was necessary to confirm the obli-

gation to redress indirect damage arising in the patrimony of a person other than the one against whom the unlawful act was directed. However, the Court created confusion between the issue of 'relativity of wrongfulness' and the exclusion of compensatory claims by indirect victims (albeit each aims to limit liability). The decision reported above reiterated the entitlement of shareholders to seek recovery for lost value of shares, but the Court quashed the judgment on the ground of insufficient discovery regarding causation.

See also case at 6/22 no 5ff. **6**

Sąd Najwyższy (Supreme Court) 13 October 1987, IV CR 266/87

OSNC 9/1989, item 142

Facts

A was driving under the influence of alcohol and hit a car driven by X, in which Y and Z were travelling as passengers. V, the mother of Y and Z, claimed compensation from A and his insurer for the moral harm she had suffered, alleging that she has developed aggravated neurotic conditions due to the severe personal injuries suffered by her children as a result of the accident. The passengers actually suffered different types and degrees of reversible injuries. **7**

Decision

The Supreme Court dismissed V's complaint. Compensatory claims are available only to direct victims of the tort. The deterioration of V's health is an indirect consequence of A's misconduct and, as an indirect victim, she cannot receive compensation. **8**

Comments

Traditional jurisprudence excluded liability for damage suffered by third parties indirectly (*par ricochet*). For example, the Supreme Court held that damages in personal injury cases may be claimed only by the person against whom the act of the perpetrator was directed and, therefore, persons who only indirectly suffered damage are not entitled to compensation.[1] **9**

The traditionally recognised principle of Polish civil law states that courts can award compensation in money for non-pecuniary loss where the law provides for such a claim. In recent years, the number of such provisions has grown.[2] Bereavement **10**

1 SN 27 April 2001, III CZP 5/01, OSNC 2001, no 11, item 161.

2 The Civil Code allows for the compensation of non-pecuniary loss in personal injury cases (art 445 § 1 KC), for deprivation of freedom and for sexual abuse due to deceit, violence or abuse of a relation of de-

damages, in particular, were introduced in 2008.[3] Moreover, Polish law has always adhered to the rule that indirect victims are protected by way of exception. Accordingly, art 446 KC lists the claims and those entitled to claim in cases of personal injury and death.

11 See also comment to the case III CZP 60/17 below at 4/22 no 17ff.

Sąd Najwyższy (Supreme Court) 27 March 2018, III CZP 60/17

OSNC 9/2018, item 83

Facts

12 The plaintiffs' (V1 and V2) child was born with severe brain damage due to oxygen deficiency, because its mother was forced by the doctor employed by A to have a natural birth. V1 and V2 claimed compensation on behalf of the child (V3) as well as for their own non-pecuniary losses due to the violation of family bonds. The Court of Appeal awarded V3 an annuity, damages for pecuniary losses as well as compensation for non-pecuniary losses, and compensation for non-pecuniary loss to V1 and V2. In cassation, the Supreme Court referred the case to the panel of seven judges, suggesting that the legislator had chosen to protect a family bond only when it is broken by death arising out of a tort (art 446 § 4 KC), hence the rules on the pecuniary protection of personality rights cannot serve as a legal basis for non-pecuniary compensation to the relatives of a seriously injured victim, who survived the tort.

Decision

13 The Supreme Court stated that wrongful death could cause a violation of a personality right. The essence of such a right is a close (emotional) family bond, or a bond between close relatives. Established court practice includes this right in the sphere of the protection of tort law.[4]

14 The Court dismissed the interpretation of art 446 § 4 KC as a rule of an exceptional nature. As a result, it can be argued that the closest relatives of the deceased are entitled to bereavement damages based on art 446 § 4 KC, regardless of whether or not their personal right has been infringed. Article 446 § 4 KC simply limits the entitlement to the closest persons. Hence, it is possible that any close persons who can prove a strong emotional (family-like) bond, its violation, fault and the moral harm stemming from it can

pendency (art 445 § 2 KC) as well as in wrongful death cases (art 446 § 4 KC). Apart from the above, several special statutory regulations permit non-pecuniary damage to be redressed.

3 See *E Bagińska*, Poland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2008 (2009) 499, nos 1–3.

4 The Court referred to its judgment (panel of seven judges) of 27 June 2014, III CZP 2/14 OSNC 12/2014 item 124.

claim compensation on the ground of the violation of a personal right (art 24 in conjunction with art 448 KC).[5] The fact that indirect victims are vested with a right to demand bereavement damages does not mean that they had been prevented from seeking compensation pursuant to the rules on the protection of personal interests in other situations, especially in cases close to death (such as, for example, a coma). There is no ethical ground to differentiate between the breach of family ties due to the victim's death and due to a serious irreversible injury.

The liability towards relatives should, however, be limited. Firstly, a family bond must be a particularly strong emotional and mental relationship, which is real and persistent. Secondly, exceptional circumstances must exist in which it is impossible for the relatives to create and maintain personal contact typical for a given type of relationship (eg a relationship between parents and child) due to the severe and deep disturbance of vital functions. The violation of a family bond in such situations can be regarded as creating grave and permanent moral harm. **15**

Dissenting, two Justices questioned both the recognition of a personal right in the form of an emotional family bond and the possibility of applying art 448 KC to claims of indirect victims. **16**

Comments

The cases at 4/22 no 7 ff and 4/22 no 12 ff above show how the courts deal with claims when there is no statutory rule which allows compensation for indirect victims in personal injury cases. The case at no 12 deals with a particularly serious personal injury, where, in addition, the mother was in fact the subject of the medical malpractice. In case no 7 above, the mother was informed of the accident involving her children as victims and their injuries were mild and reversible. Also, the case under no 12 was decided after the legislator introduced a claim for bereavement damages in 2008. **17**

The Supreme Court developed a line of case law,[6] which met with strong criticism by the doctrine. In the Court's view, its decision is compatible with 'a European standard', which means a more intensive protection of the physical and mental integrity of a person.[7] **18**

5 Art 448 provides: 'In the case of an infringement of personal interests, the court may, independently of other measures necessary to remove the results of the infringement, award the injured person an appropriate sum as compensation for non-pecuniary harm or may, at his request, award an appropriate sum to a social cause chosen by him.'

6 Starting with the judgment of 9 August 2016, II CSK 719/15, OSNC 5/2017, item 60, reported by *E Bagińska*, Poland, in: E Karner /BC Steininger (eds), European Tort Law (ETL) 2017 (2018) 467, no 11; SN 10 February 2017, V CSK 291/16, OSP 12/2017, item 125, SN 27 March 2018, III CZP 36/17, OSNC 11/2018, item 103, SN 27 March 2018, III CZP 69/17, OSNC 11/2018, item 104

7 See art 10:301 sec 1 PETL.

19 Besides a great doctrinal controversy which has arisen around the concept of the new type of a personality right, family bonds,[8] the judgment has contradicted the traditional position of Polish law, pursuant to which, the injured party in the legal sense is the person who has suffered damage to be compensated and against whom the causative event (an act or omission fulfilling the conditions of a tort) was directed.

20 We can observe that the so-called indirectly injured person can be defined from different points of view, albeit all those viewpoints are concerned with a similar aim of limiting the scope of civil liability. It is characteristic of the Roman tradition to approach this question from the damage side: direct damage is suffered by the person against whom the event was directed, and if it caused the infringement of an interest of another person, this further damage is referred to as indirect damage and the person as indirectly injured. Indirect damage therefore only exists if the rights or interests of the directly injured party have previously been harmed; direct damage is the cause of indirect damage. Indirect damage is subject to compensation on the same basis and to the same extent as direct damage, the only additional condition being proof of the existence of the latter. The above approach can also be found in some Polish legal works. In 2021, a new rule (art 446^2) was introduced to allow compensation for moral damage suffered by the next of kin when a direct victim has suffered serious and permanent injuries.[9]

23. Czech Republic

Nejvyšší soud České socialistické republiky (Supreme Court of the Czech Socialist Republic) 30 November 1976

2 Cz 36/79

Facts

1 The claimant claimed compensation for damage to health caused to her by the respondent after she realised that her minor son had participated with his father in a sightseeing flight organised by the respondent and had suffered a fatal injury in connection therewith. As a consequence of the terrifying experience, the claimant suffered mental shock with consequential depressive and anxious mental state, which persists despite medical treatment.

8 See *T Grzeszak*, Dobro osobiste jako dobro zindywidualizowane [Personal interest as an individual interest], Przegląd Sądowy 4/2018.

9 Art 446^2 KC: In the event of a serious and permanent personal injury or disorder of health resulting in the inability to establish or continue a family relationship, the court may award the injured party's immediate family members an appropriate sum by way of financial compensation for the non-material harm suffered. See the Act of 24 June 2021, Dz.U.2021 item 1509, in force from 19 September 2021.

Decision

The Supreme Court ruled that the necessary condition for liability for damage to arise under the Civil Code is the existence of a causal link between the legally relevant fact which is deemed the basis of liability and the damage, regardless of whether the liability is considered as liability based on fault or strict liability. It must be proved, while examining the causal link, whether any fact exists within the complex of facts that could be taken into account as a cause of the damage and which would be considered as a cause of the damage pursuant to the Civil Code. At the same time, liability cannot be unrestrictedly dependent on the causal link because this could cause the endless imposition of duties to compensate damage. 2

The health of the claimant was damaged as a consequence of her reaction to the fatal injury to her child. Thus, the alleged harm to the claimant's health was caused by the death of her child, for which the respondent was liable. Therefore, the direct result of the breach of the respondent's legal duty was the fatal injury to the claimant's child and not the damage to the claimant's health. Consequently, the causal link as the legal prerequisite to the establishment of liability is missing and the claim was dismissed 3

Comments

For comments see 4/23 no 15ff below. 4

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 27 June 2006, 25 Cdo 1354/2005

25 Cdo 1355/2005

Facts

The claimant lost her son in a road accident caused by the respondent. The claimant's son was fatally injured and, as a result of his death, the claimant suffered post-traumatic stress disorder. However, she did not suffer any pecuniary damage as a condition for the application of sec 420 of the Civil Code[1]. Regarding the damage to health, based on expert opinions, the injuries suffered can be classified as delayed depressive reactions resulting from an event connected with other life situations. 5

The courts of first and second instance deduced that even if the claimant's harm were proved to be a reaction to the fatal injury of her son, the causal connection between the wrongful conduct of the respondent and the damage to the claimant's health 6

1 (1) Every person is liable for damage which he causes through a violation of his legal duties. (2) Damage is caused by a legal person or an individual when it was caused by their activity through those who were used for that activity. Under this Law, such persons are not personally liable for damage caused in this way; their liability under employment law remains unchanged. (3) A person who proves that he did not cause damage exculpates himself from liability.

would be lacking. The alleged cause consists in the fact that is already the (secondary) result for which the respondent is held liable.

Decision

7 The Supreme Court stated that the necessary precondition for the establishment of liability for damage, both liability based on fault and strict liability, is the existence of a causal connection (relation between the cause and result) between the legal fact for which the wrongdoer is liable and the damage to health (post-traumatic stress disorder) suffered by the injured party. The legal fact which gives rise to general liability for damage under sec 420 of the Civil Code is the illegal activity of the wrongdoer. In the present case, the respondent caused a road accident, which resulted in the fatal injury of the claimant's son. Therefore, he is unequivocally liable for the damage caused.

8 However, the health of the claimant was not damaged during this accident. The post-traumatic stress disorder developed as a result of the depressive disorder and shock caused by her son's death. The direct result of the road accident was the fatal injury of the claimant's son and this result of the illegal activity of the respondent became a cause of the damage to the claimant's health. Thus, this injury is causally linked with a fact that alone is the result for which the respondent is held liable (The alleged harm to the claimant's health resulted from the death of her child, for which the respondent was liable). Therefore, the claim was dismissed.

Comments

9 For comments see 4/23 no 15 ff below.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 24 May 2001
25 Cdo 1946/2000

Facts

10 The claimant drove to a business meeting with company X, to which he was to deliver, as an agent under an agreement concluded with X, binding orders of a purchase agreement for deliveries to third parties. The personal involvement of the claimant at this meeting was necessary because it was the last possible date to conclude agreements with oil suppliers. On the way, however, the claimant's vehicle was damaged in a road accident caused by the respondent. As a result, the claimant was unable to participate in the meeting and, due to his absence, orders and purchase agreements could not be accepted. It is obvious from the expert opinion that if the customers had purchased the ordered volume of oil, the claimant would have been entitled to a commission in a certain amount.

Unlike the court of first instance, the court of second instance rejected the claimant's action for lost profit asserted against the respondent who caused the road accident because it reached the conclusion that there was no causal connection between the unlawful act of the respondent and the damage incurred by the claimant. 11

Decision

The Supreme Court confirmed the appealed decision. It reached the conclusion that this was not a case of an interruption of the causal link because the immediate cause of the lost profit was the circumstance that agreements, based upon which the claimant was to gain a certain benefit, failed to be concluded. 12

A distinction has to be made between an effect consisting in physical damage to an object (damage incurred by reduction of the property status of the injured party, who had to incur expenses to return an object to its previous status) and an effect manifested by the fact that the claimant's car (regardless of the scope of damage) was put out of operation and could not serve the purpose for which the injured claimant was using it at the time or possibly intended to use it in the foreseeable future. This last-mentioned effect of the damage caused to the object, consisting in the non-functionality of the object, is the reason why the injured claimant lost the benefit that he otherwise would have gained under normal circumstances. 13

The Supreme Court also stated that, considering the specific factual findings in the assessed matter, it needs to be inferred that if the respondent is responsible for the damage to the claimant's vehicle, he may also be liable for the lost profit. The initial damage to the car does not exclude a causal connection between the breach of duty resulting in the damage to the vehicle and the damage, which the claimant incurred in the form of lost profit, due to his failure to conclude agreements from which he should have gained a benefit. If the respondent prevented the claimant from attending a meeting necessary for the conclusion of an agreement by causing damage to the claimant's property, the respondent is also responsible for the lost profit if it was incurred as a result of the claimant's absence from the business meeting. 14

Comments

The concept of indirect causation deals with the existence of liability regardless of whether the wrongful behaviour caused the damage directly or damage occurred as a result of further indirect circumstances, ie not as a direct result of the unlawful behaviour. In this context, the legal or illegal behaviour of a third party can be as relevant as the behaviour of the injured party or a mere natural event.[2] 15

2 *L Tichý*/*J Hrádek*, Deliktní právo [Law of Delicts] (2016) 245.

16 However, Czech law takes another approach, which finds its roots in the Socialist era of Czech civil law, known as the interruption of a causal connection. During the period of Socialist law, causation was the subject of different theories influenced by Soviet law, which, however, tried to reject the idea of legal causation and consequently, also facts of imputability. The fundamental idea of the theories was to limit natural causation, which the law acknowledged as an objective fact. The result of this approach was a distinction between main (decisive) and secondary causes, however, without establishing particular criteria for the determination.[3] Legal theory and case law after 1989 continued to apply the outcomes resulting from the past case law and we can still find reasoning in the decisions inspired by the past law.

17 Thus, where Czech case law speaks about the interruption of a causal connection, it does not only refer to the relevance of a certain legal cause in the causal nexus, but the occurrence of another cause in general. However, always at the level of natural causation.

18 Specifically, there is a legal opinion in case law that if another (new) cause enters the causal chain, which is independent of the original cause and this subsequent cause is the decisive reason for the consequence, the causal chain will be broken. However, the Supreme Court also deems the interruption of the causal link to be a case of indirect damage, ie a situation where the cause of damage is a fact which is an immediate consequence for which the wrongdoer is liable for another legal reason (eg shock damage – 25 Cdo 1354/2005, 25 Cdo 1355/2005, or the similar case 25 Cdo 1206/2015).

19 On the contrary, a causal link is not ruled out by the damage being the result of activities that followed one another in time and therefore form a chain of events that lead to a joint consequence (25 Cdo 1946/2000).

20 The Czech approach to interruption of the chain of causes established by case 2 Cz 36/79 must be criticised and rejected as incorrect or too generic.[4] Thanks to a relatively simple formula, it does not take into account the general principle of adequacy, ie especially the objective foreseeability of the consequence and thus general imputability. Moreover, this theory applied by the case law, which fundamentally affects the extent of liability, is in fact a way of reducing (excluding) liability for indirect (reflex) damage, in the form of both actual damage and lost profit.[5] However, this general approach does not take into account the fact that pure economic loss should be compensated in cases of

3 *Š Luby*, Prevencia a zodpovednosť I [Prevention and Liability] (Vydavatelství Slovenské akademie věd 1958) 240.

4 *L Tichý/J Hrádek*, Deliktní právo [Law of Delicts] (2016) 245, *F Melzer*, Vybrané aktuální problémy práva náhrady škody [Selected actual issues of delict law], in: V Zoufalý (ed), XXVIII. Karlovarské právnické dny 2021 [XXVIII. Carlsbad's Legal Days 2021] (2021) 82.

5 *F Melzer*, Vybrané aktuální problémy práva náhrady škody, in: V Zoufalý (ed), XXVIII. Karlovarské právnické dny 2021 (2021) 82.

breach of absolute rights or contractual duties (sec 2913[6]), breaches of protective norms (sec 2910) or intentional breaches of good morals (sec 2909[7]).

Moreover, when we talk about the interruption of causality, we in fact deny the the- **21**
ory of *conditio sine qua non* or incorrectly apply the objective imputability of facts based on which the *conditio sine qua non* is factually established. Therefore, instead of cases of interruption of the causal link, we should rather talk about the non-existence of (legal) causation.[8] The reason for concluding the non-existence is the imputability of the consequence, not its non-existence within the meaning of the *conditio sine qua non*.

Tichý[9] mentions that the theory of interruption of the causal link is often applied in **22**
cases of psychological causation, ie cases when the wrongdoer interfered by his behaviour in an activity of a third party, which then caused damage. Therefore, the activity of the first wrongdoer must remain causal to the damage and no interruption of causation occurs. However, Czech case law, surprisingly, does not apply the theory of the interruption of the causal link in such cases and instead adjudicates joint and several liability of the first wrongdoer with a potential secondary wrongdoer (see 7/23).[10]

This unsatisfactory solution provided by Czech case law will remain as long as **23**
Czech courts continue to apply the principle of the artificial isolation of facts and gradation of causation without taking into account adequate principles of imputability. While both theories leave it to the judge to evaluate specific human actions and the ordinary course of events, objective attribution (legal causation) should be sought in examining the optimal observer, where empirical methods can be used. Even though in recent cases the Supreme Court also started applying the theory of adequacy jointly with those theories, there is no case that evidences this shift in changing the assessment of cases deemed to be the interruption of a causal connection (25 Cdo 1355/2005).

It seemed that this approach was changed, or that a change could be detected, by a **24**
decision of the Supreme Court 25 Cdo 1946/2000 in which it concluded that even where the respondent is responsible for the damage to the claimant's property, this does not exclude the establishment of a causal connection between the breach of duty resulting in the damage and the damage which the claimant incurred in the form of lost profit. The reason for this conclusion was that the Court preferred the factual consideration to the chronological point of view for the establishment of damage, ie the claimant's ab-

6 If a party breaches an obligation under a contract, he shall compensate damage caused as a result to the other party or to a person whose interests the fulfilment of the obligation was clearly intended to serve.

7 A wrongdoer who causes damage to the injured party by an intentional breach of good morals is obligated to compensate it. If he does so in the exercise of his rights, the wrongdoer is obligated to compensate the damage only if he intended to harm the other person as his main goal.

8 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, S. IX [Civil Code secs 2894–3081, Large commentary, vol IX] (2018) 213.

9 *L* Tichý/*J Hrádek*, Deliktní právo [Law of Delicts] (2016) 237.

10 However, Czech case law is rather arbitral and it is difficult to find a clear delimitation.

sence at the business meeting to the fact that the meeting took place after the accident and the claimant was not present. However, the Supreme Court did not take into account either the general principle of adequacy, in particular, foreseeability, or the theory of the protective purpose of a norm and arrived at its conclusion without proper reasoning.

25 On the other hand, an important development consisting in the abandonment of the theory of the interruption of the causal link can be found in the decision of the Supreme Court 25 Cdo 535/2018 (see 3/23) in which the Court did not hold a car driver liable for damage suffered by an employer, which had to pay a severance payment, ie remuneration when the employee's contract terminates. Instead of applying the theory of interruption of the causal link, the Court applied the theory of the protective purpose of the norm. In particular, the protective function of the road traffic norm ensures the protection of life, health and property of road users and guarantees compensation for any interference with these values caused by direct breaches of road regulations. Thus, damage resulting from the termination of an employment relationship in not only a remote cause, but a cause which is not within the protective scope of the norm.

24. Slovakia

Krajský súd of Bratislava (Regional Cour of Bratislava) 8 November 2016
Case no 2Cob/308/2015

Facts

1 V (Union poisťovňa, the insurer) and the travel agency (TIP Travel) had an agreement on insurance for participants in a foreign trip since 2006. At the beginning of July 2010, the travel agency concluded a contract with PF, under which he and his family members were to take part in a trip abroad from 15 August 2010. On 30 July 2010, PF was involved in a car accident and sustained serious injuries requiring long-term treatment. The family members of PF (members of the trip) cancelled the trip on that basis. V paid the insurance claim and subsequently pursued the claim against the driver of the company's vehicle (A2) and his insurer (A1).

2 The court found that the damage originated in the operation of A2's motor vehicle. It remained disputed whether V was also entitled to compensation for the cancellation of the trip of his wife and children, ie the close relatives of the victim PF.

3 The court of first instance dismissed the action. The court found that the damage suffered by the victim's wife and children as a result of the cancellation of the trip was not directly caused by the road traffic accident. Only PF, who, as a result of the road accident in question, suffered a serious injury with the consequent need for hospitalisation and long-term treatment, which immediately resulted in the cancellation of the booked trip, can be regarded as a person injured by the operation of a motor vehicle by A2.

Decision

In the case of the victim's wife and children, there is indirect damage, which is not compensable. This is also due to the absence of a direct causal link. 4

The court agreed with the view that there were, of course, subjective reasons for the cancellation of the trip by the victim's close relatives, but that objectively the damage caused to them could not be regarded as being caused by the specific nature of the operation of the operator's motor vehicle. There was no objective reason preventing the victim's relatives from going on the trip, and the court, therefore, held that the applicant was not entitled to compensation for the damage caused by the insured event to the victim's relatives. The fact that the conditions for the payment of the insurance claim to the victim's close relatives were fulfilled does not mean that the prerequisites for a claim for compensation were met. 5

The court did not accept V's argument that the cancellation of the entire trip was clearly the result of one and the same cause – a traffic accident caused by an employee of the defendant, who was liable for the damage caused. 6

Comments

See below Comments no 13. 7

Krajský súd Košice (Regional Court of Košice) 27 August 2020

Case no 2Cob/2/2020 + II. CC 42/2021

Facts

In a road traffic accident, the injured party's (V's) wife sustained injuries, which rendered her unfit for work. As a result, V's business was closed and the plaintiff went out of business. The injured company (the victim's employer) claimed damages consisting of the payment of invoices for the rent of the premises, the cost of moving the goods and the cost of restocking the goods. A was an insurance company which was liable under compulsory liability insurance for motor vehicles. 8

Decision

The court of first instance held that there was no such statutory provision which expressly provided for the award of indirect damages to V in his capacity as an employer or to a limited liability company whose employee or director was injured in a road traffic accident. In support of the above conclusions, the court also referred to the decisions of the Supreme Court of the Slovak Republic (Case nos 2Cdo/73/2006, 3Cdo/32/2007, 4Cdo/191/2017, 3Cdo/130/2010). 9

10 The court also referred to court decisions that, when examining causation, limit the establishment of liability for damages by reference to the theory of adequate causation.[1] The court referred to the decision of the Constitutional Court of the Czech Republic (Case no I. CC 312/05), in which the Court stated that 'in order to make a claim of liability for damages, it is not necessary that the occurrence of a certain damage is specifically foreseeable for the actor (the offender), but it is sufficient that, for an optimal observer, the occurrence of the damage is not highly improbable.'

11 Based on these arguments, the trial court concluded that V's claimed cessation of the business of operating a sleep studio was not a probable or foreseeable consequence of a minor personal injury, as defined by the experts in the criminal trial, from the perspective of the optimal observer or general experience.

12 The court stated that the relationship between cause and effect must be direct, immediate, and not merely mediated. It is not sufficient if the consequence of the damage already suffered causes further damage, which, however, was not caused by the unlawful act of the offender.

Comments

13 In legal theory, there is also a classification of damage into direct damage, which is compensated in accordance with § 442(1), and indirect (remote) damage, which, on the contrary, is not compensated, except in cases expressly provided for in the law. Indirect damage is defined as damage to property suffered by a person other than the injured party as a result of the injured party being affected by the harmful event and, at the same time, a certain relationship existing between that third party and the injured party.[2]

14 The courts have refused to compensate so-called non-primary damage for a long time. An example is the case of a parent whose son was seriously injured in a car accident. V sought, among other things, compensation for loss of income from private tuition during the time he was caring for his injured son. The court did not uphold his claim (see also (Rc) Rv I 2602/34).

1 Resolutions of the Supreme Court of the Slovak Republic in proceedings under Case nos 6Cdo/89/2001, 6MCdo/11/2010, 6MCdo/7/2013.

2 *K Eliáš,* Obsah, způsob a rozsah náhrady škody v soukromém právu I Právní rádce (2007) no 12, 4.

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Supreme Court of the Republic of Croatia) 30 September 2009, No Rev 869/08-3

<https://www.iusinfo.hr/sudska-praksa/VSRH2008RevB869A3>

Facts

V died in a car accident. V1, V2 and V3, V's parents and brother, sue A's insurer claiming compensation for non-material damage caused by the death of a close relative, whereas V1, V's father, also claims compensation for material damage in the form of an annuity due to his inability to work. V1 explains that because of a depressive reaction to his son's death, he was assessed incapable of working, so he exercised his right to a disability pension. Therefore, he requests to be compensated for the difference between his former salary and the disability pension he receives. 1

The first instance court fully sustained V1's, V2's and V3's claims, including V1's claim to be compensated for material damage for inability to work. The second instance court affirmed the first instance decision regarding V1's, V2's and V3's request to be compensated for non-material damage, but dismissed V1's claim to be compensated for material damage caused by his inability to work. 2

Decision

V1 files an application for revision before the Supreme Court of the Republic of Croatia, disputing the second instance court's decision in the part in which his compensation request regarding material damage was dismissed. The Supreme Court dismissed V1's application as unfounded on the merits and affirmed the second instance court's decision. 3

Substantiating its decision, the Supreme Court first noted that V1's claim relates to so-called indirect damage, ie damage which is sustained by a third party as a consequence of initial damage caused to someone else (direct victim), in this case, V1's son. In this respect, the Supreme Court noted that the COA recognises indirect damage only exceptionally, namely in three situations; non-material damage caused by death or severe disability of a close relative, material damage for loss of support from the deceased person and compensation of funeral expenses and other related expenses in the case of death of a direct victim. Accordingly, the Supreme Court opined that there is no legal basis for accepting V1's request to be compensated for material damage due to inability to work. 4

Comments

See below 4/25 nos 10–15. 5

Presuda Vrhovnog suda Republike Hrvatske (Supreme Court of the Republic of Croatia) 13 May 2009, No Rev-x 224/08-2

<https://sudskapraksa.csp.vsrh.hr/home>

Facts

6 V was seriously injured. V and V1, V's mother, sue A claiming compensation for damage sustained by V's injuries. V1 requests to be compensated for the past and future loss of profit sustained while nursing and taking care of her seriously injured son.

7 The first instance court sustained V's request and dismissed V1's request to be compensated for lost profit. The appellate court dismissed V1's appeal and affirmed the first instance court's decision. V1 filed an application for revision before the Supreme Court.

Decision

8 The Supreme Court dismissed V1's application for revision as unfounded on the merits.

9 Substantiating its decision, the Supreme Court noted that V1 is an indirect victim and further asserts that the COA recognises only direct victims' right to be compensated for the profit lost while unable to work. Since V1 is an indirect victim, she is not entitled to claim compensation for loss of profit sustained due to her son's inability to work.

Comments

10 As noted by the Supreme Court of the Republic of Croatia in judgment Rev 869/08-3, in some instances the COA explicitly recognises the right of an indirect victim to be compensated for their indirect damage, ie damage sustained as a consequence of a violation of someone else's person or property (ie direct victim). The Supreme Court accurately enumerated those instances: liability for funeral costs and medical treatment costs in the case of death of a direct victim, liability for loss of support from the deceased person, and liability for non-material damage caused by death or especially severe disability of a family member.

11 Pursuant to art 1093 of the COA, a person who has caused another person's death shall compensate the usual costs of a funeral, the costs of medical treatment from the injuries and other costs related to the treatment, as well for income lost as a result of incapacity to work.[1] These costs shall be compensated to those (indirect victims) who have incurred them.

12 Pursuant to art 1094 of the COA, a person supported or regularly assisted by the deceased person, as well as a person who had a legal right to request support from the de-

1 Full text of art 1093 of the COA in English, see *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 54 f.

ceased, shall be entitled to compensation for damage suffered through the loss of support or assistance, and such damage shall be compensated by means of an annuity payment.[2]

13 Finally, pursuant to art 1101 of the COA, in the event of the death or especially severe disability of a person, the immediate family members (spouse, children and parents) shall be entitled to just pecuniary compensation for non-material damage. Parents have the same right in the event of the loss of a conceived but unborn child. Other family members, like grandchildren, grandparents, siblings, common-law spouses, same-sex partners, may also be awarded such compensation, provided that there was a more permanent cohabiting union between them and the deceased or injured person.[3]

14 Based on the position that liability for indirect damage can be awarded only in instances provided for in above-cited arts 1093, 1094 and 1101 of the COA, in case Rev 869/08-3 the Supreme Court dismissed the claim of a father whose psychological condition, caused by the death of his son, forced him to retire from work, holding that the COA does not provide for a possibility to award material damage for inability to work to an indirect victim in the case of the death of a close relative, awarding at the same time V1, V2 and V3, V's parents and brother, non-material damages, in accordance with explicit provision of art 1101 of the COA.

15 In fact, it seems that, in some cases, the COA itself excludes liability for indirect damage explicitly, and not only by implication. Thus, for example, pursuant to art 1095 of the COA, a person who has inflicted a bodily injury on, or has impaired the health of, another person shall compensate *that person* for the costs of medical treatment and for other related costs, as well as for income lost as a result of incapacity to work during the treatment.[4] Explicitly mentioning only direct victims in the course of defining the scope of compensation in the case of bodily injury should mean that liability for damage sustained by indirect victims due to bodily injury of another (ie a direct victim), is excluded. This stance was quite unequivocally confirmed by the Supreme Court in case Rev-x 224/08-2, discussed above. In this case, the mother of a person who was inflicted bodily injury requested to be compensated for loss of profit incurred while nursing her injured son. The Supreme Court however dismissed her claim, holding that there is no legal basis for such compensation to be awarded.

2 Full text of art 1094 of the COA in English, see *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 55.

3 Full text of art 1101 of the COA in English, see *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 57.

4 Full text of art 1095 of the COA in English, see in *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 55.

26. Slovenia

Vrhovno sodišče (Supreme Court) 7 December 2006, II Ips 875/2006

<https://www.sodnapraksa.si/> (27 November 2021)

Facts

1 As the mother of a 16-year-old son who became severely disabled as a result of a car accident, the plaintiff V sought compensation for the non-pecuniary damage she suffered in the form of mental pain due to severe disability and material damage because she was often absent from the restaurant she owned due to her son's health problems, which had a negative impact on the economic success of the company and ultimately led to her having to give up her catering business and liquidate the company. The courts of first and second instance dismissed her action. With regard to non-pecuniary damage, they found that the compensation already received by the plaintiff from the insurance company exceeded the amount of compensation for mental pain due to the severe disability of a relative who would otherwise have been entitled to it. She cannot claim compensation for non-pecuniary damage from the person who caused the damage. The courts rejected the claim for compensation for pecuniary damage, arguing that there was no legal basis for it because the law does not recognise compensation for indirect damage.

Decision

2 The Supreme Court rejected V's appeal as unfounded, although it did not agree with the reasoning of the lower courts that the law only recognises the right of indirect victims to compensation of non-pecuniary damage. It pointed out that the legal relationship between the responsible person and the (indirect) injured party in the case of pecuniary damage is established by means of the usual limits of a legally relevant causal link. It is true, however, that, in the present case, V did not provide a sufficient argument for establishing a causal link.

Comments

3 The concept of an indirect injured party has been established in the legal system primarily in relation to non-pecuniary damage under the conditions defined in art 180 of the Code of Obligations. Accordingly, a court can award close family members fair monetary compensation for the mental pain they suffered as a result of the severe disability or death of a loved one. Only persons explicitly specified in the law are considered close family members who can claim compensation for non-pecuniary damage: spouse, children, parents, brothers and sisters, if there was a lasting community between them and the injured or deceased, and an extra-marital partner if there was a more permanent life community between them and the injured or deceased. Based on the Civil Partner-

ship Act[1] a same-sex partner from a registered or unregistered partnership must be added to the immediate family members under the Code of Obligations if there was a more permanent life community between the unregistered partner and the injured or deceased. The provision of art 180 of the Code of Obligations, pursuant to which compensation can be claimed only by a limited circle of close persons and only for certain types of serious consequences of damage (severe disability or death), shows the restrictive and exceptional nature of awarding compensation to indirect victims.

By expanding the notion of legally relevant causation, the legal institution of art 180 of the Code of Obligations broadens the scope of protection of damages and gives the injured party something more than he or she would be entitled to only by applying the general rules of tort law. According to court practice, such a special arrangement does not allow the conclusion that, in all other cases, the (indirect) injured party does not have compensatory protection. In these cases, the legal relationship between the responsible person and the (indirect) injured party can only be established through the usual rules for determining the legally relevant causal link. **4**

27. Hungary

Pécsi Ítélőtábla (Court of Appeal of Pécs) Pf 20.296/2007/9

BDT.2008.1801

Facts

The wife of applicant no 1 and mother of applicant no 2 went to hospital on 14 February 2003 complaining about knee pain and inflammation. The emergency doctor took samples from the knee liquid, but considered it clean and for this reason did not ask for microbiological testing of the sample liquid. On the following day, the patient returned to the hospital with increased pain and inflammation and the doctor on duty plastered her knee and prescribed medication. Two days later on 17 February, the patient went back again to the emergency hospital for a scheduled medical check up, when she was diagnosed with deep vein thrombosis and was sent for a vascular surgery examination to another medical institution where she was transported by her relatives. There she was treated in the intensive care unit, but died the same day. The autopsy established a septic condition and heart insufficiency as the cause of death. The applicants (no 1 and no 2) claimed non-pecuniary damages from the hospital for the loss of their relative, due to the omission of the doctor who first examined the patient to correctly diagnose the illness by failing to send the knee liquid for a microbiological analysis. In their opinion, such an analysis would have made it possible for the patient to receive treatment that would have prevented her death. **1**

1 Uradni list RS (Official Journal) No 33/2016.

Decision

2 The court of first instance rejected the claim of the applicants, although admitted that the patient was wrongly diagnosed. However, it established that even if the first doctor treating her had asked for microbiological testing of the knee liquid and based on this would have established the correct diagnosis, the death of the patient would still have occurred because of the severity and rapid evolution of the septic condition. In the court's view, it could not be established whether antibiotic treatment could have prevented such a streptococcus infection.

3 The applicants challenged this decision and on appeal the court overruled it based on a new expert opinion, which established that a microbiological analysis is required according to the medical professional standards in case of liquid accumulation for unknown reasons and that such a test allows doctors to establish a diagnosis in two to three hours and to identify the category of pathogens necessary for suitable treatment with antibiotics.

4 The appeal court established that for the relatives of the victim it is sufficient to prove that the death occurred within the process of the medical treatment or immediately after the treatment. The medical institution may exonerate itself from liability only if can successfully prove that the death of the victim occurred despite its staff acting with the diligence expected from medical personnel. If the medical institution cannot prove that even a correct diagnosis could not have saved the life of the patient, its liability will be established.

Comments

5 The new Civil Code governs the entitlement of victims to damages for their own pain and suffering under the heading of *grievance*. This new provision replaces the old concept on non-pecuniary damages. Article 2:52 of the Civil Code provides that the person whose personality rights have been violated will be entitled to a grievance payment. In such cases, the rules on damages will apply with the exception that the victim must only prove the unlawfulness of the act to be entitled to damages and must not prove the disadvantage suffered. The general provisions on tort liability will apply as regards the conditions of establishing liability, including the limitation of liability. The amount of damages will be established considering the circumstances of such torts, including the gravity of the infringement, its duration, the gravity of the fault, the impact of the tort on the victim and their environment. Damages may be only awarded as a lump sum and not as periodical payments.

6 Grievance payments have a double function: a) a compensatory function for the victim whose personality rights have been infringed and b) a punitive function for the tortfeasor. This is why grievance is not placed in the New Civil Code under the chapter on the law of damages, but under that governing the sanctions applicable in case of infringement of personality rights. The reasoning to the New Civil Code mentions that this change serves better the interest of victims, as they do not have to prove the disadvan-

tage suffered by the infringement of their personality rights.[1] The legal doctrine lists several categories of personality right infringements for which victims may seek compensation under art 2:52: infringement of bodily or psychical integrity of a person; loss of the chance to heal; infringement of a person's good reputation by illegal detention or unjustified criminal prosecution, discrimination based on ethnic origin; illegal use of personal data, infringement of intellectual property rights.

Article 2:42 of the Civil Code contains a list of personality rights for which victims may seek grievance payments under art 2:52. In addition, art 2.52 also covers those infringements of personality rights on which the Civil Code does not contain specific provisions, but which are acknowledged by the case law, such as the infringement of the right to appeal in a lawsuit or the right to freely exercise a profession. 7

It is important to emphasise that in the absence of an infringement of personality rights, a grievance payment (non-pecuniary damages) cannot be awarded. For this reason, this is a personal right, which cannot be inherited, except when the direct victim started the suit and died before the court issued a decision awarding such damages. 8

Fővárosi Ítélőtábla (Budapest Court of Appeal) 6 Pf 21 340/2010/4

BDT.2012.2704

Facts

In 2007, the child of applicant 1 and applicant 2, brother of applicant 3 was hit by a car while crossing the road at a zebra crossing and died as a consequence of the bodily injuries suffered in the accident. The applicants claimed pecuniary and non-pecuniary damages from the insurance company which insured the car that hit the child. 9

Decision

The court of first instance partially admitted the claims of the applicants, while, due to lack of evidence, rejected the argument of the defendant that the victim contributed to 40 % of the accident. The defendant challenged the decision, among others, because the court did not consider the contribution of the victim to the accident. The victim stepped onto the road when the car was within braking distance from him and before he crossed the road, the victim did not make sure that no car was approaching. 10

The court of appeal considered the appeal partially grounded and established the liability of the driver of the car that hit the victim on the basis of art 354 (1) of the old Civil Code. 11

According to art 345 (2), the tortfeasor must not cover damage which was caused by the victim. In the court's view, the driver could not prove that the damage occurred out- 12

1 Indokolás Második Könyv XII. cím 2. pont.

side the sphere of the hazardous operation. He could also not prove that the victim caused the accident. According to art 21(5) of the Highway Code[2] the victim crossed the road at the place indicated for crossing the road. Article 21(6) of the same traffic rules provides that pedestrian have priority at places where it is signposted that they can cross the road. In the court's view, it is generally expected that drivers approach such crossings at a speed that allow them to give priority to the pedestrian. Therefore, drivers have to adjust the speed of their car in such a way that can give priority to the pedestrian even when he starts crossing the road from behind another vehicle. Although the pedestrian should be careful before starting to cross the road, according to the Highway Code, once the pedestrian is on the road, he has absolute priority. Therefore, the court of appeal shared the finding of the court of first instance that the victim did not infringe the rules of the Highway Code and did not cause the accident, thus his contributory negligence cannot be established.

13 In addition, the court also clarified that relatives of the deceased person may seek damages *in their own right* for costs incurred in relation to the death of the persons suffering an accident and for non-pecuniary damage (pain and suffering) caused by the death of the injured person. Therefore, the *court will not consider when awarding damages to such indirect victims the possible contribution (fault) of the victim to the accident*.

Comments

14 In the case above, the court established that the claim of the indirect victims will not be reduced according to the contribution of the victim to the accident because their right to damages is independent from the contributory negligence of the victim, since *they are entitled to damages in their own right*. However, in Hungary, there is no uniform case law on this issue. The *Kúria* is consistent in its approach, confirmed on several occasions, that the contributory negligence of the victim must be considered when establishing the compensation of indirect victims. In the highest court's view, the claims of indirect victims have the same legal basis and thus should have the same content as the victim's claim (for example: BH2012.151; BH2015.36, Pfv 22.287/2016, Pfv 20.537/2016, Pfv 20.053/2016/5, Pfv 22.018/2015/4). The other line of court reasoning, also shared in the legal doctrine,[3] considers that indirect victims have an independent right to claim damages on their own, thus for this reason the damages claimed by indirect victims may not be reduced considering the contributory negligence of the direct victim.

2 1/1975 (II.5) KPM-BM együttes rendelete a közúti közlekedés szabályairól KRESZ.

3 *A Harmathy*, Felelősség szerződésen kívül okozott károkért, in: G Wellman (ed), Polgári Jog. Kötelmi Jog. A Ptk. magyarázata VI/VI (2021) 2490.

Kúria (Curia of Hungary) Pfv III 20.606/2018
BH.2020.10

Facts

The father of the applicant sexually abused his grandchildren and was imprisoned, where he died after being attacked by his cell mate. The applicant sought non-pecuniary damages from the prison for the loss suffered as a result of her father's death for herself and also on behalf of the other two children of her father. She claimed that a prison guard had not acted according to his professional obligations and did not prevent the death of her father. In addition, she also sought non-pecuniary damages from the prison for hiding the attack on her father, for not cooperating with her and for the failure to put at her disposal in time the necessary documents for her father's funeral, which caused a delay. She claimed a total of HUF 3,900,000 in non-pecuniary damages. 15

Decision

The court of second instance established that claims based on an infringement of personality rights can only be personally submitted, thus the applicant cannot seek non-pecuniary damages on behalf of other family members. Contrary to the decision at first instance, the second instance court did not establish contributory negligence of the prison and the person committing the murder. In addition, the court, based on evidence available to it, established that the loss of the father has not affected the personality right of the applicant to live in a family, because living in the same home is not a sufficient justification for invoking the infringement of the right to live in a family and the applicant could not provide evidence on the existence of a family relationship based on mutual support. For this reason, the court rejected the claim based on an infringement of the personality right to live in a family. The applicant challenged this decision at the highest court. 16

The *Kúria* found the complaint ungrounded while considering that the second instance court had assessed the evidence correctly and reached the right conclusion that the applicant did not suffer an infringement of her personality right to live in a family, since she could not prove health damage, neither physical nor mental. The court also clarified that the applicant did not share the same home with her father, she visited him in prison rarely (three times in two years) and during the previous year they had had no contact. *She could not prove a close emotional relationship* with her father and that the function of the family has changed upon the death of her father. 17

Comments

The legal debate on grievance envisaged that, by relieving victims of the burden of proof concerning the disadvantage suffered in cases of infringement of personality rights for which grievance payments may be claimed, the number of cases will increase, which has 18

actually happened.[4] This change in approach will allow victims to claim damages for pain and suffering, which was excluded under the old Civil Code from non-pecuniary damages.

19 Under the impact of this decision, it was expected that there would be more cases in the future of courts granting damages to families for losing a family member as a result of a tort violating their right to live in a complete family, without requiring severe mental suffering or other health problems.[5] The case law of recent years has confirmed this assumption.

20 This tendency raises the question of whether the granting of grievance payments based on the infringement of the personality right to live in a complete family is justified or whether this should be conditional upon the actual relationship between the victim and his/her family. Could family members seek grievance payments when their relationship to the victim was very bad or non-existent?

21 The legal literature is divided on this matter. One line of approach argues that the infringement of the personality right should not be enough to grant to family members a grievance payment,[6] whereas others, with whom I agree, argue that in the case of certain family relationships, such as between parents and children, sisters and brothers and between spouses, the infringement of the personality right to live in a complete family should suffice to justify grievance payments.[7] In my opinion, the punitive function of grievance payments supports such an approach.

28. Romania

Curtea de Apel (Court of Appeal) Târgu Mureș, Civil Section, Decision No 655/2020

ECLI:RO:CATGM:2020:001.000655, Dosar no X./102/2017

Facts

1 A repeatedly threatened to kill V, who informed the local police several times about such risk and asked for protection. However, such warnings were either ignored or, when considered, the measures taken by the local police were ineffective. On 18 January 2017, A again threatened V and her mother. V called 112, but the operator of the emergency centre refused to send help, because it was not considered that the case justified emergency intervention. Based on this act of aggression, V, for the second time, filed a criminal complaint against A and contacted a lawyer to obtain legal protection against A. On 22 January 2017, A shot V with a hunting weapon.

2 Based on art 1357 C civ and art 2 of the European Convention on Human Rights (ECHR), V's son and family sought € 10,000 in moral damages from the Romanian State,

4 *A Molnár*, A sérelemdíj elméleti és gyakorlati kérdései, Kúriai határozatok 2013/7, 745.

5 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 845.

6 *A Molnár*, Kúriai határozatok 2013/7, 747f.

7 *Á Fuglinszky*, Kártértési Jog, HVG-Orac (2015) 846.

€ 50,000 from the county police inspectorate and € 25,000 from the Special Telecommunication Services for pain and suffering caused by V's death.

Decision

By decision no 655/2020, the Appeal Court of Tg Mureș obliged the Romanian State to pay € 10,000 in moral damages to each claimant (the son and parents of the victim) and also obliged the two concerned authorities mentioned above to jointly pay € 50,000 in moral damages to the son of the victim and € 25,00 to each parent. The court established that the public authorities omitted to take measures to protect V against threats to her life despite repeated criminal complaints, which were solved with delay, V being killed in the meantime. The court found that the passivity and the professional incompetence of the authorities favoured new acts of aggression by A, the threats culminating in the murder of V. 3

Comments

Concerning the *causal relations between the tort and the harm of the claimants*, the Court considered that, although the acts and omissions of the authorities constitute external conditions, these indeed contributed to the occurrence of the damage, building an indivisible link with the cause. For this reason, such conditions have a causal character. The unity of such circumstances follows from their contribution to the occurrence of the harm, thus each of such circumstances is part of the causal link. For this reason, the causal relation includes not only the necessary direct cause, but also the causal conditions making the harm possible or favouring its effects. The lack of action by the authorities that would have protected the life of the victim have favoured the repeated threats, culminating in the murder of V. 4

On the issue of causation between the criminal act and its consequence, this was qualified as *direct harm*, which can be caused directly and indirectly, having the same source. The harm is indirect when there is no direct causal relation and is direct when there is a direct causal link with the tort. *Indirect victims*, who are victims by *ricochet,* suffer damage due to their relationship with the victim. In the case before it, the Court found that the harm of relatives was in a *direct causal connection* with the tort consisting in the infringement of legal norms by the authorities. 5

The Court established the *objective (strict) liability* of the authorities for their own acts, based on the idea of warranty for damage caused to others by the exercise of legal tasks aimed at the protection of citizens, *the indirect victim being not obliged to prove the fault of the authorities*. Once the infringement of such obligation is established, neither the authority nor the public servant can escape liability by proving lack of fault when committing the tortious act. 6

Vulnerability of the victim was also discussed by the Court, which emphasised that victims of such abuse often decide not to take legal measures against the aggressor, because of a lack of financial means needed for a court action, or because of fear of the ag- 7

gressor or shame in the local community, or because of a lack of knowledge of their rights or lack of knowledge of social assistance available in such situations. The Court, when qualifying the actions of A, considered the age, studies and professional background of the victim, that she was a mother having a child with the aggressor and that she was not informed and advised about the legal means available in such cases for her protection. Despite these omissions, V indeed informed the authorities of the real, concrete danger facing her, but the authorities failed to offer protection.

Curtea de Apel (Court of Appeal) București, Civil Sectiona V-a, Decision No 1368/2020
Cod ECLI ECLI:RO:CABUC:2020:168

Facts

8 On 8 January 2017, an accident took place while A was trying to park his car behind a snow cleaning vehicle which was stationary on the road. Because A did not adapt his speed to the state of the road covered by snow, A lost control of the car and hit the stationary cleaning vehicle and killed V who was trapped between the two vehicles. V's successors claimed moral damages from A's insurer.

9 The Tribunal of Ilfov, in decision no 2184 of 26 June 2019, obliged the insurance company to pay RON 80,000 to the wife, RON 60,000 to each of the three daughters and RON 25,000 to each of the four grandchildren of the victim. The judgment was appealed and the Appeal Court of Bucharest, in decision no 1386 of 12 October 2020, increased the amount granted to the wife to RON 150,000 and that for his daughters to RON 100,000 each.

Decision

10 Deciding so, the appeal court stressed that moral damages should be established in a such way as to be *equitable, just and reasonable, without causing the unjust enrichment of the victim or being insignificant*. Such damages must reflect the real and effective harm suffered by the victim. In this process, account should be taken of objective criteria, such as the average income in Romania, in order to not distort the function of moral damages. The legislation does not provide objective criteria for establishing the level of moral damages, the *freedom of courts is great and the case law is not binding on the judge as long as there is no settled case law.*

Comments

11 As emphasised in the Introduction, bereavement damages are not held to be indirect under Romanian law. The commented judgment highlights this view quite well.

12 The Court recalled that the aim of art 1.391(2) C civ is *to compensate any person who suffers moral damage caused by the death of the victim*. Therefore, courts may grant damages to ascendants, descendants, and siblings for the pain caused by the loss of their

relative and to any other person who may prove such harm. *No legal provision establishes the degree of kinship up to which moral damages may be awarded*, the only condition being the moral harm, more specifically the suffering experienced as a consequence of the tragic event on the basis of the relationship existing before the damage was caused. For this reason, the moral harm suffered by V's grandchildren is real and effective considering that V and the children had been living in the same house and V was constantly involved in their life. Taking into consideration the age of V's grandchildren (10, 12, 13 and 16), their emotional pain is not in doubt, because, at such ages, all have the psycho-cognitive capabilities to realise the dramatic event and its consequences.

Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, ÎCCJ)
Civil Section I, Decision No 1853 of 30 September 2020
Detalii jurisprudență - Înalta Curte de Casaţie şi Justiţie a României (scj.ro)

Facts

V's descendants sought pecuniary and non-pecuniary damages from A, the company which caused damage to V, who died during the civil law action for damages. **13**

The Tribunal of Maramureș, in its decision no 239 of 18 March 2019, awarded moral damages to the daughters as well as to the mother of V, including periodical payments to one of the daughters. On appeal, the Appeal Court of Cluj dismissed the claim of the descendants of V, who requested judicial control of this decision from the highest court. **14**

Decision

The ÎCCJ, in its decision no 1853/2020, admitted the claims of the descendants of the victim. The ÎCCJ established that although the right of the indirect victim to moral damages is a personal *right, which is non-assignable*, *art 1.391(3) C civ provides for an exception from this rule in cases when the compensation between the victim and the tortfeasor was previously settled by an agreement or by a final judgment.* In such a case, the descendant of the direct victim will be entitled to continue to sue and to seek damages, being entitled to do so pursuant to art 1.391 (4) C civ. This provision establishes that the death of the victim gives rise to the processual legitimacy of his descendants once he initiated the court action. **15**

Comments

Article 1.391 (2) C civ establishes *the right of indirect victims or victims by ricochet to damages* for the affective non-pecuniary harm caused by the death of the victim. **16**

In another similar case (Tribunalul Arad, Civil decision sentința no 555 of 1 July 2019), the defendant, the driver of a car, caused an accident by hitting a pedestrian while the latter was crossing the road at a place market for pedestrians. The victim, who was **17**

in part liable for the accident as he was intoxicated at the time, died as a consequence of the accident. The relatives of the victim sought damages from the driver.

18 The Tribunal of Arad obliged the insurer of the tortfeasor to pay moral damages to the relatives of the victim: € 100,000 to the mother, € 50,000 to each of the two sons, and € 10,000 to each of the three brothers. The Court however, dismissed the grandchildren's claim for moral damages.

19 In the case of moral damages, victims do not have to prove their damage. The court considered the relationship between the victim and his relatives. Concerning V's siblings, the court established direct causation between the damage suffered by them and the act of the person causing the accident, as a result of which, they were deprived of the regular help of the victim. In the case of his children, the court awarded moral damages based on their good relationship with their father. The court refused to award moral damages to V's grandchildren, who were very young (five and ten) when the accident happened and, therefore could not suffer moral damage directly.

20 In this case, the court considered the damage of the parent and of the children as direct damage. The damage is direct when it is the necessary consequence (assessed on a *sine qua non* basis) of the tortfeasor's act and indirect when it is further in the causation chain so that it cannot constitute even a condition favouring the occurrence of the damage.

21 Article 1.391 (2) C civ[1], for the first time in Romanian tort law, deals with *victims by ricochet* listing the sphere of persons who are entitled to damages if proven that they suffered harm as a consequence of the victim's death.

22 The legal doctrine considers damage by ricochet as a *specific form of direct damage* strongly related to the damage suffered by the direct victim of the tort, more specifically, conditioned by the damage directly caused to the victim and the affectionate relationship between the direct victim and the indirect victim.[2] The causal relation between the damage caused to the indirect victim and the tort is indirect in nature, a consequence of the damage suffered by the direct victim.

23 The central element of the legal construction of the victim by ricochet is the *affectionate relationship* between the person claiming damages and the victim, family ties being not sufficient. This condition limits the category of indirect victims eligible for moral damages to those suffering a psychical trauma as a consequence of the death of the direct victim. In practice, *the victim by ricochet must prove the existence of the affectionate relationship with the victim at the moment when the accident occurred.* Under Romanian law, only relatives can qualify as victims by ricochet.

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1 Article 1.391 (2): The court may grant damages to ascendents, descendents, brothers and sisters, children and spouse of the victim for the suffering caused by the death of the victim, as well to any other person who can prove such damage.

2 *L Pop*, Tratat de drept civil. Obligațiile. vol III. Raporturile obligaționale extracontractuale (Edn Universul Juridic, 2020) 224; *F Mangu*, Despre prejudiciul prin ricoșeu, (I), Revista universul juridic premium, no 9/2019.

29. European Union

European Court of Justice, 8 October 1986, joined cases 169/83 and 136/84 Gerhardus Leussink and others v Commission[1]

ECLI:EU:C:1986:371

Facts

A civil servant of the Commission (V) had been injured in a car accident while travelling on a professional mission. He had already received compensation under the accident insurance scheme for EC staff. What he claimed in one of the joined cases here (136/84) was indemnification for losses in excess of what was already covered by the insurance award, arguing that the latter did not cover his non-pecuniary damage. In addition, V's wife and four children claimed damages for their own non-pecuniary loss allegedly resulting from V's change of character and personality, which had a detrimental affect on relations within his family (169/83). **1**

Decision

After concluding that the Commission was indeed liable in substance for the consequences of the accident, the Court had to determine whether the benefits already received under the insurance scheme had already indemnified the civil servant's non-pecuniary losses in full. The calculation of that award indeed included a certain amount attributed to the claimant's 'psychological and non-physical injury', corresponding to almost BFR one million (approx € 25,000). However, the Court deemed it 'equitable' to award him double that amount as additional compensation 'in view of the extreme gravity of the non-economic consequences' of the accident. **2**

As regards the claims raised by V's family based upon the harmful impact upon their relations with their husband and father respectively, the Court was not equally generous. While the Court had 'no doubt about the reality of those effects or about the existence of a link with the accident, they are nevertheless the indirect results of the injury suffered … and do not constitute part of the harm for which the Commission may be held liable in its capacity as employer. This is borne out by the fact that the legal systems of most member states make no provision for compensating such effects' (para 22). These claims were therefore dismissed. **3**

1 This case was already presented with a different focus in *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 11/28 no 1ff. The facts and the decision are quoted from there.

Comments

4 This ruling seems to confirm that EU tort law indeed draws a line between compensable damage incurred by the direct (primary) victim, on the one hand, and indirect (secondary) losses, on the other, which are merely triggered by the former and will not be indemnified despite a causal link ultimately leading to the same source of harm, though via the primary victim.[2] As AG Slynn argued, 'it does not seem to me that Community law recognizes, or should recognize, that all consequences which can be said indirectly to result from a wrongful act are compensable in damages. Albeit that direct and immediate consequences may be so compensable, what are in effect the consequences of such consequences are not in the same position. A line has to be drawn where the responsibility of the defendant ceases. Beyond that line the consequences are too remote.'[3]

5 The general statement made by the Court cited above no 3 goes too far, though – it is by no means clear that a majority of Member States 'makes no provision for compensating such effects'.[4] This is definitely no longer true for the specific harm at stake here – after recognising damages for bereavement, jurisdictions increasingly show willingness to also compensate the immaterial harm incurred by close relatives of a surviving primary victim, if only under certain conditions (such as severe disability of the latter and/or higher degrees of fault attributable to the liable person).[5]

6 Nevertheless, the case shows that at least some indirect losses may not be deemed recoverable, although the justification may not always be found in a comparative assessment of Member States' laws.

European Court of Justice, 5 June 2014, case C-557/12, Kone AG and others v ÖBB Infrastruktur AG

ECLI:EU:C:2014:1317

Facts

7 For decades, Kone and other undertakings (As) were parties to cartels relating to the installation and maintenance of elevators and escalators, inter alia on the Austrian market. In 2007, they were fined by the Commission for such anti-competitive behaviour in markets other than Austria. ÖBB Infrastruktur (V) claims compensation from As for alleged damage sustained when buying elevators and escalators from third parties. V

2 See also ECJ 11.1.1990, C-220/88, *Dumez France SA and Tracoba SARL v Hessische Landesbank et al*, [1990] ECR I-49, presented in *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 5/28 no 1ff.

3 [1986] ECR 2819.

4 See the comparative analysis by *B Winiger* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 11/30.

5 Cf, eg, *M Martín-Casals*, Non-Pecuniary Losses of Secondary Victims when the Primary Victim Survives: *Baremo* v *Dintilhac*, in: E Karner et al (eds), Essays in Honour of Helmut Koziol (2020) 117.

claims that the latter had arguably raised their own prices due to the increase of the higher market price pushed by As, thereby indirectly benefitting from As' cartels without themselves being part thereof.

The court of first instance in Austria had denied V's claims, arguing that the alleged loss was too remote, so that V had not succeeded in proving adequate causation. Even if they had, the lower court questioned whether the alleged conduct was within the protective scope of the violated norm (art 101 TFEU). The appellate court disagreed. When the matter was brought before the Austrian Supreme Court (OGH), that court decided to ask the ECJ for a preliminary ruling on whether art 101 TFEU can indeed be the basis for a claim for compensation against cartel members even if the damage had been caused by a third party who had decided to take advantage of the increase in the market price (umbrella pricing) and raise its own prices accordingly. **8**

Decision

The ECJ answered the question in the affirmative and argued that the principle of effectiveness requires that domestic law allows for claims for compensation even if a claimant merely indirectly suffered harm through the anti-competitive behaviour of the cartel members. 'Where a cartel manages to maintain artificially high prices …, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition …' (para 29). This was also true if the latter choice was a purely autonomous decision of the third party. **9**

Comments

In this ruling, the ECJ confirmed that also indirect losses resulting from a cartel are, in principle, compensable (or at least cannot be 'categorically excluded' by the domestic laws of a Member State). **10**

The relevance of the ruling is doubtful, however, not only because it concerns a very peculiar area of the law (competition law) with very unique damage scenarios. The real problem lies in the false presentation of the case to the ECJ by the Austrian Supreme Court, distorting the actual state of the law in Austria, and – even worse – a further misunderstanding of the real problems by the ECJ. Austrian law does *not* categorically exclude compensation for indirect losses, but merely sets higher standards for their compensability. In the case at hand, the appellate court had reversed the ruling of the first instance court and indeed confirmed that causation was adequate in the instant case – the Austrian courts had merely disagreed on the proper application of Austrian law. **11**

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 *First scenario*. A, a construction company, is doing work on a road in the vicinity of V, a company producing stainless steel. A carelessly damages a cable that supplies electricity to V's factory, causing a power cut. The cable is *not* owned by V but by a third party. The power is off for 14 hours, disrupting V's 24-hour-a-day operations. V claims damages from A under three heads:

(a) physical damage to melted material which was in the furnace when the power supply was cut and which V's workers tried to save. The damage to this material amounts to € 15,000;

(b) loss of the € 10,000 profit that would have been made on the same melted material if the melt had been properly completed;

(c) loss of € 40,000 profit V would have been able to make on four more melts which could have been put through the furnace, had the power not been cut.[1]

2 *Second scenario*. V and her sport partner M are an internationally successful and renowned figure skating pair. M is injured in a traffic accident for which A is solely liable. For some time after the accident, the pair cannot exercise their sport nor participate in national and international competitions. Consequently, both skating partners lose in-

1 See the English case: *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*, Court of Appeal (Civil Division) 14 December 1971, [1973] 1 QB 27, see *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 3b/12/1 ff (295–297) with comments by *K Oliphant*/*V Wilcox*; for the solution under the PETL and the DCFR, see Digest vol 3, 3b/30/1 ff (332–337); see also the Austrian case: Oberster Gerichtshof, 6 September 1972, 1 Ob 176/72 JBl 1973, 579, with comments by *E Karner* and *A Longin*, above 4/3 nos 1–2 and 6–9; the Maltese cases: *S.T. Microelectronics (Malta) Ltd v Malta International Airport p.l.c. and others* – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 26 October 2004, and: *McNeill Ltd v Omnitec Ltd – Prim'Awla tal-Qorti Ċivili* (Civil Court, First Hall) 6 March 2003, with comments by *G Caruana Demajo*, above 4/15 nos 1–16; the Swedish cases: Högsta domstolen (Supreme Court) 4 April 1966 NJA 1966, 210, and Högsta domstolen (Supreme Court) 7 March 1988 NJA 1988, 62, with comments by *H Andersson*, above 4/17 nos 1–6; the Swiss case: Tribunal fédéral Suisse (Federal Supreme Court of Switzerland) 2 March 1976, ATF 102 II 85, with comments by *B Winiger, C Duret, A Dubout, A Parreaux* and *S Suter*, above 4/4 nos 1–10; the Dutch cases: Hoge Raad, 1 July 1977 NJ 1978/84 (Van Hees/Esbeek) and Hoge Raad, 29 April, ECLI:NL:HR:2011:BQ2935 NJ 2011/191 (Bouwcombinatie/Liande), with comments by *S Lindenbergh* above 4/8 nos 1–7; the Scottish case: *Dynamco Ltd v Holland and Hannen and Cubitts (Scotland) Ltd*, Court of Session (Inner House) 15 July 1971 1971 SC 257, 1972 SLT 38, with comments by *M Hogg* above 4/13 nos 1–7; the Norwegian cases: Høyesterett (Norwegian Supreme Court) 9 September 1955 Rt 1955, 872, and Høyesterett (Norwegian Supreme Court) 10 November 1973 Rt 1973, 1268, with comments by *AM Frøseth* and *B Askeland*, above 4/16 nos 1–13; and the Finnish case: Korkein oikeus (Supreme Court) 12 December 2003, KKO 2003:124, with comments by *O Norros*, above 4/18 nos 1–9. For examples of 'cable cases' in these and further jurisdictions, see *T Kadner Graziano*, Comparative Tort Law (2018) 71–114.

come. A's insurer pays M € 300,000 as compensation. V claims a similar amount in compensation from A, with the argument that, to earn income, she necessarily depends on the participation of her skating partner.[2]

Solutions

a) Solution According to PETL. The PETL do not use the category of 'direct' or 'indirect' damage, nor that of 'direct' or 'indirect' victims, nor do they systematically exclude liability for such damage. Instead, the limits of liability result from a careful analysis of the conditions of liability under the PETL, and notably the extensive protection of life, bodily or mental integrity, human dignity, liberty, and property under art 2:102(2) and (3) PETL, on the one hand, and from the fact that '[p]rotection of pure economic interests [...] may be more limited in scope' pursuant to art 2:102(4) PETL, on the other. **3**

In the *first scenario*, the damaged cable was owned by a third party, a primary victim (rather than by V). A negligently injured the primary victim in the property of its cable, and for this it can claim damages under the PETL and arguably all European jurisdictions. **4**

V, a secondary victim who did not own the cable, was deprived of its energy supply and consequently suffered physical damage to the material which was in the furnace in the amount of € 15,000. V is thus claiming € 15,000 for damage to *property*. **5**

Had V been able to properly complete the melt, it would have been able to sell the material that was in the furnace for a profit of € 10,000. This loss of profit is thus *consequential loss* resulting from damage to property. **6**

Last but not least, V is claiming € 40,000 for loss of profit because the company was unable to proceed to four more melts, profit it could have made had the power supply not been cut. The loss of € 40,000 in profit, suffered by V, does *not* follow from the damage to V's property in the material, which was in the furnace when the power was cut. It is, on the contrary, *pure economic loss* not resulting from physical injury to V's property but from the fact that V's activities were interrupted as a consequence of the damage to the power cable owned by a third party.[3] **7**

This case raises the issue of the extent to which a party (in the above scenario: the construction company A) is required to avoid different categories of loss, and in particular whether it is required to avoid causing 'pure economic loss' to third parties (in the scenario: V). **8**

Under the PETL, the reasoning would start with the fact that V suffered physical damage to the metal that was in the furnace when the cable was cut. Just like the owner of the cable, V has suffered damage to its property. Given that property rights enjoy ex- **9**

2 See the German case: Bundesgerichtshof (Federal Supreme Court) 10 December 2002, VI ZR 171/02, NJW 2003, 1040, with comments by *U Magnus,* above 4/2 nos 1–5.

3 Compare PETL – Text and Commentary (2005) art 2:102 no 9 (*H Koziol*): 'Pure economic loss is a financial loss which does not result from physical injury to the plaintiff's own person or property'.

tensive protection under art 2:102(3) PETL, that the PETL make no fundamental distinction regarding the length of the chain of causation and that they make no fundamental distinction between primary and secondary victims when it comes to damage to property,[4] under the PETL, A was required to take reasonable care with respect to the protection of property of secondary victims such as V. Experience shows that carelessly digging in the vicinity of roads and factories entails a risk of cutting the supply of essential commodities, such as electricity, gas, or water, so in this respect the damage to V was foreseeable. A was carrying out its professional activities, it should have had the expertise necessary to avoid this damage and could have avoided it at reasonable cost and effort by surveying the location of underground power lines (see the criteria provided in art 4:102(1) PETL). Following this line of reasoning, V could successfully claim compensation for the damage to the steel that was in the furnace when the cable was cut (position (a) in the scenario).

10 Once liability for damage to property is established, the liable person has to restore the victim 'so far as money can, to the position he would have been in if the wrong complained of had not been committed', art 10:101(1) 1st sent PETL. The damage to V's property would thus include V's loss of profit which is consequential to the property damage, ie the loss of the € 10,000 profit that would have been made if the melt had been properly completed (position (b) in the scenario).

11 The last question is whether A was also required to not cause pure economic loss to third parties (in the scenario: V) and, consequently, whether it is required to compensate V's further loss in the amount of € 40,000. The PETL list the factors relevant in assessing whether the required standard of conduct has been attained in art 4:102(1). According to this provision, '[t]he required standard of conduct' depends, among other criteria, 'on the nature and value of the protected interest involved'. Article 2:102 PETL defines the protected interests and provides in para (4) that '[p]rotection of *pure economic interests* or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim'.[5]

12 Under the PETL, the duty to protect others from pure economic loss 'may' thus be less intensive than the duty to avoid injury to life, bodily or mental integrity, human dignity, liberty and property rights, compare art 2:102 (1)-(3) PETL. In the above scenario, A and V were not in a relationship with each other and A was not 'aware' of the fact that it was causing damage to V (see the criteria in art 2:102(4) PETL). Thus, it may very well be argued that under the PETL, A did not have a duty to protect V against such further loss suffered due to the standstill of V's operations.

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4 Compare *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 2: Essential Cases on Damage (2011) 5/29/9 with comments by *T Kadner Graziano*.

5 Emphasis added.

A further argument for treating victims who suffer property damage differently from victims suffering pure economic loss under the PETL is the number of potential victims. In fact, the number of victims who may suffer pure economic loss due to a shortage in energy supply is much larger than that of victims who may suffer damage to property. The burden on the tortfeasor would thus be much heavier if he were held liable not only towards victims having suffered damage to property, but also to those having suffered pure economic loss. Last but not least, the duty to not harm property aims at the protection of the owner of the property, but not at the protection of third parties, which may have a contract with the owner and consequently suffer pure economic loss. 13

Thus, it may very well be argued under the PETL that A was required to take all reasonable care to avoid V suffering *property damage* as well as the *loss of earnings consequential to property damage*, whereas A was not required to prevent V from suffering *pure economic loss* following a shortage in power supply. The case may hereby illustrate the less extensive protection of pure economic interests under the PETL, when compared to the protection of body, health, or property rights, for instance. 14

If this reasoning is applied to the *second scenario*, the solution is rather straightforward under the PETL. Here again, it may be argued that A was required to take all reasonable care to avoid M suffering *damage to his health* as well as the *loss of earnings consequential to damage to his health*. On the other hand, A was not required to prevent M's partner V, a secondary victim, from suffering *pure economic loss* following her inability to compete with M in sporting events. 15

In art 10:202(2), the PETL explicitly address consequential loss suffered by a secondary victim stating that '[i]n the case of death, persons such as family members whom the deceased *maintained or would have maintained* if death had not occurred are treated as having suffered recoverable damage to the extent of loss of that support'.[6] One may argue *e contrario* that, where these specific conditions are not fulfilled, ie the primary victim suffering only non-fatal injuries, such as in our scenario, pure economic loss suffered by a secondary victim is not recoverable under the PETL.[7] 16

b) Solution According to the DCFR. The owner of the cable has suffered damage to his property. According to art VI–2:206, damage to property is 'legally relevant damage' under the DCFR and the contractors are, pursuant to arts VI–1:101 and VI–2:206 DCFR, li- 17

6 Emphasis added.

7 This reasoning is in line with that of the German Federal Supreme Court in this case, Bundesgerichtshof (Federal Supreme Court) 10 December 2002, VI ZR 171/02, NJW 2003, 1040, with comments by *U Magnus,* above 4/2 nos 1–5. Contrast with the Italian decision: Corte di Cassazione, Sezioni Unite (Court of Cassation, Joint Divisions) 26 January 1971, no 174 Foro it 1971, I, I, 342, with comments by *N Coggiola, B Gardella Tedeschi and M Graziadei*, above 4/9 nos 1–3 and 8–14: a 24-year-old professional football player, star of the Torino football team, was killed in a road traffic accident. The Torino football club claimed compensation from the driver A of the car, maintaining that, by causing V's death, A had negligently infringed the football club's rights to the player arising from the employment contract with him. Compensation was awarded.

able for the damage to the property of the owner of the cable, just as under the PETL and arguably all European national jurisdictions.

18 With respect to the damage suffered by the steel factory V, under the DCFR, this case again raises the issue of the extent to which a party (in the above scenario: the construction company A) is required to avoid different categories of loss, and in particular whether it is required to avoid causing 'pure economic loss' to third parties (in the scenario: to the steel factory V).

19 The Official Commentary to the DCFR deals explicitly with a 'cable case' similar to that above.[8] According to the Commentary, art VI–2:206 DCFR protects the owner of the damaged cable as well as the owner of the factory against damage to their property (for example, damage to the heated metal in the furnace that cools down and is thereby damaged) and against losses consequential to such damage (for example, lost profits resulting from the damage to property in the material which was in the furnace). The Commentary hence suggests that, once property rights are violated, damage is 'legally relevant' not only with regard to primary victims but also regarding secondary victims suffering damage to their property. The decisive criterion under the DCFR is therefore not the length of the chain of causation, but the fact that the victim's property right is infringed.

20 The Commentary further suggests, on the other hand, that the DCFR does not protect the factory owner against *pure economic loss* that does *not* result from damage to his property, but from the mere temporary interruption of the power supply.

21 According to the solution suggested by the Commentary, the loss suffered by V due to the physical damage to the metal (€ 10,000), as well as the profit lost regarding the melted metal (€ 15,000), is legally relevant damage, whereas V's further loss of profits in the amount of € 40,000 is not recoverable.

22 In the *second scenario*, the tortfeasor's insurance paid € 300,000 to the injured skater M as compensation for lost income. V, his partner, claims equal damages for economic loss suffered as a consequence of the accident since due to the specificity of their profession (as professional pair figure skaters), she cannot train and participate in sports events for the duration of M's recovery.

23 Article VI–2:202 DCFR on 'Loss suffered by third persons as a result of another's personal injury or death' addresses the issue that, due to the injury or death of a primary victim, secondary victims suffer economic or non-economic loss. Claims for pure economic loss brought by secondary victims are limited in para (2)(b) and (c) to 'reasonable funeral expenses' and 'loss of maintenance'.

24 The Official Commentary to art VI–2:202 DCFR states that: 'This article concerns a segment of the question which losses suffered by third parties as a result of the injury or death of another constitute for them legally relevant damage. The Article is concerned

8 *C v Bar/E Clive*, DCFR, art VI–2:206, Comment B, Illustration 4 (3317).

with the claims of close relatives and other persons who were particularly close to the injured person …'.[9]

Under the heading 'Persons not covered' the Commentary continues: 'Others having a relationship to the deceased (eg employers or employees, partners in a firm, etc.) may also be adversely affected … and likewise suffer consequential damage ….' However, 'persons who were connected with the injured person only in a business sense and not in a personal sense will only suffer a legally relevant damage in highly exceptional circumstances.'[10] 25

The Commentary explicitly uses the example of the figure skaters to illustrate a situation where a person is unable to pursue her profession without the participation of the other. It excludes any claims of the secondary victim in that case.[11] 26

V and M could still argue that they jointly exercise a profession within the meaning of art VI–2:208 (Loss upon unlawful impairment of business). Such a claim would, however, require that the tortfeasor's interference was directed against the occupational activity of the claimant.[12] Where the damage is the consequence of a road traffic accident, this condition is not fulfilled. The situation may have been different had A intentionally caused the accident to prevent M and V from taking part in an upcoming competition. 27

31. Comparative Report

Introduction

'Indirect damage' and 'indirect victim' come into play whenever a loss is suffered by a third party merely as a side effect of someone else's wrongful behaviour. 1

In principle, directness has been a general feature of the damage to be compensated since the *lex Aquilia*[1] and still finds application in all the jurisdictions at stake, even where it is not expressly provided for by a specific legal provision. However, no jurisdiction currently bars all forms of indirect damage. Therefore, the aim of this comparative overview is not to state whether or not directness is a known concept in the national systems, but rather to highlight its extent and main fields of application. Furthermore, the way directness plays a role in designing the limits of liability is also a feature to be considered. Against this background, single jurisdictions will be grouped according to the relevance given to indirect damage and indirect victims. 2

9 *C v Bar/E Clive*, DCFR, art VI–2:202, Comment A, Overview (3224).

10 *C v Bar/E Clive*, DCFR, art VI–2:202, Comment A, Persons not covered (3224).

11 *C v Bar/E Clive*, DCFR, art VI–2:202, Comment A, Illustration 1 (3224 f), explicitly with respect to para (1), and implicitly to para (2).

12 *C v Bar/E Clive*, DCFR, art VI–2:208, Comment B (3356).

1 Historical Report 4/1 no 1 ff, where it is reported how Roman jurists extended the scope of the *lex Aquilia* by proposing to the praetor to introduce so-called *actiones in factum* and *actiones utiles*.

3 Directness as a means to limit liability came to the attention of the EU Court of Justice in a specific area of tort law – that of anti-competitive agreements. In the well-known *Kone* case, the Court overcame such limit by arguing that the principle of effectiveness requires that domestic law allows for claims for compensation even if a claimant merely indirectly suffered harm through the anti-competitive behaviour of the cartel members.[2]

4 At national level, the courts deal with the directness limit by using different conceptual tools.[3]

5 As to the main groups of cases (*Fallgruppen*) where the indirectness limit is traditionally an issue, those included in this survey fall outside competition law and tend to be framed in two sets of situations.

6 A first one involves harm suffered by relatives as a consequence of the injury or the killing of the direct victim. Most jurisdictions have ultimately removed the 'indirectness' limit at least in the case of the death of the primary victim and admitted compensation for damage.[4] A second line of cases is related to violations of someone's contractual rights by third parties. This is still a huge area where the limit 'indirect damage' applies.[5]

The approaches of national systems

7 Indirectness is a quite generic limit of liability, which needs to be further detailed and conceptualised. Indeed, the role it plays in the individual jurisdictions is very much influenced by value-oriented arguments. Even the level at which the liability is restricted by reference to directness varies greatly in the European legal systems.

8 Directness is a clear limit of both liability and its extent in England and Wales, where it operates at the duty of care stage of the negligence enquiry, serving to bar recovery for 'relational economic loss'.[6] In Scotland, directness is caught by the 'grand rule' on the recoverability of damages laid down by the Court of Session in *Allan v Barclay*[7].

9 Directness is sometimes related to the adequacy test (Norway,[8] Slovakia[9]); it is an element to be considered in causation issues (such as the interruption of causation) in the Czech Republic, Croatia and Poland.[10]

10 In other systems, the language of directness or indirectness is not relevant in terms of causation.

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2 European Union 4/29 no 7 ff.
3 See below no 7 ff.
4 See below no 12 ff.
5 See below no 21 ff.
6 England and Wales 4/12 no 6.
7 Scotland 4/13 no 3 ff.
8 Norway 1/16 no 6 ff.
9 Slovakia 4/24 no 10.
10 Czech Republic **1/23** no 1 ff; Croatia 1/25 no 7; Poland 1/22 no 4 and see art 361 § 1 KC.

In some systems, it is absorbed by the unlawfulness requirement, in particular where violations of obligatory rights and mere pecuniary loss arise. This is the case, for instance, of Switzerland[11] and Germany, where indirect loss is not compensated if it does not derive from the violation of legally protected rights.[12] **11**

In others, the directness requirement is applied to limit liability for causally-related consequences of certain conduct on the basis of value judgements; therefore, indirect damage is excluded as falling outside the protective purpose of an infringed provision (Austria, Estonia,[13] Latvia[14]), unless a transfer of risk to a third party takes place, which enables the victim to claim the shifted damage.[15] **12**

The French, Italian and Maltese Civil Codes mention directness as a means to limit the extent of damage to be compensated. In particular, the right to damages is intended to include any loss provided that it is an immediate and direct consequence of the unlawful conduct.[16] However, this limit plays a minor or no role in practice.[17] Conversely, no reference is made to the directness limit in either the Spanish[18] or Portuguese Civil Codes (art 564). **13**

Finally, neither the PETL nor the DCFR address directness in a specific provision. What is significant is not the length of the chain of causation but the legal relevance of the infringed interest.[19] However, the PETL make implicit reference to remoteness under art 3:201 – Scope of Liability, which, under b), takes into account foreseeability as a factor leading to the attribution of damage to a person, and, under c), the protective purpose of the rule that has been violated. The DCFR mentions the proximity of the damage as a factor to be taken into account in assessing the right to reparation in art VI.–2:101 (Meaning of legally relevant damage proximity of the damage). **14**

11 See below no 21ff.

12 Germany 4/2 no 1ff.

13 Estonia 4/19 no 1ff.

14 Latvia 3/20 no 16.

15 Austria 4/3.

16 In the French, Italian and Belgian Civil Codes, this provision relates to contractual liability. See art 1231-5 of the French Civil Code ('Dans le cas même où l'inexécution du contrat résulte d'une faute lourde ou dolosive, les dommages et intérêts ne comprennent que ce qui est une suite immédiate et directe de l'inexécution'); previously, see art 1151; art 1151 of the old Belgian civil code (Dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention), now abrogated; art 1223 of the Italian Civil Code (Damages include both the loss suffered and the gain the creditor has failed to attain, provided that they are immediate and direct consequences of the non-fulfilment or the delayed fulfilment). Remoteness of the damage has been introduced as a feature of extra-contractual liability in the new Belgian Code (art 6.18). In the Maltese Civil Code, directness is stated by art 1045, which is included in the tort law section of the Civil Code.

17 Belgium 4/7 no 3.

18 Art 1106 makes reference to the suffered loss and the profit the damaged party was prevented from gaining as components of 'damage', whereas no mention is made to directness.

19 PETL/DCFR **4**/30 nos 3 and 19.

The main groups of cases

a) Pecuniary and non-pecuniary harms suffered by relatives of the direct victim

15 In 1986, the European Court of Justice stated that most European legal systems did not recognise damages to third parties for injury to a primary victim.[20]

16 Such damages are currently allowed by most systems and are no longer considered indirect,[21] especially as far as shock damages are concerned. However, the country reports show that their requirements vary considerably, while the need to prevent duplications of compensation and the fear of multiple claims are still a policy concern.[22]

17 Systems belonging to the Romanistic legal family (Belgium,[23] France, Italy,[24] Portugal,[25] Spain) recognise the right to compensation for pecuniary and non-pecuniary loss whenever a sufficiently close relationship is demonstrated between the severely injured or deceased victim and the third party. No difference seems to be drawn between bereavement and shock damages.

18 Systems belonging to the Germanic legal family traditionally take a more restrictive approach. In Germany, emotional distress due to the death of a relative may give rise to compensation for pain and suffering only in cases where there is an injury to body or health (§ 823 BGB); furthermore, § 844 (3) BGB provides for survivors' allowance in the case of mere bereavement damage. In Austria, shock damage to close relatives arises under § 1325 ABGB in respect of psychological harm which becomes pathological. Furthermore, 'pure grief pain', which does not lead to shock in the sense of damage to health (§ 1325 ABGB), is also to be compensated in the case of gross negligence. Under Swiss law, the third party victim is considered to be directly injured if protected by an absolute norm (ie life, physical or psychological integrity according to art 122 Swiss Penal Code) or by specific protective norms.[26] In Greece, nervous shock leading to therapeutic treatment or hospitalisation is considered direct damage to be borne by the tortfeasor,[27] while members of the victim's close family have a personal right to seek compensation

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20 European Union 4/29 no 1ff.

21 See, eg, Romania 4/28 no 1ff.

22 See, eg, Latvia 4/20 no 1ff.

23 Belgium 4/7 no 3ff; Italy no 4/9. Of course, compensation is not awarded if the victim's children, born several years after the accident, claim damages due to the infringement of their parental relationship with him (see Cour de Cassation, Chambre civile, 24 February 2005, France, 4/6 no 8 ff).

24 Italy 5/9 no 4ff. Damage suffered by registered cohabiting couples are currently recognised by Law no 76 of 20 May 2016 (art 1 subsec 49) under the same rules provided for married couples.

25 Portugal 4 no 1ff. Compensation for non-pecuniary loss is granted even in case of loss of a normal sexual life and in case of severe personal injury leading the spouse to dedicate their life to assisting the injured party. See art 495/3 regarding pecuniary loss suffered by third parties as a consequence of the primary victim's death if they are entitled to maintenance from him/her.

26 Switzerland 4/4 no 11ff. See art 45 Para 3 Swiss Code of Obligations (SCO) (loss of support) and art 47 SCO (moral damage) acknowledge the reparation of so-called 'indirect' damage in the case of a relative's death.

27 Greece 2/5 no 4ff.

for their bereavement according to art 932 GCC sent 3. The recognition of a wife's moral harm due to her husband's impotency caused by the tortfeasor developed by case law since the 1980s is held to be an exception to the general rule according to which, only the person who directly suffered the injury can be granted compensation for moral harm, any further person being considered outside the ambit of protection of the violated rule of law (art 932 CC).[28] The Dutch Civil Code recognises the right to compensation to third parties in both cases of personal injury (art 6:107) and death (art 6:108).[29] The new Hungarian Civil Code expressly recognises grievance damages for non-material harm to any person whose personality rights have been violated (art 2:52),[30] and, similarly, art 1.391 (2) of the Romanian Civil Code establishes the right of indirect victims or victims by ricochet to compensation for the affective non-pecuniary harm caused by the death of the primary victim.[31] Even traditionally 'reluctant' systems have finally come to recognise damages in a tort action for loss caused by the primary victim's death. This is the case of England and Wales, where the restrictive rule affirmed in *Baker v Bolton* was limited by the Fatal Accidents Act 1846, which awarded the victim's close relatives a claim for financial loss, and, then, by the Fatal Accidents Act 1976. However, *Baker v Bolton* still applies to cases not covered by this legislation.[32] In Poland, bereavement damages were introduced only in 2008.[33] In Slovenia, close family members are allowed to claim compensation for the mental pain they suffered as a result of both severe disability or death of the direct victim (art 180 of the Code of Obligations)..

19 Ireland seems to be open to recognise compensation for psychiatric harms resulting from the perception of the injury or risk of injury to another person, whose requirements were set by *Kelly v Hennessy*.[34]

20 Among the legal systems surveyed in this volume, the only one still following a quite restrictive approach is the Czech Republic, where the post-traumatic distress due to the death of the primary victim seems to be denied as considered an indirect damage.[35]

21 To conclude, pecuniary and non-pecuniary losses suffered by the primary victim's family members are, tendentially, no longer barred by the indirectness limit. However, the requirements and the extent of the right to damages are still heterogeneous in the European legal systems.

28 Greece 4/5 no 3ff.

29 Netherlands 4/8 no 4ff.

30 The following personality rights are listed by the Civil Code: infringement of bodily or psychical integrity of a person; loss of the chance to heal; infringement of a person's good reputation by illegal detention or unjustified criminal prosecution, discrimination based on ethnic origin; illegal use of personal data, infringement of intellectual property rights. See Hungary 4/27 no 6.

31 Romania 4/28 no 1ff.

32 England and Wales 4/12.

33 Poland 4/22 no 10.

34 Ireland 4/14 no 12ff.

35 Czech Republic 4/23 no 67ff.

22 Finally, both the PETL and DCFR take into consideration pecuniary (see art 10:202 PETL, art VI.–2:202 DCFR) and non-pecuniary losses suffered by third parties. As to the latter, both texts are far-reaching as non-pecuniary loss is due both in cases of a fatal and non-fatal injury (qualified as 'very serious' by the PETL, art 10:301. Non-pecuniary damage; art VI.–2:202 DCFR – Loss suffered by third persons as a result of another's personal injury or death).

23 However, both would deny compensation to a business partner of a primary victim who was severely injured and could not perform their professional activity.[36]

b) Pecuniary harms consequent on the violation of someone else's contractual right

24 Attitudes of the legal systems towards the contractual party's right to damages as a consequence of the tortfeasor's unlawful conduct vary and basically reflect a willingness or reluctance to compensate pure economic loss. In particular, the restrictive approach is traditionally linked to the unwillingness to compensate the violation of obligatory rights through tort law.

25 Most legal systems are still unwilling to compensate mere pecuniary loss. This is the case of Germany, where such loss does not belong to the list of protected rights pursuant to § 823 BGB;[37] Austria, where it is deemed to lie beyond the protective scope of the violated rule (*mittelbare Schäden*); England and Wales,[38] Ireland,[39] Finland,[40] Scotland,[41] and Slovakia.[42]

26 This reluctance, however, has been overcome in several jurisdictions. In Italy, this result has been reached since the 1970s by widening the concept of unlawfulness beyond the infringement of absolute rights.[43] Other systems have developed the more flexible criterion of the concrete and close connection between the third party and the harmful event – as in Norway,[44] and Sweden,[45] which, under certain conditions, allow compensation to third parties.

27 Awarding damages for such loss also seems to find no obstacle in Belgium,[46] or in France, where damages are allowed whenever a negligent conduct caused a loss of any kind to someone else. Notwithstanding the absence of a proper theoretical framework, at least some kinds of indirect damages are precluded, as those claimed by a better pre-

36 PETL/DCFR 4/30 nos 16 and 25.
37 Germany 4/2 no 1ff.
38 England and Wales 4/12 no 6.
39 Ireland 4/14 no 1ff.
40 Finland 4/18 no 6ff.
41 Scotland 4/13 no 3ff.
42 See Slovakia, both decisions and comments under 4/24.
43 Italy 4/9 no 1ff.
44 Norway 4/16 no 1ff.
45 Sweden 4/17.
46 Belgium 4/7 no 8.

vented from winning the bet as a consequence of a football player's misconduct.[47] Tortious liability for damage due to breach of contractual duties finds, in principle, no obstacle even in the formulation of art 1902 of the Spanish Civil Code; however, unforeseeable damage is not compensated.[48]

28 Both the PETL and DCFR take into consideration pure economic interests (arts VI.–2:204–2:208 DCFR, art 2:102 PETL – Protected interests (4)). However, the PETL provide for stricter standards and make clear that '[p]rotection of pure economic interests [...] may be more limited in scope' pursuant to art 2:102(4) PETL. The DRCF includes 'particular instances of legally relevant damage', such as certain types of loss suffered by third persons as a result of another's personal injury or death; loss upon communication of incorrect information about another; loss upon breach of confidence; loss upon infringement of property or lawful possession. Once the suffering of a legally relevant damage (Chapter 2) is established, the tortfeasor must be accountable for it (Chapter 3).[49]

29 The 'cable cases' are often cited by national reporters and represent a typical benchmark to compare national tendencies in this area. Thus, on the basis of the materials collected in this volume, damages are recognised in Italy,[50] Malta,[51] the Netherlands,[52] Norway,[53] Sweden,[54] Switzerland,[55] whereas they are not in Austria,[56] Finland,[57] Ireland,[58] and Scotland.[59]

30 Both the PETL and DCFR allow compensation for property damage and the consequential loss of earnings suffered by the third party (typically, the owner of a factory whose activity has been temporary stopped), but not for their pure economic loss.[60]

31 However, the situation tends to be different in cases where an employer claims compensation for damage suffered as a consequence of the employee's inability to work due to a tortfeasor's misconduct. In this situation, some jurisdictions keen to deny damages for pure pecuniary loss exceptionally admit compensation for the remuneration the employer is forced to pay without benefitting from the employee's services. In Germany and Austria, for example, this is held to be a consequence of the transfer of risk

47 France 4/6 no 1ff.
48 See Tribunal Supremo 26 June 2008, Spain 4/10 no 1ff.
49 PETL/DCFR 1/30 no 3ff.
50 Italy **4**/9.
51 Malta 4/15 no 1ff.
52 Netherlands 4/8 no 1ff.
53 Norway 4/16 no 1ff.
54 Sweden **4**/17.
55 Switzerland 4/4 no 1ff.
56 Austria 4/3 no 1ff.
57 Finland 4/18 no 1ff.
58 Ireland 4/14 no 1ff.
59 Scotland 4/13 no 1ff.
60 PETL/DCFR 4/30 no 3ff.

provision.[61] The Dutch Civil Code admits the employer’s recourse action for wages paid during employees’ sickness (art 6:107a). Conversely, this is not the case in Ireland, where the *per quod servitutum amisit* action is excluded.[62]

61 Austria 4/3 no 1.
62 Ireland 4/14 no 4ff.

5. Lawful alternative conduct

2. Germany

Bundesgerichtshof (Federal Supreme Court) 24 October 1985, IX ZR 91/84

BGHZ 96, 157 = NJW 1986, 576

Facts

V claimed damages from defendant A, a public notary, for the latter's breach of an official duty (*Amtspflichtverletzung*). A had notarised the purchase of a piece of land that V intended to purchase from a third party G. This piece of land had still to be measured and to be formally divided from the rest of the land which G sold to another purchaser D. According to the contract between V and G, the purchase price was due one week after the land was free of any encumbrances. The defendant declared this condition fulfilled on 19 May. On 26 May, V paid the price of DM 1.5 million for which she had to take out credit. **1**

However, already on 13 April, the defendant had notarised the purchase of the remaining piece of land from G to the other purchaser D. A priority notice of conveyance in favour of D was registered as well as a mortgage for the bank which had credited D's purchase price. Both encumbrances extended to the still undivided land including the part sold to V. Although D as well as his bank declared their willingness to release their rights with respect to V's piece of land before 19 May (though not in the necessary notarial form), the division of the entire land and the encumbrance-free registration of V's part did not occur before 25 November. **2**

V argued that A had incorrectly and in breach of his official notarial duties confirmed on 19 May that the purchase price was due although the conditions for payment were in fact fulfilled only on 25 November. Since V – in her view unnecessarily – had to pay interest for the credit for this half year, she claimed the interest costs (DM 130,938) as damages. **3**

The defendant countered with the argument that he could have created the conditions for payment in a legal way already on 19 May. Because he was entitled to do so, he should not be held liable for the pre-mature interest costs. **4**

Decision

The Federal Supreme Court upheld the decision of the lower court which had decided in favour of V. The BGH rejected the defendant's argument on *rechtmäßiges Alternativverhalten* (lawful alternative conduct). It based its judgment on this point on the general principle that the defence of *rechtmäßiges Alternativverhalten* can successfully be raised only if, and to the extent that, the protective purpose of the violated norm allows it. The *Bundesnotarordnung* (Federal Ordinance for Notaries Public, BNotO) obliges notaries to **5**

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fulfill their duties reliably and strictly.[1] The defendant violated the duty to issue a correct maturity confirmation. This duty exists towards both parties of a contract which the notary shall notarise. The duty shall not only protect the respective party against unjustified encumbrances and charges but also against pre-mature payments and consequential financial damage. If the defendant could invoke that he could lawfully have caused the same damage to the claimant, 'the trust of the parties in the reliability and impartiality of the notary as an officially appointed person for documentation would not be effectively protected.'[2] The defence of *rechtmäßiges Alternativverhalten* was therefore unsuccessful.

6 The decision qualifies the defence of *rechtmäßiges Alternativverhalten* as an institute that is separate from causation (causation in a natural sense): 'Rather, it is the question that ensues after the causal link has been affirmed whether, under evaluative considerations [*wertende Betrachtung*], the consequences of unlawful conduct can reasonably be attributed to their author.'[3]

Comments

7 The judgment is the first and still leading decision of the Federal Supreme Court which acknowledged the legal institute of *rechtmäßiges Alternativverhalten*. Lawful alternative conduct is the defence that the tortfeasor should not be liable because he or she could have caused the same damage or result also by way of lawful behaviour and would then not be liable. Later decisions of the Federal Supreme Court specified that the defence can, however, only be accepted if the author *would* in fact have brought about the lawful result either being obliged to do this or doing it usually. The mere possibility that he or she *could* have caused the same result in a lawful way is not sufficient.[4] The author has the burden of proving this.[5] These principles are followed by the lower courts and the majority in legal literature.[6] Meanwhile, the German legislator has introduced a norm which accepts the defence of lawful alternative conduct if a doctor did not, or not sufficiently, inform the patient before a medical measure.[7]

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1 See §§ 19, 24 (1) BNotO.

2 BGH NJW 1986, 579 [my translation].

3 BGH ibid [my translation].

4 See BGH NJW 2017, 1104 no 24 with further references.

5 *H Oetker* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn 2019) § 249 no 224 with numerous references.

6 See, eg, *O Dörr* in: Beckscher Online Großkommentar (2020) § 839 BGB no 492ff; *H Oetker* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn 2019) § 249 no 217ff; *U Magnus* in: NomosKommentar BGB (3rd edn 2016) Vor §§ 249–255 no 107f; *G Schiemann* in: J von Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (2017) § 249 BGB no 102ff.

7 § 630h (2) sent 2 BGB: 'If the information does not comply with the requirements of section 630e, the treating party may assert that the patient would also have consented to the measure had proper information been provided.' [translation published by the German Ministry of Justice and Consumer Protection].

Nevertheless, it has been criticised that the Court's reported judgment changed the function of the law of damages into a law for disciplining public notaries.[8] Indeed the damages sanction can have a disciplining effect wherever duties are neglected. However, this is no specialty for notaries but an immanent ingredient of the law of damages. **8**

It is further still disputed whether the defence of lawful alternative conduct is an independent legal institute or a mere sub-category of causation, in particular of the problem of hypothetical causation.[9] The various dogmatic approaches do not influence the final outcome. It is common ground that causation in the general sense must always be established first before the defence of lawful alternative conduct can be examined[10] and that the party relying on the defence must prove its factual conditions.[11] **9**

In any event, lawful alternative conduct functions as an element that in appropriate cases limits the liability of the wrongdoer although in the majority of cases the courts have rejected the defence.[12] **10**

Bundesgerichtshof (Federal Supreme Court) 29 January 2019, VI ZR 495/16

BGHZ 221, 55 = NJW 2019, 1076

Facts

V claimed compensation for her pecuniary and non-pecuniary damage in consequence of her donation of a kidney to her father. The defendants were the clinic and four doctors who were involved in the transplantation. **11**

On 12 September 2008, by means of a written and signed patient confirmation,V consented to the living kidney donation. Until 30 October 2008, V's qualification as possible donor was – positively – evaluated. On 30 December 2008, the Commission for Transplantation Medicine of the Medical Chamber assessed V and found no indication that the donation would not be voluntary. On 27 January 2009, a so-called living donation discussion between V and two of the defendant doctors took place as well as a discussion, referred to as a *Konsensusgespräch* (consensus talk), between V, her father and two doctors, one of them being the transplantation surgeon. V and her father signed a checklist protocol on this latter discussion. **12**

On 24 February 2009, V went to the defendant clinic for the donation. Another defendant doctor informed V about the explantation of the kidney, which was performed the next day and implanted into V's father. **13**

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8 *P Hanau* in a note to the judgment in DNotZ 1986, 406 (415 ff).

9 In this latter sense, eg, *H Oetker* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn 2019) § 249 no 218.

10 BGHZ 192, 298 no 13.

11 BGH NJW-RR 1995, 937; BGH NJW 2005, 1718.

12 See the survey over the case-law by *H Oetker* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn 2019) § 249 no 219f.

14 In May 2014, the father's implanted kidney no longer functioned. Since the donation, V suffers from chronic fatigue syndrome and kidney insufficiency.

15 V claims damages, arguing that she had not been sufficiently informed about the high risk situation of her father and her own health risks. She further relied on the fact that provisions of the German *Transplantationsgesetz* (Transplantation Act, TPG) were not complied with.

Decision

16 The courts of lower instance had dismissed V's claim because they allowed the defendants to rely on the defence of lawful alternative conduct: V would have consented even though the information was insufficient and some TPG provisions were not observed. The Federal Supreme Court quashed the court of appeal's decision and remitted the case.

17 The highest civil court reasoned that the case of a living organ donation is a special case of medical treatment because the donor is not treated in order to heal his or her condition but for the health of another person. Therefore, there must be safeguards for the donor against high health risks. A specifically high level of pre-operative information is thus required. The provisions of the TPG intend to provide such safeguards. Although the provisions, in particular § 8 (2) TPG, have a merely formal character, their material essence concerning information must be respected. Their purpose disallows the defence of lawful alternative conduct. For, the donor of a living donation must be protected against him- or herself. The formal requirements (presence of a neutral doctor) should prevent the donor from agreeing to the altruistic donation under a certain personal pressure.[13]

Comments

18 Although the result of the BGH should be accepted,[14] the Court's reasoning is not entirely convincing. If the provisions of the TPG have a merely formal function, it is astonishing that their purpose is nonetheless so strict as to exclude the defence of lawful alternative conduct. Legal doctrine partly supported the decision[15] and partly criticised it.[16] In 2020, the Federal Supreme Court confirmed its decision of 2019 and rejected the critique.[17]

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13 BGH ibid no 45.

14 But see for a critique, the notes on the BGH decision: *J Prütting*, MedR 2019, 559; *A Spickhoff*, JZ 2019, 522 (523 f).

15 See, eg, *G Mäsch*, JuS 2019, 812ff; *C Grüneberg* in: Palandt, BGB (80th edn 2021) Vor § 249 no 64; *J Siglmüller*, LMK 2019, 417182.

16 See no 14.

17 BGH NJW 2020, 2334.

In medical law, doctors are often confronted with patients' allegations that they were not given sufficient information before the medical measure and that therefore their consent to the measure was invalid. This is not rarely the case where a medical mistake cannot be proved. In such a situation, the courts allowed the doctor the defence that the patient would have consented even if he or she had been adequately informed. The burden of proof of this fact was on the doctor. This rule, that even hypothetical consent can justify the medical treatment, can be seen as a special case of lawful alternative conduct. It is now settled in § 630 (2) sent 2 BGB.[18] **19**

3. Austria

Oberster Gerichtshof (Supreme Court) 11 February 1999, 2 Ob 20/99a

ZVR 1999/97

Facts

A1 was driving her car. When entering a crossroads, she contravened the priority rules and failed to give way. Thereby, she caused a collision with A2, who was driving his car at a speed of 92 km/h despite the speed limit of 70 km/h on the (prioritised) main road. Thus, A2 skidded into the opposite lane, where he crashed into the bus of V, which was thereby damaged. In the recourse proceedings of the involved liability insurance companies, the question was whether both A1 and A2 can be held liable for the damage of the bus. **1**

Decision

In its decision, the Supreme Court endorses the opinion that liability is excluded when a tortfeasor who has acted wrongfully would have otherwise caused the same damage by lawful alternative conduct. Hence, provided that the damage to V's bus would have been the same if A2 had been driving his car at the permitted speed of 70 km/h – which was not definitively ascertained by the first instance court – A2 is not even in part liable for V's damage. According to the Supreme Court, however, it is not decisive if the identical actual negative change of state (*realer Schaden*) would have occurred. The question is rather if the damage measured in monetary terms (calculable damage; *rechnerischer Schaden*) would have been the same. As the findings of the lower instance courts were insufficient to answer this question, the Supreme Court annulled the contested decision and referred it back to the first instance court. **2**

18 For the text of the provision see above 5/2 fn 7.

Comments

3 A special group of cases in which liability is excluded for damage that has been caused in the sense of the *conditio sine qua non* test (but-for test) due to considerations relating to the protective purpose of the infringed rule is addressed with the concept of lawful alternative conduct (*rechtmäßiges Alternativverhalten*). In the case of lawful alternative conduct, the issue is whether a perpetrator who has acted wrongfully is liable for the damage caused even if he would have caused the same harm otherwise by lawful conduct.[1] A well-known example is the case in which a car driver overtakes a cyclist leaving too little space on the side and crashes into him, but the same damage would have occurred had he allowed enough space as the cyclist was drunk and did not keep to the side of the road, instead lurching out far to the middle.[2]

4 At first glance, one could maybe think that these cases of lawful alternative conduct pertain to a problematic group of causation,[3] but this is not the case. When it comes to lawful alternative conduct, only one event really occurred and this actually brought about the damage; the second event – the lawful alternative conduct had the perpetrator not acted wrongfully – never took place, it is merely hypothesised, has thus not in fact posed any specific risk and could evidently not be causal for any damage. Rather, as in cases of lawful alternative conduct, the actual actions taken were causal for the damage according to the *conditio sine qua non* theory (but-for test), no question of causation is at issue.[4] Instead, as already stressed, a problem of limiting liability by value judgements is addressed: the question arises as to whether, pursuant to the protective purpose of the respective rule, the perpetrator who has acted wrongfully should be liable for the harm that would also have been brought about by lawful behaviour.[5] In the reported decision concerning the traffic accident at the crossroads, the Supreme Court therefore asked if the same damage would have occurred if A2 had been driving at the permitted speed of 70 km/h at the very moment A1 crossed into the road.

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1 See *P Bydlinski*, Schadenersatzrechtliche Überlegungen anläßlich eines Verkehrsunfalls, ZVR 1984, 194f; fundamental *P Hanau*, Die Kausalität der Pflichtwidrigkeit (1971); in detail *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/77ff.

2 See originally the decision of the German BGH 4 StR 354/57 = JZ 1958, 280; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/77; see also *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/22ff.

3 See *BA Koch* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) no 6a/3 nos 6ff and 12ff.

4 In cases of omissions, on the other hand, according to the prevailing opinion, liability would have to be rejected for lack of causation if the same harm would also have arisen had the perpetrator taken action in accordance with his duties. An omission is thus only causal if taking specific action would have prevented the occurrence of the damage and this action would have been possible, eg *BA Koch* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) no 2/3 no 5f; see also *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/24.

5 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/23f.

According to Austrian literature and case law, as the reported decision demonstrates, the defence of possible lawful alternative conduct does not only mitigate liability, but, if justified, in general leads to a full exemption from liability for the perpetrator.[6] The underlying consideration is that if a certain behaviour is prohibited by the legal system or by contract in order to prevent damage, the basis for this rule no longer stands if the same damage would have been brought about anyway by lawful conduct. In other words, the wrongfulness of the behaviour is irrelevant when the aim of avoiding the damage cannot be achieved,[7] the Austrian Supreme Court stresses in its decision outlined above. **5**

Oberster Gerichtshof (Supreme Court) 15 July 1981, 1 Ob 35/80

SZ 54/108

Facts

Police officers arrested V, a suspect, without a warrant. The defendant in the lawsuit for damages because of unlawful deprivation of liberty, the Austrian federal government, referred to the fact that the competent judge would have issued the arrest warrant anyway. **6**

Decision

The Supreme Court stresses that although, in general, lawful alternative conduct can exculpate the perpetrator, this is not the case under the present circumstances. As regards claims for damages due to an infringement of the constitutional right to personal freedom, the defence of lawful alternative conduct cannot prevail. A person should only be arrested in the expressly provided cases on the basis of a judicial arrest warrant. This is not a mere rule of procedure, but guarantees that an individual is only deprived of their personal freedom in accordance with the statutory requirements. V's claim for compensation was therefore successful. **7**

Comments

According to the by far prevailing view, the defence of lawful alternative conduct does not lead to an exemption from liability when a violated rule serves to ensure a procedure featuring specific security guarantees.[8] Unlike the general principle, when violat- **8**

6 Eg OGH 11.2.1999, 2 Ob 20/99a; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 399 ff.

7 Eg OGH 2 Ob 52/56 = ZVR 1956/132.

8 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 15 with further references. *Karollus* comes to some different conclusions by adopting the 'risk

ing such a rule, the perpetrator is fully liable for the losses caused if the requirements of liability for damage are given.

9 For instance, the protection of personal liberty is of utmost legal significance. So, in this field, special rules aim at ensuring that a deprivation of liberty by public authorities only takes place in compliance with the stipulated procedures. Therefore, in the above-mentioned decision where police officers arrested a suspect claimant without a judicial arrest warrant, the responsible public authority could not avert liability with reference to the fact that the competent judge would have issued the arrest warrant anyway.[9]

10 However, it is increasingly stressed that such exemptions from the general limitation of liability in cases of lawful alternative conduct should only be allowed in rare, exceptional cases, for instance when the procedures aiming at the protection of the victim were totally disregarded and thus a very severe infringement has taken place.[10] Merely formal deficiencies of such procedural safeguard guarantees or a violation of the rules of jurisdiction, on the contrary, cannot exclude the defence of lawful alternative conduct.

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 4 October 2004

ATF 131 III 115

Facts

1 V, a five-year-old boy, entered a horse pasture where he was badly injured by a horse. The pasture was fenced by an electric cable at an average height of 124 cm. V measured 110 cm and could easily pass under the fence. On 25 February 2002, V's parents brought an action before the district court against A, based on art 56 of the Swiss Code of Obligations (SCO) (liability for animals). The court declared the defendant liable and ordered him to pay compensation for the damage caused. On 1 June 2004, the regional court, on appeal by the defendant, confirmed the first instance's decision. The defendant appealed the judgment before the Federal Supreme Court notably against the district's evaluation of A's alternative lawful conduct.

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increase theory' developed in criminal law, see *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 399 ff; the Austrian Supreme Court followed him in a number of decisions, eg OGH 2 Ob 594/95 = RdW 1996, 114.

9 See also *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2004) § 1295 no 1b.

10 *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 405 ff; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/85; accordingly the Austrian Supreme Court, eg OGH 1 Ob 248/14y = ecolex 2015, 652.

Decision

The Court upheld the lower court's decision. 2

Firstly, the Court considered that the fence did not fulfill the safety measures recommended by a foundation specialised in animal keeping. As A failed to prove that he had taken all necessary measures to keep and supervise his animals, the Court found A's conduct to be unlawful. 3

Secondly, the Court further assessed whether the damage would still have occurred had A adopted lawful alternative conduct. It reminded as a general remark that the tortfeasor's proof is submitted to strict conditions. The tortfeasor has to prove that the damage would have occurred with certainty had he adopted lawful alternative conduct. In casu, A had only produced evidence that the damage would *possibly* have occurred had he taken all the necessary measures. The Court found that the proof was not sufficient and held A liable towards V. 4

Comments

Article 56 SCO, regarded as *lex specialis* in relation to art 41 SCO, is conceived as a fault liability.[1] In this so-called mild causal liability (*milde Kausalhaftung*)[2] the animal owner's fault is presumed. 5

An animal holder is allowed to provide two types of proof: firstly, that he took all the necessary measures to avoid damage. If he is unable to provide this proof, he may secondly prove[3] that the damage would have occurred even if his behaviour had been lawful.[4] The latter is known as the 'alternative lawful conduct'[5] argument.[6] 6

The 'alternative lawful conduct' proof has to amount to certainty that the damage would have occurred.[7] As the court stressed, it is not sufficient to prove that the damage *could* have taken place if the measures had been taken. The tortfeasor has to prove that 7

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1 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 56 no 38.

2 This liability has to be distinguished from the strong causal liability for which such a proof of release is not possible (see art 58 SCO); *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-1 OR (4th edn 2013) ad art 56 no 4, 31.

3 Arts 55 and 56 SCO.

4 No causal liability if the damage would have occurred even if the aforementioned care had been taken – ATF 45 II 85f; ATF 49 II 89, 94, c 3 (1923); ATF 122 III 229, 233 s, c 5a/aa (1996); TF, 2C_147/200, 20.11.2009, c 8.1 (unpublished); TF, 4C.156/2005, 28.09.2005, c 3.5.6 (unpublished).

5 The English expression 'alternative lawful conduct' is not precise enough. The German technical term of 'rechtmässiges Alternativverhalten' is broader. It does not focus on unlawfulness but includes the idea that the person has behaved according to the legal order as a whole, including avoiding fault.

6 *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 13 no 13.13, at 135; TF, 4A_449/2018, 25.03.2019, c 5.4 (unpublished).

7 C 3.3.

the damage would have occurred *with certainty*.[8] The reason behind this strict standard of proof lies in the role unlawfulness plays in this concept. The basic idea is that in the 'lawful alternative behaviour concept', the lawful or unlawful behaviour has no impact on the damage, in other words, that the damage would occur with either behaviour. Had the court admitted that the probability that the damage would occur was sufficient, it would have admitted that lawful behaviour could possibly have prevented the damage from occurring.

8 As the Court explained, this exemption revolves around natural causation. It aims at questioning the causal link between the unlawful act – ie the carelessness of the keeper – and the damage itself.[9] Some authors refer to the lack of *conditio sine qua non* (but-for test) of the damage.[10]

9 Since the test of alternative lawful conduct consists in replacing unlawful conduct with hypothetically lawful conduct, the expression 'alternative lawful conduct' is by definition also directly linked to unlawfulness.[11]

10 In other words, the Court's reasoning is based on two alternative steps. Firstly, A has to prove that he took all necessary measures to avoid damage (standard of care). If A does not succeed in doing so, he may prove that alternative lawful conduct would not have prevented the damage. This second step is submitted to the strict condition that A has to prove that damage would have occurred with certainty (standard of proof).

11 Conclusively, while the argument of alternative lawful conduct first seemed to limit civil liability, it ultimately appears to neither restrict nor extend liability. It rather underlines the fundamental importance of natural causation in tort law and the strict conditions of the *conditio sine qua non* test.

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8 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 56 no 52; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 5 no 885, at 298.

9 *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 5 no 885, at 298; ATF 97 II 221, 223 s, c 1 (1971).

10 *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) § 5 no 885, at 298. However, this argumentation is controversial. Part of the legal doctrine considers it to be superfluous as it expresses something self-evident, namely that the violation of due diligence must have been causal for the damage; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 56 no 85; *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 6 no 06.24 ff, at 72 f.

11 *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 6 no 06.24, at 72 and no 06.27, at 73; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 56 no 4.

5. Greece

Efeteio Thessaloniki (Court of Appeal) 2384, 23 July 2005

Published in NOMOS

Facts

V did not undergo a certain ultrasound examination between the 22nd and 24th week of pregnancy. As a consequence, the congenital anomalies of the foetus were not detected. V and her husband did not have the possibility to exercise their right to interrupt the pregnancy, as they may have done as their wish was to have a healthy child. Both V and her husband sued A, the obstetrician, alleging that he had omitted to indicate to them that she had to undergo this ultrasound examination in the said period of V's pregnancy and sought compensation for their moral harm. 1

Decision

The Court of Appeal concluded, contrary to the court of first instance, that it had not been proven that the obstetrician had not suggested performing the ultrasound. It further mentioned, however, that even if the ultrasound had not been recommended, there is no causal link between said unlawful and culpable conduct and the damage caused, that is, the birth of the child with a disability, since, even if A had not omitted his duty to indicate the need for an ultrasound, the congenital anomalies of the baby would not have been prevented. Even if the damage sustained was the violation of the right of the parents to choose whether or not to perform an abortion, such a causal link would not have existed, as the decision of the parents to interrupt the pregnancy was also needed, a decision that the doctor could not objectively have foreseen. For this and for other reasons, the parents' appeal was rejected. 2

Comments

One of the issues in cases of wrongful birth is whether the abortion would have taken place had the parents been duly informed, as religious reasons can point at a different decision. 3

Areios Pagos (Greek Court of Cassation) 619, 25 April 2000

Ell Dni 42, 73, 74 = NoV 49, 1010 ff

Facts

A motorbike and a car collided. The Athens Court of Appeal (decision no 1492/1998) found that A, the driver of the car, was exclusively liable for the crash because he was not careful and drove into a crossing at a speed exceeding 100 km/h; as a result, he 4

caused the fatal wounding of V, the motorcyclist. According to the Court of Appeal, V was not contributorily negligent although he was under the influence of alcohol and not wearing a helmet, as he was driving carefully and at a low speed. His death was due to severe chest injuries and such would have occurred even if he had been wearing a helmet.

Decision

5 According to the Court of Cassation, which confirmed the decision of the Court of Appeal, the violation of the provisions of the Highway Code by the injured party (ie the consumption of alcohol or the omission to wear a helmet by a motorcyclist) as such does not mean that the victim has contributed by his own conduct to the damage. A person can be under the influence of alcohol and, nevertheless, drive normally and at a reduced speed, or not wear a helmet but the death is caused because of a severe injury to the abdomen or the thorax, in which case wearing a helmet would not have prevented the fatal result.

Comments

6 As mentioned, according to the Greek jurisprudence, if the necessary causal link does not exist between the unlawful and culpable act and the damage, ie if the damage would also have occurred if the behaviour had been lawful, then no liability is established. This is deduced from several decisions,[1] among which the one presented here, which, although they do not deal with the lawful alternative conduct of the tortfeasor but with that of the victim, support this approach.

7 In particular, the courts are more often faced with cases where the victim acted in an unlawful and culpable way (eg was intoxicated or did not wear a helmet), so they have to examine whether there is contributory negligence on the part of the victim and whether, as a consequence, the tortfeasor's liability should be reduced or not. The violation of the provisions of the Highway Code constitutes an element that is taken into consideration by the Court. The latter will judge whether there is a causal link between the particular behaviour in violation of the Code and the harm in order to decide whether or not to reduce the percentage of the tortfeasor's liability.

8 Though contributory negligence is not within the scope of the present volume, we are of the view that the present case can be reported here, as it highlights the issue of lawful alternative conduct. The courts have found that when, even if the victim had acted lawfully, the damage would not have been avoided or reduced, the causal link of

1 See, indicatively, above-mentioned decisions under 1/5 no 4 (fn 3): AP 1063/1990 NoV 39, 1383; 619/2000 Ell Dni 42, 74.

the damage suffered by the victim to the unlawful and culpable act of the tortfeasor has not been broken and continues to exist.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 20 November 2003, 01-17.977

Bull civ II, no 355; D 2003, 2902, concl *R Kessous*, note *L Grynbaum*; JCP G 2004, I, 163, no 36, note *G Viney*; RTD civ 2004, 103, note *P Jourdain*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007049023>

Facts

The family of a chain smoker who had died from tobacco-induced cancer brought a claim against the manufacturer of the cigarettes smoked by their relative, arguing that his death had been caused by the lack of information about the dangers of smoking on cigarette packs. **1**

Decision

The appellate court had ruled that, even assuming that the manufacturer had breached its duty to warn about the dangers of smoking, this did not have any consequence on the deceased smoker's conduct, since, at the time when the duty arose, the smoking habit of the deceased was so deeply entrenched that he would have kept smoking in any case. The *Cour de cassation* upheld the appellate court's decision. **2**

Comments

Although there is no official doctrine of 'lawful alternative conduct' in French law, this decision, which is by no way unique, shows that this doctrine is in effect applicable, at least in some cases. A defendant is not liable, although he was at fault, if he proves that harm would have occurred even if he had violated no duty. This is considered a mere application of the basic principles of causation, whereby causation can be recognised only if the fact that is being considered was a necessary condition of harm.[1] In other words, there can be no liability if it is proven that harm would have occurred even in the absence of that fact. **3**

It should be noted, however, that French courts are not always consistent when considering the existence of lawful alternative conduct. There are some cases, especially when the defendant was in breach of his duty to warn about the dangers of a pharma- **4**

1 See, eg, *G Viney*/*P Jourdain*/*S Carval*, Les conditions de la responsabilité (4th edn 2013) no 353.

ceutical, where the courts have refused to check that the harm would not have occurred in the absence of that breach.[2] These decisions, where causation is in effect overlooked, express a concern for the compensation of claimants, which is very common among French judges. The same concern can be found in medical liability cases, an example of which is given now.

Cour de cassation, Chambre civile 1 (Supreme Court, First Civil Division) 25 January 2017, 15-27.898

RDC 2017, 231, note *JS Borghetti*; RTD civ 2017, 403, note *P Jourdain*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000033943617>

Facts

5 Following a diagnosis of carotid stenosis, a radiologist carried out an arteriogram on a patient. The patient afterwards presented hemiplegia of the left lower and upper limbs and she sought compensation from the doctors who had not informed her about the risks of the arteriogram. The appellate court granted the claim and found the doctors liable both for the loss of the chance of avoiding the harm and for the loss resulting from the patient not being prepared for the harm she had suffered.

Decision

6 The *Cour de cassation* upheld the appellate court's decision. It ruled that 'irrespective of those cases where failure to provide information on the risks inherent in an individual act of prevention, diagnosis or care has caused the patient to lose a chance of avoiding the harm resulting from the occurrence of one of those risks by refusing to allow the act to be carried out, a breach by a medical practitioner of his duty to provide information causes the person to whom the information was owed, when that risk occurs, non-material damage resulting from a lack of preparation for the consequences of such a risk, which, if it is invoked, must be compensated'.

Comments

7 This decision distinguishes two types of loss or harm which can be compensated when a medical practitioner has breached his duty to inform his patient about the risks of the medical act he is about to perform, thus depriving the patient of the possibility to knowingly accept or refuse performance of that act.

2 See, eg, Cass 1 civ, 25 June 2009, no 08-12.632; RDC 2010, 619, note *JS Borghetti*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020801219>.

The first one is the loss of a chance to refuse performance of that act, and thus to avoid the harm which eventually resulted from it. This loss of chance amounts to the probability that the patient would have refused the medical act if she had been correctly informed of the risks, multiplied by the amount of the various losses consequential to the bodily injury suffered as a result of the realisation of those risks.[3] The use of the loss of a chance concept in this context has been criticised for several reasons. One is that the assessment of the probability that the patient would have refused the act if correctly informed cannot be made in any objective manner and is based only on the judge's discretion. Besides, if the patient had been correctly informed about the risks, she would either have accepted or refused the medical act, so that an all-or-nothing approach would be more suited. Indeed, this is a typical case where the balance of probabilities test used in English law would be suitable: if it appeared that, on the balance of probabilities, the patient would have refused the act if she had been correctly informed, then she should be compensated for all the consequences of that act, and not just for a part of them (also taking into account, as the case may be, the negative consequences which would have resulted if the act had not been performed); but if it appeared that, on the balance of probabilities, the patient would nevertheless have accepted the act, she should receive no compensation at all. **8**

Instead, by indemnifying the loss of chance in those cases, French courts show their refusal to consistently apply the lawful alternative conduct doctrine. This can no doubt be explained by French courts' traditional concern for the compensation of those who have suffered bodily injuries. **9**

The second type of loss which can be compensated when a medical practitioner has breached his duty to inform his patient about the risks of the medical act he is about to perform is what French lawyers call the 'unpreparedness loss' (*préjudice d'impréparation*), ie the fact that the patient, who was not aware of the risks, could not prepare herself for their realisation. This type of loss was first recognised by the courts in 2010, even though the *Cour de cassation* gave no details as to how it should be measured, as this is, in theory, a question for lower judges only.[4] It was initially unclear if this type of loss could be compensated only when the risks unknown to the patient materialise, and whether it could be combined with the compensation of a loss of a chance. The present decision gives an affirmative answer to both questions. While it seems logical that a patient should be compensated for her unpreparedness only if the risks for which she could not brace herself materialise, to allow simultaneously this loss and a loss of a chance is debatable. As a matter of fact, the two losses rest on two different counterfactual scenarios: the compensation of unpreparedness rests on the assumption that the **10**

3 Insofar as these losses have not been already compensated, for example by social security. In practice, social security normally covers the financial losses suffered by the victim, so that the medical practitioner only has to pay for the loss of a chance not to suffer extra-patrimonial losses.

4 Cass civ 1, 3 June 2010, no 09-13.591; Bull civ I, no 128; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000022313216>.

medical act would nevertheless have been performed if the patient had been correctly informed, whereas the compensation of a loss of chance is justified by the refusal to accept precisely this scenario. This contradiction is further proof of the fact that French courts are often eager to compensate victims of bodily injuries and are therefore ready to disregard the lawful alternative conduct doctrine in certain circumstances.

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 17 June 2010, 09-67.338

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000022369805>

Facts

11 While driving on the road, A lost control of her vehicle when she tried to avoid a van that was coming towards her and was overtaking dangerously. A's car hit the car driven by V, and then the car driven by C. After having compensated V for her losses, A's insurance brought a regress claim against C's insurance and asked to be reimbursed for half the sum paid to V. The appellate court rejected the claim on the ground that V's harm would have occurred even in the absence of C's car and that C had played no role in V's accident.

Decision

12 The *Cour de cassation* quashed the appellate court's decision. It ruled that the successive collisions occurring within the same period of time and in a continuous sequence constituted the same accident, and that any driver whose vehicle was involved in the accident was liable for any harm caused by this accident.

Comments

13 The solution adopted by the *Cour de cassation* in this case clearly contradicts the lawful alternative conduct doctrine. It is also counter-intuitive, since a driver (or rather her insurance) finds herself liable for a harm in the occurrence of which she played no role. This solution, however, is the result of the logic that governs the special liability regime applicable to traffic accidents under French law.

14 This regime was created by a 1985 statute on the compensation of victims of traffic accidents known as *loi Badinter*.[5] Under this statute, the driver or keeper of a vehicle involved in a traffic accident is strictly liable for any harm caused by this accident.[6] The

5 Loi no 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation, JORF 6 July 1985, 7584.

6 See *JS Borghetti*, Extra-Strict Liability for Traffic Accidents [2018] Wake Forest LR 53, 265.

causation requirement, which is a characteristic of civil liability, therefore applies between the accident and the harm, and not between the driver's behaviour and the harm. This means that a driver can be liable even if he did not cause the harm, provided that the harm was caused by the accident in which his vehicle was involved. This is typically the case when a 'complex accident' occurs, ie when there is a succession of car crashes, as in the present decision. Here, V was liable for C's harm, even though she had played no role in its occurrence, because the vehicle she was driving was involved in the complex accident which caused C's harm.

This case shows that French law is ready to accept that liability can arise, not only when the harm would have happened in the absence of the unlawful element in the defendant's conduct (in contradiction with the lawful alternative conduct doctrine), but even when the harm would have occurred in the absence of the conduct itself. Admittedly, this extreme solution is justified by the special structure of the *loi Badinter*, which is itself clearly intended to make the compensation of victims of traffic accidents as easy as possible. This is nevertheless interesting, as it illustrates how French law is ready to relax the causation requirement. Given that this requirement underpins the lawful alternative conduct doctrine, it should come as no surprise that the doctrine cannot be consistently applied under French law. **15**

Besides, it should be stressed that the extra-strict liability created by the *loi Badinter* is acceptable only because drivers have an obligation to be insured, and claims under this statute must be brought directly against the driver's insurance, and not the driver himself. **16**

7. Belgium

Cour de cassation / Hof van cassatie (Supreme Court) 25 March 1997

Pas 1997, I, 405

Facts

A car accident occurs in a place where only temporary parking was allowed. However, A permanently parked his car there. V, whose car was damaged after a collision, argues that the illegal presence of A's vehicle caused the accident. **1**

Decision

The Supreme Court considered that the trial judge had been correct to exclude the causal link between the permanent illegal parking of the vehicle and the collision caused by its presence at that place. Indeed, after replacing the unlawful parking of the vehicle with correct parking, the trial judge concludes that the damage would have occurred in the same way if the vehicle had been temporarily parked there. **2**

Comments

3 The Belgian Supreme Court developed the theory of the legitimate alternative[1] in this commented decision. This theory consists in assessing the causal link between wrongful conduct and damage by replacing the wrongful act with a lawful act. In other words, it aims at ascertaining whether the damage would have occurred in the same way if the wrongdoer had acted according to the law. If so, there is no causal link between the fault and the damage.

Cour de cassation / Hof van cassatie (Supreme Court) 1 October 2019

RGAR 2020, no 15641

Facts

4 A, driving at high speed, deviated onto the hard shoulder of a motorway and hit a lorry parked there, causing the death of its passenger (V). The lorry's driver (V) had stopped at this location to take his mandatory rest period, even though this action contravened sec 21.4.4 of the Highway Code prohibiting vehicles from stopping or parking on motorways. Both the claimant (V) and the defendant (A) were at fault.

Decision

5 The trial judge denied a causal link between the wrongful parking of the lorry and the death of its passenger. He supported his decision by stating that the damage would have occurred in the same way if the vehicle had been parked on the motorway's hard shoulder due to a mechanical issue. The Supreme Court overturned the judgment, arguing that the judge changed the circumstances of the accident since no breakdown had occurred in this case.[2]

Comments

6 This decision highlights that, except for the removal of the wrongful conduct, the judge may not modify the conditions under which the damage occurred.[3] On the one hand, as part of the hypothetical and abstract reconstruction of the facts, the court may reason by replacing the wrongful act with its legitimate alternative. On the other hand, the existence of a causal link cannot be excluded on the grounds that the damage could also

1 For an in-depth discussion of this topic, see *R Jafferali*, L'alternative légitime dans l'appréciation du lien causal, corps étranger en droit belge de la responsabilité? in: F Glansdorff (eds), Droit de la responsabilité. Questions choisies (2015) 97–164; *B Dubuisson*, Les mystères de l'alternative légitime, in: Entre tradition et pragmatisme – Liber amicorum Paul Alain Foriers (2021) 343.

2 *J Van Meerbeeck*, Le coup de la panne n'est pas une alternative légitime, Les pages 2019, no 63.

3 Cass, 28 May 2008, Pas 2008, 1335; Court of Appeal of Liège, 8 March 2007, JLMB 2007, 1352.

have occurred in hypotheses which are foreign to the concrete circumstances of the case.[4] The judge may only substitute the unlawful behaviour for the lawful behaviour but he cannot change anything else.

Indeed, it is extremely easy to imagine circumstances in which the unlawful con- **7**
duct becomes lawful but the trial judge's reasoning must maintain the same circumstances of the accident as expressly highlighted in the judgment of 1 October 2019.[5] This is the *sine qua non* condition for the application of the theory of the legitimate alternative. Therefore, the trial judge may neither apply different traffic rules nor other author's features.[6] The Supreme Court stated that the 'verification consisting in questioning the possibility of damage without fault cannot "slide" into the mental construction of an imaginary case'.[7] The judge is not allowed to 'completely reconstruct events by resorting to circumstances that did not occur in reality',[8] such as a breakdown in the present case or 'a hut or a tent for work on the road' in another, older case.[9] When altering the facts to an unlimited extent, one could 'at the very least, justify the occurrence of any damage'.[10]

Cour de cassation / Hof van cassatie (Supreme Court) 19 December 2007

Pas 2007, 2385

Facts

When reversing, a drunk driver (A) hit another vehicle regularly parked on the right- **8**
hand side of a road. The hit vehicle was, however, not covered by insurance, as imposed under Belgian law. The owner of the damaged vehicle (V) sues the drunk driver. A defends himself by invoking the victim's fault, namely the lack of insurance.

Decision

The trial judge denied a causal link between the lack of insurance (the victim's fault) and **9**
the accident. To reach this conclusion, the appeal judge virtually replaced the unlawful conduct (the lack of insurance of the hit vehicle) by the lawful conduct (an insured vehicle at the same place). However, the appeal judge did not consider what would have hap-

4 Cass, 18 December 2008, JLMB 2010, 2006; Cass, 23 September 2011, Pas 2011, 2034.

5 For another case with a similar reasoning, see Cass, 28 June 2018, RGAR 2019, no 15535.

6 Civ Mons, 4 March 2008, JJP, 2009, 33.

7 Cass, 21 November 2012, Pas I, 2272.

8 *C Parmentier*, La théorie de l'alternative légitime, comment under Cass, 18 December 2008, JLMB 2010, 2010.

9 Cass, 28 March 2001, Pas I, 174.

10 *R Jafferali*, L'alternative légitime dans l'appréciation du lien causal, corps étranger en droit belge de la responsabilité? in: F Glansdorff (eds), Droit de la responsabilité. Questions choisies (2015) 131.

pened absent the misconduct, ie whether the accident would also have occurred if the vehicle – given the lack of insurance – had not been on the public highway at all.

10 According to the Supreme Court, the trial judge was legally entitled to consider – without modifying the concrete circumstances of the accident – that the accident would have occurred in the same way if the vehicle which A had crashed into had been properly insured. As the victim's misconduct had no effect on the causal link, the drunk driver (A) could be held liable for the entire damage suffered by the car owner (V).

Comments

11 The two last commented cases have a common thread: the alternative conduct at stake is that of the victim and not that of the initial tortfeasor. Indeed, in Belgian case law, this theory is statistically applied more often by the victim as a defence to counter-attack the arguments of the tortfeasor, who tries to be exonerated from all liability by invoking the victim's misconduct. However, ultimately, the reasoning does not change whether we examine the causal link between the victim's or the tortfeasor's fault and the damage.

12 The preferred terrain of the legitimate alternative theory is in traffic law. Several cases assess the link between alcohol intoxication,[11] the (under) age of the driver,[12] the lack of insurance, registration or technical inspection of the vehicle, and the occurrence of an accident. In each case, the trial judge must rule on whether the accident would have occurred in the same way if the vehicle had been on the road lawfully. If so, the trial judge should conclude that there is no causal link. Only the person whose *driving* fault lies at the origin of the accident will pay compensation for the harmful consequences of it.[13] The application of the theory of the legitimate alternative, which is accepted by the Belgian Supreme Court, tempers the rigidity and severity of the theory of equivalence of conditions. A strict application of the 'but-for' test would have led to the author of the wrongful act being held liable (see the analysis in Digest 1, 1/7 nos 1–12). Indeed, the accident would not have occurred, of course, if the driver of the vehicle had simply refrained from putting it into circulation, as the law requires for one of the reasons mentioned in our examples above. Ultimately, the theory of the legitimate alternative makes a selection from among the causes, selecting only those which contributed significantly to the accident. The causal link is ruled out when the misconduct did not significantly increase the risk of the accident occurring.

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11 Cass, 16 September 1986, Arr Cass 1986–1987, 56.

12 Cass, 11 September 1984, Pas 1985 I, 45; Cass, 10 June 2003, Pas 2003, 1143 (commented in *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 5/7 nos 11–19).

13 *N Van De Sype*, Causaal verband en het rechtmatig alternatief, cmt under Cass, 28 May 2008, RABG 2009, 660.

8. The Netherlands

Hoge Raad (Supreme Court) 11 January 2013, ECLI:NL:HR:BX7579

NJ 2013/47 (Amsterdam/Have)

Facts

A company called Have rented several buildings in which it wanted to operate a brothel. **1**
The City of Amsterdam, which had to issue an operating licence for this enterprise, unlawfully did not meet the statutory deadline in which to issue its decision. Have suffered loss because of the delayed permit and held the City of Amsterdam liable in tort. The mayor had the authority to extend the period in which to make a decision, but had not made use of that authority. The appellate court ruled that the single fact that the mayor had that authority did not stand in the way of liability of the city.

Decision

The Supreme Court ruled that the decision of the appellate court that the loss of Have **2**
was causally related with the failure to reach a decision within the period within which it had to be reached is incorrect, as the mayor had the – albeit unexercised – authority to extend this period. A causal relationship can, according to the Supreme Court, not be assumed, since the damage suffered by Have would also have arisen if the mayor had made use of that possibility.

Comments

This case illustrates that the possibility of lawful alternative conduct may stand in the **3**
way of establishing a causal relationship between the unlawful act and the loss suffered. Under Dutch law, this issue is mostly illustrated in cases on decisions of public bodies and on public permits. When someone acts without a permit in a case where a permit would have been granted if it had been requested, no liability arises.[1] The rationale of this line of reasoning is that apparently the scope of protection of the norm violated is limited: when the norm does not evidently serve to protect against the loss at stake and there is a lawful alternative causing the loss, the norm apparently does not serve to protect against that loss.[2]

1 Hoge Raad 3 November 2000, ECLI:NL:HR:2000:AA8108, NJ 2001/108, case note *AR Bloembergen* (EBS/Groenewegen Agro).

2 *DA van der Kooij*, Relativiteit, causaliteit en toerekening van schade (dissertation Erasmus University of Rotterdam, 2019) no 479ff.

9. Italy

Corte di Cassazione (Court of Cassation) 31 July 2013, no 18334

Resp civ prev 2014, 2, 569 with note by *Fontana Vita Della Corte*, Le omissioni del medico e il regime di responsabilità; Dir giust 2013, 2 August, with note by *Basso*

Facts

1 A man suffering from pre-senile cataracts, suffered the detachment of the retina in both eyes and, ultimately, lost most of his sight after the implant of crystalline lenses in a public hospital.

2 The court of first instance ordered the two doctors who performed the surgery and the hospital to compensate the damage suffered. The *Corte d'Appello di Bologna*, the second instance court, reversed the decision of the first instance court.

3 The claimant appealed against the decision of the *Corte d'Appello di Bologna*, arguing that he had not been informed by the doctors of the risks associated with the surgery, and that those risks had not been discussed with him. He also insisted on the defendants' fault in conducting the surgery.

Decision

4 The *Corte di Cassazione* quashed the decision of the Court of Appeal. It affirmed the first instance court ruling that established the liability of the defendants for two different reasons. Firstly, the doctors failed to adequately inform the patient about the risk of a detachment of the retina and of the possible risks connected to the surgical insertion in the eye of an artificial crystalline lens. Secondly, the doctors did not take into due consideration the medical history of the patient and underestimated a number of elements indicative of a high risk of retinal detachment. The Court of Appeal, by rejecting these points, did not offer sufficient grounds to reach an opposite conclusion.

5 The Court ruled that medical professionals are obliged to give the patient all the information regarding treatment, and must ask the patient to sign a form declaring that the patient received such information, so that it can be established with certainty which information was provided to him. Lack of compliance with these rules leads to the establishment of liability for breach of the duty of information owed to the patient.

6 Moreover, the *Corte di Cassazione* held that, in the case at hand, the liability of the defendants for breach of their professional duties of skill and care had to be ascertained on the basis of the opinion of the scientific expert, as the court of first instance had done, while the *Corte d'Appello* failed to convincingly explain why it had set aside the opinion of the expert witness showing lack of due care by the defendants.

Corte di Cassazione (Court of Cassation) 24 February 2010, no 2847

Corriere giur 2010, 1201 with note by *A di Majo*, La responsabilità da violazione del consenso informato

Facts

V underwent a surgical intervention of the eyes for cataracts, performed by A, consisting in the removal of a crystalline lens. Following the intervention, V developed keratitis (inflammation of the cornea) and sought compensation of the damage suffered, holding that the damage was the consequence of the surgical intervention. **7**

The *Tribunale* of Napoli, that is to say the first instance court, rebutted the claim for the compensation of the damage on the basis of two expert reports. The Court held that V's damage was not the consequence of the surgical intervention performed by A, the surgical intervention was necessary and V had not been able to prove a lack of informed consent for said intervention. **8**

The Appellate Court of Napoli, that is to say the second instance court, quashed the first decision. A was held liable for the damage caused by the surgical intervention, although it had been correctly performed, because A failed to prove that they informed V of the risks of the surgery when they got V's consent to perform it. A appealed to the *Corte di Cassazione*. **9**

Decision

The *Corte di Cassazione* held that, on the basis of the contractual relationship existing between doctor and patient, it is upon the former to prove that they clearly explained all of the possible consequences that may occur because of the surgery and of the therapies, in order to acquire the patient's informed consent to the treatment. **10**

The ruling acknowledges that the lack of the informed consent was an autonomous source of liability when the medical intervention caused damage to the patient, even if the medical intervention was correctly performed.[1] **11**

This decision makes clear that the wrongful conduct consists of the infringement of the patient's right to make a free choice because, if the patient V had been duly informed about the risks of the surgery, there would not have been any compensable loss. **12**

Therefore, in the opinion of the Court, the lack of informed consent is by itself a source of liability, even where an intervention is performed according to the *leges artis*;[2] the violation of the right to self-determination is the crucial issue in such a case. **13**

1 Cass 24 September 1997, no 9374, Mass giur it 1997.

2 Cass 30 January 2009, no 2468/2009, Resp civ 2009, 4, 370 with note by *G Facci*.

Comments

14 The Law 22 December 2017, no 2019, affirms the obligation of a medical professional to provide patients with comprehensive information of the consequences and risks of medical treatment and surgical interventions. Previously, as in the case under comment, the source of the duty was found in arts 13 and 32 of the Italian Constitution on personal freedom and the right to health.

15 Italian courts generally declare that the violation of the rule is, by itself, an autonomous source of liability. In practice, the breach of that duty is, in the majority of cases, sanctioned with the obligation to compensate the damage suffered by the claimant when the same claimant was not treated according to the *leges artis,* because of a lack of due care by the attending doctor. On the contrary, if the lack of information does not actually have any consequences on the choice of the patients, and no damage arises from the medical intervention, no liability is established.[3]

16 The first case under examination is, therefore, a good example of the application of that case law. In the case at hand, liability for the damage suffered by the claimant would have been established even if the same defendants had informed the claimant of the possible risks of the surgical intervention because there was a finding of professional negligence in the evaluation of the patient's condition.[4]

17 A different line of cases holds that doctors incur liability for the breach of the information duty even if the adverse consequences suffered by the patient are not due to professional negligence. In the second case under examination, the *Corte di Cassazione* ruled that the mere omission to provide the relevant information about the risks associated with the intervention was enough to establish liability because the lack of the relevant information prevents a patient from making a free decision about whether or not to undergo said intervention.[5] If, however, the violation of the rule did not substantially increase the risk of a violation of the patient's autonomy, compensation may be denied. For example, an obstetrician, who was not informed of the risk of pregnancies, as it happened, following the intervention of tubal ligation, which she underwent, could not recover, because the Court held that she should nonetheless have been aware of that risk because of her profession.[6]

3 Cass 5 September 2022, no 26104.

4 See, eg, Cass 2 July 2010, no 15698; Cass 11 May 2009, no 10741; Cass 8 October 2008, no 24791.

5 Of the same opinion, Cass ord 6 October 2021, no 27109, Jurisdata.

6 Cass 27 March 2018, no 7516, Foro it 2018, I, 2401.

10. Spain

Tribunal Supremo (Supreme Court) 4 November 2010

RJ 2010\7998

Facts

V1 and V2, parents of V3, a child who suffered from phocomelia due to the absence of both hands and two thirds of the forearms, sued A1, a gynaecology and obstetrics specialist who attended the mother during her pregnancy and labour, and A2, a health insurance company with whom they had entered into a health care insurance contract, for damages arising from the lack of information that had deprived them of the possibility of interrupting the pregnancy. Both the Court of First Instance and the Court of Appeal ruled in favour of the claimants and held that there had been negligence in the physician's conduct, thus preventing the mother from having the option to terminate the pregnancy, and awarded pecuniary and non-pecuniary damages, although in different amounts. 1

A1 and A2 appealed in cassation alleging, among other arguments, that the lower courts had violated the principle of burden of proof and that proof of causation and fault should fall on the claimant. The Supreme Court dismissed the claim and confirmed the judgment of the Court of Appeal. 2

Decision

The Supreme Court considers that the judgments of the courts of first instance do not use the *res ipsa loquitur* rule to establish causation and fault, altering thereby the general rules on the burden of proof of the causal relationship and on the proof of fault in cases of medical liability. It contends that it uses, as a defence, the objective imputation criterion offered by the so-called 'lawful alternative conduct' (*conducta alternativa conforme a Derecho*), according to which, damage is not attributable to a cause if, had the defendant acted according to law, the same type of damage and to the same extent would have occurred. The practical effect of the application of this doctrine is to transfer the burden of proof to those who have acted negligently in order to verify whether the conduct of the defendant, when compared to its diligent alternative, did or did not increase the risk of the damage occurring. If it did not, then the only attributable damage would be the (non-pecuniary) harm resulting from deprivation of the power to decide to abort or to exercise freedom of procreation. The Court holds that it is a proven fact that there was negligence of the co-defendant doctor and that there was lack of information regarding the disturbing data from the morphological ultrasound and that there was, as a consequence, deprivation of the possibility to choose or decide on a eugenic abortion within the legal term of the twenty-two weeks of gestation. The will of the patient, who underwent all types of prenatal diagnostic tests, to abort is also a proven fact, with the consequent effect on recoverable damages, in accordance with the criteria admitted by judgments of this Chamber of 21 December 2005 and 24 October 2008. 3

Comments

4 The doctrine of the 'lawful alternative conduct' (*conducta alternativa conforme a Derecho*) is a German legal transplant which has been followed both in criminal and civil law. In civil law, it is rarely applied and it gives rise to a great deal of confusion, firstly, due to the incorrect Spanish translation of the German terminology, which, in all Spanish translations, omits that it is a 'defence' (*Einwand*).[1] In Spanish civil law, the doctrine was imported by Pantaleón in 1990, together with the distinction between causation and scope of liability according to the German doctrine of *objektive Zurechnung* (*imputación objetiva*). Pantaleón acknowledged that the doctrine of lawful alternative conduct could be considered either as a case of the scope of the protective rule (*Schutzzweck der haftungsbegründenden Norm*) or an increase in risk (*Risikoerhöhung*) but, under the influence of German criminal law, considered that the topic was best treated as an instance of increase in risk.[2] According to this point of view, a harmful event is not objectively attributable to the negligent conduct that caused it when such conduct, compared to its diligent alternative (ie with the conduct that, in those circumstances, would not have exceeded the limits of the permitted risk), has not increased the risk of the harmful event in question occurring. In these cases, with respect to the actual harmful event that has actually occurred, the negligent conduct of the agent has been exactly the same as its diligent alternative: it has created the same risk of this event occurring (or even a minor risk or, in any case, a risk that is allowed). In this sense, it is contended that the negligent conduct of the defendant 'is not negligent' with respect to the specific harmful event with which the attribution is concerned.[3]

5 In most cases where lawful alternative conduct has been discussed in the context of actions, it has not excluded liability. Thus, for instance, in a negligently issued audit report, the Supreme Court rejected the argument that, even if the audit report had disallowed the content of the social accounts, the ensuing damage would have occurred any-

1 So the German expression 'Einwand des rechtsmässigen Alternativverhalten' is sometimes translated as 'conducta alternativa correcta' (*L Diez-Picazo*, Fundamentos de Derecho patrimonial, vol V (2011) 374), 'comportamiento alternativo lícito' (*FJ Infante Ruiz*, La responsabilidad por daños: nexo de causalidad y "causas hipotéticas" (2002) 202 ff), 'conducta alternativa lícita' (*F Peña López*, Inexistencia de responsabilidad cuando se pruebe que el daño se hubiera producido igualmente con un comportamiento correcto (el argumento de la 'conducta alternativa lícita'), in: M Herrador Guardia, Responsabilidad civil y seguro. Cuestiones actuales (2017) 149 ff, reprinted in El argumento de la 'conducta alternativa lícita' en el derecho de daños, Revista IBERC (2019) 3, 1–31 available at <www.responsabilidadecivil.org/revista-iberc>. Case law tends to follow Díez-Picazo's or Pantaleon's translation as 'conducta alternativa conforme a Derecho', *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889-1989, vol 2 (1990) 1561, at 1587.

2 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889-1989, vol 2 (1990) 1590.

3 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889-1989, vol 2 (1990) 1577.

way, because this would deny 'the importance of the content of a legally required report' and would 'ultimately lead to a general irresponsibility of the auditors';[4] or, in a case where the presence of a cow in the middle of a road was also causative of the collision between three vehicles, regardless of whether their drivers were drunk and could have hardly therefore anticipated the crash.[5]

Since, in order to exclude liability, the required standard of proof must be met, and this standard is very high in Spanish law ('beyond any reasonable doubt'), there is speculation as to what would happen if the act merely increases the risk of harm. But in these cases, especially when dealing with liability of health care personnel, this doctrine, in the form of proportional liability, would not be of much use because the doctrine of loss of a chance has taken over from it.[6] Even in cases of lack of information or of uninformed consent, Spanish courts currently tend to apply the loss of a chance doctrine, which generally leads to halving the compensation amounts, for lack of a better parameter to assess what the patient would have done had he or she been duly informed. **6**

When compensation for wrongful birth was introduced in Spain at the end of the 1990s, some decisions had considered obiter dicta that, in order to obtain compensation, the claimant had to prove that if she had been correctly informed of the malformations of the foetus, she would have terminated the pregnancy.[7] Some legal writers considered that requiring this evidence when it was proven that the physician had been negligent by not informing, or by providing wrong information to the mother about these malformations, seemed unfair, since the party who had committed a fault was not the claimant, but the defendant health professional and that, in any case, if someone had to prove that the damage would have been caused anyway, it would be that healthcare professional. Therefore, the claimant simply had to state that she had undergone a test and that, if she had known the result in time, she would have had an abortion, thereby releasing her from the burden of proving whether or not she would have had an abortion. **7**

4 STS 5 March 2009 (RJ 2009\1631).

5 Court of Appeal of Salamanca, Section 1, 27 February 2019 (JUR 2019\108680). In other cases, in the context of lawful alternative conduct as increase in risk, the Supreme Court does in fact discuss negligence, as in the case of the pilot of a helicopter who suffered an accident when flying too low and close to rocky mountains (STS 2 January 2006 (RJ 2006\129), or in the case of personal injury suffered by a skier who collided with an artificial snow cannon negligently placed by the company running the ski resort close to a ski slope (STS 9 February 2011 (RJ 2011\1822). For other cases, see *FJ Infante Ruiz*, La responsabilidad por daños: nexo de causalidad y "causas hipotéticas" (2002) 204ff.

6 See *F Peña López*, Inexistencia de responsabilidad cuando se pruebe que el daño se hubiera producido igualmente con un comportamiento correcto (el argumento de la 'conducta alternativa lícita'), in: M Herrador Guardia, Responsabilidad civil y seguro. Cuestiones actuales (2017) 163ff.

7 Thus STS 4 February 1999 (RJ 1999\748) rejects causation by saying that whether the mother would have aborted had she been informed is just a 'sheer hypothesis', and so does STS 7 June 2002 (RJ 2002\5216) by saying that there is no piece of evidence in the proceedings that proves that the mother would have terminated her pregnancy if she had known about the malformation of the foetus. See *M Martín-Casals/J Solé*, Responsabilidad civil por la privación de la posibilidad de abortar (*wrongful birth*). Comentario a la STS, 1ª, 18.12.2003, Indret 2 (2004) 1–32.

However, fairness also requires that health personnel are not to be held liable for a simple statement, and that they should be given the possibility of rebutting that presumption by convincing the judge that, despite having acted negligently, the result would have been the same.[8] The authors just mentioned the lawful alternative conduct doctrine and that it could be useful to ascertain what would have happened had the defendant acted lawfully. This idea, if applied to wrongful birth cases, would affirm that, in spite of his or her negligent omission, the doctor would not be liable for the pecuniary and non-pecuniary consequences of having a severely handicapped child if it was proven that, had he or she diligently provided the relevant information, the pregnant mother would not have had an abortion. The practical consequence of this approach was that, in the majority of cases, health personnel would not have been able to obtain sufficient evidence to rebut the presumption and that, in most cases, the mothers would have received full compensation.[9]

11. Portugal

Tribunal da Relação do Porto (Porto Court of Appeal) 18 April 2016[1]

1112/12.3TJPRT.P1

Facts

1 The tortfeasor (A), a bank, refused to pay the injured party V three cheques (with the gross amount totalling € 15,960) that had been drawn against V by C, another company that was V's client and that was subsequently declared insolvent. C communicated with the bank alleging that those cheques should not be paid as they had been mislaid, which was not

8 *M Martín-Casals*/ *Solé*, 18.12.2003, Indret 2 (2004) 8. This approach, as a solution for this specific case, was new, but not so the background idea, which had already been expressed by *Pantaleón* (fn. 1) 1588 f, as regards the different points of view in German legal writing of Zeuner and Mertens regarding a case of informed consent.

9 However, some authors, such as *F Peña López*, Inexistencia de responsabilidad cuando se pruebe que el daño se hubiera producido igualmente con un comportamiento correcto (el argumento de la 'conducta alternativa lícita'), in: M Herrador Guardia, Responsabilidad civil y seguro. Cuestiones actuales (2017) 165 and 170, did not understand the meaning of this approach, overlooked the judgment under comment and, by misreading a judgment issued five years previously (STS 21 December 2005 [RJ 2005\10149]), mistakenly held that since 2005 the Supreme Court had rejected the lawful alternative doctrine in the case of wrongful birth 'due to evaluative considerations'. Believing this, legal writing and case law have started moving wrongful birth actions into the area of loss of a chance. For a general summary of the recent evolution of case law in this area, see *J Tomillo Urbina*, Veinte años de wrongful birth en España (1997-2017): Inicio, desarrollo y consolidación jurisprudencial, in: L Prats Albentosa/G Tomás Martínez, Culpa y responsabilidad (2017) 871–893.

1 <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/7bd45a901a0ee95580257fa400308ba7?OpenDocument&Highlight=0,%E2%82%AC15.959%2C52>.

true. The claimant V demands damages from A, based on the fact that A had acted illicitly by not verifying the information conveyed by C, which A was legally bound to do.

Decision

The case is of interest to this matter since the court of first instance uses the concept of potential cause to waive the responsibility of the bank. It argues that even if A had acted according to the law and verified the received information, C's bank account was overdrawn (although the company had not been declared insolvent at this time) and V could not have been paid. **2**

V appealed to Porto's Court of Appeal, arguing that the court of first instance should not have invoked this 'negative relevance of the potential cause',[2] which is inadmissible in Portuguese law to exempt the tortfeasor from liability, according to many authors, except for cases in which the tortfeasor's fault derives from a legal presumption (cases of arts 491, 492 and 493/1 of the CC). **3**

The Court of Appeal does not use the concept of negative relevance of the potential cause, it simply argues that there was no causal link between the bank's omission and the losses suffered by the injured party, and instead uses the concept of lawful alternative conduct, which results in the same premise argued by the court of first instance: even if the bank had followed the law, the account was overdrawn and V would not have been paid. For this reason, the appeal was dismissed. **4**

Comments

Articles 491, 492 and 493 of the Civil Code have the particularity of setting out presumptions of fault of the tortfeasor when the preconditions stated in these articles are verified. As a result, the burden of rebutting these presumptions falls on the tortfeasor. According to the above-mentioned articles, amongst the options the tortfeasor has in order to rebut these presumptions, lies the opportunity of proving that the losses would still have been caused if the tortfeasor had not acted improperly. This is a novelty of the Civil Code presently in force, inspired by similar provisions in the German BGB. Although most authors consider that this lawful alternative conduct and the concept of negative relevance of the potential cause are two expressions used to describe the same concept,[3] **5**

2 This theory simply states that the author of the event that is the real cause of the losses suffered may have his liability excluded by invoking that this potential cause would have produced the same damage. The general rule is that this is *not* a possibility awarded by Portuguese law: the potential cause does not interrupt the causal link between the real event and the losses, therefore the author of the real cause is liable for the damage.

3 Many authors state that these three articles contain an exception to the general rule that a potential cause does not exempt the author of the event that is the real cause of the losses of his liability, eg *Antunes Varela*, Das Obrigações em Geral (2005) 619.

other authors[4] differentiate between both ideas, arguing that the former relates to an intellectual hypothesis presented by the tortfeasor and the latter refers to a parallel event to that of the tortfeasor, which conflicted with the cause of the losses, interrupting it or even preventing it completely.[5] Authors who follow this differentiation between both concepts believe this has an important consequence: in the case of lawful alternative conduct, the tortfeasor denies that the event for which the tortfeasor is responsible is the real cause of the losses, since, had he acted legally, the losses would still have been produced;[6] whilst in the second case (negative relevance of the potential cause), he argues that whilst his misconduct was the real cause of the damage, the losses would have still happened due to the parallel event[7] that coincidentally occurred at the same time.

6 Although it may seem a theoretical problem, this distinction helps explain why the 'negative relevance of the potential cause' is not generally recognised in Portuguese law:[8] a nurse that administered poisoned medication to a patient who later dies may not invoke the fact that the patient would have later died naturally anyway as a means to

4 *RP Mascaranhas Ataíde*, Responsabilidade Civil por Violação de Deveres do Tráfego, Tese de Doutoramento em Ciências Jurídico-Civilísticas apresentada à Faculdade de Direito da Universidade de Lisboa em 2013 (2015) 925–933.

5 Antunes Varela describes the potential cause of the losses as the hypothetical or real event that would have the tendency to produce certain losses if those had not been produced by a different event (the real cause of the losses), in: *Antunes Varela*, Das Obrigações em Geral, vol I (2000) 618ff.

6 In this case, the author explains that if the tortfeasor is successful in proving that following the law would have resulted in the same losses being produced, *there is no causation* between his fact and the losses suffered by the injured party.

7 Here, the tortfeasor is not able to argue that there is no link between the event for which he is responsible and the losses: he merely argues that, for that event, even if there had been no misconduct, the same losses would have resulted from misconduct of a third party or force majeure event that coincidentally happened at the same time. As an example, Mascaranhas Ataíde presents the situation of a lorry that proceeds to overtake a cyclist, not observing the legally established minimum distance. If the driver wishes to invoke the negative relevance of the potential cause, he can prove that the cyclist was under the influence of alcohol and suddenly veered into the path of the lorry. For that reason, following the legally established minimum distance to overtake would not have prevented the accident. According to the author, it is a very different thing to argue that it was not the illegal overtaking which caused the accident for the simple reason that the cyclist was intoxicated and would still have veered into the path of the lorry, which corresponds to invoking lawful alternative conduct.

8 As we have said, most authors translate the possibility of arguing lawful alternative conduct in the cases of arts 491, 492 and 493 as the idea that the Civil Code is allowing the negative relevance of the potential cause to be invoked, although accepting that these cases are exceptions to the general rule of irrelevance and may not be analogically applied to different circumstances. In this 2015 case decided by the Lisbon Court of Appeal, the Court argues that, in cases where there is a presumption of fault, the tortfeasor can either prove that he is faultless or prove a potential cause to the losses: decision on Case no 249-11.0TBSRQ.L2-8, 30 April 2015, <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/e84f6dccd63276a480257e51002e83c5?OpenDocument>.

exclude their responsibility, as all preconditions of tort liability are present in the case and this 'hypothetical cause' for the losses[9] cannot be invoked.

12. England and Wales

Barnett v Chelsea and Kensington Hospital Management Committee, High Court (Queen's Bench Division) 8 November 1967

[1969] 1 QB 428

Facts

B, a night-watchman, became ill after drinking tea in the early hours of New Year's Day 1966, and attended the casualty department of the defendant's hospital. The nurse on duty informed the casualty officer on call by telephone, and the casualty officer (perhaps assuming that B had consumed excess alcohol the night before) instructed her to tell B to go home and consult his own doctor. B left the hospital, and a few hours later died from arsenical poisoning. His widow sued the defendant in negligence. 1

Decision

Nield J found that the casualty officer had been negligent in failing to investigate or diagnose B's condition, but that B would probably have died even if properly treated. The onus of proof as to causation lay with the plaintiff, but even if it had been on the defendant, they would have discharged it. The only treatment which was likely to have worked was the use of a specific antidote, and there was no reasonable prospect of B having been given this before he died. It followed that the plaintiff had not established on the balance of probabilities that the defendant's negligence had caused her husband's death and so her claim must fail. 2

9 The idea of a hypothesis in medical liability cases is frequently used to limit the doctor's liability – hypothetical consent – although it appears correctly underpinned on the concept of lawful alternative conduct. If we take the case of a doctor who has not obtained informed consent from his patient for surgery but argues that his patient would have consented to the surgery had he been correctly informed, he is not arguing potential cause but actually arguing a 'lawful alternative conduct', ie, he aims to prove (and carries that burden) that the patient would not have acted any differently if he had been correctly informed. An example is the recent STJ's decision on Case no 148/14.4TVLSB.L1.S1, 8 November 2020: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/c1adad7a5968e9df8025862c0037b7de?OpenDocument&Highlight=0,alternativo,l%C3%ADcito>.

Comments

3 English law deals with the problem of lawful alternative conduct in this and similar cases as a question of factual causation, and *Barnett* is commonly cited as an example of the operation of the 'but-for', or *sine qua non*, test of causation in fact. The requirement that the claimant prove but-for causation on the balance of probabilities applies across the law of negligence and in other torts where liability is contingent on the defendant's wrongful conduct having caused damage, although exceptionally the courts have departed from this requirement where of the view that its application would lead to injustice.[1]

R (Lumba) v Secretary of State for the Home Department, Supreme Court, 23 March 2011

[2012] 1 AC 245

Facts

4 Legislation conferred on the defendant powers to detain foreign nationals convicted of criminal offences, pending their deportation. According to the defendant's published policy on the application of these powers, there was a presumption that foreign nationals should be detained only where their detention was justified. However, for a period of over two years, the defendant maintained an unpublished policy which amounted to a near blanket ban on release, regardless of whether removal from the country could be achieved and the apparent level of risk posed to the public by the foreign national. It was unlawful for the defendant to maintain and apply an unpublished policy which was inconsistent with the published policy. The claimants were foreign nationals who had been detained pursuant to the unpublished policy, and the question arose as to whether they were entitled to damages in the tort of false imprisonment. The Court of Appeal held that there had been no false imprisonment, because they would inevitably have been detained lawfully in any event. The claimants appealed to the Supreme Court.

Decision

5 The Supreme Court held by a 6:3 majority that the defendant was liable to the claimants in false imprisonment. All that a claimant had to prove to establish false imprisonment was that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifted to the defendant to show that there was lawful justification for so doing. The law did not recognise any defence of causation which would render detention lawful by reference to how the executive could and would have acted if it had acted lawfully, as opposed to how it did in fact act. It followed that the claimants had been falsely imprisoned for the period in which the unpublished policy was in force. However, a dif-

1 See *J Goudkamp*/*D Nolan*, Winfield & Jolowicz on Tort (20th edn 2020) §§ 7–029 ff.

ferently constituted 6:3 majority held that the claimants were entitled to only nominal damages, since the fact that they would have been detained in any event meant that they had not suffered any loss as a result of the unlawful exercise of the power to detain. The overall position of the court was summed up by Lord Dyson as follows:

> 'If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort has not been committed.'[2]

Comments

The explanation for the imposition of liability in this case lies in the fact that false imprisonment is a form of trespass to the person, and hence actionable without proof of damage. This can be contrasted with the cause of action for negligence, where damage is an essential element of the tort. It follows that in false imprisonment cases, the lawful alternative conduct question is not relevant to the liability issue, although it may (as in this case) have a bearing on the award or amount of compensatory damages. Despite the dissenting judgments, and the contrary view of the Court of Appeal, the majority's reasoning on the liability question seems clearly to be correct as a matter of legal principle. More controversy surrounds the question of damages, with some commentators arguing that substantial damages should be awarded in such cases as a marker of the significance of the violation of the claimants' rights,[3] a view that was also adopted by a minority of the judges in the case.[4] However, in subsequent English case law, there has been little judicial enthusiasm for such 'vindicatory' awards.[5] **6**

13. Scotland

Kay's Tutor v Ayrshire & Arran Health Board, House of Lords, 14 May 1987

1987 SC (HL) 145, 1987 SLT 577, [1987] 2 All ER 417

Facts

V, the father of a boy whose deafness the father alleged was due to medical negligence, raised a claim for damages against A, the employers of the medical staff whose alleged **1**

2 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [70].

3 See, eg, *R Stevens*, Torts and Rights (2007) 59 ff; *J Varuhas*, The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages (2014) 34 OJLS 253.

4 For full discussion, see *N McBride*/*R Bagshaw*, Tort Law (6th edn 2018) 792 ff.

5 See, eg, *Shaw v Kovac* [2017] EWCA Civ 1028, [2017] 1 WLR 4773 (medical non-disclosure). See also the recent decision of the High Court of Australia in *Lewis v Australian Capital Territory* [2020] HCA 26, a case with similar facts to *Lumba*.

negligence was at issue. When the boy had been admitted to hospital suffering from meningitis, a doctor had negligently administered a dose of penicillin 30 times that which had been prescribed by the consultant who had first examined the boy. The boy initially suffered seizures from which he recovered, but on his release from hospital he was found to be deaf.

2 At first instance, the judge concluded that, while the meningitis had damaged the boy's auditory nerve, the overdose of penicillin had materially contributed to the deafness. He found A liable in damages. A appealed against that decision.

Decision

3 The Inner House of the Court of Session allowed the appeal, holding that the judge's finding of fact at first instance that the doctor's negligence had materially contributed to the deafness was not based upon sound evidence. On the contrary, the appeal bench found that the available evidence did not support the view that the overdose had had any causal connection to the boy's deafness, which it was therefore concluded had been caused entirely by the meningitis.

Comments

4 The argument (commonly found in civilian jurisdictions) that the damage would still have been caused had the party responsible instead undertaken some alternative lawful conduct (what in Germanic legal systems is referred to as *rechtmäßiges Alternativverhalten*) is dealt with in Scots law by reference to standard principles for determining causation-in-fact. The question is asked: would the damage have occurred even if the defender had conducted itself with sufficient care? If the answer (on the balance of probabilities) to this counterfactual question is 'yes', then it is concluded that the necessary causal connection has not been demonstrated and the defender is not held responsible for the harm caused. This judgment (which is comparable to the English case of *Barnett v Chelsea and Kensington Hospital Management Committee*,[1] discussed in the English and Welsh section in this volume[2]) exemplifies this approach, the appeal bench's conclusion being that there was no reliable evidence available to the court to justify finding a causal connection between harm and loss. In other words (and to put it in terms of the Germanic conceptual approach[3]): had the doctor engaged in lawful alternative conduct (by acting competently), it is probable that the loss would still have occurred in any event.

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1 [1969] 1 QB 428.

2 See discussion at 5/12 nos 1–3.

3 See, for a further discussion of this point, the discussion in the Austrian report at 5/3 nos 3–5.

14. Ireland

Geoghegan v Harris, Irish High Court, 21 June 2000

[2000] IEHC 129, [2000] 3 IR 536[1]

Facts

A carried out a dental implant procedure on V; nerve damage was caused during the procedure, leaving V with chronic neuropathic pain. V alleged that A negligently failed to warn him of the risk and sought damages for the injury caused by the procedure. **1**

Decision

Kearns J followed established authorities on the duty to warn of risks associated with elective surgery and found that A should have provided a warning in respect of the risk of nerve damage. Failure to do so was negligent. But liability was refused on the basis that, had a warning been given, the plaintiff would probably have undergone the surgery anyway and the damage would still have occurred. The court should use an objective test of what a reasonable patient in V's position would have done if a warning had been given, unless a reliable picture of V's likely subjective choice can be determined by credible evidence. In this case, Kearns J found sufficient evidence of V's subjective perspective; he found V to be 'a man haunted by pain and somewhat overwhelmed by his condition' and so it was probable that he would have undertaken the surgery despite the risk. **2**

Comments

In negligence cases, it must be shown that the negligent aspect of the behaviour was a cause of the injury or loss complained of. If the injury would have occurred anyway, then no liability will be imposed. Failure to warn cases can be problematic, as victims may give self-serving evidence of what they would have done if they had received a warning and they may also be affected by the hindsight of living with the consequences of the injury or loss. Kearns J's approach, using an objective test only giving way to a subjective assessment if credible evidence of the particular person's response is available, was endorsed by the IESC subsequently.[2] **3**

A similar approach can be seen in the product liability case of *Duffy v Rooney and Dunnes Stores (Dundalk) Ltd.*[3] This involved a child's coat, supplied by the second defen- **4**

1 Analysed by *J Trainor*, Informed Consent and the Duty to Disclose: How Ireland Stands in Comparison to Some Other Common Law Jurisdictions (2005) 11 MLJI 5.

2 *O'Carroll v Diamond* [2005] IESC 21; [2005] 4 IR 21, noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2005 (2006) 348, no 17ff.

3 [1997] IEHC 102; IESC 23 April 1998.

dant (A), lacking a warning in respect of flammable properties. V was wearing the coat standing next to an open fire; the coat caught fire and V was seriously burned. The coat was bought for V by her grandmother; while the grandmother claimed she would not have bought the coat if it had had a flammability warning, the evidence showed that flammability was not a major consideration in making the purchase. There was also evidence that V's mother had dressed V in other garments that did carry flammability warnings on the day of the accident, so a flammability warning on the coat would not have deterred her from putting it on V. Laffoy J found that A was negligent in not attaching a flammability warning to the garment, but that the injury to V would have occurred even if such a warning label had been attached. The IESC upheld Laffoy J's decision. The same approach has been applied in other contexts.[4] The issues in these cases are treated as a matter of causation, rather than a separate doctrine.

GE v The Commissioner of An Garda Síochána (Irish Police), Irish Supreme Court, 2 December 2022

[2022] IESC 51

Facts

5 V was awaiting a decision on his application for subsidiary protection under the International Protection Act 2015 when travelling on a bus from Northern Ireland back into the Republic. He was arrested and detained by the police in a border town and later transferred to prison. He made a *habeas corpus* application and the IESC held that his detention was unlawful and ordered his release.[5] V sued A for false imprisonment. In the IEHC, A argued that the unlawfulness related to a technical deficiency on the face of the warrants used to detain the plaintiff. These were rectified and he was subsequently lawfully detained. A argued that only nominal damages should be awarded for the unlawful detention, because the plaintiff could have been lawfully detained if the technical errors had not been present. The IEHC rejected this argument and awarded the plaintiff € 7,500 in general compensatory damages.[6] A appealed, but the Court of Appeal upheld the IEHC decision.[7] A further appealed to the IESC.[8]

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4 *Skinner v Hartnett & Cork Corporation*, unreported IEHC, 3 February 1995; *BME McMahon*/*W Binchy*, Law of Torts (4th edn 2013) [2.11] fn 14. A crossing light for cyclists left inadequate time to cross the road. P was struck by a car when crossing. P crossed when the light was red, so even if the green light had been available for longer, it would not have availed P in this instance. *Stapleton v O'Regan* (1961) 95 ILTR 1 (IESC) applies the same approach to P's contributory negligence, see Kingsmill Moore J at 5; *McMahon*/*Binchy*, Law of Torts (4th edn 2013) [2.38] fn 53.

5 Unreported, IESC 26 August 2011, mentioned by the IECA at [2021] IECA 113 [5] ff.

6 Unreported, IEHC May 2013, discussed by the IECA at [2021] IECA 113 [9] ff.

7 [2021] IECA 113, [2021] 2 ILRM 441, noted by *S Walsh* (2022) 21 Hibernian Law Journal 140; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, no 22 ff.

8 Leave to appeal was granted in *GE v Commissioner of An Garda Síochána* [2022] IESCDET 20.

Decision

The IESC dismissed the appeal and upheld the award of €7,500 for false imprisonment. **6**
The court refused to adopt the approach taken by the UKSC and the HCA.[9] The IESC noted that damages could be reduced on the basis of contributory negligence; the award in the present case was considered to set an appropriate balance between the police wrongdoing and V's own contribution to the circumstances of his detention.

Comments

The tort of false imprisonment relates to the vindication of personal liberty and the **7**
IEHC, IECA and IESC regard it as unsuited to the use of the causal principles used in negligence cases to determine the link between unlawfulness and loss. The fact that the police failed to act lawfully merits an award of substantial damages even if the same consequence could have occurred through lawful behaviour. V's underlying behaviour that made him susceptible to being lawfully detained was treated as a relevant factor in setting the amount of damages. The IESC noted that it was possible for a V's behaviour to warrant a total denial of damages in respect of some wrongs, but that it would not be appropriate to fully deny damages in respect of unlawful arrest and detention.[10]

15. Malta

Michelina Spiteri and others v Tabib Ewlieni tal-Gvern (Chief Government Medical Officer) and another – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 19 June 2003

Facts

The father and husband of the plaintiffs was undergoing a course of chemotherapy for **1**
mesothelioma due to exposure to asbestos. The first course started on 22 April 1994 and the medicine was administered gradually by slow intravenous infusion, without ill effects. A second course was administered by the same method on 12 May 1994, again without ill effects. The third course was administered on 1 June 1994. Unlike the previous two occasions, this time the medicine was administered directly by means of intravenous injection, although the patient complained of pain during the process. It was later determined that the method used in administering the third course of therapy was 'injudicious and careless'. After some time, necrotising cellulitis developed at the site of the injection as a result, and the patient had to undergo surgery on 18 and 20 July 1994 for

9 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245; see also 5/12 no 4ff; *Lewis v Australian Capital Territory* [2020] HCA 26.

10 The court cited *McCord v Electricity Supply Board* [1980] ILRM 153, a breach of contract case, as an example of V's contribution leading to a total denial of any damages.

a skin graft. He was hospitalised until 22 August 1994. Because of this condition, the patient could not flex his elbow.

2 On 13 January 1995, the patient gave up his employment due to the condition of his health. He died on 12 July 1995. The cause of death was mesothelioma, from which he had suffered since before this episode; the necrotising cellulitis was not a factor contributing to his death.

3 As a consequence of his having given up his employment before his death, the patient's wife and children did not receive the monetary benefits they would have received had he died while still employed.

4 Claiming that the medicine was wrongly administered by direct injection, and that the complications which developed as a result led to their husband and father having to give up his employment, the plaintiffs sued the hospital for damages.

Decision

5 The court found that defendants were to blame for the injury suffered by the victim as a result of the injudicious administration of the medicine. It therefore proceeded to quantify the damage suffered by the plaintiffs as the victim's successors.

6 Concerning the claim for compensation for the loss of the financial benefits lost by the plaintiffs because their husband and father had given up his employment before his death, the court observed that the victim himself had already received a financial benefit during his lifetime as a consequence of giving up his employment. That part of the claim was therefore dismissed.

7 The court acknowledged also that, considering the state of his health and that he was in the terminal state of a debilitating illness, the plaintiffs' husband and father would probably have given up his employment even without the added complication of the necrotising cellulitis. However, it was also a fact that he suffered a disability not only because of his illness but also because of the necrotising cellulitis, which cannot, therefore, be disregarded as a concurrent cause of his incapacity. Considering the relative gravity of the two causes of the victim's incapacity, the court, after quantifying the damages using the usual 'multiplier' method for assessing loss of earnings between termination of employment and death, ordered the defendants to pay 25 % of the loss (reasoning that the mesothelioma was a more serious factor than the necrotising cellulitis). No appeal was entered.

Comments

8 The victim would have had to give up his employment in any case because of his illness. However, the loss of the effective use of his arm as a consequence of the wrongly administered procedure would, by itself, have been a sufficient cause to bring about the same result and this, in the view of the court, justified the decision to hold the defendants liable for a portion of the damages. The fact therefore that, even if the therapy had been properly ad-

ministered, the victim would still have suffered a loss, was not deemed sufficient to exclude liability, also because the harm hastened the patient's retirement from employment.

On the other hand, although the victim's injury, by itself, would have been sufficient to cause the whole loss, the plaintiffs were awarded only a proportionate share because otherwise they could possibly have received damages twice over if the other cause – the mesothelioma – were to be proved to have been due to a negligent failure of the victim's employer to protect him from exposure to asbestos. 9

Joanna Briffa v Spinola Development Company Ltd – Qorti tal-Appell (Court of Appeal) 9 January 2009

Facts

The plaintiff is the owner of a tenement, which she used to rent out on short lets. The tenement is adjacent to a site belonging to the defendant company on which, over a period of years. the defendant carried out extensive works, including rock blasting. During the course of these works, damage was caused to the plaintiff's tenement. The plaintiff sued the defendant company claiming the cost of repairs to her property and also loss of income because she was unable to rent out her property for the duration of the works on the defendant's site. 10

Decision

The first instance court held that it was established that the defendant had caused structural damage to the plaintiff's property and it should therefore pay the cost of the necessary remedial works. The court observed, however, that, apart from the damage caused by the defendant, the tenement was in a poor state of general maintenance. Nevertheless, the main cause preventing the plaintiff from renting out her tenement was the damage caused by the defendant and also the inconvenience of having a construction site close by, and not the poor state of maintenance. The court therefore ordered that the defendant should pay the loss in rental income incurred by the plaintiff in addition to the cost of repairs. 11

The defendant appealed, arguing inter alia that the plaintiff had failed to prove that it was the works carried out by the defendant which had prevented her from renting her property. 12

The Court of Appeal observed that, although the works carried out by the defendant were indeed a factor to be taken into account, nevertheless the poor state of maintenance was also a relevant factor and the plaintiff should bear a portion of the loss on that account. In any case, under the circumstances, the plaintiff ought to have minimised the loss by renting out the tenement at a reduced rent in consideration of the inconvenience due to the works. Considering also that, even under ideal circumstances, it 13

was most unlikely that the tenement would have been let uninterruptedly for the whole duration of the works, the Court of Appeal drastically reduced the damages awarded by the first instance court for lost rental income from Lm 14,000 (approx € 32,600) to Lm 3,000 (approx € 6,988).

Comments

14 Unlike the *Spiteri v Chief Government Medical Officer* case discussed at 5/15 no 1 above, where the plaintiffs would still have incurred the entire loss even if the defendant had acted correctly, the plaintiff in this case would not have incurred the entire loss but would still have incurred part of the loss had the defendant not acted wrongfully, That part of the loss which would still have been incurred had the defendant taken proper precautions is accordingly to be borne by the plaintiff.

16. Norway

Høyesterett (Norwegian Supreme Court) 23 October 1998

Rt 1998, 1538

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-1998-67-b?searchResultContext=2052&rowNumber=1&totalHits=1>

Facts

1 A patient underwent surgery in a hospital after having been severely injured in a traffic accident. The operation was performed in the lower part of his back, due to pain stemming from an injury to his cauda equine (roots of nerves connected to the lower part of the body). During the surgery, the surgeons found that they could not proceed, because it would be too dangerous. Before the surgery was ended, the surgeon removed four small pieces of bone, approximately one millimetre in size, from the patient's back. After the surgery, the patient suffered severe pain, sciatica nerve pain and deteriorated sexual functions. He sued the state, claiming compensation for his loss. He based his claim on the fact that he was not fully informed of the risks involved before the surgery.

Decision

2 The question for the Court was whether the patient had been given sufficient information before the operation and whether he still would have agreed to the surgery had he received sufficient information. All judges in the Supreme Court agreed that the information given was insufficient. The Court was, however, divided on the question of the legal consequences of the insufficient information. A majority of three judges found that the patient would have undergone the operation even if the information on potential risks had been more thorough. A minority of two judges found that the state should be

deemed liable because it could not be proved that the patient would have agreed to the operation if he had been sufficiently informed. Hence, the minority resolved the case by pointing to rules of evidence.

Comments

The majority vote in this case shows that Norwegian courts tend to resolve this type of question by applying the general rules of causality. It is at the same time an illustration of the fact that questions of lawful alternative conduct do not come into the picture in such an explicit manner as in Germanic jurisdictions. Because of the traditional, strong tendency to apply the 'but-for test', a court will examine the juridical problem from this perspective and with the terms associated with *conditio sine qua non* reasoning. The alternative lawful conduct is solely addressed as a part of the hypothetical question applied under the 'but-for test'. Whether the damage would have occurred even if the tortfeasor had acted within the boundaries of the law should, in principle, be a very simple material question under the 'but-for test'. In practice, one often deems the tortfeasor liable anyway, because, after all, they broke the law. As the Court put weight on the factor that did occur, it was not necessary to elaborate on the question of what would have happened had the surgeons acted lawfully by providing the patient with sufficient information. **3**

The approach may have been chosen due to a competing doctrine of causation that is established in order to amend the weaknesses of the 'but-for test'. Nygaard has introduced a doctrine, which he refers to as the *realiseringslæra*, the doctrine of fullfilled cause, which resembles Richard Wright's NESS test. The doctrine puts weight on whether the alleged cause in fact occurred at the point in time when the harm materialised, had the potential to cause damage, and in fact did so. Hence, it is a causation test not based on hypothesis, such as what would have happened had the actor acted lawfully. **4**

There is not much legal discussion on lawful alternative conduct in the Norwegian theory and only a few contributions have been made on the subject.[1] **5**

1 See *E Wigenstad*, Om betydning av at skaden ville ha skjedd uansett om skadevolder hadde handlet uaktsomt [The influence of the fact the a harm would have occurred even if the tortfeasor had not acted negligently], TfE 2017, 122 ff and *B Askeland*, Limitation of liability and lawful alternative conduct, Norway, in: H Koziol (ed), Comparative Stimulations for Developing Tort Law (2015) 212 ff.

17. Sweden

Högsta domstolen (Supreme Court) 17 March 2009

NJA 2009, 104

Facts

1 Due to a car accident in 1992, a woman suffered such severe injuries that she became completely incapacitated. Eight years after the accident, the traffic insurer had not yet finalised the matter by establishing an annuity to be paid to the victim; the insurer had, nevertheless, compensated the full loss of earnings every year since the accident. In 2000, the woman suffered – unrelated to the initial damage – a cardiac arrest that led to additional injuries; these injuries would have been sufficient to cause complete incapacitation. The insurance company then terminated the annual payments, with reference to the fact that the woman would in any case have been completely incapacitated because of the subsequent injuries. From a logical causation perspective, the insurer's position can be understood as an invocation that the car accident – even if this factor was both a necessary and sufficient condition for the incapacity for the first eight years – no longer was a necessary condition, since the heart disease was a sufficient condition in itself for complete incapacity. Alternatively, expressed in the terminology of the difference principle: compensation shall place the victim in the same economic position as if the injury had not occurred, and since the woman – if the traffic injury was hypothetically 'removed' – nevertheless, at this moment in time (in 2000) would have suffered the same disability (loss of revenue), there is no negative difference (ie damage) to compensate.

Decision

2 The Supreme Court's decision was that the condition which occurred later (the cardiac arrest) and its consequences should not affect the liability for the earlier traffic accident, ie the insurer's obligation to pay compensation for loss of earnings. In other words, the liability for the earlier sufficient causal factor was not excluded just because of the later sufficient causal factor. The injured woman was entitled to compensation even after the second factor had occurred.

Comments

3 In this case, the Supreme Court shows a rather pragmatic approach to the concept of causation. The strict definitions and logical handling of necessary and sufficient condition is explicitly downplayed in favour of other evaluative topics in tort law. However, if causality does not solve legal problems, it can still be taken as a simple starting point. Then we can use a more pragmatic inclusive causation test – ie where the factor at least can be seen as one component that can be considered in the framework of a

narrative concerning the injury in question. We can then move on to the more interesting and not so simple issues concerning liability and borders of liability – ie differentiated valuations of different factual situations. Instead of 'correcting' lawyers' application of language, a possible method would be a 'close reading' of the sources, the cases, ie the discourse as it is actually performed today. If this case from the Supreme Court were subjected to such a close reading, the following line of argumentation can be seen.

(1) Uncertainty as regards hypothetical reasoning (preparing the ground for values and functions – instead of factual and logical calculations): The so-called 'difference method' states that the victim shall be put in the same economic situation as if the accident had not happened. Thus in this case, if the first accident had not occurred, the victim would nevertheless have been unable to work from 2000, so it could be argued that there is no difference – ie no causation of damage. The Supreme Court mentioned this difference method, but added that 'the ground for calculation of future income loss (without the injury) always becomes hypothetical' and that 'an assessment based on uncertain factors often cannot be verified afterwards'; moreover, the Court stated that even the factual income loss (as a result of the injury) 'contains elements of uncertainty'. The Court therefore reaches the conclusion that 'assessments of income loss must include considerations of reasonableness and fairness'. This argument is important to the interpretation of the case. What otherwise could be seen as objective value-free remarks on damage and causation really involve legal evaluations. In addition, since the calculation of income loss nevertheless involves uncertainties, we can be prepared to let tort law's purposes and functions influence the outcome even in cases where something real (not just hypothetical) has happened that influences the evaluation of the income loss. At least, this starting point of the decision implies openness to substitutes for logical calculations … and that is what follows. **4**

(2) Legally relevant changes in the last decades: In an earlier similar case – NJA 1950, 650[1] – it was decided that the person who was liable for the first sufficient cause did not have to pay compensation for the income loss for the time after the later factor had occurred. The Supreme Court referred to this case, but added that it 'has only limited value as precedence' in this case, because 'since 1950 both regulations and other circumstances have changed substantially'. What does the Court mean by this? In the context of the Court's own reasoning and explicit remarks (later in the decision), we can see that, since 1950, Swedish tort law has dealt more openly with how a purposeful protection of citizens should be arranged, especially as concerns personal injuries. Considerations of the victim's social needs are more relevant than subtle reasoning regarding logic and prevention as regards the tortfeasor. **5**

1 See *H Andersson* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 522f.

6 *(3) Legally relevant difference as regards the factual situation in comparison to older cases:* The 1950 case dealt with recourse between insurers, ie the victim's position was not addressed. The 2009 case dealt directly with the injured person's right to compensation, and therefore the issue of social needs was more explicit. The difference in outcome indicates that the logical causality in itself was not decisive. The logic of the 1950 recourse precedent therefore did not invite the same logic in the 2009 protection from personal injury precedent.

7 *(4) Negative assessment of 'traditional causality reasoning':* When examining the insurer's causality arguments, the Supreme Court repeatedly undermined such reasoning. The 'traditional causality reasoning' is said to be 'not immediately decisive' and it 'hardly provides any direction'; furthermore 'it could be questioned if it is reasonable' that the obligation to compensate ceases when a disease subsequently arises 'that does not change the incapability to work that already exists'. It also 'can be seen as arbitrary' what is to be considered as 'normal background' and 'fixed damage'; for example, 'it could be argued' that the damage is determined already when the personal injury or the incapacity to work was established. This kind of 'negative' reasoning contains quite elusive justifications, so the question is if we get any clear message at all. Against the above-mentioned background, this reasoning can at least be interpreted as a statement that these traditional ways of reasoning regarding causality are not decisive. The critical questioning of exactly these arguments demonstrates that the Supreme Court does not have to consider any deeper what it actually finds irrelevant (ie the reasoning about the concept of causation).

8 *(5) Viewing theoretical definitions or practical reasoning – preference for practical considerations and contemplations of reasonable solutions*: Instead of the above-mentioned 'traditional' causality concepts, the Supreme Court clarifies: 'The decisive factors will instead have to be more practical considerations and assessments of reasonableness.' Moreover, compensation is often 'crucial to the victim's economic security'. This argument can be seen in the context of the changes since the old precedence case from 1950, which means that the solution may be affected by the increased emphasis on aspects relating to the victim's financial security. 'That the victim due to illness, through no fault of her own, would lose her right to compensation even though the working incapacity has not changed may be perceived as unreasonable.' However, the solution to all 'causation issues' cannot of course always lead to the 'practical' consequence that the victim wins; but nowadays the victim's perspective should in any case be viewed as part of the proper risk allocation in Swedish tort law. Both parties' risks and interests should be evaluated, and that is better done in a model of conscious evaluation of the risk allocation than in logical – or otherwise abstract – causality definitions. Instead of monistic models, a pluralistic network of decisive factors that weigh differently in different situations can be preferred.

18. Finland

Korkein oikeus (Supreme Court) 23 January 1991, KKO 1991:13

<https://finlex.fi/fi/oikeus/kko/kko/1991/19910013>

Facts

A, an auditor of a limited company, neglected their duty to notify in their report that the board of the company had disregarded its duty to take measures to place the company in liquidation because of loss of the shareholders' equity. The company then bought goods on credit but became insolvent, thus causing a credit loss to the seller V. V claimed compensation for its loss from A. 1

Decision

The Supreme Court held that V's loss was not causally connected to A's negligence because, first, V had not acquainted themselves with the auditor's report. Thus, even if the report had contained a notification of the board's omission to take measures to place the company in liquidation, V would not have become aware of the notification. Second, the Supreme Court held the circumstances of the case as indicating that, even if A had recommended that the board place the company in liquidation, they would still have continued the business, and V's loss would have emerged just as it actually did. In other words, V's loss was not caused by A's negligence, because the same loss would have emerged even if A had fulfilled their duties. 2

Comments

In Finnish law, the doctrine of lawful alternative conduct is not normally recognised as a separate limit to the establishment of liability. However, it is evident that if certain loss that is to some degree connected to certain unlawful act would have emerged even if the unlawful act had never taken place or if it had been replaced with lawful conduct, then the unlawful act is simply not regarded as being causally connected to the loss. In other words, the doctrine of lawful alternative conduct is, more or less, included in the general causation requirement in Finnish law. As far as I am aware, the existence of a particular doctrine on lawful alternative conduct has not been commented upon in legal literature, because its nature as a simple application of the normal requirement of causation (*conditio sine qua non*) is regarded in Finnish law as self-evident. Case KKO 1991:13 is a clear-cut illustration of this.[1] As other, quite similar, examples, one can mention cases KKO 3

1 As examples of publications where case KKO 1991:13 or a similar case is presented as a typical example of assessment of causation, see *M Hemmo*, Vahingonkorvausoikeus (2005) 112f; *P Virtanen*, Vahingonkorvaus. Laki ja käytännöt (2011) 315f; *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus. (7th edn 2020) 396; *A Savela,* Vahingonkorvaus osakeyhtiössä (3rd edn 2015) 307.

1988:95, KKO 1996:96 and KKO 1999:118, which all concern insolvency of a party and another party's omission to take measures because of the said circumstance.

20. Latvia

Rīgas apgabaltiesa (Riga Regional Court) 5 October 2020, No C33422218
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/424957.pdf>

Facts

1 A, while serving in the National Guard of Latvia, found an explosive during military training and placed it in his backpack. The found object exploded, resulting in moderately severe bodily injuries of five guards, one junior guard was seriously injured and one guard was killed as a result of serious injuries sustained in the explosion. A was found guilty of negligent manslaughter in dealing with explosives and of causing bodily injury through negligence and sentenced. As a result of the accident, V, the Ministry of Defence, paid social benefits and covered medical expenses to the victims of the explosion in the total amount of € 138,572. V brought a claim against A for compensation of damage in that amount. V referred to sec 40 (1) of the National Guard Law of Latvia, according to which, a national guard is liable for unlawful actions and has to compensate material damage caused to another, arguing that the losses have been incurred by the Ministry of the Defence as a result of having to pay compensation to the victims due to the misconduct of A.

Decision

2 The first instance court partially satisfied the claim awarding damages in the amount of € 73,384. Both claimant and defendant appealed the judgment, and the court of appeals awarded V damages in the amount of € 101,464. The court of appeals concluded that A acted unlawfully, a fact which was established in criminal proceedings, and, as a result thereof, six guards were injured, and one died due to injuries. Therefore, A shall compensate the claimant for the damage caused by his unlawful and culpable conduct, consisting of the benefit paid to the spouse and heirs of the deceased guard and his funeral expenses, and the benefits paid to other guards. The court of appeals rejected the claim for the benefits and medical expenses paid to the junior guard, since no social guarantees are provided by law for junior guards. Therefore, any benefits paid voluntarily (*ex gratia*) cannot be considered as caused by A and recovered from V as damages. The judgment of the second instance court has entered into force as the Supreme Court refused to initiate cassation proceedings.

Comments

Although the doctrine of lawful alternative conduct is not expressly addressed by the case law and the doctrine in Latvia, this case could lead to a discussion as to the necessity to limit A's liability if A had argued that V would have incurred the same extent of losses even if A had acted lawfully and the same result would have occurred. **3**

Unfortunately, the issue whether or not such social benefits paid by V to national guards may be considered compensable damage at all was not addressed by the courts in the particular case. The courts of first and second instances referred to sec 34 of the National Guard Law of Latvia, which provides several social guarantees and benefits for national guards in case they suffer damage to their health, personal injuries or are killed or die while serving in the National Guard. These amounts re not necessarily paid when the injury or death was caused by the misconduct of another. **4**

The social benefits would have been paid to the injured guards (not the junior guard) and the heirs of the killed guard even in the absence of unlawful behaviour by A. Thus, A could have argued that the same result would have occurred even if A had acted lawfully, without the unjustifiable behaviour of anyone else (for example, the explosive could have gone off unexpectedly, when it was found, even if A had complied with the required standard of conduct). Social benefits exist to protect national guards against personal injuries which are not self-inflicted or caused by the improper behaviour of a particular guard, regardless of whether or not the cause of the injury is someone else's unlawful conduct. The claimant also did not refer to any right of recourse that it may have. For example, the insurer, having paid out insurance indemnity, may bring a claim against the liable party,[1] but such a right is expressly provided by the law, which was not so in the present case. **5**

One may also argue that the *conditio sine qua non* test allows the conclusion that the costs of the claimant in the amount of social benefits paid would not have arisen had A acted lawfully. However, it might be debatable if it would be just to hold A liable to the extent of social benefits in the case of death of the guard, which exceed the limit of liability for non-pecuniary harm inflicted as a result of death approximately threefold. This means that, if the relatives of the killed guard claimed compensation from A due to causing his wrongful death, the award would likely be € 30,000 or less, but the damages for the claimant in this case related to benefits paid for the death of the guard exceeded € 71,000. Unfortunately, this aspect was not considered in this case by the second instance court. **6**

1 The insurer who has paid the insurance indemnity has the right of subrogation, except for personal (life and health) insurance cases in accordance with sec 45 (1) of the Insurance Contract Law.

21. Lithuania

Lietuvos vyriausiasis administracinis teismas (Lithuanian Supreme Administrative Court) 29 November 2010, Administrative Case No A-858-1452-10
<http://liteko.teismai.lt/>

Facts

1 The plaintiff sought compensation from the State of Lithuania for the pecuniary and non-pecuniary damage suffered as a result of a failure to adopt the relevant gender reassignment legislation. According to the plaintiff, due to the lack of regulation, she (previously he) was forced to carry out the gender reassignment surgery in Thailand and thus incurred surgery and travel expenses amounting to approximately LTL 31,000 (€ 9,000).

2 The plaintiff also sought LTL 100,000 (€ 28,962) in non-pecuniary damages. According to the plaintiff, she suffered mentally before the surgery and after it due to the lack of medical services to transgender persons resulting from the gap in regulation, as well as to the refusal to issue new personal ID confirming the reassigned gender.

Decision

3 The first instance court dismissed the claim for pecuniary damages and awarded LTL 30,000 (approx € 8,700) in non-pecuniary damages.

4 The Supreme Administrative Court of Lithuania (SACL) upheld the decision. The courts agreed that the unlawful conduct of the State took the form of a legislative omission, as the legislator failed to comply with the obligation laid down in the Civil Code to adopt a law establishing the conditions and procedure for gender reassignment. However, the inaction of the State did not in itself lead to the compensation for personal expenses related to gender reassignment and treatment. There is no sufficient ground for claiming that, if the procedure and conditions for gender reassignment were established in Lithuania, the costs of this treatment would be fully compensated by the State. The SACL based its decision, inter alia, on art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the right to respect for private and family life but does not guarantee the right to free treatment.

5 However, the absence of appropriate legal preconditions for the treatment of the disease and change of personal ID after the surgery caused moral suffering to the plaintiff.

Comments

6 Only one case has been found in this category. The concept of alternative lawful conduct is not *expressis verbis* used in Lithuanian case law. However, the motives of the commented decision show that, if the same damage would have occurred but for the illegal

actions of the perpetrator, no liability would arise. In this case, the core of the question with respect to pecuniary damages was whether, in the absence of unlawful conduct on the part of the State, the plaintiff would still have incurred the costs of the gender reassignment surgery. In other words, even if the Lithuanian legislation had made it possible to carry out this surgery in Lithuania, this does not mean that such medical services would be provided free of charge. The SACL addressed the issue of alternative lawful behaviour on the basis of legal causation and reached the conclusion that there was no causal link between the illegal actions of the State and pecuniary damage.

22. Poland

Sąd Najwyższy (Supreme Court) 14 January 2005, III CK 193/04

OSP 7-8/2006, item 89

Facts

V took out three loans (nos 1, 2 and 3) in the defendant's bank A, but he did not pay off any of them. A therefore issued enforcement titles on all three loans, however, only the title to credit no 3 was subject to a court enforcement. After having executed loan no 3 and, upon A's request, the bailiff continued execution on loans no 1 and no 2. The execution did not result in full satisfaction. V sued for damages in tort claiming wrongful and negligent conduct of the bank. **1**

Both the first and the second court dismissed the suit, because although the bank initiated the enforcement of the contracts in violation of law, it caused no loss to V, but rather a reduction of his debts. Hence, the courts determined that A may not be held liable for a tort (art 415 KC). At the time of delivery of the appellate judgment, V was still in default. V appealed to the Supreme Court. **2**

Decision

The Supreme Court considered whether the bank could argue that, had the bailiff not continued execution on credits no 1 and no 2, the bank could have been able to obtain a court enforcement on the loans and could have performed execution lawfully (lawful alternative conduct). In general, the Court permitted a supervening cause to be taken into account for the purpose of assessing the extent of property losses. **3**

The Court established the following conditions that should be met in order to plead a supervening cause: **4**

(i) First, the supervening cause has to form a part of a parallel, hypothetically constructed chain of events, independent of the actual sequence of events. A hypothetical cause is an event that has been prevented from happening by the first, independent event. **5**

6 (ii) Secondly, the defendant has to prove with a degree of probability bordering on certainty that such a hypothetical cause would have necessarily happened. However, necessity of the successive event should not be equated with, or inferred from, its irreversibility.

7 By way of exception, however, a hypothetical cause, where the actual conduct (the original cause of the damage) of the defendant violated the legal (procedural) norms aiming to prevent the plaintiff's damage, should be disregarded. The protective function of those norms would otherwise be undermined. The Supreme Court concluded that A could not take advantage of a defence that its subsequent legal conduct would have caused the same loss. The verdict was reversed.

Comments

8 See comments below to case I CSK 404/11 at 5/22 no 9 ff.

Sąd Najwyższy (Supreme Court) (Panel of 7 Judges) 22 January 2013,I CSK 404/11

OSNC 9/2013, item 110

Facts

9 The plaintiffs (Vs) are legal successors of the owner of real estate in Warsaw who was illegally deprived of its ownership in 1954 and did not obtain a right to temporary ownership of land pursuant to art 7 of the Decree of 26 October 1945 on ownership and use of real estate in the city of Warsaw. This decision was nullified in 2004. The right to the land was transferred to a housing co-operative in Warsaw in 1960 and it has been in its lawful possession ever since. Vs demanded redress of damage arising from an illegal decision and the court of first and second instance ruled in their favour.

10 In cassation, the State argued that the expropriation of the real property in question would have taken place for the second time in 1960 due to the change in law, and simply on a motion of the housing cooperative, which would have built the blocks of flat on that real estate. Hence, the State argued that the damages should be reduced to the sum that should have been awarded as compensation for the latter expropriation. The case was referred to the panel of seven judges.

Decision

11 The judgment aimed at finally resolving the dispute around hypothetical causation. The Supreme Court confirmed the newer approach, presented in the previous case (infra). A supervening cause may in general be taken into account for the purpose of assessing the extent of property losses. The consideration of hypothetical cause means that it may be regarded as an element of the process of establishing the hypothetical state of the victim's patrimony. Limitations to its application may flow from policy arguments,

functional interpretations as well as from uncertainty of the hypothetical course of events.

Notwithstanding this general statement, the Court moved on to distinguish cases **12** where the hypothetical cause, raised as a defence by the State Treasury, is a hypothetical, lawful expropriation of a proprietary right to land. In cases such as this one, it is important to remember that the starting point of assessment should be a positive decision of (former) Warsaw public authorities (and not the lack of the decision), since there was almost no margin of discretion as to the granting of the temporary ownership right to citizens. On the facts, that right was taken away from Vs' predecessor and consequently a receivable, in the form of a claim for compensation, due to expropriation entered their patrimony.

Further, on the facts, the *causa superveniens* related to the conduct of a third person **13** (housing co-operative). According to the then binding rules, expropriation could only have taken place on the motion of the co-operative and for its benefit; moreover, the latter would have been liable to pay damages for expropriation. The cassation of the State (A) was dismissed.

Comments

In a way, a supervening cause influences the outcome of the application of the theory of **14** adequacy. As the Court approaches the issue, a supervening cause is not a matter of assessing causation, but of evaluating damages. From the theory of difference follows the necessity to take account of certain hypothetical causes when assessing the damage. All the circumstances subsequent to the tortious event, including a supervening cause that might, or which did, influence the patrimony of the victim should be considered in that process.

The Court has put limits to the defence of inevitable lawful expropriation, thereby **15** giving preference to the protection of the interests of victims. Important arguments underlying this approach are public policy and justice. The Court underlined that the wrongs committed by the socialist government after World War II, in execution of nationalisation decrees that had accommodated the interests of former owners by guaranteeing them a right to be compensated, were intentional. Such conduct not only breached the protective scope of the said provisions, but was also a method to avoid formal procedures in which the interests of former owners and their procedural rights would have had to be respected. The final result of such procedures was unpredictable to the authorities.

26. Slovenia

Vrhovno sodišče (Supreme Court) 20 September 2012, II Ips 171/2009
<https://www.sodnapraksa.si/> (27 November 2021)

Facts

1 A plaintiff V, who was presumed to be intoxicated on the basis of her refusal to take an alcohol test, was hit by a taxi at a pedestrian crossing at night. Since it was established in the light of the course of the accident that the taxi driver A was fully responsible for the accident and that the same damage would have occurred even if pedestrian V had been sober, the courts of first and second instance granted V's claim.

Decision

2 The Supreme Court fully upheld the position of the lower courts and rejected revision of A as unfounded.

Comments

3 In the present case, alcohol consumption was not causally related to the collision of the car with the plaintiff, who was crossing the road at a pedestrian crossing. The same damage would have occurred if the plaintiff had been involved in traffic in a state of sobriety. It should be noted that the concept of 'alternative behaviour' is not known in Slovene literature, and court practice does not use the term. Nevertheless, the conduct of the injured party can be relevant if the injured party contributes to the damage. If this is the case, the injured party is entitled to only relatively reduced compensation.[1]

27. Hungary

Legf Bír (Supreme Court of Hungary) Pfv III 20.893/2010
EBH.2011.2397

Facts

1 Neighbours claimed non-pecuniary damages from the owner of a building which was built in a style different to the architectural features of the neighbourhood. The building in question consisted of two storeys with eight flats.

1 For more about the contribution of injured party see case at 8/26 nos 1–3.

Decision

The court established that the inconvenience caused to the neighbours of the new building could be avoided by necessary diligence and care, and awarded the damages claimed by the neighbours, although the construction had been built legally. The court considered the following disadvantages created to the detriment of the neighbouring immovable and their owners: increased sound pollution, deprivation of sunshine, loss of intimacy, worsening of lighting conditions, the close proximity of the two buildings, the erection in the neighbourhood of an 'exaggerated' size of building which did not fit into the landscape of that area. 2

Comments

In this case, the damage was in fact caused by a legal act, the construction being permitted by the competent authorities, but it nevertheless infringed the requirements of a 'good' neighbourhood protected under the Civil Code, which qualified the construction as unlawful. 3

As testified by the case law, unlawfulness under civil law is independent from unlawfulness under administrative law. However, it has been correctly criticised in the tort law literature that this state of law does not always lead to justified legal solutions in practice, hence the neighbours have available as a legal tool the administrative complaint to stop constructions that would cause unnecessary inconvenience to them.[1] Therefore, in case the neighbours omit or intentionally do not challenge the planned constructions by making use of their administrative rights to oppose such projects, the civil law should take this into account and limit the liability of the person acting legally.[2]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

First scenario. A driver overtakes a cyclist leaving too little space on the side and crashes into him. The cyclist was drunk and did not keep to his side so that the same damage would have occurred had the driver allowed enough space.[1] 1

Second scenario. A doctor operates on a patient without adequately informing him about the risks of the surgery. The operation is performed professionally, but one of the 2

1 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 63.
2 Ibid.

1 The following scenarios are taken from *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/22.

risks of this type of surgery materialises and the patient suffers damage. It can be established that the patient would have undergone the surgery in any case, even if he had been informed of all risks involved.

Solutions

3 **a) Solution According to PETL.** The PETL do not explicitly address the question of whether liability is excluded in situations in which the damage would still have occurred had the party whose misconduct is alleged acted lawfully (doctrine of 'lawful alternative conduct', *rechtmässiges Alternativverhalten* or *Rechtswidrigkeitszusammenhang*).

4 Under art 3:101 PETL, like in many national jurisdictions,[2] the issue would be dealt with in terms of *conditio sine qua non*. In the *first scenario*, the question is whether the accident would still have occurred had A respected the required space when overtaking the cyclist. According to the scenario, the cyclist was drunk and did not keep to his side so that the same damage would have occurred had the driver acted as required. Even if he had acted lawfully, the accident would still have occurred so that the violation of his duty would not be regarded as a *conditio sine qua non*, or *natural* cause, of the accident under art 3:101 PETL. As mentioned above, the PETL's rule on strict liability in art 5:101 does not apply to road traffic accidents.[3]

5 In the *second scenario*, the doctor violated his duty to inform the patient of the risks of the surgery. However, it is established that the patient would have undergone the surgery even if he had been informed of all risks involved. Here again, the damage would have occurred even if the doctor had acted lawfully. Under these circumstances, the violation of his duty would not be regarded as a *conditio sine qua non*, or *natural* cause, of the patient's damage under art 3:101 PETL and the doctor would not be liable.

6 **b) Solution According to the DCFR.** When dealing with situations of 'lawful alternative conduct' under the DCFR, it is necessary to determine whether, and to which degree, the alleged tortfeasor contributed to causing the damage, pursuant to art VI–4:101 (1), the DCFR's 'General rule' on 'Causation'. The aim is to establish whether, and to what extent, the allegedly liable person caused the damage by his conduct (lit a) or by being responsible for the source of danger (lit b). Article VI–4:101 DCFR 'does not distinguish between a cause in fact and a cause in law' and 'rather leaves it for further discussion whether and to what extent such distinction will stand up in theory and [...] lend itself to

2 See, eg, the reports on France by *J-S Borghetti* and *J Knetsch*, above 5/6 no 3: 'This is considered a mere application of the basic principles of causation, whereby causation can be recognised only if the fact that is being considered was a necessary condition of harm. In other words, there can be no liability if it is proven that harm would have occurred even in the absence of that fact', or on Belgium by *E De Saint Moulin* and *B Dubuisson*, above 5/7 no 2ff.

3 See below 6/30 nos 1–2, and PETL – Text and Commentary (2005) art 5:101 no 21 (*B Koch*).

be being put in practice'.[4] However, the Official Commentary to the DCFR provides, here again, helpful guidance for the analysis.

The *first scenario* concerns a road traffic accident and the ensuing death of the cyclist. On this topic, as mentioned previously,[5] the DCFR provides a specific basis of accountability for damage caused by a motor vehicle, according to which, the liability of the 'keeper' of the motor vehicle is 'strict' for instances of personal injury (and consequential loss) and damage to property resulting from the use of the vehicle (art VI–3:205 DCFR). **7**

The driver of the car would, as a consequence, still be liable for the damage caused to the cyclist even if the same damage would have occurred had he acted lawfully. Therefore, under the DCFR, the doctrine of lawful alternative conduct would arguably not allow the driver of a motor car to free himself from liability in the first scenario.[6] **8**

In the *second scenario*, a doctor failed to inform the patient of the full extent of potential risks associated with the planned operation. He defends himself claiming the patient would have consented anyway to the surgery (the latter, notably, was carried out without any medical malpractice). The damage caused to the patient's health falls within the scope of 'legally relevant damage' under the DCFR, pursuant to art VI–2:201(1) DCFR 'Personal injury and consequential loss'. **9**

Here, unlike in the first scenario, the doctor's liability under the DCFR would depend on his fault, and would be assessed under art VI–3:102 DCFR (Negligence) and in particular lit a, where a person causes damage by conduct which 'does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the person suffering the damage from that damage'. This is the case here, since the doctor failed to provide the relevant information to the hospital while having a duty to do so. His conduct was thus negligent. **10**

The question of the doctor's liability for the unlawful omission will then be decided with the test of causation (art VI–4:101 DCFR). **11**

The Official Commentary makes clear that no distinction is made 'between positive action on the one hand and passivity or omission, on the other'[7]. An omission to act can therefore be 'a cause of damage where (a) the person had the opportunity to intervene and *was under a duty* to use that opportunity and (b) the damage is to be *regarded as a consequence of the failure to intervene*'.[8] **12**

4 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3570).

5 See above, 2/30 no 12.

6 While in practice, a subsequent possible reduction of this liability, even to zero, would be very probable due to the drunken state of the cyclist (certainly gross negligence and a contributory fault to the materialisation of the damage according to art VI–5:102(1) DCFR), this consideration is outside the scope of the present study.

7 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment A (3568).

8 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment A (3568), emphasis added.

13 On this point, the DCFR provides the example of a doctor who fails to inform a hospital of a patient's high risk of suicide; however, the hospital was already aware of this danger. When the patient kills himself, the doctor's omission to inform is not regarded as a cause of the patient's death under the DCFR.[9]

14 In the second scenario, the DCFR's answer would, therefore, be the same as under the PETL: the omission to inform would not be considered as a natural cause of the event and the doctor would not be liable.

31. Comparative Report

Introduction

1 The lawful alternative conduct limit aims to exclude liability for losses which would still have occurred without the relevant misconduct and in case of alternative lawful conduct (*rechtmäßiges Alternativverhalten*). This limit is based on a hypothetical reasoning replacing the actual causal chain including the wrongful conduct with an alternative and lawful one, in order to verify whether the harmful event would have taken place anyway or would have produced the entire detrimental consequences.

2 Some reports make clear that this defence is to be taken into account provided that the hypothetical cause is proven to be a certain – not only possible or probable – alternative cause of the same damage.[1]

3 In principle, it is conceived as a ground for excluding a defendant's liability. However, if it is proven that, had the defendant acted lawfully, the plaintiff would not have incurred the entire loss but only a part of it, the defence works as a ground to reduce the damages claimed by the plaintiff.[2]

4 At the comparative level, the language of lawful alternative conduct is not used as widely as that of other limits of liability this volume deals with. It seems to be unknown to Roman law.[3] This explains why its theoretical importance and its practical role significantly varies among the jurisdictions at stake, a fact which is reflected in the lack of cases to be reported under this heading in some jurisdictions.[4]

5 Despite the fact that its conceptualisation has not been developed in all jurisdictions, applications of this defence can be found almost everywhere. The most common (although non-exhaustive) cases to be grouped under the heading 'lawful alternative

9 *C v Bar*/*E Clive*, DCFR, art VI–4:101, Comment A, Illustration 2 (3568).

1 Switzerland 5/4 no 4; Germany 5/2 no 7; Poland 5/22 no 6: 'with a degree of probability bordering on certainty'.

2 See Malta 5/15 no 14.

3 Historical Report 5/1.

4 See, eg, Croatia 5/25; Romania 5/28; Slovakia 5/24.

conduct' are the following: medical liability;[5] traffic accidents;[6] damage caused in the absence of administrative permits.[7]

No reference to lawful alternative conduct is found in EU case law.[8] 6

Neither the PETL nor the DCFR address lawful alternative conduct in a specific provision. 7

However, the DCFR states the strict liability for personal injury and damage to property caused by motor vehicles (art VI–3:205), with the consequence that the driver of a car is liable even if the same damage would have occurred had the victim acted lawfully. 8

The approaches of national systems

In a group of systems, lawful alternative conduct is a well-established general defence in tort law, whereas others apply the hypothetical reasoning without mentioning it. 9

Germany, Austria, and Switzerland belong to the first group. In Germany, in particular, this defence has been expressly codified in medical liability,[9] although, of course, it has a general application. 10

In Germany and Austria, lawful alternative conduct is not conceptualised as a question of causality but as a limit to the allocation of liability implying value-oriented considerations.[10] In particular, it is subjected to the rationale of the protective purpose of the norm.[11] Consequently, the defence of lawful alternative conduct is exceptionally set aside when the violated behavioural rule aims at ensuring particularly important procedural requirements rather than preventing the harmful event.[12] 11

A similar attitude seems to be shared in the Netherlands, where lawful alternative conduct is related to the protective purpose of the norm and applied in cases concerning damage which occurred without administrative permits which would have been given had they been sought.[13] In Sweden, the case law concerning lawful alternative conduct has evolved and abandoned the abstract logic of causality to embrace risk allocation reasoning and practical considerations and contemplations of reasonable solutions,[14] in light of the victim's protection. Similarly, in Poland, the Supreme Court has elaborated guidelines on the application of the lawful alternative conduct defence since 2005, stat- 12

5 See below no 18ff.

6 Belgium 4/7 no 1ff; Slovenia 5/26 no 1ff.

7 Netherlands 4/8 no 3.

8 European Union 5/29.

9 § 630h (2) sent 2 BGB: 'If the information does not comply with the requirements of section 630e, the treating party may assert that the patient would also have consented to the measure had proper information been provided'.

10 Austria 5/3 no 1ff.

11 Germany 5/2 no 1ff.

12 Austria 1/3 no 6.

13 Netherlands 5/8 no 3.

14 Sweden 5/17 no 1ff.

ing that, while in principle revolving around the assessment of the causal chain, the defence can be set aside where the protective function of the norm violated by the tortfeasor would be otherwise undermined.[15]

13 Unlike the jurisdictions cited above, others are keen to conceive lawful alternative conduct as functional to establishing whether a material causal link actually exists between the unlawful conduct and the harmful event actually. This is the case of Switzerland[16] and Greece.[17]

14 Similarly, England and Wales,[18] Scotland[19] and Ireland[20] deal with the problem of lawful alternative conduct as a question of factual causation.

15 More generally, this understanding is common even to jurisdictions which have not developed a doctrine of lawful alternative conduct, but apply it to 'but-for' reasoning. These are Norway,[21] Finland,[22] France,[23] Italy, Lithuania,[24] and Slovenia.[25]

16 In France, in particular, notwithstanding the absence of the lawful alternative conduct doctrine from legal discourse on tort law, applications can be found as a corollary of the *conditio sine qua non*. For instance, reasoning based on the lawful alternative conduct doctrine led the Cassation to reject a smoker's claim for damages in tobacco tort litigation.[26]

17 In Belgium, the lawful alternative conduct doctrine has developed since 1997,[27] when the *Cour de Cassation* denied a driver's liability for violating parking rules, arguing that the accident would have occurred in the same way had the car been parked properly. Since then, the doctrine has been established by subsequent cases and, similarly to the systems cited under no 11, has been seen as a limit of the 'but-for' test.

18 Spanish literature and case law imported the lawful alternative conduct doctrine from Germany at the beginning of the 20th century.[28] Since then, the lawful alternative conduct reasoning has become familiar to Spanish courts and its main field of application seems to be that of medical liability for lack of information.[29]

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15 Poland 5/22 nos 5–7. See also the case reported under 5/22 no 9ff.

16 Switzerland 5/4 no 5ff.

17 Greece 1/5 no 5.

18 England and Wales, 5/12 no 1ff. In the very interesting case of unlawful detention, the lawful alternative conduct defence was held to be irrelevant, false imprisonment being a form of trespass to the person, and hence actionable without proof of damage. However, it impacted on the damages to be awarded.

19 Scotland 5/13 no 4.

20 Ireland 5/14 no 1ff.

21 Norway 1/16 nos 3 and 5.

22 Finland 5/18 no 4.

23 France 1/6 no 4.

24 Lithuania 1/21 no 3 and the case reported under 5/21 no 1ff.

25 See the traffic accident case included in the Slovenian report, 5/26 no 1ff.

26 France 5/6 no 1ff.

27 Belgium 5/7 no 3.

28 Spain 5/10 no 4ff.

29 Spain 5/10 no 5.

Conversely, there are systems where lawful alternative conduct doctrine has been neither developed nor applied.[30] **19**

Violation of medical information duties and lawful alternative conduct defence

As mentioned earlier, one of the most common fields of application of the lawful alternative conduct defence is that of medical liability due to violation of information duties prior to treatment. The strict application of the defence would imply that, where the defendant demonstrates that the damage would have taken place even where the patient had been properly informed, damages are not due (see the cases reported in Germany,[31] Greece,[32] Norway,[33] and Ireland[34]). **20**

The success of this defence depends on how strictly the defendant is required to prove the patient's alternative decision which would have been taken had they been properly informed: typically, that the patient would have refused to undergo the treatment or would have had an abortion. **21**

Irish courts have endorsed a quite strict probatory regime focusing on the assessment if credible evidence of the particular person's response is available.[35] **22**

Conversely, such burden of proof is lighter in some other countries surveyed, especially as far as medical malpractice is concerned. In case of failed prenatal diagnosis, for instance, the mere fact of asking for such tests is considered to be sufficient to prove the woman's will to terminate the pregnancy if she had received the inauspicious diagnosis in due time.[36] **23**

Italian case law takes a step forward in emphasising the relevance of violations of information duties on consequences and risks of medical treatment and surgical interventions (currently stated by Law no 2019/2017). In rooting the reasoning on the legal theory of fundamental rights, a line of thought states that such violation is enough to establish doctors' liability even if the adverse consequences suffered by the patient are not due to professional negligence. A lawful alternative conduct defence is admitted insofar as the lack of information is proven not to actually impact on the patient's autonomy.[37] **24**

30 Croatia 5/25; Czech Republic 5/23; Estonia 5/19; Latvia 5/20 no 3, where, however, the reporter stresses that the commented case raised a debate on lawful alternative conduct.

31 Germany 5/2 no 19.

32 Greece 5/5 no 1ff.

33 Norway 5/16 no 1ff.

34 Ireland 5/14 no 1ff.

35 Ireland 5/14 no 1ff.

36 Spain 5/10 nos 3 and 6.

37 Italy 5/9 no 17.

25 Under both the PETL and DCFR, the question as to whether the medical doctor is liable would be solved according to the 'but-for' test and, as a consequence, the omission of information would not be considered as a natural cause of the event.[38]

38 PETL/DCFR 5/30 nos 5 and 14.

6. Doctrine of 'sufficient connection to target risk' and related concepts

2. Germany

Bundesgerichtshof (Federal Supreme Court) 26 March 2019, VI ZR 236/18

NJW 2019, 2227 with note *St Herbers*

Facts

The lawsuit was litigated between a building insurer and the insurer of a car. The in- **1**
sured of the car insurer, A, was solely responsible for an accident in which another car was considerably damaged. This car was brought the same day to V's garage where it stood overnight in the work hall. V did not disconnect the car's battery from the car's electric system. Shortly after midnight, a shortcircuit in the battery of the car led to a fire, which seriously affected the garage and V's adjacent house. The shortcircuit was due to the accident which had damaged the battery and the electric system.

V's insurer compensated V's damage and claimed the compensation sum as dam- **2**
ages from A's insurer.

Decision

While the court of first instance accepted the claim to 60 % because of attributable con- **3**
tributory negligence of V, the Court of Appeal dismissed the claim. The Federal Supreme Court set this judgment aside and remanded the case to the Court of Appeal.

The Federal Supreme Court stated that the protective purpose and scope of the ap- **4**
plicable § 7 (1) *Straßenverkehrsgesetz* (Road Traffic Act, StVG) is wide.[1] The provision extends to personal and property damage occurring 'during the operation' (*bei dem Betrieb*) of the motor vehicle. The provision intends to cover all damage situations which are influenced by motor vehicles. In the concrete case, despite the certain temporary and spatial distance to the accident, still the damage inflicted in the accident continued to have an effect insofar as the damaged battery caused the fire. Thus, the Court held that the consequential damage occurred during the operation of A's car and fell within the protective scope of § 7 (1) StVG.

The Court further held that the *Zurechnungszusammenhang* (the necessary attribu- **5**
tion of the damage to the author's conduct) was not interrupted by V's failure to disconnect the battery from the car's electric system. Under evaluative considerations, an author – here A – is not liable for consequences if the risk which he or she created 'has

1 The provision constitutes strict liability for damage caused to persons or property during the operation of a motor vehicle. The liable person is the keeper of the vehicle.

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already completely disappeared.'[2] If there is 'only an "external", quasi "accidental" connection between the two interferences, then the first author cannot reasonably be expected to be liable to the injured party for the consequences of the second interference.'[3] This is, for instance, the case if a third person intentionally interferes without being induced by the first interference to do so. The merely negligent interference of a third person or of the victim – here of V – generally does not interrupt the causal connection even if the act was committed with gross negligence. In particular a wrongdoer cannot raise the argument that a third person, though neglecting an own duty, did not remove the risk which the wrongdoer had created.[4] Consequently, V's failure could only be taken into account as contributory negligence.

Comments

6 The decision is an example that the protective purpose doctrine also applies to strict liability. In order to be compensable under a strict liability regime, the damage must be sufficiently connected with the risk the avoidance of which is the special target of the respective strict liability statute. The strict liability traffic statute aims at better protection of traffic victims against the risks which vehicles cause through their speed, their weight, their form and the fact that even if utmost caution is taken, accidents cannot always be avoided. For compensation to be awarded, the damage must be the consequence of the specific traffic risks. This is even the case if the vehicle did not touch the victim but alarmed him or her as a pedestrian or cyclist so that he or she fell.[5] Insofar, the German courts apply a wide definition of 'operation of a vehicle', which is an essential requirement for compensation to be awarded.

3. Austria

Oberster Gerichtshof (Supreme Court) 26 April 2007, 2 Ob 174/06m

ZVR 2008/188

Facts

1 Due to a lack of parking spaces, A parked his car only partly on the street, partly obstructing the pavement in front of a restaurant. When passing in front of the restaurant, V had therefore to go through a narrow space of about 70 to 75 cm. Besides, the struts of

2 BGH NJW 2019, 2227 no 12; see same formulation already in BGH NJW 1989, 767 (768) above 2/2 no 16.

3 BGH NJW 2019, 2227 no 12; similar formulation in BGH NJW 1989, 767 (768) above 2/2 no 16.

4 BGH NJW 2019, 2227 no 12.

5 See, eg, the situation in BGH NJW 1988, 2802.

the fence bordering the open-air area of the restaurant protruded into this space. V fell over one of these struts, thus sustaining severe facial injuries and sued A.

Decision

The Supreme Court found in favour of V. The decisive question was if the parked car was 2
'in operation' in the sense of § 1 of the Austrian Motor Vehicle Liability Act (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG), which provides for a strict liability (risk-based liability, *Gefährdungshaftung*) for motor vehicles. The Court supports the view that a motor vehicle is 'in operation' in the sense of the EKGH when there is either an inherent connection to the typical operating risks of a motor vehicle or an adequate and causal connection to certain operational processes or certain operational facilities of the motor vehicle. Therefore, when examining whether a motor vehicle is 'in operation' in the sense of the Austrian Motor Vehicle Liability Act, no strictly technological approach must be taken, according to the Court. Rather, it is sufficient when there is a causal and adequate connection between the accident and the traffic-related dangerousness of the vehicle. According to this criterion, A's car was 'in operation' at the moment of V's fall, as it was parked in violation of road traffic regulations, thus constituting a danger for pedestrians using the pavement for its intended purpose.

Comments

It has already been discussed above that, in Austria, limitation of liability arises on the 3
basis of the protective purpose of the rule on which liability is based (*Schutzzweck* or *Normzweck*; see in detail 3/3 no 7ff). As the purpose of the rule theory is merely a facet of the very general principle of teleological interpretation (*teleologische Interpretation*) of rules (see already above 3/3 no 8), it is, however, not only applicable to limit fault-based liability. Rather, it applies in the entire field of the law of damages and thus also and above all in the field of strict liability (risk-based liability, *Gefährdungshaftung*).[1] When it comes to determining the protective purpose of a certain strict liability regime, the key question is whether, in a certain accident, precisely those risks which were the reason for introducing this strict liability materialised.[2]

In the scope of application of the EKHG; the crucial question is thus what the typical 4
dangers associated with the operation of motor vehicles and railways are.[3] Roughly speaking, their typical dangerousness comprises first and foremost the movement of

1 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 10; *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/17.

2 See *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/94.

3 *H Koziol*/*P Apathy*/*BA Koch*, Österreichisches Haftpflichtrecht III (3rd edn 2014) no A/2/5.

great masses at high speeds in traffic.[4] Accordingly, the Austrian Motor Vehicle Liability Act explicitly excludes its applicability to vehicles whose maximum construction speed does not exceed 10 km/h (§ 2 para 2 EKGH).[5]

5 Focussing on this typical dangerousness of motor vehicles, in earlier decisions the Austrian Supreme Court applied a more restrictive, more technological approach. A good example for this is the case where, for unknown reasons, a parked moped fell on a car that was parked beside it.[6] In this decision, the Supreme Court stated that the moped was not 'in operation' in the sense of the Austrian Motor Vehicle Liability Act when it was left for several hours parked in a situation where a self-acting ignition could be excluded, thus denying liability of the owner of the moped. Considering the typical dangerousness of motor vehicles, which was the reason for introducing strict liability for them, this seems worthy of support.

6 In the above-reported decision concerning the car blocking a part of the pavement, however, the Austrian Supreme Court demonstrates that nowadays, it is willing to consider 'operation' in a broader sense. Here, the Court did not require inherent technological dangers, but it rather took into consideration the traffic-related dangerousness of the vehicle, which consequently results in an expansion of the scope of the specific risk-based liability on the basis of the Austrian Motor Vehicle Liability Act. As the vehicle was parked on the pavement in violation of the road traffic regulations, the Court affirmed a causal connection between the accident and the traffic-related dangerousness of the vehicle and it granted compensation (6/3 no 2). Considering that in this case, none of the specific dangers related to the operation of motor vehicles arose, it is not surprising that this view evoked critical responses in legal literature by some authors who emphasised that a parked motor vehicle does not constitute a greater danger than any other obstacle.[7]

4 *C Rabl* in: C Rabl/A Riedler, Bürgerliches Recht III: Schuldrecht Besonderer Teil (6th edn 2017) no 14/38.

5 *H Koziol*/*P Apathy*/*BA Koch*, Österreichisches Haftpflichtrecht III (3rd edn 2014) no A/2/5 with further references to the legislative materials; this exclusion of slow vehicles was however criticised in the legal literature, see eg, *M Spitzer*, Betrieb und Betriebsgefahr im EKHG, in: S Perner/D Rubin/M Spitzer/A Vonkilch (eds), Festschrift für Attila Fenyves (2013) 337 ff.

6 OGH 2 Ob 119/75 in ZVR 1976/232.

7 Eg *BC Steininger*, Verschärfung der Verschuldenshaftung (2007) 109; *M Spitzer*, Betrieb und Betriebsgefahr im EKHG, in: S Perner/D Rubin/M Spitzer/A Vonkilch (eds), Festschrift für Attila Fenyves (2013) 345; see also *H Koziol*/*P Apathy*/*BA Koch*, Österreichisches Haftpflichtrecht III (3rd edn 2014) no A/2/10 ff.

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 22 May 1984

ATF 110 II 423

Facts

Truck driver A lost control of his vehicle, which overturned and came to a standstill on a railway line. The driver switched off the engine and tried to separate the truck from its trailer. Three to four minutes later, a train collided with the truck and the railway employee V was injured. V filed a claim in tort against the truck insurer. The regional court ordered the insurer to pay damages according to art 58 para 2 LCR (Road Traffic Act, which states fault liability or the proof by the victim of a defect of the vehicle if the vehicle is not in use). The truck insurer appealed against this decision before the Federal Supreme Court. **1**

Decision

The Federal Supreme Court partially confirmed the regional court's decision and ordered the truck insurer to pay damages to V, but on the basis of art 58 para 1 LCR (instead of para 2). According to art 58 para 1 LCR, the keeper is liable (no-fault liability) for damage due to the operation of the vehicle (*par suite de l'emploi d'un véhicule*, *durch den Betrieb eines Motorfahrzeuges*). **2**

The question is whether this formulation implies that the vehicle was in use precisely at the time of the accident (view of the regional court) or whether it also applies if the accident occurred a few moments after its use. The Supreme Court based its reasoning on causation. In a first step, it examined the question of natural causation and considered that a short lapse of time between the vehicle's use and the damage does not interrupt the natural causal link between the event and the damage. In a second step, it verified the adequate causal link referring again to the time criterion. The event (the overturned truck lying on the railway line) leading to the accident was due to the use of the vehicle. Given the short time interval between the overturning and the collision, there was no interruption of the adequate causal link. **3**

Comments

The legislator's interpretation of the distinction between art 58 para 1 and para 2 LCR is as follows: para 1 targets cases where an operating vehicle causes damage, while para 2 applies to vehicles that are not in operation, but where the keeper is at fault or the vehicle has a defect. In other words, para 2 is applicable for cases where there is a lack of a direct connection to the initially targeted risk (vehicle in operation). **4**

However, this distinction can be confusing because of the slightly different formulation of art 58 para 1 LCR in German (*durch den Betrieb eines Motorfahrzeuges*) and in **5**

French ('*par suite de l'emploi d'un véhicule*').[1] The German text implies that the damage occurs while using the vehicle, while the French text refers rather to the consequence of the use. The French formulation suggests a difference in time between the use of the vehicle and the damaging event. This interpretation also covers cases where the damage occurs while the vehicle is at a standstill.[2] In this case, the prior use has a direct causal link to the damage. This follows the legal doctrine's interpretation of the notion of 'vehicle use':[3] to determine the use or non-use of a vehicle, the analysis has to be based on the overall circumstances of the case.[4]

6 Indeed, this present case has to be interpreted together with another case.[5] What both have in common is that they concern stationary trucks. However, they differ on (at least) two points: (i) In the present case, the engine of the vehicle was not running, while in the other one it was. (ii) Regarding the other case, the Court did not apply the Road Traffic Act, whereas, in the present one, the judge applied it (art 58 para 1 LCR). Consequently, according to the Court, it seems that neither the running of the engine nor the moving of the vehicle is a necessary condition for the application of art 58 para 1 LCR.[6]

7 In the present case, which is written in French, the Federal Supreme Court's understanding of art 58 para 1 LCR is close to the French text,[7] while the regional court (whose language was also French) referred rather to the German formulation of the LCR. This matter illustrates how the linguistic ambiguity for the same Act can be a means to extend or limit liability.

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1 For a discussion on the European level, see notably CJEU 4.9.2014, C-162/13, *Damijan Vnuk v Zavarovalnica Triglav d.d.*, ECLI:EU:C:2014:2146, <http://curia.europa.eu/juris/document/document.jsf?docid=157341&text=&dir=&doclang=FR&part=1&occ=first&mode=lst&pageIndex=0&cid=14872468> (consulted on 25.11.2020).

2 Liability according to art 58 para 1 for a stationary vehicle is also admitted in other cases, see ATF 114 II 376, 378 ff c 1b (1988); 97 II 161, 164 f c 3a (1971); 64 II 237, 240 c 1 (1938); *R Brehm*, La responsabilité civile automobile (2nd edn 2010) no 204 ff, at 80 f.

3 This definition is linked to the specific risk incurred for people or things, a risk originating from the mechanical organs of the vehicle itself: *R Brehm*, La responsabilité civile automobile (2nd edn 2010) no 161, at 64; *C Müller*, Commentaire ad art 58 LCR, in: A Bussy/B Rusconi et al, Code suisse de la circulation routière commenté (4th edn 2015) at 706 ; ATF 107 II 269 (1981). Such a risk is particularly important when the vehicle speed and mass combined together create kinetic energy: *R Brehm*, La responsabilité civile automobile (2nd edn 2010) no 165, at 65; *C Müller*, Les risques inhérents au risque inhérent, Strassenverkehr 2/2011, 41; nevertheless, it is not necessary that the engine is still running at the time of the accident: *C Müller*, La responsabilité civile extracontractuelle (2013) no 530 f, at 172.

4 *K Oftinger/EW Stark*, Schweizerisches Haftpflichtrecht, II/2: Gefährdungshaftungen: Motorfahrzeughaftpflicht und Motorfahrzeughaftpflichtversicherung (4th edn 1989) no 355, at 154; *R Brehm*, La responsabilité civile automobile (2nd edn 2010) no 204, at 80.

5 ATF 107 II 269 (1981).

6 ATF 110 II 423, 424 f c 1a (1984); 114 II 376, 378 ff c 1b (1988); 113 II 323, 329 c 2 (1987).

7 ATF 110 II 443, 424 c 1a (1984).

5. Greece

Areios Pagos (Greek Court of Cassation) 1168, 31 May 2007

NoV 56, 1249

Facts

V, a builder, was seriously injured while pouring concrete from a mechanical pump for the construction of a building. The accident was due to the sudden tilting of the concrete mixer truck, which had not been properly and securely fixed to the ground. The accident led to V experiencing dizziness from concussion and he suffered a serious injury to his right leg. V lodged a claim seeking the amount of € 219,970 as compensation for his moral damage against the owner of the building, the contractor of the work, the project engineer, the company producing the concrete, the owner of the concrete mixer truck, the operator of the pump and the insurance company. **1**

Decision

Areios Pagos held, among others, that, as it derives from arts 2 § 1, 5 § 1 and 10 § 1 of L 489/1976 on 'Compulsory Insurance of the Civil Liability Caused by the Circulation of Automobiles' and art 4 of L 3950/1911 on 'Liability for Automobiles',[1] in the case of car accidents, the liability of the driver and of the insurance company according to L 3950/1911 or arts 914 ff GCC presupposes that the accident is caused 'during the operation' of the car. The Court noted that the accident caused by the operation of a machine, such as the machine pumping concrete, which is firmly attached to a specially adapted vehicle, is not regarded as an accident caused by the operation of the vehicle according to the aforementioned provisions. This is owed to the fact that the damage caused by such a machine is not connected to the typical risks of the vehicle, given that, in such a case, what is crucial is the operation of the machine which has been adapted to be used on the vehicle, while the characterisation of the vehicle as such is of no importance. Accordingly, it confirmed the decision of the Court of Appeal which had rejected the court action against the insurance company as not legally founded. **2**

Comments

As mentioned above (see 3/5 no 10 f), in the Greek legal order, the protective purpose of the rule on which liability is based is applied in order to limit liability. This theory also applies in the field of strict liability. Accordingly, when applying the Greek Law 3950/ **3**

1 For a translation (in English) of the most important provisions of L 3950/1911, see *E Dacoronia*, Greece, in: K Oliphant/ B C Steininger (eds), European Tort Law. Basic Texts (2nd edn 2018) 160, 161. For the field of application of L 3950/1911 in detail, see *A Kritikos*, Damages from Traffic Road Accidents (5th edn 2019) § 6 II, no 7ff.

1911, which provides for the strict liability of the driver of a vehicle, the crucial question is what the typical dangers associated with the operation of the vehicle are. If there is not a sufficient connection to the risk targeted, then there is no liability, as mentioned in the commented decision.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 22 January 1992, 90-17.385

Bull civ II, no 23; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007028018>

Facts

1 A trailer attached to a lorry overturned on a motorway due to high winds, causing unspecified damage to the company operating the motorway. The latter sued the company owning the lorry and the appellate court rejected the claim, on the ground that the lorry had not collided with another vehicle, nor hit a pedestrian or a cyclist.

Decision

2 The *Cour de cassation* quashed the appellate court's decision. It ruled that the lorry's owner was liable since the harm had been caused by a traffic accident and its vehicle had been involved in the accident.

Comments

3 The doctrine of 'sufficient connection to target risk' is not accepted under French law. As a matter of principle and unless the legislator explicitly limits the range of compensable damage (which very seldom happens), any type of damage should be compensated, regardless of the basis of liability and the reason why this type of liability was adopted or developed in the first place.

4 This is illustrated by the present case, where the *loi Badinter* on the compensation of victims of traffic accidents was applicable.[1] While this statute has its own special logic, it was clearly adopted in order to facilitate the compensation of bodily injuries and physical damage to property caused by traffic accidents to pedestrians, drivers and other individuals. Nothing in the *travaux préparatoires* of the statute nor in the commentaries that were written on it suggests that it was also intended to apply to damage, be it physical damage to property or pure economic loss, caused to public persons, commercial companies or other legal persons operating facilities such as roads or motorways. Yet, as the

1 See 5/6 nos 14-15 above.

present case shows, courts see no problem in applying the statute for the benefit of such persons.

A traffic accident under the *loi Badinter* is any unforeseen and potentially harmful event arising in connection with the circulation of motor vehicles.[2] The overturning of a trailer therefore qualifies as an accident. And the owner of the lorry (who was sued in its quality as the driver's principal) is therefore strictly liable for any harm caused by the accident. 5

The *Cour de cassation*'s decision does not give any indication as to the nature of the harm (physical harm or pure economic loss) for which the company operating the motorway sought compensation. This illustrates the fact that, as is generally the case under French law, any type of harm can be compensated under the *loi Badinter*, including pure economic loss, despite the fact that the statute was clearly intended primarily to make compensation of *bodily injuries* and resulting losses easier. The doctrine of 'sufficient connection to target risk' is therefore clearly inapplicable under French law. The *ratio legis* of a liability regime has never been considered as justifying an explicit limitation on the kind of harms or losses that can be compensated under this regime. As soon as the 'triggering factor' (*fait générateur*) of liability has been proven, the defendant must normally compensate any harm caused by it, even if the strict liability regime that is being applied was obviously not created with a view to compensating that kind of harm. 6

The *Projet Terré*,[3] an academic reform project of French tort law, took the view that the 'sufficient connection to target risk' doctrine should be introduced in at least some cases of strict liability,[4] but this suggestion did not find its way into the reform bill on civil liability, which is currently under discussion.[5] 7

Cour de Cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 26 September 2002, 00-18.627

Bull civ II, no 198; JCP G 2003, I, 154, no 34, note *G Viney*; D 2003, 1257, note *O Audic*; RTD civ 2003, 100, note *P Jourdain*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007041693>

Facts

A building hosting a hotel and a restaurant was located at the foot of a cliff. In view of the risk that blocks may fall down from the cliff, an administrative order was taken or- 8

2 *A Tunc*, Loi Badinter – On Traffic Accidents and Beyond, 6/7 Tul Eur & Civ LF 27, 37 (1992).

3 *F Terré* (ed), Pour une réforme de la responsabilité civile (2008).

4 See esp art 23, on which *JS Borghetti*, Des principaux délits spéciaux, in: F Terré (ed), Pour une réforme de la responsabilité civile (2008) 163, 174.

5 Projet de réforme de la responsabilité civile, published by the French Ministry of Justice in March 2017 <http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf> An English translation by *S Whittaker* is available at <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-de-la-responsabilite-civile-traduit-en-anglais-30553.html>.

dering the closure of the hotel and restaurant. The owners of the business brought an action against the owner of the piece of land on which the cliff was situated and claimed damages for the loss of profits resulting from the closure of their businesses. The appellate court rejected the claim on the ground that the operation of the restaurant had never until then been impeded by the risk of falling rocks and that this mere risk was not the direct cause of the loss.

Decision

9 The *Cour de cassation* quashed the appellate court's decision. It ruled that the closure of the business had been caused by the 'action' of the cliff and that the resulting loss of profits was therefore to be compensated under the rules of liability for the action of things.

Comments

10 Starting at the end of the 19th century, French courts have developed a new strict liability regime, called *responsabilité du fait des choses* ('liability for the action of things') whereby the 'keeper' (*gardien*) of a thing can be held strictly liable for damage caused by the action of that thing.[6] This regime was originally intended to facilitate the compensation of harm suffered by victims of industrial accidents, and it was later used, until the adoption of the *loi Badinter* in 1985, as a way to impose strict liability on drivers in the case of traffic accidents, in order again to facilitate the compensation of those injured in these accidents.[7] There is therefore no doubt that the *raison d'être* of liability for the action is and has always been to help victims of bodily injuries to be compensated.

11 Yet, French courts have decided that this strict liability regime should apply to any type of things, regardless of their intrinsic dangerousness. Courts also see no problem in applying this strict liability regime whenever there has been an 'action' of a thing, regardless of the type of harm caused, and thus to compensate, for example, pure economic loss, as in the present case, or pure emotional harm.[8] Admittedly, the cases where liability for the action of things is used to compensate other types of harm than bodily injuries are few and far between, but they nevertheless testify to the fact that the 'sufficient connection to target risk' doctrine is not recognised in French tort law.

12 In the present case, the *Cour de cassation* also adopted a rather lax conception of causation. It ruled that the administrative order was only a consequence of the risk of falling rocks and that this risk was therefore the actual cause of the loss of profits. Ex-

6 On this regime, see *J Bell*/*S Boyron*/*S Whittaker*, Principles of French Law (2nd edn 2008) 381ff.

7 On the 'raison d'être' and evolution of liability for the action of things, see *JS Borghetti*, Strict Liability in Tort and the Boundaries of Tort Law, in: H Koziol/U Magnus (eds), Essays in Honour of Jaap Spier (2016) 19, 22ff.

8 See Cass civ 2, 5 June 1991, 88-20.132; Bull civ II, no 76; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007026938>.

pressed in such terse terms, the reasoning is not totally convincing, as any event is always the consequence of another event, but the idea behind it seems to be that the risk left the local authority no choice but to issue the order. Stressing the 'passive' role of the local authority was also a way to avoid judging the local authority's behaviour (something the appellate court of the *Cour de cassation* would not have been allowed to do, since only administrative courts are competent under French law to rule on the liability of public authorities).

7. Belgium

The doctrine of 'sufficient connection to target risk' or its equivalent does not exist in Belgian law. 1

How would the two examples from the questionnaire be solved under Belgian law? In the case of a car, which stopped due to an unforeseeable technical defect, the issue relates to a vehicle's defect. V could then obtain compensation on the basis of art 1384 of the former Civil Code, which establishes an irrebuttable presumption of liability for the custodian of a defective thing. It is a rather extensive regime. The nature of the materialised risk and the connection between this kind of risk and the harm suffered is irrelevant. For the custodian to be held liable, the defect only has to be causally linked with the damage. 2

As to the example of the pedestrian who walks on a road to avoid the irregularly parked car and falls, the fact that the presence of the vehicle on the pavement is a remote cause of the damage is not sufficient, in principle, to exonerate the author of the misconduct. We could also approach this case considering art 29*bis* of the Law of 21 November 1989.[1] In Belgium, there is a strict (risk-based) liability regarding cars given the increased danger they represent. For this provision to apply, it is sufficient that a motor vehicle used as a means of transport and participating in traffic (as opposed to vehicles serving as operating machines) is involved, without any misconduct being required. As a result, an elderly woman who falls after being startled by a moving truck may claim compensation on this basis.[2] The concept of traffic accident is interpreted very broadly in Belgian law. In a famous case, a young girl, sitting in the back of a car driven by her mother, was shot in the spine by a stray bullet during a shoot-out between police officers and the perpetrators of a hold-up. According to the Supreme Court, the accident was indeed related to the use of vehicles. The insurer of the car involved was required to compensate the damage suffered.[3] 3

1 Loi du 21 novembre 1989 relative à l'assurance obligatoire de la responsabilité en matière de véhicules automoteurs, art 29*bis*, MB, 8 December 1989, 20122.

2 Civ Flandre occidentale (div Bruges), 27 June 2019, CRA 2019, liv 5, 15. For another case with a pedestrian's fall, see also Pol Bruges, 18 October 2013, CRA 2014, liv 2, 10.

3 Cass, 9 January 2004, Pas 2004, 34 (*Melissa* case); Cass, 6 January 2012, Pas 2012, 40.

8. The Netherlands

Hoge Raad (Supreme Court) 24 February 1984, ECLI:NL:HR:1984:AG4766

NJ 1984/415, case note *WCL van der Grinten* (Bardoel/Swinkels)

Facts

1 Two neighbouring farmers kept pigs. Some pigs escaped from Swinkels' farm, where an infectious disease had been detected. Swinkels' neighbour, Bardoel, herded the pigs, which had escaped into his own herd. One of Swinkels' pigs came into physical contact with Bardoel's pigs, which were subsequently infected with the disease. The question was whether this fell within the scope of protection of (now[1]) art 6:179 BW, which holds the owner of an animal strictly liable. The appellate court did not hold Swinkels liable because the infection was not caused by an activity of the animal.

Decision

2 The Supreme Court held that art 6:179 BW establishes strict liability for damage caused by domestic animals. The basis of this liability must be found in the danger that lies in the animal's own energy and in the incalculable element that is contained in that energy. This means that the liability based on art 6:179 BW, in principle, does not include the event that an animal transmits a contagious disease to other animals or to humans. Liability under art 6:179 BW may, however, extend to contamination damage if this is the result of behaviour of the animal, which, apart from the transmission of the disease, can be regarded as a realisation of the danger that art 6:179 BW protects against. The appeal was, therefore, rejected.

Comments

3 This case clearly illustrates that the strict liability for animals is limited in relation to its scope of protection. In this case, that scope of protection is derived from, and limited to, the basis of the liability: the incalculable element in animal behaviour. Where it is more generally recognised that the scope of protection of a strict liability rule is an important factor for causal attribution in the sense of art 6:98 BW,[2] this case shows that it should first be decided whether the risk that has materialised falls under the scope of protection of the rule.

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1 The decision was based on the predecessor of art 6:179 BW, but it mentions the same scope for this new article.

2 See above 1/8 no 1ff. Also, explicitly with regard to strict liability for mining operations (art 6:177 BW) Hoge Raad 19 July 2019, ECLI:NL:HR:2019:1278 (Prejudiciële vragen aardbevingsschade).

9. Italy

Corte di Cassazione (Court of Cassation) 17 November 1997, no 11386

Dejure, online

Facts

While driving his motorbike, V hit the left edge of A's lorry, parked in violation of municipal parking regulations. V suffered serious personal injuries as a consequence of the accident. He sued A and his insurer in order to recover damages. 1

Decision

The *Corte di Cassazione* confirmed the decision by the appellate court and ruled that the infringement of municipal parking regulations was not enough to establish a causal link with the harmful event because the road was wide and visibility and lighting were good, despite the lorry being parked incorrectly. 2

Corte di Cassazione (Court of Cassation) 4 May 2004, no 8457

Foro it 2004, 2377–2382

Facts

V was playing with some friends near a pylon supporting a high voltage cable. In order to surprise them, he climbed to the top of the high voltage pylon, where there was a 'Danger of death' warning sign. The boy touched the high voltage cable and suffered a serious electric shock. He then sued A, the electrical company seeking compensation for personal injury. He argued that the defendant was liable on the basis of art 2050 cc, (strict liability for dangerous activities). According to V, the electrical company was liable as it did not take all possible measures to avoid the damage, as demanded by that provision. 3

Decision

The *Corte di Cassazione* upheld the decision of the lower court that rejected the claim against A. The Court held that the claim did not establish strict liability according to art 2050 cc on dangerous activities because the causal link between the company's activity and the damage was broken by the 'claimant's acrobatic and reckless behaviour'. The damage was, therefore, produced entirely by V's conduct rather than by the dangerous activity carried out by A. 4

Comments

5 In the first case in this section, the Court follows a reasoning close to the doctrine of the protective purpose of the rule. In the second case, this is applied to a claim based on the alleged strict liability of the defendant. Strict liability is not the general rule of tort liability, but the Italian Civil Code and special laws provide ad hoc rules on this matter. Being an exception to the general rule, strict liability is limited to the 'typical risk' contemplated by each provision. According to Trimarchi, the limits imposed on strict liability by the 'typical risk' doctrine are necessary to ensure the correct functioning of insurance coverage.[1] Italian scholars regularly discuss issues of risk and compensation.[2] Nonetheless, the Court did not address the issue of the 'target of the risk' doctrine; it rather resolved the case on the basis of causation, a well-established and less innovative basis for Italian lawyers, since it has its textual basis in the Penal Code, while the notion of 'typical risk' is wholly doctrinal.[3]

10. Spain

Tribunal Supremo (Supreme Court) 4 February 2015

RJ 2015\2075

Facts

1 D was driving along a regional road and came across a herd of wild boar. To avoid them, he undertook an evasive manoeuvre to the left, thereby colliding with the vehicle driven by V that was heading towards him in the opposite direction. D's wife and son and V's daughter died; V's wife was seriously injured. The drivers of the two cars sued each other. In the first instance, the court dismissed both claims. It considered that the accident was due to force majeure. The Provincial Court upheld the appeal and awarded compensation to both drivers and all the injured passengers. V's insurer was dissatisfied and appealed to the Supreme Court, arguing that it was D who had caused the collision.

Decision

2 The cause of the accident was the presence of wild boars on the road. The critical factor is whether or not this involves force majeure unrelated to the activity of driving. According to art 1 Road Traffic Liability Act, the liability of the driver for personal injury is strict. Still, he or she can be exonerated from liability in the case of interference of force majeure unrelated to driving ('fuerza mayor extraña'). The court connects this notion

1 *P Trimarchi*, La responsabilità civile: atti illeciti, rischio, danno (3rd edn 2021) 306.

2 Eg *B Gardella Tedeschi*/*N Coggiola*, Risk and Italian Private Law, in: M Dyson (ed), Regulating Risk through Private Law, Cambridge (2018) 113.

3 *M Bussani*, L'illecito civile (2020) 789.

with the concepts of fortuitous event and force majeure, which appear to be different in some provisions of the Civil Code. A fortuitous event is an unforeseeable or unavoidable event leading to contractual breach that is internal to the debtor's activity, whereas force majeure is external. Applying this division to strict liability, force majeure relating to the sphere of risk created by the relevant party is to be considered a fortuitous event and will not exonerate him or her. In the case at stake, the crossing of the road by wild boars is not a fact alien to the specific risk posed by the circulation of motor vehicles; it connects to the sphere of the risk set in motion by the agent. The court mentions as evidence the considerable number of incidents of this kind that occur on the roads every year. The judgment ends by confirming the application of the so-called doctrine of cross-compensation. This doctrine implies that, in the event of a collision without proven fault of any of the drivers, each of them must cover the injuries suffered by persons travelling in the other vehicle.

Comments

Legal writing stresses that for courts to apply strict liability rules, the injury must be the typical realisation of the specific risk or danger to which the legislature sought to bind this particular type of liability.[1] Article 1.1 Road Traffic Liability Act provides that 'the driver of a motor vehicle shall be liable, on the basis of the risk created by driving, for damage caused to persons and goods on the occasion of circulation'. The Act provides for strict liability in cases of personal injuries, although case law has also taken into account the creation of specific risk when dealing with property damage.[2] The driver can only be exonerated from liability for personal injuries if he or she proves either the 'exclusive fault' of the victim (100 % contributory negligence) or the intervention of a force majeure event unrelated to the driving or the functioning of the vehicle (literally: 'extraneous' force majeure; '*fuerza mayor extraña a la conducción o al funcionamiento del vehículo*'). Traditionally, legal writing and case law agreed that force majeure 'unrelated to driving or the functioning of the vehicle' was any event alien to the operation of the motor vehicle involved in the accident. Accordingly, unforeseeable or unavoidable incidents, including the interference of a third party (eg pedestrians or cyclists, other vehicles, animals) or natural events, could amount to exoneration from (strict) liability.[3] For years, the Supreme Court took this view.[4] A group of scholars held, however, that within a strict liability regime, the interpretation of the adjective 'extraneous' must refer only to events that have nothing to do with traffic or circulation of motor vehicles, such as ex- **3**

1 *X Basozábal*, Responsabilidad extracontractual objetiva: parte general (2015) 81ff.

2 STS 10 September 2012 (RJ 2012\11046).

3 See STS 17 November 1989 (RJ 1989\7889) and 8 February 1992 (RJ 1992\1198); both commented with criticisms by *LF Reglero Campos*, CCJC (1989) 1061–1072 and CCJC 28 (1992) 241–258.

4 The last ruling being issued on 14 May 2014 (RJ 2014\2729). See *JA Badillo Arias*, Responsabilidad en accidentes por atropello de especies cinegéticas, RRCS 4 (2014) 3.

traordinary natural events or terrorist attacks.[5] Strict liability based on the Road Traffic Liability Act must thus extend to any harm produced by circumstances inherent to the so-called 'traffic risk'. These circumstances can be internal – such as vehicle defects or breakdowns – but also external. External circumstances attributable to the specific risk of traffic encompass unavoidable incidents related to pedestrians, animals or other drivers' manoeuvres that regularly interfere with the driving of a motor vehicle. The judgment under comment endorses this line of thought.

4 This result matches the legislative evolution of the special provisions on harm caused by game[6] concerning damage arising from animals crossing the roads.[7] Hunting associations lobbied for years to have the Road Traffic Liability Act changed to overcome the original case law of the Supreme Cout. In 2001, and then again in 2005, reforms were passed, attributing damage to drivers. However, courts were slow to blame drivers[8]. They applied extensive criteria to link hunting events with the presence of wild animals on roads.[9] Finally, since 2014, persons running game reserves are *strictly liable* only if the crossing of the road happens during a big game hunting event involving a group of hunters, or within 12 hours after it has ended.[10] Traffic accidents caused by wild fauna are therefore no longer the realisation of the specific risk of game reserves, but of the risk created by the driving of the motor vehicle.[11] This is, by the way, how cases of any kind of animal crossing the road are tackled. The driver cannot argue that there was force majeure, and may seek to make good his or her damage and/or recoup whatever

5 *LF Reglero Campos/JA Badillo Arias*, Accidentes de circulación: responsabilidad civil y seguro (3rd edn 2013) 399; following them, see also *M Medina Crespo*, Responsabilidad civil automovilística por daños corporales: la fuerza mayor liberadora como manifestación concreta de la atenuación de la objetividad atributiva, RRCCS 1 (2013) 6–29.

6 Art 35 Act 1/1970, of 4 April, on Hunting. Art 1906 CC also deals with damage caused by game. See on both regulations, STS 22 December 2006 (RJ 2007\608). *E Vicente Domingo,* Los daños causados por animales y en el ámbito de la caza, in: LF Reglero Campos, Tratado de responsabilidad civil, vol 2 (3rd edn 2014) 1512–1514 and *P del Olmo García*, Artículo 1906. Responsabilidad del propietario de heredad de caza, in: Código civil comentado, vol 4 (2011) 1488–1493.

7 See *P Álvarez Olalla*, ¿Quién responde de los daños causados por colisión con animales que irrumpen en la calzada? Novedades legislativas y jurisprudenciales, Revista Doctrinal Aranzadi Civil-Mercantil, 6 (2014) 1.

8 *E Vicente Domingo*, Los daños causados por animales y en el ámbito de la caza, in: LF Reglero Campos, Tratado de responsabilidad civil, vol 2 (3rd edn 2014) 1519.

9 SAP Soria (Section 1) 7 May 2009 (JUR 2009\283288) and A Coruna (Section 6) 10 September 2014 – commented on by *I Jiménez López*, dA. Derecho Animal: Forum of Animal Law Studies, 6/1 (2015).

10 Road Traffic and Safety Act, Additional Provision No 7 of the consolidated text as approved by Royal Legislative Decree 6/2015, of 30 October. See SAP Zamora 9 February 2016 (JUR 2016\58105) and Lugo 25 November 2015 (JUR 2015\304900).

11 STS 3 June 2016 (RJ 2016\2316). Commented on by *P Domínguez Martínez*, CCJC 103 (2017) 37–76. But see *E Llamas Pombo*, El nuevo régimen de Responsabilidad Civil por atropello de especies cinegéticas, RAAERCS 51 (2014) 9–32, 32 (holding that 'liability is attributed to the one who did not cause the harm but who suffered it; the one who did not create the risk but who was a victim of it, regardless of whether his conduct was negligent or not').

he or she paid against the third party who might be liable: that is, any possessor of a wandering animal,[12] the managers of natural wild-life reserves and sanctuaries,[13] or persons running game reserves or landowners acting with fault, or public bodies accountable for road maintenance or signposting.[14]

12. England and Wales

Wormald v Cole, Court of Appeal, 26 February 1954

[1954] 1 QB 614

Facts

The plaintiff was an elderly woman who lived in a cottage next to a field in which the defendant kept cattle. One evening some of these animals entered the plaintiff's land. When the plaintiff sought to prevent the cattle from causing damage, she was knocked over and trampled by one of the cows, as a result of which she was seriously injured. She brought a claim against the defendant for cattle trespass, but the trial judge dismissed the action. The plaintiff appealed to the Court of Appeal. The judge's finding that the defendant had not been to blame for the escape of the cattle was not disputed. **1**

Decision

The court held that the plaintiff could recover damages for her injuries in cattle trespass. It was acknowledged that originally this cause of action had been limited to damage to the surface of the land itself and to crops and shrubs eaten or trodden down by the trespassing animal. However, later authorities had extended the scope of the tort, and recovery was now possible for all damage reasonably and naturally resulting from the trespass. In particular, injury to the plaintiff occupier was not too remote, at least where it was not the result of a deliberate attack by the animal. **2**

Comments

Cattle trespass is a tort of strict liability, quite separate from the fault-based cause of action for negligence. This decision, which concerned the common law action for cattle trespass – since replaced by a statutory cause of action, found in s 4 of the Animals Act **3**

12 Art 1905 CC. Among many others, see *A Ramos Maestre*, La responsabilidad extracontractual del poseedor de animales (2003).

13 For example, on an accident caused by a badger, see judgment of the High Superior Court of Extremadura, Section 2, 12 December.2005 (JUR 2006\199903) (applying Act 8/1998, of 26 June, concerning the preservation of wildlife and natural spaces of Extremadura).

14 See also the judgment of the Spanish Constitutional Court no 112/2018 of 17 October.

1971 – shows that the courts took a relatively broad approach to the remoteness issue in the context of this tort. As for other torts of strict liability, there is little in the way of English authority on whether liability is limited by a doctrine of 'sufficient connection to target risk'. It is, however, possible that the courts would hold that, for example, liability under the rule in *Rylands v Fletcher*[1] is limited to manifestations of the dangerous characteristic of the thing accumulated by the defendant which gives rise to strict liability in the first place. An analogy could be drawn here with the position in the United States, where the principle of strict liability for ultra-hazardous activities (a descendant of the *Rylands* decision) is limited to consequences which lie within the risk that makes the activity ultra-hazardous.[2]

13. Scotland

Pullar v Window Clean Ltd, Court of Session (Inner House) 11 October 1955

1956 SC 13

Facts

1 V, a window cleaner, stepped on to a window sill on the second floor of a building in order to clean the outside of the window. When he attempted to pull down the sash, he lost his balance and fell to the ground, injuring himself. V raised an action for damages in delict against A1, his employers, and A2, the owners of the building.

2 V's claim against A2 was founded on an alleged breach of a statutory provision which provided that:

> 'In all buildings erected or reconstructed after the commencement of this Order the window sashes above the ground floor shall … be so constructed as to admit of the window being cleaned from the inside of the room and the Dean of Guild Court shall unless there are special grounds established to their satisfaction refuse to grant a warrant for any such building where provision is not made for satisfying this requirement'.

3 At first instance, the judge found in favour of A2. V appealed against that finding.

Decision

4 The Inner House upheld the decision at first instance, reasoning that: (1) 'the general underlying purpose of this portion of the Order is the maintenance and improvement of the safety and healthiness of buildings in the city' and that it was not 'designed to constitute a charter for window cleaners'; (2) the fact that the section only applied to some windows

1 On this rule, see above 2/12 nos 5–7 and below 9/12 nos 4–6.

2 Restatement, Third, Torts: Liability for Physical and Emotional Harm (2010) § 29, comment l.

(those of new or reconstructed buildings) emphasised this point; (3) the obligation in the section was not absolute, and gave discretion to the Dean of Guild: 'Dean of Guild considerations, therefore, and not window cleaners' safety' was intended as the scope of the provision; and (4) commercial window cleaners as a class of person were not specifically mentioned in the Order as parties intended to benefit from the provision, further emphasising that their protection was not specifically intended as the purpose of the section.

Comments

The decision in this case may seem a somewhat harsh one for the victim, but it can be explained on the narrow approach taken by the appeal court to the purpose which the court ascribed to the provision. The court thought that (to put it in the terms of the current section of this report) the 'target risk' for which the provision was enacted was not the avoidance of personal injury to window cleaners as a result of windows which were hard to clean from inside the building; rather, more narrowly, the court conceived of the risk the provision was designed to combat as poor safety and unhealthy buildings generally within the municipal area. It was, in intent, thus a provision designed to improve the general quality of housing stock rather than one designed to permit compensation to injured parties. **5**

14. Ireland

Superquinn Ltd v Bray UDC, Irish High Court, 18 February 1998

[1998] IEHC 28; [1998] 3 IR 542

Facts

V's shop was flooded during a storm (colloquially referred to as 'Hurricane Charlie'). V sued several As; one, the national forestry company (A4) was sued, inter alia, under the principle in *Rylands v Fletcher*[1] – a strict liability tort. A dam on an artificial lake owned and occupied by A4 failed and the flood waters added to the excess water in the adjacent river, which flooded the nearby town, including V's premises. **1**

Decision

Laffoy J held that the *Rylands v Fletcher* principle requires that A be able to foresee the type of damage caused if their accumulated hazard escapes.[2] This requirement was sa- **2**

1 (1868) LR 3 HL 330.

2 Following the House of Lords decision in *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1993] UKHL 12, [1994] 2 AC 264, noted by *Heuston* (1994) 110 LQR 185.

tisfied on the facts, but A4 had a defence of 'act of God' (or *viz major*). This defence is available if extraordinary natural forces, that could not be anticipated or guarded against, cause the escape of the hazard.[3]

Comments

3 The use of foreseeability of the type of risk here is a scope of duty type of argument. The escape itself does not have to be foreseeable, but the damage the hazard might cause, should it escape by some means, does have to be capable of being anticipated. There is no further consideration of the issue in Irish cases on the *Rylands v Fletcher* principle (and there are very few cases on the principle at all in Ireland), so it is not clear whether the subsequent revision of the issue would be adopted in Irish law.[4] The act of God principle operates as a defence and also engages a foreseeability requirement. Another defence available under *Rylands v Fletcher* is 'act of a stranger'. A can escape liability if the escape of the hazard was caused by the unforeseeable intervention of an unauthorised person.[5] Road accidents of the type in the questionnaire do not involve strict liability in Ireland; they are dealt with as negligence cases.

16. Norway

Høyesterett (Norwegian Supreme Court) 5 May 2003

Rt 2003, 557

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2002-1594-a?searchResultContext=2108&rowNumber=1&totalHits=1>

Facts

1 A police car followed another car at high speed. The driver had been driving recklessly and was trying to flee. The pursuit took place in a residential neighbourhood, and the police found it necessary to stop the driver from causing serious damage. The police therefore drove into the car while it was stationary. The runaway car was not insured. The state, which owned the damaged police car, sued the insurance pool of traffic insurers (*Trafikkforsikringsforeningen*) claiming compensation for the damage to the police car.

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3 Relying on *Nichols v Marsland* (1876) 2 ExD 1, *Nitro-Phosphate and Odam's Manure Company v London and S. Catherine's Docks* (1878) 9 Ch D 503and *Greenock Corporation v Caledonian Railway* [1917] AC 556. She also cited Charlesworth and Percy on Negligence (9th edn 1997) and a Scottish treatise, *J Rankine*, Law of Land Ownership in Scotland (4th edn 1909), as cited by Finlay LC in *Greenock* [1917] AC 556, 571.

4 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1; see also *Cambridge Water*, 2/13 no 5.

5 See *BME McMahon*/*W Binchy*, Law of Torts (4th edn 2013) [25.38] ff; *E Quill*, Torts in Ireland (4th edn 2014) 252f.

Decision

The Supreme Court found that the damage was compensable under the Traffic Liability Act, *Bilansvarsloven* 3 February 1961 § 2. The prerequisite of the basis for liability is that a car 'gjer' the damage, which translated means 'does' the damage. Even though the car in question was standing still at the point in time when the damage was caused, the Supreme Court found that the car 'did' the damage in the eyes of the law. The reckless driving before the collision was perceived as the cause of the damage, hence, the runaway car was the cause of the damage. This view was supported by the preparatory works of the Traffic Liability Act, which emphasises that the target goal of the scope of the strict liability was a risk generated by the pace and weight of motor vehicles.[1] When referring to the preparatory works, the Supreme Court bore in mind the entire chain of events, taking into consideration also the pursuit prior to the actual damage whilst the car was stationary. **2**

Comments

The decision shows how a causal criterion may be interpreted widely by raising arguments on adequate connection between the damaging act or event and the damage. In this case, the damage was a consequence of the policemen in the pursuing car making the decision to collide with the runaway car. This would, in another context, have been deemed to be the sole cause of the accident. The fact that there is insurance coverage that targets the dangers of traffic in a rather broad sense, called, however, for a more broad understanding than the ordinary perception of causation. Consequently, the events leading up to the decision of the policemen who deliberately crashed into the other car with the victim was seen as a legally effective cause. The case demonstrates how the comprehension of causation is sometimes dominated by normative thinking.[2] It would be fair to say that the targeted risk for the basis of liability influences the understanding of causation. **3**

Hence, the case also illustrates how the protective purpose behind the scope of the liability scheme under Norwegian law may be used actively in order to warrant a finding of liability. **4**

The decision has been mentioned several times by legal commentators as a contribution to general discussions on adequacy.[3] **5**

1 Innstilling om revisjon av reglene om motorvognansvaret, fra Motorvognansvarskomiteen av 1951 (1957) 58.

2 Cf the reference to value-based decisions in 1/16 above (General overview).

3 See *N Nygaard*, Skade og ansvar [Damage and responsibility] (6th edn 2007) 332 f; *Hagstrøm*/*Stenvik*, Erstatningsrett [Tort Law] (2019) 390.

17. Sweden

Högsta domstolen (Supreme Court) 27 December 2007

NJA 2007, 997

Facts

1 A man started his car, but before driving off, he cleared his windows from ice and snow. While doing this he fell on an icy patch. He claimed compensation for his personal injuries from the compulsory traffic insurer. According to the Swedish Traffic Accident Act, personal injuries shall be compensated from the passenger's own traffic insurance as a kind of strict liability. The requirement is that the damage arose as a result of the vehicle being used in traffic.

Decision

2 Although the car was not literally used in traffic when the accident occurred, the Supreme Court found that compensation to the injured party should be covered by the strict liability. Since the man was injured while performing a preparatory provision in order to make the car ready to be used in a traffic-safe way immediately afterwards, the personal damage was considered as having a connection to the normal use of a car.

Comments

3 Although the result of the case is positive, the judgment nevertheless can be read as a restriction in comparison with earlier legal usage concerning the Traffic Accident Act. In a previous case (NJA 1988, 221), a young intoxicated man injured his eye which came into contact with a car door when his friends pushed him in the car to avoid a confrontation with the police. The young man received full compensation since the Court found that the injury was connected to the normal use of a car. The 1988 case thus made no qualifications regarding the connection (and it has therefore been criticised in the legal doctrine), but the 2007 case provides two such important requirements: a 'time qualifier' and a 'function qualifier'. The Supreme Court noted that the accident happened immediately before the car should be used; this time qualifier can put a line of demarcation to any damage that occurs at a more obvious time distance to the actual car ride. Moreover, the Court emphasised that the function of the action was to remove ice and snow – or more precisely, to ensure that the car could be driven in a traffic-secure manner. This safety function can delimit liability, since many actions before or after a car ride have no connections to such a function. Thereby, these cases concerning strict liability give evidence of the requirements for making more obvious the argumentation concerning finding a borderline of the liability in question. When dealing with strict liability, the approach to the issue of limitation is often articulated as a search for 'the typical risk' in-

stead of 'adequacy'.[1] When comparing these cases regarding strict liability in traffic scenarios (NJA 2007, 997; NJA 2016, 142; NJA 2017, 622), we can understand how both the positive and negative responses sharpen the understanding of the interpretation of borderline issues.

Högsta domstolen (Supreme Court) 23 March 2016

NJA 2016, 142

Facts

A mobile crane was used on a construction site, where it overturned and caused damage to a building. According to the Traffic Damage Act, the owner of the vehicle is strictly liable for damage 'resulting from motor vehicle traffic'. The house owner interpreted this criterion in the traditional extensive way, meaning that liability will apply if the damage was a result of a 'normal use' of the vehicle; hence the normal use of a vehicle with a crane is lifting – and a normal risk when lifting is overturning due to the weight that is being lifted. The car owner (ie the insurance company, which was actually the party in the court proceedings) instead argued that liability presupposes that the vehicle was being used in a traffic situation, and since the wheels were raised with the vehicle standing on its supporting legs, there was no traffic accident; instead, it was argued, the vehicle was only used in its function as a crane – not as a vehicle – when it overturned. **4**

Decision

The Supreme Court did not hold the car owner's insurance liable for the damage. Initially the Court mentioned that the traffic connection in earlier case law had been given a wide scope to the injured party's advantage; the Court also stated that, 'under certain conditions', liability had also had been established in situations when the damage had been caused by stationary vehicles. However, it was explained that the Court in such cases had paid attention to the car's 'characteristic modes of transport' and 'the specific risks that traffic with cars involves'. Since the damage had occurred when the mobile crane was used at a construction site and in its function as a lifting vehicle, there was no connection to specific risks associated with road traffic. **5**

Comments

This case highlights two possible interpretative paths to consider when dealing with strict liability that is covered by mandatory insurance. A 'formalist' approach can be **6**

1 See *H Andersson*, Ersättningsproblem i skadeståndsrätten (2017) 422ff; *H Andersson*, Gränsproblem i skadeståndsrätten (2013) 184ff; *J Hellner*/*M Radetzki*, Skadeståndsrätt (10th edn 2018) 169ff.

adopted, which uses the insurance to cover as many victims as possible; thereby the criterion 'normal use' of a vehicle can be asserted. A more restricted 'substantial' approach will lead to fewer cases where liability is established; such an argumentative method would stress the specific and significant risk factors behind the various compensation regulations with strict liability. Since the formalistic approach with 'normal use' of a mobile crane includes the lifting of goods, the substantial approach can be seen as a more restrictive search for the relevant and typical risks that should be covered by the Traffic Damage Act, ie the risks specific to road traffic risks. The issue concerns appropriate risk allocation, which, for various liability and compensation rules, may be qualified by detailed risk analyses. The judgment shows that the earlier formal interpretation would establish that almost everything that happens around a vehicle can be included as a completely unqualified causal factor. Instead the substantial interpretation deals with the functional analysis of typical risks which car owners – due to their mandatory insurance – should bear. Since the vehicle was not used in a road traffic situation, none of the typical traffic risks were present; a mobile crane can be used in its normal horizontal function when driving on roads, but no relevant traffic risk is created when the vehicle is not used as a horizontal driving car but only as a vertical lifting crane.

Högsta domstolen (Supreme Court) 6 July 2017

NJA 2017, 622

Facts

7 A car was parked three metres from a building. Some youngsters smashed the windows and threw burning substances into the car. As a result, the car started to burn, and, due to the fire, the starting engine was short-circuited, which caused the car to 'jump' closer to the building. The fire spread to the house which was totally destroyed. Since the mandatory insurance for vehicles is regulated (in the Traffic Damage Act) as a strict liability for injuries 'resulting from motor vehicle traffic', the issue in the case was if this strict liability could be invoked in this odd situation.

Decision

8 The traffic insurance for the car could not, according to the Supreme Court, cover the burnt down house. The car was not 'in traffic' when the events started. The fact that the movement (the 'jump') was due to the short circuit of the motor was a result of the fire, and not of any 'measure relevant for a vehicle' which forced the car to move. The circumstance that the motor had an impact on the car for a short displacement was not seen as sufficient for the conclusion that the car could be considered to have been 'in traffic'. The traffic insurance should therefore not cover the damage.

Comments

This judgment confirms the negative outcome of NJA 2016, 142 (6/17 no 4 above) concerning the relevant risks covered by the Traffic Damage Act. It perhaps may be regarded as unexpected that the Supreme Court already one year later found it necessary to deliver the same decision. However, the reason is probably that the older formalistic tradition is still strong in lower courts. Therefore the judgment can be interpreted as a clarification of a new, more substantial argumentation, including specific risk evaluations concerning the specific purpose behind the strict liability for traffic situations. 9

19. Estonia

Tallinn Ringkonnakohus (Tallinn Court of Appeal) 10 November 2015

Civil Case 2-13-61255

Facts

There was a fire in a building owned by the defendant in Tallinn. The fire started due to the self-ignition of a truck in the defendant's possession. The claimant's vehicle was parked in the same building, which the claimant used under a tenancy contract. The claimant demanded that the defendant pay damages in the amount of € 119,033 in connection with the destruction of the claimant's property. 1

The district court dismissed the claim, taking the view that the defendant was not liable due to a breach of the tenancy contract because the purpose of the contractual obligation breached by the defendant within the meaning of LOA § 127(2) was not the prevention of such damage as arose in the given case. The district court decided that the defendant was also not liable on the basis of provisions of tort law because the defendant did not commit an unlawful act (LOA § 1045ff) and was also not in control of a source of danger within the meaning of the provisions on strict liability (LOA § 1056ff). 2

Decision

The court of appeal upheld the judgment of the district court holding, among other things, that the district court correctly refrained from applying LOA § 1056. The purposeful use of a motor vehicle is its use as a means of transport and, since the defendant's non-operating truck was standing in a garage, it does not constitute damage arising from a threat characteristic of an especially dangerous thing within the meaning of the referred provision. This fact precludes the defendant's strict liability because the prerequisite for the application of the first sentence of LOA § 1056(1) is the suffering of damage as a result of a threat characteristic of an especially dangerous thing (a characteristic risk). A heightened threat characteristic of a truck is a traffic risk, not its self-ignition. 3

Comments

4 Estonian tort law contains so-called general strict liability: LOA § 1056(1) stipulates that, where damage stems from the manifestation of a danger characteristic of an especially dangerous thing or activity, the person who controlled the source of danger is liable for causing the damage regardless of the person's fault. According to the position prevalent in case law as well as legal writing,[1] one of the prerequisites for the application of strict liability is that a threat characteristic of a source of danger has manifested itself – this means a danger due to which the thing or activity is considered a source of great danger in the first place.

5 Since a thing or activity may, as a source of great danger, pose various threats to the surroundings and cause various kinds of harmful consequences, the application of strict liability is only possible where a threat characteristic of the source of great danger manifested itself. For instance, a threat characteristic of a dog is that it may bite or scare a person. But when a person accidentally stumbles on a dog lying in the middle of a road, a threat characteristic of a dog has likely not manifested itself.

6 A threat characteristic of a motor vehicle, as correctly noted by the court of appeal, is, above all, a risk of causing damage while the vehicle is present in traffic. The judgment of the court of appeal clearly expressed the view of the court that a vehicle is not considered a source of danger merely because it may self-ignite. In light of the decision of the CJEU in Case C-100/18, this is a highly questionable position.[2]

Tallinn Ringkonnakohus (Tallinn Court of Appeal) 28 April 2016

Civil Case 2-14-61146

Facts

7 The defendant was fishing on 27 March 2014 and was dragging a trawl behind a ship for fishing purposes for which a fishing permit had been issued. In doing so, the defendant's ship broke the submerged cable co-owned by two claimants. The cable was damaged by the defendant's ship, its trawl or anchor or an object that had been attached or that had become attached to them.

1 *T Tampuu*, Lepinguvälised võlasuhted [Non-contractual obligations], Juura 2017, 282.

2 In CJEU 20.6.2019, C-100/18, *Línea Directa Aseguradora SA gegen Segurcaixa Sociedad Anónima de Seguros y Reaseguros*, ECLI:EU:C:2019:517, the European Court found (in the context of traffic insurance) that the first paragraph of art 3 of Directive 2009/103 must be interpreted as meaning that a situation, in which a vehicle parked in a private garage of a building, used in accordance with its function as a means of transport, has caught fire, giving rise to a fire which originated in the electrical circuit of that vehicle and caused damage to that building, even though that vehicle has not been moved for more than 24 hours before the fire occurred, falls within the concept of 'circulation of vehicles' referred to in that provision.

The claimants covered the costs of repairing the submerged cable in equal portions. Each claimant demanded that the defendant pay damages in the amount of € 56,432. The claimants relied on provisions of strict liability as well as fault-based tortious liability. 8

In its objections, the defendant argued, among other things, that LOA § 1056 was inapplicable because its precondition – a manifestation of a risk characteristic of a source of great danger – did not materialise in the defendant's case and the defendant did not cause damage to the claimants. The defendant was engaged in the activity of fishing in a usual and compliant manner, as a result of which no risk characteristic of a source of great danger arose. 9

The district court denied the claimants' claims, noting among other things that, in a situation where the defendant's ship was engaged in pelagic trawling, the defendant's ship was not a source of great danger to submerged cables. 10

Decision

The court of appeal set the district court's judgment aside and passed a new judgment in which it granted the claims. The court of appeal noted that, under the first sentence of LOA § 1056(1), where damage stems from the manifestation of a danger characteristic of an especially dangerous thing or activity, the person who controlled the source of danger is liable for causing the damage regardless of the person's fault. The prerequisites for the application of strict liability include the causing of damage, the controlling of a source of great danger, the manifestation of a risk characteristic of the source of great danger, a causal link between the manifestation of a risk characteristic of the source of great danger and the damage, and the absence of any statutory liability-precluding circumstances. 11

The court of appeal agreed with the claimants in that the operation of the ship, including trawling in the vicinity of the cable, constitutes a source of great danger. Unlike the district court, the court of appeal held that the following prerequisites for the application of strict liability existed: the causing of damage; the controlling of a source of great danger; and a causal link between the manifestation of the risk of the source of great danger and the damage. 12

Comments

In its judgment, the court of appeal clearly stated that one of the prerequisites for the application of strict liability is the manifestation of a risk characteristic of a source of great danger in the course of controlling the source of great danger. This case is an example of a situation where the court came to the conclusion that a risk characteristic of a source of great danger had manifested itself. Although the court of appeal did not analyse the prerequisite very thoroughly, it can be concluded from the judgment that the court of appeal finds that a ship can be considered a source of great danger owing to, among other things, the fact that its trawl, anchor or some other object that has become attached thereto could damage a submerged optical cable. 13

20. Latvia

Augstākā tiesa (Senāts) (Supreme Court – Senate) 5 March 2015, No SKC-250/2015
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/205634.pdf>

1 Please see 3/20 above.

22. Poland

Sąd Najwyższy (Supreme Court) 5 February 2002, V CKN 644/00
OSNC 12/2002, item 156

Facts

1 V's taxi was damaged when another car ran into it after V had pulled over for a few minutes to let a passenger and his luggage out of the vehicle. The driver of the other car had suffered from heart and brain failure and he died soon after the accident. V sued the insurer of the dead driver for compensation. The court of first instance awarded damages. The insurer appealed, alleging that the rule of strict liability should not apply. The court of appeal found that the event was a collision and exempted the insurer from liability due to lack of fault.

Decision

2 Under Polish law, the liability for damage caused by the operation (motion) of a motor vehicle is strict (independent of fault)[1] and borne by the possessor of the vehicle (art 436 § 1 KC). However, by way of exception to the first rule, in the case of a collision of means of transport, liability for damages is based on the principle of fault (art 436 § 2 KC). The Supreme Court held that V's parked car had been run into, hence the event was not a 'collision' and the liability for his damage was based on the principle of risk (strict liability). Thus, the defendant insurer had to pay damages. The Court also considered the possibility of the wrongdoer's liability being based on fault, but *ad casum* fault could not have been assigned to the driver's conduct, as the exclusive cause of the accident was his heart and brain failure.

3 The key issue in this case is the interpretation of the word 'motion' or 'a vehicle in motion', which determines whether we classify an accident as a collision (hence, liability is based on fault) or a simple 'running into another car not in motion' (hence, liability is

1 Explanatory note: in Poland, strict liability is known as 'liability based on risk'. Other terms used to describe it are: objective liability, liability without fault, or liability for result. Polish civil law does not establish one single type of strict liability, but rather approaches the issue on a case-by-case basis.

strict). The Court reviewed its case law under art 436 KC and analysed the regulations on road traffic.[2] The Court came to the conclusion that when a taxi, having reached its destination, stops at the side of a road for more than one minute, and the reasons for its stopping are neither attributable to the traffic conditions nor to the regulations, it is not considered 'in motion' in relation to other moving vehicles. A collision of mechanical means of transport should be understood as their physical contact while they are in motion in relation with each other in the light of the road traffic law. Hence, the Court held that V's car had been run into and the liability for his damage was strict. Thus, the defendant insurer had to pay damages.

Comments

The Court first assumed that the driver could not be considered to be at fault, hence it focussed on interpreting art 436 §§ 1 and 2 KC in a way which allowed strict liability to be imposed on the possessor (insurer) of the vehicle. In consequence, the decision was favourable to the plaintiff. **4**

Strict liability attaches to dangerous activities or objects creating a risk of damage, for example, a means of transport. The legislative solution is based on the premise that when two cars are moving (are in motion), then each creates the same risk and there is no need to protect one more than the other by imposing a stricter ground of liability. **5**

Generally, Polish courts interpret the statutes concerning strict liability extensively.[3] The phrase 'in motion', which is an element of the strict liability of an enterprise (art 435 KC) as well as of car holders, has been construed broadly by case law to include, for example, work stoppage, night pauses, technical breakdown, a car stopping on the hard shoulder with its engine turned off.[4] The usual justification is the risk created by an activity, benefits coming from such activity, and the need to protect victims. In the reported judgment, by referring to the law on road traffic, the Court correctly linked the norm of the Civil Code dealing with the consequences of driving activity with other legal provisions intended to regulate the rules of that very activity. The conclusion was correct and just and the judgment is representative of current court practice. Reference can also be made to the case reported in 7/22 no 6 ff. **6**

2 The Law on Road Traffic of 20 June 1997, Dz U 98, at 602 as amended.

3 Sąd Najwyższy (Supreme Court, SN) of 15.11.1959 (1961), Orzecznictwo Sądów Polskich i Komisji Arbitrażowych (Reports of the Polish Courts and Arbitration Panels Cases, OSPiKA) 159, SN 18 December 2018, IV CSK 483/17, OSNC ZD 2019/4, item 60.

4 *M Nesterowicz*/*E Bagińska*, Strict Liability in Poland, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 259.

Sąd Apelacyjny in Warsaw (Court of Appeals) 6 August 2013, I Aca 226/13

<http://orzeczenia.waw.sa.gov.pl>

Facts

7 V is a shareholder in a limited liability company, X, which is a lessee of land belonging to the State Treasury (A). X built a commercial pavilion on the land and used it for business rentals (trading fairs). X did not hold ownership of the building, as it was not the owner of the land. The building collapsed during a pigeons' fairs in Katowice in 2006 due to the fact that tonnes of snow destroyed the roof (negligently constructed and maintained), causing mass injuries (not subject to this lawsuit). This event had a great impact on the operation of X's business. V sued the State (the land owner) for lost value of the shares he held in company X, caused by the collapse of a building. V based his claim on art 434 KC (strict liability of the independent possessor of a building for damage caused by the collapse of that building or part thereof). The court of first instance dismissed V's claim holding that he is not an injured party; the patrimonial damage was suffered by X and that art 434 KC is not applicable.

Decision

8 The Court of Appeals affirmed, upholding the decision of the lower court and citing all the doctrinal arguments supporting the theory of relativity of unlawfulness justifying the dismissal.[5] Moreover, however, the Court discarded the legal ground offered as the basis of V's claim. The norm stipulated in art 434 KC aims at protecting the interests of persons directly injured by the collapse of a building, and not those persons who possess the structure or the shareholders of such persons. X constructed the pavilion and was, in fact, in possession of it and, therefore, X is not covered by the protection of art 434 KC. Neither is V. Both the concept of relativity of unlawfulness and the principle that only direct victims can seek redress for personal injury, expressed in art 446 KC, speak for limiting the liability towards V and against expanding liability under art 434 KC.

9 Finally, it cannot be expected that subjects of civil law will bear all consequences, even the most distant ones, of legally relevant events (here: damaging conduct). This would be incompatible with the sense of justice, fairness and common sense. In addition, the damage to the shareholder of the limited liability company (the entity that used the damaged structure) is not identical to the damage to the entity and is not in an adequate causal relation to the collapse of the structure. Therefore, the reduction in the va-

5 See *A Szpunar*, Comment to the judgment OSP 7-8/1959, item 197; *E Bagińska*, Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej (2006) 397–401; *M Kaliński*, Szkoda na mieniu i jej naprawienie (2014) 62ff; *R Kasprzyk*, Bezprawność względna, "Studia Prawnicze" Nr 3/1988, 149ff; *B Lewaszkiewicz-Petrykowska*, Wina jako podstawa odpowiedzialności cywilnej, "Studia Prawno-Ekonomiczne" Nr 2/1969, 91. See also *P Machnikowski* in: A Olejniczak (ed), System Prawa Prywatnego: Prawo Zobowiązań Część Ogólna vol 6 (2009) 379.

lue of shares owned by the plaintiff does not remain in a causal relation with the collapse of the pavilion.

Comments

This case involves a claim which is obviously groundless and manipulative in the context of the catastrophe which caused several deaths and personal injuries. The Court, making use of the functional interpretation of art 434 KC, clarified that the aim of art 434 KC is to protect victims injured physically who are outside or inside of the building when it collapses or when a part detaches from it. Strict liability is imposed on the independent possessor of the building who is the owner or a possessor like-owner (without title). **10**

The possessor who suffered pecuniary damage as a result of the destruction is not covered by the rule, and instead can direct their claims towards the parties responsible for the maintenance, design or construction (who might be liable for fault). The maintenance, design or construction are the circumstances within the risk imposed by law on the possessor of the building and are covered by strict liability toward third parties. **11**

Sąd Najwyższy (Supreme Court) 26 September 2003, IV CK 8/02

OSN 11/2004, item 180

Facts

V was badly beaten up by unidentified persons at a discotheque run by As (a business partnership). The administrative decision allowing for the operation of the discotheque set out certain requirements to provide safety at mass events. A person responsible for safety, named in the decision and obliged to attend organised events, was the owner of a security agency with whom the defendants concluded a contract for security services. The discotheque's by-laws prohibit intoxicated, aggressive or vulgarly behaving persons from being present in the club. **12**

On the night in question, the person responsible for security was absent, and the police who had been called to intervene refused to expel a group of aggressive clients for lack of grounds and claiming that the security team is competent in such matters. The latter did not act and, as a result, the situation in the discotheque got out of control. A group of clients attacked V and his partner. V claimed compensation from the owners of the discotheque for serious personal injuries. **13**

The regional court awarded compensation on the basis of tort law finding that As breached a duty to secure safety of a mass event envisaged in the Law of 27 August 1997 on the safety of mass events,[6] and that their employees were negligent in monitoring the club. **14**

6 Dz U 1997, no 106, at 680, with amendments.

15 The Court of Appeals reversed and dismissed the claim on the grounds of art 429 KC (independent contractor rule).[7] As were not liable for the independent contractor because they chose a professional to perform the task of ensuring safety in the club.

Decision

16 The Supreme Court quashed the judgment and reaffirmed the Regional Court verdict. Article 5 of the Law on the Safety of Mass Events provides for a duty to ensure the safety and control of the participants of mass events. The *ratio legis* of this Act was to impose on the organiser the full liability for the safety of mass sport events, concerts and other entertainment events, which often create a serious risk of personal injuries. The duty is not fulfilled by formally contracting it out to other persons or institutions such as security agencies, or by using the help of police.

17 A breach of this duty results in strict liability of the organiser who has to implement all measures to guarantee safety in the club. In consequence, art 5 of the Law on the Safety of Mass Events, by introducing a stricter regime of liability, limits the possibility of exculpation under art 429 KC by rebutting the presumption of fault in choosing an independent contractor. The Court stated that art 5 is *lex specialis* to art 429 KC. In addition, under the facts, the negligence of the defendants' employees and the agency was sufficient to hold them liable on the general basis of fault (art 415 KC).

Comments

18 The judgment was significant because of the functional (teleological) interpretation of the Law on the Safety of Mass Events, which took account of the aim of the statute. It underlines that the organiser of a mass event is solely responsible for the safety of all those participating in such event. It may not discharge this liability by contracting out its duties to security agencies. Hence, the interpretation allowed an expansion of the limits of liability.

7 Art 429 KC states that anyone who entrusts another person with the execution of a transaction is liable for damage caused by that person in carrying out the transaction entrusted to him, unless he is free of fault in his choice or he entrusted the execution of the transaction to a person, enterprise or institution which performs such transaction within the scope of their professional activity.

23. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 31 August 2017
No 25 Cdo 3485/2016

Facts

An electrical malfunction of a vehicle's wiring in a parked Tatra 815 truck caused a fire in an administrative and technical building in Liberec. The truck was owned by JB, whose liability for damage caused by the operation of the motor vehicle was insured by an insurance company. The owner of the building claimed damages from JB's insurance company as compensation of damage to the building and items stored. 1

The courts of first and second instance dismissed the claim. They concluded that the respondent cannot submit a claim, because the damage to the building and its warehouses, for which the claimant sought compensation, was not due to the special nature of the operation under sec 427 of Act No 40/1964 Coll, Civil Code[1]. The motor vehicle was not running, had not recently been driven and was not about to be driven.[2] In the case of a vehicle parked off the road in an enclosed building, no connection to the operation of the vehicle can be made when the technical defect did not occur immediately in connection with the operation of the vehicle, ie shortly before or after driving or at starting. The origin of the fire was thus not directly related to the operation of the vehicle. 2

Decision

The Supreme Court awarded the damages. It ruled that there is no doubt that a vehicle's wiring is an integral part of it. It is technical in nature, serves to operate the vehicle and is a potential hazard in the event of a failure both when the vehicle is in motion and when it is idle. The failure of such a technical part in a parked car is an internal defect capable of causing adverse effects to the surroundings, as occurred in the present case. 3

Such a defect is, therefore, an undesirable manifestation of the very characteristics of a vehicle that are connected with its operation, which result from its nature and even originate in its operation, as sec 428 of the Civil Code[3] also refers to. If vehicles are equipped with such increasingly sophisticated technical means that even in the event of inaction of the vehicle (in the sense of its movement) injuries can be caused comparable 4

1 (1) Individuals and legal entities operating a means of transport shall be liable for damage caused by the special nature of this operation. (2) The operator of another motor vehicle, a motor vessel or an aircraft is equally liable.

2 Referring to the decision of the Supreme Court published under No 9/1972.

3 The operator cannot exonerate itself from liability if the damage was caused by circumstances that originate in the operation. It may exonerate itself from liability only if it proves that the damage could not have been prevented despite all effort that may be required.

to the adverse effects of moving cars, it is also necessary to deem such types of accidents as a manifestation of the particular nature of the operation of motor vehicles.

Comments

5 For comments see below.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 18 February 2015
No 2, 5 Cdo 272/2013

Facts

6 While working in a field, the claimant's harvester became stuck in soft ground. Two tractors tried unsuccessfully to rescue him and while doing so, the respondent's tractor damaged the claimant's tractor by overturning it. The respondent's tractor was insured under the first respondent's liability insurance for damage caused by vehicles.

7 In relation to the first respondent, the insurance company, the court of first instance concluded that, despite the fact that a tractor is a motor vehicle whose operation is covered by compulsory insurance, during the extraction of the claimant's tractor from the soil, it did not perform the function of a means of transport, as it was not moving from one place to another under its own power, and consequently the damage is not subject to sec 427 of the Civil Code. Instead, it is to be classified as a working machine. For this reason, the first respondent is not obliged to pay compensation for damage according to sec 2 h) of Act No 168/1999 Coll, on Motor Vehicle Insurance. The court of second instance confirmed the above decision.

Decision

8 The Supreme Court awarded the damages. In its opinion, in terms of liability, under sec 427 of the Civil Code, the crucial issue is the nature of the circumstances under which the damage occurred. In the present case, the claimant's tractor was damaged by the first respondent's tractor while using that tractor's engine power to pull the harvester that was stuck in the field. Although the damage occurred in connection with the performance of field work, the immediate cause of the incident was the motor power of the tractor, which was not being used for any special work at that time, but to move forward, albeit slowly, motivated by an effort to pull another machine.

9 This involved the use of the tractor in a situation comparable to helping another vehicle in normal traffic (eg pulling a car out of a ditch). There is therefore no reason to qualify the tractor's activity differently and to regard it as a special working machine just because it was somehow involved in field work.

Comments

The theory of the protective purpose of the norm is divided by the Czech legal doctrine into the theory of 'nexus of wrongfulness' and the theory of 'nexus of threat', depending on the type of liability involved. These theories analyse the relationship between the legal causes (behaviour or result) and the protected legal value. The theory of nexus of wrongfulness relates to liability based on fault, where the objective wrongfulness of conduct is examined.[4] The theory of the nexus of threat, on the other hand, relates to strict liability, where not the wrongfulness of the conduct but the imputability of the consequence is examined.[5] Therefore, only those consequences are attributable in which the danger for which the relevant norm stipulates strict liability materialised.[6] **10**

The theory of the protective purpose of a norm was not recognised by the earlier case law and legal academia. Instead, until 2007[7] the civil courts often rejected the causal link with the simple reasoning that the causal link between the harmful event and the consequence is not given. **11**

This is also the reason why we do not find explicit mention of the theory in the decision-making practice of Czech courts. In a number of Supreme Court decisions, however, the question of the scope of the violated norm is emphasised and academia argues with this theory as developed and applied in foreign jurisdictions.[8] In the mentioned cases, it is apparent that when considering strict liability for means of transport, the courts assess the nature of the thing and try to categorise it under the requirements of the norm. **12**

When we talk about nexus of threat in cases of strict liability, we must critically admit that one of the most fundamental points of these considerations is the inclusion of individual facts in the regime of strict liability. The basis for determining the norm as a case of strict liability is sec 2895 of the Civil Code, which stipulates that: 'A wrongdoer is obliged to compensate damage regardless of his fault in special cases stipulated by a statute.' **13**

However, the Civil Code does not provide a definition and leaves the definition of strict liability to the interpretation of the norm. The basic principle for defining individual cases is that the law (not only the Civil Code), instead of exculpation, allows only an exemption from liability and either sets forth specific grounds of exemption or completely denies it. It is also possible that exemption grounds exist in the context of other pro- **14**

4 The reason for this examination is that Czech tort law is based on the distinction between objective wrongfulness and subjective fault, which is reflected in the individual aspects of imputability.

5 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, S. IX [Civil Code § 2894–3081, Large commentary, vol IX] (2018) 223.

6 *F Melzer* in: Melzer Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 225.

7 Decision of the Constitutional Court, File No IÚS 312/05.

8 Eg *J Esser*/*H-L Weyers*, Schuldrecht, Band II, Besonderer Teil (6th edn 1984); *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, S. IX [Civil Code § 2894–3081, Large commentary, vol IX] (2018) 225.

visions.[9] It must also be mentioned that, unlike Austrian legislation, an analogy is not permissible.

15 When we talk about strict liability, we are talking about liability for threats, ie the risk of a harmful outcome occurring or, in other words, the protection of specific or abstract legal goods that are endangered by the source of danger to which the relevant norm applies. The nexus of threat theory is based on the assumption that only damage that arises as a result of a breach of protected goods is compensable damage in the sense of strict liability. Protected legal goods are seldom defined by the legislator and their existence or scope must be deduced by interpreting the relevant norm. A typical example with a long-term legislative history is the strict liability for means of transport such as cars or railways or for dangerous operations to which also sec 427 of the former Civil Code or sec 2927 of the Civil Code apply.

16 As to the cases listed, the special nature of the operation, which is decisive for the qualification of strict liability of the operator under the provisions of sec 2927ff.[10] and which the law does not define more closely, is based on the general observation that the operation of the means of transport is the source of the increased risk of damage to human health and property. This is a technical operation usually associated with motor power, high speeds and the use of increasingly sophisticated methods and techniques of operational management or control in which failure cannot be fully excluded. Thus, both the technical equipment and the operation can be deemed sources of the increased danger and consequently, qualification of a thing as subject to a specific legal regime.

17 Therefore, unlike in the case of fault-based liability, the operator is obliged to compensate the damage which is the consequence of the nature of the operation. This happens, in particular, if there has been an unpredictable impact on the outside world, which is characteristic for its operation and which results from its nature as a vehicle. A vehicle is an object that is moving at a certain speed and which can produce an adverse impact on people inside the vehicle or to persons or things (especially vehicles and other assets) with which it comes into contact. Operation refers not only to the movement of the vehicle, but also to the preparations for driving and the immediate actions after driving. The crucial factor is the nature of the circumstances under which the damage occurred.

18 On the contrary, liability for damage caused by vehicles cannot be inferred where the injury was caused by a work machine during its operation for which it was designed.

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9 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 53.

10 Sec 2927: (1) A person who operates a means of transport shall compensate damage caused by the specific character of that operation. The same duty also pertains to another operator of a vehicle, boat or plane, unless the means of transport is moved by human power. (2) The operator cannot be exempted from the duty to compensate damage if the damage was caused by circumstances that have their origin in the operation. Otherwise, he is exempted from liability if he proves that he could not prevent the damage, even when exercising all due care.

This does not apply if the machine is not carrying out such an operation and is moving from one place to another (eg file no 25 Cdo 3125/2005) or where such machines are put out of operation. Frequently, to be able to perform the task, they have the ability to move under their own power.

The particular qualification of the object is decisive to assess whether the means of transport falls under the norm establishing the strict liability regime and thus, 'injured-friendly' liability, or solely general liability based on fault applies. **19**

The purpose of the norm also plays an important role in determining what the scope of the compensable damage will be. With respect to means of transport, the question is whether the damage to the means of transport itself will be compensated. The answer based on the purpose of the norm is negative, since the primary goal of the norm is to protect third parties against damage and not damage to the means of transport. This conclusion corresponds with the regulation on liability insurance.[11] **20**

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 4 July 1991, No Rev-488/1991-2

<https://www.iusinfo.hr/sudska-praksa/VSRH1991RevB488A2>

Facts

Due to the fact that a pavement was blocked by irregularly parked cars, V was forced to walk on the road instead of on the pavement, when she was hit by a car. V sues A, the insurer of the owner of a car that hit her in the traffic accident. **1**

The first instance court upheld V's claim in the most part and the second instance court affirmed the first instance decision. A filed an application for revision before the Supreme Court, holding that she is entitled to full compensation. **2**

Decision

The Supreme Court reversed the first and the second instance decision by slightly adjusting the compensation awarded, upholding V's claim to 80 %, and dismissing it to 20 % of the compensation sought. **3**

Substantiating its decision, the Supreme Court noted that A is liable since the owner of the car insured by A exceeded the speed limit thus contributing to the occurrence of the harmful event. The Supreme Court, however, noted that A cannot be solely liable since others contributed to the occurrence of the harmful event. Notably, the Supreme Court opined that V contributed to the damage by walking on the road instead of on the **4**

11 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 608.

pavement. However, the Supreme Court also noted that if V was forced to walk on the road because of the cars irregularly parked on pavement, then the owners of the parked cars would also be responsible for the damage sustained. The Supreme Court concluded that in any case, A cannot be held liable for more than they contributed to the damage.

Comments

5 The above-presented case demonstrates how Croatian courts normally approach situations in which multiple causes contributed to particular damage. Generally speaking, a person who caused a harmful event shall be liable for the damage thereby sustained. If a harmful event is a result of a coincidence of actions of a number of persons, damage should be proportionately allocated to all persons involved in the occurrence of the harmful event. If the victim contributed to the occurrence of a harmful event, the tortfeasor's liability should be proportionately reduced. If actions of more persons contributed to the damage, liability should be proportionally distributed between them.

6 Applying this rationale to the case at hand, the Supreme Court held the tortfeasor liable to 80 %, based on the position that the occurrence of the harmful event was partly caused either by the actions of the victim (who walked on the road), or the third parties (who irregularly parked their cars on a pavement, thus forcing the victim to walk on the road).

7 Even though the logic applied by the Supreme Court in this case seems quite plausible, this decision is not without controversy. First, it is rather unclear what was the basis for the given apportioning of damage. In other words, based on which criteria did the Supreme Court decide that the driver of the car who hit the victim should be liable to 80 %? Second, the Supreme Court left unanswered one of the most important questions: notably, who contributed to the damage; the victim, or the owners of the parked cars? The Supreme Court referred to this issue only in an *obiter* comment, noting that the rest of liability (above the 80 % allocated to the tortfeasor) should rest either on the victim or the owners of the parked car, depending on whether or not the parked cars were the reason why the victim stepped onto the road. However, the rules on strict liability for damage caused by dangerous things, which the Supreme Court applied to this case, provide for different solutions depending on whether the victim or a third party contributed to the damage. Pursuant to art 177 para 3 of the COA of 1078 (applied to this case and corresponding to art 1067 para 3 of the COA), if the victim partially contributed to the damage, the tortfeasor's liability shall be proportionally reduced. However, if a third party contributed to the damage, pursuant to art 177 para 4 of the COA of 1978 (applied to this case and corresponding to art 1067, para 4 of the COA), the tortfeasor and the third party shall be jointly and severally liable. Hence, the Supreme Court could not have dismissed the victim's claim to 20 % without first deciding whether the victim or the third party contributed to the damage.

Notwithstanding the foregoing criticism, this case clearly suggests that Croatian courts will generally take into account any contribution of a third party to the damage sustained. It is true that Croatian courts do not explicitly invoke the doctrine of 'sufficient connection to the target risk'. However, the above-presented case clearly demonstrates that this concept is implicit in the Croatian court's approach to distributing liability. Liability shall be attributed to a responsible person only if established that this person's actions are sufficiently closely connected to this damage. If, on the other hand, such a sufficiently close causal connection is not established, a person shall be released from liability. 8

26. Slovenia

Vrhovno sodišče (Supreme Court) 15 December, II Ips 682/2004

<https://www.sodnapraksa.si/> (1 December 2021)

Facts

On the way to his work, V tried to walk on the pavement, which was impassable due to a hole and a pile of snow. Since V could not bypass this obstacle on the right hand side, he had to take the only remaining possible route, that is, on the left hand side of the road. The road was icy, causing V to slip and sustain injuries. V demanded compensation from the party responsible for the maintenance of the road (A) and accused him of not maintaining the road in such a condition that pedestrians could walk on it safely. The courts of first and second instance granted V's claim for damages. 1

Decision

The Supreme Court rejected revision of A and upheld the judgments of the courts of first and second instance. It pointed out that the damage was caused by several circumstances, but the direct cause of the fall was the icy road on which V was forced to step. According to the Supreme Court, the second instance court also correctly referred to the theory of adequate causality, since an experienced observer would find that the cause, ie, the icy road, coincided with the consequence, ie, the fall. If the road had been properly maintained, V would not have fallen, according to the theory of equivalence or 'but-for' test. 2

Comments

Slovene literature and court practice consider the limitations of liability arising from the *protective purpose of the rule*, taking into account the causal link between unlawful conduct and damage in the context of the application of the theory of *ratio legis* causality. The Code of Obligations only mentions a causal link between an inadmissible act or a 3

damage event and the consequence and does not define assumptions for establishing the causal link. Court practice therefore answers the question of establishing causation on its own, assisted by theoretical knowledge.[1]

4 In the present case, the Supreme Court dealt with *ratio legis* causality in the question of whether the occurrence of the damage was influenced by the circumstance that the injured party was walking on the right hand side of the road. The Supreme Court pointed out that it was irrelevant whether the plaintiff was walking on the right hand side of the road and incurred damage. The plaintiff would have violated regulations by walking on the 'wrong' side of the road, but the purpose of the legal rule that requires pedestrians to walk on the left hand side of the road outside of a built-up area must be taken into account. The purpose of this rule is to ensure the safety of pedestrians who are able to see oncoming vehicles and can keep at a safe distance from them, not to oblige a road maintenance worker to maintain the right hand edge of the roadway. The party responsible for road maintenance is obliged to maintain both sides of a road.

5 The theory of *ratio legis* causality in Slovene legal practice is not only applicable to culpable liability, but also to objective liability. In the case of strict liability, the theory of *ratio legis* causality is of particular importance, since it is necessary to determine in each case whether the damage represents the realisation of the danger from the consequences of which the norm protects.[2]

27. Hungary

Kúria (Curia of Hungary) Pfv IV 21.734/2012/8

Facts

1 A small airplane crashed during a storm and all passengers including the pilot died. The storm damaged one wing of the airplane and this caused the crash.

Decision

2 The court of first instance dismissed the claim of *indirect victims* considering the storm an event falling outside the sphere of activity of the air transport company, thus being an unavoidable cause of the accident. At second instance, the Court of Appeal of Buda-

1 *A Polajnar Pavčnik*, Vzročnost kot pravnovrednostni pojem [Causality as a legally valuable concept], Zbornik znanstvenih razprav 1993, 179, 187; *D Jadek Pensa*, Uvodni komentar [Introductory commentary], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, splošni del, 1. knjiga [Code of Obligations with commentary, General part I] (2003) 674ff.

2 *A Polajnar Pavčnik*, Vzročnost kot pravnovrednostni pojem [Causality as a legally valuable concept], Zbornik znanstvenih razprav 1993, 179, 189. For more about *ratio legis* causality see also case at 3/26 nos 1–3.

pest challenged the decision and established the liability of the air transport company upon establishing that although the storm was an unavoidable event, it belongs to the sphere of activity of the air transport company. The *Kúria* upheld the decision of the appeal court; however, based on a different reasoning. It considered the storm as an external event, while the occurrence of the damage was not unavoidable. The *Kúria* reached this conclusion based on evidence testifying that the pilot knew about the occurrence of turbulence on the planned route and could have postponed the trip for this reason. It was established that the pilot assumed the risk and conducted the flight although he knew that, lacking adequate warning equipment on board, he may not have been able to assess extraordinary natural events.

In the *Kúria*'s view, in order to exonerate the pilot from liability, *it is irrelevant that no regulation imposed* the installation of equipment in such a small airplane that would signal natural events such as turbulence. The *Kúria* reached the conclusion that, with sufficient precaution or adequate technical equipment, the risk could be recognised by the pilot and could be avoided, either by postponing the trip or by returning to the airstrip or by emergency landing upon detecting the risk during the flight and thus established the liability of the pilot. **3**

Comments

An external cause is defined as one which falls outside the sphere of activity of the hazardous operation. Technical defects or the personal circumstances of the person performing the risky activity do not fall in this category, although these contributed to the occurrence of the harmful act. The case law regards the concept of hazardous operation as an operational and not a technical one. Any activity which is an element of that activity or which makes that activity possible will belong to the sphere of the risky activity. **4**

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Preliminary remark

The vast majority of cases in the country reports that address the limits of strict liability and the issue of 'sufficient connection to target risk' concern the use of motorised vehicles. Under the current version of the PETL, liability for road traffic accidents is still fault-based. Strict liability under art 5:101 PETL is limited to 'abnormally dangerous activities' which are 'not a matter of common usage' so that 'only few activities will fall under this rule in practice'.[1] The PETL hereby exclude from the scope of strict liability all cases that are dealt with in the country reports, and it is difficult to form an illustration **1**

1 PETL – Text and Commentary (2005) art 5:101 no 21 (*BA Koch*).

for the present category for which objective liability (and its limits) would apply under the present version of the PETL.

2 However, the European Group on Tort Law is currently preparing a revision of art 5:101 PETL, which may extend strict liability to road traffic accidents. The following example anticipates this revision, concerns a road traffic accident and otherwise analyses the rules of the PETL in their present version.

Facts

3 A, keeper of a car that she is driving, causes a road traffic accident in which B's car is damaged. B's car is brought the same day to V's garage where it stands overnight in the work hall. Shortly after midnight, a short-circuit in the battery of the car leads to a fire, which seriously affects V's garage and adjacent house. The short-circuit is due to the accident which has damaged the battery and the car's electric system.[2]

4 V claims damages from A, the driver and keeper of the car that caused the accident. A is, in principle, liable for the damage caused by the accident. However, she contests that her liability extends to the damage to V's garage and house.

Solutions

5 **a) Solution According to PETL.** Art 3:201 (Scope of liability) PETL provides a series of criteria for attributing liability, and limiting it, including, for example, the foreseeability of the damage and the protective purpose of the rule that has been violated. They apply also to claims based on strict liability.[3]

6 Article 7:102 PETL on 'Defences against strict liability' establishes further limits for claims based on strict liability, providing that:

(1) Strict liability can be excluded or reduced if the injury was caused by an unforeseeable and irresistible

(a) force of nature (force majeure), or

(b) conduct of a third party. ...

7 Regarding the relationship between the scope of liability (art 3:201) and specific defences against strict liability (art 7:102), art 7:102(2) PETL states that:

(2) Whether strict liability is excluded or reduced, and if so, to what extent, depends upon the weight of the external influence on the one hand and the scope of liability (Art. 3:201) on the other.

2 See the German case: Bundesgerichtshof (Federal Supreme Court) 26 March 2019, VI ZR 236/18, NJW 2019, 2227, with comments by *U Magnus,* above 6/2 nos 1–6.

3 In fact, the 'basis of liability (Article 1:101)', such as fault or an 'abnormally dangerous activity', is explicitly mentioned in art 3:201(e) PETL and is one of the factors to be considered when determining 'whether and to what extent damage may be attributed to a person'.

In the above scenario, under the assumption that a future version of the PETL will extend strict liability to damage caused by motorised vehicles, the *foreseeability of the damage* and the *protective purpose of the rule* on strict liability for road traffic accidents would have to be examined, pursuant to art 3:201(a) and (e) PETL, alongside the other factors mentioned in this provision. **8**

When addressing the case under the PETL, it could be argued that the *protective purpose* of a rule on strict liability for the use of a motorised vehicle extends to all damage connected with the risks inherent in the use of a motorised vehicle, including damage caused by defects in the vehicle.[4] This may be the case, for example, where a burst tyre causes an accident; it may also be the case where a car battery, damaged in a road traffic accident, subsequently causes a fire overnight and damages a garage to which the vehicle was towed, as well as damage to an adjacent house. **9**

As mentioned above, under the PETL, strict liability 'can be excluded or reduced if the injury was caused by an unforeseeable and irresistible (a) force of nature (force majeure), or (b) conduct of a third party', pursuant to art 7:102 (Defences against strict liability) PETL. When analysing a claim under the PETL, foreseeability thus plays a role both when determining the scope of liability (art 3:201) and when analysing a specific defence against strict liability (art 7:102). **10**

However, a defect in a motor vehicle (in the present case: the damaged battery) is not a case 'of an unforeseeable and irresistible (a) force of nature (force majeure)'.[5] On the contrary, it was 'foreseeable to a reasonable person at the time of the accident' that a car battery damaged in a road traffic accident may lead to a fire shortly after the accident, causing damage to the nearby property of others, such as V's garage and adjacent house. If this line of reasoning is followed, the damage is within the scope of liability (art 3:201 PETL) and A's strict liability would not be excluded pursuant to art 7:102(1)(a) or (b) PETL.[6] **11**

b) Solution According to the DCFR. According to the DCFR, it must be established (i) whether V's damage constitutes 'legally relevant damage', (ii) whether A is accountable for it, and (iii) whether any limits apply to A's liability. **12**

The consequential damage to V's garage and house all qualify as damage to property. Therefore, they all constitute 'legally relevant damage' within the meaning of arts VI–2:101(1)(a), VI–2:206(1) and (2)(b) (Loss upon infringement of property or lawful possession) DCFR. **13**

A's liability for the damage suffered by V will depend on whether she can be held accountable for it. In case of road traffic accidents, art VI–3:205 DCFR provides for strict **14**

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4 Compare the reasoning of the German Federal Supreme Court in this case, above 6/2 nos 4–5.

5 For a comment on this provision with examples, see PETL – Text and Commentary (2005) art 7:102 no 1ff. (*BA Koch*)

6 Victim V of the accident is not a third party under lit (b). He may have been contributory negligent when not disconnecting the battery from the car's electric system overnight; the questionnaire does, however, exclude the issue of the victim's contributory negligence from the scope of the present study.

liability of a keeper of a motor vehicle for personal injury and property damage caused in a traffic accident resulting from the use of the vehicle. The question under the DCFR thus is whether the damage to V's garage and house was *caused* 'in a traffic accident which results from the use of the vehicle', art VI–3:205(1) *in fine*, together with art VI–4:101 DCFR (on causation).[7] In other words, it must be established that the fire which consumed the garage and the house was a consequence of A's 'conduct', art VI–4:101(1)(a) DCFR, or the consequence of 'a source of danger for which that person is responsible', art VI–4:101(1)(b) DCFR.

15 In the above scenario, A's driving with her car was the *conditio sine qua non* for the accident and the damage caused to the battery of B's car, which in turn caused the fire to the garage and the house.

16 The Official Commentary to the DCFR explains that the decisive factor for establishing causation is 'whether there is a link of cause and effect between an intentional or negligent conduct or a source of danger on the one hand and a legally relevant damage on the other'.[8] The Commentary further states that there is no conclusive list of elements to consider when assessing whether a legally relevant damage is the consequence of a particular wrongdoing or of a particular source of danger ('[e]ach individual case can make a new calibration necessary'). 'Aspects of probability and foreseeability come into play but so too do the type of attributive cause and the type of damage. Also relevant are the protective aim of the norm of social behaviour which has been infringed and (occasionally) general policy considerations.'[9]

17 Regarding a potential break in the chain of causation, the assessment will similarly have to be made in each individual case. The stance of the Official Commentary is that '[w]hile the intentional intervention of a third party typically breaks the chain of causation or liability, it depends on the circumstances of each individual case whether or not the damage is to be seen as a consequence of a particular person's conduct'.[10]

18 Based on these elements, it could be argued that in the present case it was indeed foreseeable that a car involved in an accident would have a damaged battery, which, in turn, could lead to a fire (the fact of bringing the car to a garage being a natural consequence of the accident thus not breaking the chain of causation) – leading to the same solution as under the PETL regarding the liability of A for V's damage.

19 To conclude, it seems worth mentioning that, while the PETL explicitly mention in their Chapter 3 (Causation), art 3:201(Scope of Liability), the criteria for determining liability, and for limiting it, the DCFR, on the other hand, does not list the relevant criteria in its text (such as 'probability and foreseeability' or 'the protective aim of the norm of

7 *C v Bar/E Clive*, DCFR, art VI–3:205, Comment B (3526). The general rules of Chapter 4 on causation apply also to art VI–3:205.

8 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3570).

9 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571).

10 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571).

social behaviour which has been infringed'). They can only be found in the Commentary.

31. Comparative Report

All the reports contain cases for this category except the Historical Report and those from Belgium, Portugal, Malta, Finland, Slovakia, Lithuania, Romania and the Court of Justice of the European Union. **1**

General. As explained in the Questionnaire (I. Introduction) the doctrine of 'sufficient connection to target risk' may be an alternative or equivalent concept to adequacy or to the protective purpose of the rule. The formulation of the question suggests that the courts have different instruments to resolve their cases, such as causation, unlawfulness, a narrow or extensive interpretation of the norms, or a combination of all these. The reports confirm largely that court practices oscillate between these instruments or combine them. **2**

Proximity to the 'protective purpose of a norm'. Several reports mention a strong link between the 'sufficient connection to target risk' concept and the protective purpose of a norm analysed in category 3.[1] **3**

Proximity to causation. Certain reports underline the importance causation may play in the context of the 'sufficient connection to target risk' concept. Sometimes adequacy[2] and remoteness[3] are at stake, sometimes the *conditio sine qua non*,[4] sometimes general allusions[5] or more elaborated concepts.[6] The Swedish report mentions the 'typical risk criteria' as an alternative to adequacy.[7] **4**

Interpretation. The term 'sufficient connection to target risk' indicates first that the legislator targeted certain risks and second that courts have to evaluate whether the cases at hand are close enough to this risk. In other terms, it suggests that the court deci- **5**

1 Germany 6/2 nos 4 and 6; Austria 6/3 no 3; Greece 6/5 no 3; Netherlands 6/8 nos 1 and 3; Italy 6/9 no 5; Scotland 6/13 nos 4 and 5; Latvia 6/20 no 17; Poland 6/22 no 8, on the relativity of unlawfulness-criteria, more generally also Poland 6/22 no 11; Czech Republic 6/23 nos 10, 11 and 20; Slovenia 6/26 nos 3 and 6.

2 Germany 6/2 no 5; Switzerland 6/4 no 3 and France 6/6 no 12 mention a rather lax conception of causation; Ireland foreseeability 6/14 no 3; Norway 6/16 nos 3 and 6; Sweden 6/17 no 3 uses notably the proximity in time-criteria and Sweden 6/17 no 3 the function-criteria; Poland 6/22 nos 3 and 9 and the Czech Republic 6/23 nos 2 and 10 the proximity in time-criteria; Croatia 6/25 no 8; Slovenia 6/26 nos 2 and 3; PETL/DCFR 6/30 no 18.

3 England and Wales 6/12 no 2.

4 Switzerland 6/4 no 3.

5 Italy 6/9 nos 2 and 4; Norway 6/16 no 2 and Latvia 6/20 no 3 on illegal omission; Poland 6/22 no 8; Croatia 6/25 no 5; Slovenia 6/26 no 2; PETL/DCFR 6/30 no 16 f.

6 Eg 'Zurechnungszusammenhang' (necessary attribution of the damage to the author's conduct) Germany 6/2 no 5.

7 Sweden 6/17 no 3.

sions based on this concept are closely linked to the interpretation of the norms considered. It is not a surprise that several reports underline the role of interpretation.[8]

6 *Acceptations and refusals.* The reception of the 'sufficient connection to target risk' concept varies strongly among the various countries under study. It goes from clear acceptance[9] through several intermediate forms[10] to mere refusal.[11] However, as the Belgium report shows, mere refusal may sometimes occur rather in name but not necessarily in practice. A closer analysis of the cases may reveal that the concept, if rejected by judges or scholars, is sometimes nevertheless used by the courts as a kind of 'doing without saying'.[12]

7 *Dangerous activities.* Though the term 'risk' should not necessarily imply technical equipment or engines, most reports cite cases related to road traffic and motor vehicles.[13] The question is mainly whether the damage was caused by the typical danger targeted by a provision.[14] One of the recurring criteria is more or less explicitly whether the engine was operating or not.[15] Only few cases relate to problems other than road traffic.[16]

8 *Effect of extension or restriction.* Some reports specify that the means used to resolve the cases at hand (was it by the 'sufficient connection to target risk' concept or another instrument?) had as an effect an extension of liability.[17] Some mention a rather restricting effect.[18]

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8 Switzerland 6/4 no 5 and France 6/6 nos 4 and 6 refer to the preparatory works by the legislator and the *ratio legis*; Latvia 6/20 no 5 mentions the intention of the legislator; Latvia 6/20 nos 16 and 17 on restrictive interpretation; Poland 6/22 no 16 on the *ratio legis* and Poland 6/22 no 18 on teleological interpretation; Czech Republic 6/23 no 15; Slovenia 6/26 nos 3, 4 and 5 on theory of 'ratio legis' causality.

9 Germany 6/2 no 4; Austria 6/3 no 6; Greece 6/5 no 2; Sweden 6/17 no 9; Estonia 6/19 nos 3, 4, 5 and 11.

10 Switzerland 6/4 no 4; Italy 6/9 no 5 with hesitations; Spain 6/10 nos 2, 3 and 4; England and Wales 6/12 no 3 '…there is little in the way of English authority on whether liability is limited by a doctrine of "sufficient connection to target risk"'; Scotland 13/6 no 5; Norway 6/16 no 3 in connection with causation; Sweden 6/17 no 5; Croatia 6/25 no 8 on an implicit use of the concept.

11 France 6/6 nos 3, 6 and 11 strengthening that any type of damage has to be compensated; Belgium 6/7 no 1.

12 Belgium 6/7 no 3.

13 Germany 6/2 no 1ff; Austria 6/3 no 1ff; Switzerland 6/4 no 1ff; Greece 6/5 no 1ff; France 6/6 no 1ff; Italy 6/9 no 1ff; Spain 6/10 no 1ff; Norway 6/16 no 1ff; Sweden 6/17 nos 1 ff, 4 ff, 7ff; Estonia 6/19 no 1ff; Latvia 6/20 no 5 on aviation; Poland 6/22 no 1ff; Czech Republic 6/23 no 1ff; Czech Republic 6/23 nos 6 and 8; Croatia 6/25 no 1ff; Slovenia 6/26 no 1ff; Hungary 6/27 no 4; see also PETL/DCFR 6/30 nos 1 and 2, 12ff.

14 Austria 6/3 no 6; Greece 6/5 no 3; Estonia 6/19 nos 1 ff, 7 ff concerning a motor boat.

15 Germany 6/2 no 1ff; Austria 6/3 nos 2 and 6; Switzerland 6/4 nos 2 and 6; Greece 6/5 no 2; Sweden 6/17 no 8; Estonia 6/19 no 3; Latvia 6/20 no 7; Poland 6/22 no 3; Czech Republic 6/23 nos 3 and 17.

16 France 6/6 no 8ff; Netherlands 6/8 no 1ff; Italy 6/9 no 3ff; England and Wales 6/12 no 1ff; Scotland 6/13 no 1ff; Latvia 6/20 no 1ff; Poland 6/22 no 7ff.

17 Germany 6/2 no 4 *passim*; Austria 6/3 no 6 *passim*; France 6/6 no 3; Spain 6/10 no 4; England and Wales 6/12 nos 2 and 3; Norway 6/16 no 3; Poland 6/22 no 18.

18 Sweden 6/17 no 3; in Latvia 6/20 no 5 causation as a means to restrict tort law.

D. Losses and Additional Losses as a Result of Subsequent Conduct or Other Event

7. Losses and additional losses resulting from the misconduct of a third party

1. Historical Report

Ulpian (Celsus, Marcellus) D 9,2,11,3; Julian, D 9,2,51 pr

Facts

One attacker mortally wounds a slave; before the slave dies of the wound, a second assailant kills him. **1**

Decision

Following Celsus, Marcellus and Ulpian hold that only the second attacker can be held liable for killing, while the first is liable for wounding only. In contrast, Julian states that both attackers are liable for killing. **2**

Comments

The antinomy between Ulpian and Julian with regard to the 'slave who was slain twice'[1] is one of the classics of Roman law scholarship, and is frequently discussed in conjunction with D 9,2,15,1 (below at 9/1 no 1).[2] **3**

Faced with a situation in which considerations of causality, especially the *conditio sine qua non* test,[3] do not yield satisfactory results, Celsus evidently relies on the established narrow interpretation of *occidere*: only between the action of the second assailant **4**

1 Cf *AJB Sirks*, The slave who was slain twice: causality and the lex Aquilia (Iulian. 86 dig. D. 9,2,51), Tijdschrift voor Rechtsgeschiedenis 79 (2011) 313 ff. For a discussion of this text see also *N Jansen* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 479 ff.

2 Cf eg *F Lawson*/*B Markesinis*, Tortious Liability for Unintentional Harm in the Common Law and in the Civil Law (1982) 30 ff; *R Willvonseder*, Die Verwendung der Denkfigur der "conditio sine qua non" bei den römischen Juristen (1984) 144 ff; *D Nörr*, Causa mortis (1986) 181 ff; *AJB Sirks*, The slave who was slain twice: causality and the lex Aquilia (Iulian. 86 dig. D. 9,2,51), Tijdschrift voor Rechtsgeschiedenis 79 (2011) 313; *W Ernst*, Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts (2020), which also gives an in-depth survey of the relevant literature (61 ff).

3 There is some doubt, however, whether Roman jurists would have regarded the case in this light: it has repeatedly been pointed out that the Romans had a different understanding of causality and only rarely applied the 'conditio sine qua non' formula to cases of delictual liability; cf eg *B Winiger*, La responsabilité aquilienne romaine: damnum iniuria datum (1997) 58 f; *R Willvonseder*, Die Verwendung der Denkfigur der "conditio sine qua non" bei den römischen Juristen (1984) 32 ff and 144 ff (who, however, assumes that Julian had the *csqn* formula in mind in this particular case); *W Ernst*, Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts (2020) 62 ff. For a modern-law

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and the death is there a direct link; hence, the first attacker can only be held liable for wounding, but not for killing.[4] According to his decision, the liability of the first attacker is limited to the harm that he undoubtedly has directly and actively caused; since the second attacker's intervention made it impossible to ascertain whether the first wound would indeed have proven fatal, the first assailant cannot be held liable for the victim's death.[5]

5 In contrast, Julian's decision to hold both attackers liable for killing is in line with the penal character of actions under the *lex Aquilia*;[6] however, it not only appears to disregard considerations of causality,[7] but also stands in opposition to Julian's own standpoint in D 9,2,15,1. This discrepancy has given rise to considerable speculation, both on the authenticity of the three texts[8] and on Julian's motivation for departing from what appears to have been the prevailing opinion.[9] It is worth noting, however, that none of the Roman jurists who have dealt with the case speculated that the second attacker might be in a position to disclaim liability because the death of his victim would have ensued even in the absence of his intervention.[10]

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perspective on the case, cf *N Jansen* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 353 f.

4 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 992.

5 Cf *AJB Sirks*, The slave who was slain twice: causality and the lex Aquilia (Iulian. 86 dig. D. 9,2,51), Tijdschrift voor Rechtsgeschiedenis 79 (2011) 325 f.

6 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 973; *N Jansen* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 353; critical of Julian's 'penal' argument *T Finkenauer*, Pönale Argumente in der lex Aquilia in: R Gamauf (ed), Ausgleich oder Buße als Grundproblem des Schadenersatzrechts der lex Aquilia bis zur Gegenwart (2017) 35 ff (63).

7 *Julian* himself addresses this consideration in D 9,2,51,2: '... But in case anyone might think that we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to hold that neither should be liable under the lex Aquilia or that one should be held to blame rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide if one is more blameworthy than the other. Indeed, it can be proved by innumerable examples that the civil law has accepted things for the general good that do not accord with pure logic. ...'

8 For instance, *D Pugsley*, Causation and Confessions in the Lex Aquilia, Tijdschrift voor Rechtsgeschiedenis 38 (1970) 163–174 (169 ff) argues that Julian's text is only a fragment of a longer text in which Julian initially reached the same conclusion as Celsus, but then went on to discuss special constellations in which both attackers should be held liable and discussed the measure of damages due by each of them; Justinian wanted to make a law that held both equally liable for killing, so had Julian's text adapted for his purpose. Because of the speed at which the compilators worked, they subsequently overlooked that they had thus created two conflicting decisions. For a survey of textual criticism cf *W Ernst*, Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts (2020) 44 ff.

9 There is some speculation that Julian understood 'occidere' to refer to the act of inflicting the mortal wound regardless of the outcome; cf eg *R Willvonseder*, Die Verwendung der Denkfigur der "conditio sine qua non" bei den römischen Juristen (1984) 148; *D Nörr*, Causa mortis (1986) 187 f; *B Winiger*, La responsabilité aquilienne romaine: damnum iniuria datum (1997) 47; against this view *W Ernst*, Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts (2020) 126 ff.

10 *D Nörr*, Causa mortis (1986) 183.

2. Germany[1]

Bundesgerichtshof (Federal Supreme Court) 10 December 1996, VI ZR 14/96
NJW 1997, 865

Facts

The suit concerned litigation between insurers with respect to the consequences of a traffic accident. 1

A was the insured of the defendant liability insurance W. A was solely responsible for a road traffic accident: when he tried to overtake a car, he drove on the opposite lane and hit the oncoming money transporter of company V. The transporter swerved off the road, overturned several times and came to rest on its roof with the driver's door half-open. Despite their injuries, the driver and the co-driver of the transporter managed to get out of their vehicle, subsequently receiving medical treatment, whereas A died on the scene. The money transporter was brought to the yard of the police station. An inspection carried out on the following day revealed that two money cases containing approx DM 250,000 were missing. 2

The two claimants, who were – with other insurers – the transport insurers of V, compensated V's loss of the money and claimed their share of the compensation from the defendant insurance. According to the relevant provision of the *Versicherungsvertragsgesetz* (Insurance Contract Act, VVG)[2] V's claim had passed to the claimants by *cessio legis*. They argued that V had a compensation claim against W for the missing money. According to them, the money had been stolen before the police arrived at the scene of the accident because, from this time onwards, the money transporter had been under the permanent control of the police. 3

W refused to accept liability. The situation at the accident scene could not have enabled the theft, which therefore must have happened in the police yard. If the cases containing the money had been stolen from the police yard, W could not be held liable. 4

Decision

The lower courts had dismissed the claim, the Court of Appeal with the argument that A was not liable so that no claim against him could be subrogated to the claimants because the unknown thief was the author of a new and independent act for which the accident was merely the external cause, irrespective of whether the theft occurred at the scene of the accident or in the police yard. The Federal Supreme Court remanded the case. 5

The Federal Supreme Court held that even the criminal act of the thief lay within the scope of protection of § 823 (1) BGB and § 7 (1) StVG if the theft occurred at the scene 6

1 See also above the case at 2/2 no 16 ff.

2 The then relevant provision was § 67 (1) VVG; now it is § 86 (1) VVG.

of the accident. In cases of the present kind, where an act of a third person causes an additional loss, the author of the first damaging event must compensate even the further loss unless the act of the third person was entirely unusual and beyond the range of the danger and risk that the first interference had created.

7 In the opinion of the BGH, the circumstances of the present case did not justify exempting A from his principal liability even for the stolen money if the theft occurred at the scene of the accident: A's dangerous driving had led to the fact that the money transporter was no longer a safe place for the money because the transporter's door was not closed, allowing entry, and the injured staff was unable to safeguard the money. The accident thus continued to create a danger for the money and in a sense invited or at least facilitated possible criminal acts with respect to the money. The theft was, therefore, although an intentional criminal act of a third person, still within the protective scope and *Zurechnungszusammenhang* (the necessary attribution of the damage to the author's conduct) of § 823 (1) BGB and § 7 (1) StVG.

8 The Court further held that the solution would be otherwise if the theft had occurred in the police yard because there the money was in safe official custody. Then the theft could no longer be imputed to A. The lower court had therefore to clarify where the theft had happened.

Comments

9 The decision lays down the principle that the author of a first damage event is also liable for further damage through – even criminal – acts of third parties if the first damage event creates a situation in which third parties are tempted to commit the second act. A further implicit reason for this principle might be that the thief was unknown. In such a situation, the wrongdoer of the first act is 'closer' for bearing the damage than the victim.

10 Also, if a third party acted without fault – hardly imaginable in the present case – the result of the BGH would not be different. The faultless act of a third party, eg a helper on the scene who erroroneusly put the money cases in the waste, would be even less unusual than a criminal act. That the litigation parties were insurance companies may have facilitated the BGH's decision. However, in all likelihood, the solution would not have been different if merely the original tortfeasor and the original victim had been the litigants.

Bundesgerichtshof (Federal Supreme Court) 30 June 1987, VI ZR 257/86

BGHZ 101, 215

Facts

11 V was 13 when she suffered a sports accident with a suspected spleen injury. In the local hospital, the senior doctor A, a surgeon who at that time represented the chief of the sur-

gery department of the hospital, examined V and decided to open V's abdomen. There he found injuries of the left kidney, which he therefore removed. The following day, V had to be transferred to the university hospital because she was suffering from acute kidney failure. It transpired that she had not had a right kidney since birth, with the result that, after the removal of the left kindney, V had no kidneys at all. On the advice of the university doctors, V's mother agreed to donate a kidney, which was successfully explanted and implanted two months later. V recovered.

V claimed and received compensation from A and the carrier of the local clinic for her pecuniary and non-pecuniary damage because it was established that correct medical treatment would have saved V's only kidney. V further claimed the damage her mother had suffered and would in future suffer through the explantation. The mother had assigned all her eventual claims to her daughter. **12**

Decision

All three court instances affirmed V's claim for her mother's damage. The Federal Supreme Court held that the *Zurechnungszusammenhang* (the necessary connection for the attribution of the damage to the conduct of the wrongdoer) between A's incorrect and negligent treatment of V and the damage of V's mother was given. A had created an 'increased danger situation' and an 'accusable challenge' for V's mother to endanger her own health: 'if the wrongdoer … has put the person to be rescued in a position which makes the intervention of the rescuer and emergency helper, if not mandatory, at least understandable and reasonable, he must answer for the self-damage of the rescuer and emergency helper.'[3] The wrongdoer is thus liable if he or she has created a situation which challenges the third party to intervene and even take the risk of being injured. However, the Court further stated that the self-endangerment must stand in a reasonable proportion to the possible success of the intervention. Also, the motives for the self-endangerment must be such that they conform to accepted social rules of conduct. **13**

According to the BGH, in the present case, all these requirements were fulfilled. That the kidney donation occurred some time after the injury A had caused was also not a reason to refuse the claim. The donation was not simply a mere measure of healing but rather a measure to save V which could not have been performed immediately after A's misconduct because it required a time of consideration for V's mother and thereafter some preparation. **14**

Further, the Court did not consider it a hindrance for the claim that V's mother decided voluntarily and intentionally for the donation and thus for her self-damage. Nonetheless, A had put her in the challenging situation which led to her injury. **15**

The final argument of the defendants was that V's mother had validly consented to the explantation, which therefore was not a wrongful violation of her health. The Court **16**

3 BGHZ 101, 220 f.

rightly held that the consent was not consent to A's misconduct which had brought her in the situation to sacrifice her kidney for her child.

Comments

17 The decision makes it clear that, under specific circumstances, even voluntary and self-damaging acts of third persons must be regarded as consequences of tortious conduct which make the wrongdoer liable. This is in particular the case where the third party's act is induced by the defendant's conduct and supported or even required by social norms and values.

3. Austria

Oberster Gerichtshof (Supreme Court) 25 October 2018, 6 Ob 182/18k

JBl 2019, 318

Facts

1 A's dog ran into V, causing her to lose her balance and to injure her knee. During the surgery she underwent therefor, the surgeon committed a grave error in medical treatment. V sued A for the whole damage.

Decision

2 The Supreme Court found in favour of V, granting claims for compensation against A for the total damage – thus also that part of the damage which only occurred due to the faulty treatment by the surgeon. The Supreme Court refers to its prior case law, which also corresponds to the by far prevailing view in legal literature. According to this, when a person is injured by a perpetrator and then the consequences of the injury are aggravated by a medical error during treatment, the first perpetrator continues to be jointly and severally liable alongside the doctor for the consequences. On the other hand, if the doctor intentionally treats the patient incorrectly, the first perpetrator is no longer accountable for the aggravated consequences because of the subsequent malpractice.

3 Subsequently, the Court addresses the question if, in cases where an injured person suffers erroneous medical treatment, liability of the first perpetrator could also be excluded because of a lack of adequacy – as the German Supreme Court (*Bundesgerichtshof*, BGH) stresses in its decisions. In the particular case, the question was whether the consequences of the erroneous treatment had been adequately caused by A's dog. In accordance with its previous case law, the Court answered the question such that even if medical malpractice is not likely to happen, it is not outside of human experience. Hence, liability was not limited due to inadequacy in the case at hand. However, the Supreme Court did not exclude that, in cases of negligent medical malpractice, the liability

of a first perpetrator, who had caused the need for treatment, could be limited because of a lack of adequacy if the doctor acted with wholly exceptional carelessness.

Comments

Generally speaking, liability can be excluded as far as the consequences of damage are based on an independent act on the part of a third party, which was not provoked by the wrongful act of the original tortfeasor (intervening wilful act, *Dazwischentreten einer fremden Willensbetätigung*).[1] In these cases again, there can be no doubt about the causality in the sense of the *conditio sine qua non* test (but-for test) when, without the wrongful act of the original tortfeasor, the intervening wilful act of the third party would not have been able to take place. The question rather is if, also by evaluative consideration, the (part of the) damage which occurred only because of the act of the third party can still be imputed to the first tortfeasor. **4**

It is controversial whether these cases of a subsequent, intervening wilful act of a third party form a subset of that case group where the protective scope of the rule on which liability bases must be denied or if the intervening wilful act relates to a separate limit of liability.[2] Either way, in cases where losses or additional losses result from the misconduct of a third party, if this separate act exempts the first perpetrator from liability depends on a comprehensive evaluation of interests, which takes into consideration the respective weight of elements constituting the basis for liability – above all the degree of fault.[3] If this evaluation of interests shows that the criteria inculpating the victim or third party far outweigh those inculpating the first perpetrator, it no longer seems appropriate to impute the damage to such.[4] Thus, as a general tendency, under ordinary circumstances, the original tortfeasor cannot be held liable for the (part of the) damage that occurred due to an intentional act of a third party. This is, for instance, the case when a doctor intentionally treats a patient incorrectly. The first perpetrator is then no longer accountable for the consequences of the medical malpractice:[5] firstly, the grounds for the doctor's liability are the strongest conceivable in respect of this part of the damage, secondly, the grounds for the first perpetrator's liability are very weak: his fault related only to the first injury.[6] In contrast, if the consequences of the injury are aggravated by a negligent medical error during treatment, the damaging party who **5**

1 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 15.

2 *G Kodek* in: A Kletečka/M Schauer (eds), ABGB-ON[1.03] (2018) § 1295 no 37 with further references.

3 *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/99; eg OGH 2 Ob 155/97a in JBl 1999, 533.

4 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/36f.

5 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 15.

6 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/37.

brought about the risk continues to be liable alongside the doctor for these consequences.[7]

6 The above-reported decision of the Austrian Supreme Court concerning the erroneous knee surgery (7/3 no 1ff) is in its result totally in line with the outlined principles: A was held liable for the whole damage, including that part which only occurred due to the faulty, negligent treatment by the operating doctor. However, the Supreme Court revealed a new aspect when stressing that in cases of negligent medical malpractice, liability could potentially also be excluded on the basis of the adequacy theory (see in detail above 2/3 no 6ff), therefore referring to decisions of the German Supreme Court. Consequently, this would mean that – contrary to previous case law and the prevailing opinion – in situations such as the present case, in application of the adequacy theory, liability of the first perpetrator can, as a result, be limited even if a doctor did not intentionally, but only grossly negligently, treat the victim incorrectly.

7 There are other contexts, however, where liability is not to be limited even if an intentional act by a third party has intervened. For instance, the person who neglects his or her duty to supervise a child remains liable towards the child if the child is then intentionally injured by a third party, as the supervisory duties have precisely the purpose of preventing such damage.[8] Likewise, when a custodian of a deposited thing culpably breaches his or her custody obligation, then the custodian will by no means be freed from liability towards the depositor if a third party damages the thing, be it negligently or deliberately.[9]

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 19 August 2003

TF 6S_155/2003 (unpublished)[1]

Facts

1 Car driver A overtook the moped driver V by crossing the barrier line positioned in the middle of the road. When the two vehicles were side by side, V abruptly turned left and collided with A's car. V was transferred to hospital where he died several days later. Consequently, A was sentenced by the penal judge of the district court for homicide by negligence. A argued that the course of events resulting from the accident was unfore-

7 *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) no C/10/101.

8 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 15.

9 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/37.

1 <https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F19-08-2003-6S-155-2003&lang=de&type=show_document&zoom=YES&>.

seeable. According to him, the negligent care in the hospital caused V's death, thus, interrupting the causal link between the collision and V's death.

A's appeal was dismissed on 18 March 2003 by the regional court and he subsequently filed a claim before the Federal Supreme Court, pleading that V died due to the hospital's negligent surveillance. **2**

Decision

The Federal Supreme Court rejected his appeal and confirmed the lower court's decision. **3**

The Court defined as negligent behaviour if someone could and should have known at the moment of his act that legal interests of another were endangered and that he simultaneously passed the threshold of admitted risk. Secondly, it affirmed that negligence supposed that the outcome of certain behaviour was (at least) somewhat foreseeable and that adequacy was the benchmark for this evaluation. **4**

Thirdly, it reminded (and slightly completed) the definition of adequacy. A cause is adequate if, according to the ordinary course of things and general experience of life, certain behaviour causes or at least favours a (damaging) result. The Court also added as an essential criterion that adequate causation can only be interrupted in the presence of 'entirely exceptional circumstances such as the concurrent fault of third parties or defects of material or of a construction' (*Material- oder Konstruktionsfehler*[2]). According to the Court, these circumstances have to be so exceptional that one did not have to take them into account and that they must be so preponderant that they have to be considered as the likeliest and most immediate cause of the result to such an extent that they relegate to the background all other concurrent factors – in particular the behaviour of the accused (consideration 3.1). **5**

In casu, the Court proceeded step by step to evaluate adequacy. First, it considered that it was not entirely unforeseeable that V would abruptly turn to the left and second, that it was likely for V to suffer a permanent handicap perhaps even to die, given the severity of his injuries. Finally, the Court admitted that negligent care in a hospital did not occur every day, but that it was not so exceptional that A's negligent behaviour could be disregarded. As the whole chain of events was not so unusual that one could not expect it, A was held liable for V's entire damage. **6**

Comments

A problem this decision raises is that of the need to limit the extent of natural causation and more specifically, the infinite causal chain of events that can result from it. Consequently, in order to limit such a causal chain of events, the author of the damage can **7**

2 The court considers as 'defects of material construction' for example defects of buildings, etc.

prove that the adequate causal link was interrupted.[3] One has to demonstrate that the correlation between the conduct and the damage is unlikely to occur in light of the ordinary course of events and general experience of life[4] and thus, that the conduct is too remote to produce the result in question.[5] Yet, strict requirements ought to be met for the interruption of an adequate causal link to be asserted. For the Court, adequacy can only be denied if extraordinary circumstances appear to be the most probable and direct cause of the damage.[6]

8 Nonetheless, this strong argument is also to be considered with regard to third parties' fault and defects of material or construction. Third parties' fault is an extremely flexible notion. However, in practice, it is almost never a means of interruption of adequate causation.[7] Indeed, third parties' fault is only a ground for exoneration if it is of considerable intensity.[8] In practice, only a severe third party's fault such as gross negligence or intent can interrupt the causal link.[9] Apparently, for adequacy to be interrupted, the third party's fault has to be more dominant.[10] The Court also added that this criterion had to be combined with foreseeability, in that the third parties' fault had to be entirely unforeseeable.[11]

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3 *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 6 no 06.36, at 75.

4 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 135; TF, 5C.125/2003, 31.10.2003, c 4.3 (unpublished).

5 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 134 s: 'If A. mistakenly indicates a wrong path to an inquiring wanderer B., and B. is run over by an automobile on this path, the false indication of A. is ("natural") causal, but "inadequate". Because according to the usual course of things, such a false statement (even if it had been made deliberately) is not suitable to favour a traffic accident. It is the same if A. helpfully takes the delayed neighbour to the airport with his car in a hurry (disregarding all traffic signals), so that he can still reach the plane which crashes shortly afterwards...'.

6 C 3.1; ATF 127 IV 62, 64–65, c 2d (2001); ATF 126 IV 13, 17, c 7a/bb (1999); ATF 122 II 315, 320, c 3c (1996); ATF 122 IV 17, 23, c 2c/bb (1996).

7 *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 151, at 159 and no 160, at 161.

8 *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 3 no 152, at 159 and no 157, at 160; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 136a and no 140; TF, 4C.6/2001, 30.05.2001, c 2a (unpublished); *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 467, at 166; *V Roberto*, Haftpflichtrecht (2nd edn 2018) § 6 no 06.40, at 76.

9 *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Bd I: Allgemeiner Teil (5th edn 1995) § 3 no 157, at 160; *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 140 ; ATF 101 II 154, 165, c 3 (1975); *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Bd I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 467, at 166.

10 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 no 140.

11 C 3.1; *V Roberto*, Haftpflichtrecht (2th edn 2018) § 6 no 06.43, at 77.

However, the Federal Supreme Court seems to require an almost unattainable level of unpredictability. In the present case, it argued that 'not an everyday occurrence' was not sufficiently unpredictable.[12] 9

With this decision, the Court does not limit liability but rather extends it. The author of the damage is not acquitted even if the damaging event is rather far away from the author's act. (In the present case the question as to whether the hospital had causally contributed to the death remained open). 10

5. Greece

Efeteio (Three-member Court of Appeal of North Aegean) 14, 2016

ChrID 2016, 352, cmt by *S Ioakeimides*, ChrID 2016, 352, 353

Facts

A was hired as a security guard by D, a private company appointed by a factory to supervise and guard its premises and entrance area. One morning, V, a journalist from the local television company of Chios, a Greek island of the Dodekanese, arrived at the factory carrying a photo camera and a video camera. The video camera bag, weighing approximately 1,850 grammes, was hung crosswide from the right part of her neck to the left part of her body. Despite A's refusal, V insisted on attempting to enter the factory. A, in order to prevent V from entering and recording material of the place, gripped the bag's strap below one of her shoulders and pulled it towards him, aggressively pushing and pulling V, who resisted and tried to hold onto the camera. A's violent and rapid moves resulted in her suffering from severe bodily harm and, specifically, from the 'locked-in' syndrome (V is conscious, but cannot move or communicate due to quadriplegia). The doctors at the General Hospital of Chios, where V was taken, were negligent in incorrectly diagnosing her bodily harm in time. D, being sued by V as vicariously liable for A's act, alleged that the doctors' negligent behaviour interrupted the causal link between A's unlawful act and the damaging result and that, as a consequence, D was exempted from liability. 1

12 C 3.3.2 'The legal relevance of the causal connection is not assessed on the basis of whether it could be foreseen that the events would take place in every detail as they had taken place, or according to the effective ideas of the complainant, but rather on the basis of whether his conduct, when viewed objectively, was suitable to bring about the success that had occurred. According to the normal course of events and life's experience, the complainant's overtaking was, in view of the dangerous nature of the given traffic situation, quite capable of causing a collision with fatal consequences. In this respect, the causal course leading to the death of the moped driver – at least in its rough outline – was not outside the range of the foreseeable events, nor was it, contrary to the opinion of the complainant, carried out against all expectations, especially since in the case of such serious injuries as the moped driver had suffered as a result of the accident, health complications or careless monitoring of the patient by the nursing staff do not appear to be such unusual circumstances as not to be expected'.

Decision

2 The Court of Appeal held that an interruption of the causal link exists when, after the fact that could generate liability for particular damage, another, completely irrelevant and unexpected incident takes place, which causes the damage the first incident would have caused had the second incident not taken place.[1] The non-diagnosis in time of V's bodily injury by the doctors of the General Hospital of Chios, though, did not constitute such an interrupting factor. A's acts caused V's harm, without which neither the damage nor the negligent behaviour of the doctors would have occurred. V's injury was a condition for the doctors' behaviour or was the consequence of it. As a result, the Court concluded that V's severe bodily injury was causally linked to the injury A caused her and that the doctors' negligent behaviour did not interrupt said causal link. An interruption of the causal link would only then have taken place if the doctors' faulty behaviour had been exceptionally or unusually serious, outside the ordinary course of events, which, according to the Court, was not the case here .

Comments

3 In the remarks by S Ioakeimides that follow the decision, the latter is criticised[2] because, although, as pointed out, it starts from what is accepted as an interruption of the causal link, it arrives, according to the author, at conclusions which are not correct. In particular, according to the commentator, by deciding that the negligent behaviour of the doctors would not have occurred had it not been for V's severe injury, the Court considered the fact of the medical negligence as part of the (entire) causal chain, confusing natural causation with legal causation. The doctors' fault would not have occurred without the injury (natural causation) but the injury does not constitute, according to the teaching of common knowledge, an adequate link to the medical fault. In order to constitute part of the (legally important) causal chain, the posterior fact should be examined under the aspect of adequate causation. If this does not happen and the intervening fact is totally exceptional and first led to the damage, then the causal link is interrupted.

4 As the commentator points out, it is accepted in Greek literature[3] that the issue of which damage is to be attributed to the tortfeasor is not solved with the (logical, according to the natural laws) causality, so as to be decided that, because the second act would not have taken place had the first not occurred, the causal link to the first act is not interrupted; only if the second act caused the damage is the causal link to the first act interrupted and no liability for it arises.

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1 AP 1479/2013 published in NOMOS; 719/2012 ChrID 2013, 23; 979/1992 Ell Dni 35, 1044. See also indicatively *A Georgiades*, Law of Obligations, General Part (2nd edn 2015) § 10 no 37.

2 *S Ioakeimides*, ChrID 2016, 353.

3 *M Stathopoulos*, Law of Obligations – General Part (5th edn 2018) § 8 IV 6 no 144.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division)
25 October 2007, 06-17240
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007530967>

Facts

On a rainy morning, A, who was travelling on a motorway, lost control of his vehicle and stopped on the hard shoulder. A few moments later, at the same place, B also lost control of his vehicle and came to a halt in the wrong direction on the hard shoulder. Following these accidents, the fire brigade intervened and parked their vehicle between an access ramp to the motorway and the lanes of traffic on the motorway. As they were returning to their vehicle, three firemen were struck by the vehicle driven by C. C's insurance compensated the firemen and then brought a regress claim against B and his insurer. The appellate court rejected the claim on the ground that C had hit the firemen only because he was driving too fast on a wet road and that B's vehicle had played no role in that accident. **1**

Decision

The *Cour de cassation* quashed the judgment of the appellate court. It ruled that the firemen's presence on the road was a result of A's and B's accidents and that A's and B's cars were involved in the firemen's accident, for which B was therefore liable. **2**

Comments

This case is another illustration of the specific logic of the *loi Badinter*, which governs the compensation of traffic accidents under French law. In this regime, the driver of a vehicle involved in a traffic accident is strictly liable for any harm caused by this accident, even if he personally did not cause that harm.[1] This is typically the case when a 'complex accident' occurs, ie when there is a succession of car crashes, as in the present decision. Here, the firemen's accident was considered as being part of the complex accident which also included A's and B's accidents. B was therefore liable for any harm caused by that complex accident, even though that harm was not a direct consequence of B's own accident and behaviour. **3**

The solution in this case illustrates the very relaxed approach to causation taken under the *loi Badinter*. While this statute is a special regime which only applies to traffic accidents, it plays a very important role in practice, since traffic accidents account for a substantial share of tort liability claims. Besides, even if this case had not been governed **4**

1 See 5/6 nos 14–15 above.

by the *loi Badinter* (before this statute's entry into force in 1985 it would have been governed by the 'classic' strict liability regime for the action of things), the next cases cited in this section suggest that B could have been held liable for the firemen's harm, since their accident was clearly a sequel, though somewhat indirect, of B's accident.

Cour de cassation, Chambre civile 1 (Supreme Court, First Civil Division) 4 December 2001, 99-19.197

Bull civ I, no 310; D 2002, 3044, note I de *Lambertye-Autrand*; JCP G 2002, II, 10198, note *O Gout*; JCP G 2002, I, 186, no 10, note *G Viney*; RTD civ 2002, 308, note *P Jourdain*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007045447>

Facts

5 A man injured in a traffic accident had undergone surgery in the course of which he had been transfused with contaminated blood. The organisation that had provided the tainted blood had been found liable for the contamination and had brought a regress claim against the driver strictly liable for the injury caused by the traffic accident. The appellate court found against the organisation and held that the latter 'could not pass on to the author of the accident a fault which was its personal responsibility, and which alone was at the origin of the contamination'.

Decision

6 The *Cour de cassation* quashed the judgment of the court and remitted the case to another appellate court. It ruled that the blood transfusions which led to the contamination had been made necessary by the accident attributable to the defendant.

Comments

7 This decision is part of a long series of similar judgments. Under French law, a driver is liable for all harmful consequences of a traffic accident in which his vehicle is involved, regardless of his fault.[2] Not only is this liability strict, but the courts accept that the driver must answer for losses caused by the later misconduct of a third party, such as an organisation having provided tainted blood to someone injured in the accident. One reason for this solution is probably that drivers have an obligation to insure. Thus, they will normally not have to pay out of their own pocket for direct or indirect losses caused by a traffic accident in which their vehicle was involved. Besides, if the driver is not identified or has no insurance, a compensation fund will step in to compensate the plaintiff (before possibly bringing a regress claim against the uninsured driver).

2 See 5/6 nos 14–15 above.

The *Cour de cassation* justifies the solution in the present case and other similar cases simply by saying that the contamination was caused by the accident. Thus, it implicitly accepts that the driver whose vehicle was involved in the accident and the organisation which supplied the tainted blood were jointly and severally liable (*responsabilité in solidum*) to the victim for the contamination. 8

Given the very general justification given to the solution in this case, the same solution should apply if the driver's liability had been based on fault. There are no cases confirming this, however, since the *loi Badinter* excludes the application of liability for fault against drivers. One could also argue that if someone who committed no fault must answer for such distant damage, then the same solution should apply *a fortiori* to someone who was at fault. On the other hand, as suggested above, the circumstance that car drivers must have insurance may also have played a role in the *Cour de cassation* holding them liable for contamination indirectly caused by a traffic accident. It remains therefore to be seen if the Court would adopt the same solution if the initial accident had been caused by an uninsured cyclist, for example. 9

The issue of the 'distance' between the accident and the contamination, and of the impact of the subsequent act of a third party, is not openly addressed by the Court in the present case. This is typical of the *Cour de cassation*'s judgments, which normally contain only a formal motivation and do not give the substantial reasons which underly the position taken. Also, while the French Civil Code only sets the causation requirement without saying anything more on the definition or nature of causation, the *Cour de cassation* has always refused to define causation, to openly distinguish between 'natural' and 'legal' causation, or to officially endorse a doctrine which would limit causation, such as that of 'adequate' causation. As a consequence, French courts retain considerable discretion when assessing causation. They can recognise the existence of a relevant causal connection even in cases such as this one, where other legal systems applying strict doctrines on causation might not; but French courts can also deny causation in other circumstances, which at first sight may look rather similar, as the next case illustrates. 10

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 17 March 1977, 75-15.507

Bull civ II, no 91; RTD civ 1977, 770, note G Durry;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006998216>

Facts

An intruder, after having started an excavator parked in a private yard, the ignition key of which had been left on the dashboard, successively drove this machine into two buses belonging to a transport company, into other vehicles and into buildings used as a garage. The owner of the buses claimed damages against the owner of the excavator, on the basis that he had been negligent in leaving the key on the dashboard, but the appellate court rejected his claim. 11

Decision

12 The *Cour de cassation* upheld the judgment of the appellate court. It ruled that the lower court was allowed to hold that voluntary acts of the driver of the machine were independent of the owner, so that the facilities which the author of the damage had taken advantage of to seize the excavator were not related to the harm.

Comments

13 Here again, the solution adopted is presented as being based only on causation. Contrary to the solution adopted in the previous case, however, the third party's fault acted as a 'screen' between the initial negligence and the harm. This difference is difficult to explain on the sole basis of causation, as damage caused to the buses in this case cannot be said to be more remote from the initial negligence than the contamination was from the traffic accident in the previous case. The real difference between the two cases seems to be that, in the second one, the third party's fault was *voluntary*. Despite the fact that there is no general rule under French law that an intentional fault interrupts the causal chain, and while the *Cour de cassation* unfortunately does not state the substantial reasons for its decisions, one has the strong feeling that it is the seriousness of the third party's act that breaks the link between the initial fault and the harm.

7. Belgium

Cour de cassation / Hof van cassatie (Supreme Court) 4 January 2017

RGAR 2018, no 15443

Facts

1 A1 left his vehicle, engine running, in front of a shop for a short moment. Taking advantage of this negligence, a thief (A2) takes possession of the car and causes an accident where V is the victim. A2 sues A1, claiming that the latter was also liable and therefore A2 should only have to compensate part of the damage.

Decision

2 It is not disputed that A1 committed a fault by leaving his vehicle without due care. However, when examining the causal link between this fault and the accident caused by the thief, the trial judge considered that the misconduct of the car's owner did not contribute to V's damage. The Supreme Court approved the trial judge's decision that A1's fault was not causally linked with the accident and the damage which occurred.

Comments

A traffic accident caused by the driver of a stolen vehicle due to the owner's negligence **3** is one of the areas where case law, in the interest of fairness, tends not to apply the theory of equivalence of conditions. In these circumstances, the accident results from a combination of two causes: the fault of the car owner who left his keys in the ignition or on the dashboard and the thief's intentional fault.[1]

Three trends can be seen in the jurisprudence:

The first strictly applies the 'but-for' test. It considers that the owner's negligence **4** is in a necessary causal link with the damage resulting from the accident since, without his fault, the theft would probably not have been committed and the damage would not have occurred as it did *in concreto*. Consequently, the owner will be held jointly and severally responsible with the thief; each of them will be liable for full compensation of the damage suffered by the victim of the accident.[2] This trend is in line with art 6.19, § 1 of the new Civil Code. According to this provision, 'where several persons are held liable for separate misconducts and where each of these are in a causal link with the same damage, the distinct tortfeasors are jointly and severally liable for this damage'.

The second makes a disguised application of the theory of adequate causation[3] by **5** admitting that theft, which is an intentional fault, breaks the causal relationship.[4] In its decision of 4 January 2017, the Belgian Supreme Court officially endorsed this line of reasoning without any further explanation regarding causation.

Lastly, other judges rely on the fact that the thief would have stolen the car anyway, **6** even if the keys had not been left on the dashboard.[5] After applying the 'but-for' test, the court therefore concludes that there was no causal link between the car owner's negligence and the accident. In our opinion, this latter trend is legally incorrect because the 'verification consisting in questioning the possibility of damage without fault cannot "slide" into the mental construction of an imaginary case' (above 5/7 no 7).[6]

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1 On this subject, see *E Verbert,* Het oorzakelijk verband tussen de foutieve nalatigheid van de eigenaar van het gestolen voertuig en de door de dief veroorzaakte ongevalsschade, RGDC 1995, 394–401.

2 Court of Appeal of Mons, 3 June 1982, RGAR, 1984, no 10784; Court of Appeal of Liège, 8 December 1989, RGAR 1993, no 12104; Court of Appeal of Brussels, 18 September 1991, RGAR 1993, no 12231; Court of Appeal of Brussels, 7 December 1993, Dr circ 1994, 84; Court of Appeal of Liège, 29 March 1994, RGAR 1996, no 12555; Court of Appeal of Liège, 13 June 1994, RGAR 1996, no 12679; Court of Appeal of Mons, 1 February 1999, Bull Ass 1999, 509; JP Ostende, 25 January 1991, RW 1994–95, 201.

3 Above 2/7 no 17.

4 Court of Appeal of Mons, 20 February 1989, RGAR, 1990, no 11619; Court of Appeal of Liège, 11 December 1989, RRD 1990, 361; Comm Bruxelles, 2 March 1994, Dr circ 1994, 221.

5 Court of Appeal of Liège, 22 June 1987, JLMB 1987, 1286.

6 Cass, 21 November 2012, Pas I, 2272.

Tribunal de première instance de (Court of First Instance of) Liège, 28 June 2005
Rev dr santé 2008–2009, 43

Facts

7 A1 wields a pickaxe less than two metres away from his neighbour V, who talks to him while he is working. A1 accidentally hits concrete instead of grass with the pickaxe and a piece of concrete is projected into V's eye. V goes to hospital, where only a pain-killer and ointment are prescribed after A2's diagnosis of 'left corneal injury'. The next day, the pain is such that V returns to the hospital where, after a few days of massive doses of antibiotics, enucleation surgery (removal of the entire eyeball) has to be performed.

Decision

8 A1 argues that, without A2's wrong diagnosis, the damage suffered by V would not have been so serious. According to him, consequently, the medical malpractice broke the causal link between his own negligence and the damage as it occurred.

9 The court of first instance of Liège considers, on the contrary, that the possible medical malpractice committed by A2 does not break the causal link, since, without A1's clumsiness that caused the piece of concrete to be projected into V's eye, the damage would not have occurred as it did *in concreto*. Therefore, the author of the initial accident is jointly and severally liable for the reparation of the subsequent therapeutic accident, since the second would not have occurred without the first.

Comments

10 Where there is more than one fault, the court has to ascertain separately for each fault whether the link between the fault and the damage is of a necessary nature, in the meaning of the theory of the equivalence of conditions. In other words, the judge must examine, for each of the competing faults, whether, without the analysed fault and notwithstanding the intervention of another fault, the damage as it appeared *in concreto* would have occurred as it did.[7]

11 It cannot be inferred from the establishment of a causal link between one of the faults and the damage that there is no causal link between another fault and the same damage.[8] Thus, it cannot be concluded that there is no causal relationship between the first fault and the damage simply because another fault by another party follows.[9] Generally speaking, the prior or subsequent fault of a third party never constitutes a reason

7 Cass, 24 March 2005, Pas 2005, 703; Cass, 24 March 1999, Bull 1999, 441.
8 Cass, 10 May 2007, Pas 2007, 888.
9 Cass, 12 January 2007, Pas 2007, 62.

to exempt from liability the party whose fault is the *conditio sine qua non* for the damage.

In the case of concurrent faults, the victim may claim full compensation from each of the co-authors whose fault is the *conditio sine qua non* of the damage, regardless of the seriousness of the fault committed. The authors of competing faults are jointly and severally liable for the reparation of the entire damage suffered by the victim, without prejudice to any recourse they may have against each other in the subsequent phase of the contribution to the debt. In the recourse proceeding, the tortfeasor who has paid full compensation to the victim is allowed to claim contributory recourse from his co-debtor to the extent of his share of responsibility in the occurrence of the damage. The liability between the different co-authors will be apportioned according to the causal incidence of their respective misconduct. 12

The judgment of the court of first instance of Liège is perfectly in line with Belgian tort law rules (Digest 1, 5/7 nos 3–5). The occurrence of medical malpractice at a hospital, subsequent to the worker's fault, cannot lead to the first tortfeasor being exempted from any liability. In order to rule out the liability of one of the protagonists, the court must find that, even without his fault, the damage suffered concretely would have occurred in the same way, which is clearly not the case here. 13

Cour d'appel de Bruxelles (Court of appeal of Brussels) 3 January 1995

RGAR 1997, no 12836

Facts

A first traffic accident causes an oil pool to form on the road. This first accident is then followed by another due, on the one hand, to the wrongful manoeuvre of an unidentified driver who forced others to brake suddenly and, on the other hand, to the fault of the police officers who reopened the road, which had become dangerously slippery, before it had been cleaned by the fire brigade. 14

Decision

The Brussels Court of Appeal considers that the concurrent faults of the unknown troublemaker and the police officers break the direct and necessary chain of causality between the initial fault of the driver responsible for the first accident and the damage caused by the second accident. 15

Comments

Where it is possible to attribute different damage to successive accidents, some courts are inclined to break the causal link by distinguishing between several separate acci- 16

dents in the same complex sequence.[10] This is particularly the case when a third party is confronted with a visible and avoidable obstacle.[11]

17 The Ghent correctional court adopted a similar reasoning in another case in which, following an initial accident, a car was standing stationary on a motorway. A moment later, a second collision occurs because another driver was not able to avoid the damaged car. The court considers that the causal link between the first accident and the subsequent collision is interrupted and that the driver who caused the first accident must be exonerated from liability for the second accident. The Court argued that the lapse of time between these two events was such that the following drivers were able to avoid the obstacle by adapting their speed to the circumstances. Furthermore, the occupants of the first vehicle had had time to reach the hard shoulder.[12] This kind of reasoning gives the opportunity to the trial judge to circumvent the severity of the theory of equivalence of conditions, according to which, all the facts considered as a *conditio sine qua non* of the damage are treated on an equal footing, regardless of their degree of remoteness in the chain of causation.

8. The Netherlands

Hoge Raad (Supreme Court) 29 June 1969, ECLI:NL:HR:1969:AD8001

NJ 1969/374, case note *GJ Scholten*

Facts

1 Due to a fault of a car driver, a motorcyclist was severely injured and disabled. The car driver was held liable for the damage of the motorcyclist on the basis of fault (now art 6:162 BW). A medical expert had stated that the severe disablement of the motorcyclist would have been prevented had the attending physician correctly diagnosed an injury to his hip, which resulted in 65 % disablement. The car driver argued that he was not liable for the part of the loss that would have been prevented had the attending physician acted properly. The appellate court held the car driver liable for the total loss of the motorcyclist, arguing that the motorcyclist would not have suffered the 'extra' loss had the car driver not acted wrongly. Furthermore, it held that it could be expected that this wrongful behaviour resulting in physical injury would lead to medical treatment in which some injury could be overlooked.

10 On this topic, see *M Kruithof*, Oorzaak of aanleiding? Geen causaal verband zonder causale bijdrage, in: Actuele ontwikkelingen in het aansprakelijkheidsrecht en verzekeringsrecht (2015) 139, 154 ff.

11 Cass, 8 September 1983, Pas 1984 I, 14; Cass, 21 September 1983, Pas 1984 I, 63; Cass, 31 March 1981, Pas 1981 I, 830.

12 Corr Gand, 24 June 2003, JJP 2006, 196.

Decision

The Supreme Court upheld the decision of the appellate court and held that it is not in general true that someone who acts wrongfully and causes physical injury is not liable for the consequences of a subsequent medical error. The car driver had argued that the reasoning of the appellate court was not sufficient to conclude that there was a causal relationship between the car driver's wrongful act and the total loss of the motorcyclist, because a medical error can be so unforeseeable, improbable and reasonably unexpected, that it cannot be considered to be reasonably foreseeable. The Supreme Court, however, decided that this had not been sufficiently substantiated before the appellate court. 2

Comments

This case is considered to be leading with regard to liability in tort, whereby a physical injury can result in additional loss due to subsequent medical negligence.[1] It is considered that this ruling means that, in general, a subsequent medical error does not break the causal chain, but it is debated that this may be different when the intervening act was committed intentionally or grossly negligently.[2] 3

9. Italy

Corte di Cassazione (Court of Cassation) 24 April 2001, no 6023

Resp civ prev 2002, 133, with note by *Facci*, Il nesso di causalità e la funzione della responsabilità civile; Danno e resp 2002, 535, with note by *Bonetta*

Facts

A woman was severely injured in a car accident on 25 February 1986. She claimed compensation from the driver of the car, its owner and from the insurance company. 1

While the liability of the defendants for the car crash was undisputed, a number of discussions arose regarding the amount of damages to be awarded. Following transfusions of contaminated blood and plasma that had been necessary to treat the victim after the accident, she had contracted hepatopathy (an abnormal or diseased state of the liver). 2

The *Corte d'Appello* of Milano ruled that the damage she suffered was the consequence of the car accident because, if that accident had not occurred, she would not have needed those blood and plasma transfusions. 3

1 Also in this sense Hoge Raad 8 February 1985, NJ 1986/136, case note *CJH Brunner* and Hoge Raad 9 February 1979, NJ 1979/400, case note *FHJ Mijnssen*.

2 Groene Serie Schadevergoeding (comment by *RJB Boonekamp*) art 96 (Deventer, Wolters Kluwer) no 5.6.

4 The defendant insurance company appealed the decision of the *Corte d'Appello di Milano* on this point. The company argued that, on the basis of a statistical regularity assessment, in the case under consideration, a causal link between the car accident and the hepatitis was not established, because the latter is not a regular or necessary consequence of the former.

Decision

5 The *Corte di Cassazione* rejected the appeal. The Court ruled that the causal link between a previous cause and a subsequent harm may be excluded only when a second intervening cause is the sufficient and only cause of the harm, considering its exceptional nature with reference to the causal development triggered by the antecedent cause.[1]

6 Therefore, in the case under examination, the question was not if the hepatitis caused by the transfusion could be considered a normal or regular consequence of a car accident, but if it could be considered as such when the injuries suffered required surgery and this, in turn, required blood transfusions. The Court held that the evaluation of the facts of the case, with the help of the scientific expert opinion, did not prove that the hepatitis was an abnormal consequence of the car accident. The Court held, on the contrary, that the contraction of such disease is a risk inherent in transfusions and an event that may follow them with sufficient regularity.

Comments

7 First of all, it must be pointed out that the issue on which decision no 6023 of 24 April 2001 by the Court of *Cassazione*, on the existence of a causal link between a negligent car accident and V's contraction of hepatitis, following the transfusion of contaminated blood and plasma, was classified as an issue of material causation under Italian law, and not as a question of legal causation. The question therefore was not which damage directly arose from the car accident, but if the contaminated transfusion was an intervening cause which interrupted the causal link between the car accident and V's hepatitis.

8 The question is to be addressed on the basis of the second paragraph of art 41 pc,[2] according to which, supervening causes exclude a causal relationship when they are themselves sufficient to bring about the event.[3] The idea of the legislator was to exclude the causal link when the event was caused by the coming into existence of facts that are

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1 For precedents: Cass 8 May 1993, no 5325; Cass 19 May 1999, no 4852, cited by the Court.

2 Above, general overview. For a helpful discussion: *E Rajneri*, Case 9 – an epidemic in a town in Italy, in: M Infantino/E Zervoggianni (eds), Causation in European Tort Law (2017) 381ff.

3 For other cases of application of the rule, see ia: Cass 7 October 1987, no 7467, Giust civ Mass 1987, 10; Cass 14 June 1982, no 3621, Giust civ Mass 1982, 6; Cass 14 April 1981, no 2247, Giust civ Mass 1981, 4; Cass 10 February 1981, no 826, Giust civ Mass 1981, 2; Cass 11 September 1978, no 4114, Resp civ prev 1979, 334; Cass 24 August 1978, no 2964, Dir prat ass 1980, 262.

completely unforeseeable, that is to say absolutely abnormal.[4] This provision generally excludes the causal link between a certain action or omission and a certain harmful event when there is an exceptional supervening event.[5]

Therefore, the Court of *Cassazione* was asked to ascertain if the supervening trans- **9**
fusions of contaminated blood and plasma could be considered an exceptional supervening event. The causal link between the car accident and the hepatitis had been established by the *Corte di Appello di Milano* on the basis of the *conditio sine qua non* rule, that is the 'but-for test'. If the car accident had not occurred, the claimant would not have been injured and the harmful transfusion would not have been necessary. Was that the correct way to ascertain causation or rather, following the arguments put forward by the defendant insurance company, the contaminated transfusion should have been treated as an exceptional event, able, in itself, to interrupt the causal link between the car accident and the hepatitis?

The *Corte di Cassazione* did not hesitate in affirming that the transfusions with in- **10**
fected blood or plasma could not be considered an exceptional event, but rather a normal risk when a car accident causes bodily harm that requires surgical treatment. Finally, the Court decided that those who were responsible for putting the victim in the situation requiring the transfusion had to compensate her for the damage resulting from it.

It should be pointed out that the same reasoning was also adopted by the Italian **11**
courts in other cases of car accidents, which were followed by the contraction of hepatitis due to transfusions with infected blood.[6] From a more general point of view, Italian courts do not treat medical errors that worsen the victim's health as an unexpected and unforeseeable event that interrupts the causal chain.[7]

What if, following a car accident, the victim falls out of the window of the hospital **12**
where he is being treated, during an attempt to escape from it, while suffering a psychiatric condition that is due to the car accident?[8] To find the driver of the car also liable for the damage resulting from the fall would place on him the burden of compensating harm that is outside his sphere of control and which is unforeseeable. He clearly is not in a position to avoid this damage by way of prevention. Some of these decisions have therefore been treated as 'true judicial errors' that undermine the consistency of the

4 *F Antolisei*, Manuale di diritto penale, parte generale (2017) 215. See, eg, Cass 15 December 1988, Cass pen 1990, I, 1028; Cass 25 May 1983, Riv pen 1982, 1048; Cass 25 January 1984, Giust peno 1985, II, 99; Cass 1 July 1981, Cass peno 1983, 48; Cass 3 May 1979, Arch. giur circ 1980, 93.

5 *F Antolisei*, Manuale di diritto penale, parte generale (2017) 216; *F Mantovani*, Diritto penale (1992) 187.

6 Trib Parma, 30 September 1998, Danno e resp 1999, 455, note by *G Facci*, La trasfusione di sangue ed il nesso di causalità; Trib Perugia, 8 June 1991, Resp civ prev 1993, 632, note by *G Giannini*, Sinistro stradale, responsabilità professionale del medico e nesso causale.

7 See, eg, Cass 4 March 1983, Arch giur circol 1984, 14; Cass 4 July 1980, Giust pen 1981, II, 351; Cass 7 June 1979, Giust peno 1980, II, 288; Cass 6 April 1978, Cass pen 1979, 1095.

8 Trib Milano 13 July 1989, Giur it 1991, I, 2, 54, with a note by *E Rubini Tarizzo* (joint and several liability of the employees of the hospital for failure to supervise the patient).

link of causation theory in the Italian system.[9] This point of view is opposed by those for whom the rules on the causal link are more a tool to distribute the burden of damage between tortfeasors and victims than an abstract theory that should be applied to every case without exceptions.[10]

Corte di Cassazione (Court of Cassation) 4 August 1987, no 6707

Foro it 1988, I, c 1639, with note by *N Mazzia*, "Furto" di neonato e responsabilità civile dell'ospedale

Facts

13 On 9 April 1979, a woman gave birth to a baby in the Ventimiglia hospital. Two days later, the new-born was kidnapped from the hospital and was never found by the police.

14 The parents of the baby sought compensation from the hospital for the damage suffered. They alleged that the kidnapping was caused by the inadequate surveillance of the nursery in the paediatric ward. The *Tribunale di San Remo* rejected the claim, but the *Corte di Appello di Genova* reversed the decision, affirming the parents' right to be compensated. The defendant hospital appealed the ruling.

Decision

15 The *Corte di Cassazione* dismissed the appeal. The Court ruled that persons admitted to the hospital, or who seek medical assistance from the accident and emergency ward, are entitled to security as part of the protection of the right to health (art 32 Italian Constitution). Therefore, the custody and protection of the new-born was a duty of the defendant hospital, and its breach led to it being held liable for the damage.

16 The *Corte di Cassazione* found that the omission of the hospital to look after the new-born allowed the perpetration of the crime. Therefore, that omission was one of the causes of the harm suffered by the parents, as it created a situation that facilitated the illicit action of the kidnappers. The kidnappers' crime did, however, not break the causal link on the basis of the provisions of art 41 cp, because it could not be considered as an exceptional intervening cause.

Comments

17 This case is a clear illustration of the general rule according to which, omitting to do something that is obligatory by law or on the basis of some general duty equates to committing a wrong. In this case, the liability of the hospital was affirmed because it had omitted to protect the baby from the malicious act of other persons.

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9 *PG Monateri*, La responsabilità civile (1998) 167, 174, 176.

10 See the classic work by *S Rodotà,* Il problema della responsabilità civile (1964).

The case is interesting because the second action, the kidnapping of the baby, was not, as in the previous case, a non-malicious event, but was instead a criminal act, wilfully perpetrated by the kidnappers, while the omission of the hospital was merely negligent. Although the kidnapping was a malicious event, the court affirmed that it did not break the causal link between the negligent omission to protect the new-borns in the nursery and the damage suffered by the parents as a consequence of the kidnapping. **18**

In cases as the one under consideration,[11] where the supervening action is malicious, the first tortfeasor is discharged from liability for the damage caused by the second tortfeasor only if the latter would have committed the malicious action notwithstanding the conduct of the first tortfeasor. This defence failed in the case under examination, as the negligence of the first tortfeasor certainly facilitated the crime of the kidnappers.[12] **19**

The same rule was also applied where a bank omitted to make public the fact that a cashier's cheque sent by the same bank using the postal service, had been stolen.[13] **20**

10. Spain

Audiencia Nacional (Nacional Court – Administrative Chamber, Section 5th) 30 October 2013

JUR 2013\346843

Facts

V brings an appeal against the administrative decision dismissing the claim she had brought in her name and on behalf of her minor child asking for compensation for the death of her husband as a result of the terrorist attack that took place in Madrid on 11 March 2004. V sued the public administration based on the contention that the terrorist attacks were due to an absolute lack of control over explosives and detonators used in a mine, from where they had been stolen to use in the attacks, as proven in several judgments concerning these facts. V argues that, pursuant to arts 8 and 10 of the Regulations on Explosives, the control of explosives is a matter that concerns the Ministry of Interior, via the General Directorate of the Police and the *Guardia Civil*. She considers, therefore, that all liability requirements are met. The *Audiencia Nacional* rejects the appeal. **1**

11 For a similar case, concerning a riot in a jail, see Cass 20 January 1983, no 567, Foro it 1984, 1, 1628.

12 *P Cendon*, Il dolo nella responsabilità extracontrattuale **(1976)** 57, 97ff; *P Trimarchi*, Causalità e danno: atti illeciti, rischio, danno (3rd edn 2021) 116 ff, 154ff.

13 Cass 14 October 1992, 11207, Mass Foro it 1992; Banca borsa tit cred 1994, II, 128, Giust civ 1993, I, 1870.

Decision

2 The court states that 'the functions of the administration concerning the control of explosives do not mean, nor cannot be construed as if it is directly and immediately liable for any event or risk in connection with weapons or explosives that occurs anywhere in the Spanish territory … The Regulations on Explosives stipulate that commercial and consumer depots shall have guards belonging to a security firm who shall watch over the explosives according to the depot's security plan drafted by the security firm and approved following technical instruction no 1 by the General Directorate of the *Guardia Civil*' (art 178.1)'. Thus, the guards hired by security companies are responsible for watching over commercial and consumer depots. Without prejudice to the powers of the Ministry of Interior to control, supervise and inspect the depots, it is not its direct responsibility to guard the stores of explosives permanently, and thus it cannot be blamed for whatever illegal action takes place in them.

Comment

3 The criterion which is known in Spain as 'prohibición de regreso' ('prohibition of return') broadly coincides with what is internationally known as 'novus actus interveniens' and suggests rejecting the objective imputation of harm to the defendant whenever the causal process that he or she set into motion has been interfered with by the subsequent intentional or reckless conduct of a third party. The intervention of the third party must be disruptive. The defendant cannot be exonerated if his or her acts have sufficient importance for it to be concluded that the actions of the third party 'do not exclusively absorb the causal trigger'.[1] Perhaps because of its effect of total exclusion of liability, the criterion of the prohibition of return is used frequently in court.

4 However, this criterion is not absolute. It is subject to many exceptions. It does not apply if the third party's conduct was 'significantly encouraged or favoured' by the defendant. Even more so when 'it is one of the types of conduct that the duty of care violated aimed to prevent'[2], that is to say, that the defendant violated the norm the purpose of which was to avoid the intervention of that third party.[3] The criterion connects to the protective purpose of the rule[4] and with the defendant's status as 'guarantor'.[5] The so-called 'guarantor position', which on occasion legal writing also uses as an independent

1 STS 17 May 2007 (RJ 2007\4002).

2 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889-1989, vol 2 (1990) 1568 ff.

3 *R de Ángel Yagüez*, Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 235.

4 This is what happens in the case commented above 3/10 no 1.

5 *P Salvador Coderch/A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, 13.

criterion of objective imputation, asks whether the defendant was responsible for controlling the situation in a way which would prevent the intervention of the third party. The decision under comment rejects such a possibility in the case of the Ministry of Interior since 'it is not its direct responsibility to guard the stores of explosives permanently'. If there is no such 'position of guarantor', the criterion of the prohibition of return is applicable, and the damage is not attributable to the defendant. The Supreme Court even uses the criterion of the prohibition of return when the interference emanated from the victim (see below 8/10 no 14).

The criterion of the prohibition of return mainly links a constellation of cases in which a criminal act or even a terrorist attack intervenes between the defendant's conduct and the damage caused.[6] However, it is often raised by the parties in cases that have nothing to do with the criterion,[7] or can be found implicitly – as in the case under comment – or explicitly.[8] **5**

Legal writing has pointed out that the criterion's usefulness is minimal and its use excessive, in the sense that courts even apply it to situations in which the conduct of the third party was merely negligent.[9] Case law denaturalises the criterion because its goal is not to apportion liability between the defendant and a third party. The criterion is designed to exonerate the former because of the intervention of the latter.[10] **6**

Tribunal Supremo (Supreme Court) 16 April 2003

RJ 2003\3718

Facts

V's arm was injured when a heifer, which escaped during a running of bulls organised by a city council as part of popular celebrations, ran into her. The city council had mistakenly announced that all heifers were enclosed while the one that ran over V remained **7**

6 See also STS 17 March 2004 (RJ 2004\1926). There are many decisions concerning State liability for personal injury caused by inmates enjoying a release on temporary licence. See *P Salvador Coderch*/*A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, 13 f.

7 As an example, see STS 24 February 2017 (RJ 2017\826).

8 See STS 24 February 2017 (RJ 2017\826) no 11.

9 *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual: parte general: delimitación y especies, elementos, efectos o consecuencias (5th edn 2019) 236 ff (quoting among others STS 14 February 2006 [RJ 2006\884]), where the Supreme Court applied the prohibition of return in a case of a mistaken diagnosis by the defendant surgeon that caused the unlawful removal of one of the fallopian tubes of the claimant; the defendant argued that the cause of the harm was the prior, incomplete and not at all definitive curettage performed by another physician.

10 See also *M García-Ripoll Montijano*, Imputación objetiva, causa próxima y alcance de los daños indemnizables (2008) 148–164 and *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual: parte general: delimitación y especies, elementos, efectos o consecuencias (5th edn 2019) 222–223, examining the solution given in cases in which the third party's conduct was merely faulty or even lawful.

free. After the accident, V felt pain in her arm, went to the emergency services of the local hospital and waited there to be examined. She was left lying on a little stretcher for a long time. Eventually, she fell asleep and fell from the stretcher, which had no protective sides. V suffered severe injuries to the elbow that required surgical treatment. V brought an action against the city council and the hospital. The Court of First Instance rejected the claim against the city council on jurisdiction grounds and held the hospital liable. The Provincial Court upheld the appeal, and both the city council and the hospital were held solidarily liable.

Decision

8 The plurality of subjects causing damage needs to be classified. The accident caused by the heifer, attributable to the local council, only caused the injuries certified by the physician who acted on behalf of the local council at the very beginning of the case. On the other hand, the injuries that led to the claimant's permanent incapacity were a consequence beyond the scope of control of the local council and only resulted from the poor treatment provided by the hospital. Thus, the hospital must be liable for the latter and the local council only for the former.

Comments

9 This decision concerns the question of whether the damage produced by negligent medical care should also be attributed to the person who, with his prior negligent action, caused the victim's need to receive that medical attention. The court does not give any explanation, but this is not a case of prohibition of return. The risk that ensued when the victim fell from the stretcher was not the continuation or development of the risk created by the defendant. In other words, the negligent act of the defendant did not increase the risk that the victim would fall from the stretcher in the hospital. Accordingly, as the judgment pronounces by intuition and good sense, but without any argument, the defendant and the third party should be liable only for the damage that derived from the risk created by each of them. The situation would be different if the risk created by the defendant increased the risk of the damage caused by the third party.

10 Cases involving the liability of the defendant for damage resulting from a subsequent risk created by a third party, but where this is nonetheless the realisation of a risk derived from the defendant's actions, are very close to cases applying the criterion of increased risk. However, in our opinion, they do not match exactly. In general, the doctrine of 'increased risk' is an independent criterion of objective imputation according to which an adverse event cannot be objectively attributed to the negligent conduct that caused it when, concerning this event, the defendant's conduct did not exceed the limits of the risk allowed for that event, even though it exceeded them in relation to other possible harmful events and, therefore, may be considered negli-

gent.[11] Spanish legal writing links this criterion with the idea of 'risk allowed', which has less relevance for civil law than for criminal law – from where this doctrine comes[12] – and also with the 'alternative lawful conduct' theory.[13] In civil law, it is often difficult to differentiate between the criterion of increased risk and culpability. Thus, legal writing points out that it is a criterion fraught with imprecision, indeterminacy and abstraction.[14]

11. Portugal

Tribunal da Relação do Porto (Porto Court of Appeal) 10 April 2018[1]

2331/11.5TVLSB.L1-7

Facts

In a veterinary clinic, V was bitten by two dogs as she was walking down a corridor carrying her small dog. The owner of the two dogs was sitting in an adjacent room, speaking to her dogs' veterinarian when the dogs were attracted to the injured party's dog and lunged into the corridor. V requested that both owner and clinic be deemed responsible, as the clinic was contractually obligated to watch over the dogs as was the owner, since the Civil Code carries a legal presumption of fault (art 487/1) that burdens those who have assumed the obligation to supervise an animal: when such an animal causes damage, he or she is liable for that damage (art 493/1). **1**

Decision

Porto's Court of Appeal set aside the application of art 493/1 of the Civil Code, as it was proven that the dog's owner (A) did her best to diligently supervise her animals, holding onto them by a leash, and could not have foreseen or prevented them from being attracted to another passing dog.[2] Strict liability (arts 499 ff) was also waived (art 502) by **2**

11 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed), Centenario del Código Civil: 1889–1989, vol 2 (1990) 1577 f.

12 *P Salvador*/*A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, 10 f.

13 *F Pantaleón Prieto*, Causalidad e imputación objetiva, vol 2 (1990) 1578.

14 *R de Ángel*, *Yagüez*, Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 252.

1 <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/8a3d5785c3d770838025829c003678ea?OpenDocument>.

2 According to art 493/1, the tortfeasor must 'prove that he fulfilled his duty of vigilance or that the damage would have arisen even if he had fulfilled such duty' in order to rebut the legal presumption of fault set out in the article.

application of art 505, which states that a tortfeasor's liability may be excluded in cases where the event is imputable to a third party. Article 505 mentions this possibility in order to exclude the tortfeasor's liability only for losses caused from road traffic accidents (art 503). In spite of this, the Court followed scholars' interpretation that art 505 is applicable to issues other than road traffic accidents[3] and may be applied in cases where the tortfeasor is responsible for losses produced by an animal, under art 502. The door to the veterinarian office was shut, up until the point that a clinic's assistant left the office and neglected to close it behind her, which amounted, in the Court's view, to the exclusive fault of the clinic. The Court exempted the dog owner's liability completely.

Comments

3 The Court follows the precedent set in previous Portuguese court decisions regarding art 505 and excluding the tortfeasor's liability not only by verifying that losses were a causal consequence of a third party's action, but evaluating whether this third party's conduct was the exclusive cause of those losses. The Court deemed the employee of the veterinary clinic, who neglected to follow the appropriate protocol due in a place where the risks of animals causing injuries are extensive, a *third party whose action was the one and only cause of the losses*. Article 505 of the Civil Code has been the centre of prolific discussions regarding losses that may be attributed to the conduct of a third party.

4 Traditionally, this article was interpreted as excluding the liability of the tortfeasor for any fact attributed to the injured party, third party or force majeure events. Following this interpretation would mean that the word 'imputable' included in art 505 should not be interpreted from a technical and legal point of view (it should be interpreted as not requiring the presence of legal causation between the injured party and the cause for the losses – which translates into the concept of fault), but instead as a mere reference to causation, as 'attributable' to any action of the injured party/third party.[4] The same body of opinion dismisses the possibility of conjoining the fault of the injured or the third party with the strict liability of the tortfeasor (doctrine known as the 'non-admissibility of the heterogeneous combination of fault and risk'), based on the preliminary works of the main contributing author of the Civil Code,[5] who himself never adhered to this position, having always admitted the possibility of this combination. According to this first position, once an event has any fact attributable (not necessarily

3 *A Pereira da Costa*, Dos Animais (O Direito e os Direitos) (1998) 59 ff.

4 What underpins this opinion is the fact that an intervention of the injured party, third party or force majeure event interrupts the causal link between the tortfeasor (strict liability that burdens the tortfeasor) and the losses produced, which in turn means that the event is no longer an adequate cause for the losses suffered by the injured party. *Antunes Varela*, Das Obrigações em Geral, vol I (2000) 675.

5 The author interpreted art 505 as requiring that the intervention of the injured party/third party/force majeure event was the only (exclusive) cause of the damage in order to completely exclude the tortfeasor's liability.

imputable, there is no evaluation of fault) to the injured or third party, the tortfeasor is exempt from strict liability based on risk (cases of strict liability are stated in art 499 ff). Note that following this position would result in different situations being managed in uniform ways: an injured party who purposely threw himself on the road and was run over and an injured party who fainted on the same road would both see their cases against the tortfeasor dismissed. That being said, the traditional view was the prevailing opinion up until 2007, when the *Supremo Tribunal de Justiça*[6] (Supreme Court of Justice) clearly paved the way for a more modern interpretation of the above-mentioned art 505, based on the work of renowned academics.[7]

This interpretation was also promoted by the legislator: following an analysis of the evolution of the legislation on this matter, the most recent ordinances (art 14 of Decree-Law no 71/90[8], art 11 of Law no 67/2007[9]) require that the event for which the third party is responsible (having acted with or without fault) is the exclusive cause of the losses. **5**

The traditional interpretation was abandoned and replaced by a progressive interpretation, which requires, in order to completely exclude the tortfeasor's liability, that the conduct of the third party/injured party or force majeure event is the only and exclusive cause of the losses. If we once again resort to the example given above, in the case where a person falls on a road and is run over, in order to exempt the tortfeasor from strict liability, the court will assess whether the fall was the only cause of the accident, ie, whether, had the person not fallen, the accident would not have happened. If it is deemed the only cause of the accident, the tortfeasor's liability can be excluded. **6**

12. England and Wales

Knightley v Johns, Court of Appeal (Civil Division) 27 March 1981

1982] 1 WLR 349

Facts

The first defendant's car overturned in a road tunnel. The second defendant, a police inspector who led the police response to the accident, failed to close the tunnel to traffic on **1**

6 Supremo Tribunal de Justiça's (Supreme Court of Justice) ruling on Case no 07B1710, 4 October 2007 <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/05818af2c77287aa8025736a003ed983?OpenDocument&Highlight=0,07B1710>.

7 *Calvão da Silva*, Anotação ao Ac. STJ de 01.03.2001, Revista de Legislação e Jurisprudência, Ano 134, 112 ff. *Brandão Proença*, A conduta do lesado como pressuposto e critério de imputação do dano extracontratual (1997) 276 f.

8 Altered by Decree-law no 208/2004 (19 August).

9 Altered by Law no 31/2008 (17 July).

arriving at the scene. He later ordered two police motorcyclists, one of whom was the claimant, to ride back through the tunnel against the traffic to do this. Near the entrance to the tunnel, the claimant collided with an oncoming vehicle and suffered injury. The trial judge held that the first defendant was solely liable for the claimant's injuries. The first defendant appealed to the Court of Appeal.

Decision

2 The court held that the first defendant was not liable to the claimant as the latter's injuries were too remote a consequence of the former's negligence. Stephenson LJ said that the issue was whether the whole sequence of events was a natural and probable consequence of the negligence and a reasonably foreseeable result of it. Negligent conduct was more likely to break the chain of causation (as opposed to non-negligent conduct), as were positive acts (as opposed to omissions). Particularly on top of the other errors made by the police in their handling of the situation, the negligence of the second defendant in failing to close the tunnel earlier 'was the real cause of the plaintiff's injury and made that injury too remote from [the first defendant's] wrongdoing to be a consequence of it'.[1] According to Stephenson LJ:

> 'In the long run the question is … one of remoteness of damage, to be answered … not by the logic of philosophers but by the common sense of plain men … In my judgment, too much happened here, too much went wrong, the chapter of accidents and mistakes was too long and varied, to impose liability on [the first defendant] for what happened to the plaintiff …'[2]

Comments

3 This decision illustrates three connected facets of the judicial approach to limitations of liability in English law. First, Stephenson LJ does not draw a clear line between intervening cause/legal causation and foreseeability/remoteness, but instead uses the language of causation and remoteness interchangeably. Second, he sees these not as scientific or 'philosophical' issues in a legal context, but matters of 'common sense', to be resolved according to the instincts of 'plain men and women'. And third, he is keen to emphasise that the enquiry is a very fact-sensitive one. These features of the judgment suggest judicial scepticism as to the value of conceptual or abstract analysis when it comes to setting the limits of negligence liability. But at the same time both the outcome and the reasoning in the case can be reconciled with a relatively sophisticated causal analysis, whereby the issue of causation in the legal context is seen to extend beyond the basic question of historical connection between fault and damage to encompass ascription of responsibility as between different causal actors, with that ascription resting (as it did here) on

1 *Knightley v Johns* [1982] 1 WLR 349, 367.
2 Ibid.

both the relative culpability of the actors and the relative causal potency[3] of their conduct vis-à-vis the damage.

The Oropesa, Court of Appeal, 17 December 1942

[1943] P 32

Facts

A collision took place off the coast of Nova Scotia between two steamships, *Oropesa* and *Manchester Regiment*, for which both were to blame. The damage to the *Manchester Regiment* was serious, and her master decided to take 16 men to the *Oropesa* in a lifeboat to discuss salvage arrangements. The lifeboat capsized in heavy seas and nine men drowned. The parents of one of the dead sailors brought a damages claim against the owners of the *Oropesa*, which was successful at trial. The owners appealed to the Court of Appeal. **4**

Decision

The court held that because the decision of the master of the *Manchester Regiment* to cross to the *Oropesa* in the lifeboat had not been unreasonable, it had not broken the chain of causation between the collision for which the defendants' ship was partly to blame and the death of the plaintiffs' son. Lord Wright said that while the master may have been guilty of an error of judgement, that would not affect the question of whether his conduct and its consequences flowed directly from the negligence of the *Oropesa*. Regarding human action and legal causation, he commented: **5**

> '[H]uman action does not per se sever the connected sequence of acts. The mere fact that human action intervenes does not prevent the sufferer from saying that injury which is due to that human action as one of the elements in the sequence is recoverable from the original wrongdoer.'[4]

Comments

This case decides that for human conduct to break the chain of causation it must be unreasonable or extraneous in some way (an example given of such 'ultroneous' conduct is a voluntary decision to make an ex gratia payment to the families of members of a ship's **6**

3 'Causal potency' is a somewhat elusive concept, on which the courts have not elaborated. However, the idea seems to be that the more likely it is that cause X will result in consequence Y, the higher the degree of causal potency when X is in fact a cause of Y. So, for example, A shooting B in the head has more causal potency when it comes to B's death than C having left unlocked the gun which A used to do this, since while shooting someone in the head almost always results in their death, this is only rarely a consequence of leaving a gun unlocked.

4 *The Oropesa* [1943] P 32, 37.

crew who had lost their lives in a collision[5]). This decision can usefully be contrasted with that in the later case of *Knightley v Johns*, discussed above. Like Stephenson LJ in *Knightley*, Lord Wright emphasises the fact-sensitive nature of the enquiry,[6] but here the focus is more squarely on the question of legal causation/*novus actus*, which is unsurprising given that at this time the governing test of remoteness in negligence was directness (ie, absence of intervening cause) rather than foreseeability.[7] As for the results of the two cases, the finding in *Knightley* that the conduct of the police inspector had been negligent is sufficient to distinguish the case from *the Oropesa*. However, it should be emphasised that although *the Oropesa* stands for the proposition that intervening conduct of a third party which is reasonable is unlikely to break the chain of causation, the converse is not necessarily true.[8] On the contrary, in many cases involving negligent intervening conduct, the most appropriate solution is to impose liability on both the original actor and the intervening actor, with responsibility then being apportioned between the two by way of contribution proceedings between them.[9] It is only exceptionally that (as in *Knightley*) intervening third party conduct which is merely negligent – rather than deliberate – absolves the original defendant altogether by virtue of the doctrine of *novus actus interveniens*.

Lamb v Camden London Borough Council, Court of Appeal (Civil Division) 18 March 1981

[1981] 1 QB 625

Facts

7 The plaintiffs were the owners of a house which had been let to a tenant. While replacing a sewer in the road in front of the house, the defendants broke a water main and the water that escaped undermined the foundations of the house, making it uninhabitable. The tenant moved out, and the plaintiffs subsequently removed all the furniture. Squatters later broke into the house and caused damage. Although these squatters were removed, others followed and the house was not finally secured until some three-and-a-half years after the initial accident had occurred. The defendants admitted liability but

5 See *The Amerika* [1917] AC 38.

6 See *The Oropesa* [1943] P 32, 36 ('you must deal with the case on its facts').

7 See *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 (effectively overruled in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388).

8 Hence, for example, negligent medical treatment will not usually amount to a *novus actus* (see, eg, *Wright v Cambridge Medical Group* [2011] EWCA Civ 669, [2013] QB 312), though exceptionally it may do so (as conceded in *Rahman v Arearose* [2001] QB 351).

9 See, eg, *Rouse v Squires* [1973] QB 889, apportioning responsibility for a fatal road accident on a 25/75 % basis as between two lorry drivers.

the official referee held that they were not liable for the damage caused by the squatters as it was too remote. The plaintiffs appealed to the Court of Appeal.

Decision

The court held that the damage caused by the squatters was too remote a consequence of the defendant's tort. It was agreed that particular care was needed when applying general remoteness principles to the deliberate intervening conduct of third parties. Lord Denning MR justified the outcome by reference to policy considerations, arguing that the responsibility for ensuring that property was properly secured when unoccupied lay with the owner and that where damage like this occurred, the loss should generally fall on the insurer. He said: **8**

> 'Sometimes [the law limits the range of liability for negligence] by limiting the range of the persons to whom [a] duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote .... All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.'[10]

Oliver LJ held that where the consequence in question arose out of the intervention of some independent human agency over which the defendant had no control, that conduct must have been very likely to happen if the test of reasonable foreseeability was to be met, and that, on the facts, that test was not satisfied.

Comments

In English law, a negligent defendant is not usually liable for damage deliberately inflicted on the claimant by a third party.[11] Although there are a number of exceptions to this general rule, these are now understood to be based on the recognition of an exceptional duty of care to guard against the deliberate wrongdoing of third parties, so that in the modern law the issue is generally dealt with as a question of duty of care, rather than legal causation or remoteness.[12] This case is an exception, since there was no question that the defendants were liable to the plaintiffs for the initial water damage, with the result that duty of care was an unsuitable mechanism for resolving the issue of responsibility for the later damage done by the squatters.[13] Unfortunately, however, the guidance provided by the decision is undermined by the fact that the judges all arrived at the conclusion that the damage was too remote by different reasoning. The approach **9**

10 *Lamb v Camden London Borough Council* [1981] 1 QB 625, 636.

11 *Weld-Blundell v Stephens* [1920] AC 956, 986.

12 *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874, a decision of the House of Lords in a Scottish appeal, is the leading authority.

13 Though cf *M Jones* (ed), Clerk & Lindsell on Torts (23rd edn 2020) §§ 2–122, arguing that *Lamb* was 'really a case concerned with the extent of the defendant's duty'.

of Oliver LJ, in holding that intervening human conduct must be very likely to happen if its consequences are not to be too remote, is most consistent with the general tenor of judicial reasoning in other cases. Lord Denning's explicit focus on policy arguments is regarded by some commentators as refreshing, but his reliance on insurance considerations has been criticised for simply shifting the cost of the damage in such cases from defendants who are at fault to those who pay insurance premiums.[14]

13. Scotland

Grant v Sun Shipping Co, House of Lords, 23 June 1948

1948 SC (HL) 73, 1949 SLT 25, [1948] AC 549

Facts

1 A ship owned by A1 was berthed in dock. Repairs were being undertaken to it by employees of A2 at the same time as stevedores were loading items of cargo onto the ship. While the stevedores were on a break, the repairs were completed. A2's employees, having moved hanging deck lights onto the floor of the deck, omitted to re-cover a hatch on the deck before they left the ship. V, one of the stevedores, returned to the ship after dark. While he was walking across the deck, and in the darkness failing to see the uncovered hatch, he fell through it into the hold, seriously injuring himself.

2 V raised an action of damages against A1 and A2, alleging that each had been in breach of a duty owed to V: A1 in respect of a failure to provide a safe working environment (as required under statutory regulations), and A2 for negligently moving the lights and negligently failing to recover the hatch. A1 argued that responsibility for the injuries fell solely on A2 and not A1.

3 At first instance, the judge found A1 solely liable for the injuries, on the basis that A1 had an ongoing duty to provide a safe working environment, this duty continuing to apply after the repairers had left the ship. This meant that 'the effect of any negligence of the second defenders was broken by the later negligence of the first defenders'. On appeal to the Inner House of the Court of Session, the appeal bench relieved both defenders of any liability, holding that responsibility for the injury was attributable solely to V's own carelessness. V further appealed to the House of Lords.

Decision

4 The House of Lords agreed neither with the Inner House of the Court of Session nor with the judge at first instance, instead holding that A1 and A2 had each contributed through

14 *M Lunney*/*D Nolan*/*K Oliphant*, Tort Law: Text and Materials (6th edn 2017) 27.

their respective breach of duty to V's injuries, A1 to the extent of 25 % and A2 to the extent of 75 %. Giving the leading speech, Lord Du Parcq said:

> 'If the negligence or breach of duty of one person is the cause of injury to another, the wrong-doer cannot in all circumstances escape liability by proving that, though he was to blame, yet but for the negligence of a third person the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender.'

Looking at the chain of events which had occurred in this case, Lord Du Parcq reached **5** the conclusion that the breach of duty 'attributable to each of the defenders "partly" and "directly" caused the pursuer's injuries'. In addition, his Lordship did not think that any breach of care by V himself had contributed to his injuries: he had been entitled to rely on a strict performance of A1 and A2's duties in relation to the safety of workers.

Comments

This judgment is a clear example from case law of the view taken by Scots law that a sub- **6** sequent delictual act of A2 will not necessarily exclude a preceding delictual act of A1 from a share of the responsibility for injuries caused to V. As in this case, a common outcome is an apportionment of liability between both A1 and A2 and sometimes also (though not in this case) V, if V has been contributorily negligent.

There are, however, instances where a subsequent negligent act of A2 is judged to **7** be of such significance that it is held to attract sole responsibility for the injurious outcome, thereby exonerating the earlier wrongdoer A1 from any liability. Such instances have traditionally been said to indicate that A2's conduct constitutes a *novus actus interveniens*, breaking the chain of causation with the preceding conduct of A1. This suggests that the decision faced by a court is a causal one, but, in reality, the logic of causal rules does not furnish any easy answer for a court (or indeed a jury). As Lord Du Parcq remarked in this case when reflecting on what might have happened had the facts been considered by a jury:

> 'A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims.'[1]

1 1948 SC (HL) 73, at 95.

Maloco v Littlewoods Organisation Ltd, House of Lords, 5 February 1987

1987 SC (HL) 37, [1987] AC 241

Facts

8 A purchased a cinema, intending to demolish it and build a supermarket on the site. Shortly after the purchase of the building, local youths began breaking into it. Although the contractors working at the site locked and secured the premises when they finished work each night, they discovered that the premises continued to be broken into. When the contractors eventually finished their work on the site, they left the building in as secure a state as they could. However, the premises continued to be broken into. A's employees noticed signs of someone having attempted to start a fire on the premises, as did the beadle of a nearby church. However, no steps were taken by anyone to alert the police to these matters. Sometime later, a fire deliberately started by youths inside the building spread to a cafe and billiard hall next to the cinema, and to a nearby church which was so substantially damaged that it had to be demolished. V, the owners of the affected properties, claimed damages from A, alleging that the damage to their properties resulted from A's negligence. The claims were rejected by the Inner House of the Court of Session. V appealed to the House of Lords.

Decision

9 The House of Lords dismissed the appeals, holding that: (1) there was no general duty of care requiring someone to prevent a third party from causing damage to property by the third party's deliberate wrongdoing, even though there might be a high degree of foreseeability that such damage might occur; (2) there were, however, special circumstances in which someone might be held responsible in law for injuries suffered as the result of a third party's deliberate wrongdoing; (3) one such special circumstance might be where an occupier who negligently caused or permitted a source of danger to be created on its land could reasonably foresee that third parties might trespass on the land and, interfering with the source of danger, might cause damage to nearby persons or property; (4) someone might be liable for damage to neighbouring property caused by a fire started on its property by the deliberate wrongdoing of a third party where it had knowledge (or means of knowledge) that a third party might start, or indeed had started a fire, on its premises, and then failed to take reasonable steps to prevent such a fire from damaging neighbouring property; (5) however, in this case, the empty cinema could not properly be described as an unusual danger in the nature of a fire hazard; and (6) even if there was any fire risk, A had no means of knowing that it existed.

Comments

10 Generally, in Scots law, a party is responsible in delict only for its own acts or omissions; there is thus no responsibility for the conduct of a third party, even where it can reason-

ably be foreseen that the third party's conduct may cause harm. However, there are exceptions to this general rule: parents are liable for the conduct of their children, and employers for the conduct of their employees while the employees are engaged in work. In addition, other circumstances may indicate that a party has assumed responsibility in delict for the conduct of a third party, either by virtue of a contract to that effect or because some other circumstances indicate such an assumption of responsibility (for instance, where a party has control of a third party, such as a prisoner: see *Dorset Yacht Co Ltd v Home Office*[2]). Some nominate delicts may also impose liability for the conduct of a third party, nuisance being a clear example (where an occupier of land may be liable in some instances for harm done to a neighbouring property by third persons while on the occupier's land).

Two additional instances where the House of Lords believed that responsibility for **11**
the acts of a third party might arise concerned: (i) parties having a source of danger on their premises which causes harm, and (ii) cases where a party knows that a fire may be, or has been, started on its land and takes no reasonable steps to avert the fire spreading. On the facts of this case, neither of these circumstances was thought to arise: their Lordships did not think that a derelict cinema could itself be properly described as a 'source of danger', and no risk of fire had been brought to the attention of the police or A such that A might reasonably have foreseen the need to take specific steps to counter this risk. One might query whether it was correct to assess a derelict building as not being itself a fire risk, but such was the opinion of the House of Lords.

14. Ireland

Conole v Redbank Oyster Co, Irish Supreme Court, 7 May 1975

[1976] IR 191

Facts

C built a fishing vessel for A. During initial trials, water coming on deck could be **1**
pumped off. On the day of the naming and blessing ceremony, A ran some test trips. On one trip, the boat took on water at an alarming rate and it could not be pumped off quickly enough. A's managing director ordered that the boat be tied up. Contrary to that instruction, an employee took the boat out with 50 children on board. The boat sank and nine children, including V's daughter were killed. A settled V's claim, but sought an indemnity or, at least, a contribution from C. The IEHC dismissed the claim against C, finding that A's negligence was the sole legal cause of the deaths. A appealed.

2 [1970] AC 1004, [1970] 2 WLR 1140.

Decision

2 The IESC rejected the appeal and upheld the IEHC decision. While C may have been negligent in supplying an unseaworthy boat,[1] A's employee's disregard of a clear risk, for which A was vicariously liable, was a *novus actus interveniens*, breaking the causal link between C's negligence and the deaths.

Comments

3 The question of when an intervening act is sufficient to break the causal connection between an earlier act of negligence and an injury is difficult to state in a single, precise rule. Wilful disregard of a clear risk was sufficient in the present case.[2] The test is not based on the foreseeability of the intervening act, but foreseeability is a useful rough guide as to whether a court is likely to treat the intervening act as a sole legal cause or to treat the two incidents as concurrent causes.[3] Deliberate wrongdoing is generally considered to break the causal connection, except where the deliberate wrongdoing is the very thing A was supposed to guard against.[4]

4 Apart from cases of very clear and serious disregard of risk, Irish courts generally prefer to treat multiple wrongdoers causing the same harm as concurrent wrongdoers, allowing for apportionment of liability under statutory principles.[5] While there is no definitive authority on the issue, Irish courts are also reluctant to treat medical errors in treating the victims of torts as intervening causes.[6]

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1 Whether C was negligent was not actually determined.

2 See also *Cowan v Freaghaile* unreported IEHC, 24 January 1991.

3 The law on concurrent wrongdoers is contained in Part III of the Civil Liability Act 1961, see *BME McMahon/W Binchy*, Law of Torts (4th edn 2013) ch 4; *E Quill*, Torts in Ireland (4th edn 2014) 491ff. On *novus actus interveniens*, see *McMahon/Binchy* Law of Torts (2013) ch 3, Part III; *Quill*, Torts in Ireland (2014) 410ff.

4 *Breslin v Corcoran* [2003] IESC 23, [2003] 2 IR 203; in this case, the IESC held that it was not foreseeable that a car thief would injure a pedestrian through negligent driving, so no duty of care arose. The causal issue was discussed *obiter*. The Motor Insurers Bureau of Ireland (MIBI) had to pay V's compensation. Deliberate behaviour that is not wrongful, but nonetheless causes V additional losses, is less likely to be considered a *novus actus interveniens*, see *Dovoren v HSE* [2011] IEHC 460.

5 See Part III of the CLA (fn 3).

6 Discussed in *Webb v Minister for Finance* [2009] IEHC 534, per Herbert J, *obiter*; *Carey v Minister for Finance* [2010] IEHC 247, [4.53] ff, per Irvine J *obiter*, citing *Hodgson*, The Law of Intervening Causation (2008) at 169.

L v Minister for Health & Children, Irish High Court, 6 April 2001

[2001] IEHC 64, [2001] 1 IR 744[7]

Facts

V was infected with Hepatitis C prior to 1983 during treatment for moderate Haemophilia A. He worked in various jobs up to 1997, at a lower rate of pay than he would have had in his intended career (which he was precluded from pursuing due to the effects of Hepatitis C). In 1997, V was involved in a serious road accident, resulting in the amputation of his right leg above the knee. This forced him to give up his job as a curtain fitter and he became a self-employed pelmet maker and upholsterer, but at a similar rate of pay. This accident would also have ended his intended career if he had not already lost the career due to Hepatitis C. With respect to V's claim for loss of future earnings, a question arose as to whether the 1997 injury precluded a claim for losses after that point. **5**

Decision

O'Neill J indicated that there was no universal rule for situations where a second event arises that would have caused some of the same consequences as an earlier event. The judge indicated that where the second event was a tort, each case would have to be looked at on the merits of its own facts.[8] In the present case, the second event was not considered to be a supervening event. Thus A remained liable for the difference between V's income from his intended career and his earning capacity post-Hepatitis C for the period after the 1997 accident. **6**

Comments

The case itself involved a claim under a statutory compensation scheme for infected blood products.[9] The scheme uses tort principles for determining damages, including principles such as causation and remoteness of damage. The tortfeasor in respect of the second event is liable for any additional damage caused and the person responsible for the first event is not liable for those additional losses.[10] O'Neill J suggested that a naturally occurring illness is likely to be treated as a vicissitude of life and so, if the second event was such an illness, it would normally end the liability of A for damage that the illness would also have caused if the original event had not occurred.[11] **7**

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7 Noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2001 (2002) 293, no 48ff; see also *E Quill*, Successive Causes and the Measurement of Damages (2002) 37 Ir Jur 91.

8 He declined to follow the approach in *Baker v Willoughby* [1970] AC 467, but the result in the case is consistent with that decision.

9 Hepatitis C Compensation Tribunal Act, 1997.

10 Applying the principle in *Performance Cars v Abraham* [1961] 3 All ER 413.

11 Following *Jobling v Associated Dairies* [1982] AC 794.

15. Malta

Francis Portelli v George Attard and others – Prim'Awla tal-Qorti Ċivili (Civil Court, First Hall) 20 March 1997, Writ no 1513/1993

Facts

1 The plaintiff suffered damage to his property as a result of penetration of water from a neighbouring tenement belonging to the defendants. He sued the defendants and the court ordered the defendants to carry out works in their property to avoid the penetration of water to the plaintiff's property. The defendants failed to carry out the works within the time granted to them by the court and the plaintiff suffered further damage as a result. He again sued the defendants. The defendants pleaded that they were not responsible for the delay in carrying out the works, which was due to the fact that a third party had stored some items in their property and the works could not commence before the third party removed those items.

Decision

2 The court held that the plaintiff had no legal relationship with the third party and he had no remedy against him to force him to remove his belongings so that works could start in the defendants' property. The defendants, on the other hand, did have that remedy against the third party, and they are responsible towards the plaintiff for the damage suffered by him as a result of their failure to act against the third party. The court therefore rejected the defendants' plea and allowed the plaintiff's claim, without prejudice to any rights the defendants may have to recover from the third party.

Comments

3 The misconduct of a third party can be pleaded by the defendant as a defence only if it was a factor completely out of the defendant's control. At best, if it can be shown by the defendant that a third party contributed to the damage and that he had no means and no obligation to restrain the third party, the defendant can ask that the third party be called into the suit and be made to bear a proportionate portion of the damages, in terms of arts 1049 and 1050 of the Civil Code.

16. Norway

Høyesterett (Norwegian Supreme Court) 10 March 1958

Rt 1958, 984

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/rt-1958-984-137b?searchResultContext=2992&rowNumber=1&totalHits=1>

Facts

A factory, A, disposed of two sacks of highly inflammable material by dumping them on the neighbouring property, which was owned and run by a gardener. The factory had an agreement with the gardener whereby they disposed of waste materials that were suitable for mixing into soil in connection with his gardening business on the gardener's property. One of the employees therefore thought that he was supposed to dispose of the sacks on the gardener's property. 1

The gardener set fire to the sacks of material himself, partly because he was under the influence of alcohol at the time. The fire spread rapidly to the yard of an adjacent factory, which manufactured prefabricated houses. Several buildings were burnt to the ground. V, the owner of the buildings, sued the factory, A, for having caused the fire to the buildings through negligence. 2

The material should have been disposed of at a secure waste disposal site run by the municipality. However, there were misunderstandings and a lack of communication between three employees of the factory, A. 3

Decision

The Supreme Court found that the disposal of the sacks of material was negligent, and that the factory was vicariously liable for the damage based on the negligence of the employees. Hence, the Court found that factory A was liable. The Court stated that even if it had been unforeseeable that the gardener would act in such an unwise and unforeseeable manner, the disposal of the material had generated a general risk that the factory should be deemed liable for. 4

Comments

The case is a clean-cut case on the question of adequacy in cases of a third party's intervention. Although the gardener very well may be seen as the main causal factor, the factory should be liable because it produced a general risk of damage. There are some similar cases within the practice of the Norwegian Supreme Court, see for example Rt 1967, 597. 5

It should be noted that the gardener was jointly liable according to Norwegian tort law. Thus, the gardener and the factory were solidarily liable for the damage caused. 6

The fact that the gardener acted grossly negligently was not decisive to the question of whether the factory was liable. This fact will, however, in such cases be of significant 7

relevance to the question of contribution in the factory's recourse action against the gardener. In general, where one of two responsible tortfeasors has shown gross negligence, he may bear the greater part of the loss.

17. Sweden

Högsta domstolen (Supreme Court) 4 February 1931

NJA 1931, 7

Facts

1 Petrol leaked out from company A's tank while the tank was being rinsed. The petrol ran through the sewer, out into a nearby harbour, where a significant amount spread onto the water's surface. B frivolously threw a burning match onto the layer of petrol, whereupon there was an explosive fire and a ship was damaged. The ship owner claimed damages from A.

Decision

2 Due to the risky circumstances, company A was obliged to ensure that no petrol was left in the tank when cleaning it. Since no such examination was carried out, it was considered that A had negligently caused the petrol to flow out in the harbour. Therefore A was liable for the damage caused by B's ignition of the petrol.

Comments

3 Even though the judgment is quite brief (which older Swedish judgments often are), and does not explicitly mention the foreseeability issue, the case can be understood as an evaluation of the ignition risk, which can be called the 'risk potential'. Since the liquid in the tank was petrol – and hence not water, beer or similar – the foreseeable risk of causing an explosive fire was great if the security measures were not fulfilled. The typical petrol risk was foreseeable, and since many different sources could have started the fire – when the harbour water was covered by petrol – A could not invoke B as another kind of unforeseeable risk factor. However, if the wrongful act had not included the specific danger of fire, the intervention of the third person, B, would not have led to A being held liable; for example, if A had cleaned its warehouse, and thereby left some pieces of wood lying on the ground outside its premises, A would not have been liable if had B set fire to this waste (possibly, A would have been held liable if there had been recent incidents of children setting fire to waste at nearby premises). The foreseeability that anything at all should start a fire is greater after a petrol emission than after emissions of other materials. Therefore, the foreseeability of fire is higher when flammable materials are concerned than when 'fire neutral'

material is being handled (although, of course, any material can burn if the temperature is hot enough).[1]

Högsta domstolen (Supreme Court) 16 December 1961

NJA 1961, 518

Facts

A stole a moped and subsequently gave B permission to borrow it for a day. B knew that **4**
the moped was stolen. After B had used the moped, he returned it to A. The owner claimed compensation from B since he had given the vehicle back to the thief A instead of choosing to return it to the owner.

Decision

The Supreme Court held that although the use of the moped was considered a crime – **5**
receiving stolen goods – this, in itself, had not caused damage. The fact that B returned the moped to the thief A instead of to the owner could therefore not give rise to a claim for compensation in tort law.

Comments

Both A and B were active in the events that led to the loss of the owner's property. How- **6**
ever, when B returned the vehicle to A, he had not inflicted any physical damage to the moped. Therefore, it could be argued that his use of the moped was not in itself a cause of harm. B could have chosen a 'better' alternative, ie he could have given the moped back to the owner. However, in terms of causation, the damage – loss of the property – had already occurred when the owner lost his possession in the first place. The case shows that the law does not overstrain the demands on citizens to do positive deeds as long as they have not themselves been active in doing something harmful to another person or their property. The possibility of doing something 'morally better' is not the same as causation of harm.

1 Concerning evaluations of different interventions by third parties, see *H Andersson*, Skyddsändamål och adekvans (1993) 434 ff, 446 ff.

Högsta domstolen (Supreme Court) 19 March 1952
NJA 1952, 152

Facts

7 The father A ordered his son B to sink a damaged rifle in a small frozen lake. The rifle could no longer be used since a bullet had been stuck in it. B could not get the whole rifle below the ice so he left it with a bit of the rifle sticking up through the ice. A boy saw the rifle and tried to move it, whereby the bullet shot out and he was injured. Only the penal law issues against A and B were considered in court (but the example can be analysed in a tort law context).

Decision

8 It was argued that A had been negligent when he did not made sure that the rifle had been fully immersed in the lake, but since A could presuppose that B (who was 23 years old) could complete the simple task in a safe way, A was not held liable (only B was held liable for the personal injury).

Comments

9 The case shows that sometimes the wrongdoing of a third person can lead to the consequence that the first person (who starts the dangerous causation, ie the father A in this case) is not considered liable. However, this negative case is to be regarded as an exception, and the above (7/17 no 1) mentioned positive case NJA 1931, 7 can be seen as the main rule.

18. Finland

Korkein oikeus (Supreme Court) 25 January 1960, KKO 1960 II 13
<https://finlex.fi/fi/oikeus/kko/kko/1960/19600013> *(only the summary)*

Facts

1 A drove their vehicle contrary to traffic regulations and hit a pole of a traffic sign. The traffic sign, the pole of which had not been dug into the ground as deep as it should have been, fell on V, causing them a brain injury. A was sentenced to pay a fine. In addition, the prosecutor demanded obliging A to compensate V for their loss, which occurred because of the incident.

Decision

The majority (4–1) of the Supreme Court held that the defective nature of the traffic sign's pole could not be regarded as a type of external circumstance to the criminal offence which could lead to an adjustment of A's liability. Thus, A was obliged to compensate all V's losses. The minority regarded the effect of the defective attachment of the sign as being one quarter of the whole loss, thus adjusting A's liability to three quarters. **2**

Comments

Most of the situations where some external condition has affected the emerging of damage or increased its extent are covered in Finnish law by ch 6 sec 1 of *vahingonkorvauslaki* (31.5.1974/412), the general statute on extra-contractual liability. According to the said provision, '[i]f there has been a contribution to the injury or damage from the side of the person sustaining it or if a circumstance external to the act giving rise to the injury or damage has also been involved, the damages may be adjusted as is reasonable'. The provision mostly corresponds to the earlier rule (ch 9 sec 1(2) of *rikoslaki* 19.12.1889/39), which was applied in case KKO 1960 II 13.[1] **3**

As transpires from the wording of ch 6 sec 1 of *vahingonkorvauslaki*, the same provision is applicable to contributory negligence of the injured party as well as to circumstances external to both the damaging and injured party. The latter type of situation is often called *casus mixtus cum culpa.* Chapter 6 sec 1 and the principle of *casus mixtus cum culpa* cover both situations where the external circumstance is an act, be it accidental, negligent or intentional, of a third party, and a natural event.[2] **4**

As the wording of ch 6 sec 1 of *vahingonkorvauslaki* is quite ambiguous, it is often unclear, how different case-specific circumstances affect the application of the norm.[3] It is clear that the external condition must be somewhat unpredictable for the damaging party in order for ch 6 sec 1 to apply. In other words, had the damaging party been aware of the external circumstance that is prone to aggravate the potential damage, they do not receive the benefit of ch 6 sec 1 restricting their liability. However, if the external condition is unforeseeable to the degree that also the requirement of foreseeability of causation applies and excludes liability of the unforeseen consequences, ch 6 sec 1 of *vahingonkorvauslaki* lacks any independent significance. Thus, the core scope of application of ch 6 sec 1 focuses on situations where the external condition and its effect on the occurrence of the loss are 'unpredictable to some ex- **5**

1 On the correspondence between ch 6 sec 1 of *vahingonkorvauslaki* and the former ch 9 sec 1(2) of *rikoslaki*, see Government Bill 187/1973, 25.

2 *H Saxén,* Skadeståndsrätt (1975) 158.

3 This vagueness of the legal state is also noted by *P Ståhlberg*/*J Karhu,* Suomen vahingonkorvausoikeus (7th edn 2020) 530.

tent'.[4] It has also been regarded that, if the level of negligence of the damaging party is high – *a fortiori* if the act is intentional – this is a counter argument for adjusting liability by virtue of ch 6 sec 1.[5]

6 Case KKO 1960 II 13 illustrates the above described threshold for applying the *casus mixtus cum culpa* principle. Although the defective attachment of the traffic sign was, as a circumstance, both beyond A's control and unknown for them, it was nevertheless not so exceptional that it would have appeared as reasonable to place the consequences thereof to be borne – even partly – upon V instead of A. Also, the fact that A's conduct had been quite blameworthy likely affected the overall assessment. The case confirms that a tortfeasor, as a main rule, even bears the risk of unexpected circumstances which contributed to the loss.

Korkein oikeus (Supreme Court) 8 November 1945, KKO 1945 II 260

<https://www.finlex.fi/fi/oikeus/kko/kko/1945/19450260t>

Facts

7 A, when driving a car on a road in a town, was overtaking a lorry driving in the same direction when a woman, who remained unknown, stepped onto the road carelessly from the right side of the street. To avoid hitting the pedestrian, A steered their vehicle to the left side of the road and crashed into a van, owned by V, that had been driving in the opposite direction. The prosecutor pressed charges against A for a traffic violation and obliged them to compensate the damage caused to V as a result of the crash.

Decision

8 The views of the five Justices of the Supreme Court divided into three opinions. According to two Justices, whose opinion became the predominant view in the court's vote, A committed a traffic violation and caused V's damage negligently, and thus is liable towards V. However, as the unknown woman had also acted against traffic rules when stepping onto the road carelessly, and this circumstance, external to A's act, also contributed to the causing of the damage, A's liability had to be adjusted to half of the whole loss.

9 According to another two Justices, the fact that the woman had stepped onto the road carelessly could not limit A's liability, because A had been driving their vehicle so recklessly that they had drifted to the opposite side of the eighteen-metre-wide road and

4 *H Saxén*, Skadeståndsrätt (1975) 158; *M Hemmo*, Vahingonkorvausoikeus (2005) 111f; *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 530; *O Norros*, Determining Loss Caused by Defective Information in Investment Services, JFT 2013, 341–370, 364.

5 *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (7th edn 2020) 530.

hit V's van there. On these grounds, the two Justices suggested obliging A to compensate V for the entire loss.

The fifth Justice held that as A had acted to avoid hitting the woman, who had unexpectedly appeared on the road against the traffic rules, A could not be regarded as having violated the traffic rules even negligently, while the occurrence had to be regarded purely as an accident. Thus, this Justice suggested rejecting the claims towards A completely. 10

Comments

Case KKO 1945 II 260 reflects the flexibility of the assessment under the *casus mixtus cum culpa* principle. The opinions of the Justices as regards A's liability varied between zero and full compensation of the loss. 11

What seems to have been essential in the case is the unlawfulness of the pedestrian's conduct. Had the pedestrian followed the traffic rules, it seems clear that A could not have appealed the pedestrian's conduct as a fact limiting their liability of V's loss, even though the pedestrian's appearance on the road had been somewhat unforeseeable to A. It would be difficult to allege that a need to give way to a third party, who acted according to the traffic rules, should be regarded as a circumstance external to the damaging act. 12

As regards the opinion of the two dissenting Justices, according to which A was liable for the entire loss, it seems that these two Justices took a stricter view towards A's conduct compared to the other Justices. As noted above (7/18 no 5), a high degree of negligence is a counter-argument for restricting liability of the damaging party because of an external circumstance affecting damage. It is also possible that the two dissenting Justices regarded the significance of the pedestrian's conduct as minor, while the true reason for the crash was A's carelessness. 13

Korkein oikeus (Supreme Court) 21 April 2015, KKO 2015:33

<https://finlex.fi/fi/oikeus/kko/kko/2015/20150033>

Facts

A, a managing director of a local insurance association, transferred about € 800,000 to a bank account newly opened in the name of the association in Austria. A had neither reported the money transfer for the accounting of the association, nor informed the board of the association of it. A foreign attorney had been granted a right to use the account. A and the attorney had agreed that the latter had a right to use the money and make investments using it, but the money had to be returned to the Finnish account of the association after six weeks. However, A did not demand any security from the attorney for the repayment. The attorney spent most of the money for their own purposes and returned no more than € 55,000 of it. The prosecutor demanded A be prosecuted for gross 14

embezzlement and abuse of a position of trust as well as be obliged to compensate V's loss.

Decision

15 The main question of the case was whether A had committed embezzlement and abuse of a position of trust. The Supreme Court found A guilty of gross embezzlement but held that a separate criminal offence of abuse of a position of trust had not been committed. As a subsidiary question, the Supreme Court also had to assess A's liability toward the association for the occurred loss. On this question, the Supreme Court first noted that A had committed an intentional criminal act – the gross embezzlement. According to the Court, there were no grounds to adjust A's liability to an extent lower than the actual loss.

Comments

16 The Supreme Court did not specify what the normative basis for A's liability was, which is quite common in cases where damage has been caused through a criminal act (see above 2/18 no 15). Most probably the grounds of liability were considered as being *vahingonkorvauslaki* (31.5.1974/412), the general statute on extra-contractual liability. It may be noted that A could have been held liable also by virtue of provisions concerning liability of a managing director of an insurance association (see ch 15 sec 1 of *vakuutusyhdistyslaki* 31.12.1987/1250), but nothing in the judgment indicates that the Supreme Court had paid further attention to this concurrent ground of liability. In other words, from the viewpoint of the law of damages, the case may be regarded as extra-contractual.

17 The case highlights that a tortfeasor may be held liable for consequences of even intentional damaging acts of a third party, at least when the degree of blameworthiness of the tortfeasor is as high as it was in this case – an intentional criminal act. Furthermore, it may be noted that, in the circumstances of the case, the risk of an intentional damaging act of a third party was quite foreseeable. The outcome could have been different in a scenario where the tortfeasor could not have reasonably anticipated the damaging act of a third party. The same holds true in a situation where the tortfeasor's act was not intentional but merely negligent.

18 Even the fact that A's act was not merely intentional but also subject to criminal punishment was probably a counter-argument for adjusting A's liability, as it is a circumstance that further increases the level of blameworthiness of A's conduct and thus reduces the justification for restricting their liability.

19. Estonia

Harju Maakohus (Harju District Court) 15 June 2009
Case No 2-08-50458

Facts

A farewell party for the defendant's employees was held in office premises leased by the defendant. In the course of the party, a heating radiator was broken (an employee smashed a champagne bottle against it, as a result of which the radiator cracked) and water started pouring from the radiator onto the floor. The water that poured onto the floor and damaged the claimant's rooms located below the defendant's premises and the property in the claimant's rooms. Three photocopying machines and a large amount of photocopying paper were damaged. The claimant estimated its damage at € 15,296 and demanded that the defendant pay this sum. 1

The defendant argued that the damage suffered by the claimant was caused by the negligence and insufficient efforts of the owner of the house (the landlord) because, in spite of the immediate reporting of the water emergency by the on-site guard of the building, it took nearly one and a half hours to cut off the water supply to the building. The defendant itself did not have a chance to cut off the water supply because there were no shut-off valves in the premises used by the defendant or on the common premises of the building. The owner had failed to instruct the guard to act in a proper manner in the event of an emergency or to inform the guard of the water supply taps in the building so that it would be possible to quickly shut off the water supply in the building in the event of a water emergency. Had the water supply been switched off within a reasonable time, the claimant's alleged damage could have been prevented. 2

Decision

The district court granted the claim in part, finding that the claimant's damage was causally linked to the defendant's actions. The defendant had failed to prove the absence of its fault. The defendant unreasonably argued that it made every effort to prevent the damage to the claimant and that the landlord (a third party) should be held liable for the damage because its heating system did not allow for the water supply to be disconnected. The claimant did not file the claim for damages against the third party. The district court established that the conduct of the defendant's employees caused the claimant's damage. If the claimant's damage were increased by an act or omission on the part of the third party, both the defendant as well as the third party would be the tortfeasors and their liability would be joint and several under LOA § 137(1). Under LOA § 65(1), the claimant can decide against which of the joint and several debtors it files its claim for damages. 3

Comments

4 In the present case, it may well have been that the failure to act on the part of the third party (the landlord) did in fact increase the claimant's damage. If the landlord had instructed its employee (the guard) on how to act in the case of a water accident, the water supply might have been disconnected sooner.

5 In the given case, the district court did not establish what the magnitude of the damage would have been in the event of the landlord's appropriate conduct, noting merely that if the damage increased due to the actions of the third party and the third party can be blamed for the actions, both the defendant as well as the third party would be the tortfeasors and they would be jointly and severally liable under LOA § 137(1). Thus, the court considered the defendant was also liable for a possible increase of the damage without focussing on the issue in-depth.

6 The landlord should not be held liable for damage that would have been suffered in the event of its appropriate conduct. In light of the circumstances of the case, it would have been difficult for the court to distinguish between the 'initial' and 'increased' damage.

7 Due to the lack of relevant case law, it is not possible to point out generally, whether and in which cases the conduct of a third party would exclude the liability of an (initial) tortfeasor for an increased loss.

20. Latvia

Rīgas apgabaltiesa (Riga Regional Court) 8 April 2021, No C28330013
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/461056.pdf>

Facts

1 One of the largest banks in Latvia, A, submitted to the Chairman of the Legal Affairs Committee of the Parliament of Latvia an application where it claimed, among others, that, with the help of blatantly illegal decisions of judge V, which were made within the out-of-court legal protection process of company B contrary to the spirit and wording of the law, a significant fraudulent scheme had been carried out. The part of the document which contained the said allegation was published in one of the Latvian newspapers.

2 V brought an action against A requesting an injunction be imposed, obliging A to submit to the Chairman of the Legal Affairs Committee of the Parliament an application asserting that the above-mentioned information was false. Further, V requested from A compensation of € 14,229 for insulting his honour and dignity. He asked the court to take into account that the false and defamatory information was made available by A not only to the Members and employees of the Parliament, but also to the journalist who then published it in the newspaper, which was printed in 17,000 copies and which was available online.

Decision

The first instance court entirely rejected the claim, as, in its opinion, A had not disseminated the information at stake to the public. The second instance court upheld the decision of the first instance court and also rejected the claim. The Supreme Court reversed the decision of the second instance court. The second instance court rejected the claim of V once again, coming to the conclusion that the information at stake was an opinion, rather than a statement of facts, and that there was no dissemination of it. The Supreme Court adjudicated the case in expanded composition and decided to reverse the decision of the second instance court once again. Subsequently, the second instance court satisfied the claim partially, awarding V the requested injunction and compensation of € 1,000. The judgment of the second instance court has come into force as the Supreme Court refused to initiate cassation proceedings. 3

The second instance court arrived at the conclusion that A had in fact provided information, in the form of a statement to the Chairman of the Legal Affairs Committee of the Parliament, that V had been involved in illegal activities, namely, in the execution of the fraudulent schemes described in the application. Consequently, it could be concluded that A had only formally presented the above-mentioned information as an opinion, but in fact it was delivered in the form of a statement. 4

In the course of establishing the amount of compensation, the court of second instance, among other arguments, took into account that there was no evidence that A had handed over the application at dispute to the journalist who then published a part thereof in the newspaper. Thus, this partial publication of the application in the newspaper was not taken into account when assessing the breadth of distribution of the information at dispute. 5

Comments

Although the main points of law examined in the case by the courts are related to the interpretation of the dissemination criterion, in particular, whether, by submitting the application, complaint or other similar documents to the State institution one disseminates the statement of facts or opinion in the sense of sec 2352[1] of CLL and, thus, possibly interfere with another person's right to protect their honour and dignity, it also serves as an example of a limitation of liability when damage occurs, not only as a direct result of the conduct of a tortfeasor, but to some extent as a result of the subsequent conduct of a third party. 6

The court did not apply the *conditio sine qua non* test, but rather concluded that the application was not handed over to the journalist by A and, therefore, as a result of A's actions, a relatively limited number of persons could gain knowledge of the application. In other words, the court acknowledged the lack of a causal link between A's act of submitting the application to the Parliament and the publication of a part thereof in the newspaper. Thus, if the victim sought compensation of his non-pecuniary harm, he would have had to implead or sue also the newspaper. 7

8 Such reasoning is debatable, as the court probably did not sufficiently assess the causal link in the matter in question. Due to the fact that documents submitted to the chairmen of commissions of the Parliament are usually made available to the members of commissions and also to the participants of their meetings, one could argue that it would be difficult to conclude that A could not foresee that its application might become available to journalists or that A's action was too remote to be taken into account as the cause of dissemination of information in the newspaper. It is also difficult to provide solid grounds for such a broad limitation of liability by referring to the principle of justice.

21. Lithuania

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) 15 June 2018, Civil Case No 3K-3-235-1075/2018 and 30 October 2018, Civil Case No e3K-7-143-684/2018
<http://liteko.teismai.lt/>

Facts

1 At midnight, a motor vehicle accident occurred. The police arrived, cordoned off the street and started an investigation into the cause of the accident. Because of the street closure, a traffic jam formed behind the accident scene. When a taxi carrying the passenger approached the scene of the first accident, a police officer showed a sign indicating either to reverse or to turn around. The passenger of the taxi stepped out of the cab on to the street in order to help the taxi driver to turn around. Another car driven by a speeding and intoxicated driver (defendant DN) crashed into the man causing him fatal injuries.

2 The plaintiffs, the immediate family members of the passenger, sought compensation from the driver DN and the State of Lithuania, represented by the Police Unit, solidarily, for pecuniary and non-pecuniary damage. The plaintiffs argued that the State should also be held liable, since the police officers contributed to the damage by failing to ensure the safety of the traffic at the scene of the first accident.

3 The court of first instance dismissed the claim against the State, justifying its decision inter alia on the basis of the foreseeability of the damage. The court stated that: 'the failure of the police officers to foresee that a drunk driver would arrive at the accident scene and that he would not react to the flashing warning lights of police cars and that he would cause the second detrimental accident does not amount to a breach of the duties of police officers'.

4 The CoA reversed, finding the State liable on the basis of art 6.271(1) CC, which provides for liability of the State for damage inflicted in the course of the activity of public authorities, irrespective of the fault of any particular officer.

Decision

The LSC agreed with the findings of the CoA. Both courts held that the officers failed to take the action necessary to control the behaviour of traffic participants, leaving it to the drivers to decide on how to act. Since the police officers had not detoured traffic after the first accident, they failed to exercise their duties in order to ensure general traffic safety. According to the CoA and the LSC, since a causal link between the omission of the police officers and the damage is only indirect, the State shall be responsible to the plaintiffs for only 5 % of the damage.[1] 5

Comments

In this case, the loss was triggered as a result of 'intervening' misconduct of a third party – the intoxicated driver. However, the LSC considered that the State is also liable because there was a sufficient connection between the omission of police officers to act and the damage. Thus, the consequences of damage in this case were not based on an independent act on the part of a third party. The LSC explicitly indicated that the damage was not too remote a consequence of the omission of the police officers. The decision to declare the State liable only up to 5 % of damage is questionable. In the authors' opinion, the joint and several liability of the State and the intoxicated driver and a recourse action between the two tortfeasors would be the correct solution. 6

No cases were found to illustrate the issue as to when the consequences of damage are the result of an intervening wilful act, even though causality exists in the sense of the *conditio sine qua non* test. Thus, it is difficult to state whether the separate act of the third party shall exempt the first perpetrator from liability. According to the authors, the first tortfeasor should not be held liable for the (part of the) damage that occurred due to an intentional act of a third party. In other cases, issues of liability of the first party depend on a comprehensive evaluation of interests – the nature of the damage caused, the degree of fault, foreseeability, etc. 7

1 It seems difficult for Lithuanian courts to abandon the rule that if the conduct of one party only indirectly creates the possibility for another to cause damage by his independent conduct, the liability of those parties would be several. This approach precludes an application of solidary liability in any case where there is a person whose conduct is a direct cause of damage, whereas another person fails to prevent infliction of that damage, even if he was under a legal duty to do so. For criticism of the approach, see *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 387, no 23.

22. Poland

Sąd Najwyższy (Supreme Court) 10 September 1997, II CKN 311/97

Facts

1 A's employees improperly installed bolts in V's car, which resulted in the steering wheel lock system not working properly. The car was stolen, and the thieves had an accident as a result of which the car was damaged. V sued A, demanding a new car or, alternatively, compensation in an amount corresponding to the value of the car. The Regional Court dismissed the claim for the lack of adequate causation in 1990. The Supreme Court reversed but on remand the claim was eventually again dismissed by the Court of Appeal. V appealed to the Supreme Court for the second time.

Decision

2 In its decision, the Supreme Court stated that the improper screwing of the bolts was a defect which facilitated the removal of the steering wheel lock system and, as a result, greatly enabled the theft of the car. There is an adequate causal link in the meaning of art 361 KC between the improper installation of the bolts, the theft and the subsequent damage to the car. The event causing the damage is the theft, but the thieves' accident remains in the causal sequence. The last circumstance affects the extent of the damage, but may also be relevant in determining who is liable to compensate and to what extent.

Comments

3 This is a telling example that the application of the two-step test is rarely found in the motives of courts' decisions. Almost always, courts discuss factual causation in the statutory language, ie they call any causation, whether factual or legal, 'adequate causation', in accordance with art 361 KC. Thus, it is difficult to decipher whether the Court referred to *conditio sine qua non* (the first step) or the adequacy (the second step). The case also highlights the two roles of adequacy (defining causation and limiting the scope of damages).

4 A would be liable for the entire damage, with possible recourse to the thieves, who are jointly and severally liable.

5 See also below 7/22 no 11ff.

Sąd Najwyższy (Supreme Court) 12 March 1975, II CR 6/75

OSPiKA 3/1977, item 51

Facts

6 A, while driving a motorcycle, hit V's son returning from a party. The latter suffered serious injuries, especially to the head and lost consciousness. A immediately fled from the

scene of the accident, leaving the victim on the road. Soon afterwards, an unidentified vehicle ran the victim over, causing his death. The victim's parents (V1 and V2) demanded compensation from the first driver A.

Decision

The Regional Court held that the defendant and their insurer are liable for the damage stemming from the victim's death because there is a causal link between running into the victim and his death. If the victim had not been left on the road unconscious and without help, he would not have been run over by another car. **7**

The Supreme Court held that that leaving an injured man on a public road without providing first aid and security against oncoming cars is evidently linked with a risk of his death. Hence, death belongs to the broad range of results that can be, and should be, foreseen by the person responsible for the traffic accident. Therefore, in such circumstances, a victim's death is always a normal consequence of the tortfeasor's conduct, although it follows from a fact subsequent to the abandonment of the car accident's victim on the road. For this damage, a driver of the unidentified second car would also be liable, and both defendants would be jointly and severally liable. **8**

Comments

The Supreme Court has for several years been persistent in holding that the person liable for the initial damage is also liable for the consequential loss if the first damage led to another, and the causal link between the event triggering the second damage was not broken by the conduct of another wrongdoer or by an extraordinary event, for which the victim is not responsible. Albeit in this case the Court's view was taken in relation to traffic accidents, it was also applied in other contexts as well (eg in the context of leaving a patient unattended in a post-operative room, or in cases of failure to supervise school pupils). **9**

As to the first commented case, it should additionally be noted that Polish law does not categorise losses into primary and consequential loss. The adequacy theory typically includes all direct losses (primary losses) and does not take into account further losses, which cannot be considered as normal consequences. Hence, the test of adequate causation has major significance in cases of so-called consequential economic losses. In personal injury cases, the consequential losses suffered by third parties find an express regulation in art 446 KC[1]. **10**

1 Arts 444–448 KC.

Sąd Apelacyjny (Court of Appeals) Łódź, 21 May 1991, I Acr 102/91
OSPiKA 1991/11, item 284

Facts

11 V broke her leg in a car accident for which A was liable. During recovery, she had to use a crutch. While doing exercises in hospital, V's crutch suddenly broke and she fell, as a result of which her leg was fractured again at the same place. As her condition worsened, V had to undergo two operations and further rehabilitation. After having completed the treatment, she remained disabled. V demanded full compensation from the person responsible (an insurer) for the car accident. The Regional Court ruled for the plaintiff.

Decision

12 On appeal, the Court of Appeals held that, in a case where damage stemming from the first event increased because of a new fact that remains linked to the first one, the court should first of all establish whether or not the second fact is an adequate consequence of the first one. If it is not, the person responsible for the initial event is liable only for the primary harm, as the second event must be considered as breaking the adequate causal link between the first event and the effects of the second one. The second event can be a mishap or a result of a third party's gross negligence or errors. The Court of Appeals stated that: 'life experience teaches us that, during rehabilitation, a crutch used for physical exercises does not usually break. This argument should usually preempt the recognition of the existence of the normal causal link between the effects of the car accident (the first leg fracture) and the second fracture caused by the crutch breaking.' Accordingly, if it is established that the second fracture of V's leg was due to an unusual coincidence or to the medical personnel's gross negligence, A will bear liability only for the consequences of the car accident, excluding the injury and complications resulting from the second fracture. V retains her cause of action for the remaining injuries against other persons liable for them. This argument justified the reversal and remand of the regional court judgment.

Comments

13 According to the *conditio sine qua non* test, absent the car accident, V would not have broken her leg the first time. The theory of adequate causation is thus employed to limit the liability of the tortfeasor responsible for the initial damage. The result is a division of the consequences of personal injury. The Court of Appeals called for an expert opinion to calculate the extent of damage for which the original tortfeasor should be held liable, without the consequences of the crutch breaking.

14 The line of arguments is representative of a general tendency in court practice, although it should be noted that the court only referred to gross negligence, which 'can-

not be assumed' in the normal course of events. Reference can also be made to the comments made above at no 3ff.

23. Czech Republic

Nejvyšší soud České socialistické republiky (Supreme Court of the Czech Republic) 22 Janury 1988

1 Cz 70/87

Facts

The respondent broke into a cottage where he damaged equipment and stole goods worth a total of CZK 10,503 (approx € 400). **1**

The courts of first and second instance dismissed the action for damages claiming that, according to the findings made, the respondent committed the burglary in question and the owner of the cottage suffered the said damage, but it was not possible to prove that the respondent had stolen all the things lost. **2**

Decision

The Supreme Court ruled that if the respondent, after breaking into the cottage, left the cottage unsecured and thus allowed another person to steal other things, by his actions and omissions, he breached the legal obligation provided in sec 415 of the Civil Code[1]. If someone else took advantage of the unlawful situation created by the respondent and stole other things from the unsecured cottage, this additional damage arises not only in causal connection with the crime of the second burglar but is also causally linked with the unlawful conduct of the respondent, who enabled the theft of other items due to a breach of the said preventive duty. Both burglars would be held jointly and severally liable for any damage suffered by the injured party. **3**

Comments

For comments see below. **4**

1 Every person shall behave in such a manner that no damage to health, property, nature and environment occurs.

Nejvyšší soud České socialistické republiky (Supreme Court of the Czech Republic)
22 January 1971
4 Cz 5/70

Facts

5 The respondents broke into a shop, but after this crime, the premises remained unsafe and open and later it was discovered that the loss exceeded the value of the goods stolen during the burglary. The burglars were ordered to pay damages in criminal proceedings, however, only for the damage caused by the burglary, not for the loss which was discovered later.

6 The court of first instance held the respondents liable and argued that, due to their break-in, they interfered with a legal relationship, which would otherwise exist between the claimant and the shop manager, who was liable for entrusted goods. The respondents therefore caused an intervention which excludes the liability of the liable person for the loss of entrusted goods and are to be held liable for such damage. However, the appellate court rejected this opinion because it was not proven that the burglars caused further damage than that for which they were sentenced in the criminal proceedings.

Decision

7 The Supreme Court concluded that damage from breaking into a shop does not only consist in the value of the stolen or damaged goods and equipment of the shop by the perpetrators, but may also consist of property damage suffered by the shop owner not being able to satisfy the right to account for the assets it entrusted to an employee. This is the case when the employee excludes his/her liability for the entrusted goods because of the fact that the burglar created such a situation in the shop which prevented the liable employee from managing and taking care of the entrusted goods.

Comments

8 For comments see below.

Ústavní soud České republiky (Constitutional Court of the Czech Republic)
15 December 2015
I ÚS 1587/15

Facts

9 For facts see 3/23 no 1f.

Decision

For decision see 3/23 no 3ff. 10

Comments

The liability of the wrongdoer may also be limited in cases where another fact enters the causal chain, in this case the conduct of a third party. In cases of these similar subsequent actions, we talk about cases of causal uncertainty.[2] 11

Czech law, when assessing a case with more attributable causes, is based on an assessment of the relevance of each cause. If another cause enters the chain of damaging acts, the law examines whether the new fact is independent of the original cause, and, at the same time, this subsequent cause is the decisive reason for the consequence. If such a conclusion can be reached, the causal chain will be interrupted. Therefore, if a new fact enters the chain of events, this may be a reason to exclude the liability of the wrongdoer of the original cause (see 4/23). 12

The theory of the influence of other causes was addressed by the Czech legal doctrine from the period of validity of the ABGB. For example, Randa[3], who criticises the notion of interruption of the causal link, states that in cases where a patient who has previously been injured in an accident dies as a consequence of the doctor's activities, both the originator of the accident and the doctor shall be jointly and severally liable. This is disputable only where the unlawful conduct of a third party or the injured party is committed intentionally, ie, for example, a doctor takes the opportunity to get rid of his competitor by killing him. Randa also mentions another case where someone injures a person and leaves him lying on the ground without help, and a third person uses this situation to rob the injured person.[4] The Czech Civil Code explicitly regulates a case of subsequent cause within the framework of liability for operation of a means of transport based on sec 2931. 13

The basic starting point for deciding these cases remains the same as in the former legal theory, ie joint and several liability. The reason is the fact that the actions of wrongdoers contributed or might have contributed to the consequence and there are multiple wrongdoers[5]. 14

2 *P Bezouška* in: M Hulmák et al, Občanský zákoník, Komentář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, Part VI, Obligations from delicts (§ 2894–§ 2971)] (2014) 1584.

3 *A Randa*, Die Schadensersatzpflicht nach österreichischem Recht insbesondere aus Eisenbahn- und Automobilunfällen mit Bedachtnahme auf ausländische Gesetzgebungen (3rd edn 1913) 58.

4 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, Sv. IX [Civil Code secs 2894–3081, Large commentary, vol IX] (2018) 213.

5 *M Pašek* in: J Petrov/M Výtisk/V Beran, Občanský zákoník. Komentář [Civil Code, Commentary] (2017) 2841.

15 However, as regards the application of joint and several liability, there are situations which merit special consideration. Tichý[6] points to cases when the probability of causing damage by individual wrongdoers is different. However, there may be further reasons for allowing partial liability. In such a case, the principles for partial liability within the meaning of sec 2915 para 2 of the Civil Code[7] apply.

16 The basic precondition for the application of partial liability is the general fact that 'there are grounds which merit special consideration'. The Civil Code does not define the rule in more detail and it is up to the court to assess the circumstances of a particular case. The role in decision-making is played by the manner of action, the type and degree of fault, and also the personal and property circumstances not only of the wrongdoer, but also of the injured party, as well as the significance of the damage for the injured party and the wrongdoer.[8] The threshold for rejecting joint and several liability will thus be, for example, the intentional conduct of one of the liable entities, since, at such a moment, a negligent breach of a legal obligation cannot exist in addition to the intentional conduct of the other entity.

17 In the above cases, however, there is no issue of partial liability and the parties are to be held jointly and severally liable. In cases 1 Cz 70/87 and 4 Cz 5/70 from the thief's point of view, the crime established conditions for the occurrence of further damage. The burglar caused the shop to remain open and thereby enabled another person to steal goods, so that his crime caused the conditions for the occurrence of further damage. Another reason was that the burglar did not allow the owner of the shop to uncover losses caused by employees, who would otherwise be liable towards him and, therefore, he must be held jointly liable with them.[9] This case could therefore be qualified as a case of damage caused by several successive acts. The burglar might have allowed the occurrence of concurrent or alternative causes, since it is unclear which of the complex causes led to the damage suffered by the owner of the shop.

18 The offender in the first crime must foresee the risk that the shop remained open after he broke into it and further damage could consequently be incurred or that there are some losses in the accounting which will never be discovered, and the possibly liable

6 *L Tichý/J Hrádek* Deliktní právo [Law of Delicts] (2016) 257.

7 If there are circumstances meriting special consideration, the court may decide that the wrongdoer shall compensate the damage according to their share in causing the wrongful result. If that share cannot be determined exactly, the degree of probability shall be taken into account. Such a decision cannot be made if a wrongdoer took part knowingly in the activity of another wrongdoer, or if they incited or supported them or if damage can be attributed to each of the wrongdoers, despite acting in a manner independent of each other. The same applies if the wrongdoer must compensate damage caused by a helper and that helper is also liable to pay compensation.

8 *J Hrádek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník, Komenntář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2021) 947.

9 *M Holub*, Odpovědnost za škodu v právu občanském, pracovním, obchodním a správním [Liability for damage in civil, labour, commercial and administrative law] (2004) 20.

employee cannot be held liable. This is then the legal reasoning for joint liability of the first burglar with another person who can, however, never be found.

The court deciding on the burglary cases must nevertheless first examine how the shop was managed in the period before the burglary. If there were no shortcomings found in the management, the courts would deal only with the issue of the burglar's liability and the burglar should be ordered to pay full compensation of the damage incurred, ie not only the amount obviously incurred by stealing the goods but also the value of the goods which resulted when the shop remained unsafe and open. **19**

As to the fault of the father in case I ÚS 1587/15 when supervising his children, we reach the same conclusion, unless there are special circumstances in the case. The breach of parental responsibility represents a reason why the parent should be held liable jointly with the driver who did not pay attention to his driving. In other words, the parent will be held liable if they have caused damage, breaching their legal duty to properly exercise their parental duties. However, there is still a fundamental correction of this approach, which consequently limits an excessively wide scope of the parental responsibility. It is the application of the theory of protective norm which analyses whether the particular case falls under the scope of the norm (see 3/23). **20**

In this case, the courts concluded that, in a given situation, there is a requirement to protect children from harm caused to them by carelessness in traffic, which would not occur in the case of an intellectually developed person. Therefore, if a minor acts in full compliance with the law and behaves in the same way as the average person with full legal capacity and nevertheless suffers harm in traffic, the nexus of wrongfulness between the breach of duty of the supervising person and the harm suffered is lacking. For these reasons, the child's behaviour in traffic must always be taken into account when assessing whether the supervising person has fulfilled their obligations. **21**

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 24 January 2021, No Rev 1144/09-2

<https://www.iusinfo.hr/sudska-praksa/VSRH2009RevB1144A2>

Facts

V1 and V2 are co-owners of a house, which was, in 1995, allocated to a refugee family for temporary use, based on the decision of the Temporary Care and Use of Property Commission, formed by the Republic of Croatia for the purposes of taking care of property temporarily abandoned due to military hostilities. In 1998, the decision of the Temporary Care and Use of Property Commission was revoked, but the refugee family refused to leave the house. Subsequently, the house caught fire and it burned down. The fire was caused by the refugee family who occupied the house at the relevant time. **1**

2 V1 and V2 sue A, the Republic of Croatia, claiming material damage caused by the destruction of their property. V1 and V2 hold the Republic of Croatia liable for allocating the house to a refugee family based on a Temporary Care and Use of Property Commission's decision, which was subsequently revoked.

3 The first instance court dismissed V1's and V2's claim. The appellate court dismissed V1's and V2's appeal and affirmed the first instance judgment. V1 and V2 filed an application for revision before the Supreme Court of the Republic of Croatia.

Decision

4 The Supreme Court dismissed the application brought by V1 and V2 for revision as unfounded on the merits.

5 Substantiating its position, the Supreme Court first noted that this case should be decided based on general tort law rules, provided for in the COA, rather than the special rules of the Revitalisation Act (in Croatian: *Zakon o obnovi*), designed to remedy damage inflicted during the military hostilities. The Supreme Court further observed on a general note that, in order for tort liability to arise, general conditions for liability must be met. Applying these general conditions for liability to the case at hand, the Supreme Court took the position that A cannot be held liable since there is no causal link between A's actions (allocating V1's and V2's house to a refugee family) and the damage V1 and V2 sustained when their house caught fire. According to the Supreme Court, an adequate and legally relevant causal link exists only if a particular action is apt to cause a particular consequence, ie if a particular action typically results in such a consequence. According to the Supreme Court, this was not the case here, since burning down a house is not an adequate and typical consequence of issuing a decision on allocating someone's house to a refugee family. Issuing a decision on allocating a house to a refugee family does not typically, in the normal course of events, result in the destruction of the house by fire, opined the Supreme Court. Based on these findings, the Supreme Court dismissed V1's and V2's claim for lack of causality, holding that damage was not caused by A's actions, but by the third person's actions (refugee family occupying the house).

Comments

6 See below 7/25 nos 19–24.

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 6 June 2002, No Rev 2955/1998-2

<https://www.iusinfo.hr/sudska-praksa/VSRH1998RevB2955A2>

Facts

V bought some hay from A and, as was customary in the area in which V lives, he went into A's barn, climbed to the attic and was unloading hay when a rotten plank in the attic floor cracked beneath him. V fell from the attic to the floor of the barn seriously injuring himself. V broke a thoracic vertebra, which required surgery. **7**

V sued A as the owner of the barn and claimed damages caused by the injury. During the proceedings, a medical expert witness detected some flaws in V's medical treatment. Thus, it was found that the initial X-ray processing had not been adequate so that the initial diagnostic was not appropriate and therefore, surgical treatment, which was required, was not performed. Three days after being admitted to the hospital, V experienced a neurological episode after which, the doctors who treated him asked for the assistance of a neurological specialist. It took a couple of days before the neurologist examined V, and only after he examined V was V transferred to a better equipped hospital, ten days after being initially admitted to the first hospital. After being thoroughly examined, V underwent surgery. **8**

Even after the medical treatment, V never fully recovered. An expert witness determined V's disability at 80 %, which makes him incapable of any physical work, longer walking or standing. During the proceedings, a medical expert witness opined that there is a possibility that V's medical consequences could have been less severe had he received the appropriate medical treatment from the beginning. **9**

The first instance court sustained V's claim and ordered A to compensate him for material and non-material damage caused by the injury. The appellate court dismissed A's appeal and upheld the first instance decision. **10**

A filed an application for revision before the Supreme Court. In its application for revision, A asserted, among others, that the lower courts failed to reduce compensation for the contribution of a third party. Substantiating this argument, A asserted that the medical expert witness found that V was not properly treated while in the hospital and that his medical condition would not have been as severe had he been adequately treated. **11**

Decision

The Supreme Court dismissed A's application as unfounded on the merits and affirmed the lower courts' decisions. **12**

Substantiating its position, the Supreme Court first established that, in this case, rules on strict liability should apply, because a barn with rotten planks in an attic floor represents a dangerous object, and the barn's owner is strictly liable. The Supreme Court further dismissed A's argument about the alleged contribution of the third party **13**

to the damage. The Supreme Court first established that the expert witness did not assert that V's medical condition would have been less severe had he received proper medical treatment, but they only pointed to the possibility of such an outcome. Hence, the expert witness did not establish with certainty that proper medical treatment would have made V's medical condition less severe. Moreover, even if, *arguendo*, a medical error making V's injuries more severe did occur, this would only allow for joint and several liability of A and the hospital, which would still enable V to sue any of the debtors, requesting to be compensated in full, as was the case here.

Comments

14 See below 7/25 nos 19–24.

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 6 July 2005, No Rev 342/05-2

<https://www.iusinfo.hr/sudska-praksa/VSRH2005RevrB342A2>

Facts

15 V was employed with A as an accountant. V was seriously injured when another of A's employee entered the office and activated a hand grenade. V sues A, her employer, and requests to be compensated for material and non-material damage sustained by the injuries.

16 The first instance court partly sustained V's claim and awarded her claimed compensation for the most part. The second instance court dismissed A's appeal and affirmed the first instance decision. A filed an application for revision before the Supreme Court of the Republic of Croatia arguing, among others, that the damage was solely caused by the third party, and therefore A should be released from liability.

Decision

17 The Supreme Court dismissed A's application for revision as unfounded on the merits.

18 Substantiating its decision, the Supreme Court first noted that, pursuant to the Protection at Work Act (in Croatian: *Zakon o zaštiti na radu*), an employer is strictly liable for the damage sustained by workers while at work or in connection to their work. As to the possible release from liability based on the fact that the damage was caused by a third party, the Supreme Court noted that a tortfeasor can be released from liability if the damage was entirely caused by the third party's act, which could not have been foreseen and the consequences of which could not have been avoided or eliminated. In this respect, the Supreme Court invoked a provision of the Protection at Work Act, which requires an employer to ensure a safe working environment for their workers, and stated that A violated this provision by failing to properly inspect people who enter its business

premises, including its workers. Had A ensured a proper security check at the entrance to its business premises, the accident would have been avoided. Hence, the Supreme Court was of the opinion that the conditions needed for a liable person to be freed from liability for damage caused by a third party were not met in this case.

Comments

When a case involves the contribution of a third party to the damage, two types of situations must be distinguished; situations in which liability is assessed based on the rules of strict liability and situations in which liability is assessed based on the rules of fault-based liability. Unlike with cases of an injured person's contribution to their own damage, in which both, rules on strict and rules on fault-based liability contain a black-letter rule on the reduction of the responsible person's liability,[1] when the contribution of a third party to the damage is concerned, only the rules on strict liability provide for a black-letter rule explicitly regulating this contribution. **19**

Pursuant to art 1067 of the COA, the owner of a dangerous thing (who is strictly liable for damage caused by that thing) shall be exonerated from liability if he proves that damage occurred exclusively due to an act of a third party, which the owner could not have foreseen and the consequences of which could not have been avoided or eliminated. If, on the other hand, a third party only partly contributed to the occurrence of damage, the owner and the third party shall be jointly and severally liable for the damage thereby sustained.[2] **20**

Thus, for example, in case Rev 2955/1998-2, which involved the request for compensation from the victim who fell from A's attic, the Supreme Court dismissed A's request to reduce the compensation awarded to the victim for the third party's contribution, holding that even if a third party had contributed to the damage, this would not have allowed for the compensation to be reduced, but the responsible person would still be liable for the entire damage since the liable person and the third party are jointly and severally liable for the entire damage. Furthermore, in case No Rev 342/05-2, which involved a request for compensation from an employer severely injured when another employee activated a hand grenade, even though it was established that the damage was caused exclusively by the action of a third party, the Supreme Court refused to exonerate the responsible person from liability, holding that the third party's actions could have been foreseen and prevented by the responsible person, as is provided for in art 1067 of the COA. **21**

What is interesting to note with respect to the Supreme Court's judgment in case Rev 342/05-2, which involved a request for compensation from an employer severely in- **22**

1 See in more detail below under 8/25 no 17.

2 Full text of art 1067 of the COA in English, see in *M Baretić* Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 49.

jured when another employee activated a hand grenade, is that this Court relied on art 1067 of the COA, providing for exoneration from liability for damage caused by a dangerous thing or activity, even though in this particular case, strict liability was invoked based on a special law, notably the Protection at Work Act, and not the COA's provisions on liability for dangerous objects and activities. Hence, it seems that Croatian courts are generally willing to interpret art 1067 of the COA well beyond its substantive scope of application.

23 Even though the COA's general rules on fault-based liability do not provide for a black-letter rule on a third party's contribution to damage, this is not to say that the third party's contribution to the damage shall not be relevant in apportioning damage in cases in which liability is assessed based on the rules of fault-based liability. As is evident from the Supreme Court's judgment in case Rev 1144/09-2, which involved the request for compensation of an owner of the house burned down by the refugees living in it, courts in Croatia will be willing to release a responsible person from liability if damage is caused by a third party even when liability is assessed based on the general rules on fault-based liability. It is true that in such cases the courts will most likely rely on the general conditions of liability, especially causation, rather than invoking specific black-letter rules, as they do when liability is assessed based on the rules of strict liability. Thus, for example, in judgment Rev 1144/09-2, the Supreme Court did not hold the responsible person liable due to a lack of causation, holding that the damage (burning down the house) was a result of a third party's actions (ie people who resided in the house without a valid legal basis) and, therefore, it held that no relevant causal link existed between the responsible person's actions and the damage sustained.

24 Based on the foregoing, it can be generally concluded that Croatian courts will approach the issue of a third party's contribution to the damage either by invoking some specific statutory provisions providing for exclusion of liability caused by a third party's actions, as is the case with art 1067 of the COA, or by resorting to the concept of causality, dismissing requests for compensation in situations in which they establish that, because of the intervention of a third party, no causal link exists between the responsible person's actions and the damage sustained.

26. Slovenia

Vrhovno sodišče (Supreme Court) 10 October 2013, II Ips 317/2010

<https://www.sodnapraksa.si/> (1 December 2021)

Facts

1 In 2004, V, together with other boys, ran around a fire station during a fire drill. One of the boys in the group (C) slipped on an oil slick on the ground, so he grabbed V by the shoulder to catch his balance and fell forward with him. V was injured in the fall and sought compensation from the fire brigade (A). The court of first instance upheld V's

claim on its merits and partly the amount thereof, while the court of second instance reversed the judgment of the court of first instance by rejecting the claim in its entirety because, in its view, the causal link had been broken.

Decision

The Supreme Court granted revision and annulled the judgment of the court of second instance and remanded the case for retrial. The Supreme Court allowed revision on the question of whether a reflex act of a third party could break the causal link. V fell because C was pulling on him, but he slipped on the wet and slippery ground. The natural (actual) cause of the plaintiff's injury was indeed the act of C, but the legal cause of V's fall was an oil slick on the asphalt ground. The Supreme Court pointed out that, according to the theory of adequate causality, the legally relevant cause of V's injury was the slipping of a third party (C) on wet and slippery ground. However, since the damage as a result of the slip was caused to V, it is materially incorrect to conclude that the slip of C broke the causal link between the oil slick on the ground and the damage to V. A reflex act of C cannot, therefore, break the causal link when their act is the result of an unlawful omission or an act of A as the defendant. **2**

Comments

Slovene theory and court practice deal with the issue of damage arising from the unlawful act of a third party within the framework of the issue of the severance of a causal link. The question of when an event or action can be considered a *novus casus interveniens* can only be answered on the basis of a value assessment. The literature, as a general starting point for evaluation, sets the rule that it must be a new, independent cause. For example, if A throws a smouldering cigarette butt onto the ground and the wind spreads the fire to a forest, the wind does not represent a new cause.[1] However, for example, if A throws a smouldering cigarette butt onto the ground and B pours petrol on it and causes a fire, B's behaviour breaks the causal link between A's conduct and the fire.[2] **3**

1 There is no case in Slovene court practice that could illustrate the impact of a natural event on the occurrence or further increase of damage. Nevertheless, the literature dealing with causation mentions the possibility of breaking a causal relationship or further increase of damage due to a natural event. The literature cites the case of *Carlslogie S. Co Ltd v The Royal Norwegian Government*, in which the court considered as a new cause a severe storm that destroyed the ship while it was sailing to be repaired due to a previous collision, and held that the perpetrator of the initial accident could not be held responsible for the ship being destroyed in the storm (*A Polajnar Pavčnik*, Vzročnost kot pravnovrednostni pojem [Causality as a legally valuable concept], Zbornik znanstvenih razprav 1993, 179, 188). Regarding the further increase of damage due to a natural event, see Comments to the case at 7/26 no 3.

2 *A Polajnar Pavčnik*, Vzročnost kot pravnovrednostni pojem [Causality as a legally valuable concept], Zbornik znanstvenih razprav 1993, 179, 188.

4 Not every act of a third party necessarily leads to the severance of the causal link, even if the third party commits an offence. These are cases in which the act of a third party is a very likely consequence of a situation caused by the perpetrator. In this case, the occurrence of damage can be objectively attributed to the risk taken by the perpetrator.[3] Since the Supreme Court ruled in the presented case that the reflex act of the third party did not break the causal link, it ordered the court of second instance to rule again on the liability of the fire brigade, taking into account the proven fact that the fire brigade knew that the road, which was used as a training ground for firefighting drills, is regularly driven and parked on by trucks and tractors, and that oil often leaks from them onto the road.

27. Hungary

Legf Bír (Supreme Court of Hungary) Pfv VIII 21.902/1998

BH.2000.200

Facts

1 A bomb placed on a public bus operating between the cities of Budapest and Esztergom exploded and injured several passengers. The passengers sought damages from the bus company.

Decision

2 The court of first instance rejected the claim by finding that the company is not liable for the damage caused by an event external to its activity; therefore, it cannot be held liable for the act of a third person who brought the bomb onto the bus. The defendants challenged this decision, which was confirmed at second instance, and later appealed this second decision.

3 The *Kúria* found the recourse unjustified and established that, based on the state of art of public security and technical development, it cannot be expected from a bus company that it check its passengers on a daily basis to ascertain whether they are carrying bombs, similar to an airport.

Comments

4 The incident occurred in 1996 and was ruled by the highest court in 1998 under the provisions of art 345 (1) of the old Civil Code on liability for operation of a hazardous activity.

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3 *D Jadek Pensa*, Uvodni komentar [Introductory commentary], in: M Juhart/N Plavšak, (eds), Obligacijski zakonik s komentarjem, splošni del, 1. knjiga [Code of Obligations with commentary, General part I] (2003) 676, 677.

Article 6:535 of the new Civil Code also contains similar provisions on liability for hazardous operations and it states that an exclusion or limitation of liability is not possible for hazardous activities. 5

Szegedi Ítélőtábla (Szeged Court of Appeal) Pf I 20.172/2019

BDT.2020.4141

Facts

The defendant, riding a motorcycle, arrived at a junction at the same time as the applicant who was driving his car and, being surprised, instead of braking, he accelerated and crashed into the car. The driver of the car suffered multiple bodily injuries. At the time of the accident, the car driver's licence was no longer valid, while the driver of the newly brought motorcycle possessed a driving licence not suited to that category of motorcycle. The investigation into the traffic accident established that at the crossroads, in the motorcycle's lane, the road sign indicating 'give way' was missing, this having been removed by unknown persons two to three years previously. The investigation also established that the road management was outsourced by the local council to a private company, obliged under the contract, among others, to control the road signs and make the necessary maintenance and repair works when required. The applicant sought HUF 800,000 as a grievance payment and HUF 283,000 in material damages for the harm he suffered. He based his claim on the damage caused to him jointly by defendant I (the local council) and defendant II (the road management company), which contributed to the causation of the accident by not fulfilling their obligation to control the road signs and to replace missing signs and defendant III (the driver of the motorcycle), who by infringing the 'right hand' rule did not grant him priority at the junction. 6

Decision

The court of first instance established the joint liability of defendants I and II and dismissed the claim against the motorcycle driver (defendant III) because the road sign was missing, thus he was not found liable for not giving priority to the defendant, *considering the requirement of foreseeability provided for by art 6:521 of the Civil Code*. The court found that, under such circumstances, the liability of defendant III cannot be established either under art 6:535 of the Civil Code on the liability of the operator of a hazardous activity, because the accident could not have been prevented by him. The court qualified the accident as absolutely unavoidable and, hence, *the driver* of the motorcycle did not know and *could not have foreseen* that the road sign had been removed previously. 7

Concerning the liability of defendant II, the court established that safety of the public road belonged to the sphere of obligations of the municipality regardless of the outsourcing of road management activities to a private company, which justifies the joint liability of defendant I and defendant II. This because, from the contract delegating the 8

management to the private company, it cannot be established how the tasks were shared between the parties, and they omitted to precisely list the obligations, thus creating legal uncertainty concerning whose obligation it was to replace missing road signs.

9 The court considered irrelevant for the circumstances of the case that when the accident occurred neither of the drivers possessed a valid driving licence and also found irrelevant the fact that the driver of the motorcycle accelerated instead of braking, because at that moment they had already collided, thus the braking could have not prevented the accident. Defendant I and defendant II appealed this decision.

10 On appeal, the court established that damage was caused by the *collision of the hazardous activities* in the meaning of art 6:539 of the Civil Code, which states that *if two hazardous activities cause damage to each other, the persons operating such activities will be liable to each other according to their fault*. Thus, the court found that at first instance the court had based its decision on an erroneous legal basis when applying art 6:535 of the Civil Code. The appeal court clarified that it is irrelevant in such a case that, for defendant I, administrative liability applies under art 6:548 of the Civil Code, while for defendant II art 6:519 and for defendant III art 6:539 of the Civil Code is relevant, because the conditions of liability are the same in all these cases (unlawfulness, damage, fault and the causal relation between the damage and unlawfulness).

11 The appeal court established that the court of first instance was wrong for not finding defendant III liable, since, according to art 6:520 of the Civil Code, every damage event is unlawful except for those causes of exoneration of liability listed in a) to d) of the same provision, which do not apply to defendant III.[1] The court stressed that defendant III infringed the traffic rules by not complying with the right hand rule and for this reason not giving priority and it is irrelevant that, in the other lane where the applicant approached the junction, the road sign was missing, because the priority rules apply in all situations. For this reason, the driver of the motorcycle cannot be exonerated from liability. It is also irrelevant that his view was hindered by vegetation and an electricity pillar, because drivers should approach a junction in compliance with the traffic rules. Therefore, the court considered that the non-compliance by defendant III with the traffic rules concerning giving priority was causally linked with the collision of the two vehicles.

12 The appeal court furthermore considered that the court of first instance was wrong in establishing that the accident was unavoidable by defendant III on the ground that the condition of unavoidability provided for by art 6:535 of the Civil Code as a ground of exoneration from liability of the operator of a hazardous activity only applies when the operator of the hazardous activity causes damage to a person who is not operating an extra hazardous activity. Thus for accidents resulting from the collision of two hazardous activities, such as in the present case, the special provisions of art 6:539 of the Civil Code apply.

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1 See para 2 of the General Overwiev on art 6:520.

The court went on to explain that the lack of *foreseeability* in the meaning of art 6:521 only then excludes causation and liability when the person causing the damage *had not foreseen and could not foresee the type and extent of damage* that was caused by his behaviour. The court emphasised that by infringing a traffic rule concerning the access priority, the person should have considered that such act may result in a traffic accident resulting in severe or even fatal injuries and also causing significant pecuniary damage. The court pointed out that, in the case before it, as a result of the accident, the applicant suffered usual and typical damage, which does not deviate in its extent from damage caused in similar cases, thus this is not a case of unforeseeability that would exclude liability. In light of these arguments, the court established the fault of the motorcycle driver and obliged his insurer to pay the damages claimed by the applicant. **13**

The appeal court in addition dismissed the finding of the first instance court considering the liability of defendant I (the local council) on the ground that it had contractually transferred to defendant II the tasks related to the control and maintenance of road signs, in accordance with the applicable legal provisions (GMK 5/2004 of I.28.). The court established that the contract did not contain any provision stating that defendant I had retained the performance of certain activities or competencies concerning the road management, but on the contrary, had transferred all such tasks to the company. **14**

The court considered that, by outsourcing to a specialised company an activity that requires specific professional knowledge and technical equipment, the local council acted as expected in similar situations and for this reason it cannot be held responsible for the road sign being missing at the junction. The local council (defendant I) cannot be held accountable for the omission of the company to whom it outsourced the activity (defendant II) to replace the missing road sign. This omission infringed the provisions of both the GKM regulation and the contract. **15**

In addition, the court also clarified that road signs were included in the territorial planning documents of the City Hall in the area concerned and the local council is not liable for the omission to replace the missing road sign because defendant II is the only liable entity because this omission constituted an infringement of its obligations resulting from road traffic regulations (GKM 5/2004). This omission, in the court's view, contributed to the occurrence of the accident. However, it considered that further evidence is needed in order to clarify the proportion of the contributory negligence of defendants II and III to the occurrence of the accident and returned the case to the court of first instance. The court mentioned that in such a case, an expert opinion is needed to establish whether or not the driving technique of the motorcycle driver contributed to the occurrence of the damage. **16**

Szegedi Ítélőtábla (Szeged Court of Appeal) Pf I 20034/2020/8
BDT.2020.4270

Facts

17 The young son of A was convicted of theft and sent to prison. On 17 June 2013, he was transferred to another cell where his cell mates JM and BS repeatedly attacked him physically and BS also abused him sexually. V feared that such attacks would continue but did not report them to the guards. When other cell mates mentioned to a guard that the victim could not eat and was experiencing stomach pain, the guard said that this may be because of the food. The medical personnel did not examine V in this period although it was obliged by law to do so on a weekly basis, considering the young age of V. After a few days, V's health condition drastically worsened while the attacks against him continued and, on 21 June 2013, he died as consequence of the continued attacks. The criminal investigation established that the guard could not have noticed the attacks and acquitted him as well as the medical staff, hence causation could not be established between the lack of medical care and and V's death.

18 V's mother sought pecuniary and non-pecuniary damages from the prison. Her claim for non-pecuniary damages was built on the infringement of her personality right to a family life, which was disrupted by the death of her son. She accused the prison guard of not noticing the continuous attacks on V and the medical staff for not examining her son, which deprived him of the chance to be treated in time, which would have prevented his death. The medical staff, in its defence, mentioned the overcrowding in the prison, which functioned in that period at 220 % of its capacity, a circumstance which did not make a proper medical examination of V in privacy possible.

Decision

19 The court of first instance partially admitted the claim and obliged the prison to pay to the applicant HUF 200,000 in non-pecuniary damages, a much lower amount than that claimed. The court did not accept the defence of the prison that the overcrowding did not make the regular and mandatory medical examination of V possible. Such an examination would have revealed V's bodily injuries. In the court's view, this omission enabled the attacks to remain undetected and, thus, the behaviour of the medical personnel played a role in the causal link, making the inhumane, humiliating attacks on V possible. In light of this, the court established the liability of the prison.

20 The court also rejected the argument that the victim, by not reporting the attacks, omitted to prevent or mitigate the damage. In this context, the court stressed that such omission does not affect the claim of the third party relative, because *her claim is an independent claim, thus she is not responsible for the omissions of the victim*. Nevertheless, when establishing the amount of non-pecuniary damages, the court took into account that the victim contributed to the damage by not reporting the attacks to the guard, a fact which reduces the fault of the defendant.

The appeal court established that the omissions of the employees of the prison, namely a) the infringement of the rules requiring the separate placement of persons under preventive arrest from those convicted by placing V together with inmates convicted of murder; b) the failure to prevent the attacks and to protect the life and bodily integrity of V; c) the infringement of the obligation by the medical personnel of the prision to perform the regular health examinations of the inmates, which could have revealed the consequences of the attacks and prevented their continuation; and d) the omission of the guard to report to competent persons the poor health condition of the victim were causally linked *to the death of V*. In the court's view, *these constituted a unity of causes, based on series of infringements of obligations committed by several persons that led to the death of V (A's son)* and by so doing, infringed A's personality right. **21**

The court established that the prison has to compensate the indirect victim for the pecuniary and non-pecuniary damage she suffered from the loss of her son, who died in prison as consequence of the attacks committed by his cell mates and the omissions of the prison, based on art 355 old Civil Code. **22**

In addition, the appeal court considered the damages granted to the victim by the court of first instance too low considering the value of money at the time of the infringement of the personality right of the applicant and increased the amount of damages to HUF 1,000,000. The court justified the increased damages by the bond of *affection between the mother and her son*, which although not too close, *was significant*, testified by the fact that she accepted him in her house and the victim indicated her as contact person in the prison. **23**

28. Romania

Curtea de Apel (Court of Appeal) Brașov, Decision No 487/2020

Cod ECLI ECLI:RO:CABRV: 2020:012

Facts

The 73-year-old V was hospitalised in a psychiatric ward of a hospital, being diagnosed with severe psychiatric disorders and suffering dementia. Some weeks later, a nurse restrained the patient in bed for four hours to calm her down. The nurse tied both arms and one leg of V to the bed and left for the night, leaving V unattended for several hours. At night, V's roommate, another psychically ill person, strangled the restrained patient with a bedsheet. The criminal court established the liability of the doctor and the nurse for causing death by fault and sentenced them to two years' imprisonment, which was suspended conditionally for four years. V's relatives sued the doctor and the nurse for moral damages. **1**

Decision

2 The Appeal Court of Brașov admitted the claim and granted to each of V's two sons € 20,000 moral damages, € 8,000 to each of V's four grandchildren aged between four and eight and € 5,000 to the youngest grandchild, who was 19 months old when the criminal act took place.

Comments

3 Medical malpractice is a special form of tort liability, being considered an autonomous type of professional liability.[1] In this case, the crime was committed by a third person (mentally disordered, thus not liable), who was not adequately supervised by the medical staff of the hospital, although a mentally disordered patient. The civil law tort committed by the nurse and the doctor consisted in the infringement of the medical rules concerning the medical measure of restraining, governed by the Order No 372/2006 of the Ministry of Health, implementing the provisions of the Law on Mental Health. The nurse applied the measure without having a written decision of the on-call doctor, which would have established the reasons, the nature and the length of the restraining measure and did not monitor the patient during the period of restraining, making it impossible for the victim to defend himself against the aggressor. The on-call doctor allowed the nurse to apply the restraining measure by phone, thus infringing the legal provisions concerning the use of this medical measure and not instructing her to monitor the patient.

4 The court, based on the theory of *unity of the cause and conditions,* established the fault of the nurse implementing the medical measure and of the on-call doctor allowing that measure, taking into account that *the restraining favoured the murder* of the patient by the third person. The court explained that the on-call doctor and the nurse were at fault, although they caused the harm without intention, by not foreseeing that their actions may cause the death of the patient.

5 The court also established the joint liability of the hospital with that of the tortfeasors based on art 1.373 C civ on the liability of the principal for the acts committed by the agent. The doctor and the nurse committed the torts within the framework of their employment relationship during their working hours at the hospital and they were related to their professional tasks.

6 The court partially admitted the civil claims of the relatives of the victim, arguing that moral damages cannot affect the scope of tort liability, thus they must be equitable in order to not cause the unjust enrichment of the indirect victims. When establishing the amount of damages, this must be proportional to the damage suffered, to offer just compensation for the suffering caused by the tortious act. In support of its decision, the

1 *LB Luntraru*, Răspunderea civilă pentru malpraxis profesional (Editura Universul Juridic, București 2018) 164–207.

court recalled the earlier decisions of the ÎCCJ, which offered guidance to the courts on how to establish the amount of moral damages: a) ÎCCJ decision no 2617/2009, stating that moral damages should not be limited by the financial possibilities of the tortfeasor, because, also in such cases,the general principle applies that the damage must be fully compensated, and b) ÎCCJ decision no 1779/11, in which the ÎCCJ explained that the principle of equity in tort law demands just and real compensation in order to satisfy the victim, thus moral damages should not constitute an excessive sanction for the tortfeasor or unjust enrichment for the victim.

29. European Union

European Court of Justice, 18 March 2010, case C-419/08P, Trubowest Handel GmbH and Viktor Makarov v Council

ECLI:EU:C:2010:147

Facts

German customs authorities ordered Trubowest to pay anti-dumping duties on the basis of an EC regulation, claiming that imports had been falsely declared. Trubowest's managing director Makarov personally faced criminal charges for that reason. Trubowest reached a settlement with the customs authorities, and the criminal proceedings against Makarov were concluded upon his payment of a fine. 1

The applicants now seek compensation for the losses incurred in the course of these proceedings, alleging that the regulation on the basis of which the German authorities had acted was unlawful. 2

Decision

As far as the recovery of payments to the German customs authorities is concerned, the Court pointed to earlier case law 'that the national courts alone have jurisdiction to entertain actions for recovery of amounts wrongly levied by a national body on the basis of Community legislation declared subsequently to be invalid' (para 23). 3

As far as the remainder of the claim was concerned, the Court did not even touch upon the question of whether the regulation concerned was indeed flawed as claimed by the applicants. Instead, all claims were denied due to lack of causation. 4

As said in earlier rulings, liability under art 288 ECT (now art 340 TFEU) requires 'a sufficiently direct causal nexus between the conduct of the institutions and the damage', denying that a 'remote' harmful consequence could be indemnified (para 53). The Court continued that 'even in the case of a possible contribution by the institutions to the damage for which compensation is sought, that contribution might be too remote because of some responsibility resting on others, possibly the appellants' (para 59). Even assuming that the regulation complained of had been flawed, it was still the German customs 5

authorities alone to whom the ensuing losses were attributable. If, however, the regulation could stand, it was the conduct of the appellants themselves that caused their own loss: The *causal link may be broken* by negligence on the part of the person adversely affected, where that negligence proves to be the determinant cause of the damage. (para 91, emphasis added).

6 Since 'the condition relating to the causal link is independent of that relating to the illegality of the act in question' and causation had already been denied for all heads of damage claimed, the Court no longer saw a need to address the alleged illegality of the regulation at stake (para 48).

Comments

7 This is one of the few cases where the Court expressly refers to the concept of a 'break in the causal chain'. If the direct cause is someone other than the EU defendant(s), the Court tends to focus primarily on that immediate actor rather than, say, the EU legislator, even if it was the latter who may have issued norms upon which the intermediary acted and thereby caused harm. While the legislative act may still be one of the links in the chain of causation as a *conditio sine qua non* (had the legislation not been passed, the intermediary could not have applied it), it was the application of the norm rather than its passing which was the direct cause in the eyes of the Court.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 *First scenario*. A tries to overtake a car, moves to the opposite lane and hits an oncoming money transporter of company V. The transporter swerves off the road, overturns several times and comes to rest on its roof with the driver's door half-open. Despite their injuries, the driver and the co-driver of the transporter manage to get out of their vehicle and subsequently receive medical treatment. An inspection carried out the following day reveals that two money cases containing approximately € 250,000 are missing. The money was stolen before the police arrived at the scene of the accident.

2 V claims compensation from A's motor vehicle insurance, including damages for the stolen money.[1] It is undisputed that A is responsible for the damage caused by the traffic

1 Inspired by the German case: Bundesgerichtshof (Federal Supreme Court) 10 December 1996, VI ZR 14/96, NJW 1997, 865, with comments by *U Magnus*, above 7/2 nos 1–10; see also the French case: Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 25 October 2007, 06-17240, with comments by *J-S Borghetti* and *J Knetsch*, above 7/6 nos 1–4: B causes a road traffic accident; the fire brigade intervenes; another car driving too fast hits and injures three firemen. Held: B is also liable for their injuries; the Czech case: Supreme Court of the Czech Republic (Nejvyšší soud České socialistické republiky) 22 Jan-

accident. A's insurer disputes, however, that A's liability extends to the theft of the money cases.

Second scenario. V is severely injured in a car accident caused by A, whose liability **3**
is undisputed. When V's injuries are treated in hospital, she receives transfusions of contaminated blood and plasma and contracts hepatopathy, ie a chronic, passive congestion of the liver. V claims compensation from A's car insurance company, including damages for having contracted hepatopathy in the hospital.[2]

Solutions

a) Solution According to PETL. Had the accidents not occurred, the money cases would **4**
not have been stolen in the first scenario, and the victim would not have contracted hepatopathy in the second. In both cases, the accident for which the insured are responsible is the *conditio sine qua non* for the further damage suffered by the victim (art 3:101 PETL), so that natural causation is established in both scenarios.

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uary 1971 4 Cz 5/70, with comments by *J Hrádek*, above 7/23 nos 5–7 and 11–21: thieves break into a shop and leave the premises open and unsafe; later it is discovered that the loss exceeds the value of the goods stolen by them; it is impossible to identify whether the further loss is due to acts of the shop's manager or another theft by third parties. Held: the burglars are also liable for this further loss, having deprived the shop owner of any means to identify what had happened to these goods.

2 See the Italian case: Corte di Cassazione (Court of Cassation) 24 April 2001, no 6023, Resp civ prev 2002, 133; Danno e resp 2002, 535, with comments by *N Coggiola, B Gardella Tedeschi* and *M Graziadei*, above 7/9 nos 1–12; the German case: Bundesgerichtshof (Federal Supreme Court) 30 June 1987, VI ZR 257/86 BGHZ 101, 215, with comments by *U Magnus*, above 7/2 nos 11–17; the Austrian case: Oberster Gerichtshof, 25 October 2018, 6 Ob 182/18k, JBl 2019, 318, with comments by *E Karner* and *A Longin*, above 7/3 nos 1–7 (A's dog injures V, the surgeon treating his injuries commits a serious medical error aggravating the damage); the Swiss case: Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 19 August 2003, TF 6S_155/2003, with comments by *B Winiger, C Duret, A Dubout, A Parreaux* and *S Suter*, above 7/4 nos 1–10; the Greek case: Three-member Court of Appeal of North Aegean 14, 2016 ChrID 2016, 352, with comments by *E Dacoronia,* above 7/5 nos 1–4; the Belgian case: Tribunal de première instance de (Court of First Instance of) Liège, 28 June 2005 Rev dr santé 2008–2009, 43, with comments by *E De Saint Moulin* and *B Dubuisson*, above 7/7 nos 7–13; the Dutch case: Hoge Raad, 29 June 1969, ECLI:NL:HR:1969:AD8001, NJ 1969/374, ca, with comments by *S Lindenbergh* above 7/8 nos 1–3; the Croatian case: Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) No Rev 2955/1998-2 of 6 June 2002, with comments by *Marko Baretić*, above 7/25 nos 7–13 and 19–24. For *limits* of this liability, see the Spanish case: Tribunal Supremo (Supreme Court) 16 April 2003 RJ 2003\3718, with comments by *M Martín-Casals* and *J Ribot*, above 7/10 nos 7–10: V is injured during the running of bulls negligently organised by a city council as part of popular celebrations; at hospital he is left for a long time lying on a stretcher, falls off and injures himself; no liability of the city council for the further damage (this particular risk was not created by the first accident); the Polish case: Sąd Apelacyjny (Court of Appeals) Łódź, 21 May 1991, I Acr 102/91 OSPiKA 1991/11, item 284, with comments by *E Bagińska*, above 7/22 nos 11–14: V broke her leg in a car accident caused by A; when doing exercises in hospital, a crutch breaks, fracturing her leg again and worsening her conditions and leading to permanent disability. Held: crutches usually do not break; the further damage was caused by gross negligence of the hospital's personnel or by an unusual coincidence; no adequate causal link and hence no liability of A for this further damage.

5 The question in both scenarios then is whether A's liability should extend to the precise loss for which compensation is claimed (the stolen money in the first scenario and the damage related to contracting a severe disease in hospital in the second). In the first scenario, the loss was caused by the *intentional intervention* of a third party that took advantage of the opportunity to commit theft created by the accident; in the second, the further injury to V's health was caused by *negligent treatment* in the hospital.

6 When drafting the PETL, the European Group on Tort Law 'discussed at some length whether or not intentional or grossly negligent activities of third parties should limit another's liability'.[3] Under the final version of the PETL, much depends on whether the 'acceptable scope of liability is exceeded'[4] under art 3:201 PETL.

7 Article 3:106 PETL may serve as a further basis to tackle this issue.[5] According to this provision, '[t]he victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere'. According to the Commentary, 'if [...] an activity lies within the victim's sphere, [the victim] has to bear the corresponding loss'.[6]

8 For the solution of the two scenarios, the criteria found in art 3:201 PETL and art 3:106 PETL have, therefore, to be analysed and, as the case may be, balanced against each other.

9 According to art 3:201 (Scope of liability) PETL, 'whether and to what extent damage may be attributed to a person depends on factors such as

(a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
(b) the nature and the value of the protected interest (Art. 2:102);
(c) the basis of liability (Art. 1:101);
(d) the extent of the ordinary risks of life; and
(e) the protective purpose of the rule that has been violated.'

10 In the *first scenario*, due to the accident, the money was not stored safely in the transporter anymore and exposed to the risk of theft. It was 'foreseeable to a reasonable per-

3 PETL – Text and Commentary (2005) art 3:201, no 11 (*J Spier*).

4 PETL – Text and Commentary (2005) art 3:201, no 11 (*J Spier*).

5 PETL – Text and Commentary (2005) art 3:201, no 12 (*J Spier*).

6 PETL – Text and Commentary (2005) art 3:201, no 12 (*J Spier*). Article 3:106 PETL applies *literally* only to cases in which causation is uncertain and one of the potential causes lies within the victim's sphere. According to the Commentary to the PETL, the provision shall, however, not only apply to cases of uncertainty of causation but also to cases where the tortfeasor's activity and circumstance within the victim's sphere contribute with certainty to the damage, see eg, the illustration provided in PETL – Text and Commentary (2005) art 3:106, no 14 (*J Spier*).

son' that third parties acting criminally may profit from an accident-related emergency of the money transporter to commit theft.

11 The rules on liability for road traffic accidents serve the purpose of protecting potential victims of accidents against risks to their lives, health and property – whether property was directly damaged by the accident (eg the victim's car), whether third parties subsequently crashed into the vehicle hereby causing further damage, or whether third parties took advantage of the emergency situation for committing crimes and enriching themselves. The theft thus fell within the protective purpose of the violated norm, and the loss should hence be borne by the tortfeasor rather than lie with the victim.

12 An analysis of arts 3:106 and 3:201(d) PETL confirms this result: being the victim of theft at the scene of an accident is not part of the general risk of life of an accident victim, just as it is not part of the victim's general risk of life to suffer injury to health and property in an accident.[7]

13 The *second scenario* occurs frequently and has occupied the courts in most, if not all, jurisdictions.[8] Without the accident, the victim would not have been severely injured and would not have needed a blood and plasma transfusion. Even if medical malpractice is not likely to occur, it is not outside the human experience und still 'foreseeable to a reasonable person'. Here as well, the rules on liability for road traffic accidents serve the purpose of protecting potential victims of accidents against risks to their life and health related to the accident. Even if transfusions of contaminated blood and plasma should at all costs be avoided, the risk that they nevertheless occur falls into the sphere of the person who caused the accident rather than into the sphere of the victim.

14 The Official Commentary to art 3:201 PETL confirms this line of reasoning. According to art 3:201(d) PETL, 'whether and to what extent damage may be attributed to a person depends on factors such as [...] (d) the extent of the ordinary risks of life'. The Commentary explains that the 'ordinary risks of life ... may come into play if, say, P is involved in a car accident for which D is liable. He only suffers a slight injury. On his way to his physician, he is again hit by a car. The latter accident may very well be considered as a consequence of the ordinary risks of life, in that everyone runs the risk of becoming involved in an accident. The second accident seems to be totally unrelated to the first one in any sense which should be relevant for the imposition of liability. If, on the other hand, the first accident has increased the chance of being involved in the second accident (eg the injury is quite serious; the victim has to be transported to a hospital straight away at high speed; on the way to the hospital, the ambulance is hit by a car), the latter can no longer be considered as a normal risk of life'.[9] Last but not least, this

7 This line of arguments is in line with the decision of the German Bundesgerichtshof (Federal Supreme Court) 10 December 1996, VI ZR 14/96, NJW 1997, 865, with comments by *U Magnus*, above 7/2 nos 1–10.

8 See the numerous references in fn 2 above.

9 PETL – Text and Commentary (2005) art 3:201, no 19 (*J Spier*).

line of reasoning is in line with the case law in the large majority of European countries.[10]

15 **b) Solution According to the DCFR.** According to the DCFR, the liability of a keeper of a car for damage caused by his motor vehicle in a road traffic accident is strict (art VI–3:205 DCFR). In a given case, it is necessary to establish what exactly falls under 'legally relevant damage', and that this damage was caused 'in a traffic accident which results from the use of the vehicle'.

16 In the *first scenario*, the legally relevant damage comprises the personal injury (and consequential loss in the form of medical expenses) of the driver and co-driver of V's car (see art VI–2:202(1) DCFR), the damage to V's car, as well as the loss of the two cases of money containing € 250,000 which were stolen as a result of the damage to the safety features of V's car (the latter two are property damage falling under art VI–2:206 DCFR).

17 None of this damage would have arisen had A not caused the traffic accident, so that natural causation under art VI–4:101 DCFR is established. The theft of the transported property was also a foreseeable consequence of the damage to V's car and security system. A is consequently liable for the damage suffered by V, including the loss of the money boxes.

18 It seems that the only ground on which the liability under the DCFR could be limited is art VI–6:202 (Reduction of liability), which allows to reduce the liability of the tortfeasor according to a 'fair and reasonable' test.[11] The Official Commentary to the DCFR provides the illustration of a broken pipe in A's apartment which inundates and damages a valuable archive in the apartment situated just below. The owner of the archive specifically insured it with his household insurance.

19 The owner of the apartment is, in principle, strictly liable for the 'damage caused by the unsafe state of an immovable' pursuant to art VI–3:202 DCFR. The Commentary argues that, in this case, however, A's liability should be reduced since there is a disproportion between the grounds of his liability (strict liability for a defect that the liable person could not have discovered) and 'the extraordinary risk of damage' given the value of the archive.[12]

20 Taking inspiration from this example, in the above scenario it may be argued that full liability for the loss of the money boxes would create a disproportion between the grounds of his liability (strict liability for damage caused by motor vehicles, or possibly fault-based liability if his overtaking was negligent) and the extraordinary damage

10 In all but two cases reported in the country reports, the courts held that the tortfeasors' liability extended to the aggravation of the damage caused by medical malpractice. Depending on the jurisdiction, the causation was regarded as adequate; the criteria of *Zurechnungszusammenhang* as fulfilled; the causal link as not being interrupted. Limit: the medical negligence was entirely unusual and beyond the risk the accident had created, completely outside the human experience, or the doctor acted intentionally.

11 The topic of the victim's contributory negligence (should the safety system have withstood an accident?) is not part of this study.

12 *C v Bar/E Clive*, DCFR, art VI–6:202, Illustration 2 (3785).

caused by the theft. Whether such an argument would be successful under the DCFR remains a matter of speculation.

In the *second scenario* of the contamination at hospital, the injury to V's body and health is legally relevant damage (art VI–2:201 DCFR). The Official Commentary to the DCFR states that for establishing causation (art VI–4:101 DCFR), the decisive factor is 'whether there is a link of cause and effect between an intentional or negligent conduct or a source of danger on the one hand and a legally relevant damage on the other'.[13] There is no conclusive list of elements to consider. 'Aspects of probability and foreseeability come into play but so too do the type of attributive cause and the type of damage. Also relevant are the protective aim of the norm of social behaviour which has been infringed and (occasionally) general policy considerations'.[14] **21**

In this scenario, the urgent surgery was the consequence of the serious injuries sustained by V in the accident. An infection with hepatopathy was a risk to which the accident exposed V. Although it should have been avoided, it was still within the foreseeable consequences of the medical intervention. It may thus very well be argued under the DCFR that V's infection was within the scope of damage for which A is accountable. This conclusion is supported by the protective aim of the norm infringed (the road security rules aiming at protecting the health of potential victims of road traffic accidents) and general policy considerations, which speak in favour of attributing the risk of the victim's infection and contamination to the person who caused the accident rather than to the victim. **22**

31. Comparative Report

Where loss, or some additional loss, has manifested itself after misconduct on the part of a third party[1] (A2), the question arises of whether the intervention of the third party ought to limit, or perhaps even exclude, the responsibility of the original tortfeasor (A1). This is not a new legal issue: already at the time of classical Roman law, there was a recognition that the intervention of a third party in the chain of conduct leading to harm, or the occurrence of some other supervening, causally significant event, ought to limit or exclude the liability of the wrongdoer.[2] However, the views of the classical jurists were not always in agreement, as (for instance) in the case of a slave who suffers mortal wounds at the hands of two successive attackers.[3] **1**

13 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3570).

14 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571) emphasis added.

1 Rather than misconduct of the victim, a situation which is considered separately under question 8 below.

2 Historical Report 1/1 no 9.

3 Historical Report, 7/1 no 1.

2 In the modern law, the factual causal contribution of A2's misconduct to the loss or the additional loss of V is a necessary but not usually sufficient requirement for the exclusion or limitation of A1's responsibility. In addressing the relevance of A2's misconduct, some systems employ the language and analysis of a subsequent cause which is: 'legal';[4] 'adequate';[5] supervening, new, or independent;[6] the 'real'[7] or 'only'[8] cause; or one which is 'sufficiently direct',[9] 'indirect' causes sometimes sounding in liability but only at a reduced level.[10] France requires A2's conduct to amount to *force majeure* before it will relieve A1 of responsibility.[11] Analyses which use causal language, while common, are often opaque in their underlying rationale.

3 Some systems employ in addition (or as an alternative) non-causal language, such as analysing whether the conduct of A2 manifested a risk already created by A.[12] In Germany, such manifestation creates the 'necessary connection for the attribution of the damage to the conduct of the wrongdoer' (the concept of *Zurechnungszusammenhang*).[13]

4 In considering whether A1 must bear responsibility for A2's conduct, a number of factors can influence a court's decision: the proximity of the conduct of A1 and A2 (its 'remoteness'[14]); the relative culpability of the parties;[15] the relative 'potency' of the parties' conduct;[16] and the foreseeability of A2's conduct from the position of A1.[17] So, courts have excluded A1 from responsibility for A2's subsequent misconduct if A2 acted wilfully/intentionally,[18] in a grossly negligent way,[19] or in some other outrageous, unreasonable, exceptional, or highly unforeseeable manner.[20] However, some systems operate exceptions to these exclusions.[21] Some systems reach the same conclusion regarding unforeseeable outcomes by stating that A1 will be liable for losses caused by A2 only if a particu-

4 Ireland 7/14 no 1.
5 See, eg, Norway 7/16, no 3, and Poland 7/22 no 1 and no 11.
6 Czech Republic 7/23 no 12; Ireland 7/14 no 6; Scotland 7/13 no 7; Slovenia 7/26 no 3.
7 England and Wales 7/12 no 2.
8 Portugal 7/11 no 3.
9 European Union 7/29 no 5.
10 Lithuania 7/21 no 1.
11 France 1/6 no 5.
12 Germany 7/2 no 1; Spain, under its 'continuation or development of risk' principle – see 7/10 no 9; Sweden 17/7 no 3.
13 Germany 7/2 no 13.
14 England and Wales 7/12 no 7.
15 England and Wales 1/12 no 2, 7/12 no 3.
16 England and Wales 7/12 no 3.
17 Sweden 7/17 no 3, Finland 7/18 no 5 (A2's intervention must be 'unpredictable to some extent' in order for A1 to benefit).
18 Austria 7/3 no 5; Spain, under its 'prohibition of return' principle – see 7/10 no 3.
19 Austria 7/3 no 6; Switzerland, 7/4 no 8.
20 England and Wales 7/12 no 6; Greece 7/5 no 2; Italy 7/9 no 1, no 13; Poland 7/22 no 12; Sweden 7/17 no 7.
21 Austria 7/3 no 7.
22 Croatia 7/25 no 1.

lar action is 'apt to cause' a particular consequence (that is, if it typically results in the consequence which has occurred[22]); the commentary to PETL art 3:201 cites circumstances where a 'first accident has increased the chance of being involved in the second accident' as one where A1 will likely bear continuing responsibility for the second event.[23] The unsatisfactory guidance of 'common sense' is sometimes called on to support decisions.[24] Sometimes the language used by courts can obscure underlying operative policy considerations, as the English courts have admitted.[25]

Many systems have dealt with some common types of case, and some have developed particular rules for such cases. Traffic injuries are one such common case, and, in France, the driver of a vehicle involved in a traffic accident is strictly liable for any harm caused by the accident, even if they did not personally cause that harm,[26] except where a third party's act is a voluntary one (in which event, this may break the chain of causation).[27] The PETL's discussion of the 'extent of the ordinary risks of life' as being risks which an injured party must itself bear (see art 3:201(d)) is exemplified by discussion in the commentary of traffic accidents, with examples given of both circumstances where a subsequent injury is likely to be considered part of such risks and of circumstances where it will likely not.[28] In the DCFR, liability for damage caused by vehicles in a traffic accident is (as in France) strict;[29] however, there is the possibility of reduced damages where this is fair and reasonable, and some circumstances of disproportionately high consequences may fall within this exception.[30] **5**

Another common circumstance is the medical negligence of A2 in diagnosis or treatment following A1's tortious conduct: common medical negligence will not usually exempt A1 from responsibility, but gross or highly exceptional medical negligence may do so.[31] Some systems have wrestled with the question of when a defendant, without causing any harm itself, may be responsible for harm caused by a third party, often (but not always) a criminal.[32] **6**

23 PETL/DCFR 7/30 no 14.

24 England and Wales 7/12 no 3.

25 'Sometimes [the law limits the range of liability for negligence] by limiting the range of the persons to whom [a] duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote …. All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide': *Lamb v Camden London Borough Council* [1981] 1 QB 625, 636, discussed at England and Wales 7/12, no 7.

26 France 7/6 no 1 and no 5.

27 France 7/6 no 11.

28 PETL/DCFR 7/30 no 14.

29 PETL/DCFR 7/30 no 15.

30 PETL/DCFR 7/30 nos 18–22.

31 Greece 7/5 no 1; Netherlands 7/8 no 3; Switzerland 7/4 no 8.

32 Including Hungary 27/7, no 17; Italy 7/9 no 13; Malta 7/15 no 1; Scotland 7/13 no 8.

33 Belgium 7/7 no 14.

7 Where the total damage caused to a victim can be divided into specific losses attributable to each of A1 and A2 separately, there is authority in some systems for apportioning liability for the specific loss caused by each.[33] Otherwise, where the loss is indistinguishable, systems tend to apportion liability based upon a discretionary, judicial assessment of each defendant's contribution to the loss.[34] However, joint and several liability is favoured by some systems[35] and may be the outcome in some instances in other jurisdictions.[36]

34 The apportionment may be specifically linked to the criterion of reasonableness, as in Finland 18/7 no 3.

35 Estonia 7/19 no 3, Czech Republic 7/23 no 14.

36 Hungary 7/26, no 17.

8. Losses and additional losses resulting from a decision of the injured party

1. Historical Report

Paulus, D 9,2,30,4

Facts

Someone attacks and wounds a slave, who then dies of neglect. 1

Decision

According to the Roman jurist Paulus, the attacker is liable for wounding, but not for killing. 2

Comments

Paulus' decision illustrates that Roman jurists did not rely exclusively on the *conditio sine qua non* formula for assessing liability.[1] In this case, the wound inflicted on the slave is certainly the *conditio sine qua non* for his death: without the wound, his master's neglect would not have proven fatal. As such, the injurer's action is certainly causal for the death of the slave; however, it is certainly not the only, and possibly not even the main, cause. 3

Given that the wound in itself was apparently not lethal in and by itself, but only when coupled with the *dominus*' refusal to provide proper medical treatment, Paulus decides that if the injured party (ie the *dominus*, not the slave who has been wounded, since slaves were regarded as property) contributed to the harmful outcome, the wrongdoer's liability is limited to what would have happened in the absence of this contribution: hence, the attacker can only be held liable for wounding under the third chapter of the *lex Aquilia*.[2] 4

1 Cf our analysis of D 9,2,11,3 and D 9,2,51 pr (above at 7/1 no 1) for a discussion of this point.

2 Cf *Alfenus*, D 9,2,52 pr (below); *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 20.

https://doi.org/10.1515/9783111001272-009

Alfenus, D 9,2,52 pr

Facts

5 A slave dies as a result of an assault, without other factors – such as neglect by his master or lack of skill on the part of the doctor who treated him – contributing to his death.

Decision

6 Alfenus decides that an action under the first chapter of the *lex Aquilia* can be brought against the attacker.

Comments

7 This case can be regarded as a companion piece to D 9,2,30,4 (no 1 above). In the case of a slave who has been assaulted and subsequently dies, Alfenus first rules out that other factors may have contributed to his demise, such as neglect on his master's part or lack of medical skill on the part of the physician who attended him. Only when it has been ascertained that the conduct of the injured party (the *dominus*) has played no role in the slave's death does Alfenus grant the owner of the slave an *actio* under the first chapter of the *lex Aquilia* against the attacker.[3]

2. Germany

Bundesgerichtshof (Federal Supreme Court) 13 July 1971, VI ZR 125/70
BGHZ 57, 25

Facts

1 The claimant V, who was a ticket inspector of the *Deutsche Bundesbahn* (German Railway) asked 23-year-old A to show his ticket while on the platform of a railway station. A had no ticket. V asked A either to pay a penalty of DM 20 or to show his identity card in order to ascertain A's identity. However, A ran away, down a steep staircase to the station exit. V followed him to get hold of A but fell at the bottom of the stone staircase and suffered a complicated femoral neck fracture of his left leg. A was caught and V sued him for compensation of his damage.

3 *G MacCormack*, Aquilian Studies (1975) 46; *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 177 f. Cf also *Paulus*, D 9,2,30,4 (above 8/1 no 1).

Decision

The courts of all three instances affirmed V's claim in principle but reduced it by 33 % for contributory negligence. **2**

The Federal Supreme Court accepted that the necessary *Zurechnungszusammenhang* (the necessary connection for the attribution of the damage to the conduct of the wrongdoer) was present because A's flight almost unavoidably led to V's decision to pursue him. It was V's task and rightful obligation to ascertain whether railway passengers possessed valid tickets and to fine persons without a ticket or to ascertain their identity. A had no justified reason to flee. 'If the independent decision of the injured party … is induced by the event that gives rise to liability, then the responsibility [sc of the wrongdoer] is not excluded simply because the injured party … contributes.'[1] **3**

However, the Federal Supreme Court stated that the wrongdoer is only liable for significantly increased risks of a pursuit. The normal risks of a pursuit are to be borne by the pursuer him- or herself. In the present case, the risks were in that sense increased because the pursuit on the steep and stone staircase was foreseeably dangerous and A did foresee or should have foreseen this dangerousness and increased risk. The Court justified this restriction of liability with the argument that the requirement of an inner connection with the reason for the liability suggests such. **4**

The BGH further held that V's conduct was not out of proportion to the intended result, namely to catch a fare evader who, under German penal law, commits a crime (§ 265a StGB). Disproportionate conduct would have interrupted the chain of causation. V's contributory negligence was, on the other hand, not excluded. **5**

Comments

The decision concerns the so-called pursuer cases (*Verfolgungsfälle*). The regular risks of chasing criminals or other lawbreakers is borne by those whose job it is to pursue such persons or who are reasonably induced to do it. 'Official' pursuers – the police, ticket inspectors, etc – must and can assume higher risks. The chased person must, however, compensate any damage suffered by the pursuer as a result of pursuit risks only if these risks are significantly increased. In other situations where helpers, for example firemen, suffer damage when trying to remove a danger for which the tortfeasor is responsible, the latter is generally liable for the helper's damage irrespective of whether or not the risk was specifically increased.[2] **6**

The differentiation between normal and significantly increased risks is not entirely convincing. In its justification, the fact that no-one is obliged to incriminate themself and may therefore also avoid being caught can be mentioned. However, this does not allow **7**

1 BGHZ 57, 30.

2 See, eg, BGH NJW 1996, 2646 (fireman seriously injured when involved in extinguishing a fire for which the defendants were responsible).

the pursued person to create special risks for the pursuer. Any damage due to the 'normal' pursuit of criminals is thus a task which the general public and the taxpayer shall finance.

3. Austria

Oberster Gerichtshof (Supreme Court) 22 June 2011, 2 Ob 219/10k

EvBl 2011, 1076

Facts

1 V was severely injured in an accident culpably caused by A. Since for religious reasons, V refused a blood transfusion, she died. V's surviving husband sought compensation for the funeral expenses as well as compensation for grief and sued A for damages.

Decision

2 The Supreme Court decided that the (additional) losses resulting from the free decision of V to refuse a blood transfusion could not be attributed to A. Due to the freedom of religion, there is no doubt V was free to refuse medical intervention. However, this does not mean that V does not have to bear the detrimental consequences of this decision herself. A can thus not be held responsible for the objectively unfavourable choice of conscience V made.

Comments

3 Liability can also be excluded when the consequences of damage are based on an independent decision on the part of the victim himself or herself.[1] Here the same principles apply as in those cases where a wilful act of a third party has intervened. Again, whether the separate act of the injured party can exempt the first perpetrator from liability depends on a comprehensive evaluation of interests. Only if this shows that the criteria inculpating the injured party far outweigh those inculpating the first perpetrator, does it no longer seem appropriate to impute the damage to the first perpetrator.

4 In the reported case concerning the refusal of a blood transfusion, the Supreme Court stressed that liability is excluded when the victim refuses medically indicated treatment. However, in this particular case reported above, where the refusal was based on religious reasons, the duty to mitigate damage had to be balanced with the freedom

1 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (7th edn 2023) § 1295 no 15, § 1304 no 10.

of religion and conscience. Considering this delicate field of tension, it is not surprising that some authors have criticised the exclusion of liability in this case.[2]

In other cases however, the independent decision on the part of the victim himself or herself does not weigh so heavily that it seems justified to put a veritable limit to the original tortfeasor's liability. In particular, this is the case when the injured party did not act intentionally, but only (even grossly) negligently and thus aggravated his or her own damage. However, even though a complete exclusion of liability does not seem justified in these cases, there can at least be an apportionment of the damage on the basis of the rules on contributory negligence so that, as a result, the victim may seek compensation for part of the damage. In this sense, the Austrian Supreme Court, for instance, did not entirely exclude liability of the perpetrator in a case where the victim, who was physically incapacitated due to the injury for which the perpetrator was responsible, through carelessness hurt himself again; however, because of contributory negligence of the victim, the perpetrator was only held liable for part of the damage.[3] For further explanations on the apportionment of damages due to contributory responsibility of the victim under Austrian tort law, the pertinent literature is to be referred to.[4] **5**

As already mentioned, in the cases at hand where the consequences of damage are aggravated by an independent decision on the part of the victim himself or herself, in general the same principles apply as in those cases where a wilful act of a third party has intervened. Thus, for further details on this limitation of liability, reference can be made to the statement above under 7/3 no 4ff. **6**

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) TF 4C.345/2003 11 January 2005 (unpublished)

Facts

V1 and V2 bought a competition horse for CHF 250,000 (approx € 240,000). Vet A vaccinated the horse, which fell ill and was saved in extremis by another vet thanks to emergency surgery. According to an expert opinion, the horse's illness was due to a hypersensitivity to the vaccine. The expert added that A had violated several rules of the state of medical art and that his treatment during the horse's illness was inadequate. He estimated the value of the horse at CHF 5,000. However, he explained the loss of value partly by the fact that V1 and V2 had omitted for several years to train the horse after its release from the clinic. **1**

2 Eg *BC Steininger*, Anmerkung zu OGH 2 Ob 219/10k, ÖJZ 2011, 1079.

3 OGH 2 Ob139/88 in ZVR 1989/130.

4 Eg *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/204ff; *id*, Die Schadensminderungspflicht, JBl 1972, 225ff.

2 A appealed against the lower court's decision for him to pay to V1 and V2 damages in the amount of CHF 60,000 (€ 55,000).

Decision

3 The Federal Supreme Court rejected the appeal.

4 It considered that V1 and V2 were linked to A by a mandate and that the vet's contractual obligations were akin to those of a physician. According to the tort law rules applicable in casu, the physician has a large margin of discretion in the choice of treatment. He violates the rules of the medical art if a diagnosis, a therapy or a medical act is unjustifiable according to the objective professional rules. The Court accepted the expert's view that A's treatment was totally inadequate and that it had exposed the horse without need to danger.

5 The Court reminded that the damage consisted in an involuntary diminution (or non-augmentation) of one's patrimony, which corresponds to the difference between the current patrimony and the patrimony such as it would have been without the damaging act. In casu the damage was the difference between the horse's initial value of CHF 250,000 and the estimated current value of CHF 5,000.

6 The Court considered that the fact that the horse was not trained after its recovery did not interrupt the causal link between A's treatment and the damage. It motivated its decision with the arguments that the absence of training was not totally unforeseeable and that it could not be considered as such an important cause for the damage that it would push all other causes to the background. However, the absence of training had to be considered as contributory negligence (*faute concomitante*), which may justify a reduction of the damages according to art 44 para 1 SCO. The Court considered that the damages of CHF 60,000 the lower court had awarded to V1 and V2 was a rather generous solution for A but that it was within the court's margin of appreciation.

Comments

7 In Swiss law, the present case is discussed under the heading of contributory negligence. This is the vocabulary the Court uses in its decision (*faute concomitante*). Contributory negligence may occur either during the damaging act, for example if the victim is partly at the origins of the damage, or if the victim's behaviour after a first damage event is inappropriate.

8 Article 44 para 1 SCO authorises the judge to reduce the compensation or not to award any compensation if the facts for which the victim is responsible have played a contributory role in creating or increasing the damage.[1]

1 This provision applies generally in Swiss civil liability law.

These 'facts' are relevant to the extent that they are attributable to a contributory fault of the victim.[2] The fault can play a double role. If the fault qualifies as serious or gross negligence, it can have the effect of interrupting the causal link between the author's conduct and the damage suffered,[3] thereby releasing the author from any liability. In the opposite case, it will only act as a factor reducing compensation.[4] **9**

The extent of the concomitant fault and its effect on the amount of compensation are matters left to the judge's discretion.[5] In deciding on the gravity of the injured party's concomitant fault, the Court shall take into consideration the objective circumstances surrounding the latter's act, as well as the subjective circumstances.[6] **10**

5. Greece

Areios Pagos (Greek Court of Cassation) 415, 12 April 2019

ChrID 2019, 669

Facts

V was seriously injured in a car accident caused by A and needed hospitalisation. V decided to be hospitalised in a private hospital and included in the amount sought to be paid by A as damages also the amount paid for the hospitalisation in said private hospital. **1**

Decision

The Court of Cassation held, as it also did previously,[1] that the victim has the right to choose between a private or a public hospital to treat him, as it is considered within his right to protect his health and decide on matters concerning his life in a way that he considers proper. However, the victim must prove that the choice was made on the basis of chances of a faster or better recovery rather than on an over-cautiousness basis, in which case such costs will be regarded as abusive (art 281 GCC) and will be subject to re- **2**

2 ATF 116 II 519, 524, c 4b (1990); *C Chappuis*, La faute concomitante de la victime / I.–II, in: F Werro (ed), La fixation de l'indemnité, Colloque du droit de la responsabilité civile 2003, Université de Fribourg (2004) 30.

3 ATF 116 II 733, 734, c 4f (1990); *C Chappuis*, La faute concomitante de la victime / I.–II, in: F Werro (ed), La fixation de l'indemnité, Colloque du droit de la responsabilité civile 2003, Université de Fribourg (2004) 32.

4 ATF 114 II 376 ff (1988), DC 1990, 16.01.1987, at 50; ATF 116 II 733, 734, c 4f (1990); 108 II 51, 56–57 c. 5a (1982); *A Keller*, Haftpflicht im Privatrecht (6th edn 2002) 381; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, vol II/1 (1987) 476.

5 TF 4C.193/2001, 14.05.2002, c 2.5 (unpublished).

6 TF 4C.278/1999, 13.07.2000, SJ 2001 I 110; ATF 115 II 283, 287, c 2a (1989); 111 II 89, 90, c 1a (1985).

1 See AP 634/2010 NoV 58, 2330.

duction (art 300 GCC, reduction on the basis of contributory fault). The Court of Cassation held in the particular case that the objection based on art 281 GCC was raised before the Court of Appeal for the first time, though it should have already been raised before the court of first instance. Thus, it was not admissible.

Comments

3 According to art 929 GCC, in the case of injury to the body or health of a person, such person has the right to seek from the tortfeasor the payment of the medical expenses the former has incurred. The notion of medical expenses is broadly understood in the Greek legal order. It includes all expenses incurred or that have been considered necessary for the recovery of the victim's health,[2] such as the payment of medicine, medical doctors' fees, costs for the transport to the hospital as well as costs of hospitalisation.[3]

4 Regarding the choice of doctor, hospital or method of treatment, it is accepted by Greek courts that said choice belongs to the victim.[4] The victim is not obliged to accept the services the social insurance system offers in order to avoid burdening the tortfeasor. In view of the importance that health has to humans, the rule that the victim has to minimise her damage cannot apply. Accordingly, hospitalisation in a private clinic that is more expensive than a public hospital is allowed and the cost has to be borne by the tortfeasor. Only if the choice of an expensive hospital and doctor is not necessary can the payment of said cost be rebutted on the basis of an abuse of a right (art 281 GCC)[5] and will be reduced according to art 300 GCC on contributory fault, an article which, though located outside tort law provisions, also applies to torts. What also has to be taken into consideration is what the victim would have done if she were to bear the cost of the treatment herself,[6] ie if the victim would have chosen the treatment of the particular injury in a private hospital because the existing conditions in a public hospital would worsen her health condition.

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2 *A Georgiades* in: A Georgiades/M Stathopoulos (eds), Civil Code (1982) art 929 nos 10, 11; *G Georgiades*, SEAK I, 929 no 7; *M Georgiadou* in: I Karakostas, Civil Code, Law of Obligations – Special Part, vol 6 (2009) art 929 no 6; *A Kritikos*, Damages from Traffic Road Accidents, § 17 II no 12; Athens Court of Appeal 4155/1986 Ell Dni 27, 1327; Ioannina Court of Appeal 407/2005, 2007, 170; Kalamata Single Member Court of First Instance 61/2006, EpSygkD 2006, 381.

3 For details about what is included in the medical expenses see *A Kritikos*, Damages from Traffic Road Accidents, § 17 II no 12ff.

4 Athens Court of Appeal 6930/2001, EpSygkD 2004, 641; 5508/1993 Ell Dni 36, 1578; 3252/1991 and 10667/1990, both of them not published; Kavala Single Member Court of First Instance 49/2015 Ell Dni 56, 862; *A Kritikos*, Damages from Traffic Road Accidents § 17 II no 86.

5 The Athens Court of Appeal, in its decision 26/1981 EpSygkD 11, 516, has held that seeking the relevant expenses can be excluded on the basis of the principle of good faith, if such costs had been undertaken by the victim out of excessive care and beyond what is normal. See also *M Georgiadou* in: I Karakostas, Civil Code, Law of Obligations – Special Part, vol 6 (2009) art 929 no 6.

6 See also *A Kritikos*, Damages from Traffic Road Accidents § 17 II no 86.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division)
19 June 2003, 00-22302

Bull civ II, no 203; JCP G 2004, 1, 101, no 9, note *G Viney*; RTD civ 2003, 716, note *P Jourdain*; D 2004, 1346, note *D Mazeaud*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007047923>

Facts

A woman operating a bakery and her daughter had been injured in a traffic accident for which A was held liable. Among the losses for which the woman and her daughter claimed compensation was the loss of the bakery, which had remained closed for nearly six years after the accident and had lost all its clients, as well as the loss of chance for the daughter to take over a previously prosperous business. The appellate court had rejected the plaintiffs' claim on that count, on the ground that the baker, even while not being able to operate the bakery herself, could have handed over the management of the business to someone else, but instead had chosen to let it go into decline and could not blame this decline on the person liable for the accident. **1**

Decision

The *Cour de cassation* quashed the appellate court's decision on the ground that 'the perpetrator of an accident must compensate all the harmful consequences of the accident' and that 'the victim is not obliged to limit her loss in the interest of the person liable'. **2**

Comments

This is the first of a series of decisions in which the *Cour de cassation* held that 'the perpetrator of an accident must compensate all the harmful consequences of the accident' and 'that the victim is not obliged to limit her loss in the interest of the person liable'. While the present case concerned a traffic accident, the *Cour de cassation* referred to former art 1382 Civil Code, a very general provision on tort law, thus indicating that the reason for its decision did not lie in the specificities of *loi Badinter*.[1] It is indeed a clear solution under French law that a defendant must answer also for the losses or additional losses resulting from a decision of the injured party, including when, as was the case here, his liability is strict and not based on fault.[2] This solution has been applied mostly **3**

1 See 5/6 nos 14–15 above.

2 Liability for traffic accidents is strict under French law; see 5/6 nos 14–15 above.

in cases where the initial harm was a bodily injury, but also in some instances of pure economic loss[3].

4 The justification behind this solution is clearly that the person liable and the victim are not on an equal footing, and that the latter's interest should prevail over that of the former. This can be seen as an extension of the idea already expressed by *Bertrand de Greuille* at the time of the adoption of the Civil Code, according to which, 'the law cannot balance between he who is wrong and he who suffers'.[4] Of course, this approach conspicuously ignores the interest of society as a whole, since it promotes, or at least condones, behaviour which may be regarded as not socially responsible.

5 The present case does indeed show that even a decision by the victim which may seem unreasonable does not 'break' the causal relationship between the fact giving rise to liability and the loss resulting from that decision. The only limit to this rule, albeit implicit, is the general rule on comparative fault, since it is not disputed that the victim's right to compensation must be reduced when she contributed to her harm through her own fault. In practice, however, comparative fault is mostly relied on in cases of bodily injury and there seems to be hardly any case where a decision taken by the victim after the initial harm was suffered was regarded as comparative fault. Here, the victim's decision not to find another manager for her bakery was undoubtedly unsound from a business perspective, but it fell short of negligence, at least in the eyes of French courts.[5]

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 25 October 2012, 11-25.511

D 2013, 415, note *A Guégan-Lécuyer*; JCP G 2013, 484, note *P Stoffel-Munck*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000026542681>

Facts

6 A woman had been injured in a traffic accident and could no longer walk normally. Among the heads of losses for which she sought compensation from the person liable for the accident was the cost of hiring someone who must be present overnight to help her down the stairs from her room on the second floor in case a danger should arise. The appellate court refused to grant that claim and held that it would be cheaper for the claim-

3 See, eg, Cass civ 1, 2 July 2014, 13-17.599; RDC 2015, 24, note *G Viney*; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000029194036>. In that case, the Cour de cassation referred to the same rule as the one formulated in the case commented above and ruled that public notaries who had been involved in a property sale intended to create a tax reduction for the buyer were liable for the loss suffered by the latter, who had not been denied that tax reduction but had chosen not to try and benefit from another tax reduction scheme.

4 *PA Fenet*, Recueil complet des travaux préparatoires du Code civil (1827) vol 13, 474.

5 It is not clear from the Cour de cassation's decision, however, if the defendant put forward the plaintiff's negligence before the lower courts.

ant to move to a room on the ground floor, to have her house extended or even to move to another house, something she had already done since her accident.

Decision

The *Cour de cassation* quashed the appellate court's decision on the ground that 'the perpetrator of an accident must compensate all the harmful consequences of the accident' and 'that the victim is not obliged to limit her prejudice in the interest of the person liable'. **7**

Comments

This is another illustration of the rule set out in the decision cited just above. Both cases concerned traffic accidents, but nothing in the decisions suggests that this played a role in the *Cour de cassation*'s ruling. **8**

The difference between the two cases is that, in this one, the victim's choice was not just an abstention and did not just express poor business judgement; it bordered on the whimsical and suggested a deliberate choice to make things more complicated. Besides, since there can be no control under French law on the use of sums awarded to compensate harm, there was a risk that, once she got the money for an overnight attendant, the victim would move to another room or place where she would not need him or her, thus getting in effect richer from her accident. Yet, this consideration, assuming it was ever aired before the Court, did not prevent them from clinging to the rule adopted in 2003 and from hammering their now famous dictum. This gives the rule a distinctive punitive flavour. Even though French law officially rejects punitive damages,[6] French courts prefer to err on the side of overcompensation rather than to impose on victims a duty to mitigate their losses. **9**

Cour de cassation, Chambre civile 1 (Supreme Court, First Civil Division)
15 January 2015, 13-21.180

Bull civ I, no 13; RDC 2015, 461, note *JS Borghetti*;
<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000030114056>

Facts

Following a surgery, a man developed hyperthermia indicating an infectious state. After a couple of days, however, he refused any treatment and left the clinic to return to his home, against medical advice. Even though his condition worsened, he refused to go to a **10**

6 See *JS Borghetti*, Punitive Damages in France, in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 55ff.

doctor and was eventually admitted to another hospital, where he was diagnosed with streptococcal septicaemia, with secondary damage to the shoulder, liver and heart. This required several treatments, and the man sued the clinic where he had undergone the initial surgery. The appellate court held that the complications of the infection were the consequence of the patient's refusal, for a period of more than a month, to undergo a treatment that was neither extensive nor painful, because he believed in 'natural medicine'. The court therefore only accepted to compensate those consequences of the nosocomial infection which the claimant would have suffered if he had been 'normally treated'.

Decision

11 The *Cour de cassation* quashed the appellate court's decision. According to the Supreme Court, the worsening of the patient's condition could not be blamed on his refusal to accept the proposed treatment, since the latter had been necessary only because the patient had contracted a nosocomial infection for which the clinic was liable.

Comments

12 In this decision, the *Cour de cassation* did not resort to its oft-repeated statement whereby 'the victim is not obliged to limit her prejudice in the interest of the person liable', and it instead chose to rely on the statutory provisions which state that a medical treatment must normally be accepted by the patient (art 16-3 Civil Code and art 1111-4 Public Health Code). The logic and result are the same as in the previous case, however. Additional losses resulting from a decision of the injured party must be borne by the person liable. Here again, the victim's fault probably constitutes the limit, even though this is not explicitly stated by the Court. Given that a patient has an absolute right under French law to accept or refuse medical treatment, however, the claimant's refusal in this case cannot be regarded as a fault.

7. Belgium

Cour d'appel de Liège (Liège Court of Appeal) 23 February 2016

RGAR 2016, no 15338

Facts

1 V is walking his dog quietly on a leash when a massive dog suddenly comes out of a neighbouring property and repeatedly bites his animal. V's dog is admitted to the veterinary clinic severely shocked with multiple wounds. He stays there from the day of the accident until the date of his death, one month later. V claims from the insurer of the other dog's owner the reimbursement of the veterinary expenses incurred which amount to a total of € 7,033.

Decision

According to the Court, despite the existence of an emotional bond between a man and his pet, the owner of a seriously injured dog does not behave like a normal, reasonable and prudent person in the same circumstances when he incurs such significant expenses to keep it alive. An animal cannot be assimilated to a human. In view of the seriousness of the injuries suffered by the dog, asking for an unsuccessful blood transfusion or keeping it in a clinic for a long period at an exorbitant cost when compared to the purchase cost of the animal constitutes unjustified obstinacy. It leads to a worsening of the damage, which cannot be at the expense of the liable tortfeasor. Therefore, the dog's owner does not have to bear the faulty aggravation of the damage, ie the exorbitant veterinary costs compared to those that a normally prudent and diligent person would have incurred. He only must compensate the costs of veterinary care which were in a strict causal link with the attack, assessed by the judge as a lump sum of € 1,000. **2**

Comments

Under Belgian law, the victim is not obliged to limit his or her damage as far as possible 'in the interest of the responsible person'[1]; he or she must take all reasonable steps to limit the damage but only if this would have been the behaviour of an ordinarily prudent and diligent person.[2] Consequently, the author of misconduct may criticise the victim for not having limited his or her damage only when he proves that the victim did not behave as a 'reasonably prudent person' in the same circumstances.[3] **3**

In the event of a breach of this duty of mitigation, 'damages shall be reduced in proportion to the damage which could have been avoided if reasonable measures had been taken'.[4] For example, in the context of judicial proceedings, when the victim neglects to pursue his or her claim for compensation within a reasonable period of time, it may constitute a breach of his or her obligation to mitigate the damage and may then justify the cancellation or reduction of the amount of compensatory interest.[5] **4**

If the duty of mitigation does not require the victim to seek the least expensive solution at any time[6], the victim cannot, in turn, commit a fault in the exercise of his or her right to claim full compensation for the damage suffered. In a case filed to the Brussels Court of Appeal, the owner of a luxury car brought an action against the responsible person in order to **5**

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1 Expression set by Cass fr, 18 July 2013, <https://www.courdecassation.fr>.

2 Cass, 14 May 1992, RGAR, 1994, no 13312; Cass, 17 May 2001, Pas 2001, 889.

3 For a complete review of the topic, see *M Houbben*, Le devoir pour la victime de minimiser son dommage, in: Le dommage et sa réparation dans la responsabilité contractuelle et extracontractuelle: études de droit comparé (2015) 513ff.

4 *P Wéry*, Droit des obligations: vol 1 – Théorie générale du contrat (2011) 473.

5 Pol Gand (8th ch), 17 December 2001, Bull ass 2005, 778; Pol Liège, 14 February 2008, EPC 2008, III.2. Liège, 121; Court of Appeal of Anvers (2nd ch), 9 December 2009, RW 2011–12, 1303.

6 Pol Bruxelles (26th ch), 15 December 2004, RGAR 2006, no 14139.

obtain, in addition to reimbursement of the repair costs resulting from rubble falling on his vehicle (Fr 36,989), reimbursement of the cost of renting a car of the same make (Fr 168,074) during the ten day period needed for the repairs. The Court reduced the compensation to an amount equivalent to the cost of renting an 'average' replacement vehicle.[7]

6 However, if the victim has not committed any fault, the author of the initial accident is obliged to compensate the entire damage suffered, both primary and secondary. For instance, the fact that a victim chooses to get treatment from a doctor other than the one closest to his or her home cannot be considered as a fault.[8] Another court has ruled on a case where an initial accident compelled the victim to use crutches. Then while using these, the victim slips and breaks his leg. The judge held the author liable to compensate for the consequences of the second accident as well.[9]

7 In short, the (non-existent) obligation to do everything possible to limit the damage should not be confused with the victim's obligation to act as an ordinarily prudent and diligent person, ie to not wrongly aggravate his or her damage.[10]

Tribunal de première instance de Liège (Liège Court of First Instance) 26 June 1990

Bull ass 1990, 830

Facts

8 V had an accident at school resulting in multiple fractures and is significantly limited in the mobility of his right forearm and right wrist. These after-effects result in a partial personal permanent disability of 40 %. After the initial treatment, his doctor suggested a new operation on the fractured right humerus, but this was refused by the patient and his family. According to the expert and the doctors consulted, the suggested operation is a routine operation with a very high chance of success (85 %) and which would reduce the remaining incapacity to 10 % or 15 % instead of the observed 40 %.

Decision

9 The Court considered that the victim's refusal to undergo the operation recommended by the medical profession, without the slightest medical justification, appeared unreasonable and, therefore, contrary to the obligation of every victim to reasonably minimise his or her damage. Consequently, the court of first instance reduced the victim's claims to what could and should have been his normal harm, by compensating him in accordance with a permanent incapacity of 15 %.

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7 Court of Appeal of Brussels, 23 March 2000, Bull ass 2000, 489.

8 Court of Appeal of Anvers, 15 April 1997, TAVW 1998, 35.

9 Court of Appeal of Liège, 20 May 1974, RGAR, 1976, no 9599.

10 *D de Callataÿ*/*N Estienne*, La responsabilité civile. Chronique de jurisprudence 1996–2007, vol 2: Le dommage (2009) 59.

Comments

Should the compensation to the victim be reduced when he or she refuses medical intervention intended to minimise the extent of the damage? Patients generally agree to undergo treatment that may improve their condition, which no doubt explains the scarcity of case law on the subject.[11] However, when the problem does arise, the courts usually analyse the patient's attitude in terms of the seriousness, risks, inconveniences, pain and potential consequences of the surgical intervention. In other words, the judge weighs up the risks and benefits of the medical act that the victim has refused and assesses if the patient's personal choice appears unreasonable or abnormal. According to the Court of Appeal of Ghent, when the corrective surgery is 'probably very painful', the victim of a dog bite cannot be blamed for having waited a few years before deciding not to undergo it.[12] Similar reasoning is observed in the field of work accidents. For instance, the Labour Court of Antwerp ruled that 'the victim's refusal to undergo a surgical operation – which is likely to reduce or completely eliminate the permanent incapacity for work and which does not involve any exceptional risk – is not justified and cannot be charged to the industrial accident insurance company'.[13] **10**

It should be noted that the commented judgment dated from before the adoption of the Act of 22 August 2002 on patients' rights.[14] Article 8, § 4, subpara 1 of this Law states that the patient always has the right to refuse an operation. Although there is no longer any doubt that the doctor must respect this corollary of the right to self-determination, the question remains on the possible repercussions of a refusal of treatment in terms of compensation. **11**

In the light of the fundamental right to physical integrity and the right to control one's body, a patient's refusal to undergo medical treatment, which would likely have reduced his or her harm or prevented its aggravation, can never be regarded as wrongful since it is the exercise of fundamental freedom. Some prefer then to see the obligation for the victim to limit the importance of his or her damage in the good faith principle. Others rather place the debate in terms of causation and not on the potential existence of 'misconduct'. In this case, the trial judge has to distinguish between the damage resulting from the author's harmful conduct from that resulting from the victim's discretionary choice. If the judge finds that, but for the patient's refusal of care, the damage as it occurred would not have occurred in the same way, the victim will have to bear the consequences resulting from his or her personal choice.[15] **12**

11 *J-L Fagnart*, Le refus de soins, For ass 2015, 136.

12 Court of Appeal of Gand, 19 September 2002, RGAR 2003, no 13768.

13 C trav Anvers, 17 May 2004, Bull ass 2005, 60.

14 Loi du 22 août 2002 relative aux droits du patient, MB, 26 September 2002, 43719.

15 *G Genicot*, Le refus de soins entraînant une aggravation du préjudice causé par la faute d'un tiers : une hypothèse délicate et controversée, Rev dr santé 2015–2016, 270–276.

13 In contrast to its French counterpart, the Belgian Supreme Court has not given a formal ruling on the subject yet.[16] This conflict between the patient's autonomy and the reasonable obligation to mitigate his or her damage therefore remains a delicate and controversial issue in Belgian law.[17] In our view, 'the freedom to refuse treatment certainly prohibits any form of "reparation in kind", which would consist in implementing treatment against the patient's will. However, it does not imply that the patient's choice should be without consequence on the extent of the compensation to which he or she is entitled. It is one thing for the patient to be free to refuse treatment; it is another for him or her to be able to pass the full consequences of that choice on to the person responsible for his or her initial damage'.[18]

Cour de cassation / Hof van cassatie (Supreme Court) 6 November 2002

RGAR 2003, no 13719

Facts

14 A swindle, involving an amount of BEF 183,000,000, was committed by a stockbroker, A, during the sale and purchase of securities on behalf of an investment fund. V, a credit institution, was one of the main shareholders of the fund's management company.

15 On the civil issues, the Court of Appeal of Liège ruled in favour of a shared liability, with two-thirds being borne by A and one-third by V. Although the perpetrator of the swindle committed an intentional criminal offence, the bank was also negligent in not exercising sufficient supervision and control over the disputed transactions. Before the Supreme Court, the bank invokes the *fraus omnia corrumpit* principle in order for the judgment to be overturned.

Decision

16 The Supreme Court followed the argument brought by the bank and overturned the contested judgment. The Court began by pointing out that when damage is caused by the concurrent faults of the victim and a tortfeasor, the responsible person cannot, as a rule, be condemned to pay full compensation to the victim for the damage. However, the Supreme Court introduces a new exception to this rule. The general principle of *fraus omnia corrumpit* prohibits any deceit or dishonesty with the aim of causing harm or making a profit. Therefore, this principle excludes the perpetrator of an intentional offence from benefitting from a reduction in the reparation because of the victim's negligence.

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16 Cass fr, 15 January 2015, Rev dr santé, 2015–2016, 267.

17 For case law on this topic, see Trib trav Namur, 12 October 1977, Bull ass 1978, 123; C trav Mons, 10 December 1997, RGAR 1999, no 13105.

18 *J-S Borghetti*, L'incidence du refus de soins sur le droit à indemnisation de la victime d'un dommage corporel, RDC 2015, 461.

In the discussed case, the perpetrator of the fraud cannot therefore invoke the bank's lack of vigilance in an attempt to obtain a sharing of liability.

Comments

This judgment marks a clear turnaround in the case law of the Belgian Supreme Court. Previously, in the presence of a concurrent fault from the victim, the Supreme Court strictly applied the 'but-for' test, according to which, all faults that necessarily led to the damage entail the liability of their author. A shared liability – often *unequal* having regard to the seriousness of the committed faults – was therefore systematically established. Full compensation of the victim was not possible since the nature of the faults could not be taken into account by the trial judge when assessing the causal link. **17**

From now on, this rule only applies in the event of unintentional misconduct of the tortfeasor. Where the responsible person has committed an intentional fault, the theory of equivalence of conditions gives way to the principle of *fraus omnia corrumpit*. In the case of a fraudulent act, any shared liability is, therefore, excluded. The principle that no one can benefit from an intentional fault prevents the perpetrator of a fraudulent act from relying on the victim's negligence to claim a reduction in compensation. In so doing, the above decision provides a clear departure from the equivalence theory, which is established case law of the Belgian Supreme Court. This exception is no doubt justified by the intention to provide better protection to victims of intentional criminal offences.[19] **18**

The decision commented above is a matter of limitation of liability since the victim's misconduct will have, in this particular situation, no influence on the compensation of his or her damage. The same reasoning applies in the case of an intentional fault committed by the victim themself. The *fraus omnia corrumpit* principle prevents the victim of misconduct from obtaining compensation when the damage partially results from his or her own intentional fault.[20] This case can also be seen as an example of limitation of liability since the tortfeasor will be exempted from any liability even if he committed a wrongful act. **19**

19 For comments, see *B Weyts*, Fraus omnia corrumpit in het buitencontractueel aansprakelijkheidsrecht: geen aansprakelijkheidsverzekering in geval van opzet, RW 2002–03, 1629 ff; *J Kirkpatrick*, La maxime fraus omnia corrumpit et la réparation du dommage causé par un délit intentionnel en concours avec une faute involontaire de la victime. A propos de l'arrêt de la Cour de cassation du 6 novembre 2002, JT 2003, 573 ff; *P Graulus*, Fraus omnia corrumpit et responsabilité extracontractuelle, Bull ass 2003, 816 ff; *F Glansdorff*, Encore à propos de la causalité: Le concours entre la faute intentionnelle de l'auteur du dommage et la faute involontaire de la victime, RCJB 2004, 272–290.

20 Cass, 2 March 2016, RGAR 2016, no 15336.

8. The Netherlands

Hoge Raad (Supreme Court) 25 September 1992, ECLI:NL:HR:1992:ZC0691
NJ 1992/751

Facts

1 A veterinarian, who was consulted by a farmer raising calves, prescribed medication for ill calves. The farmer administered the medication wrongfully to the calves and many of the calves died. The veterinarian was held liable for this loss. The appellate court ruled that the veterinarian had not acted properly by not supervising the dosage of the medication and by failing to have the farmer calculate and weigh the amount of medicines to be administered, but it also ruled that the veterinarian did not have to check the actual administration of the medication by the farmer. The appellate court denied the claim because of lack of causality between the improper conduct of the veterinarian and the death of the calves, because the calves had died as a result of a considerable overdose of the medication, which can only be attributed to a serious administration error by the farmer.

Decision

2 The Supreme Court upheld the decision of the appellate court. It ruled that the judgment of the appellate court must be understood as meaning that, in the given circumstances, given the nature of the liability and of the damage, the significant overdose cannot be attributed to the veterinarian as a result of his improper conduct. The Supreme Court finds that the considerations of the appellate court – which are strongly intertwined with valuations of a factual nature – are not incomprehensible and did not require further motivation.

Comments

3 This case illustrates that intervening conduct of the person suffering the loss may stand in the way of causal attribution. In literature, it is recognised that such situations may be dealt with either under the heading of causal imputation (art 6:98 BW), resulting in an 'all-or-nothing decision', or under the heading of contributory negligence (art 6:101 BW), also allowing attribution of part of the loss to the claimant. It is also recognised that it cannot be clearly distinguished which article is to be applied under which circumstances.[1] The decision furthermore illustrates that how such a situation must be judged is merely a matter of valuation of facts.

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1 Groene Serie Schadevergoeding (comment by *RJB Boonekamp*) art 96 (Deventer, Wolters Kluwer) no 5.2.4.2.

9. Italy

Corte di Cassazione (Court of Cassation) 23 February 2000, no 2037

Resp civ prev 2000, 984, with note by *L Gaudino*, Suicidio del lavoratore infortunato e risarcimento del danno; Danno e resp 2000, 1203, with note by *F Salvatore* and *A Palmieri*, Suicidio dell'infortunato: imputazione dell'evento letale e selezione dei danni risarcibili, Dir giust 2000, fasc 8, 6, with note by *M Rossetti*, Lungo i sentieri del nesso di causalità la Suprema corte liquida anche il suicidio, Riv giur lav 2000, II, 474, with note by *S Guerra*; Nuova giur civ comm 2001, I, 70, with note by *F Alleva* and Arch giur circol e sinistri 2000, 847, with note by *V Toninelli*.

Facts

A lorry driver, V, employed by a road transportation company, suffered carbon monoxide poisoning, which emanated from his lorry's defective heating system. This poisonous gas filled the cockpit while he was resting in a motorway lay-by. Following the poisoning, the victim was completely physically impaired for a period of time and, after that, he suffered a permanent impairment of 70 % of his physical capacity. 1

Thirteen months after the accident, V, severely depressed, committed suicide. 2

The widow and sons of V sued his employer to obtain compensation for both the damage caused by the period of temporary total physical impairment and the permanent physical impairment of 70 % until his death. They also claimed the compensation of the damage they suffered because of his death, holding that his suicide was the direct consequence of the accident caused by the defendant. 3

The first instance court ruled that the claimants were entitled to obtain compensation for the damage suffered up to the suicide of V, the breadwinner in this family. On appeal, the court ruled that the damage suffered by V's widow and sons as a consequence of V's suicide should also be compensated, since they were deprived of the income that V earned for the family. The Court held that V's severe depression, caused by the poisoning, which was A's fault, led V to take his life. A appealed against this decision. 4

Decision

The *Corte di Cassazione* upheld the decision of the second instance court, holding that V's suicide did not interrupt the causal link between A's harmful conduct – consisting of providing an unsafe vehicle – and the harm resulting from the suicide, for which V's widow and sons claimed damages. The same wrongful conduct had caused V's serious psychological illness, that is a depressive psychosis, or other serious mood changes, affecting V's nervous system and his capacity for self-control. 5

The Court ruled that V's suicide could not be deemed to be an extraordinary and atypical event, extraneous to the causal chain beginning with the harmful conduct, but was instead, as stated by the medical expert, the direct and immediate consequence of the carbon monoxide poisoning, which had caused V's severe depression, leading him to commit suicide. 6

Comments

7 This case is a clear example of how the rules on causation in Italy are applied in cases where personal injuries, directly caused by A, are followed by harmful events, in which V's actions play a part. The tendency is to hold the defendant liable for the compensation of all the damage flowing from the entire sequence of events.

8 In similar cases, Italian judges in fact generally tend to consider that the general rule of art 1223 of the Italian Civil Code, discussed above (Introduction, 1/9 no 4 f) is not a bar to compensation. The duty to compensate only such damage that is deemed to be the 'direct and immediate' consequence of the defendant's negligence should, in these cases, be interpreted in such a way that V's suicide is not to be considered as an interruption of the causal link, when that same suicide was caused by a state or depression or distress that is the consequence of A's wrongful action or omission.

9 The decisions handed down by Italian courts do not only affirm the existence of a causal link when the suicide was committed because of a state of disease and depression originating from the injuries inflicted by A,[1] but also when the suicide was a sudden reaction to the physical pain and psychological distress suffered by V immediately after the accident.[2]

10 The same rule governs cases where V's second set of injuries is the consequence of a negligent rather than a deliberate action of the same victim. For example, A's liability was affirmed in full when a motorcyclist, who had his leg broken as the consequence of a traffic accident caused by the defendant, fell from the second floor of the hospital where he was recovering while attempting to escape from the building. In this case, V was still suffering from mental problems caused by the road accident.[3]

Corte di Cassazione (Court of Cassation) 4 July 1986, no 4404

Giust civ Mass 1986, no 7

Facts

11 The local provincial authority built a drainage system to divert the rain on the provincial road. Following this construction, a vineyard was often flooded following rain and suffered water stagnations.

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1 For a similar case: App Messina, 19 July 1960, Giur sic 1960, 922.

2 Cass 7 February 1996, no 969, Resp civ prev, note by *L Gaudino*, Suicidio post-traumatico e responsabilità civile, Foro it 1996, I, 2482 (the victim, a member of military troops, committed suicide with his gun immediately after the car accident, having realised the seriousness of his physical injuries). There is an old case to the contrary: Cass 10 April 1963, Foro it 1963, II, 265 (V's suicide following a road accident interrupts the causal link between A's wrongdoing and the death, the latter being an extraordinary and unpredictable event).

3 Trib Milano 13 July 1989, Giur it 1989, I, 2, 54.

The owner and farmer of the vineyard sued the local provincial authority for the compensation of damage to his vineyard, claiming that the system to divert the rain was defective and that the local provincial authority omitted to maintain it as it should have done. 12

The *Tribunale* of Trapani, in its decision of 26 May 1982, stated that the local provincial authority had caused the flooding and water stagnations due to its negligence, and affirmed its liability. Nevertheless, the Court also pointed out that the flooding and the water stagnations did not affect the entire vineyard. The technical expert appointed by the Court reported that a portion of the vineyard, which was located far from the drainage system, could easily have been cultivated by the claimant, without incurring onerous expenses or expending great efforts. Therefore, in that section of the vineyard, the irreversible deterioration of the vines was a consequence of the owner's inertia. Hence, the damage to be compensated by the local provincial authority was to be reduced accordingly. 13

The *Corte di Appello di Palermo*, in its decision of 19 July 1983, upheld the decision of the court of first instance. 14

Decision

On appeal, the *Corte di Cassazione* ruled that the owner of the vineyard contributed to the damage, because he did not cultivate the part of the vineyard that had not been flooded. 15

According to the Court, both the Tribunal and the Court of Appeal rightly affirmed that that owner of the vineyard could have cultivated that part of the land, instead of neglecting it as he had, hence the portion of the vineyard that had not been affected by the flooding was not to be taken into account when calculating the compensation due. 16

Comments

The case under examination deals with the application of the second section of art 1227 cc: 'Compensation is not due for damage that the creditor could have avoided by using ordinary diligence'. This rule was introduced in the Italian Civil Code of 1942; it had no precedent in the first Italian Civil Code of 1865 or in the French Civil Code of 1804. Its source of inspiration was likely BGB § 254(2).[4] 17

While the first section of art 1227 cc deals with the cases where the victim contributed to the harm, with the consequence that damages must be proportionally reduced because of this causal contribution to the production of the harm, the second section instead concerns those cases where the victim's conduct worsened the damage which is 18

4 For general comments on art 1227 cc, see *M Franzoni,* Il danno risarcibile (2010) 24ff.

a consequence of the tortfeasor's conduct, or where the victim is to be blamed because he did not reasonably act to reduce the harm caused.

19 Comparing this case to the first case of this section, therefore, we may infer that while the victim's active conduct, that is to say the suicide, was considered by the Court as the direct and immediate consequence of the defendant's conduct (art 1223 cc), in this case the claimant's omission, namely the decision not to cultivate the part of vineyard not damaged by the flooding, was interpreted by the judges as an omission to reduce the possible amount of damage.

20 When the second section of art 1227 cc is applied, the expenses incurred by the victim to limit the harmful consequences of the wrongful event are to be paid by the tortfeasor.

21 This is one of the rare applications of this rule. As the commentary to the next case makes clear, Italian courts seldom apply this rule, especially when the victim would have to perform an action involving her or his body, or to give up his or her freedom of choice in order to limit or reduce the harmful consequences of a wrong.

Corte di Cassazione (Court of Cassation) 15 January 2020, no 515

Resp civ prev 2020, 6, 1890, with note by *F Greco*, Il rifiuto di emotrasfusioni: libertà di autodeterminazione e efficienza concausale; Ridare.it, 25 February 2020 with note by *M Liguori*, Rifiuto della trasfusione di sangue salvavita per credo religioso e interruzione il nesso causale tra evento dannoso cagionato da terzi e successivo decesso.

Facts

22 One driver, V, was seriously injured in a car accident caused by the fault of another driver, A. V was admitted to hospital, where he underwent an emergency surgical operation as well as all treatment necessary, with the exception of blood transfusions. V was a Jehovah's Witness and, although unconscious when hospitalised, he had with him an express declaration rejecting any blood transfusion because of his faith. V died the same evening of the car accident.

23 The *Tribunale di Roma*, the court of first instance in the case, affirmed in its decision dated 15 September 2010 no 18332 A's liability for his negligent driving. It also held that V's refusal to undergo a blood transfusion did not interrupt the causal link between the car accident and his death. This conclusion was reached because, according to the Court, the refusal of the transfusion was to be considered legitimate, being an exercise of V's right.

24 The *Corte d'Appello di Roma*, second instance court in the case, in its decision dated 25 May 2017 no 3510, held instead that, as V's chances of survival if the blood transfusion had been performed were between 50 % and 65 %, the death was the consequence of both A's negligent driving and of V's assumption of a risk. Consequently, the damages awarded were reduced by half.

25 On appeal before the *Corte di Cassazione*, V's heirs argued that the free legitimate religious choice of the deceased, concerning the integrity of his body, could not be in-

voked to reduce A's liability. They flatly rejected the application of the provisions of art 1227 cc to the facts of the case.

Decision

The *Corte di Cassazione* held that the V's refusal of the blood transfusion did not exclude or reduce A's liability, because A's conduct was, in itself, sufficient to cause the fatal injuries suffered by V. Without A's fault, V would not have suffered the bodily injuries that put him in danger, nor would he have required medical care or the blood transfusion that, although it could have saved his life, was unacceptable to him on the basis of his faith. **26**

Accordingly, the rejection of blood transfusions, made on the basis of his religious belief and of his freedom of choice over medical therapies (both protected by the Italian Constitution), did not amount to contributory negligence under the first subsection of art 1227 cc. Nor was it correct to hold that V was under an obligation to accept the blood transfusion, so that the application of the first provision of art 1227 cc was also ruled out by the Court. **27**

Comments

This case is peculiar due to the victim's religious motivation in denying his consent to the blood transfusion that could have saved his life. Actually, some scholars disagree with the decision: A should not be required to pay for the damage that partially originated in V's personal choices.[5] The case is a good example of the judicial tendency to avoid the application of the second subsection of art 1227 cc in cases where V's personal opinions, freedom, health, etc are at stake. **28**

V's 'duty' to mitigate the consequences of A's wrongdoing, as it is sometimes called,[6] usually ceases to operate when the victim should take especially onerous measures, or put his life at risk, or take personal sacrifices which impinge on his or her freedom, in order to reduce the harmful effects caused by the tortfeasor's wrongful conduct. **29**

Therefore, although only a new surgical intervention could limit or suppress the pain caused by the scars of a hysterectomy, such a second intervention was by no means a prerequisite to claim full compensation for the damage suffered as a consequence of **30**

5 See *B Tassone*, Testimone di Geova, rifiuto di cure e risarcimento integrale, Foro it 2020, 2082 (critic of the decision). For *P Laghezza*, "Hic sunt leones": gli incerti confini del danno, fra diritto all'autodeterminazione e volontaria esposizione al rischio, Foro it 2020, 2089, according to the ruling, the defendant should be liable for damage that is well beyond what should reasonably be taken into account. But, in our opinion, the decision is to be supported for the reasons given by *G Calabresi*, Ideals, Beliefs, Attitudes and the Law: Private Law Perspectives on a Public Law Problem (1985), namely a different decision would discriminate among (religious) beliefs.

6 *C Criscuoli*, Il dovere di mitigare il danno subito, Riv dir civ 1972, I, 553 ff, 572; Cass 11 February 2005, no 2855, Rep Foro it 2005, voce Danni civili, no 185.

the hysterectomy.[7] Nor should a woman abort her baby in order to limit the consequences of a failed sterilisation, namely an unexpected and unwanted pregnancy.[8]

31 In the same vein, a claimant is not obliged to choose, where she or he has a choice, the less onerous course of action to reduce harm, provided that the expenses incurred are reasonable.[9] The expenses are not reasonable, for example, when the repair costs are greater than the market value of a car,[10] or when the victim chose to be treated in a private clinic instead of undergoing the same treatment at the expense of the national health service in a public hospital.[11]

10. Spain

Tribunal Supremo (Supreme Court) 7 March 2018

RJ 2018\1063

Facts

1 V, a spectator, suffers injuries in one eye from the impact of a ball during the warm-up before a professional football match. She sues the football club and its insurer. The First Instance Court and the Provincial Court of Appeal reject the claim and the Supreme Court upholds their views.

Decision

2 Objective imputation of damage can be examined in cassation. Objective imputation is a legal question involving an assessment that goes beyond the mere dispute over the physical causal link, and which requires assessing the possibility of attributing to the agent the damage caused according to criteria developed in the legal system, such as the proximity with their conduct, the scope of protection of the infringed norm, the increase of risk, the victim's consent and assumption of the risk, and the principle of trust, which are criteria which have been taken into account by this Chamber in several judgments (147/2014, of 18 March; 124/2017, of 24 February).

3 In fact, there is no legal causation in this case. A ball projected from the playfield to the stands is indeed at the origin of the damage suffered by the claimant. Still, the causal link with the spectator's injuries to her eye disappears from the moment in which she assumed a risk that is inherent to the game and of which she is aware, namely that of

7 Cass 10 May 2001, no 6502, Resp civ prev 2001, 1160.

8 Trib Venezia, 10 September 2002, Resp civ prev 2003, 117.

9 For first examples on these cases: *M Bussani,* L'illecito civile (2020) 796.

10 Cass 28 April 2014, no 9367, Resp civ prev 2014, 847, and Cass 4 November 2013, no 24718, Arch circ sin 2013, 1093.

11 Trib Trieste, 14 January 1988, Dir prat ass 1988, 539.

a ball shot with more or less force towards the stands located behind the goal post. The responsibility of the organiser of the sporting event should not be judged from the perspective of the singular risk created by an ordinary incident of the game, to which he is unrelated. The risk that is created is not something unexpected or unusual, for which he must be held liable. It arises during the football players' warm-up before the game where the throwing of balls into the stands is more frequent, and is transferred to the sphere of responsibility of the victim, who controls and assumes this potential source of danger. Therefore, the causal link is established between this voluntarily assumed risk and the damage produced by the ball, with the consequent obligation to bear the consequences derived from it.

Comments

There are different devices that the Spanish courts use to limit liability based on the victim's decisions, such as assumption of risk and the victim's consent, the so-called 'competence of the victim' criterion, and the victim's contributory negligence, which is not listed as an 'imputation criterion' but, following the old causation doctrine of French origin, is treated as a factor for causation and thus included in the criteria of objective imputation. Usually, some courts and some legal scholars treat them as criteria of 'objective imputation'. However, from the standpoint of the tortfeasor, they are defences or grounds for partial or total exoneration from liability. From the victim's perspective, these devices are grounds of subjective attribution, reasons allowing attribution of the damage due to her own fault, or because a risk materialised while under her control or which pertained to her sphere of risk. To these criteria, the so-called 'ordinary risks of life', which is recognised as an autonomous criterion, could perhaps be added. This will be examined below under 11/10 no 1 ff because, although it is a risk that rests within the victim's sphere, it is not contingent on her decision. **4**

As regards assumption of risk, legal writing points out that the damaging result is not attributable to the agent when the protected legal interest that has been violated could be disposed of, and the victim assumed the risk of suffering the damage that ensued or gave her consent to its production.[1] The difference between the assumption of risk and the victim's consent lies in that, in the former, the victim agrees to take part in an activity creating the risk of damage, whereas, in the latter, the victim consents to a harm that is not merely possible or even probable but actual/real. Courts use the criterion of assumption of risk to exonerate defendants from liability, totally or partially, when the claimant willingly took part in any kind of sport.[2] It is usual to find this criter- **5**

1 *P Salvador Coderch*/*A Fernández Crende*, Causalidad y responsabilidad (Tercera edición), InDret (2006) no 329, 17 f.

2 STS 18 March 1999 (RJ 1999\1658) (skier who dies after colliding with the booth of an electric transformer when descending a ski slope) and 15 February 2007 (RJ 2007\1452) (skier who suffers injuries when falling on a slope designed for experienced skiers), STS Administrative Chamber, 1 July 2002 (RJ 2002\

ion in litigated cases in activities involving bulls or heifers, which are still common in local festivities in some Spanish villages and cities.[3] The rule is also used in connection with cases where the defendant was injured when trespassing on private property without the owner's consent.[4] In the area of sports, the criterion of assumption of risk can refer both to the risk assumed by those who practise it and to the risk assumed by the spectators. There are doubts as to whether its doctrinal classification is to be found in unlawfulness, where it would involve a ground of justification, or in causation, or more specifically, in 'objective imputation'. Case law and and an important section of legal scholarship follow this second classification when it considers it as a relatively autonomous species of the 'victim's fault' belonging to the genus 'victim's causal event'.[5]

Tribunal Supremo (Supreme Court) 18 March 2014

ECLI: ES:TS:2014:981

Facts

6 Firefighter V dies from injuries sustained on the occasion of a fire in which he intervened. His wife and two children bring a claim for compensation for the loss against the owner of the burnt house. The First Instance Court holds him liable, but the Provincial Court of Appeal revokes the decision, and the Supreme Court confirms this revocation.

Decision

7 From the standpoint of causation, and to give rise to liability for the firefighter's death, according to so-called objective causation, which entails both a physical and a legal causal link, the decision of the Provincial Court is correct. Objective imputation is a legal question involving an assessment that goes beyond the mere dispute over the physical causal link. In this case, there is no objective imputation. The fire is indeed the origin of the damage. Still, the causal chain linking the firefighter's death with this source of risk

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6300) (player in women's football match suffered a complex distal fracture in the left radius); STS 17 October 2001 (RJ 2001\8639) (a rafter who dies when hitting his head when falling from the inflatable raft in which he was riding); STS 27 September 2001 (RJ 2001\7129) (a learner of golf who hits her instructor with the club when missing a blow); more on harm suffered by golf players: STS 9 March 2006 (RJ 2006\1882) and 5 November 2008 (RJ 2008\5896).

3 STS 10 February 2006 (RJ 2006\675) and 21 May 2008 (RJ 2008\4149) (injured while in the arena during a bullfight). See *M Medina Alcoz*, La asunción del riesgo por parte de la víctima. Riesgos taurinos y deportivos (2004).

4 STS 2 April 2004 (RJ 2004\2051): Victim who sneaks into an abandoned factory and suffers an electric shock when leaning on a transformer, causing him to lose both hands. The court notes that 'such conduct involved the acceptance of a serious risk given the danger of uncontrolled access to a building by a person ... unaware of the harmful contingencies inherent in it'.

5 *M Medina Alcoz*, La asunción del riesgo por parte de la víctima. Riesgos taurinos y deportivos (2004) 40 f.

disappears from the moment when he starts performing the task of extinguishing the fire, and the owner of the house stands outside the activity that he develops within it, without any possibility of controlling this task. The owner's liability should not be judged from the perspective of the specific risk created by the fire that prompted the victim's intervention. The risk he has created is transferred to the sphere of the victim, who controls and assumes this source of danger in the ordinary exercise of his profession. As a result, the causal link is established between the professional practice of this voluntarily assumed risk and the damage caused by the fire, and the victim, therefore, must bear the consequences of his actions.

Comments

This decision illustrates the criterion of objective imputation known in case law as 'competence of the victim'. This criterion has unclear boundaries and would mean that liability must be rejected when the victim had 'control' of the risk that produced the loss. Some scholars point out that this criterion could be useful when the victim suffers injuries while carrying out his or her professional activity and damage is the realisation of the typical risks of this activity.[6] However, the application of this criterion often has nothing to do with professional activity and case law combines it with the assumption of risk or with elements aimed at assessing the victim's contributory negligence.[7] **8**

6 In that sense, see *R de Ángel Yagüez*, Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 269–271 (commenting on this judgment as an example of a criterion of 'not objective imputation'), que cita la sentencia comentada como ejemplo de un criterio de 'no imputación objetiva'. Along the same lines, some appellate decisions also speak of 'competence of the victim' to exempt the defendant of liability: SAP Álava 18 December 2019 (JUR 2019\52657) (a policeman is injured while attempting to immobilise a dog that had escaped) or SAP Seville 17 March 2016 (JUR 2016\152614) (on the injuries suffered by a security guard while carrying out professional duties).

7 Thus, in a judgment issued on 6 February 2015 (RJ 2015\249), concerning damage suffered after falling from a platform raised in a village square, the Supreme Court argued that 'competence of the victim' was one of the criteria to be taken into account for assessing the objective imputation of the damage to the defendants. In the case at issue, it concluded that the claimant was aware that the platform lacked balusters and that was not designed for public use. She nonetheless climbed onto it and willingly assumed a risk that would have required her to adopt precautions to avoid falling as eventually happened. The accident occurred due to circumstances that were extraneous to the defendant, and only attributable to the claimant. In the judgment of 20 December 2007 (RJ 2007\9054), the claimant lost an arm when attempting to give water to the defendant's tigers locked in their cage; he had failed to take all the security measures, and the case was resolved as an issue of 'exclusive fault' of the victim. Finally, in the case of a four-year-old boy who died after falling into a partially filled groundwater pool located in the middle of an unfenced piece of land, which lacked protective barriers, the judgment of 6 September 2005 RJ (2005\6745) exonerated the owner because 'in the configuration of the harmful event, the control of the situation was with the victim', or, in other words, with the party that is presented as such [the parents of the child], given the specifics of the facts. Adapting the case to the general theory, it would be a hypothesis close to what has been called in the doctrine 'the competence of the victim'.

Tribunal Supremo (Supreme Court) 23 February 2010

RJ 2010\1293

Facts

9 During village festivities, V, an 11-year-old boy, suffered serious burns when firecrackers exploded in his pocket while he was with other children in an open-air disco at four o'clock in the morning. This type of firecrackers was prohibited for minors of that age and had been acquired by A, the father of one of these children, who was a municipal guard. A gave them to his son and he distributed them among his friends, among whom was V. V's parents sue A and the judgment of the Court of First Instance holds that V and his parents also contributed to the damage in a proportion of two thirds. V's parents file an appeal, and the Provincial Court of Appeal holds that there is no contributory negligence, neither of the minor child V nor of his parents, and orders A to pay full compensation. A appeals in cassation and the Supreme Court holds that V's parents and V himself contributed 40 % to the damage and that, therefore, compensation should be awarded for only 60 % of the losses.

Decision

10 (a) The defendant contributed to the damage since he bought the firecrackers for the minors, who were not authorised to buy them themselves; despite knowing of this prohibition, he gave them to his son, also a minor, so that he could distribute them among his friends. Taking into account his profession, which implies his knowledge of the prohibition of selling these firecrackers to children of that age, the appellate decision is right in considering that his fault contributed decisively to the production of the damaging result. (b) The conduct of the parents must also be deemed contributory to the production of the damage because given the age of the child (11 years old) and the obligations flowing from parental custody, the circumstances in which the accident occurred led this Chamber to consider that the father did not perform his duties properly, without which the damage could not have happened. Under the criteria of objective liability [*sic*], as stated by the Supreme Court judgment of 6 September 2005, 'in the configuration of the harmful event, the control of the situation was with the victim, or, in other words, with the party that is presented as such, given the specifics of the facts'; besides, the appellate judgment has not ruled out their negligence ... and, according to the aforementioned judgment, the contribution of the minor himself in the production of their damage cannot be ruled out either, since the negligent conduct of the minor has been proven and, furthermore, he had the ability to understand how to handle firecrackers because it was not the first time that he used them. It must be declared that the defendant contributed 60 % to the damage, given what he did in connection with the obligations flowing from his position as a policeman and the knowledge that he should have had about the rules on the sale and distribution of firecrackers. In comparison, the other 40 % is due to the recklessness of

the parents and the minor himself, who contributed to the harmful result in this proportion.

Comments

There is still a significant lack of clarity in Spanish law as regards what contributory negligence of the victim is and how it operates. The terminology is confusing.[8] Agreement exists, nonetheless, regarding the fact that contributory negligence does not inevitably entail the exclusion of liability, as happened with Roman *culpae compensatio* where the minimal fault on the side of the victim ruled out the liability of the tortfeasor. Contributory negligence nowadays leads to a reduction based, firstly, on the contribution of the victim's negligence or of the risk borne by him or her, and, secondly, his or her causal contribution, which can be very low or up to 100 %. In this last case, the victim's contribution entails the exclusion of the liability of the tortfeasor; a situation described in Spain as 'culpa exclusiva de la víctima' (exclusive fault of the victim). **11**

The Spanish Civil Code lacks a provision dealing with contributory negligence. Some have *connected* it with art 1103 CC, which allows courts to reduce compensation awards on equity grounds[9], but case law rejects this possibility.[10] Except for reforms undertaken in 2015 to the Road Traffic Liability Act[11], there is no specific regulation on the issue in other statutes that mention it in one way or another[12] and the same occurs with the re- **12**

8 The original Roman language – *culpae compensation* – has been abandoned. Still, there is no agreement about using 'concurrencia de culpa' (concurrence of faults), 'concurrencia de causas' (concurrence of causes) or 'concurrencia de responsabilidades' (concurrence of liabilities). Litigators' usage seems to prefer 'co-participation' of the victim.

9 See below 10/4.

10 STS 19 February 2014 (RJ 2014\1129) quotes STS 20 June 1989 (RJ 1989\4702) and 20 April 2011 (RJ 2011 \3597) in which the Supreme Court stated that 'the moderation faculty of Art 1103 CC, insofar as it is an exception to the full compensation of damage proven, based on the principles of equity, is justified in the case at issue because of the lack of proportion between the damage caused and the negligent behaviour of the agent'. As a result, when liability arises from negligence, 'full compensation might be unfair bearing in mind the specific circumstances involved in it and this requires the extent of liability to be moderated, *without it being necessary to appreciate any kind of contribution to causation or concurrence of fault*' (emphasis added).

11 Among other issues, the new wording of 2015 distinguishes between contributory negligence and failure to mitigate the damage, admits the exclusive fault of the victim, and in cases of contributory negligence, limits the scope of the victim's contribution to 75 %. It also prevents any limitation of liability from being applied when injuries are suffered by children under 14 years of age in traffic incidents.

12 See art 145 TRLGDCU (mentioning 'fault of the injured person' in product liability); art 6.2 LRCDN (limiting operator's liability 'if ... the nuclear damage was due in whole or in part to the wilful act or omission or *gross negligence* of the person who suffered it' [emphasis added]; or art 33.5 Hunting Act (mentioning also 'exclusive fault' of the victim).

ference made by art 114 Penal Code.[13] The most widespread doctrine and case law do not consider contributory negligence a ground for exoneration that is based on the same or similar requirements as those needed to establish liability for damage (*mirror image rule*). Due to the strong influence of Italian doctrine, the prevailing view is that contributory negligence is linked to causation or, more specifically, to objective imputation. Accordingly, it is irrelevant that the victim is not 'civilly imputable', that is, that he or she lacks the capacity for civil fault, or the natural capacity of will to carry out harmful acts and understand their consequences.[14] Still, both case law and legal writing show here a division of opinions.[15] The decision under comment seems to follow the line of reasoning which takes into account whether or not children have tortious capacity when it points out that the child had been negligent and that 'in addition it cannot be excluded that he had the ability to understand the handling of firecrackers, since it was not the first time he had used them'.

13 Other relevant criteria with regard to losses and additional losses resulting from a decision of the injured party would be the 'prohibition of return', which the Supreme Court also uses when there is an interference not emanating from a third party but from the victim himself or herself and the 'provocation' criterion.

14 In the first case, courts use the 'prohibition of return' criterion to assess whether the defendant who set a causal process into motion must bear the entire responsibility for the damage when there is a disruptive interference from the victim. In these cases, the Supreme Court speaks of the victim as if he or she were a third party, and to establish whether the victim had control of the situation that would exclude the application of the criterion and any limitation of the actor's liability, it speaks of the 'victim's competence'.[16]

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13 Art 114 Penal Code ('If the victim has contributed with her conduct to the production of the damage or injury suffered, the judges or courts may moderate the amount of compensation awarded').

14 *M Medina Alcoz*, La culpa de la víctima en la producción del daño extracontractual (2003) 298 ff.

15 This division is even shown in one of the main works on tort liability, as for instance, the Tratado of LF Reglero, where one of its sections claims that capacity for civil fault is required for taking into account contributory negligence on the part of minors who are victims of tortious acts (cf *LF Reglero Campos* in: LF Reglero (ed), Tratado de responsabilidad civil (3rd edn 2014) 940 ff), and another section of the book holds the contrary opinion: 'the causal contribution to the damage by a civilly non-imputable subject justifies the agent's corresponding adjustment of liability, provided that the damage is objectively attributable to the conduct of the victim and this conduct has been objectively negligent'. (*E Gómez Calle* in: LF Reglero (ed), Tratado de responsabilidad civil (3rd edn 2014) 1235, emphasis added). Case law is also divided, since, whereas some decisions consider that children of tender ages cannot be held contributorily negligent (STS 8 November 1995 [RJ 1995\8636], STS 11 May 2004 [RJ 2004\2730], STS 27 January 2006 [RJ 2006 \615]), others hold the contrary view and point out that tortious capacity of the child is irrelevant by saying, for instance, that 'the fact that the victim is a minor child of tender age cannot undermine the eventual appreciation of her conduct, if not as fault, as contributing to the causal chain that gave rise to her injuries (STS 6 February 2008 [RJ 2008\1215]).

16 Among many others, see, eg, STS 24 October 2003 (RJ 2003\6556), where the Supreme Court originally said that 'according to the view of modern doctrine, one of the criteria of objective imputation that best fits the circumstances of the case is the so-called prohibition of return', but it then concluded also that damage cannot be attributed to the defendant 'when the victim has control of the situation'.

The provocation criterion goes well beyond cases of interference by third parties. 15
This criterion allows the damage that a person suffers (or that he or she causes to third parties) while trying to save his or her life, physical integrity or assets (or the life, physical integrity or assets of a third party) to be attributed to the person whose misconduct created the imminent danger for these legal interests.[17] It encompasses instances where someone suffers harm when protecting their legal interests either by running away from wrongdoers (eg victim injured while trying to escape from kidnappers[18]) or when going after them to catch them or to get assets back (pursuers). Other cases where this criterion is used and that may also be related to a decision of the victim refer to rescuers who suffer damage on the occasion of the rescue. Here the question that arises is whether or not the damage caused by the action to rescue can be attributed to the person responsible for the threat or who caused the harm triggering the action to rescue.[19] In the case of rescuers, the general criterion is that the damage suffered on the occasion of the rescue cannot be attributed to the person who started the causal process if the attempt to rescue is unreasonable given the enormous disproportion between the risk assumed by the rescuer and the value of the interest put at risk, in relation to the probability of saving it.[20] It should also be taken into account whether the rescue action is reasonable or not, in view of other parameters, such as, for example, the physical condition of the rescuer himself.

11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 11 December 2012[1]

549/05.9TBCBR-A.C1.S1

Facts

A tree branch fell onto a tractor, which resulted in a total loss of the vehicle. The company that owned the vehicle was deprived of its use for over 54 months and sought damages from the tortfeasor, the State-owned company *EP – Estradas de Portugal*, SA. Since 1

17 *F Pantaleón Prieto*, Article 1902 in: Comentario del Código Civil. Ministerio de Justicia (1991) 1986.

18 That is the case in STS Criminal Chamber, 26 September 2005 (RJ 2005\7336), commented upon by *A Fernández Crende*, Imputación objetiva en un caso de responsabilidad civil ex delicto: criterio de la provocación, InDret (2008).

19 *R Ragués i Vallés*, Proceso al buen samaritano. Acciones de salvamento y responsabilidad por daños, InDret (2001).

20 *F Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed.), Centenario del Código Civil: 1889-1989, vol 2 (1990) 1576; *R de Ángel Yagüez*, Causalidad en la responsabilidad extracontractual sobre el arbitrio judicial, la "imputación objetiva" y otros extremos (2014) 243ff.

1 <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/ff604450d36c079880257adb0034746b?OpenDocument>.

the tractor was needed for farming but could not be used, the company claimed that losses could be estimated at around € 4,000 per month, which amounted to more than € 200,000 over the course of 54 months, plus interest. The court of first instance awarded damages of € 54,500 (plus interest), but the owner of the company deemed the amount insufficient.

Decision

2 The Court mentions that the Portuguese legal system does not set out a duty to mitigate losses as an obligation that falls upon the injured party. That being said, the Court indicates that the law takes into account the ethical behaviour of the injured party who notices losses worsening and intensifying and does nothing to prevent them materialising. The Court states that the option of *non facere* does not comply with the obligation of *bona fide* that emerges in cases of non-contractual liability: both parties are bound to certain duties, such as following a principle of loyalty and preserving each other's property. Although the Court does not deny that the general obligation of reparation burdens the tortfeasor, his liability should be limited to the amount fixed by the Appeal Court since the injured party in this case did not take action (eg hire another tractor) to contain the growing and negative evolution of the damage caused by deprivation of use of the vehicle.

Comments

3 We have had an opportunity to present a situation where the fault of the injured party is combined with a case of strict liability that burdens the tortfeasor. This is the situation set out in art 505 of the Civil Code. When an event is imputable (no evaluation of fault is necessary) exclusively to the injured party, the tortfeasor's liability can be excluded. Exclusion or limitation of the tortfeasor's liability is also possible when an event is the result of the fault of both parties, a possibility set out in art 570 of the same Code. That being said, some academics[2] note that two situations must be distinguished in these instances: the event for which the injured party is responsible may occur simultaneously or after the event for which the tortfeasor is responsible. When it is simultaneous, no questions arise regarding the verification of an adequate and natural causal chain: the injured party has contributed to the emergence of the losses. If the event that produced the losses was already ongoing, problems will arise in the Portuguese liability system, as there may be difficulties linking the losses to the event for which the tortfeasor is accountable and determining whether the injured party has a legal obligation to minimise the consequences of the losses suffered.

2 *M Miranda Barbosa*, Causalidade Fundamentadora e Causalidade Preenchedora da Responsabilidade, Revista da Faculdade de Direito e Ciência Política (2017) Universidade Lusófona do Porto, no 10, 34ff.

Whilst the first component of this equation has not been discussed in Portuguese courts, the STJ is sensitive nonetheless to situations where the injured party should have acted to alleviate further losses that the tortfeasor's misconduct may have produced. This obligation does not derive from a duty to mitigate losses (which, as we said, is not set out in the Portuguese legal system) but from a general principle of acting according to the rules of good faith that applies to Portuguese tort law. **4**

12. England and Wales

Clay v TUI UK Ltd, Court of Appeal (Civil Division) 23 May 2018

[2018] 4 All ER 672

Facts

The claimant and members of his family had become trapped on the balcony of a hotel room in Tenerife in the early hours of the morning when the door leading to the balcony inadvertently locked. After about 30 minutes, the claimant tried to cross to the balcony of an adjacent room in which his sons were sleeping, but a ledge on which he stood collapsed, and he fell some twenty feet (approx six metres) to the ground, fracturing his skull. He brought a claim for damages against the defendant holiday company on the ground that his injury had been caused by a defect in the lock of the door. The trial judge dismissed the claim on the ground that the claimant's attempt to climb onto the adjacent balcony was a *novus actus interveniens*. The claimant appealed to the Court of Appeal. **1**

Decision

A majority of the court upheld the judge's decision that the defendant was not liable for the claimant's injuries. Hamblen LJ said that intervening conduct was more likely to constitute a *novus actus interveniens* the less foreseeable it was, the more unreasonable it was, and the greater the extent to which it was voluntary and independent conduct. In the absence of any danger to the claimant or his family members, his conduct in attempting a manoeuvre which posed an obvious risk of life-threatening injury had not been reasonably foreseeable, was unreasonable to a high degree, and was considered and deliberate. It followed that the judge's finding that his act had broken the chain of causation should not be disturbed. Moylan LJ dissented, holding that on a broad evaluation of the claimant's conduct it had not been sufficiently unreasonable to eclipse the causative effect of the defective lock, but that the claimant's damages should be discounted by 45 % for contributory negligence. **2**

Comments

3 This decision shows that the courts are prepared to hold that highly unreasonable conduct on the claimant's part may relieve a negligent defendant of liability altogether, as opposed to merely serving to reduce the damages by way of contributory negligence. The reliance on causal analysis is explicit and the question is seen to be one of legal causation, as opposed to remoteness of damage. The disagreement between the members of the court as to the appropriate outcome demonstrates the extent to which questions of legal causation are a matter of individual judgement. The fact-sensitive nature of the enquiry is evident from the reasoning and explains the high degree of deference accorded by the majority to the decision of the trial judge.

Spencer v Wincanton Holdings Ltd, Court of Appeal (Civil Division) 21 December 2009

[2010] PIQR P8

Facts

4 The claimant suffered an injury to his knee in a work accident for which the defendant was responsible. Three years later, this injury led to the amputation of his right leg. A few months after the amputation, the claimant was filling his car with petrol when he fell and suffered a further injury. He was not using his prosthesis or walking sticks at the time of the fall. At the trial of his action for compensation, the trial judge awarded the claimant damages for the injury suffered in the fall, subject to a reduction of one third for contributory negligence. The defendant appealed to the Court of Appeal.

Decision

5 The court upheld the decision of the trial judge, holding that the claimant's failure to use his prosthesis or walking sticks was not a *novus actus*. According to Sedley LJ, the judge's apportionment of responsibility spoke clearly against a finding that it was unfair to treat the chain of causation as having survived his fall. The fall was a 'real consequence' of the original accident, albeit one to which the claimant's own misjudgement contributed.[1] Aikens LJ emphasised that the line between conduct that amounted to contributory negligence and conduct that amounted to a *novus actus* was not 'capable of precise definition'.[2] Each case would depend on its facts and the court would have to make a value judgement on the facts as found.

1 *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2010] PIQR P8 at [23].
2 Ibid, [45].

Comments

The result in this case can be contrasted with that in an earlier decision of the House of Lords in a Scottish appeal, *McKew v Holland & Hannen & Cubitts (Scotland) Ltd*.[3] In *McKew* the pursuer had developed a weakness of the left leg as a result of an accident for which the defender was responsible. This meant that the leg could give way at any time. While the pursuer was descending a steep staircase without a handrail, his leg gave way, and in the resultant fall he suffered a further injury. The House of Lords held that the pursuer's decision to descend the stairs without assistance had broken the chain of causation between the defender's negligence and the losses caused by the fall. In *Spencer* the Court of Appeal made it clear that although *McKew* might be thought to stand for the proposition that in a case of this kind any unreasonable conduct of the claimant would amount to a *novus actus*, that was too restrictive an approach. Instead, it depended on *how* unreasonable the conduct was, although the suggestion that only reckless or deliberate conduct would have this effect was rejected. **6**

Corr v IBC Vehicles Ltd, House of Lords, 27 February 2008

[2008] 1 AC 884

Facts

The claimant's husband had sustained horrific injuries in a workplace accident for which the defendant had admitted responsibility. As a result, he suffered severe depression, and six years after the accident, he committed suicide. It was not disputed that the accident had caused the depression, nor that the depression had caused the suicide. The claimant brought proceedings against the defendant, including an action under the Fatal Accidents Act 1976 for financial losses resulting from her husband's suicide. This claim failed at trial, but by a majority the Court of Appeal allowed the claimant's appeal. The defendant appealed to the House of Lords. **7**

Decision

The court held that the defendant was liable for the death of the claimant's husband. In particular, their Lordships rejected the argument that the suicide of the deceased had amounted to a *novus actus interveniens*. According to Lord Bingham, the rationale of the *novus actus* principle was that it was not fair to hold a tortfeasor liable, however gross his negligence, for damage caused not by his breach of duty but by some independent, supervening cause for which he was not responsible. An example of such a supervening cause was 'a voluntary, informed decision taken by the victim as an adult of sound mind **8**

3 1970 SC (HL) 20.

making and giving effect to a personal decision about his own future'.[4] However, the deceased's suicide had not been a voluntary, informed decision of this kind, but was the response of a man suffering from a severe mental illness which impaired his capacity to make reasoned and informed decisions about his future, an illness which was itself the result of the defendant's wrong.

Comments

9 This case demonstrates the importance of the third of the factors identified by Hamblen LJ in *Clay v TUI UK Ltd* (discussed above) as relevant where it is argued that the conduct of the claimant has broken the causal chain, namely the extent to which that conduct was 'voluntary and independent'. In this case, as Lord Bingham explained, it was neither. It was not truly voluntary because it was the result of profound mental illness: as Sedley LJ said in the Court of Appeal, 'there is nothing one can decently call voluntary either in the suffering or the act of self-destruction of a profoundly depressed individual'.[5] And it was not independent because the mental illness that drove the deceased to take his own life was itself the result of the injuries he had sustained in the accident for which the defendant was responsible.

13. Scotland

The Kelvin Shipping Co v The Canadian Pacific Railway Co (The SS Baron Vernon) House of Lords, 19 December 1927

1928 SC (HL) 28, 1928 SLT 117

Facts

1 V's ship, the Baron Vernon, was badly damaged when A's ship, the Metagama, collided with her. As a result of the damage done to the Baron Vernon by A, it had to be beached by its pilot on the bank of the river to stop it from sinking. A short time after being beached, the ship slipped back into the river and floated over to the bank on the other side. There it was tied up but the tide subsequently caught it, pulling it out into the river where it sank. By the time V's claim for damages reached the House of Lords, it had been established that A had been at fault in relation to the collision. However, A maintained that a substantial portion of the damage had been caused not by its negligence but by the subsequent mishandling of the Baron Vernon. The issue for the court therefore was whether A should be held liable for the post-collision damage or whether the actions of

4 *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2009] 1 AC 884 at [15].

5 *Corr v IBC Vehicles Ltd* [2006] EWCA Civ 331, [2006] 2 All ER 929 at [69].

V (including through not having engaged the ship's engines during the subsequent manoeuvres) were responsible for that subsequent damage.

Decision

The majority of the House of Lords found A liable for having caused all of the damage sustained by the Baron Vernon, on the basis that losses are recoverable if they are the ordinary and natural result of the wrong complained of. Viscount Haldane characterised the test of liability for the further damage sustained as whether, in the ordinary course of things, the damage 'would flow from the situation which the offending ship had created',[1] Lord Blanesburgh likewise referring to injury flowing 'in the ordinary course … from the negligence'. A had failed to show that V's actions were negligent or amounted to a *novus actus interveniens.* As they were unable to do so, they were responsible for all of the losses. **2**

Comments

This decision is an interesting one for a number of reasons. First, it represents a point in the development of the Scottish rules on the recoverability of damages when prominence was given by courts to the 'natural' and 'direct' consequences flowing from some initial damage, rather than (as was later to be the case) the 'reasonable foreseeability' of any subsequent damage.[2] It is also of particular interest for present purposes in relation to the issue of the effect on liability of V's conduct after A's initial wrongdoing: the court had to consider whether arguable negligence on the part of V (which may have exacerbated the consequences of the original damage) in responding to the emergency could be considered as falling within the scope of the original accident. The court held that it did. **3**

There might conceivably be consequential harm caused by an injured party which could be considered so extreme that it could not be considered within the scope of the initial harmful conduct of A, but no such extreme consequences were thought to arise in this case. As Viscount Haldane put it, V's reasonable but 'mistaken judgment may be a natural consequence for which the offending ship is responsible just as much as is any physical occurrence.' The reference to the reasonableness (albeit 'mistaken' and 'unsuccessful') nature of what V attempted suggests that, had something 'unreasonable' been attempted, the court might have taken the view that such an unreasonable act constituted a *novus actus interveniens*, releasing A from liability for the subsequent loss of the vessel. **4**

1 1928 SC (HL) 21 at 25.

2 Judgment in this action was handed down shortly after the English Court of Appeal had likewise stressed the importance of the direct consequences of a wrongful act, in its decision in *Re Polemis and Furness, Whitty & Co Ltd* [1921] 3 KB 560.

5 The House of Lords' stress upon the natural and direct consequences of the accident would likely, were similar facts to come up for consideration today, be replaced with (or at least accompanied by) language focused upon an assessment of whether the subsequent conduct of V in response to A's initial wrong was reasonably foreseeable. Had a reasonable foreseeability analysis been adopted in this case, the court would have had to ask whether what V did in an attempt to save the vessel was foreseeable, even if it might have been an error of judgement. Such an investigation would have necessitated hearing evidence concerning the quality of the judgements made by the pilot of the Baron Vernon.

6 The question of whether consequential damage is too remote from an initial harm is not, however, an exercise relating solely to the question of whether the subsequent losses might reasonably have been foreseen by the original wrongdoer. The overall assessment of responsibility for harm involves considering a range of issues, especially where a later event is human conduct. That the subsequent conduct of another party was negligent is one factor to be considered in assessing whether a defender should be held liable for the entire set of consequences flowing from an initial harm[3] (or held to have been contributorily negligent), but, in judgments since *The Baron Vernon*, it has been held that a subsequent act (whether of the pursuer or a third party) which is negligent does not necessarily constitute a *novus actus interveniens*. So, the stress laid by the House of Lords in this case on the 'reasonableness' of the pursuers' subsequent acts ought not to be taken to suggest that only careful subsequent conduct of another party can fall within the responsibility of the original wrongdoer.

McKew v Holland Hannen, Cubitts (Scotland) Ltd, House of Lords, 26 November 1969
1970 SC (HL) 20, 1970 SLT 68, [1969] 3 All ER 1621

Facts

7 V had been injured while working as an employee of A. The injuries sustained (to his back, hip, and left leg) were relatively minor. A accepted responsibility for these original injuries. The month after he sustained these injuries, V had exited a house, carrying his daughter, and was descending a flight of stairs (which had no handrail) when his left leg suddenly gave way under him. As he felt his leg giving way, he threw his daughter clear and jumped down ten steps to a landing on the staircase, severely injuring his ankle.

8 In an action of damages against A, V sought compensation not merely for his original injuries but for the further harm sustained to his ankle. A argued that the later injury was unconnected to the earlier injuries and 'too remote' to be considered a conse-

3 In the English case of *Knightley v Johns* [1982] 1 WLR 349, discussed in the English and Welsh section in this volume (see 7/12 nos 1–3), there was consideration of whether subsequent negligent conduct of a third party ought to be considered as constituting a *novus actus interveniens* (the decision being that it should).

quence of those earlier injuries. At first instance, the judge agreed with A, holding that the later injury was caused by the 'voluntary and deliberate' act of V and not by A. V appealed to the Inner House of the Court of Session, where his appeal was refused. He further appealed to the House of Lords.

Decision

The House of Lords affirmed the decision of the Inner House, dismissing V's appeal. Lord Reid (giving the leading speech) noted that someone who is injured in such a way that his leg may give way suddenly must act 'reasonably and carefully'. If he acts unreasonably, causing himself to sustain a second injury, the party which caused the original injury is not liable for the second injury: **9**

> 'His unreasonable conduct is *novus actus interveniens*. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the defender's fault or the disability caused by it.'[4]

Lord Reid further observed: **10**

> 'I do not think that foreseeability comes into this. A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other *novus actus interveniens* as being quite likely. But that does not mean that the defender must pay for damage caused by the *novus actus*.'[5]

Their Lordships held that V had acted unreasonably. He had not descended the stairs carefully and slowly, so that he could sit down if his leg gave way. Instead, he had descended in such a way that, if his leg gave way, he could not stop himself from falling. **11**

Comments

As noted in the comments on the prior case of *The Baron Vernon*, a defender is not liable for all the consequences of a harmful act simply because they may be foreseeable. The quality of subsequent events, including whether conduct of the pursuer or a third party is negligent or unreasonable, may be such as to lead a court to conclude that the subsequent event should be treated as a *novus actus interveniens*, a cause of such significance that it should be deemed to 'break the chain of causation' and thus to negate any responsibility of the original wrongdoer for the subsequent losses. Such was the conclusion of the House of Lords in this case, their Lordships focusing on the unreasonable and hazar- **12**

4 1970 SC (HL) 20, per Lord Reid at 25.
5 1970 SC (HL) 20, per Lord Reid at 25.

dous conduct of the pursuer in not guarding himself against injuries which might be sustained through falling down a flight of stairs if his leg gave way.

13 The analysis of the House of Lords employs the language of 'remoteness' and *novus actus interveniens*, highlighting the quality of unreasonableness in the decision of the injured party as the basis for a finding that the later harm was too remote. Though the language of remoteness suggests a regard for the lack of proximity (in some sense) of injury to original harm, and the language of *novus actus* suggests a break in a causal chain, in reality the approach adopted manifests a judicial view that a hazardous and unreasonable decision of the injured party *ought* to exclude any responsibility of the original wrongdoer for the later injury (a normative conclusion).

14. Ireland

Anderson v Cooke, Irish High Court, 29 June 2005

[2005] IEHC 221, [2005] 2 IR 607[1]

Facts

1 V was a passenger in a car owned by C and driven by A. The purpose of the journey was for V to take a photograph of the car at high speed to post to a website for such extreme activities. A lost control of the car and crashed, causing V serious injuries.

Decision

2 Finnegan P held that the joint illegal venture precluded the imposition of a duty of care on grounds of public policy.[2]

Comments

3 Here the court uses the duty of care as a mechanism to exclude liability. Although expressed in terms of duty, it is clear from the discussion that Finnegan P is concerned with the content of the duty – ie how to determine an appropriate standard of care. It is relatively common in Irish cases for courts to use a plaintiff's own disregard of risk to determine that a defendant has not breached the relevant standard of care in a variety of settings.[3] It is clear from the present case that an exclusion of duty will not be readily

1 Noted by *Ryan* (2005) 1(1) QRTL 16.

2 Relying in particular on the Australian decision in *Gala v Preston* (1991) 172 CLR 243; Finnegan P also cited other Australian cases, English cases and a Canadian case on plaintiffs engaged in illegal activities. The lack of any tort liability on the part of the driver would exclude recovery from the MIBI.

3 See the cases on self-responsibility in *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, no 39 ff and in previous Reports, noted at fn 71 of the 2021 Report.

based on illegal activity; the seriousness of the illegality, the fact of a joint venture and the fact that the risk that eventuated was inherent in the illegal activity were all relevant concerns. It would also be possible to exclude liability by using the defence of *ex turpi causa non oritur actio*, rather than denying the existence of a duty of care. This defence is very rarely used in Ireland and is briefly discussed by Finnegan P. The policy reasoning underpinning that defence was incorporated into the duty of care discussion.

It is possible for a plaintiff' own behaviour to be treated as a *novus actus interveniens*, but Irish courts generally prefer to treat it as contributory negligence, allowing for an apportionment of responsibility between V and A.[4] Exacerbating injury by a failure to mitigate the damage from a wrong is expressly included in the contributory negligence defence under sec 34 of the Civil Liability Act 1961.[5] **4**

There are some extreme cases where the court will focus on V's actions or choices as a sole cause of injury. In *Ward v Sheridan*,[6] A injured V's wife in a road traffic collision. As a result of her injuries, she was advised that having children was a risk for her. In order to assist her, V agreed to undergo a vasectomy operation. As a result of the procedure, V suffered adverse side effects. His decision to undergo the procedure, after advice as to the risks, was treated as the sole cause of his injury. It is not clear that A would have owed V a duty in any event. In *O'Hara v Eirebus Ltd*,[7] V was inadvertently left on the hard shoulder of a motorway at night after a coach stopped to let passengers off for a toilet break. Instead of waiting to be picked up, V walked off and strayed into the fast lane of the motorway and was struck by a car. On the facts, Irvine J was not satisfied that there was any breach of duty by the driver, but if there had been, it would not have been treated as the cause of V's damage, as his decision to walk down the motorway was the sole legal cause of his injuries. **5**

4 *Stakelum v Bank of Ireland* [1999] IEHC 149, noted by *R Byrne*/*W Binchy*, Annual Review on Irish Law 1999 (2000) 510 f; see also *E Quill*, Torts in Ireland (4th edn 2014) 412 & 443 f; *E Quill*, *Corr v IBC Vehicles Ltd*: An Irish Perspective (2010) 18(3) ERPL 621 (on how the courts would treat the effects of suicide).

5 See, eg, *KBC Bank v BCM Hanby Wallace* [2013] IESC 32; *Curley v Dublin Corporation* [2003] IEHC 28 f.

6 [2010] IEHC 308. See also *PMcD v The Governor of X Prison* [2021] IESC 65, noted by *R Byrne*/*W Binchy*, Annual Review on Irish Law 2021 (2022) 480 f; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, no 3 ff; a prisoner going on hunger strike in protest at problems in respect of the prison complaints system – no duty owed by prison authorities in operating the complaints system.

7 [2011] IEHC 450; see also *Quinn v Kennedy Bros Construction Ltd*, unreported IEHC, 4 March 1994; *Fellони v Dublin Corporation* [1998] 1 ILRM 133, at 135 f per Morris J, obiter. In these cases, V's conduct was looked at in conjunction with the conduct of third parties to determine that A was not the cause of injury.

15. Malta

Charles Halliday and another v Alan Dimech Debono and another – Qorti tal-Appell (Court of Appeal) 9 January 2009

Facts

1 The defendants were the owners of a tenement overlying the property of the plaintiffs. The defendant's property was in an unfinished state and not properly waterproofed. After heavy rain, water penetrated into the plaintiffs' tenement and caused substantial damage to goods stored in the tenement. The plaintiffs had warned the defendants about this danger to their property before the event, but the defendants did not take steps to waterproof their property before it was too late.

2 The plaintiffs sued for damages. The defendants replied that the plaintiffs ought not to have stored goods in their property when they knew of the danger posed by the state of the overlying tenement.

Decision

3 The first instance court held the defendants liable for the damage suffered by the plaintiffs: they cannot rely on the principle *volenti non fit iniuria* to shift the blame when they were negligent in the upkeep of their property.

4 The defendants appealed but the Court of Appeal dismissed the appeal. For the plea of *volenti non fit iniuria* to be upheld, knowledge on the part of the plaintiffs of the risk of danger is not sufficient; it must be shown that the plaintiffs positively accepted the risk and renounced their right to claim damages. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise only where there can be truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to. There was no such acceptance in the present case; when they stored goods in the underlying tenement, the plaintiffs were merely exercising their rights over their own property.

Comments

5 Although it is the duty of the plaintiff to minimise damage, this duty does not extend to having to modify his own conduct in anticipation of the defendant's misconduct (see *d'Amato v Camilleri*, 2/15 no 7 above). The fact that the plaintiff, being aware of the danger posed to him by the defendant's conduct, does not take precautions to avoid that danger is not a relevant factor for the purposes of assessing the quantum of damages. It is only after the harmful event materialises that the plaintiff's duty to minimise damage comes into play. Presumably, in the present case, the plaintiff would have been under a duty to remove any undamaged goods to avoid these being damaged. The costs of re-

moval would obviously be at the charge of the defendant. However, even at this point, the plaintiff would still be under a duty not to involve the defendant in extra costs, so that if the costs of removal exceed the damage avoided by the removal, then the defendant would only be liable for the lower amount between the costs of removal and the value of the 'saved' goods.

Francis Gauci v Jimmy Bugeja – Qorti tal-Appell (Court of Appeal) 27 November 2009

Facts

The plaintiff, a twenty-six-year old construction worker employed with the defendant, was seriously injured when he fell from a height while working on a construction site. Due to his injuries, he is no longer capable of heavy manual work and, being of little schooling, he had to find a less well-paid job as a greengrocer. He sued the defendant for damages. **6**

Decision

The question of liability was straightforward: although the plaintiff was working at a considerable height, he was not wearing a safety harness, nor was there evidence that the defendant had provided one. In fact, the evidence showed that the defendant had a policy of leaving his employees to their own devices, with no training or supervision whatsoever. Observing that it is the employer's duty to provide a safe system of work, and that any injury to which the employee has not contributed would be the sole responsibility of the employer, the court held that the defendant was solely at fault. **7**

On the matter of the assessment of damages, the medical expert appointed by the court reported that the plaintiff was suffering from a permanent disability of 12 %. This could be reduced to 4 % if the plaintiff successfully undergoes further surgery to remove a metal plate which had been surgically inserted in his upper arm and which was no longer required after the bone healed. However, fearing the risk of infection, the plaintiff had opted, against medical advice, not to undergo this procedure. Taking these factors into account, the first instance court settled on a compromise solution of 8 %. **8**

Both parties appealed: the defendant argued that the plaintiff's refusal to undergo further surgery was tantamount to failure to observe the victim's duty to minimise damages, whereas the plaintiff argued that, since the metal plate was still in place, his actual degree of disability was still 12 % and this was the figure that ought to have been adopted by the court. The Court of Appeal dismissed both appeals, adopting the reasoning of the first instance court. **9**

Comments

10 Considering that the plaintiff was within his rights in refusing to have the plate removed due to the danger of infection, it is not clear why the higher disability figure was not adopted. Presumably it was because the plaintiff had refused to follow the medical advice to undergo the procedure, although it must also be pointed out that he was advised of the danger of infection. Since his choice was a legitimate one, possibly he ought not to have been penalised for it.

16. Norway

Høyesterett (Norwegian Supreme Court) 16 October 1868

Rt 1868.817

Not available on website

Facts

1 The customs authority of the Norwegian State owned a warehouse where water was leaking from the ceiling when it rained due to lack of preventive maintenance. An agent of an owner of goods who needed to store them in the warehouse placed the goods at a spot where the water was leaking from the ceiling. The agent was unaware of the leak. The goods were damaged. The State was sued for compensation. The Supreme Court did not deem the State liable in damages.

Decision

2 The Court pointed to the fact that the owner's agent had placed the goods exactly where the water was leaking from the ceiling. Hence, the damage to the goods had to be considered as a random incident that no one could be blamed for.

Comments

3 As the decision is very old, the written justification of the conclusion is only briefly described in the publication. In older scholary discussions of the decision, the justification has been interpreted as an expression of a line of thought which has strong similarities with the old English common law 'the last opportunity rule',[1] according to which, the party who had the last opportunity to avert the danger also had to bear the loss if the danger caused damage. The judgment is also seen as an expression of a line of thought which reasons that a last intervention of the victim in the course of events 'breaks the chain of causation'. Today, the State would have been deemed liable, and the liability

1 See *O Platou*, Forelæsninger over Skadeserstatning [Lectures on Tort Law] (1905) 266 f.

would have been strict because customs rules require owners to place goods in a given warehouse, and therefore in the State's custody. The rule is based on the principle that anyone storing goods must bear the risk of damage if the good is stored mainly in their interest.[2] The general rule on liability for someone storing goods when damage is caused to a thing while in storage is, however, *culpa* with a reversed burden of proof.[3]

If the owner or agent had placed the goods in a warehouse owned by the customs authority and in a place where there was noticeable traces of a water leakage from the ceiling, the owner would likely have been held contributorily negligent. **4**

Høyesterett (Norwegian Supreme Court) 15 November 1982

Rt 1982, 1506

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/rt-1958-984-137b?searchResultContext=2992&rowNumber=1&totalHits=1>

Facts

A plumber, who had hired his labour out to a principal contractor, was working on a construction site. One day, part of a pipe burst, and water leaked into the building. The water leak was detected and the stop valve was closed. The water caused harm to the building and the costs to repair the damage were assessed at NOK 25,000. The next morning, large parts of the construction site were under water. Employees of the principal contractor had opened the stop valve before the burst pipe had been repaired. The principal contractor sued the plumber for damages as a consequence of the damage caused by both incidents. The firm asserted that the plumber had not secured the pipe properly after the first incident. **5**

Decision

The Supreme Court decided the case with dissenting opinions. The majority stated that a risk of a subsequent water leakage was still present after the stop valve had been closed. Accordingly, the majority noted that a subsequent water leakage could be considered foreseeable for the plumber, as long as the pipe had not been repaired or properly secured. However, the majority noted that the principal contractor's employees had been working in the building after the water had been cleared and that the workers did not know that there was a burst pipe that could cause a water leakage if the stop valve was opened. The principal contractor should have anticipated that the painters who remained in the building would most probably wash their hands after they finished working. Pursuant to the rule on contributory negligence, the majority therefore rejected **6**

2 *A Stenvik*, Forvareransvaret [Liability for the storer], TfF 2021, 73, at 83.

3 Rt 1998, 40.

awarding compensation for the damage caused as a consequence of the subsequent water leak. The principal contractor was identified with his employees and held 100 % contributory negligent.

7 The minority agreed that the subsequent water leak could be considered foreseeable for the plumber. On the other hand, the minority disagreed with the attribution of responsibility for the damage caused by the subsequent water leak. The minority suggested that the two parties should share responsibility for the last incident, and that the damages relating to the subsequent water leak should be shared equally.

Comments

8 The Supreme Court's ruling shows that a course of events might be considered foreseeable for the tortfeasor even if there has been a grossly negligent intervention by the injured party. In this case, this is stated in principle as the plumber was found liable in damages, but not ordered to pay any compensation due to the contributory negligence of the victim. One reason for this choice might be that the latent risk of damage created by the tortfeasor materialised due to the conduct of the injured party in exactly the manner that could be expected. Hence, the injured party's choice not to inform all the workers in the building does not constitute sufficient grounds for exonerating the tortfeasor from liability. The conduct expected of the plumber would be to secure the burst pipe more properly, and, if the plumber had done so, he would not have been dependent on the principal contractor informing all the workers on the construction site to avoid damage.

17. Sweden

Högsta domstolen (Supreme Court) 22 February 2001

NJA 2001, 65 I

Facts

1 A cross-breed cat was bitten by a dog (in Sweden, dog owners are strictly liable for their dogs' actions). The cat owner took the wounded cat to a veterinary clinic, where the cat underwent surgical treatment for some days before the sad decision had to be made to put the cat to sleep, since it could not be cured. The cost for this treatment was a sum equivalent to the amount of € 600. The dog owner paid the cat owner what he claimed as a cross-breed cat's objective market value, ie € 10. The dog owner refused to pay the veterinary costs, since these costs were far above the market value of the cat.

Decision

2 The Supreme Court mentioned the general rule (from the earlier case NJA 1971, 126 concerning repair costs for a car) that a victim has no right to compensation for repair costs

that exceed the market value.[1] It was also mentioned that exceptions can be accepted if certain circumstances are at hand. Thereby it must, in the specific case, be considered 'reasonable' to repair the property, and the costs must be held within 'reasonable' limits. To these general remarks concerning 'reasonableness', the Court added specific criteria relating to expenses when pets are injured. As an initial justification for exceptions, the Court stated that pets 'cannot be seen as just any other property in general' and that therefore it may be 'reasonable' that the owner seek veterinary care even if the costs can exceed the animal's market value. It was further argued that in this case, the health care measures were considered medically founded. The costs did not exceed what a cat owner in a justified way can be expected to incur when his animal is injured. Therefore, the full costs were compensated.

Comments

The case clearly indicates that the objective market approach has its limits when consid- **3**
ering values other than the ordinary economic interests on the market – ie subjective interests. Since the objective value of the cat already was compensated before the trial (the dog owner paid the cat owner the sum he claimed, that is € 10 – ie a sum equivalent to the price of a sandwich and a cup of coffee at an ordinary coffee house), the case only concerns what could be labelled as the subjective value for the owner – since, when trying to rescue the life of his pet, he incurred costs that were higher than the value of the cat. When the Court emphasises that a pet is not just a thing among other things, we are given some indication as to what kind of exceptions from the main rule can be justified. There are things (properties) that are 'only things', and there are more problematic borderline cases, where we – as humane humans – can discuss the value of things in words other than pecuniary terms. Although the only categories in law are persons and property (so there cannot be a third kind in-between category), we can understand that certain things can give rise to 'reasonable' actions – ie costs – that exceed the market value in question. Compared to the other alternative – immediately putting the pet to death since the costs are higher than its value – it can be justified for the owner of a cat or a dog to try to save the life of their beloved animal at the expense of the person who is liable for the injury.

However, a demarcation line has to be drawn somewhere. Even if the strict objec- **4**
tive market view must be rejected, there is a limit where the costs resulting from subjective bonds to the animal owner can be said to be part of his own risk zone. If he is willing to spend whatsoever great amount of money, he cannot in a tort case claim the costs that exceeds what a pet owner would 'normally' spend. A fairly broad framework, however, must be allowed in relation to animals of the now relevant type (who are often seen as

1 See *B Bengtsson*/*E Strömbäck*, Skadeståndslagen (6th edn 2018) 418ff; *J Hellner*/*M Radetzki*, Skadeståndsrätt (10th edn 2018) 398ff.

more or less 'members of the family'); a serious fracture can cause costs equal to a full monthly salary, and it can hardly be considered unreasonable that the cost is passed on to the liable party.

Högsta domstolen (Supreme Court) 3 November 2016

NJA 2016, 945

Facts

5 A stable on an estate was burnt down due to a negligent action. The building was included as one of several buildings, all of which were jointly utilised in an enterprise. The owner therefore chose to repair the house, which cost about a sum equivalent to the amount of € 380,000; as an alternative to repairing the house, the owner could have built a completely new house, but that measure would have cost € 470,000. The old house, built in the second half of the 1800s, could be estimated to a value of about € 150,000 before the fire. However, since the building was part of a larger property with several buildings used in a commercial enterprise, the stable itself could not realistically be sold separately. Nevertheless, the tortfeasor refused to pay compensation of more than € 150,000 for the damage to the building.

Decision

6 The Supreme Court stated a main rule, an exception and then an exception from the exception which could lead the way back to the main rule. 'The starting point regarding both the total damage and any partial damage is that the compensation should be equivalent to the cost of restoring the property, ie for replacement or repair.' This sentence reflects the main rule, but since the damaged property was worth less than the cost of repairing it, the Court also referred to an exception from, or nuance of, this rule. 'In general, however, the victim is not entitled to compensation for the cost of a repair if the sum is higher than that of an equal replacement property or if the sum exceeds the value of the property' (ie before the fire). This negative exception or nuance is in turn nuanced when the Court explained that a right to compensation for repair costs exceeding the value of the property will occur under 'special circumstances'. Repair costs can be allowed to be higher than the value of the property in situations 'when the repair can prevent the occurrence of other expenses and income losses, and therefore can be seen as constituting an actual limitation of the damage.' Another exception when repair costs exceeding the property value can be acceptable is specified by the Court, namely when 'repair is the only way for an enterprise to restore the previous situation, since there are no other opportunities to acquire another property that fulfills a comparable function in economic terms'. An evaluation of the two parties' interests was made, whereby the victim's financial interest in being able to continue his business as before was pointed out; on the other hand, the tortfeasor's interest in not having to pay higher compensation

than the economic harm he caused was also considered. The Court found that in this case, the victim's interest in repairing the building was legitimate. The building was used for commercial activities on the estate and there were no possible ways of replacing this stable with another equivalent property. All in all, it 'does not seem that damages calculated on the basis of repair costs are unreasonable in this case'.

Comments

This case (and the above [8/17 no 1] mentioned NJA 2001, 65 I) can be seen as an exemplification of the handling of how the victim reacts to the initial injury (including the issue of the victim's duty to mitigate the loss).[2] The stable in this case was an integrated 'tool' in the whole business that was run on the estate; there was no possible way of buying another stable (ie outside the estate), therefore, when judging the economic consequences of the alternatives, the best solution was to repair this building. This commentary should not be falsely interpreted as a simplistic homage to 'law and economics' theories. We should certainly not underpin the naive belief that we – with the support of economistic rationality – can accurately calculate the optimal formula for the best possible outcome in tort law. Instead it can be emphasised that jurists must openly invoke legal evaluations concerning different situations and different arguments – and thereby different relations to main rules and exceptions. It is easy to insist on the 'full compensation' solution in tort law, but it is harder – and intellectually more rewarding – to scrutinise the many different questions, situations and arguments that can be evaluated in relation to this so-called full compensation. **7**

18. Finland

Korkein oikeus (Supreme Court) 5 December 1980, Case KKO 1980 II 131

<https://www.finlex.fi/fi/oikeus/kko/kko/1980/19800131t>

Facts

A hijacked a passenger aircraft as it was approaching the destination airport. A first ordered the plane to delay the landing but then ordered the plane to land. Subsequently, A allowed some of the passengers and crew to exit the plane. A then ordered the plane to perform certain domestic and international flights. After landing at the airport of their home town, A went home together with their spouse. The prosecutor accused A of hijacking an aircraft and depriving the crew and passengers of their liberty as well as obliging A to compensate the losses caused to numerous parties because of A's acts. Part of **1**

2 Concerning evaluations of different choices and reactions by the injured party, see *H Andersson*, Skyddsändamål och adekvans (1993) 470ff.

the claimed damages consisted of costs that had been incurred by aviation authorities as well as hospitals and fire brigades in different towns (together V) when they had taken precautionary measures because of the ongoing hijacking.

Decision

2 The Supreme Court held that A had, having diminished responsibility, committed the crime of hijacking an aircraft and certain other crimes, and sentenced A to seven years' imprisonment. As regards A's liability for damages, four of the five Justices did not amend the judgment of the Court of Appeal, in which A was held liable for the costs incurred by the aviation authorities, hospitals and fire brigades when they had taken precautionary measures. However, the amounts of recoverable loss were reduced to 60 % of the actual loss, because A was held to be mentally disturbed in the meaning of ch 2 sec 3 of *vahingonkorvauslaki* (31.5.1974/412). According to the provision, the liability of such a person is limited to an amount that is deemed reasonable in view of the condition of the damaging party and other circumstances as enacted in the provision in more detail.

3 One of the five Justices suggested rejecting the damages claim as regards the losses which arose due to the taking of the precautionary measures, because, according to the laconic reasoning of the Justice, the costs were not causally connected to A's acts to an extent that A could be held liable for them.

Comments

4 In Finnish law, there is no specific doctrine for tackling situations where the damage is caused, at least partly, because of a decision of the damaged party. Instead, such situations belong to the sphere of ch 6 sec 1 of *vahingonkorvauslaki* (31.5.1974/412), introduced in more detail above (7/18 nos 3–5). The said provision covers all situations where the contribution of the damaged party or an external circumstance has affected the occurrence of the loss.

5 As regards the facts of the case, KKO 1980 II 131 is a clear-cut example of a case where the loss of the damaged parties has occurred because of a decision taken by them at the time when the initial damaging action was already underway. However, as the reasoning concerning this question is very laconic both in the opinion of the majority and the minority, it is difficult to say what exactly were the circumstances of the case that were found decisive in the said matter.

6 One may assume that both the blameworthiness and dangerous nature of A's acts and the necessity of the precautionary measures taken by the authorities, hospitals and fire brigades rendered the costs of the latter appearing as recoverable to the majority of the Supreme Court, even though the decisions of the damaged parties were the direct cause of these costs. Moreover, that such costs arise should not be very unpredictable – at least for a normal person – in a case where a plane is hijacked. However, as A was found as having diminished responsibility, it is possible that the dissenting Justice emphasised

the significance of A's condition and regarded the costs for precautionary measures as too distant and unpredictable consequences of A's acts in order to hold him liable to compensate them. As the Justices did not shed too much light on their reasoning on these questions, it is impossible to say what was actually found decisive and what not.

Korkein oikeus (Supreme Court) 28 March 2012, KKO 2012:36
<https://www.finlex.fi/fi/oikeus/kko/kko/2012/20120036>

Facts

V applied to their employer for permission to take study leave in order to study for a vo- **7**
cational degree on air traffic control. The employer, contrary to the provisions of the act on study leave, granted the leave but postponed the commencement of this period by six months. Because the starting time of the degree could not be postponed, V resigned from their job. However, as a result of the resignation, V was no longer entitled to adult education aid from the state. The district court imposed a pecuniary penalty for infringement of the act on study leave on a representative of the employer. V claimed compensation for the loss of adult education aid. The defendants objected to the claim, alleging that V had chosen to resign and, as such, this was unforeseeable to the defendants.

Decision

The Supreme Court was unanimous of the end result, that is, obliging A to compensate **8**
V's loss, but they dissented (4–1) on the details of the reasoning. According to the majority's opinion, when the statutory requirements for adult education aid are met, as they were in the present case, the provisions of the act on adult education aid leave no real discretion to the authority on whether to grant the aid or not. Thus, V had had a statutory right to the aid. According to the Supreme Court, V had no other choice than to resign in order to be able to start their studies in time. In addition, V's resignation could not even have been regarded as unpredictable to the defendants, because V's plan to apply for the aid had been under discussion between V and the employer's representatives. On these grounds, the majority held the defendants liable for V's loss.

The minority, in their opinion, provided further reasoning for the conclusion that V **9**
had no other choice but to resign, and that the resignation was predictable for the defendants. The minority noted first that had V not resigned but simply stopped working in order to be able to start their studies, they would have rendered themselves prone to a damages claim from the employer. According to the minority, it would be unreasonable to require an employee to take such a risk. Thus, in the circumstances of the case, V had no real choice but to resign, providing that they had a place on the course. Furthermore, V's resignation had not been unforeseeable to the employer taking into account that V had gotten a place on the degree course after eight attempts, and this could not have been postponed.

Comments

10 It is first worth noting that liability of the employer and its representative was assessed according to *vahingonkorvauslaki*[1] the general statute on extra-contractual liability, although there was an employment contract between V and the employer, and *työsopimuslaki* (26.1.2001/55, the Employment Contracts Act) which contains a provision on employers' liability towards the employee (ch 12, sec 1(1) of *työsopimuslaki*). The Supreme Court gave no reasons for this, but assumedly it was because the damaging act, that is, the six-month postponement of the study leave, was, besides being contrary to the statutory duties of an employer, a criminal offence attributable to the representative of the employer. In cases where the damaging act is an intentional criminal act, the liability for damages is usually based simply on *vahingonkorvauslaki* regardless of whether there are some concurrent grounds for liability, such as a contract (see above 2/18 no 15).

11 The case illustrates that even an intentional and considered act of the injured party contributing to the occurrence of the loss does not automatically break the causal link between the damaging act and the loss. That is so at least in a situation where the injured party could not have acted otherwise without waiving a significant right, that is, the right to a student place on a degree course. V's limited possibility to reasonably act otherwise had also increased the predictability of V's decision, and this is an argument supporting the recoverability of V's loss. As noted above in 7/18 no 5, clearly predictable circumstances cannot normally be regarded as circumstances external to the damaging act in the meaning of ch 6 sec 1 of *vahingonkorvauslaki* with the result that the effect of the circumstance would be excluded from the damaging party's liability.

12 On the other hand, had V's decision to resign been genuinely unpredictable to A, this would have been an obstacle to the recoverability of V's loss because of the general requirement of foreseeability of causation. Case KKO 2017:81 on forfeiture of employee's wage security and particularly the minority's opinion therein, described in 2/18 no 12 above, offers a good comparison point. As the issue of foreseeability of the causal link was raised in the reasoning of the Supreme Court – by both the majority and the minority – case KKO 2012:36 may also be used as an illustration of the application of the requirement of foreseeability as regards causation.

Korkein oikeus (Supreme Court) 5 June 1998, KKO 1998:59

<https://finlex.fi/fi/oikeus/kko/kko/1998/19980059>

Facts

13 V owned shares in a housing company. A, who had collected an alleged claim from V, requested a district court to seize V's shares to secure the payment of their claim. Prior to enforcing the distraint, V had received a purchase offer for their shares, but the offer

1 See para 11 of the judgment.

had lapsed because of the distraint. Subsequently, A lost their case against V on the principal claim, and the distraint was repealed. After this, V sold the shares but at a lower price than what they had been offered prior to the distraint. V claimed compensation from A for the price difference, basing their claim on the unnecessary distraint requested by A. A objected to the claim alleging, inter alia, that V had neglected their duty to mitigate their loss as they had failed to inform A of the purchase offer and request for a permission to sell the shares.

Decision

The Supreme Court first noted that A's liability for the unnecessary distraint is based on a special provision in the Execution Act, in force at the time, and arises irrespective of A's level of care. In other words, the case relates to strict liability. According to the Supreme Court, even in such situations, the general principle that the injured party must take reasonable steps to mitigate their loss applies. However, according to the Court, in a case of liability based on an unnecessary distraint, it must be the applicant – in our case, A – who bears the risk of decrease in value of the seized object. Because of this, the owner of the seized object may only be required to warn the applicant of a decrease in value of the object by way of exception. The majority (4–1) of the Supreme Court held that, in the present case, V was not in a better position than A to anticipate the decrease in value of the shares. Thus, A was held liable for the entire loss. **14**

In contrast, the minority of the Supreme Court noted that a downturn in the housing market may cause loss to an owner of a flat only if they are willing to sell their flat. As A was not aware of V's plan to sell the shares, A had been unaware of this risk and unable to consider whether to allow V to sell the shares to avoid the loss. As both parties thus contributed to the loss, the minority of the Supreme Court took the view that A's liability must be adjusted to half of the loss. The referendary[2] of the Supreme Court took an even harder position and proposed simply rejecting V's claim. **15**

Comments

The case shows that, at least in the context of requesting an unnecessary distraint, the threshold for adjusting the applicant's liability because of the injured party's failure to mitigate their loss is quite high. However, the Supreme Court based its reasoning heavily on the special characteristic of the applicant's liability for the unnecessary distraint. When a distraint is targeted at someone's property without a solid cause, this is quite a far-reaching intervention in the party's rights, and if the property's value even de- **16**

2 In the Finnish Supreme Court as well as in appellate courts all cases are presented to the judges by an independent official, referendary. If the judges deviate from the proposed decision, and the referendary does not agree with the decision or its merits, the referendary has a duty to submit their opinion to be attached to the judgment.

creases during the distraint, it seems reasonable that the party who applied for the unnecessary distraint must, as a strong main rule, compensate the loss. Because of this, the case may be regarded as giving guidance only in analogous situations, where the risk of certain damage clearly falls on a particular party due to strict liability, but not in cases of normal, negligence-based liability.

19. Estonia

Riigikohus (Supreme Court) 6 May 2015

Case No 3-2-1-39-15

Facts

1 In the yard of a house, the defendant (a minor) hit two passenger cars of the claimant, a resident of the same house, with a bat. The defendant broke the windscreens and back windows of the cars. The claimant demanded that the defendant and the defendant's mother, as a person bearing statutory liability for the defendant's actions, pay damages in the amount of € 1,368. Since one of the passenger cars was insured, the claimant had to bear only the excess. In connection with damaging the other passenger car, the claimant demanded that the defendant compensate for the value of the passenger car (€ 1,100) because, due to the smashing of the windscreen and back window, the car had become unusable.

2 In the objections, the defendant noted, among other things, that the claimant had suffered damage, above all, because the condition of one of the cars deteriorated because it was parked outside with its broken windows for ten months. The claimant did not make any effort to ensure the preservation of the passenger car.

3 The district court granted the claim. The court of appeal set the district court's judgment aside in part and denied the claim for damages to the extent of the value of one passenger car. The court of appeal took the view that, for the purposes of LOA § 127(4), there was no causal link between the passenger car becoming unusable and the smashing of the windows of the passenger car by the defendant using a bat.

Decision

4 The Supreme Court quashed the judgment of the court of appeal and remanded the case to the same court of appeal for reconsideration. The Supreme Court held that it was obvious in the given case that if the defendant's act were imaginatively omitted, the claimant's passenger car with broken windows would not have been parked outside for ten months and become unusable. The Supreme Court explained that a causal link cannot usually be verified merely based on the *conditio sine qua non* principle. In addition to the necessary reason for damage, one must also verify the existence of a legal cause between the defendant's conduct and the claimant's damage. This can be done, above all, with the help of the theory of the purpose of the rule. Under LOA § 127(2), damage does

not have to be compensated to the extent that the prevention of the damage was not the purpose of the obligation or provision as a result of a breach of which the obligation to compensate for the damage emerged. Thus, one must make an assessment of the protective purpose of clause 5 of LOA § 1045(1), which prohibits interference with another person's ownership.

The Supreme Court noted that it did not agree with the appellate court's interpretation of the causal link, according to which, damage was caused because the claimant did not have any money to replace the windows of the vehicle and not replacing the windows by the claimant was not the result of the actions of the defendant. In the present case, the claimant does not blame the defendant for causing the claimant's lack of money. A tortfeasor cannot expect a victim to immediately eliminate the harmful consequences out of their own funds. In some cases, it may prove impossible for the victim, for instance, due to the extent of the damage. As a result thereof, the tortfeasor, by inflicting damage, takes the risk that the consequences of damage will not be eliminated immediately and the extent of the damage will increase in comparison with the time of inflicting the damage. In view of the above, the prohibition to damage an item of property, which is set out in clause 5 of LOA § 1045(1), usually also protects the victim for any increase in the damage. The aforementioned does not mean that the victim is not under the duty stemming from LOA § 139 to not increase the harm caused to them. **5**

Comments

In the present case, it can be said that the victim's decision to leave the passenger car in the damaged condition led to the deterioration of the car's condition. The victim decided not to replace the windows and not to put the car in a garage. Had the victim done so, the damage to the car would not have increased to the level which occurred. While this is partly a situation of contributory negligence, one can nevertheless raise the question of whether the defendant should be liable for the increased damage due to the claimant's failure to act. **6**

The court of appeal did in fact find that there was no causal link between the defendant smashing the car's windows and the car becoming unusable (instead of reducing the damages based on LOA § 139). However, the Supreme Court did not agree therewith, finding that the tortfeasor cannot expect the victim to immediately start eliminating the harmful consequences and that the tortfeasor is also liable for the increased damage (the protective purpose of clause 5 of LOA § 1045(1)). One could agree with the court of appeal's views on the absence of a causal link, for instance in a situation where the claimant would have placed the car damaged by the defendant in a garage and there was, due to the claimant's own negligence, a fire in which the vehicle was destroyed. **7**

20. Latvia

Kurzemes apgabaltiesa (Kurzeme Regional Court) 7 June 2019, No C20402712
<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/407519.pdf>

Facts

1 V sought medical help at the dental clinic, A1, as he had toothache. Dentist A2 diagnosed chronic dental nerve inflammation. He did not extract the tooth and referred the patient for dental treatment to another dentist A3 who also worked in A1. The next day, V went to the general hospital A4, which was closed due to a public holiday. Hoping that the pain would stop, V took a painkiller and attended a summer solstice celebration. In the evening of that day, his health condition deteriorated, he could not eat, his throat was swollen, and he went to sleep. On the next day, V's pain became intolerable and he was not able to swallow the painkiller, so he was taken to A4. A doctor, internist A5, diagnosed tooth contusion with advanced inflammation of the jaw area and recommended extraction of the tooth. In his private practice, dentist A6 extracted the tooth. Afterwards, V's health condition deteriorated, and he was taken to another hospital and subsequently to yet another with a swollen throat, difficulty in breathing, a high temperature and an inability to speak. V had to undergo treatment for approximately one month.

2 V brought a claim against A1, A2, A3, A4, A5 and A6 for compensation for non-pecuniary damage and losses, arguing that the medical personnel, including those working for the clinic and hospital, committed several violations in his treatment, failed to provide the examinations required to assess his health condition accurately and the rapid degeneration of his condition.

Decision

3 The first instance court rejected the claim completely, arguing that, according to the forensic medical experts in the case, the diagnoses of V are linked to an atypical, rapid course of the claimant's illness, which the court had no reason to doubt. The claimant's own conduct (failure to carry out preventive examination and treatment of the oral cavity and teeth, decision to attend the summer solstice celebration instead of contacting the emergency medical service) shows an irresponsible attitude towards his own health. In addition, there is no evidence in the case that the defendants acted unlawfully and that there is a causal link between the defendants' actions and the consequences to the health of claimant V.

4 The court of appeals decided to satisfy the claim only against A1 and award the claimant V (a reduced amount of) compensation for non-pecuniary harm in the amount of € 500, rejecting the claim in the remaining amount and against the other defendants due to a lack of misconduct (maltreatment) among other things. The court argued that A1 is liable since the medical professional, A2, (as an employee of A1) did not fulfil her duty to exercise due care to prevent harm to the patient's health by taking all reasonably

practicable steps, as she did not provide an accurate diagnosis and failed to make relevant entries in the patient's medical records. At the same time, the second instance court reduced the compensation for non-pecuniary damage for V since his state of health has been restored; there are no serious and irreversible health consequences; his ability to work has been restored; the health problems are partly not related to the actions of A1's staff, as the claimant did not seek medical assistance the following day after experiencing symptoms, despite the fact that the tooth continued to ache. The failure to seek medical assistance cannot be considered a responsible attitude towards one's health. The court also relied on the court appointed medical forensic expert's report, which concluded that the claimant's conduct, not taking care of his state of health and not seeking medical assistance immediately after deterioration of his condition, had caused serious damage to his health.

The judgment of the second instance court has come into force as the Supreme Court has refused to initiate cassation proceedings. **5**

Comments

In the present case, it was concluded that A2 is an employee of A1 and A1 is to be held liable for the misconduct of A2. The most important issue in determining the liability of A1 was causation. Insofar as the evidence reflected in the judgment allows this conclusion, the approach taken by the first instance court and the outcome may be less contradictory than that of the Court of Appeals. The misconduct of A2 was not duly considered as a potential cause of V's pain and suffering and the *conditio sine qua non* test was not applied. Such an application may have helped to justify the limitation of liability at the causation level and the conclusion that the main cause of the damage was the decision of V not to attend emergency medical services and seek immediate medical assistance but to attend the summer solstice celebration instead. The question of whether the damage to V's health and harm would have occurred if he had acted properly and responsibly was apparently not considered and addressed. This would have made the arguments of the court clearer and more relevant. One may hypothetically argue that V would not have become more responsible towards his health condition when experiencing the symptoms if he had learned the precise diagnosis at the time of being treated by A2. It was concluded that the deterioration of V's health was to a certain extent not typical and, therefore, could be considered an unforeseeable consequence of the misconduct, even if there was a causal link between the misconduct and the damage to V's health. It must be noted that, in the present case, the conduct of V was not only a potential cause of the damage but was also in breach of law.[1] Therefore, the existence of a causal link between the misconduct of A2 and **6**

1 Sec 15 (1), (2) of the Law on the Rights of Patients provide that the patient has a duty to take care of his health and he has a duty to take an active part in his treatment as much as possible and to provide the treating doctor with information to the best of his ability and knowledge.

the harm caused to V was debateable and, if the court had come to the conclusion that V did not prove causation, then the claim would have to be dismissed entirely.

7 The case also deals with the issue of the limitation of liability due to the conduct and decisions of the victim himself or herself. The first instance court even referred to sec 1776 (1) of CLL, arguing that the victim must take reasonable measures in the particular circumstances to prevent losses. Although the particular norm may not have been a suitable basis for the circumstances of the present case and the Law on the Rights of Patients might have been more appropriate, the claimant V indeed had an obligation to prevent harm to his health and to take appropriate steps and it was his decision not to do so (or his ignorance) and he could have, or at least should have, known the risks in not doing so when his condition worsened rapidly. In such cases, before assessing a reduction or exclusion of liability, the existence of the preconditions for liability should be addressed first. If they do exist and the misconduct of a medical professional has in fact caused or contributed to the harm suffered by the patient, a limitation of liability should become relevant. Therefore, it should have been firstly established whether the defendant is at least to some extent liable in order to reduce the liability at the causation level. If indeed, as concluded by the second instance court, there was causation between the misconduct attributable to A1 and the negative consequences to V, one could argue that the circumstances did permit a reduction of A1's liability since the harm was at least partially caused by the negligence of V himself.

Rīgas apgabaltiesa (Riga Regional Court) 6 April 2016, No C31481713

<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/287444.pdf>

Facts

8 V fell down some stairs located in trade premises and broke his right heel bone. In order to restore the original state of health, V had to undergo medical procedures and rehabilitation. The staircase V fell down is located at the entrance of the trade premises and it leads up to the trade hall. According to the expert's opinion submitted to the court, the stairs did not comply with Latvian construction standards, as they were not equipped with a banister. V brought an action against the owner of the building in question, requesting compensation for damage in the amount of € 371 and for non-pecuniary harm suffered in the amount of € 14,229.

Decision

9 The first instance court rejected the claim completely. The second instance court partially satisfied the claim, awarding V compensation for damage in the requested amount and € 500 as compensation for the non-pecuniary harm suffered. The Supreme Court refused to initiate cassation proceedings due to a lack of substantial breaches of substantive and procedural law.

The second instance court concluded that A's unlawful omission to perform its duties, namely, that A had not equipped the stairs with a banister, had been proved. It also disagreed with the court of first instance on the point that no causal link could be established in the particular case between the unlawful conduct of A and the damage to V as V himself was negligent. The second instance court stressed that there was a direct causal link between the fact that the stairs were not equipped with a banister and V's injury as a banister would have prevented or reduced the severity of the fall. This, in the court's opinion, was also confirmed by the fact that the stairs in question were narrow enough for the banister to fulfil its safety function. **10**

The amount of compensation for the non-pecuniary harm suffered by V was established by the court, taking into account existing practice in similar cases. **11**

Comments

The decision of the second instance court indicates the boundaries of limitations of liability due to the injured party's own conduct. Although the court of first instance extensively analysed V's conduct, which could be seen as at least contributing to the occurrence of the accident (V was going out of the shop backwards while speaking with the shopkeeper; V should have seen that the stairs were not equipped with a banister, etc), the second instance court acknowledged merely the unlawful conduct (omission to perform duties) of A as a cause of the accident. **12**

Contrary to the court of first instance, the second instance court did not apply the limitation of liability of A based on considerations of lawful alternative conduct. The court of first instance came to the conclusion that, taking into account the conduct of V, the possibility of V accidentally falling could not have been ruled out even if the stairs had been equipped with a banister. The second instance court provided arguments that a banister would have prevented or at least reduced the severity of the fall and reinforced this conclusion by highlighting the physical characteristics of the stairs (ie the stairs were narrow). **13**

Although, according to the facts of the case, the requirement to equip stairs with a banister was determined by the Latvian construction standard regulating fire safety, it was not argued that A's liability could be limited because the protective purpose of the norm breached does not cover the prevention of such harm as in the given case. **14**

22. Poland

Sąd Najwyższy (Supreme Court) 1 September 1970, II CR 371/70
OSNCP 5/1971, item 93

Facts

1 V's taxi was damaged in a car crash with a truck. The driver of the truck was responsible for the accident. A is his insurer. V demanded compensation for the cost of repairs and the income lost in the period when his car was in a garage and when parked outside the garage (from 19 November 1967 to 5 October 1968). V did not pick up the repaired car from the garage on time (June 1968, when the repair work was completed) because he had not received any indemnity from the insurer. As he had no other financial resources, he had planned to use the indemnity to pay for the repairs.

Decision

2 An adequate causal relation with the accident exists only with respect to the income lost in the period between the accident and the completion of the repair of the car (ie until 30 June 1968). Any further losses flowing from the delay in picking up the repaired car from the garage are not causally related to the tort for which the insurer is liable. However, the case is remanded, since the court failed to establish whether the fact that A refused to reimburse the repair costs in time was wrongful and whether V should bear liability for his own acts (art 415 KC) with respect to the consequential losses. The court qualified a part of V's claim as a claim for consequential losses, which consist in the decrease in the value of the car and V's earnings arising from taxi services lost in the period from 30 June to 5 October 1968. It is also relevant to establish the extent to which V contributed to this part of the damage by his own failure to pay the repair costs himself and to find another source of income.

Comments

3 The case shows that the decision of the injured party principally breaks the adequate causation relation. The contribution to the increase of damage is subject to the same principles as a contribution to causing damage in the first place. The former occurs if the extent of damage would have been less significant but for the injured person's contributory conduct. Article 362 KC, which encompasses the rule on contribution to the damage, gave rise to four ways of interpretation. Their common ground is that one can contribute to the damage only by a conscious act and not by a reflex caused by fright or panic. Further elements are the subject of controversy. According to the interpretation widely accepted in current case law, the victim's contribution is legally relevant when their conduct was objectively improper (unlawful). According to the second most popular interpretation, the victim's conduct is assessed in a manner conditional upon the grounds

for liability. If the person liable for damage is liable based on fault, then only the fault of the injured person may constitute contributory negligence. If liability is based on risk or fairness, it is sufficient to submit a plea of objectively improper behaviour of the victim. Hence, in short, it can safely be concluded that the victim's conduct is subject to an objective assessment.

24. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 27 June 2012
Case no 25 Cdo 2974/2011

Facts

A caused injury by opening the left front door of a car as the driver after stopping his motor vehicle at a time when a cyclist was passing him. As a result of the collision with the vehicle, the cyclist fell, suffered a brain injury and died. 1

According to the district court, this was a case of special liability for damage caused by traffic under sec 427 of the Civil Code (the vehicle had stopped but was in operation). The court awarded compensation to the deceased's close family members. According to the court, the cyclist had not breached any duty and there were therefore no grounds for contributory fault on her part. 2

The regional court, as the court of appeal, ruled that the cyclist was 80 % contributorily negligent for failing to wear a protective bicycle helmet. V appealed against the judgment. The Supreme Court of the Czech Republic upheld the decision of the court of appeal as factually correct. 3

In determining the cause of the damage, the court of appeal relied on expert testimony, which showed that 80 % of cyclists who suffer fatal head injuries would have survived if they had been wearing a helmet while riding. On the basis of the expert, the court found that the cyclist had breached her general duty of care under sec 415 of the Civil Code and that 80 % of the damage was self-inflicted. To that extent, A was not liable for the damage. 4

Decision

The failure to wear a protective helmet by a cyclist constitutes a breach of the preventive duty under sec 415 of the Civil Code. The victim's failure to wear a helmet contributed to a significantly more serious (fatal) consequence. 5

Comments

6 The Supreme Court relied on an earlier decision,[1] in which it was held that the failure to wear a protective helmet by a cyclist over 15 years of age (over 18 years of age as of 1 July 2006) constitutes a breach of the preventive duty under sec 415 of the Civil Code.

7 The Court correctly noted that the primary cause of the accident was the driver of the vehicle opening the door. However, the fatal injuries resulted from the cyclist's breach of her duty of care – if it were not for this contributory negligence, the extent of the damage would have been substantially lower. According to the Court, the circumstances surrounding the operation of the motor vehicle did not necessarily and directly lead to the fatality.

8 That decision was criticised by some commentators. It was argued that the determination of the cyclist's contributory negligence is clearly excessive, since the decisive cause of the damage was the conduct of the driver and not of the cyclist. From the perspective of economic legal theory, it appears that the driver's cost of avoiding the injury is much lower than the cyclist's.

9 The argument that a cyclist has no legal obligation to wear a helmet when riding is serious. Also, it has not been proven that the average cyclist should have worn a helmet and was negligent when they did not.

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 15 October 2019, No Rev 630/2015-9

<https://www.zakon.hr/cms.htm?id=42483>

Facts

1 V is a football hooligan who took part in an incident initiated by a group of hooligans who physically attacked security officers when attempting to enter a football match without valid tickets. The security officers called the police, who intervened shortly afterwards and the hooligans confronted the police using force. In attempting to restrain the hooligans, the police also used force, including the use of batons. In the course of being restrained by the police officers, V was injured. V's injuries required medical attention, and, after being released from hospital, he required assistance from a third party for a couple of months. V filed a claim against A, the Republic of Croatia, requesting compensation for the material and non-material damage he sustained as a result of the physical injuries inflicted by the police.

1 Judgment of the Supreme Court of the Czech Republic of 20 January 2010, Case no 25 Cdo 2258/2008.

The courts of first and second instance partially sustained and partially dismissed V's claim and V filed an application for revision before the Supreme Court of the Republic of Croatia. 2

Decision

The Supreme Court dismissed V's application as unfounded on the merits and affirmed the lower courts' decisions. 3

Substantiating its decision, the Supreme Court accepted the lower courts' position that, notwithstanding the fact that the police exceeded their authority by using excessive force, V largely contributed to the police intervention by his extremely aggressive and persistent behaviour. Thus, for example, noted the Supreme Court, V attacked a female security officer, knocked her down to the ground and held her head pressed against the ground with his knee. He would not calm down but continued attacking police officers who attempted to restrain him and even while being driven in an ambulance to hospital, he continued insulting the security officer he had attacked earlier. For these reasons, the Supreme Court supports the lower courts' finding that V contributed to the occurrence of the incident and consequently to his own damage to 60 %, reducing accordingly the overall compensation awarded to V. 4

Comments

See below 8/25 nos 17–22. 5

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 28 June 2017, No Rev 2890/15-2

<https://www.iusinfo.hr/sudska-praksa/VSRH2015RevB2890A2>

Facts

V was a professional scuba diver who drowned while working at A's fish farm. V was a former drug addict and, in the course of his drug withdrawal therapy, he regularly took prescription drugs which contain benzodiapazine, a substance which causes drowsiness, fatigue and shortness of breath as side-effects. V1, V's common-law wife, sues A and requests compensation for non-material damage caused by the death of a close relative. Substantiating her claim, V1 argued that scuba diving represents a dangerous activity and A, as V's employer, should, therefore, be liable based on the rules of strict liability. 6

The first instance court partially upheld V1's claim, holding that by taking a prescription drug, which causes drowsiness, fatigue and shortness of breath while scuba diving, V contributed to the occurrence of the harmful event to 50 %. 7

8 The appellate court quashed the first instance court's decision in the part in which V1's claim was upheld, reversed the first instance court's decision and dismissed V1's claim entirely, holding that V's drowning was his sole responsibility.

9 V filed an application for revision before the Supreme Court of the Republic of Croatia.

Decision

10 The Supreme Court dismissed V1's application and upheld the second instance decision. Substantiating its decision, the Supreme Court reasoned that the autopsy report of V revealed a four times higher concentration of benzodiapazine than allowed, and since every drug contains instructions about its side-effects, V should have been aware of benzodiapazine's side-effects. On the other hand, A, as V's employer, could only have known what drugs V was taking if V had informed him of this. Against this background, the Supreme Court reasoned that, by failing to warn his employer that he was taking medication which made him unfit for scuba diving, V became exclusively responsible for the occurrence of the harmful event, and therefore the appellate court was correct to dismiss V1's compensation claim entirely.

Comments

11 See below 8/25 nos 17–22.

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 15 January 2013, No Rev-x 568/11-2

<https://www.iusinfo.hr/sudska-praksa/VSRH2011RevxB568A2>

Facts

12 V was a passenger in a car, which was fired at by members of the Croatian armed forces during the Homeland War in 1991. V was severely injured and, according to the medical expert witness, his capability to work was reduced by 90 %. V filed a claim against A, the Republic of Croatia, claiming a loss of profit allegedly caused by the wrongful act and the injuries thereby sustained. According to his own statement, V claims loss of profit caused by him being forced to leave regular education. At the time of the injury, V was a first-year philosophy and ethnology student. He continued studying while recovering from injuries, but after some time, he dropped out of university. During the proceedings, V argued that he was forced to drop out of university because of the injuries sustained in the accident. V requests to be compensated for the difference between his current salary and the salary he would have received as a philosophy teacher had he graduated from university and got a job as a teacher.

13 The first instance court dismissed V's claim. This decision was affirmed by the appellate court. V files an application for revision before the Supreme Court.

Decision

The Supreme Court dismissed V's application as unfounded on the merits and affirmed the lower courts' decisions. 14

Substantiating its position, the Supreme Court noted that, during the proceedings before the first instance court, the medical expert witness confirmed that after recovering from his injuries in 1993, V was capable of continuing his university education. Hence, the medical expert witness confirmed that the injuries sustained during the accident had not diminished V's cognitive and mental capabilities and, accordingly, these injuries neither prevented him from completing his university education nor would they have prevented him from getting a job as a philosophy teacher had he graduated from university. 15

Against this background, the Supreme Court reasoned that no causal link exists between the wrongful event and the loss of profit claimed by V, since V's failure to graduate from university was caused by his own actions/omissions, and not by the wrongful event. 16

Comments

Pursuant to art 1092, para 1 of the COA, a victim who has contributed to the occurrence of damage, or to an increase in the damage, is only entitled to a proportionally reduced amount of compensation. Pursuant to art 1092, para 2 of the COA, where it is not possible to determine which portion of damage can be accounted for by the victim's action or failure to act, the court shall decide on the compensation taking into account the circumstances of the case.[1] Similar (but not the same) solution is provided for in art 1067 of the COA, with respect to strict liability caused by a dangerous object or activity. Pursuant to art 1067, paras 2 and 3 of the COA, a responsible person can be entirely or partially exonerated from liability, but only provided that they prove that the damage occurred due to an act of the victim which they could not have foreseen and the consequences of which could not have been avoided or eliminated.[2] 17

As is evident from the analysed case law, there are two different ways in which a victim can contribute to their own damage: first, by contributing to the occurrence of an initial harmful event and second, by causing the occurrence of some subsequent types of damage, which are not caused by the initial harmful event, but which are exclusively caused by the tortfeasor's subsequent actions/omissions. Thus, for example, in case Rev 630/2015-9, the courts dealt with a situation in which the initial harmful event (ie the excessive use of force by the police), and consequently all the damage arising therefrom, was partly attributed to the victim's actions. In case Rev-x 568/11-2, on the other hand, 18

1 Full text of art 1067 of the COA in English, see in *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 54.

2 Full text of art 1067 of the COA in English, see in *M Baretić*, Croatia, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law – Basic Texts (2nd edn 2018) 49.

the courts dealt with a situation in which subsequent damage sustained by the victim was caused exclusively by his own subsequent actions/omissions, and not by the initial harmful event.

19 Depending on the way in which a victim contributed to their own damage, the courts will approach the assessment of the victim's contribution differently. If the victim contributed to the initial harmful event, the courts will normally express this contribution in percentage terms, and will proportionally reduce the overall amount of compensation. Hence, the victim will be awarded all heads of damage caused by the harmful event, reduced by the percentage of their contribution to the damage. Naturally, if the victim exclusively caused a harmful event, eg if a responsible person took no part in the occurrence of a harmful event, a responsible person will be entirely freed from liability, as is evident from the Supreme Court's judgment in case No Rev 2890/15-2.

20 If, on the other hand, the victim did not contribute to the initial harmful event but rather their subsequent actions/omissions caused some 'follow-up' damage, which was not caused by the initial harmful event, the courts will normally dismiss the victim's request to be compensated for that particular subsequent damage, and will reduce the overall amount of compensation for the amount of damage caused by the victim's subsequent actions/omissions, ie it will award the victim compensation for only those heads of damage which are causally linked to the initial harmful event.

21 The approach the courts usually take in substantiating their decision to reduce compensation for the victim's contribution to damage will normally depend on how the victim contributed to their own damage. If the victim contributed to the occurrence of the initial harmful event, the courts will most likely base their decision to reduce the overall compensation on art 1092 of the COA or art 1067 of the COA, depending on whether liability is strict or fault-based. If, on the other hand, the courts find that a particular type of damage was not caused by the initial harmful event but some subsequent victim's actions or omissions, the courts will most likely justify their decision to dismiss the claim regarding these subsequent heads of damages by invoking the lack of causality, as was the case in the Supreme Court's judgment No Rev-x 568/11-2. However, regardless of whether the court relies specifically on art 1092 or art 1067 of the COA or on a more general notion of lack of causality, the fact remains that lack of causality is the underlying principle justifying the victim's contribution to their own damage: regardless of whether a victim contributes to their own damage by partially contributing to the occurrence of the initial harmful event or by exclusively causing some subsequent damage, a causal link between the responsible person's actions and the damage will be entirely or partially disrupted. As frequently explained in legal doctrine[3] and jurisprudence,[4] in order to hold a tortfeasor liable for particular damage, an uninterrupted causal link must exist

3 *P Klarić*/*M Vedriš*, Građansko pravo (14th edn 2014) 596; *V Gorenc*/*L Belanić*/*H Momčinović et al*, Komentar Zakona o obveznim odnosima (2014) 1705.

4 See the Supreme Court's judgment No Rev 137/09-2 of 11 May 2011, below under 9/25 nos 1–6.

between the tortfeasor's wrongful act and this damage. If the causal link is interrupted by someone else's actions or omissions (which may include a victim's action or omission) or by chance (ie a natural event or social event),[5] a tortfeasor who caused the initial wrongful act will not be held liable for this subsequent damage.

As is evident from arts 1092 and 1067 of the COA, the victim's contribution in a given case will be assessed based on different conditions, depending on whether rules of strict or fault-based liability are applied. If a liable person's liability is assessed based on the rules of fault-based liability, pursuant to art 1067 of the COA, in order to partially or entirely release a responsible person from liability, it will suffice to prove that the victim contributed to the occurrence of a harmful event. However, if the rules of strict liability were to be applied, merely establishing the victim's contribution will not be sufficient. In addition, a liable person will have to prove either that they could not have known or were not expected to know of the victim's actions or that they were unable to avoid or eliminate the consequences of the victim's actions. Thus, for example, in case Rev 2890/15-2, the Supreme Court – holding that scuba diving is a dangerous activity and therefore applying rules on strict liability – released the responsible person from liability only after establishing that this person, as the victim's employer, could not have known that the victim was taking medication which made him unfit for scuba diving. **22**

26. Slovenia

Vrhovno sodišče (Supreme Court) 16 November 1995, II Ips 16/94

<https://www.sodnapraksa.si/> (1 December 2021)

Facts

A bus stopped at a place where stopping for the disembarkation of passengers was not allowed. V got off the bus and went to an opening in a fence along the road and headed towards an equally wide opening in a fence on the other side of the road, whereby she was hit by a motor vehicle near the opening on the opposite side of the road. V claimed damages from the bus company (A). The courts of first and second instance rejected her claim for damages. **1**

Decision

The Supreme Court rejected revision and upheld the judgments of the courts of first and second instance. It agreed with the findings of the lower courts that the conduct of the bus driver constituted a serious violation of traffic regulations. The Court of Appeal's assessment that the mere fact of a passenger disembarking from the bus at an un- **2**

5 See in more detail below under 9/25 nos 1–8.

authorised place is not sufficient to conclude that there is a causal link between that fact and the damage suffered by the passenger in the course of events is correct. The Court emphasised that the damage did not occur immediately on disembarkation and at the place of disembarkation, and that the passenger who decided to cross a carriageway intended only for motor vehicles, after getting off the bus, was an adult, able to assess normal dangers.

Comments

3 The Code of Obligations mentions the contribution of an injured party to damage in two provisions. In the chapter on strict liability, the Code of Obligations stipulates that the holder of a dangerous object is only partly liable if the injured party contributed to the damage (para 3 of art 153 of the Code of Obligations), and in the chapter on the extent of compensation for material damage, an injured party who also contributed to the damage, or caused the damage to be greater than it would otherwise have been, is entitled to only relatively reduced compensation (para 1 of art 171 of the Code of Obligations). Although the Code of Obligations in both provisions speaks only of the injured party's contribution to the damage, there is no doubt that, as in the case of a third party's conduct, the causal link may be broken by the injured party's conduct.

27. Hungary

Kúria (Curia of Hungary) Pfv III 20.535/2014

BH.2015.36

Facts

1 The husband of applicant 1 and father of applicant 2 died in 2011 upon being electrocuted at a fishing lake while touching the high tension lines above him with his fishing rod. The applicants sued the owner of the fishing lake and sought non-pecuniary damages for the suffering caused to them by the victim's death.

Decision

2 The court awarded the claimed damages to the applicants, however not in the amount sought by the wife and father of the victim of the accident. The defendant successfully proved the contribution of the victim to the occurrence of the fatal accident and, based on this, the court established the liability of the victim to a proportion of 50 % for the occurrence of the damage, since he knew about previous similar accidents in that area and he was repeatedly warned by the employees of the owner of the lake about the risk of electrocution and was asked to leave that area. The owner of the lake also placed warning signs prohibiting access to the area.

Comments

The court did not exonerate the defendants, neither the owner of the lake (defendant 1), nor the administrator of the lake, although he warned the victim of the risk of potential accidents and the victim used the fishing lake despite such warning. In the court's view, the contribution of the victim to the accident was not unavoidable by the custodian of the lake, who should have forbidden the victim from continuing to fish in that area and who could have barred access to the lake. The court emphasised that, being a case of strict liability, in the case before it, not the fault of the parties had to be compared, but the victim's contribution to the damage should be established. 3

Kúria (Curia of Hungary) Pfv III 21.811/2017

Kúriai Döntések 2019/2

Facts

The victim (applicant) suffered severe bodily injury, by injuring her knee when crossing railway lines at a train station under reconstruction. Because the temporary access to the platform from which the passenger should have travelled by train was not possible due to a defective stationary train, she simply walked over the rails to catch the train when she hurt her leg. Some days later, she was diagnosed with a severe fracture and underwent surgery. She claimed approximately € 15,000 from the national railways company in non-pecuniary damages for the loss of her ability to walk, drive a car and to work. 4

Decision

The court of first instance dismissed the claim because the passenger could not prove with conclusive evidence that the fracture occurred when she crossed the railway lines; she could only present witnesses to prove that the accident took place on the railway premises. At second instance, the court changed the decision and established the liability of the railway company. This court found that the railway company acted negligently when not setting up an alternative access route to the platforms upon noticing that one was blocked by a defective train. 5

The second instance court admitted that it cannot be established based on medical expertise available to it that the fracture occurred on the occasion of the accident, but admitted that this could be the result of the injury and established the causal link between the path the victim took and the injury suffered by her. It established the fault of the railways in not ensuring that passengers could access the railway platforms without assuming the risk of crossing the railway lines. The court considered that the railway company was also at fault for not warning passengers about the unexpected circumstance and not arranging an alternative safe route to the platforms. The court concluded that the railway company could not prove the lack of its fault. The railway company subsequently challenged the decision at the *Kúria*. 6

7 The *Kúria* found the claim unjustified and established that the railway company is liable for the safe condition of the premises of the railway company's stations and therefore it falls within the obligations of the railways to ensure that passengers can access the platforms safely, without being forced to cross over the rails.

Comments

8 Surprisingly, the courts did not discuss in this case the contributory negligence of the passenger for not seeking an alternative route even further than the place where the accident occurred in order to safely reach the platform.

Kúria (Curia of Hungary) Pfv 20.999/2012/5

Facts

9 An intoxicated person lying on the road at night in dark clothes was hit by a car driving at low speed (30–40 km/h) and with its lights on. The driver noticed the victim only when he was within braking distance, therefore he could not avoid the accident and ran over the person. The victim suffered 20 % health damage and claimed both pecuniary and non-pecuniary damages from the driver of the car that hit him.

Decision

10 The court established the liability of the defendant, arguing that he indeed could have avoided the accident if he had manoeuvred in time when he noticed the person lying on the road in order to avoid driving over him. This omission of the driver was qualified by the court as carelessness, although the court admitted that a person lying on the road at night is *a circumstance not expected realistically by a driver at night* and this unexpected situation caused the accident. Nevertheless, the court found that the cause of *the accident was not external to the operation of the hazardous activity* (the driving of the car). However, the court considered the contributory negligence of the victim to be 70 %.

11 On appeal and recourse, the central question was whether the court may establish joint liability of the victim and the insurer in this case considering the circumstances of the accident under art 341 of the old Civil Code (which states in para 2 that the author of the tort should not be held liable for that part of the damage which was caused by the victim) and in what proportion this should be established.

12 In the court's view, when assessing the liability of the operator of a hazardous activity, it must be taken into account whether he/she acted as expected from another person in the same circumstances, namely whether he/she has done everything possible to avoid or to mitigate the damage. If the driver did not act according to this standard, it will not be a case of joint liability but of sole liability, whereas the victim will bear his/her share of liability only when he/she was at fault.

The *Kúria* established that the accident was caused by the applicant lying on the road at night in dark clothes, the driver had not infringed traffic road rules and cannot be held liable for not reacting promptly or not making the right manoeuvre to avoid the accident. 13

28. Romania

Tribunalul Neamț (Neamț Court) Civil Section, Decision No 694/2019

<www.sintact.ro>

Facts

A attacked V on his own land, having provoked V to fight, causing him severe injuries resulting in permanent invalidity and reduction of his work capacity by 50 %. The acts of A were qualified by the criminal investigation as attempted murder and causing personal injury, and they were sentenced to prison by the criminal decision no 8/02.02.2017 of the Tribunal of Neamț, confirmed later also by criminal decision no 845/30.06.2017 of the Appeal Court of Bacău. In the criminal case, V sought € 200,000 in moral damages as compensation for the suffering caused to his family and for the partial loss of his working ability. 1

Decision

The Tribunal of Neamț granted the victim only RON 15,000 in moral damages, *as equitable compensation* for the emotional harm suffered by him, considering his *concurrent fault* and contribution to the causation of the harm. Subsequently, within a separate civil law action, V claimed from A RON 2,500 in periodical payments as pecuniary damages and RON 1,000 for the maintenance and schooling of his son, since he partially lost his working capacity and remained with a permanent invalidity as a consequence of the attack. The court partially admitted the claim and obliged A, who hit V most severely, to pay V monthly damages of RON 3,000, the remainder of the claims being dismissed. 2

The court reduced the damages in proportion to the fault of the victim, namely *provocation*, which caused the conflict, awarding RON 3,000 instead of RON 5,000. The court decided so based on art 1.371 (1) C civ, which stipulates that: 'in case the victim contributed by fault to the causation or aggravation of the harm or did not prevent the occurrence of the harm, totally or partially, although could have done so, the person liable for the harm will be liable only for the part of the harm caused by him'. 3

Curtea de Apel (Court of Appeal) Bucresti, Civil Secion a v-a, Civil Decision No 1076/2017
Cod ECLI ECLI:RO:CABUC:2017:052

Facts

4 V, the victim of a car accident, who was under the influence of alcohol, was travelling as a passenger with the consent of the driver in an open car used for the transportation of goods. Thus, the driver knew that the passenger was intoxicated. As a consequence of the road accident, V fell out of the car and suffered injuries causing his death. Following the accident, V's brothers filed an action against the insurer of the driver who caused the accident, each claiming RON 200,000 in moral damages.

Decision

5 By decision no 2746/26.10.2016, the Tribunal of Ilfov partially accepted the claim of V's brothers, obliging the insurer to pay moral damages of € 80,000 to each of them. Upon appeal, the Court of Appeal of Bucharest reduced the damages to RON 25,000 each.

6 In its reasoning, the Court established that *moral damages must be evaluated taking into consideration the compensatory function of tort law and not the punitive function* and account must be taken of all circumstances of the case (both subjective and objective) relevant for establishing a *sufficient and equitable amount of damages*. In the court's view, moral damages cannot be dissociated from the economic and social context of the victims, taking into account that this should not significantly modify their living standards, otherwise, according to the court, the scope of moral damages would be 'distorted'.

7 The court reassessed the amount of damages granted by the lower court and, being guided by the principles of equity and proportionality, granted V a lower amount of RON 25,000, reducing the amount in proportion to the contributory negligence *of the victim, which however does not exonerate the insurer from liability*. The court also found that the driver infringed the legal provisions prohibiting the transportation of persons in a vehicle designed for transportation of goods, in the hope that this is not risky.

Curtea de Apel (Court of Appeal) Cluj, Civil Section I, Decision No 50/A of 2020
<www.sintact.ro>

Facts

8 V, a tourist, during an excursion in the mountains, left the marked tourist path to take photos and slipped into a cave, falling approx 85m. The Salvamont service found V after more than five hours rescue work, when they found her dead. The applicants sued in their own name, and in their quality as legal representatives of V's child, the Romanian State, the local tourism association, the County Council, the Salvamont Service and the Romsilva National Forestry Administration, the administrator of the national park, re-

questing the court establish their tort liability and obliging them to pay jointly € 400,000 in moral damages, of which € 200,000 to V's minor son, € 100,000 to V's wife and € 100,000 to V's father.

Decision

In its decision no 252/F of 15 May 2019, the Tribunal of Cluj dismissed the civil claim on the ground that the applicants did not prove the liability of the defendants. V decided to leave the tourist path which was marked and walked to the cave on a road which was not marked, only used by cavers, and probably slipped on the ground and fell into the cave, as confirmed by witnesses. The applicants challenged this decision, which was dismissed by the Appeal Court of Cluj in decision no 50/A/5 of 5 March 2020. **9**

Concerning the fault of the victim and the issue of causation, the court found that V willingly and voluntarily went to the place of the accident. From the description of the place of the accident given by the applicants, the court deduced that the place from where the victim fell into the cave was a narrow part of the road, extremely steep and slippery, not being fenced at all. It was further established that the victim, as an adult, had the necessary knowledge to realise and analyse the risks of departing from the tourist path, thus assuming the risk of an accident while entering that area. **10**

The court concluded that the accident was the consequence of the faulty behaviour of V, who: a) ignored the warning displayed in compliance with the requirements of art 53 para (1) lit (1) of Ordonanță de Urgență a Guvernului (OUG) no 57/2007 and art 54 of Law no 46/2008, b) left the marked path voluntarily, assuming any risk; c) left the tourist path, thus infringing the legal requirements art 53 (i) and (l) of OUG no 57/2007 on the legal regime of protected natural areas, conservation of natural habitats, of the wild flora and fauna, which provides that caves and potholes may be visited only by persons with a professional background in the techniques of alpine caving and who have a permit from the owner of the concerned cave or potholes and from the county Salvamont Service,; d) did not have the two permits from the authorities in charge of that speleological area and infringed art 54 (1) of Law no 46/2008 of the Forestry Code stating that access to forests is allowed only in designated areas and on marked routes. The court added that the mountain area is full of risks, acknowledged and assumed by everybody who decides to visit such areas, and the marking and fencing of all areas, which fall outside the tourist paths, is impossible. **11**

29. European Union

European Court of Justice, 5 May 1983, case 758/79, Pizziolo v Commission

ECLI:EU:C:1983:121

Facts

1 Pizziolo (V), a scientific officer at the Joint Research Centre, was granted a one-year leave of absence on personal grounds until 28 February 1971. He has not been reinstated since. Staff Regulations in force at the time foresaw that an official 'must be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post'.

2 On 24 October 1979, V brought this action, seeking a declaration that he should have been reinstated on 1 March 1971, asking for reinstatement in the first vacant post corresponding to his seniority, and demanding compensation for his loss of salary in the interim.

Decision

3 By an interlocutory judgment of 2 April 1981, the Court dismissed V's claim to be reinstated as of 1 March 1971, but appointed experts to assess whether he would have qualified for any posts that became vacant thereafter. These experts came to the conclusion that the applicant's qualifications were not suitable for most of these posts, but possibly for one, even though it had been withdrawn. The Court concluded that this latter post should have been offered to V, since the grounds for withdrawal were overridden by his priority right to be reinstated. This post would have been available as of 1 January 1977.

4 As to the loss incurred by V, the Court pointed to earlier case law[1] 'that officials who, owing to the unlawful conduct of the institution, have not been reinstated upon the expiry of their leave on personal grounds are entitled to receive compensation for the actual damage they have suffered through the loss of their salaries, and that, in principle, the compensation payable on that account must be equal to the net remuneration to which they would have been entitled, subject to deduction of the net earned income received for the same period while engaged in other employment.' (para 12). However, the Court emphasised 'that the applicant must make reasonable efforts to mitigate his losses, if necessary by looking for alternative employment' (para 13).

1 ECJ 1.7.1976, 58/75, *Sergy v Commission*, [1976] ECR 1139.

Comments

As the last part of the ruling as cited indicates, victims of unlawful behaviour must also contribute to mitigating their losses to the extent 'reasonably' possible.[2] An applicant cannot sit back and do nothing for years while waiting for the Commission to reimburse his losses, even if the Commission was to blame for the failure to reinstate him.[3] In this case, V had almost immediately applied for reinstatement. However, in the course of the events, he had failed to appeal against a decision by the Commission regarding certain posts that should have been offered to him. This would have been held against him, had he not succeeded on other grounds.[4] In an earlier case on which the Court relied here repeatedly,[5] the applicant had taken successful steps to be reinstated by his earlier employer (the French state), but had not pursued his reinstatement by the Commission with similar efforts, which subsequently was held against him.[6] **5**

Court of First Instance, 24 October 2000, case T-178/98, Fresh Marine Co A/S v Commission[7]

ECLI:EU:T:2000:240

Facts

The Norwegian salmon producer, Fresh Marine (V), suffered harm due to the provisional imposition of anti-dumping and countervailing duties on certain salmon imports from Norway into the Community, which induced V to temporarily cease all exports into that market. As it later turned out, the anti-dumping measures were unfounded and con- **6**

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2 As the Court expressed elsewhere, a victim must 'show reasonable diligence in mitigating the extent of the damage which it claims to have suffered': ECJ 10.7.2003, C-472/00 P, *Commission v Fresh Marine Company A/S*, [2003] ECR I-7578, paras 121, 125 with further case references.

3 The duty of a victim of harmful conduct to mitigate her own loss thereafter should also be acknowledged in other areas of EU tort law, eg in the context of the PLD. Even though the wording of art 8 para 2 PLD only seems to address contributory conduct with respect to the initial harm, it would be 'an unreasonable and undesirable consequence if the injured person had to be granted full compensation despite the fact that s/he later aggravated the original damage but only reduced compensation if s/he had negligently contributed to the creation of the original damage': *U Magnus,* Limitations of Liability under EC Tort Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) 273 (no 12/50).

4 See the opinion of AG Warner in this case, [1983] ECR 983 (986 f).

5 ECJ 1.7.1976, 58/75, *Sergy v Commission*, [1976] ECR 1139.

6 See *Sergy* para 45 ff: 'It is not easy to understand why the applicant who, without doubt, had to take a number of official steps in order to secure his re-employment in the French administration … did not take similar steps, traces of which would surely be bound to be in evidence, in order to expedite his reinstatement. The absence during the whole of that period of any official request or protest indicates, at the very least, a lack of ordinary vigilance likely to help to prolong the delay of which he complains. This fact must be taken into account in assessing the extent to which the defendant must make good the damage.'

7 Both this case and the appellate decision in this matter were already presented in *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) 7/29 and 13/29.

sequently repealed. The reason for the adoption of such measures were errors made by the Commission when handling a report submitted by V containing its sales figures, of which the Commission had deleted several lines due to a misunderstanding of the submitted data.

Decision

7 The Court was convinced that 'the Commission committed an error which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence' (para 82), constituting a sufficiently serious breach of Community law triggering liability.

8 However, V was equally to blame for at least some of its own loss since it had submitted a report that 'confused the Commission's officials' (para 89) and should have been accompanied by explanations. Once such explanations had been submitted to the Commission some weeks later, however, the latter still unreasonably delayed lifting the measures for another two months. The CFI therefore held the Commission solely liable for the losses incurred during that additional period, but only for half of the damage suffered until the clarifications were submitted due to V's own contributory conduct.

9 While the CFI further found it 'necessary to ascertain whether … [V] showed reasonable diligence in limiting the extent of the damage which it claims to have suffered' (para 121), it was convinced that V had passed that test, as it should not have been expected to take the 'unusual commercial risk' of taking out a bank guarantee pre-financing the disputed duties without passing them on to its customers, as claimed by the Commission.

10 An appeal by the Commission and a cross-appeal by V against this ruling of the CFI were dismissed by the ECJ.[8]

Comments

11 Apart from acknowledging contributory conduct in causing the original damage as a factor reducing the liability of the defendant Commission (if only up to a certain point in time, ie the clarification of the initial misunderstandings), the ruling also addresses the claimant's duty to mitigate its own loss once triggered by the Commission's 'sufficiently serious breach of Community law'. The Commission had argued that as soon as V had learned of the (flawed) decision imposing provisional duties on its exports to the Community, the company should have continued to sell salmon to the Community at unchanged prices and taken out a bank guarantee which could have covered the additional charges imposed by the Commission's decision temporarily until the provisional measures were lifted retroactively. However, the CFI rightly rejected that argument in light of the consid-

8 ECJ 10.7.2003, C-472/00 P, *Commission v Fresh Marine Co A/S*, [2003] ECR I-7541.

erable uncertainty of such development, the high amounts at stake, and the fierce competition in the salmon market. V 'would have run the risk of having to bear on its own the burden of those duties should they ever have been collected definitively' (para 124).

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

First scenario. V is severely injured in a road traffic accident caused by A. She refuses a blood transfusion for religious reasons[1] (or a traditional treatment preferring 'natural medicine'[2]) and consequently dies. V's surviving husband claims compensation from A for funeral expenses as well as damages for bereavement. 1

Second scenario. V, a ticket inspector of the national railway company asks A to show his ticket while on the platform of a railway station. When A has no ticket, V asks him to either pay a penalty or show his identity card. A runs away, down a steep staircase to the station exit. V follows him, falls at the bottom of a staircase and suffers a complicated femoral neck fracture of his left leg. A is caught and V sues him for damages.[3] 2

Solutions

a) Solution According to PETL. Under art 3:106 (Uncertain causes within the victim's sphere) PETL, '[t]he victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere'. According to the Commentary to the PETL, '[a] cause lies in the first place in the victim's sphere, if it is caused by his activity'.[4] The victim thus 'has to bear his loss to the extent that such a cause may lie within his own sphere. This does not follow from Art. 8:101 [ie the PETL's rule on the victim's contributory fault]; this kind of issue is dealt with by [...] Art. 3:106 [which] is the complement of Art. 3:103',[5] ie the PETL's rule on natural causation (*conditio sine qua non*). 3

1 See the Austrian case: Oberster Gerichtshof, 22 June 2011, 2 Ob 219/10k EvBl 2011, 1076, with comments by *E Karner* and *A Longin*, above 8/3 nos 1–6, and the Italian case: Corte di Cassazione (Court of Cassation) 15 January 2020, no 515 Resp civ prev 2020, 6, 1890, with comments by *N Coggiola, B Gardella Tedeschi* and *M Graziadei*, above 8/9 nos 22–31 (Jehovah's Witness).

2 See the French case: Cour de cassation, Chambre civile 1 (Supreme Court, First Civil Division) 15 January 2015, 13-21.180 Bull civ I, no 13; RDC 2015, 461, with comments by *J-S Borghetti* and *J Knetsch*, above 8/6 nos 10–12; see also the Belgian case: Tribunal de première instance de (Court of First Instance of) Liège, 26 June 1990 Bull ass 1990, 830, with comments by *E De Saint Moulin* and *B Dubuisson*, above 8/7 nos 8–13.

3 See the German case: Bundesgerichtshof (Federal Supreme Court) 13 July 1971, VI ZR 125/70 BGHZ 57, 25, with comments by *U Magnus,* above 8/2 nos 1–7.

4 PETL – Text and Commentary (2005) art 3:106, no 2 (*J Spier*).

5 PETL – Text and Commentary (2005) art 3:106, no 5 (*J Spier*).

4 In the *first scenario*, had the accident not happened, V would not have died so that the act for which A was responsible was the *conditio sine qua non* for V's death, art 3:106 PETL.

5 However, a treatment that would have saved her life was available, medically indicated and offered to V, who refused to accept it. The question then is whether liability for V's death can still be attributed to A or whether, alternatively, her informed and independent decision to refuse treatment (in the first hypothesis based on her freedom of religion, in the second on firm beliefs in alternative medicine) created a new cause for her death that superseded the chain of causation triggered by A.

6 According to art 3:104(2) PETL, '[a] subsequent activity is … taken into consideration [as cause of the damage] if it has led to additional or aggravated damage.' Had V not refused treatment, she would have suffered injury due to the accident caused by A, but would not have died. Her free, informed decision thus aggravated the damage within the meaning of art 3:104(2) PETL and became the *conditio sine qua non* for her death. According to the Commentary to art 3:104 PETL, whether or not the author of the first activity 'will also be liable for the additional or aggravated loss, depends on Art. 3:201 (the scope of liability'[6] and on art 3:106 (see above).

7 In the first scenario, on the one hand, V enjoyed religious freedom and the freedom to choose her medical therapies so that her decision to refuse treatment was absolutely legitimate (and could thus not be qualified as contributory negligence under art 8:101 PETL). On the other hand, V took 'a voluntary, informed decision … as an adult of sound mind making and giving effect to a personal decision about her own future'.[7] It is submitted that this decision is a circumstance within her own responsibility and her 'own sphere' within the meaning of art 3:106 PETL.

8 If this reasoning is followed under the PETL, A is responsible for the damage caused by V's injury, but not the further damage caused by her death. This result corresponds to that reached by the Austrian Supreme Court in the above scenario, but differs from the reasoning of the French *Cour de Cassation* and the Italian *Corte di Cassazione* in similar cases.[8]

9 In the *second scenario*, A violated the transport regulations and refused to pay the corresponding fine or to disclose his personal details. Instead, he tried to run away, provoking V's pursuit. It was foreseeable for him (art 3:201(a) PETL) that the pursuit he provoked could involve risks for V's health, which actually materialised. The risk for V to injure his health was not a 'circumstance within his own sphere' (art 3:106 PETL), but was provoked by A's illegal behaviour. In the second scenario, V would thus be liable for V's damage under the PETL.

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6 PETL – Text and Commentary (2005) art 3:104, no 10 (*J Spier*).

7 Compare Lord *Thomas Bingham*'s reasoning in the English case *Corr v IBC Vehicles Ltd*, House of Lords, 27 February 2008 [2008] 1 AC 884, with comments by *D Nolan*, above 8/12 nos 7–9, at no 8.

8 See the references above, fn 1 and 2.

b) Solution According to the DCFR. In the *first scenario*, A's conduct caused the accident and the resulting personal injury to V. However, V's decision not to undergo an otherwise available treatment worsened the injury to her health and ultimately led to her death. Her decision hereby created additional legally relevant damage (to her health and life), including further consequential loss (both economic and non-economic) to her surviving husband (see art VI–2:202 DCFR on Loss suffered by third persons as a result of another's personal injury or death). **10**

It is true that, in the absence of the accident caused by A, V would not have lost her life, so that the accident attributable to A was the natural cause under art VI–4:101 DCFR of both her initial and her further injury and, ultimately, also her death. However, A's conduct was not the only cause leading to V's further damage. According to the Official Commentary to the DCFR, one of the criteria to be taken into account when assessing causation is that the damage must have been reasonably foreseeable for the tortfeasor;[9] it could be argued that it was indeed foreseeable for the tortfeasor that the accident would result in injury to V's health, but that he could reasonably expect her to undergo the available treatment at the hospital. V's decision to refuse the medically indicated treatment may, therefore, be qualified as unforeseeable. **11**

Additionally, V's decision to refuse treatment could be analysed under art VI–5:101 (2) DCFR establishing a defence based on the injured person's *acting at her own risk*. The Official Commentary does not directly address the issue of refusal of treatment for religious or other reasons. The most commonly found instances of accepting such risk are sports competitions, which inherently involve the possibility of sustaining an injury of a specific kind and may be considered as risks accepted by the participants.[10] However, the Commentary also states that '[t]he rule's main practical field of operation lies in the realm of participation in martial arts or dangerous sports, but it is not confined to that. In principle its application is conceivable for all fields of the law of liability …'.[11] **12**

In the present case, V voluntarily accepted the risk of undergoing a less effective treatment. She should have been aware that this could lead to further injury to her health, or even to her death. In these circumstances, A should be able to rely on the defence in art VI–5:101(2) DCFR and thus not be held liable for the worsening of V's health and ultimately her death. If this reasoning is followed, A will not have to compensate her husband's grief, nor the funeral expenses incurred by him. A remains, however, liable to compensate V's husband for all damage resulting from the initial injury to her health. **13**

In any event, even if A were held liable, his liability could be reduced according to art VI–6:202 DCFR.[12] Given that treatment was readily available, that the victim refused that treatment, and that this decision caused the damage to be considerably greater than **14**

9 *C v Bar/E Clive*, DCFR, art VI–4:101, Comment B (3571).

10 *C v Bar/E Clive*, DCFR, art VI–5:101, Comment C (3612 f).

11 *C v Bar/E Clive*, DCFR, art VI–5:101, Comment C (3612).

12 For more information on this provision, see below, 10/30 nos 15–17.

that initially suffered, it could be fair and reasonable not to make the tortfeasor liable for the further loss.

15 There is a widespread concept in European tort law that the tortfeasor has to take the victim as he finds him; this concept is also accepted under the PETL and the DCFR. However, it is generally applied to victims who, due to their physical constitution, are particularly susceptible to damage.[13] Based on a balancing of interests, it is applied even where a particular delicate constitution of the victim, and thus the magnitude of the damage, was unforeseeable for the tortfeasor. However, this principle seems to be limited to physical conditions of the victim which are beyond the victim's control, rather than to religious or other beliefs.

16 The *second scenario* has been explicitly used as an illustration in the chapter on causation (art VI–4:101 DCFR) of the Official Commentary to the DCFR. The authors consider that the inspector's pursuit and injury 'is still deemed a consequence of the conduct of the tram passenger, unless the tram passenger did not know of the pursuit and would have had no reason to infer this'.[14]

17 In the above scenario, the passenger running away on the platform provoked and should have foreseen the pursuit by the ticket inspector. In these circumstances, the legally relevant damage of the inspector (personal injury in the meaning of art VI–2:201 DCFR and consequential loss in the form of medical treatment) is still a consequence of A's conduct, and causation is, therefore, established.

18 The provision on a potential reduction of liability in art VI–6:202 DCFR would not apply in this scenario. The provision may be used, and lead to a reduction, in cases where 'a technically negligent but morally unobjectionable act leads to damage, the reparation of which would disproportionately burden the injuring person'.[15] In the present case, the escape was, on the contrary, a morally objectionable act and the tortfeasor would not be protected by this provision.

31. Comparative Report

1 The legal issues relating to the appropriate limits of liability of A in cases where losses or additional losses have been created by some conduct of the injured party (V) share many similarities with the just considered case of losses or additional losses attributable to the conduct of a third party (C): in each circumstance, the fundamental question is the extent to which another person's contributory conduct ought to relieve the tortfeasor of responsibility for the ultimate losses caused. This is sometimes recognised by the appli-

13 See PETL – Text and Commentary (2005) art 3:201, nos 8 and 16 referring to the so-called 'egg shell-cases', also called 'thin skull-rule' (*J Spier*), and above 2/30 no 10; see art VI–4:101(2) DCFR and *C v Bar*/*E Clive*, DCFR, art VI–4:101, Comment B (3573).

14 *C v Bar*/*E Clive*, DCFR, art VI–4:101, Comment B, Illustration 11 (3573).

15 *C v Bar*/*E Clive*, DCFR, art VI–6:202, Comment (3784).

cation of the same rule or analytical framework to both types of case: see for instance: Spain's application of the 'prohibition of return' rule to both cases of third parties and victims;[1] Italy, which views the subsequent conduct of C or V from the same perspective, ie by asking whether it was an extraordinary (atypical) event or not;[2] and the use of 'adequate cause' in assessing both types of case in Poland and Portugal.[3] However, some special considerations apply where it is the victim's conduct which is the contributing cause (for instance, the consideration that an injured party who has suffered harm is typically in a more vulnerable state than a third party), so that it is justifiable to consider the two types of case separately.

2 In classical Roman law, not only could the intervention of C limit A's liability, but so also might the conduct of V itself: slavery again furnished the jurists with examples, one being where a slaveowner (V) fails properly to treat a wounded slave, who subsequently dies. The view taken was that the attacker (A) was liable only for the initial injury.[4]

3 As for the modern law, where V's intentional and informed choice has caused or worsened its losses, V often has to bear the sole responsibility for its losses,[5] a position sometime encapsulated by the maxim *volenti non fit injuria*;[6] but in France, A remains liable unless V's choice demonstrates fault.[7] V's willing participation in an activity or form of employment with obvious and inherent attendant risks may indicate that V has assumed the risk of injury.[8] V's sole responsibility is common when V was participating in an illegal act at the time it was injured.[9] Where V commits suicide, having been put into a fragile mental state by A's misconduct, the suicide may not be deemed intentional and informed; rather, A may have to bear responsibility for it.[10] Generally, intentional conduct by V leads to shared responsibility for harm[11] or, in some cases, to its sole responsibility.[12]

4 Where V has behaved negligently, then typically it bears such proportion of the overall loss as can be attributed to its wrongdoing.[13] As with harm caused by third parties, the court has discretion to apportion liability as it thinks appropriate. But there are

1 Spain 1/10 nos 3–4, 7/10 no 3, 8/10 no 13.
2 Italy 8/9 no 6.
3 Poland 7/22 no 1 and 8/22 no 1; Portugal 7/11 no 1 and 8/11 no 3.
4 Historical Report 8/1 no 4.
5 Austria 8/3 no 3.
6 As, for instance, in Malta 8/15 no 1.
7 France 8/6 no 6 and no 10.
8 Spain, 8/10 no 1 and no 6.
9 Ireland 8/14 no 1.
10 England and Wales 8/12 no 7; Italy 8/9 no 1.
11 Croatia, 8/25 no 1.
12 Croatia 8/25 no 6 and no 12.
13 Austria, 8/3 no 5; Belgium 1/7 no 7; Germany 8/2 no 1; Hungary 8/27, no 1; Latvia 8/20 no 1; Romania 8/28 no 1; Slovakia 8/24 no 1; Spain 8/10 no 9; Switzerland 8/4 no 1.

a few instances where courts appear to have turned a blind eye to a contribution to its own losses made by V, holding A wholly liable.[14]

5 V's sharing in responsibility for its losses does not necessarily mean that there is considered to be a positive duty to mitigate losses resting on V,[15] but a failure to take reasonable steps to mitigate loss will typically result in a reduction of damages due by A.[16] V normally has a choice of which medical course of action to follow or not to follow when injured, and this extends to veterinarian's costs associated with a pet's injuries;[17] however, in one case, a failure to follow medical advice and have a surgical plate removed when it was no longer needed led to a slight reduction in damages.[18] Incurring expensive private medical expenses when there are reasonable public funded options at hand may be unreasonable.[19] Some (but not all) national courts have given victims a wide discretion to refuse medical treatments (eg blood transfusion) on religious grounds, A being required to accept the consequences of such refusal.[20] It has however been suggested that the PETL would not hold A liable,[21] the choice to refuse medical treatment placing the matter within V's 'own sphere' (see PETL, art 3:106).

6 There are some instances of national rules dealing with specific cases; for instance, in Belgium, a fraudster cannot seek reduction of its liability on account of V's own fault;[22] and in France, a defendant is responsible for losses or additional losses resulting from a decision of V in cases of both strict and fault-based liability.[23]

7 The analysis offered by national legal systems often uses the language of causation. So, subsequent conduct of V's which is characterised as unforeseeable and unreasonable may be deemed a *novus actus interveniens*.[24] The language of the 'determinant'[25] or 'adequate'[26] cause of the damage is also encountered. Such conduct is generally extreme or unwarranted in some way.[27]

14 Hungary 8/27, no 4.
15 Belgium 8/7 no 3; in France there is an ongoing debate as to whether such a duty should exist: 1/6, no 5.
16 European Union 29/8 no 5; Italy 8/9 no 11.
17 Sweden 8/17 no 1.
18 Malta 8/15 no 6.
19 Greece 8/5 no 3 and art 281, Greek Civil Code.
20 Italy 8/9 no 22.
21 PETL/DCFR 8/30 no 7.
22 Belgium 8/7 no 14.
23 France 8/6 no 1.
24 England and Wales 8/12 no 1.
25 European Union 7/29 no 5.
26 See, eg, Poland 8/22 no 1; Portugal 8/11 no 3.
27 Netherlands 8/8 no 1; Scotland 8/13 no 7; Slovenia 8/26 no 1.

9. Losses and additional losses from a natural event

1. Historical Report

Ulpian (Julian) D 9,2,15,1

Facts

1 A slave has been mortally wounded; before he dies of the wound, however, he is killed by the collapse of a house or in a shipwreck. **1**

2. A slave has been mortally wounded; he only dies of the wound after he has been freed or alienated.

Decision

Following Julian, Ulpian argues that in the first case, the wrongdoer can only be held liable for wounding, because 'the collapse of the house did not allow it to emerge whether or not he [ie the slave] was killed.' In the second case, however, the (former) owner of the slave can bring an action under the first chapter of the *lex Aquilia*, because the slave was already killed at the moment the attacker wounded him, which became apparent by his death at a later date. **2**

Comments

The first case recounted in this fragment is frequently discussed in conjunction with that of the slave who was mortally wounded by two assailants in succession (above 7/1).[1] The key here is whether the wrongdoer is to be held liable for the harm that his action would have caused in the ordinary course of events, or merely for the harm that is directly attributable to him in this particular instance. **3**

Both Julian and, evidently, Ulpian, who reports this decision, tend towards the former view.[2] This is made clear when Julian juxtaposes the two constellations mentioned in the text: in the first instance, the collapse of the house, shipwreck, or other event of *vis maior* makes it impossible to confirm that the wrongdoer has indeed directly and actively caused the death of the slave; hence, he is held liable only for having inflicted the wound. In the second instance, the problem is not one of concurrent causation but rather of civil procedure, the salient question being whether the former master of the **4**

1 *Ulpian* (*Celsus*, *Marcellus*) D 9,2,11,3; *Julian*, D 9,2,51 pr; for references to the relevant literature, see above at 7/1 no 1.

2 To what extent the decision is in its entirety attributable to Julian has, however, long been the subject of scholarly debate, with a strong body of opinion arguing that the text was falsified by later editors; cf eg *R Willvonseder*, Die Verwendung der Denkfigur der "conditio sine qua non" bei den römischen Juristen (1984) 147.

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deceased slave is capable of suing the wrongdoer even though he no longer has ownership of the slave and it cannot be argued that he has incurred a loss by his death. In this latter instance, however, Julian (and Ulpian) without hesitation grant an action under the first chapter of the *lex Aquilia*: once it has been ascertained that the wound was indeed deadly, the point in time which determines the *dominus*' capacity to sue is that at which the wound was inflicted.

5 Despite the fact that the *lex Aquilia* expressly sanctions a selection of harmful actions (*occidere*, *urere*, *frangere*, [*cor*]*rumpere*) rather than outcomes, Roman jurists limit liability to the harmful result that has actually manifested itself and is directly attributable to the wrongdoer. Hence, even if the wrongdoer's act would have constituted *occidere* in the ordinary run of events, his liability was limited to *vulnerare* if circumstances made it impossible to ascertain whether the result had actually manifested itself.[3]

2. Germany

Bundesgerichtshof (Federal Supreme Court) 18 June 1964, III ZR 65/63

VersR 1964, 1070

Facts

1 V was the owner of a house that bordered on the little river Dinkel and a federal road where it bridges the Dinkel. Part of the house rests – with official permission – on the retaining wall that protects the riverside against the water. In 1957, the co-defendant, Land Lower Saxony, decided to replace the old narrow bridge by a bigger one and commissioned the co-defendant building company A with the work. For the new bridge, new pillars had to be erected for which ramming work had to be undertaken near, and partly even at, the retaining wall. During that work and when the groundwater under V's house was removed, significant damage to the house became evident. It transpired that there was an undiscovered layer of quicksand under the house, which, through the defendants' work, was set in motion and affected the stability of V's house.

2 V claimed damages from the Land and from A for the damage negligently caused to his property.

3 *Cf AJB Sirks*, The slave who was slain twice: causality and the lex Aquilia (Iulian. 86 *dig*. D. 9,2,51), Tijdschrift voor Rechtsgeschiedenis 79 (2011) 329: 'For a wound to be deadly, it has to be of a nature that it can lead to death on its own, but this proposition has also to be true. It seems true as long as the future does not prove it to be wrong, which means that until the person dies of the wound we are ignorant of whether it is, in reality, true or not. If he dies, it was true, if not, it was false.'

Decision

While the court of first instance decided in favour of V, the court of second instance dismissed the claim against A but held that the Land had to compensate V on the basis of the rules on expropriation. The Federal Supreme Court changed the judgment of the Court of Appeal diametrically: it dismissed the claim against the Land and held A liable. **3**

The BGH argued that A should have foreseen that its work could impair the stability of V's house, irrespective of the undiscovered quicksand. In any case, A should have reacted faster after the first signs of damage became evident. **4**

On the other hand, the Land was not liable although its employees might have violated official duties for which the Land in principle could become liable under § 839 BGB. However, since the employees did not act intentionally, § 839 (1) sent 2 BGB was applicable. This provision prescribes that the State is not liable if the victim has another source for compensation – here the claim against A. **5**

Comments

Court decisions where a natural event adds to the damage for which the wrongdoer is responsible are rare. The present case can be considered as such a situation because the undiscovered quicksand at least added to V's damage. In principle, the natural event as a contributory cause does not relieve the wrongdoer from liability. This is in any case the result if the conduct of the wrongdoer increased the risk that the victim's person or property would suffer damage. **6**

Where a natural event subsequently increases damage for which the wrongdoer is liable, the latter has to compensate the entire damage if the first damage event had created a specific risk for the further damage. For instance, if A damaged V's car so that it had to be left at the scene of an accident, which in the following night is flooded, completely destroying the car, then A is liable for the entire damage.[1] **7**

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 25 September 1963

ATF 89 I 483

Facts

Farmer V had sent his sheep for the summer to a shepherd who also took care of other farmers' animals. When the cantonal vet discovered an epidemic in the herd, he ordered that the animals be returned to their respective owners. V had been told that some of his animals were sick. But due to chaotic communication within the veterinary services and **1**

1 See *U Magnus* in: NomosKommentar-BGB (3rd edn 2016) Vor §§ 249–255 no 99.

the public administration, V had not been informed that the sickness could be transmitted to humans. He fell ill and claimed from the vet's employers and the Cantons of Vaud and Neuchâtel damages in the amount of CHF 100,000 (approx € 93,000).

Decision

2 The Court admitted the claim partially.

3 The Court held that by not informing V about the transmissibility of the illness to humans, the officials had infringed the general principle stated in the Federal Act on Epidemics (LFE, 1 July 1966), according to which, they had to take all necessary measures to protect humans and animals. Consequently, they were considered to have acted negligently.

4 However, as not all humans are infected by this specific sickness – for example, V's wife had not contracted it – the Court considered that hazard had played a certain role in the transmission of the sickness. It reminded that hazard or fatality which plays a role in the causation of damage or in the extension of an already existing damage allows the judge to reduce damages. It awarded to V damages of CHF 29,000 (€ 27,000) to be paid in equal parts by the Cantons of Vaud and Neuchâtel.

Comments

5 A hazard appears when the event contributing to the damage occurs for reasons beyond one's will or control (*cas fortuit*; *mitwirkender Zufall*).[1]

6 When such an event occurs, the injured party has to bear any cost implications.[2] However, if an author's behaviour is concurrently considered responsible for the victim's damage, the latter may claim compensation from the former. For that to happen, the author's conduct has to be an adequate cause of the occurrence of the damage or a cause of its aggravation. In that case, the judge may reduce the compensation as art 43 para 1 of the Code of Obligations (SCO) allows.[3] According to some legal literature,

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1 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 41 nos 141–141a, at 118; *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht I (5th edn 1995) § 3 nos 89–91, at 138 f; *C Müller*, La responsabilité civile extracontractuelle (2013) no 688, at 220; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) nos 476–484, at 169 f; *V Perritaz*, Le concours d'actions et la solidarité (2017) no 484 f, at 148 f; *F Werro*, La responsabilité civile (2017) no 1372, at 388.

2 *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 479, at 169.

3 *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht I (5th edn 1995) § 7 no 33, at 400. For another example, see ATF 131 III 12 (2004) where, based on an additional expertise concluding that V had a pre-exist-

the judge should consider this element beforehand in calculating the damage (art 42 SCO).[4]

In practice, according to certain scholars, hazard is the second most important factor to reduce the amount of compensation to be paid.[5] However, this issue is rarely addressed in practice.[6] 7

In another case (ATF 123 II 577), the Court formulated an *obiter dictum* about concurrent natural events. It stated that such events had to be analysed in light of adequate causation, which can be interrupted by exceptional hazards. Furthermore, it explained that, if no-fault liability was at stake, the author of the damage was liable 'to a certain degree' for a concurrent hazard. In this decision, the Court gave two firm answers and assessed two criteria. It admitted that (i) a hazard can interrupt the initial causal link between behaviour and the damage and (ii) the instrument for the judge to use is adequacy. As to the criteria, the Court uses two undetermined expressions. Firstly, it added that hazards had to be exceptional (*aussergewöhnliche Zufälle*) that is, unpredictable or totally unexpected. As to the second expression, the Court stated that, with regard to strict liability cases, the initial author is only liable for hazard 'to a certain degree' (*'bis zu einem gewissen Grad*'). It does not indicate whether the degree is a mere reference to the notion of causation or rather to the amount of damages. As a result, it can be said that the judge has a 'triple' and great margin of discretion. He can choose to adjudicate damages either on the exceptional character of the hazard, or on the adequacy or on the amount of the damage. 8

5. Greece

Areios Pagos (Greek Court of Cassation) 128, 23 January 2017

Published in NOMOS

Facts

V suffered a spinal injury after A's vehicle crashed into his motorcycle. A was exclusively liable for the accident, following which, V, though he did not suffer a head injury, 1

ing medical condition at her neck aggravating the damage, the Court considered A's fault as minor and reduced the damages pursuant to art 44 SCO.

4 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 43 no 52c, at 234.

5 *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 43 no 52, at 233: 'Der Zufall ist (nach dem leichten Verschulden) der meisterwähnte Umstand zur Herabsetzung der Schadenersatzpflicht'.

6 *F Werro*, Commentaire romand, Code des obligations I (2012) ad art 43 no 36, at 412; *V Roberto*, Haftpflichtrecht (2nd edn 2018) no 32.10, at 268; for an ancient casuistic, see *R Brehm*, Berner Kommentar, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (4th edn 2013) ad art 43 no 52b, at 234.

felt isolated, had limited social interactions and neglected himself, while he also stated that he was 'hearing voices'. Due to these symptoms, he was hospitalised for a period of 23 days in a hospital's psychiatric ward and was diagnosed with paranoid schizophrenia.

2 Until the time of the accident, V, then 21 years old, had been working as an assistant in aluminium constructions without having exhibited any of the above-mentioned symptoms. However, according to the expert's report, it was mentioned in V's medical report kept at the hospital that his mother had died when he was 12 years old, having fallen from a balcony in unclear circumstances (possible suicide), while his sister was also referred to as 'possibly having a mental illness'. On these grounds, the Thessaloniki Three-Member Court of Appeal accepted that V had a genetic predisposition to schizophrenia, adding that the aforementioned accident, though, undoubtedly played a decisive role in the emergence of the illness, despite the minor nature of his injury. Therefore, according to the Court of Appeal, the accident was causally connected to the sudden development of V's illness.

Decision

3 The Court of Cassation confirmed the decision of the Court of Appeal holding that one of the prerequisites of art 914 GCC on tortious liability is the existence of a causal link between the act or the omission and the damage. Such a causal link exists – and, thus, liability arises – according to the Court of Cassation, when the provocation of a traffic accident and its following consequences accelerate the occurrence of damage, which was going to be suffered by the victim sometime in the future from another cause.

Comments

4 The above decision of the Court of Cassation follows the jurisprudence of the Court, according to which, the causal link is not excluded if a special predisposition of the injured party also contributed to the occurrence or the extent of the injury. Only if the predisposition of the injured party is very exceptional can the causal link be considered as interrupted and the tortfeasor might avoid liability.[1]

1 AP 1849/1981 EEN 49, 915; Athens Court of Appeal 9835/1984 Arm 39, 1187. See also *P Kornilakis*, Law of Obligations, Special Part I § 89 8I 1I, 522, 523.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 8 February 1989, 87-19.167

Bull civ II, no 39; <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007022434>

Facts

V remained crippled after a traffic accident for which T had been found liable. Ten years later, he died from wounds suffered as a result of his bed catching fire. His widow brought a claim against T, arguing that her husband's death had been caused by the initial traffic accident, since his handicap was the only reason why he had not been able to escape out of his bed. The appellate court granted the claim. 1

Decision

The *Cour de cassation* quashed the appellate court's decision on the ground that the fire was the immediate cause of V's death and that, as a result of the initial accident, V had received compensation for the assistance of a third person, which included the prevention of the risks inherent in his disability. 2

Comments

This decision, which is very fact-specific, should not be read as setting a general rule whereby losses or additional losses arising from a natural event following on from the initial harm must never be compensated by the person liable for the initial harm. The cases cited above concerning losses and additional losses resulting from misconduct of a third party suggest the contrary:[1] if the person (strictly) liable for the initial harm can be held liable for further losses caused by a third party's misconduct, even though that third party is also liable for these losses, there is no reason why he should not compensate such losses if they are merely the result of a natural event for which nobody must answer. The decisive criterion seems to be causation. Only if the additional losses are not too remote will the defendant be liable for them as well. Here, ten years had elapsed between the initial accident and the 'natural' event, which was obviously enough, in the *Cour de cassation*'s eyes, to sever any legally significant causal link. While remoteness was a matter of years in this case, it cannot be excluded that other circumstances could also be regarded as barring causation. As a matter of fact, if the natural event is exceptional and insuperable, it will amount to force majeure, thus excluding the defendant's liability (but it is disputed if force majeure acts by breaking the causal link between the defendant's behaviour and the harm). 3

1 See 7/6 no 1ff.

4 The motivation adopted by the Supreme Court in this case also carries the idea that the initial compensation received by V was enough to put him in a situation where he should have escaped the final harm, since it was intended to cover the cost of a third person's assistance. This is not to say that V was at fault for not having secured such assistance. But since T had already paid compensation to avoid future harm of the kind that eventually occurred, it would have been unfair to make him compensate that harm. This suggests that if the victim has really been fully compensated for the initial harm, in the sense that he was put in a situation functionally equivalent, vis-à-vis future losses, to the one in which he would have been if there had been no initial harm, then liability for the initial harm should be regarded as extinct and cannot extend to these losses.

7. Belgium

Tribunal Correctionnel de Bruxelles (Criminal Court of Brussels) 16 May 1972

RGAR 1972, no 8899

Facts

1 Following a road accident, V consults his general practitioner about his injuries (fractured rib). In order to reduce the pain, the doctor prescribes painkillers, including Novalgine, which contains pyramidon. Due to a particular sensitivity to the prescribed medication, V develops agranulocytosis[1] and dies shortly afterwards.

Decision

2 According to the experts' report, the patient's allergic reaction was quite exceptional and unpredictable for his general practitioner. The damage was caused both from the driver's misconduct (failure to respect a right-of-way) and from a fortuitous circumstance (the victim's allergy to the pyramidon). Applying the 'but-for' test, the Brussels Criminal Court ruled that the initial fault of the driver who caused the accident is the *conditio sine qua non* of the entire damage. Consequently, the Court decided that force majeure had no impact on the liability of the tortfeasor, who will have to pay full compensation.

Comments

3 Force majeure is defined by Belgian authors as an unforeseeable, irresistible event beyond the control of the parties. The event invoked as a cause of exoneration must not be

1 Agranulocytosis consists of a significant reduction, or even disappearance, of leukocytes and leads to a strong decrease in resistance to infections, which succeed themselves and become more and more severe.

attributable to the author of the fault, ie the damage can in no way be created, favoured or aggravated by the latter's negligence.

If there is both a person's initial fault and force majeure, the judge must verify whether the misconduct is the *conditio sine qua non* of the damage. If he finds that the damage was caused by the behaviour of the author of the fault, force majeure will not exempt the latter from the obligation to compensate the victim's harm. Force majeure is not even taken into account for the purpose of mitigating compensation. It may be invoked as grounds for exemption from liability if, and only if, it is the exclusive cause of the damage. A simple negligent act contributing to the occurrence of the situation of force majeure is sufficient to dismiss this ground for exemption from liability.[2] **4**

The question of the previous state is much debated under Belgian law[3]. Authors usually distinguish between three different cases: **5**

a) The victim who simply has a special receptivity (pathological predispositions in the strict sense);
b) The acceleration of an inevitable harmful process (the harmful event leads to current harm that would have certainly occurred in the future);
c) The aggravation of pre-existing harm.

As a rule, a simple susceptibility or particular vulnerability of the victim that existed before the accident does not reduce the obligation for the tortfeasor to compensate the entire damage. The author of a wrongful act must take the victim as he or she finds him or her and, therefore, assumes the risks associated with the victim's predisposition.[4] **6**

When the wrongful act merely accelerated the damaging process (previous state evolving on its own account towards the damage), the tortfeasor must only compensate the anticipation of the damage.[5] **7**

Finally, if the victim suffers from a pre-existing disease or condition before the accident, causing harm that would have arisen in any case, the tortfeasor can only be required to compensate the additional damage which is causally linked with the wrongful act. **8**

In brief, a pathological predisposition does not exonerate the tortfeasor from the obligation to compensate the entire damage, unless the consequences would have occurred in any case, even without the fault of the responsible person. **9**

2 *J Van Zuylen*, Du fait justificatif à la force majeure: les visages contrastés de l'exonération de la responsabilité, in: Liber amicorum Noël Simar. Evaluation du dommage, responsabilité civile et assurances (2013) 293 ff.

3 See the latest decisions of the Belgian Supreme Court: Cass, 2 February 2011, Pas 2011, 394; Cass, 20 June 2019, RGAR 2020, no 15642; Cass, 12 November 2019, JT 2019, 891.

4 Civ Bruxelles, 13 April 2015, RGAR 2015, no 15232.

5 Pol Vilvorde, 15 October 2018, CRA 2019, 51.

9. Italy

Corte di Cassazione (Court of Cassation) 13 April 1989, no 1774

Giust civ Mass 1989, fasc 4 89

Facts

1 A walnut tree fell onto a public road, hitting a passing lorry. The owners of the lorry demanded compensation from the owner of the private land where the tree had stood, assuming that the tree fell on their lorry because it had been poorly taken care of by the defendant. The latter responded that the damage was instead caused by a fortuitous event, a violent storm during the night and morning of the accident. The first instance tribunal rejected the claim for compensation.

2 On appeal, the *Corte di Appello Napoli*, confirmed the decision of the first instance court, ruling that the event was fortuitous.

3 This decision was upheld by the Italian *Corte di Cassazione*.

Decision

4 The *Corte di Cassazione* found that the Naples court had ascertained the existence of the fortuitous event on the basis of newspapers articles and meteorological information supplied by the Italian National Institute of Statistics, reporting that, on the morning of the accident, an exceptionally strong storm, with heavy rain and wind gusts of more than 80 km per hour, hit the area, causing the falling of trees and electrical and telephone lines.

5 The same court also pointed out that it is common knowledge that the fortuitous event is an unforeseen and unpredictable event that cannot be controlled by humans. Such an event interrupts the causal chain, thus becoming the sole and only cause of the unavoidable event of injury, thereby excluding the liability of the persons involved in an injury. On the basis of the factual findings of the *Corte di Appello*, the judges of the *Corte di Cassazione* stated that, in this case, the exceptionally strong storm should be considered as a fortuitous event and that therefore the defendant was not liable for the damage caused by the walnut tree falling.

Comments

6 See the comments under the following case.

Corte di Cassazione (Court of Cassation) 1 February 1991, no 981

Nuova giur civ comm 1991, I,797

Facts

Following the infiltration of rain from the road above some houses and because of the lack of any channelling system of rain and of any protection of downstream plots of land from the infiltration of rain, a large landslide damaged some houses. Their owners had to move out of their homes, as they had become uninhabitable. 7

The owners of the houses asked the *Tribunale di Perugia* to order A, the provincial administration, to compensate the damage suffered as a consequence of the defendant's fault. The Court affirmed A's liability, but limited it to half of the damages, holding that the remainder was caused by natural factors (geological, morphological, hydrogeological and meteorological). 8

On appeal, the *Corte di Appello* of Perugia upheld the first instance decision. The claimants appealed to the *Corte di Cassazione*, arguing that the causal link between A's fault and the damage should be excluded only when an exceptional and unforeseeable event, sufficient in itself to cause the damage, interrupts the causal link. Otherwise, A should be held liable. 9

Decision

The *Corte di Cassazione* ruled that arts 40 and 41 of the Italian Penal Code, on causation, which also apply to tortious damage, clearly state that there is an alternative: either the natural elements and environmental conditions are not able, without the contribution of human actions, to cause the damage, or the same natural factors and environmental conditions, or one among them, are sufficient to cause the damage, even without the contribution of human actions. 10

In the first case, the agent will be liable for all the consequences arising from the harmful event, while, in the second case, the same actor will be not liable for those consequences, because he or she did not actually contribute to the causation of the damage. 11

Therefore, the defendant may be held liable for all the damage on the basis of the provisions of the first section of art 41 pc if the damage is the consequence of their action, or they may not be held liable for any of the damage if the second section of art 41 pc applies, because there is not a causal link between their action and the damage which arose. However, the judge cannot take into consideration the concurring natural causes to accordingly reduce the liability of the defendant. Therefore the pro rata solution was rejected. 12

Comments

13 As a general rule, in Italian law, the intervention of a subsequent exceptional natural event interrupts the causal link between A's negligent conduct and the damage suffered by V, when the exceptional natural event is, in itself, a sufficient cause of the harm.

14 A good example of this line of reasoning is the *Cassazione civile* case from 13 April 1989, no 1774, above. Cases similar to this one are those of the flooding of the basement that spoiled a number of refined wine bottles, where the court stated that the damage was caused by exceptional rainfall and excluded the liability of the condominium owners for the malfunctioning of the sewage system.[1] Extraordinary rainfall was also found to be the exceptional cause of the flooding of V's house, rather than the malfunctioning of the channelling system of the rain by the municipality,[2] while the exceptionally strong wind was held to be the cause of the falling of a tree.[3]

15 In other cases, instead, the causal link between A's conduct and V's damage was not interrupted by the natural event. A case in point is the decision by the *Corte di Cassazione* 1991, no 981, mentioned above, as the second case falling in this category. Other similar rulings concerned a case where A was held liable because he negligently set up a water pipe that flooded V's land after heavy showers,[4] and a case where the local administration was similarly held liable for damage because it failed to provide a functioning channelling system for rain to avoid a road flooding, as happened in the case.[5]

16 In both these cases, without A's faulty conduct, no harm would (probably) have occurred. As some scholars have pointed out, the respective outcomes are different because, while in the first set of cases the negligent defendant could not have foreseen the natural event, nor was required to do so, in the second set of cases, the event was perhaps difficult to foresee, but nonetheless it was precisely one of those events that the defendant had the duty and the means to prevent but failed to do so.[6]

17 In any case, all the decisions discussed so far concern the ascertainment of the causal link; they never hold that, in order to assess the amount of damage that the defendant must compensate, consideration must be given to the natural event that caused the harm.

18 This latter point is, on the contrary, often debated when the case concerns a natural cause which preceded the relevant conduct. Although the *Corte di Cassazione* has repeatedly held that the pre-existing natural cause cannot proportionally diminish A's liability, in other cases, the Court proceeded to apportion liability on the basis of the respective contribution of the natural and human causes to the occurrence of damage.

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1 Cass 15 September 2017, no 21531, Diritto & Giustizia 2017, 18 September.

2 Cass 18 February 2014, no 3767, Diritto & Giustizia 2014, 18 February, DeJure.

3 Trib Verona, 28 June 1994, Resp civ prev 1995, 629.

4 Cass 30 August 1997, no 8259, Giust civ 1997, 1571. See also Cass 28 February 2014, no 4804, DeJure.

5 Cass 1 February 1991, no 981, Nuova giur civ comm 1991, I, 997. Cass 24 September 2015, no 18877, DeJure and Cass 21 July 2011, no 15991, Giust civ Mass 2011, 1098.

6 *M Bussani*, L'illecito civile (2020) 671–673.

Thus the same cases ruling against the apportionment of the damage on the basis of the contribution to the occurrence of the harm often calculate what A owes as compensation taking into account damage resulting from pre-existing natural factors.[7]

10. Spain

Tribunal Supremo (Supreme Court, Administrative Chamber, Section 6th) 17 April 2007

RJ 2007\3683

Facts

The local company responsible for the distribution of drinking water in the Jerez area (V) sued the Guadalquivir river's water management agency (A). It sought compensation for the losses it claimed to have sustained as a result of not being able to deliver 6,683,021m^3 of water because of the measures taken by A to tackle the drought situation. V accepted that the origin of its losses was the drought. However, it blamed A for having mismanaged the resources available, causing more restrictions than needed and making drinking water less palatable to consumers. In the first decision on the case, the claim was dismissed. The court pointed out that, regardless of whether A's conduct could be subject to criticism, the cause of the losses was the drought and not the acts or omissions of the water management agency. V filed an appeal before the Supreme Court, but it was dismissed. **1**

Decision

The extraordinary drought that is the subject matter of the present lawsuit is an event of force majeure. This Court has pointed out that 'a situation of emergency due to drought, which endangers the water supply to the population, is a case of force majeure allowing the administration to take the water from where it exists, whether or not there is a concession ...'. At any rate, since the drought is unrelated to the administration's behaviour and it caused the restrictions to the supply, this constitutes a break of the causal link and ... determines, therefore, the exclusion of the liability of the defendant. **2**

7 On the issue, see eg, *A D'Adda*, Concorso di causa naturale e responsabilità proporzionale: l'apparente ortodossia della Suprema Corte, Nuova giur civ 2016, 7-8, 1049, with a list of cases highlighting these contradictions. *A Belvedere*, Osservazioni minime sul nesso di causalità nel diritto civile, in: A Santosuosso (ed), Science, Law and the Courts in Europe (2004) 204 ff; *R Pucella*, La causalità "incerta" (2007) 167 ff; *M Capecchi*, Il nesso di causalità (2012) 266 ff.

Comments

3 Fortuitous events or force majeure operate as a ground of exoneration from both contractual or non-contractual liability for fault. Article 1105 CC, which is generally considered applicable to both types of liability, stipulates that 'unless it is expressly provided for in the law, or in the obligation, no one shall be liable for events which cannot be foreseen or which, being foreseen, are inevitable'. Besides, most legal provisions establishing strict liability based on risk, either in the Civil Code[1] or in special statutes,[2] lay down an exclusion of liability in cases of force majeure. The specific legislation on State liability also mentions force majeure as a ground for excluding the liability of public authorities.[3] The Administrative Chamber of the Supreme Court holds that force majeure breaks the causal link between the defendant's acts or omissions and the damage for which compensation is sought, as illustrated by the judgment under comment.[4] In practice, such a circumstance arises only very rarely. Still, in these cases, it leads to complete exemption from liability.[5]

4 Case law defines force majeure or a fortuitous event by pointing to the external nature of the incident causing the damage, as well as to its unpredictability and inevitability. Exoneration from liability demands therefore that the event (a) must be something unrelated to the agent (for instance, natural phenomena belong to this category, but force majeure is not limited to natural events but may also embrace human events, such as wars or terrorist attacks) and (b) must be unpredictable[6] or, being foreseeable, it must be unavoidable in its occurrence and in its impact on the interests of the victim.[7] The Spanish courts, for instance, have held travel agencies liable in cases where hurricanes in the Caribbean area prevented their clients from enjoying their holidays, when the travel agents could have known of this risk before the beginning of the trip and neither informed nor took appropriate measures to avoid the harm.[8] As for the unavoid-

1 Art 1905 CC (on liability for damage caused by animals) and art 1908.3 CC (on liability for falling trees).

2 Art 120 Act 48/1960, of 21 July, of Air Traffic (including 'fortuitous event' within the risk of airplanes), art 33.5 Act 1/1970, of 4 April, on Hunting (excluding 'force majeure' only), and art 1.1 II Road Traffic Liability Act (see above 6/10 no 3). The specific regulation on tort liability for nuclear damage or radioactive material only exonerates the operator in case of nuclear damage caused *directly* by armed conflict, war, rebellion or civil war. In case of radioactive material, another exoneration ground is 'natural catastrophe' (see arts 6.3 and 17.3 Act 12/2011, of 27 May).

3 Art 32 Act 40/2015, of 1 October, on the Legal Regime of Public Sector.

4 STS 4.3.1998 (RJ 1998\2488).

5 STS 3.5.1995 (RJ 1995\3598).

6 STS 22.2.2005 (RJ 2005\4742).

7 STS 2.2.2006 (RJ 2006\2694).

8 SAP Madrid 140/2008 of 25 March (AC 2008\994), 239/2010, of 25 May (JUR 2010\258641) and 93/2011 of 28 February (AC 2011\868) (all of them applying the ground for exoneration of a tour operator's liability laid down in package travel contract regulation (see art 159 TRLGDCU)). STS 11 October 2005 (RJ 2005\8769) held a tour operator liable for the personal injuries suffered by some tourists in a terrorist attack in Egypt. Damage was deemed attributable to the 'lack of information on the security conditions for travellers in the area where part of the trip was to take place, ... information that, without needing to suspend

ability requirement, in the event of trees located in places of transit that fall during wind storms, which could have given rise to the strict liability of the owner, force majeure demands that the speed of the wind was extraordinary, as shown by the high number of trees that fell in the same incident in the vicinity.[9]

The perspective adopted in this question is whether the agent's responsibility for **5** the damage caused may be limited when his actions or omissions occur concurrently with the event, or his tortious conduct is the occasion for a subsequent causal course which ends up worsening the situation of the victim through the interference of a natural event. Traditional legal writing would resort to the thesis of the break of the causal link.[10] When a fortuitous event has contributed to cause damage, 'the intervention of an event unrelated to the will of the latter, of a strange element between the behaviour of the agent and the result that it would have produced, deviates or at least influences the causal course unleashed by the original fact of the agent, and this justifies why the agent is released from liability.'[11] The most modern doctrine, however, would take the harm which occurs as a mere coincidence as objectively improbable, according to the criterion of objective imputation of adequacy.[12] The objective imputation of the damage would be justified only if the (first) harm caused by the defendant increased the risk of the victim suffering the second, or if the worsening of the victim's condition had predisposed him or her to suffering the damage, or made him or her unable to react to or avoid the damage caused by the natural event.[13]

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the trip, would have prevented or could have prevented the bus trip during which the terrorist attack took place'.

9 *E Algarra Prats*, La responsabilidad civil por daños causados por la caída de árboles y otras cosas (2006) 135.

10 *Reglero* says, for instance, that 'the damage is caused by an act unrelated to the conduct of the defendant, which is not attributable to the defendant because it is not foreseeable or avoidable by applying due care' (Lecciones de responsabilidad civil (2014) 121).

11 *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual: parte general: delimitación y especies, elementos, efectos o consecuencias (5th edn 2019) 227.

12 See STS 24.2.2017 (RJ 2017\826) on 'probability' as imputation criterion.

13 On cases involving this so-called 'induced natural risk' (where a piece of land is damaged and made more vulnerable to floods due to the unlawful action or omission of a public body), see *J Conde Antequera*, La responsabilidad de la administración por daños derivados de fenómenos naturales: especial referencia al riesgo de inundación, Revista Aragonesa de Administración Pública, 45/46 (2015) 67–100.

12. England and Wales

Carslogie Steamship Co Ltd v Royal Norwegian Government, House of Lords, 29 November 1951

[1952] AC 292

Facts

1 The plaintiff's ship was damaged in a collision for which the defendant's ship was to blame. After temporary repairs to make the ship seaworthy, she embarked on a voyage to the United States where permanent repairs were to be effected. She would not have made this voyage had the collision not occurred. During the Atlantic crossing, the ship sustained further damage in a storm. On her arrival in New York, the collision damage was repaired at the same time as the storm damage, and the issue arose as to whether the plaintiff was entitled to damages from the defendant for loss of the use of the ship for the ten days it took to repair the collision damage.

Decision

2 The House of Lords held that the plaintiff was not entitled to damages for loss of the use of the ship, as she would have been in dry dock anyway for the repair of the storm damage. There was no suggestion that the defendant was liable for the storm damage, even though this would not have happened if the collision had not taken place. According to Viscount Jowitt, 'the heavy weather damage was not in any sense a consequence of the collision, and must be treated as a supervening event occurring in the course of a normal voyage'.[1]

Comments

3 The assumption in this case that the defendant was not liable for the storm damage reflects the principle that a negligent defendant is not liable for coincidental damage, which is to say damage the risk of which was not increased by the defendant's negligent conduct. The position would have been very different if the initial collision had left the ship in a weakened state, which made her less able to ride out the storm.[2] Although some commentators explain the result in *Carslogie* by saying that the storm was a *novus actus interveniens*,[3] this analysis is unnecessary, because cases involving intervening

1 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1942] 1 All ER 20, 22 (these words from his judgment are not reproduced in the Appeal Cases).

2 See, eg, *The City of Lincoln* (1889) 15 PD 15 (collision caused loss of navigational aids which later led to the grounding of the vessel as she made for a port of safety).

3 See, eg, *M Jones* (ed), Clerk & Lindsell on Torts (23rd edn 2020) §§ 2–112f.

natural events can be explained by the application of the risk principle which underlies the rules on remoteness of damage discussed above.[4]

Nichols v Marsland, Court of Appeal, 1 December 1876

(1876) 2 Ex D 1

Facts

On the defendant's land, there were a number of ornamental lakes, which had been formed by the damming of a natural stream. After an extraordinary rainfall (described as the heaviest in memory), the lakes overflowed and burst their dams, and the resultant torrent of water destroyed four county bridges downstream of the defendant's property. In a damages action brought by the county surveyor, it was found by a jury that there had been no negligence in the building or maintenance of the pools, and that the flood could not reasonably have been anticipated. The Court of Exchequer directed that a verdict be entered for the defendant, and the plaintiff appealed to the Court of Appeal, relying on the strict liability rule in *Rylands v Fletcher*. **4**

Decision

The court held that the defendant was not liable. The jury's finding that the rainfall was so great that it could not reasonably have been anticipated was in effect a finding that the escape was due to an act of God, which served as a defence to a claim under the rule in *Rylands v Fletcher*. Since the water brought in by the flood was the effect of an extraordinary act of nature which could not have been anticipated by the defendant, it was 'in point of law the sole proximate cause of the escape of the water'.[5] **5**

Comments

This case shows that, under the strict liability rule in *Rylands v Fletcher*, an extraordinary and unforeseeable natural occurrence can relieve the defendant of liability. Although some commentators have interpreted the recognition of this defence of 'act of God'[6] as a dilution of the strictness of the rule,[7] the possibility of such a defence was recognised by Blackburn J in the original case,[8] and is consistent with the underlying ratio- **6**

4 See above 2/12. For endorsement of this explanation of *Carslogie* in preference to an intervening cause analysis, see *N McBride*/*R Bagshaw*, Tort Law (6th edn 2018) 294.

5 (1876) 2 Ex D 1, 6 per Mellish LJ.

6 For discussion of this concept, see *CG Hall*, An Unsearchable Providence: The Lawyer's Concept of Act of God (1993) 13 OJLS 227.

7 See, eg, *JG Fleming*, The Law of Torts (9th edn 1998) 385.

8 See *Fletcher v Rylands* (1866) LR 1 Ex 265, 280.

nale of the rule, namely that liability is based on causation rather than fault.[9] The defence is in any case very tightly drawn,[10] and this seems to be the only English decision in which it has operated to defeat an action under the rule.[11] The courts have also recognised two other causation-based defences to actions under the *Rylands* rule, namely 'act of a stranger' and 'default of the claimant'. The former defence is available where the escape was due to an act of a 'stranger' (meaning a person over whom the defendant had no control), which the defendant could not reasonably have anticipated and guarded against.[12] The latter defence is available where the claimant was wholly to blame for the escape or the damage which it caused.[13] These defences are complete defences and do not involve any apportionment of liability.

13. Scotland

Sabet v Fife Council, Court of Session (Outer House) 19 March 2019

[2019] CSOH 26, 2019 SLT 514

Facts

1 V's house was severely damaged by flooding from a river in Fife. V raised an action for damages jointly and severally against A1, the local authority (Fife Council), in respect of its alleged breach of statutory duties (this claim was unsuccessful), and against A2, the neighbouring owner of a weir (a kind of low dam) in the river in respect of alleged nuisance on his part. In relation to the nuisance claim, V argued that the flood would not have occurred had the weir across the river not been blocked with accumulated debris and that the accumulation of debris in the weir amounted to a nuisance attributable to A2's fault. V claimed that it was the duty of A2 in using his property to avoid causing damage to V's neighbouring home.

2 A2 argued that: (1) V had made no relevant averments of fault on his part: the claim, which concerned flooding during a period of torrential rainfall, did not allege any omission by A2 from which negligence might be inferred; (2) he owed V no duty to take positive steps to maintain the weir, nor remove debris therefrom; and (3) there was no basis

9 See *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 at [59].

10 See especially *Greenock Corporation v Caledonian Railway Co* [1917] AC 556. Although this was a Scottish appeal which did not concern the rule in *Rylands v Fletcher*, the approach of the House of Lords was indicative of a more stringent approach to the act of God defence than had been taken in *Nichols*.

11 In *Carstairs v Taylor* (1871) LR 6 Ex 217, act of God was one of several reasons why the claim failed.

12 *Box v Jubb* (1879) 4 Ex D 76.

13 *Dunn v Birmingham Canal Co* (1872) LR 7 QB 244. This defence is also recognised in some of the strict liability rules established by legislation: see, eg, Civil Aviation Act 1982 (UK), sec 76(4); Water Industry Act 1991 (UK), sec 209(2).

in law for a positive duty to maintain an artificial structure so as to alter and mitigate against the otherwise natural flow of water.

Decision

The judge allowed a proof before answer (a trial of the facts followed by a debate on the application of the law to them) in respect of the action against A2. He held that V had pled *culpa* (fault) on the landowner's part, through his alleged failure to maintain the weir (including through removal of accumulated debris). These averments of fault were sufficient to justify the ordering of a proof before answer. **3**

Comments

We are obliged in law to guard others against the harmful consequences of our own conduct. However, we are not generally under a duty to protect others against harm caused by natural events. However, in relation to the nominate delict of nuisance, an occupier of land is under a duty to ensure that the state of its land or anything done on it does not cause harm to neighbouring occupiers. That duty extends to requiring occupiers to take positive steps to prevent natural events occurring on the land, including (as in this case) the build-up of debris behind a dam on a river, from causing flooding of neighbouring land (and buildings on that land). Assuming that fault on the part of A2 could be established by relevant evidence at the hearing ordered by the court, it seems likely that this claim for failing to prevent harm caused by a natural event would ultimately result in an order of the court that damages be paid to V. **4**

14. Ireland

University College Cork v Electricity Supply Board, Irish Supreme Court, 13 July 2020

[2020] IESC 38[1]

Facts

A operated two dams as part of a hydro-electric generating station. During a period of especially heavy rainfall, V's property was flooded by the release of water from the dams. V sued A in negligence and private nuisance. A claimed that the amount of water released was no more than that arriving in as a result of the natural rainfall at the time. **1**

1 Noted by *D Ryan*, (2022) 4 ISCR 185; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 302, no 18 ff.

Decision

2 The IESC held that A was under an affirmative duty of care in the tort of negligence and had breached it. In light of this, no opinion was expressed on the question of liability in private nuisance. As liability was imposed in respect of the management of the dams, the question of liability in respect of failure to warn the plaintiff did not need to be addressed. A had warning of the coming storm, so could have released water in advance to make extra space available to absorb storm water; this would have caused a lesser level of flooding. The Court accepted that there was no general duty to protect third parties from naturally occurring risks or to confer a benefit on them, but that exceptions giving rise to such a duty did arise. One of those exceptions was where A had 'a special and substantial level of control' over the hazard and that exception was applicable in the present circumstances.[2]

Comments

3 The case makes it clear that liability for natural occurrences is exceptional. Likewise, the comments of O'Neill J in *L v Minister for Health* above in respect of naturally occurring illness as a vicissitude. However, if the defendant's negligence or other wrongdoing exposes V to the occurrence of a natural hazard that they would not otherwise have been exposed to, it is possible for liability to be imposed. Speeding up the onset of naturally occurring illness is often taken into account in the assessment of damages.[3] Failure to offset a naturally occurring risk can give rise to liability in private nuisance, but the precise parameters are uncertain, as the IESC did not address nuisance in this instance, deciding the case solely on the basis of negligence.[4]

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2 The quoted phrase is at [16.4] of the joint judgment of Clarke CJ and MacMenamin J.

3 See, eg, *Curran v Finn* [2001] IEHC 5, noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2001 (2002) 293, no 54 ff.

4 In respect of private nuisance, the IEHC endorsed the English approach in *Leakey v National Trust* [1980] QB 485 in *Grennan v O'Flaherty & Ryan* [2010] IEHC 157; see also *Larkin v Joosub* [2006] IEHC 51, [2007] 1 IR 521 and *Daly v McMullan* [1997] 2 ILRM 232 (IECC), noted in *B Winiger*/*H Koziol*/*BA Koch*/*R Zimmermann* (eds), Digest of European Tort Law, vol 1: Essential Cases on Natural Causation (2007) 3/14 no 1 ff. In *Daly* the judge accepted the principle in *Leaky* that the resources of the parties were relevant to the extent of the remedy, so that in some instances only a partial remedy would be available to V; the remedial issue was deferred until further evidence was provided on a number of issues. This aspect of *Leaky* was not considered in the IEHC decisions, so it is not clear what the current law is on the issue.

15. Malta

Tania Vassallo and others v Anna Rita Camilleri and another – Qorti tal-Appell (Court of Appeal) 31 January 2014

Facts

The plaintiff was injured when she was run over by a car driven by the first defendant, leaving her with a partial permanent disability. In a preliminary judgment, the first instance court had found the defendants liable to compensate 80 % of the damage suffered by the plaintiff (because of the plaintiff's contributory negligence). Before final judgment was delivered, and therefore before the court quantified the damages due, the plaintiff died from unrelated causes and the case was continued by her successors who prosecuted the action after her death. 1

Decision

The first instance court considered and rejected the defendants' argument that no damages were due for *lucrum cessans* since the victim died before the damages could be quantified. The court held that once the victim had suffered a permanent disability, the obligation to compensate her for the impact the disability had on her income earning capacity arose automatically on the part of the tortfeasors. 2

Secondly the court addressed the issue of the multiplier in the light of the fact that in this case the victim was only 33 years old on the date of the injury and had died within three and a half years from that date. The court observed that normally, in assessing loss of future earnings, the multiplier is not taken to be equivalent to the difference between retirement age and the age of the victim at the time of the accident, and the practice is that of automatically deducting a number of years from the multiplier to reflect the so-called 'chances and changes of life'. In such cases, the quantum of damages once finally assessed is not revised upwards if the victim actually reaches retirement age. By the same logic, if the victim dies before the lapse of the years for which lost earnings were awarded, the award is not revised downwards. However, in the present case, since the victim had died before the judicial liquidation of damages, the court held that it must limit the multiplier to the time period which elapsed between the plaintiff's injury and her death. No appeal was entered from this part of the judgment, which was therefore confirmed by the Court of Appeal. 3

Comments

The assessment of loss of future earnings is of necessity an inexact exercise since unknown factors have to be taken into account. Chief amongst these is the number of years – the multiplier – for which lost earnings must be assessed. In the present case, before judgment was delivered, the victim died of unrelated causes which would have 4

caused her death independently of the injury and the factor of life expectancy – or, rather, duration – was therefore known and had to be taken into account. The court however made it clear that it was doing so only because the event occurred before final judgment; had the plaintiff died after final judgment, the case would not have been re-opened to take this factor into account.

5 This case is therefore an example of a situation where an unforeseeable future event *reduces* the quantum of damages for which the defendant would otherwise have been liable.

16. Norway

Case Høyesterett (Norwegian Supreme Court) 20 November 1948

Rt 1948, 1044

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/rt-1948-1044-272b?searchResultContext=3410&rowNumber=1&totalHits=1>

Facts

1 The steamship *Sirius* was moored in a harbour in Henningsvær. One morning, a storm caused massive waves to hit the ship's side and pushed it towards the quay. *Sirius* made an attempt to move the front of the ship forward towards the waves, but the ship failed to do so since the stern of the ship was pushed towards the quay. The option of trying to leave the quay without any mooring was not attempted since the chances of the ship being wrecked were high. The wind and waves would probably have forced the ship into the ebb tide next to the quay before it was able to move forward with enough power to steer. As a result the quay was damaged.

Decision

2 One question before the Supreme Court was whether the shipowner should pay compensation in accordance with the rules on liability for acts of rescue. Pursuant to the Act on the Entry into Force of the General Civil Penal Code sec 24, (today the Compensatory Damages Act sec 1–4), a person or enterprise is liable in damages for damage or injury that they have caused legitimately in order to avert an imminent danger. The liability is strict.

3 The Court noted that the quay was there in the interests of the shipowners, the recipients of goods onshore and the quay owner. The ship had remained in the same position to avoid being wrecked and it was not in a position to both save itself and spare the quay. The strict liability was therefore not applicable. The Court stated that the correct description of the circumstances was that the ship had omitted to 'sacrifice' itself to spare the quay. It would not be reasonable to deem the owner of the ship strictly liable in damages when the damage was caused by a natural event that the ship was unable to escape.

Comments

The case is one of very few examples where a tortfeasor has done nothing else than being accidentally exposed to a natural force. The owner's contribution is nevertheless a necessary condition for the occurrence of the damage. It seems the ship was considered a relevant cause according to what we today would say is pursuant to the *conditio sine qua non* formula. As the ship was a necessary cause in the chain of events, the Court found the solution for the limitation of liability in terms of causation. No activity was necessary on the ship's part to trigger the potential for damage. Nor had the ship's crew committed any acts or omissions that put them in a more susceptible position in relation to unpredictable natural forces. The tortfeasor's position in the chain of events is much the same as the position of the owner of the quay. The dominant cause of injury was the natural force. As the alleged tortfeasor did not have any intention of sacrificing the interests of another, the damage should 'lie where it falls' according to the Roman law principle of *casum sentit dominus*. **4**

One possible approach to a similar case today could be to use an additional qualification from case law developed in 1992. In a case in which a woman died from a stroke due to side effects of a birth control pill, the Court added a more value-based qualification standard to the 'necessary cause' requirement.[1] Even if a cause could be characterised as *conditio sine qua non*, the courts would still not deem this to constitute the presence of a legally effective cause if it finds that the contribution is not so material to the course of events that it is reasonable to attribute liability to it. In Norwegian legal scholarship, this specific qualification was for many years considered to be part of the law on causation in fact. Today, it is recognised that the rule has more in common with a value-based proximity test, and the rules on remoteness of damage. **5**

17. Sweden

Högsta domstolen (Supreme Court) 14 September 1933

NJA 1933, 441

Facts

During roadworks over a bog, motorists were instructed to drive through a pool of water. A car stalled and got stuck in the water, after which it sank and disappeared into the swamp. The car owner sued the constructing entrepreneur. **1**

1 Rt 1992, 64. The producer of the birth control pill was found liable in damages based on strict liability pursuant to ch 3 in the Product Liability Act of 23 December 1988.

Decision

2 The Supreme Court found that the traffic obstacle did not give reasonable reason to foresee the possibility of such a serious accident, whereby the claim for damages was dismissed.

Comments

3 The judgment suggests that it is the negligence test that was negative ie no negligence was established, but certain risks – such as damage to the car's underside – were certainly associated with selecting the chosen route without closer control. But the fact that the car literally disappeared was not a typical risk. As a rule, the interaction of the negligent act with the forces of nature often does not lead to any limitation of liability.[1] In practice, additional justification beyond the negligence ruling is rarely needed to justify this conclusion. In these cases, it is often the proximity to the natural event that makes the act of the tortfeasor considered risky and thus negligent. However, if the risk potential is realised in a totally other direction than what could be expected – as in this case – the natural event can be seen as outside the scope of the danger zone.

18. Finland

Korkein oikeus (Supreme Court) 3 November 1967, KKO 1967 II 92

<https://www.finlex.fi/fi/oikeus/kko/kko/1967/19670092t> (only the summary)

Facts

1 A was driving a rail vehicle carelessly and crashed into a motorised handcar standing on the rails, as a result of which, the handcar crashed into another machine. Two workmen (together V) were injured and all three vehicles were damaged. The prosecutor pressed charges against A and demanded A compensate the loss caused to V and the owner of the vehicles. A objected to the claim, alleging, inter alia, that the accident and the damage it had caused had been affected by a circumstance external to A's act, that is, the inadequacy of the brakes of the vehicle A had been driving. The appellate court accepted the argument and adjusted A's liability on these grounds to two thirds of the actual loss. The owner of the vehicles accepted the outcome but V appealed to the Supreme Court.

Decision

2 The Supreme Court noted that as A had been aware of the inadequacy of the brakes of their vehicle, they should have taken this fact into account when controlling their driv-

1 See *H Andersson*, Skyddsändamål och adekvans (1993) 409 ff.

ing speed. Because of this, the inadequacy of the brakes could not be regarded as a circumstance external to A's act, and they were obliged to compensate V's entire loss.

Comments

The case is a straightforward application of the former ch 9 sec 1(2) of *rikoslaki* (19.12.1889/39) that mostly corresponds to the present ch 6 sec 1 of *vahingonkorvauslaki* (31.5.1974/412), according to which, 'if a circumstance external to the act giving rise to the injury or damage has also been involved, the damages may be adjusted as is reasonable'.[1] The external circumstance relevant in the case – ie, inadequacy of the brakes of the vehicle – cannot really be understood as a 'natural event' in the meaning of this chapter. However, as the same rules apply to all external circumstances, be they natural or not, the case is presented here. 3

Case KKO 1967 II 92 illustrates the requirement that, in order for an external circumstance to be capable of leading to a limitation of the liability of the party which caused the damage, the circumstance must be unpredictable to some extent. As A was aware of the inadequacy of the brakes of the vehicle they were driving, it seems accordant with common sense that A must not be able to invoke this inadequacy to restrict their liability. On the contrary, the inadequacy was a circumstance that A should have particularly taken into account, but as they failed to do so, it appears as nothing but justified that A must bear the consequences for their omission. 4

Korkein oikeus (Supreme Court) 13 July 1995, KKO 1995:129

<https://finlex.fi/fi/oikeus/kko/kko/1995/19950129>

Facts

Landowner A contracted an excavator entrepreneur to dig a ditch. During the work, a telecommunication cable was cut. A had been aware that there was a cable lying somewhere on their land but had neither investigated its exact location nor provided the contractor with any instructions on how to avoid damaging the cable. On the other hand, natural circumstances had contributed to the occurrence of the damage, namely the cable had risen from the depth at which it had initially been dug. The same circumstances had led to the removal of a yellow warning band that had initially marked the cable. The owner of the cable claimed from A and the excavator entrepreneur compensation for the damage to the cable and its economic consequences. 5

Both A and the entrepreneur were held liable by the District Court. The entrepreneur did not appeal the judgment, and, therefore, in the Court of Appeal and the Supreme Court, the only question to be addressed concerned A's liability. 6

1 For a general presentation of these provisions, see above 7/18 nos 3–5.

Decision

7 The Supreme Court held A that had acted negligently and was thus *prima facie* liable for the damage their conduct caused. Thus, A was held liable due to their own negligence as a party commissioning and overseeing the work rather than on the basis of vicarious liability.

8 The fact that the cable had risen in the ground and that the warning band was no longer in its original position were caused by natural circumstances of which neither A nor the owner of the cable were liable. Thus, the damage was held as being caused by both A's conduct and a circumstance unrelated to A. According to ch 6 sec 1 of *vahingonkorvauslaki* (31.5.1974/412), introduced in more detail under 7/18 nos 3–5, 'if a circumstance external to the act giving rise to the injury or damage has also been involved, the damages may be adjusted as is reasonable'. Because of this, the Supreme Court adjusted A's liability to cover only Finnish marks (FIM) 70,000 of the entire loss of FIM 134,000.

Comments

9 Case KKO 1995:129 is a clear-cut example of the function of the *casus mixtus cum culpa* principle enacted in ch 6 sec 1 of *vahingonkorvauslaki*. The occurrence of the damage was essentially caused by changes in the terrain that were caused by natural circumstances, and because of this, the tortfeasor was held liable for only a part of the loss. The difference in outcome compared to the former case KKO 1967 II 92 may be explained by the more exceptional character of the external circumstances in case KKO 1995:129.

20. Latvia

Augstākās tiesas Civillietu tiesu palāta (the Chamber of Civil Cases of the Supreme Court[1]) 28 October 2013, No PAC-1101/2013

<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/155036.pdf>

Facts

1 V underwent a planned surgery – a knee joint replacement – at hospital A. According to the conclusion of the inspection of medical care and work capacity examinations' quality control (the Inspection) submitted to the court, an error had occurred during the surgery, namely, misplacement of some components of the prosthesis. In order to correct the error, V underwent three further operations at hospital B. V claimed that, as a result of poor-quality surgery and post-operative care at hospital A, she suffered significant

1 The Chamber of Civil Cases of the Supreme Court was, at the time, the appellate instance court. Since 1 January 2017, there have no longer been Chambers at the Supreme Court and it is only a cassation instance court.

bodily injuries: mutilation of the left knee joint, causing movement disorders, in particular, difficulties walking up stairs, etc. V brought an action against A, requesting compensation of the costs of medical treatment (€ 282), lost profits in the amount of unearned wages (€ 8,544), non-pecuniary damages (€ 498,005) and compensation for the bodily injuries which resulted in mutilation and disfigurement (€ 498,005). V also requested compensation from A for the probable lost profit in the amount of the unearned salary.

A objected to the claim, arguing that surgery was performed according to conventional rules and procedures on knee joint replacement. Further, A stated that every operation, regardless of the implant and the surgical team, carried a risk to life and could cause complications. V had been warned of the possible risks and complications. A also highlighted that, already before the surgery, V had co-morbidities and was overweight, which actually increases the surgical risk and the incidence of complications and had affected the post-operative period and increased joint pain and immobility. Therefore the health problems of V were related to the peculiarities of her body and not to the performed operations. **2**

Decision

The first instance court partially satisfied the claim, awarding V compensation for the costs of medical treatment of € 282 and for the non-pecuniary damage an amount of € 7,114. The second instance court reduced both amounts of compensation and rejected the claim in its remaining part. The cassation instance court revoked the decision of the second instance court in part on the amount of both compensation awards. The second instance court, after re-examination of the case, awarded V compensation for the costs of medical treatment and compensation for non-pecuniary damage in the amount of € 7,114. The decision has come into force. **3**

By referring to the conclusion of the Inspection, the court observed that there was no reason to consider that the surgery at hospital A had led to permanent irreparable disorders of V's knee joint functions. However, in order to alleviate the results of the poor quality of medical treatment at hospital A, three further operations were necessary, which aggravated V's physical and mental suffering. **4**

The court also took into account that, after the operations at hospital B, the health condition of V improved. However, the possibility of complete recovery was largely affected by the V's co-morbidities. There was no dispute in the case that V's condition had been diagnosed as a second group disability since 7 June 2007. Nevertheless, bronchial asthma had been recognised as the main cause of V's disability and not the mistreatment at hospital A. Thus, the court could not establish a causal link between the poor quality of treatment V had received at hospital A and her disability. **5**

Comments

6 In this case, the courts had to deal with several causes possibly leading to the harm suffered by V. One of them – the co-morbidities of V – could have contributed to complications after the surgery at hospital A. Based on the opinion of experts, the court concluded that V's co-morbidities and not the poor quality treatment at hospital A were at least the main cause of her disability, which was established by an experts' commission at a later stage.

7 Although the co-morbidities as a more likely cause of damage in this dispute were related to V's pre-existing health conditions, the approach of the court would have been similar if the injury had been caused by a natural event, to which the misconduct of A could only be a contributory cause. Therefore, A would normally not be liable for the injury to the extent it occurred due to a natural event. Thus, A was held liable only for the harm that would not have been caused at all if the errors in conducting surgery were never committed by A.

24. Slovakia

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic)
28 November 1974
Criminal Case no 125/74

Facts

1 A kicked the victim in the abdomen. The consequence was a rupture of the small intestine and the death of the victim. The district court accepted evidence that the rupture of the small intestine was not fatal. According to the medical report, it appeared that V would most likely not have sustained injuries if his abdominal organs had been anatomically normal. Kicking the abdomen of a healthy person with intact abdominal walls would effectively only cause short-term pain or loss of consciousness, and the symptoms would subside without consequence.

2 The rupture of the small intestine occurred on an organ which had already been morbidly altered; as a result, the pressure caused by the blow could not be evenly distributed to all sides and thus the intestine ruptured. According to experts, the death could probably have been prevented if the medical intervention had occurred within ten hours of the injury. However, the victim refused to submit to medical treatment. He was not taken to hospital until 22 hours after the injury, at which time, according to the doctors, death could not have been prevented. The district court concluded that the cause of death was V's refusal to seek medical attention. The court of appeal agreed with this conclusion. The Supreme Court held that such conclusions were erroneous.

Decision

The causal link between the conduct of the perpetrator and the consequence is not broken if the conduct of the perpetrator is joined by another fact which contributes to the occurrence of the consequence, provided, however, that the conduct of the perpetrator remains a fact without which the consequence would not have occurred. The causal link is broken only if the new circumstance acted as an exclusive and independent cause in its own right, one that produced the consequence irrespective of the conduct of the perpetrator. The fact that the consequence which resulted from the perpetrator's conduct was different from what the perpetrator had imagined (so-called error in the causal course, *aberratio ictus*) does not favour the perpetrator and does not exclude his fault. 3

Comments

The district court did not consider this circumstance to be decisive, reasoning that 'an offender who harms the bodily integrity of another via physical assault capable of causing an injury is liable for the consequence, even if the injury occurs because the victim is afflicted by an anatomical anomaly of the injured organ.' According to the lower courts, the death occurred because the victim did not seek medical attention. This interrupted the primary cause, which was the victim being kicked in the abdomen. 4

According to the Supreme Court, if the defendant had not kicked the victim in the stomach, the aforementioned consequences would not have occurred. The causal link would have been broken only if the victim's death had occurred regardless of the defendant's actions, that is, solely as a result of some other circumstance. Such a different circumstance would have been, for example, if the victim had committed suicide after being injured or if someone else had killed him. 5

Case law emphasises that a causal link is established if the harmful event actually caused the damage for which compensation is sought (R 7/1992). The substantive link between cause and effect is decisive; a temporal link is helpful in assessing the substantive link (R 21/1992). Establishing causation presupposes a certain classification of causes. The courts often emphasise that the cause of the damage must be substantial and significant.[1] 6

The relationship between cause and effect must be direct.[2] The directness of the cause and effect is sometimes referred to as the 'immediacy' of the cause of the damage, otherwise it would be an indirect relationship.[3] 7

As for the breaking of the causal link, this occurs if the new circumstance would have acted as an exclusive and independent cause, which caused the consequence, irre- 8

1 For example, Judgment of the Supreme Court of the Czech Republic, Case no 25 Cdo 62/2000, Resolution of the Supreme Court of the Czech Republic, Case no 25 Cdo 1462/2003.

2 Judgment of the Supreme Court of the Czech Republic of 30 November 1976, Case no 2 Cz 36/76, published under R 7/1979.

3 Judgment of the Supreme Court of the Slovak Republic, Case no 2 Cdo 292/2006.

spective of the actions of the offender. The causal link is not broken if the conduct of the offender is supplemented by another fact which contributes to the cause of the consequence, while the conduct of the offender remains a fact without which the consequence would not have occurred.

25. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 11 May 2011, No Rev 137/09-2

<https://www.iusinfo.hr/sudska-praksa/VSRH2009RevB137A2>

Facts

1 In a traffic accident, V suffered multiple fractures in her right lower leg. After being treated for some time in hospital, she undertook physical therapy between 1 and 14 October 2014. In the course of therapy, V was also diagnosed with arterial hypertension, atrial fibrillation with absolute arrythmia and renal failure. During physical therapy, signs of heart failure with V were detected and, for this reason, she was hospitalised between 29 December 2004 and 7 January 2005. Eventually, V died on 9 April 2005.

2 V1, V's daughter, files a claim against A, who caused the traffic accident in which V was injured, seeking compensation for the non-material damage caused by the death of a close relative. V1 argues that V died as a consequence of her inactivity while she was recovering from the injuries sustained in the traffic accident.

3 During the proceedings, it was disputed whether a relevant causal link exists between the traffic accident caused by A and V's death. The first instance court dismissed V1's claim. The appellate court dismissed V1's appeal and upheld the first instance court's decision. V1 filed an application for revision before the Supreme Court of the Republic of Croatia.

Decision

4 The Supreme Court dismissed V1's application as unfounded on the merits and upheld the lower courts' decisions.

5 The Supreme Court recalled that tort liability will arise if a causal link between a harmful event and the damage is established. The Supreme Court further recalled that only that action which typically, ie under regular circumstances, results in particular damage can be considered to stand in a legally relevant causal link with the damage, whereas all other previous and subsequent atypical events should be disregarded.

6 Applying these principles to the case at hand, the Supreme Court supports the lower courts' conclusion that no such relevant causal link between the traffic accident caused by A and V's death existed. The Supreme Court noted that neither the injuries V sustained in the traffic accident (ie broken leg) nor inactivity caused by such injuries typi-

cally result in the death of a patient. Instead, underlying health problems, and especially the cardiac condition V developed before and after the accident, normally result in death. This heart condition was not caused by A, and, therefore, A cannot be held liable for the damage V1 sustained due to the death of V, her mother.

Comments

As is evident from the above-described cases, the answer to the question of whether increased losses stemming from natural events postdating the initial harmful event itself will be imputed to a person responsible for the occurrence of the initial harmful event largely depends on the concept of causation and the court's interpretation of the chain of events in each particular case. In this respect, it can be generally said that damage caused by natural events postdating a harmful event will not be imputed to a person responsible for the occurrence of the initial harmful event, provided that the court finds that this subsequent natural event cannot be taken as a typical result of the initial harmful event, in which case the court will establish that the causal link between the initial harmful event and the increased losses caused by such natural event is disrupted. Otherwise, if the court finds that a particular subsequent natural event is sufficiently causally linked to the initial harmful event, ie that a particular natural event is a typical consequence of the initial harmful event, it will hold the person responsible for the occurrence of the initial harmful event liable for the damage which occurred as a result of this subsequent natural event. 7

Thus, for example, in case No Rev 137/09-2, the Supreme Court refused to find a person liable for the initial harmful event (ie a car accident) also liable for the consequences of a natural event that occurred after the initial harmful event (ie the victim's death caused by a series of health problems unrelated to the car accident), justifiably holding that those subsequent health problems (mainly of cardio-vascular origin) and death were not a typical outcome of the initial harmful event (a car accident). 8

27. Hungary

Kúria (Curia of Hungary) Pfv VI 20.903/2009

Facts

A car collided with a deer which jumped onto the bonnet of the car. This caused the car to change direction and to enter the opposite driving lane, where it hit a car driving correctly in that lane. The deer also ran into this car. The driver of this car claimed damages from the driver who had incorrectly entered the opposite driving lane, arguing that the accident resulted from the act of the person who incorreclty operated the car after colliding with the deer and who is therefore liable for the damage caused to him. This driver also argued that the insurer of that car is obliged to pay compensation to him. The 1

driver who incorrectly entered the opposite driving lane invoked in his defence that it was impossible for him to avoid the collision with the deer, which ultimately caused the collision with the other car. For this reason, his insurer cannot be obliged to compensate the owner of the other car for the damage caused by this collision.

Decision

2 The court dismissed the claim of the plaintiff and established that the deer jumping onto the bonnet of the car was an unavoidable external cause falling outside the sphere of activity of the hazardous operation (of the driver of the car) and exonerated him from liability. Accordingly, the insurer was not obliged to pay compensation to the driver of the car hit as a consequence of the other car entering the opposite driving lane. In this case, the court established the *unavoidable nature of the cause of the damage* (the deer) and did not discuss the second condition of exoneration from liability that the cause of damage falls outside the scope of activity of the person operating the car.

Kúria (Curia of Hungary) Pfv II 20.617/2007/4

DIT-H-PJ_2008-24

Facts

3 In 1999, A, for purposes of wood exploitation, took possession of a protective forest, created to protect agricultural fields. The year before, heavy rains had caused waterlogging of the forest, by 2000 severely affecting the health of most trees, without causing decay of the trees. In spring 2000, the trees began to blossom much earlier than usual (2–4 weeks earlier), but the previous waterlogging had a negative effect on the blossoming. In spring 2000, herbicide was sprayed from a helicopter onto the neighbourhood farm land. When the herbicide was being sprayed, the wind was blowing in the direction of A's forest. In such circumstances, the safe spraying distance between the two pieces of land would have been 2.5 km, which could not be kept because the distance between the forest and the corn field was only 6-8 m. Thus, according to safety regulations, this activity should not have taken place. As a consequence, A's forest was affected by a high concentration of herbicide which could affect the budding of trees. Most of A's budding trees, being previously weakened by the waterlogging, lost their leaves and the state of the forest has worsened continuously. By June-July 2000, the weak trees were showing signs of danger of dying. In 2007, A noticed that the leaves and new shoots of his trees were dry. The expert opinion of the Plant and Land Protection Services established the effects of the herbicide on the field, but could not establish such impact on the vegetation of the 6–8 m road between the two properties. Nevertheless, the expert opinion established that the spraying of herbicides was not performed according to legal regulations and the safe distance was not established properly. However, because of the significant time lapse since the activity took place and lack of meteorological data, only

a presumption could be established that the damage to A's trees was caused by the herbicide sprayed over the grain field.

Decision

The court established the liability of the tortfeasor only for a part of the damage and not for the entire damage. The court came to this conclusion after it was proved that the trees were destroyed also due to their weak condition caused by waterlogging. 4

Comments

This decision may be considered as a dissenting one: in cases when natural events contribute to the occurrence of damage in addition to a human act, the general approach is that the liability of the tortfeasor will not be reduced accordingly. For such situations, there is no specific rule in the Hungarian Civil Code. Thus, the court will analyse whether the act was the typical, usual, relevant cause of the damage, and if so, the tortfeasor will be held liable for the entire damage.[1] Otherwise it will reject the complaint.[2] However, in more recent case law, the courts have tended to reduce the liability of the tortfeasor in such cases, regardless of the fact that the Civil Code does not contain a specific provision supporting such an approach. 5

Legf Bír (Supreme Court of Hungary) Pfv VIII 20.831/2009

BH.2010.64

Facts

On 29 June 2006, a natural event, a rainstorm (high quantity of rain in a very short time) occurred and caused significant damage to the immovable of A, because the drains could not absorb and transfer the high quantity of water. A's garage was flooded, two cars being completely destroyed. The company insuring the immovable compensated A only partially . For the remainder of the loss, A sued the local water utility company for damages. 6

Concerning the circumstances of the case, is relevant to mention: a) the water utility company had not transferred to the local council the responsibility over the new drainage system according to the requirements of law; b) the defective state of the drainage system was also attested by an expert, prior to the natural event. 7

1 *Á Fuglinszky* in: A Osztovists (ed), A Polgári Törvénykönyvről szóló 2013. évi törvény és a kapcsolódó szabályok nagykommentárja, IV. kötet (2014) 33.

2 Ibid.

Decision

8 The court partially admitted the claim of the applicant and established that the water utility company was obliged both under the local rules and the water management law to assure drainage through its water system. However, the court established that the damage should be shared between the defendant and the applicant and obliged the defendant to pay 30 % of the amount claimed by the applicant.

9 The court of second instance partially changed the decision and awarded increased damages to the applicant, close to the initially requested amount. In addition. it established that the drainage system designed by the water utility company did not comply with legal requirements and it was also not suited to the particular area, only being capable of partially absorbing the rainwater in that area. It did not find that the applicant contributed in any way whatsoever to the causation of the damage, taking into account that the garage complied with the rules on construction, although the applicant employed a risky construction technique. In the court's view, it cannot be expected from the applicant to design the garage and the capacity of the drainage system of their house to be suitable to handle extraordinary natural events such as a rainstorm, the system being suitable to handle average rain only.

10 The water utility company challenged the decision at the highest court for not considering the contributory negligence of the applicant and for transferring onto the company the unavoidable consequences of the rainstorm.

11 The highest court admitted the recourse action and established that the water utility company had infringed the law when it had not transferred the utility to the local authority, which for this reason could not comply with its legal obligations concerning the operation and maintenance of such constructions. Although it had been planned to transfer responsibility for the system in a separate agreement between the water utility company and the local council, this had not taken place. In light of this, the highest court established that the damage to the applicant was caused by multiple causes. An additional expert opinion established that the drainage system was not designed according to legal requirements, the pipes having a smaller diameter (50 cm instead of 80 cm), whereas the closed parts of the drain were only partially able to divert the water, while, at the open parts, the lack of maintenance worsened the functioning of the system. In addition, the rainstorm *significantly contributed to the causation of the damage, as established by the expert*.

12 Considering the above, the highest court found that the defendant cannot be held liable for the damage caused by the rainstorm and the defective design of the drain system under art 339(1) of the old Civil Code and applied the provisions of art 99 of the old Civil Code, which stipulate that the victim should bear the consequences of a loss for which nobody can be held liable. The court established that a high quantity of rain is a case of *casus nocet domino*, thus damage resulting from such an event should be covered by the owner. The court excluded liability for lack of causation between the unlawful act of the defendant and the damage.

Comments

The same line of reasoning can be found in case PIT-H-PJ-2008-86, in which that court established that the damage (cracks in the walls of the applicant's home) was jointly caused by the high quantity of rain and the lack of rain water removal works by the local council. The court established that the local council is not liable for the consequences of the extraordinary natural event, but only proportionally to the damage which would have been caused by average rain. 13

Győri Ítélőtábla (Györ Court of Appeal) Pf IV 20./2014/I

Facts

An industrial accident took place on the premises of an aluminium plant in Western Hungary on 4 October 2010 when a dam reservoir collapsed freeing approximately one million cubic metres of waste liquid from red mud lakes, resulting in flooding nearby (one village and one town). Ten people died and 150 were injured. About 40 square km of land was initially affected by the red mud. 14

The three applicants sued the aluminium company claiming damages for health injuries and mental distress they suffered during the flood while their life was at high risk. Subsequently, they were evacuated from their homes, which were severely affected by the dangerous red mud. In addition, they sought pecuniary damages for the loss of their movables during the accident, in the amount for which they were not compensated by the local authority. 15

Applicant I saved his life by hanging on to an electric pylon, while waiting for hours in the red mud to be rescued, 27 % of his body being irreversibly affected by burns. The loss of his home and his movables and the experience of his life being at threat caused him significant psychical trauma. Applicant II did not suffer personal injury but lost his home and all his movables, which caused him psychical shock and contributed to a worsening of his existing diseases and made him behave aggressively. Applicant III, who also had to leave his home and movables, suffered significant psychical trauma. 16

The joint claim of the applicants was based on arts 346 (2) and 355 (1) and (2) of the old Civil Code in force at the time of the accident. The applicants grounded their claims for non-pecuniary damages on the infringement of their rights to a healthy environment, arguing that the defendant conducted an activity that was dangerous for human life, human health and the environment and therefore the company should compensate the damage related to such activity. 17

Decision

On the basis of previous highest court decisions on the red mud accident (Pfv III 21.161/2013 and Pvf III 21.396/2013/5), the court established that depositing such a very high quantity of dangerous waste as the aluminium plant did, in itself constitutes such a high 18

risk considering the potential harm that may occur, which justifies the application of the provisions on *strict liability for highly dangerous activities*. Accordingly, *a company conducting such a highly dangerous activity may exonerate itself from liability only when it successfully proves that the damage was caused by a reason external to its sphere of activity, being an unavoidable cause*.The cause is unavoidable when, considering the state of science and research as well as the economic affordability of the preventive measures; the risk may not be avoided. In order to establish whether the accident was unavoidable, the court found, based on evidence, that various acts and decisions of the company caused the accident (such as choosing the place of the plant, a lack of soil analysis assessing the suitability of the land for such a reservoir, infringement of construction and maintenance rules, the technology applied). The court also accepted the argument that the *high quantity of rain during the previous six months* caused the rupture of the reservoir, which in the company's view is an external unavoidable event. In relation to this argument, the court established that, despite *the high quantity of rain, although it contributed to the rupture of the reservoir*, *the incident could have been prevented according to the state of technology at the time of the accident.* The court thus rejected the defence and established the company's liability.

Comment

19 The most important development in recent years considering this environmental accident is that the criminal liability of the decisions makers of the company was established in a final judgment at the end of 2021. *This highest court decision contains evidence and expertise also concerning the fault-based civil liability of the company*.

28. Romania

Curtea de Apel (Court of Appeal) Tg Mureș, Civil Section, Decision No 109/2021
<www.sintact.ro>

Facts

1 V parked his caravan at a camping site located at a restaurant in Sighișoara. Two days later, in strong winds, a wild nut tree, which was rotten inside, fell onto the caravan, destroying certain parts of it. V sued the company owning the restaurant and the land where the accident took place for RON 20,305 in pecuniary damages as compensation for the harm suffered.

Decision

2 The first instance court admitted the claim and obliged the owner of the nut tree to pay V the costs to repair the caravan. The defendant appealed this decision at the Tribunal of

Tg Mureș, which increased the amount of damages, granting to the owner of the caravan the RON 20,305 as initially claimed. The owner of the tree filed a recourse action against this decision at the Appeal Court of Tg Mureș that established the fault of the caravan owner and dismissed his claim for damages.

On appeal, the court analysed force majeure as a possible ground for the exclusion 3
of liability of the victim and established that *the wind and rain* that generated the *fall of the tree do not fulfil the legal conditions of force majeure*, because such weather events (eg atmospheric instability, strong winds and rain) are customary in that period of the year and the storm on 26 May 2018 *was not unforeseen and absolutely invincible (in the sense of being totally outside human control) by the victim, justifying the exclusion of liability*. Concerning V's fault, the Appeal Court of Tg Mureș established that he parked the caravan under the tree, on a playground created for children, without the consent of the owner. He refused to leave that place where he parked the caravan voluntarily and illegally and did not remove the vehicle after the storm began.

Curtea de Apel (Court of Appeal) Timişoara, Civil Section a II-a, Civil Decision No 19/R of 2020

Revista Românâa de drept al Afacerilor 5/2020

Facts

On 17 September 2017, during a storm a part of the defendant's (A) roof was dislodged 4
from the building owned by him and was swept by the wind onto the fence of the neighbour (V) causing harm to it. V sought pecuniary damages from the owner of the building.

Decision

The court of first instance, in its decision no 13697/28.11.2018, dismissed the claim as did 5
the Tribunal of Timișoara in decision no 535/A/21.06.2019. On appeal, the Timișoara Court of Appeal admitted the recourse filed by the owner of the fence and obliged the owner of the building whose roof destroyed the fence to pay him RON 30,089 in damages as well as interest until effective payment.

The court established the liability of the owner of the building based on *art 1378* 6
C Civ on liability for damage caused by the ruin of a construction, which states that the owner of a construction will be liable to repair the damage caused by the dislodging of parts from the construction as a consequence of a construction defect. The technical expertise testified that it was possible, due to the defective construction of the roof, that the wind could cause such damage to the building and to the neighbour's fence.

Concerning the liability of the owner of the building whose roof caused the harm to 7
A, the court established the lack of maintenance and construction defects as constitutive elements of the liability for the ruin of constructions. In reaching this conclusion, the court also took into consideration that in the concerned industrial area, none of the

buildings (or their roofs) were damaged by the storm and none of the fences were affected, this meaning that the construction defect was the source of the damaging event.

8 *The storm was not considered by the court as a case of force majeure* in the meaning of art 1351 (2) C civ, which defines it as any external event that is unforeseeable, absolutely invincible and inevitable, because in that region of the country, strong winds and storms in September, when the harm occurred, are never an unexpected or surprising event considering the geographical location of the village concerned on the Vest Cramp of Romania. Although according to the meteorological Norm NP-182-04 of 15.02.2005 the speed of the wind reached the upper limit of the orange code, this does not fulfil the conditions of force majeure in that geographical area, where such natural events are normal and customary in that period of the year and, thus, can be foreseen. For this reason, *the owner of the building, the commercial company, was obliged when building the construction to prevent and avoid the consequences of such natural events, but failed to comply with such obligation. Accordingly, the court reached the conclusion based on the above evidence that the case falls under art 1378 C civ on liability for damage caused by the ruin of a building.*

Comments

9 According to art 1.352 C civ, the act of the victim excludes the liability of the tortfeasor even when it does not qualify as force majeure but only as an unforeseen event, but only in those situations when the law or the agreement of the parties consider the act of the victim as a ground to exclude tort liability. The act of the victim must be illegal and committed with fault and must have caused or favoured the occurrence of the damage of the victim. In such a case, the tortfeasor will be exonerated from liability or his liability will be reduced proportionally to the contribution of the victim to the causation of the damage.

10 The act of a victim or of a third person fulfils the conditions of force majeure when it constitutes the exclusive and determining cause of the damage, and it was absolutely unforeseeable, irresistible and unavoidable. In this case, the liability of the tortfeasor is fully excluded due to lack of fault and lack of causation.[1]

11 In practice, the judge has great freedom in deciding whether to exclude or to reduce the liability of the tortfeasor, depending on the fault and the degree of contribution of the victim to damage. The courts usually use experts to establish the illegal act committed by the victim.

12 *Article 1.376 C civ governs the liability of the legal custodian of things for damage caused by such things*. Liability for things under art 1.476 (1) C civ is a form of *objective liability*, independent of the fault of the custodian of the thing. The foundation of this type of liability is the legal obligation of warranty for the risks associated with the abnormal functioning of the thing in the case of occurence of damage related to such risk.

1 *LB Luntraru*, Răspunderea civilă pentru malpraxisul profesional (Editura Universul juridic, 2018) 75f.

The custodian will not be held liable when there was no possibilty to prevent the occurence of damage. Thus, in the case of liability for things *only force majeure exonerates the custodian from liability*, including the acts of third persons and the acts of the victim. As argued in the legal doctrine, the proof of a lack of fault of the custodian does not restore the presumption of liability, because the unforseeable event does not exonarate the custodian from liability. For exoneration from liability, an external factor, such as the act of of a third person or the act of the victim, is needed. 13

Force majeure relates to natural events external to the thing and external to the activity of the custodian, which are unforeseeable, uncontrollable, and unavoidable. Invincibility is not subjective, but must be objective, being assessed in abstracto by the courts, regardless of the personal qualities of the custodian. However, invincibility, unforeseeability and unavoidability of a natural event are related to the actual state of science and technology in the field concerned by the natural event. Lastly, *for the qualification of the natural event as force majeure, this must be the exclusive cause of the damage caused by the thing.* 14

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

V's ship is damaged in a collision for which A's ship is to blame. After temporary repairs to make the ship seaworthy, she embarks on a voyage to a dockyard where permanent repairs are to be effected. She would not have made this voyage had the collision not occurred. During the crossing, the ship sustains further damage in a storm.[1] V claims damages from A not only for the damage suffered in the collision but also for the further damage suffered in the storm. 1

1 Inspired by the English case: *Carslogie Steamship Co Ltd v Royal Norwegian Government*, House of Lords, 29 November 1951 [1952] AC 292, with comments by *D Nolan*, above 9/12 nos 1–3; see also the further English case*: Nichols v Marsland*, Court of Appeal, 1 December 1876 (1876) 2 Ex D 1, with comments by *D Nolan*, above 9/12 nos 4–6: extraordinary rainfall, the heaviest in memory; the Italian case: Corte di Cassazione (Court of Cassation) 13 April 1989, no 1774 Giust civ Mass 1989, fasc 4 89, with comments by *N Coggiola, B Gardella Tedeschi* and *M Graziadei*, above 9/9 nos 1–5 and 13–18: an exceptionally violent storm, unforeseeable and unpredictable, interrupts the chain of causation and becomes the sole cause of an unavoidable, fortuitous event of injury; the Norwegian case: Høyesterett (Norwegian Supreme Court) 20 November 1948, Rt 1948, 1044, above 9/16 nos 1–5, with comments by *AM Frøseth* and *B Askeland* (massive storm pushing a ship against the quay, regarded as a natural event that the ship was unable to escape).

Solutions

2 **a) Solution According to PETL.** Like in the case of loss resulting from a decision of the injured party, the case of loss and additional losses resulting from a natural event is to be addressed under art 3:106 PETL, according to which, '[t]he victim has to bear his loss to the extent corresponding to the likelihood that it may have been caused by an activity, occurrence or other circumstance within his own sphere'. According to the Commentary to the PETL, '[n]atural events, such as earthquakes, storms, heart attacks, or other diseases, unrelated to activities by third parties, may qualify as such'.[2] 'Art. 3:106 [hereby] is the complement of Art. 3:103',[3] the PETL's rule on natural causation. In addition, here again the rule on the scope of liability (art 3:201 PETL) is to be taken into account.

3 Had the accident caused by A's ship not happened, V's ship would not have made the voyage during which it was damaged in a storm. The accident for which A was responsible was thus the natural cause, or the *conditio sine qua non*, for the further damage to the ship, suffered in the storm (art 3:103 PETL).

4 However, a storm at sea is an event which is unrelated to activities by a third party such as tortfeasor A. It is in principle an event falling within the victim's sphere pursuant to art 3:106 PETL.

5 It is true that, had the first accident not happened, V's ship would not have undertaken the journey and not been in the storm. At this point, art 3:201(d) and (e) PETL are again to be considered. The purpose of the rules on liability for damage suffered in shipping collisions is not to ensure that the damaged ship will not be exposed to storms when sailing to a dockyard (art 3:201(e) PETL). On the contrary, storms at sea are among the 'ordinary risks of life' when engaging in shipping (art 3:201(d) PETL). It is consequently submitted that, under the PETL, A would not be liable for the damage suffered by V in the storm on the way to the dockyard, even if he had not made the journey had A not caused the collision.

6 **b) Solution According to the DCFR.** Under the DCFR, the damage sustained by the ship is a damage to property which constitutes a 'legally relevant damage' according to art VI–2:206 DCFR. The principal question here is whether A's liability extends to V's further property damage suffered in the storm on its way to the dockyard. This requires that the accident for which A is liable also caused this further loss (art VI–4:101 DCFR). A caused the initial damage to the ship, which in turn, rendered necessary the repairs and the trip to the dockyard, which resulted in further damage due to the storm. A's conduct was therefore the *conditio sine qua non* not only of the damage suffered in the collision, but also the further damage suffered in the storm.

7 The issue is further to be analysed under art VI–5:302 (Event beyond control) DCFR, which could, if applicable, provide A with a defence regarding this further damage.

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2 PETL – Text and Commentary (2005) art 3:106, no 4 (*J Spier*).

3 PETL – Text and Commentary (2005) art 3:106, no 5 (*J Spier*).

Article VI–5:302 DCFR defines an event beyond control as 'an abnormal event which cannot be averted by any reasonable measure and which is not to be regarded as [the tortfeasor's] risk'. The question *in casu* thus is whether the risk of a storm further damaging the ship, on its way to the dockyard for repairs, is a risk attributable to A who caused the initial collision. It is difficult to imagine what reasonable measures A could have taken in order to prevent V's ship from being damaged in the storm. **8**

This line of reasoning finds further support in art VI–5:101(2) DCFR relating to the risks voluntarily assumed by the victim. Indeed, whenever a person decides to take their ship to sea, they voluntarily assume the risk that a storm may happen. It was V's decision to embark on the trip to the dockyard on this particular day. It is thus suggested that this particular risk lies within V's sphere under the DCFR, rather than being attributable to A. **9**

Under the DCFR, A will thus be liable for the initial damage caused to the ship by the collision, but not for the further damage it sustained in the storm. **10**

31. Comparative Report

Most European countries depart from the general rules on adequate causation when deciding whether the tortfeasor is also responsible for damage that stems from a natural event. In all reports which cover this category, it is held explicitly or implicitly that the act or event that renders the tortfeasor liable must be a *conditio sine qua non* of the total damage. The main pattern is that the tortfeasor is responsible for the total damage where a natural event increases the damage for which the tortfeasor is responsible, compared to the hypothetical situation where the natural event was absent. This solution only applies, however, provided that the natural event and the damage it causes is within a range of foreseeable consequences. **1**

Three possible scenarios arise within the European jurisdictions: 1) The tortfeasor is responsible for all the damage. 2) The tortfeasor is responsible only for their own part of the damage. 3) A third solution is that the award is reduced proportionate to the part of the whole damage that was caused by the natural event. The two latter solutions may lead to the same result. The structure of the normative approach is, however, different in scenarios two and three. **2**

In most European jurisdictions, the first tortfeasor is responsible for further damage caused by a natural event, such as category 1) above. The category comprises Belgium, Croatia, France, Germany, Greece, Latvia, Slovakia, Sweden and Switzerland.[1] This solution is, however, governed by different principles and approaches in the various countries and families of legal systems. **3**

1 See Belgium 9/7 no 9; Croatia 9/25 no 7; France 9/6 no 3; Germany 9/2 no 6; Greece 9/5 no 6; Latvia 9/20 no 6; Slovakia 9/24 no 8; Sweden 9/17 no 3; and Switzerland 9/4 no 6.

4 Some jurisdictions resolve the problem by applying the general rule of adequacy. Hence, for example, Sweden, where the ordinary adequacy approach is applied, and where atypical developments may place parts of the damage outside the scope of liability: 'if the risk potential is realised in a totally other direction than what could be expected – as in this case – the natural event can be seen as outside the scope of the danger zone.'[2]

5 In Germany, the rule also seems to be that the tortfeasor has to cover all damage in spite of the occurrence of an intervening natural event.[3] This applies where the tortfeasor has created a specific risk for further damage.[4] The German report informs us, however, that such cases are rare. In Switzerland, the same result may be achieved, but the judge has also, according to court practice and legal commentators, been granted discretion and alternative solutions.[5]

6 In Belgium, the same solution, responsibility for the whole damage, applies in relation to medical predispositions that exacerbate the harmful event. The Belgian solution is closely connected to the idea that the tortfeasor should take the victim as they find them.[6] Hence a variation of the general rules of causation is applied rather than a special institute of law.

7 The Scottish report includes a case where the tortfeasor is assumed to be liable for additional damage caused by a natural event, namely accumulated debris blocking drainage and causing flooding.[7] The solution in Scotland is, however, in general equivalent to the law of England and Wales. The parties are not generally under a duty to protect others against harm caused by natural events.[8]

8 In France, the general rule is that the tortfeasor may be liable also for the additional damage caused by a natural event or by a third party, however, only insofar as the additional damage is not too remote. Hence a tortfeasor did not have to compensate additional damage caused by a fire ten years after the physical damage caused to the victim.[9] In principle, the same rule applies in Greece. Only where a predisposition is very exceptional may the causal chain between the tortfeasor's harmful act and the damage be considered broken.[10]

9 A number of reports highlight that the damage must be a typical result of the tortious act, hence where the responsible party has only 'ignited' a hazard that was present independent of the harmful event, there will not be liability for the damage. The Croa-

2 Sweden 9/17 no 3.
3 Germany 9/2 no 6 f.
4 Germany 9/2 no 7.
5 Switzerland 9/4 nos 6–8.
6 Belgium 9/7 nos 4–6.
7 Scotland 9/13 no 4.
8 Scotland 9/13 no 2.
9 France 9/6 no 2 f.
10 Greece 9/5 no 4.

tian report presents such a case: The victim injured her leg in a car accident. Because of the inactivity during her convalescence and a cardiac condition, she died. Her relatives claimed compensation, but the Supreme Court found that death was not a typical result of her leg injury and was, therefore, outside the scope of liability.[11] The result in the reported case from Latvia is quite similar. The hospital was not held liable for damage stemming mainly from the victim's pre-morbid condition.[12] The requisite of typical risk may also be found also in Swedish tort law. The Historical Report implicitly states that this solution is preferred by making the tortfeasor responsible only for the damage that would have occurred in the event of normal developments.[13] In Hungary, the main rule is that the tortfeasor may be liable when the harm is typical regardless of the fact that a natural cause is involved.[14]

10 Other jurisdictions draw a clear line and exonerate the first tortfeasor where natural events cause the damage, as explained in category 2 in no 2 above.[15]

11 Thus, in England and Wales, the main rule is the contrary of the German approach. A natural event is not regarded a part of the defendant's responsibility and this outcome can be reached through various lines of argumentation.[16] An important authority for the result is the *Carslogie* case:[17] a ship which collided with another ship was not held liable for the damage sustained by the latter in a storm during an Atlantic crossing. A notable principle that comes into play in this regard is the notion of *novus actus interveniens*. Variations of this rule are found in many jurisdictions, for example, in Italy: a subsequent exceptional natural event interrupts the causal link between A's negligent conduct and the damage suffered by V.[18] In Ireland, liability for natural occurrences is 'exceptional' though not impossible.[19]

12 In some countries, the natural hazardous event is perceived as a kind of force majeure that breaks the causal chain between the alleged harmful act and the result (see the Spanish solution to the problem).[20] A similar solution is demonstrated by the case in the Norwegian report, even though the reasoning is tied to the question of whether a ship that damaged another ship because of a storm may be seen as a cause of the harm.[21] There was no culpable act by the captain or crew, so there are limits to which conclusions can be drawn from the case.

11 Croatia 9/25 no 7 f.
12 Latvia 9/20 no 6 f.
13 Historical Report 9/1 nos 3 and 4.
14 Hungary 9/27 no 5.
15 England and Wales 9/12 no 2.
16 England and Wales 9/12 nos 2 and 5.
17 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1942] 1 All ER 20, 22.
18 Italy 9/9 no 13.
19 Ireland 9/14 no 3.
20 Spain 9/10 nos 3–5.
21 Norway 9/16 no 4 f.

13 In some countries, there is a special legal basis for reducing the award as explained in category 3 in no 2 above. In Finland, the judge thus may reduce the award on account of 'external factors' which contributed to the harmful result. In Switzerland, there is also room for reducing the award because of extraneous hazards. The judge may 'adjudicate damages either on the exceptional character of the hazard, or on the adequacy or on the amount of the damage.'[22] The Maltese report presents rules by which a similar result is reached, however, by reference to a case where the victim dies before the award is decided.[23] Also in Hungary, the solution in a presented cases is that the tortfeasor is responsible for an award proportionate to the damage caused by the tortfeasor compared to the part of the damage caused by the natural event.[24]

14 It should be noted that a number of country reports claim that there are no cases at all within this category, namely, the Netherlands, Estonia, Lithuania, Poland, Slovenia, the Czech Republic and Ireland. The report on EU law also included no cases in this category.

15 PETL and DCFR: None of the systems have especially designed principles that address the situation of when a natural event increases the extent of the damage. The general rules on approximate cause apply. Both reports analyse a case similar to *Carslogie*: a ship damaged in a collision for which a tortfeasor is responsible sustains further damage in a storm that occurred when the ship was on its way to the site of repair.[25] Both 'legal systems' embrace the solution that the tortfeasor is only responsible for a proportional part of the damage.[26]

16 Even though the two 'systems' provide the same solution, the underlying reasoning is somewhat different. Thus, art 3:106 PETL reads that the victim must bear losses that are caused by circumstances within his own sphere.[27] A natural event such as a storm at sea is considered to be within the victim's sphere, even though damage to his ship would not have happened if the act of a responsible tortfeasor were absent.[28] In the DCFR, the point of departure is that the tortfeasor is a *conditio sine qua non* of the harm, art VI–4:10. The fact that the tortfeasor could not take any reasonable measures to prevent the damage means that the event was beyond the tortfeasor's control and therefore, they cannot be held liable, see art 5:302.[29]

22 Switzerland 9/4 no 8.
23 Malta 9/15 no 3.
24 Hungary 9/27 nos 5 and 13.
25 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1942] 1 All ER 20, 22.
26 See PETL/DCFR 9/30 nos 5, 8 and 9.
27 PETL/DCFR 9/30 no 2.
28 PETL/DCFR 9/30 no 5.
29 PETL/DCFR 9/30 no 8.

E. Reduction Clauses

10. Limitation of liability by means of statutory reduction clauses?

1. Historical Report

A Gellius (Labeo) Noctes Atticae 20,1,13

Facts

A man strikes passers-by in the face with his hand. 1

Decision

Under the Twelve Tables, he is liable for a fine of 25 asses. 2

Comments

Unlike many modern law systems, Roman delict law included no statutory reduction clauses in a narrow sense.[1] However, in contrast to the more recent *lex Aquilia*, the Law of the Twelve Tables had decreed fixed sums for certain harmful acts – 300 asses for breaking the bone of a freeman, 150 for breaking that of a slave, and 25 asses for other forms of wrongful bodily injury (*iniuria*) inflicted on freemen, thereby effectively limiting the sum of damages that could be awarded to the injured party regardless of the actual harm caused. Although arguably not intended as such, the provision therefore came to serve as a de facto statutory cap. 3

In his *Noctes Atticae*, Aulius Gellius recounts the anecdote (which he attributes to Labeo) of one Lucius Veratius, who would amuse himself by striking passers-by in the face with his hand and would avoid legal consequences by on the spot paying them the fine of 25 asses decreed by the Twelve Tables. The story illustrates Labeo's criticism of the statutory fine for *iniuria*, which – though deemed sufficient at the time the statute was enacted – had become ludicrously low due to inflation after the second Punic war.[2] According to Labeo, it was this incident which caused the praetors to decide that the relevant provision (tab 8,4) 'was obsolete and invalid', and that arbiters would be appointed instead to assess the damages due in each individual case.[3] 4

1 See above at 1/1 no 10.

2 *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 956 and 1052.

3 For details, see *P Birks*, Lucius Veratius and the Lex Aebutia, in: A Watson (ed), Daube Noster (1974) 39 ff.

https://doi.org/10.1515/9783111001272-011

Ulpian (Proculus) D 9,2,27,11

Facts

5 The slaves of a tenant farmer have burned down the house he has rented.

Decision

6 Proculus decides that the tenant farmer is liable both under the contract of tenancy and under the *lex Aquilia*, so that either – but not both – of these actions can be brought against him. If he himself was free of fault, however, he is granted the privilege of surrendering the slaves (*noxae deditio*) instead of paying damages. The same applies to lodgers in a hostel.

Comments

7 Under Roman law, the *dominus* was liable for any harm caused by his slaves regardless of fault. If he himself was free of blame, however, he was given the option of surrendering the slaves to the injured party rather than paying damages, thus limiting the extent of his liability to the value of the slave who has committed a tort. As a consequence, this provision effectively serves as a statutory reduction clause in cases where the damages payable would have exceeded the value of the offending slave. However, this option was only granted if the owner was not himself implicated in the delict, ie if he had neither ordered the harm to be done, nor had known of (but failed to prevent) the impending damage.[4]

8 In this particular case, the tenant farmer can be considered at fault if he knowingly owned and continued to use unreliable or untrustworthy slaves;[5] otherwise, he can free himself of the obligation to pay damages for the destruction of the house by surrendering the offending slaves to the injured party, so that the statute effectively limits his liability to the value of the offending slaves.

Gaius, D 9,2,32 pr

Facts

9 A group of slaves (all belonging to the same master) have caused unlawful damage.

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4 *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1995) 41; *N Jansen*, Die Struktur des Haftungsrechts (2003) 251; see above at 1/1 no 10.

5 *G MacCormack*, Aquilian Studies (1975) 51.

Decision

Gaius compares this to a theft committed by a gang of slaves: in this case, the owner is only liable for the sum which would be payable if a free man had committed the theft rather than that the penalty for *furtum* should be demanded for each of the slaves individually, 'for the reasoning in the action for theft is that the owner of the slaves should not lose his whole household because of one delict.' According to Gaius, the same applies in cases of unlawful damage, especially since these are usually less serious and caused by negligence rather than malice. **10**

Comments

The *actio legis Aquiliae* is generally considered an *actio mixta*, combining both penal and reipersecutory elements.[6] Its nature as a penal action entailed that in cases where several wrongdoers had caused harm either jointly or in such a way that it could not be ascertained which of them was responsible for the damage, each of them was liable for the full amount;[7] the same applied to the – purely penal – *actio furti*. **11**

Where several freemen have jointly committed a crime, this has the effect that all of the wrongdoers are indeed punished and none of them escapes the penalty merely because another has been sued and sentenced first.[8] Applied to cases of damage committed by a group of slaves, however, the punitive intent of this rule hit somewhat off the mark, punishing not the slaves but rather their master with undue severity. As Gaius points out, this could mean that the *dominus* would lose his entire household because of a single delict, even if he himself was entirely blameless. In order to forestall this consequence, in cases where several slaves belonging to the same master jointly caused damage, the master's liability was limited to the amount of damages a single freeman would have had to pay. **12**

Alfenus, D 9,1,5

Facts

A groom leads a horse into the yard of an inn. The horse sniffs at a mule already standing there, which kicks out at the groom and breaks his leg. **13**

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6 Cf *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 970ff; *N Jansen*, Die Struktur des Haftungsrechts (2003) 237ff; *T Finkenauer*, Pönale Elemente in der lex Aquilia, in: R Gamauf (ed), Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart (2017) 35ff.

7 *Ulpian*, D 9,2,11,2; cf also *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 973.

8 Cf also *Julian*, D 9,2,52,1.

Decision

14 An action can be brought against the owner of the mule because it committed *pauperies*.

Comments

15 The *actio de pauperies*, by which the owner could be held liable for harm caused by his animals, goes back to the Twelve Tables.[9] Liability for *pauperies* was a form of strict liability, ie liability for *damnum sine iniuria facientis datum*: fault on the animal's part did not enter into the equation, since animals were regarded as lacking the mental capacity to act *iniuria*.[10]

16 Unlike the *actio legis Aquiliae*, the *actio de pauperies* was not limited to harm resulting from direct physical contact.[11] However, the provision applied only to four-legged domestic animals.[12] In addition, there was no liability in cases where the damage could be attributed to the intervention of a third party.[13]

17 Liability for *pauperies* was limited, moreover, to cases in which an animal acted *contra naturam*, that is against its usual peaceful nature[14] – in the present case, this applies to the mule that lashes out merely because a horse has sniffed at it;[15] the horse, in contrast, despite being the root cause of the groom's broken leg, has not committed *pauperies* because it acted neither violently nor against its nature.

18 Like noxal liability for delicts committed by slaves and sons in power, liability for *pauperies* was subject to a statutory limitation: the owner could decide between paying damages and surrendering the animal to the injured party. In the absence of statutory reduction clauses in a narrower sense in Roman delict law, this provision mitigates the owner's strict liability by limiting the amount payable to the value of the offending animal.

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9 *Ulpian*, D 9,1,1 pr; cf also *MF Cursi*, Modelle objektiver Haftung im Deliktsrecht, SZ 132 (2015) 362ff (363f); *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1097ff. For the meaning of the word 'pauperies' see *A Watson*, The original meaning of pauperies, RIDA 17 (1970) 357ff; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1096f.

10 *Ulpian*, D 9,1,1,3.

11 *Ulpian*, D 9,1,1,9.

12 *Ulpian*, D 9,1,1,10. Damage caused by wild animals, in contrast, fell under the 'edictum de feris'. For a detailed discussion, cf *MF Cursi*, Modelle objektiver Haftung im Deliktsrecht, SZ 132 (2015) 373ff; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1104ff.

13 *Ulpian*, D 9,1,1,6.

14 *Ulpian*, D 9,1,1,4 and 9,1,1,7; cf also *MF Cursi*, Modelle objektiver Haftung im Deliktsrecht, SZ 132 (2015) 365f; *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1102ff. There is some speculation among scholars that this was a later interpretation of the statute to limit the owner's liability, which at the time of the Twelve Tables had extended to any harm caused by his animals; cf *G Pessi*, Ricerche sull'actio de pauperie, Dalle XII Tavole ad Ulpiano (1995) 26ff; against this hypothesis *MF Cursi*, Modelle objektiver Haftung im Deliktsrecht, SZ 132 (2015) 366ff.

15 Cf *R Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990) 1102f.

2. Germany

German law does not contain a statutory reduction clause as is referred to here. In cases where slightly negligent minors are liable for huge losses, courts which order a reduction of the amount of damages would at least not violate constitutional principles. 1

Bundesverfassungsgericht (Federal Constitutional Court) 13 August 1998, 1 BvL 25/96
NJW 1998, 3557

Facts

The 16-year-old A was involved in a traffic accident. He had no driving licence and no insurance. He was driving with his 13-year-old girlfriend V as a passenger on his moped into a priority road where the moped was hit by a truck which had priority. V was not wearing a helmet and was very severely injured. She suffered a fracture of her skull and serious brain damage. Long and probably permanent rehabilitation measures were and are necessary, the costs of which V's health insurer bore. 2

The insurer to which V's claims had passed by legal assignment sued A in the Landgericht Dessau (court of first instance, LG) for DM 153,000 and all future costs that might become necessary. The LG referred the case to the *Bundesverfassungsgericht* (Federal Constitutional Court, BVerfG) for a ruling on the question of whether the norm, on which A's liability was based, was constitutional.[1] 3

Decision

The Federal Constitutional Court held the *Landgericht's* reference inadmissible because the Court was competent merely to examine the constitutionality of law that was enacted after the foundation of the Federal Republic of Germany in 1949. The relevant norm (§ 828 (2) BGB originated, however, unchanged from 1900.[2] 4

Nevertheless, the Court stated obiter that no constitutional considerations would hinder the civil courts from reducing an oppressive liability of a minor in an equitable way based on § 242 BGB. 5

1 The relevant provision then was § 828 (2) BGB; today it is § 828 (3) BGB. According to this provision, a minor over the age of seven (in traffic accidents over ten) and under 18 is fully liable if he or she had 'the insight required to recognise his or her responsibility.'

2 Since the legislator modified § 828 BGB in 2002, the BVerfG is now competent to adjudicate the provision's constitutionality.

Comments

6 The civil courts rarely, if at all, reduce an excessive liability of a minor on the basis of § 242 BGB,[3] the reason being that the insolvency provisions now allow a discharge from debts unless intentionally caused after a reasonably short period of time (three years).[4] This regulation has mainly solved the problem of overburdening minors with oppressive liabilities. There had been attempts to introduce a general reduction clause in German law[5] but they were not successful.

4. Switzerland

Tribunal fédéral suisse (Federal Supreme Court of Switzerland) 1 June 2005

TF 4C.103/2005

Facts

1 Tortfeasor A was an employee of company V. The latter was entitled to receive subsidies from the Swiss Confederation provided that it filed a request within a certain deadline. As A was sick, he did not send the request in time. Consequently, V did not obtain the subsidies. V filed a claim against A based on workers' liability (art 321e Swiss Code of Obligations (SCO)) for the amount of CHF 90,000 (€ 83,000).

2 The first instance court held A liable for CHF 14,000 (€ 12,700). The Cantonal Court assessed the damages at CHF 35,000 (€ 32,000). V filed a claim before the Supreme Court.

Decision

3 The Supreme Court confirmed the first instance's decision (CHF 14,000).

4 First, the Supreme Court held that A was in principle liable as a worker (art 321e SCO) for any damage he causes to the employer whether wilfully or by negligence. In casu, A's fault was characterised as 'medium' because, during his illness, he did not organise with sufficient care the handling of the incoming mail, notably that from the Swiss Confederation reminding him to file a request for the subsidies.

5 The Court then went on to determine the amount of damages by referring in particular to art 44 para 2 SCO. It took into consideration that A was in an economically pre-

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3 See, eg, OLG Celle JZ 1990, 294; LG Bremen NJW-RR 1991, 1432; LG Dessau NJW-RR 1997, 214 (reference to the Federal Constitutional Court); in legal doctrine especially *C-W Canaris*, JZ 1987, 993 ff and JZ 1990, 410 ff supported this view; contra however eg, *K Goecke*, NJW 1999, 2305ff.

4 See, eg, *G Wagner* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn 2020) § 828 no 18f.

5 A Draft of 1967 provided for a reduction clause but did not make it through parliament. A similar proposal by *C von Bar* (Deliktsrecht, in: BMJ, Gutachten und Vorschläge zur Reform des Schuldrechts, II [1981] 1681, 1739 f, 1762, 1774 ff) was also not successful.

carious situation and that paying CHF 35,000 would lead to economic hardship for him. In order to assess A's financial fragile position, it took into account the fact that A was not able to pay the costs of the trial and that he benefitted from gratuitous juridical assistance (offered by the State). It considered that damages of CHF 14,000 (which corresponded to two monthly salaries and approx 15 % of the damage) would be affordable for A. It also based the reduction of the damages on the fact that V would not experience economic difficulties if it did not receive the whole amount of CHF 90,000.

Comments

Article 44 para 2 SCO[1] states that if the damage was caused neither wilfully nor by gross negligence and if the payment of such compensation would leave the author in financial hardship, the court may reduce the compensation in order to ensure fairness.[2] **6**

This legal provision confers wide discretionary power on the judge.[3] It is up to the Court to determine what being 'financially embarrassed/in need' means.[4] As long as the author has sizable assets, he does not fall within that description.[5] Also, the author does not have to depend on social welfare because of the payment of the damages in order to qualify.[6] However, temporary financial problems due to the payment of the damages are not sufficient.[7] **7**

The practical importance of art 44 para 2 SCO is not considerable nowadays because most tortfeasors have civil liability insurance. In this case, the article only applies to the extent that the damage exceeds the amount covered by the insurance.[8] **8**

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1 'When the damage has been caused neither intentionally nor as a result of gross negligence or recklessness, and its reparation would expose the debtor to embarrassment, the judge may reduce the damages fairly.'

2 For another example see TF 6B_267/2016, c 8.3 (unpublished), where the Court reduced the damages due to A's limited financial resources; ATF 108 II 422, 427 c 2d (1982); 100 II 332, 338 c 3 (1974); TF 4A_467/2010, 5.01.2011, c 3.4 (unpublished); *R Brehm*, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44 no 69, at 299; *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 2570, at 915.

3 ATF 127 III 453 (2001); 128 III 390 JT 2004 I 339 (2002); 131 III 12 JT 2005 I 488 (2004).

4 *R Brehm*, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44 no 70, at 299; *C Müller*, La responsabilité civile extracontractuelle (2013) no 668, at 214.

5 ATF 90 II 9, 14 c 7 (1964); 40 II 278 (1914); 69 II 147 (1943); *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 7 no 54, at 408; ***R Brehm***, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44, no 73, at 300.

6 *C Müller*, La responsabilité civile extracontractuelle (2013) no 668, at 214.

7 ATF 59 II 461, 467 c 4d JT 1934 I 402 (1933); *R Brehm*, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44, no 70, at 299.

8 ATF 113 II 323, 328 c 1c (1987); *K Oftinger*/*EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 7 no 57, at 408; *R Brehm*, Berner Kommentar, Kommentar zum schweizerischen

9 Furthermore, the judge cannot reduce compensation if it could expose the victim to financial problems.[9] Article 44 para 2 SCO also does not apply if the author is under a threat of bankruptcy or is declared bankrupt because then the reduced compensation would only benefit the creditors, which is not the purpose of this provision.[10]

10 If the author's economic situation subsequently improves following the payment of the compensation, it would be useful for the victim to be able to sue him again. However, she will then be faced with the *res judicata* effect of a court decision.[11]

11 In casu, (1) A's behaviour can only be characterised as 'medium' misconduct. (2) If A had to pay CHF 90,000, he would find himself in need (it would result in non-temporary financial problems). (3) On the other hand, V did not manage to prove that it needed the above-mentioned amount. Consequently, nothing stands in the way of a reduction of the obligation to pay compensation according to art 44 para 2 SCO.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Second Civil Division) 11 September 2014, 13-16.897

Bull civ II, no 185;

<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000029453764>

Facts

1 A, aged 15, had been found guilty by a juvenile court of intentional injuries to V. As is possible under French law, the criminal court also adjudicated the civil liability claim brought against A. It found that A and his parents were jointly and severally (*respons-*

Privatrecht (4th edn 2013) ad art 44 SCO, no 71, at 300; *I Schwenzer*, Schweizerisches Obligationenrecht – Allgemeiner Teil (7th edn 2016) no 16.25, at 113.

9 ATF 49 II 439, 447 c 4, JT 1924 I 106 (1923); ***K Oftinger/EW Stark***, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 7 no 55, at 408; ***R Brehm***, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44 SCO, no 78, at 302; *W Fellmann/A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 2573, at 916; *C Müller*, La responsabilité civile extracontractuelle (2013) no 669, at 215.

10 *K Oftinger/E W Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 7 no 54, at 408; *C Müller*, La responsabilité civile extracontractuelle (2013) no 669, at 215. For the purpose of the disposition, see ***R Brehm***, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44 SCO, no 68, at 299; *W Fellmann/A Kottmann*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil sowie Haftung aus Verschulden und Persönlichkeitsverletzung, gewöhnliche Kausalhaftungen des OR, ZGB und PrHG (2012) no 569, at 915 and no 2574, at 916.

11 *K Oftinger/EW Stark*, Schweizerisches Haftpflichtrecht, Band I: Allgemeiner Teil (5th edn 1995) § 7 no 56, at 408; *R Brehm*, Berner Kommentar, Kommentar zum schweizerischen Privatrecht (4th edn 2013) ad art 44 SCO, no 77, at 301; *C Müller*, La responsabilité civile extracontractuelle (2013) no 669, at 215; *F Werro*, La responsabilité civile (2017) no 1280, at 363.

abilité in solidum) liable to V. After a State-run fund had compensated V for his losses, it brought a regress claim against A. A resisted the claim by arguing that an underage child cannot be made to compensate the victim when his parents are liable for the harm he caused. The appellate court did not accept this argument and found A personally liable for the harm caused to V.

Decision

The *Cour de cassation* rejected the challenge against the appellate court's judgment. It held that the circumstance that the father and mother were liable to the victim on the basis of the Civil Code's provisions on parents' liability did not preclude the underage defendant's liability on the basis of his personal fault (art 1382 Civil Code). 2

Comments

This case illustrates the reluctance of French law as regards limitations of liability. Statutory reduction clauses are exceptional and always originate in international or European legislation or instruments, such as the Paris Convention on Nuclear Third-Party Liability. The Civil Code itself does not contain any such reduction clause and neither does it accept that liability can be excluded or reduced on equity grounds in view of the respective situations of the plaintiff and the defendant, such as when the defendant is poor and underage or mentally disabled. 3

The present case illustrates that an underage person can be held personally liable for the harm he caused, even though that person's parents are also liable for that harm under art 1242 para 5 Civil Code – and probably more likely to pay than their child. The solution would have been similar if the underage defendant had had no parent or guardian. Admittedly, in the present case, he had committed an intentional fault, but it would have made no difference if he had committed no fault and had been strictly liable for the harm caused. This is another illustration of the priority given by French law to the compensation of victims. 4

7. Belgium

Cour d'appel de Bruxelles (Brussels Court of Appeal) 21 April 2006

RGAR 2007, no 14313

Facts

A sets fire to a vehicle while in a serious state of mental imbalance rendering him incapable of controlling his actions. The insurer of the damaged vehicle is a civil party in the criminal proceedings aiming to obtain compensation for the damage suffered. 1

Decision

2 The Court of Appeal of Brussels first pointed out that victims of damage caused by a person in a state of insanity, severe mental imbalance or mental deficiency rendering him or her incapable of controlling his or her actions are not necessarily entitled to full compensation. The due compensation is determined by the trial judge, taking into account the circumstances of the case and the parties' situation, including the financial capacity of both the author and the victim.

3 In the case discussed, without establishing a general rule, the Court considers that an insurance company has financial and fiscal possibilities to bear the cost of the claim without too much difficulty. Consequently, having regard to the modest income of the author, the trial judge severely limits the amount that he has to pay to compensate the civil party for their loss.

Comments

4 As a general rule under Belgian law, no fault can be attributed to the perpetrator of the harmful act in the absence of mental capacity (Digest 3, 1/7 no 4f; 8/7 no 10). As an exception, art 1386bis of the former Civil Code[1] deals with the special case of the liability of an insane person or a person in a serious state of mental dis-equilibrium at the time of the harmful event.[2] The conditions of application of this specific legal provision have already been discussed in a previous volume (Digest 3, 10/7 nos 1–10).

5 In the context of this volume dedicated to the limits of liability, it is important to note that art 1386bis of the former Civil Code derogates from the well-established principle of complete reparation under art 1382 of the former Civil Code. Given the lack of discernment of the author, it establishes a system of reparation based not on fault but on equity. Under this article, the judge has greater judicial discretion. Not only does the court freely set the amount of reparation, it can also decide that no compensation at all will be given to the victim for the damage suffered. The only limit imposed on the judge is that the reparation cannot exceed the maximum amount of compensation that would be granted under the ordinary rules.[3]

6 Ruling in equity, the judge can take into consideration many circumstances. The elements to be considered certainly include, but are not limited to, the financial capacity of

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1 C civ, art 1386bis: 'When a person who is in a state of insanity, severe mental imbalance or mental deficiency rendering him/her incapable of controlling his/her actions, causes damage to another, the judge can oblige him/her to make all or part of the reparations which he/she would be compelled to make if he/she had been in control of his actions. The judge rules in equity, taking into consideration the circumstances and the parties' situation'.

2 For a research study on this topic, see *R Kruithof*, Buitencontractuele aansprakelijkheid van en voor geesteszieken, RGAR 1980, nos 10179 and 10190.

3 *M Marchandise*, L'article 1386*bis* du Code civil: à victime assurée, assureur victime? cmt under JP Liège (2nd canton) 19 October 2004, JLMB 2005, 1253.

the mentally ill person.[4] The trial judge can also take into account the material and financial situation of the other parties[5] (as in the judgment presented above), the seriousness of the care required by the author's state of health, the gravity of the act and its imputability to the author, the attitude of the victim, etc. Some judges rule, for example, according to the context in which the accident occurred.[6] Only in the case of absence of any element justifying a reduction in damages will the judge order the insane person to pay full compensation for the damage he caused.[7] Article 6.11 of the new Belgian Civil Code provides for an identical power of moderation for the judge.

It is important to state that art 1386bis only benefits the insane, and not third parties **7** who are presumed to be responsible for the latter's acts on another legal basis (such as parents, employer, teacher, etc)[8] or an insurer who covers his liability.[9] The right to request mitigation of the due compensation remains personal to the mentally ill person. It cannot be invoked by the person held liable for the insane author or the insurer against whom a victim initiates legal proceedings.

Apart from this specific case, there is currently no other limitation of liability by **8** means of statutory reduction clauses within Belgian law. The new Civil Code contains a provision (art 6.10) with a similar moderation power of the judge for damage caused by a minor over the age of twelve.

8. The Netherlands

Hoge Raad (Supreme Court of the Netherlands) 28 May 1999, ECLI:NL:HR:1999:ZC2913

NJ 1999/510

Facts

A man owns a holding and bought shares on behalf of the holding for Dutch guilder (NLG) **1** 21,000 (approx € 20,000). Three years later, his wife sold these shares for NLG 9,200 by for-

4 See Civ Bruxelles, 30 October 1989, RGAR 1993, no 12107 which takes into account the existence of the insane person's job providing a regular source of income; Court of Appeal of Liège (3rd ch), 26 May 2008, For ass 2008, 172 and Court of Appeal of Mons (13th ch), 5 May 2014, Bull ass 2016, 233 which highlights the absence of endangerment of the mentally ill person's personal assets as a result of the intervention of an insurer.

5 Civ Bruges (10th ch) 27 January 2005, RW 2006–07, 611.

6 JP Tournai, 28 March 2006, JT 2006, 532: 'In the present case, the facts in dispute occurred in the very particular setting of a social defence institution, in which internees, who are by definition psychiatrically vulnerable, stay along with members of staff who, for their part, are under constant pressure. In view of this specific context, which does not exclude the possibility of holding harmful acts against one or the other, but in which it is undoubtedly often imperative that an immediate reaction prevails over a well-considered action, we will limit the compensation for the moral prejudice of the applicant to the symbolic euro'.

7 Civ Verviers, 18 November 1998, JJP 1999, 118; JP Spa, 8 October 1996, JJP 1999, 124.

8 Cass, 18 October 1990, Pas 1991 I, 171.

9 Cass, 22 September 2000, RGAR 2002, no 13469.

ging her husband's signature. The holding claimed payment of NLG 26,099, arguing that compensation must take into account the increase in value of the shares since the sale. The court of appeal had not determined the extent of the damage, but ruled (assuming that the damage exceeded NLG 9,200) that, in view of the circumstances, there are grounds for mitigation of damages, and assigned a claim of NLG 9,200. The grounds taken into account by the appellate court were that the husband was the economic owner of the holding, that the issue arose while the parties were in the process of divorcing, that the woman had enjoyed no greater financial benefit than the proceeds of the shares (NLG 9,200), and that the holding should have checked its shareholding earlier.

Decision

2 The Supreme Court quashed the decision of the appellate court. It ruled that art 6:109 BW only allows mitigation of damages if full compensation in the given circumstances, including the nature of the liability, the legal relationship existing between the parties and their ability to pay, would lead to manifestly unacceptable consequences. As is evident from the legislative history, the criteria laid down in that provision requires the judge to exercise restraint in his power to moderate a legal obligation to pay damages. The court of appeal made a legal error if it failed to recognise that the judge is only authorised to mitigate a legal obligation to pay compensation if granting full compensation would lead to manifestly unacceptable consequences. If the decision of the appellate court must be understood as that the court of appeal ruled that granting full compensation in the present case would lead to a manifestly unacceptable consequence, then the Supreme Court considers that judgment to be insufficiently motivated.

Comments

3 This ruling emphasises the threshold for applying art 6:109 BW: the judge is only allowed to mitigate the obligation to pay full compensation when having to pay full compensation would evidently lead to manifestly unacceptable consequences for the liable party. In practice, the result is that art 6:109 BW is rarely applied by the courts.[1]

1 See Groene Serie Schadevergoeding (comment by *LM van den Berg*), art 6:109 (Deventer, Wolters Kluwer) no 4.

10. Spain

Tribunal Supremo (Supreme Court) 20 April 1993

RJ 1993\3103

Facts

During the night, the external pipe to a bathroom wall, which connects the bidet taps with the general water supply network of the apartment rented by A1, breaks and immediately floods the office of another tenant, V, which is located one floor below. In his office, V keeps an archive of film slides, comics, drawings, prints, posters, magazines, etc, which are seriously damaged by the water coming from the upper floor. V, however, has first party insurance with the insurance company X1, which, among other types of damage, also covers property damage caused by a leakage. In compliance with this insurance contract, X1 compensates V for the damage caused by the leakage, which amounts to PTA 12,792,950 (approx € 77,000) and, by subrogating in V's claim, sues A1, A2 and A3, who are the owners of the apartment leased by A1, and X2, who is the apartment's civil liability insurer, for compensation for the amount paid to V. 1

The Court of Appeal of Madrid confirms the First Instance judgment, which grants the claim in part. Thus, in application of art 1910 CC, which establishes liability for damage caused 'by things thrown or which might fall from a dwelling on the head of a family' who lives in it, acquits A2 and A3, as owners of the apartment. For this reason, the judgment holds A1 liable, but in application of its power to moderate liability allowed by art 1103 CC, rules that A1 will only have to pay the amount of PTA 6,000,000 (approx € 36,000), of which PTA 120,000 (approx € 720) will be paid by X2, the apartment's third party liability insurer, in compliance with his third party insurance contract. The Supreme Court confirms the judgment of the Court of Appeal. 2

Decision

The Supreme Court holds that the appealed judgment correctly applied art 43 of the Insurance Contract Act, which recognises the right of the insurance company, once compensation has been paid, to subrogate in the legal position of the insured. However, this does not prevent the court, given the particular circumstances of the case, from making use of the power to moderate granted by art 1103 CC. This power, which is also applicable to tort law cases, is a discretionary power of the courts of instance that cannot be reviewed in cassation and is one of the cases based on fairness ('equidad'), pursuant to art 3.2 CC. The Supreme Court holds that the use of this power is 'fully correct, considering the very particular circumstances of the case' in which, without any intervention of the tenant or of any other persons living with him, the breakage of the tube or bidet pipe 'occurred, unpredictably and during the night, when it was not normal to notice what was happening and therefore be able to act to avoid it'. 3

Comments

4 Article 1103 CC provides that: '[L]iability arising from negligence is equally enforceable in the performance of all kinds of obligations; but may be moderated by the courts on a case-by-case basis'. This is one of the very few cases in which fairness or equity appears in the Civil Code as the exclusive source of a judicial decision, as the decision commented on indicates. The provision applies to both contractual and non-contractual liability cases[1] and allows judges to 'moderate' the amount of damages that negligent defendants must pay. Defendants acting with intent are excluded from the scope of this provision.[2]

5 Article 1103 does not aim to recover the old distinction of the different degrees of fault, and moderation is not carried out taking into consideration the gravity of the defendant's fault, but the particular circumstances of the case. It allows the court to subtract a certain amount from the damages awards when it considers that, according to the very specific circumstances of the case, full compensation would be unfair.[3]

6 Case law, however, quite often uses this power of moderation incorrectly when it considers art 1103 CC to be the legal anchor of contributory negligence, which is not specifically regulated in the Spanish Civil Code. Legal scholarship has correctly pointed out that this identification is wrong[4] and that it also gives rise to a false path in case law affirming that, except when this moderation power has been exorbitant or arbitrary, contributory negligence cannot be discussed in cassation, since this is an aspect that is left to the free assessment of the Courts of Instance.[5] By contrast, another group of Supreme Court decisions considers that contributory negligence has nothing to do with fairness and the power granted to the courts by art 1103 CC and, for this reason, holds that the Supreme Court can always review in cassation the apportionment of liability made by lower courts in cases of contributory negligence of the victim.[6]

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1 STS 16.12.1986 (RJ 1986\7447), 7.12.1987 (RJ 1987\9282), 20.4.1993 (RJ 1993\3103), 18.3.2009 (RJ 2009\1656).

2 Among many others, STS 3.12.1992 (RJ 1992\9995).

3 This is the case, for instance, when three clients of a hostel died in a fire of unknown origin, but in which it was not clear how important the contribution of several actors had been, ie, the owner of the hostel, who had not adopted all the required safety measures against fire properly, or the municipal firefighters, who arrived with delay and showed lack of skill (STS 7.11.2000 [RJ 2000\9911]). Also, in a case where the previous condition of the victim had particular significance for injuries he suffered when an improperly maintained hospital bed broke (STS 17.7.2008 [RJ 2008\4483]). As STS 20.6.1989 (RJ 1989\4702) points out: 'The general rule is that liability arises from all kinds of obligations, but if it comes from negligence, it may be unfair in the specific circumstances of the case. In such a case, this obliges the court to moderate the amount of damages, (a circumstance which) implies an unequivocal call to assess, in accordance with fairness ('equidad'), the circumstances that qualify and configure the specific case'

4 *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual. Parte general: Delimitación y especies. Elementos. Efectos o consecuencias (5th edn 2019) 286ff.

5 STS 9.2.1987 (RJ 1987\692), 24.11.1989 (RJ 1989\7908), 24.3.1998 (RJ 1998\2049), 15.12.1999 (RJ 1999\9200), 26.6.2001 (RJ 2001\5082), 20.12.2006 (RJ 2007\439), and 12.12.2008 (RJ 2009\527).

6 Among others, STS 19.12.1986 (RJ 1986\7681), 30.6.1988 (RJ 1988, 5193) and 4.3.2015 (RJ 2015\1095).

In this sense, it must be concluded that contributory negligence and the moderation power that art 1103 CC grants to courts are two different legal instruments, The analysis of contributory negligence determines the apportionment of liability between the defendant and the victim and leads to a reduction of damages according to the corresponding percentage of contribution. By contrast, art 1103 CC, except for the exclusion of malicious actions, does not provide any legal criteria to the courts as to the cases to which it can be applied and, thus, it allows courts to reduce liability in a discretionary and even *ex officio* manner. So 'moderation' can operate if the court considers it necessary in the light of the particular circumstances of the case.[7] 7

11. Portugal

Tribunal da Relação de Lisboa (Lisbon Court of Appeal) 19 May 2020[1]

24555/17.1T8LSB.L1-7

Facts

V, a public figure, claimed € 100,000 in damages from A, a journalist, the publication director of a magazine and its owner for publishing offensive and false content about him. The court of first instance dismissed the case against the director and the owner (as no misconduct on their part was proven) and A was ordered to pay € 16,000 in non-pecuniary damages. Appealing to this court, A invoked the fact that she had not acted with malicious intent and her financial situation was not comparable to that of the injured party, therefore requesting that the damages be fixed at a symbolic value.[2] 1

Decision

The Court did not proceed to comprehensively assess the financial situation of both injured party and tortfeasor, merely taking into account the fact that A was working as an assistant director for the magazine and no mention of particular hardship had been recorded by the Court. When applying the principle of equity set out in arts 494 and 496/4 of the Civil Code, the Court states that it is customary to take into consideration the 2

7 See, in more detail, *M Albaladejo García*, Sobre si la moderación de la responsabilidad del artículo 1103 del Código Civil es o no aplicable a culpa extracontractual, Actualidad Civil, 5 (2005) 23–43 and *M Yzquierdo Tolsada*, Responsabilidad civil extracontractual. Parte general: Delimitación y especies. Elementos. Efectos o consecuencias (5th edn 2019) 285f.

1 <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ba6ebf03d4d12bd380258574002e4c69?OpenDocument>.

2 The possibility of setting damages for non-pecuniary damage at symbolic values has repeatedly been rejected by Portuguese courts.

damages awarded by courts in previous decisions. With all this in mind, it set damages at € 25,000, an amount that it considered would render justice to the injured party.

Comments

3 The established compensation may be inferior to the amount of losses suffered by the injured party when the wrongdoer acted with negligence. In this case, damages will be assessed by means of an evaluation of the principle of equity (494 of the CC[3]). This provision, inspired by its Swiss counterpart (art 44, al 2 of the Swiss Code of Obligations), aims to conciliate the protection warranted to the injured party, whilst at the same time protecting a tortfeasor in a poor financial situation and who did not act with a particularly serious degree of fault, guaranteeing a degree of proportionality between the losses and the liability and functioning as an exception to the general principle of integral reparation of damages (art 562). As the Civil Code does not specifically mention to which criteria the Courts should refer in order to evaluate the economic situation of both tortfeasor and injured party, it grants the judge discretion to determine which factors are relevant in each case. That being said, the *Tribunal Constitucional* (Constitutional Court) has made it clear that the financial situation of both parties must not exclusively be assessed by income declared to the tax authority.[4] The law refers to the financial situation of the wrongdoer and of the injured party, thus excluding assessing the financial situation of the insurance company[5] covering the damages.

4 As to the doctrinal dispute regarding whether the aforementioned art 494 may be applicable to cases of strict liability,[6] some academics believe that this should be possible,[7] contrary to the more traditional opinion subscribed to by some that denies this pos-

3 Article 494 reads: Where liability is based on negligence, compensation may be fixed equitably at an amount lower than that corresponding to the damage caused, provided that the degree of fault of the wrongdoer, the financial situation of the wrongdoer and of the injured party and the other circumstances of the case justify doing so.

4 The Court considers that exclusively taking into account net income which has been declared to the tax authority undermines the principles of effective jurisdictional protection and fair compensation of damage, concluding that all forms of evidence regarding the financial situation of the parties are admissible. See: Tribunal Constitucional (Constitutional Court), decision no 383/2012, 12 July 2012, <https://dre.pt/pesquisa/-/search/1379259/details/maximized>.

5 An example of this situation is a decision by the Tribunal da Relação de Guimarães, Case no 11/13.6TBCBT.G1, 25 February 2016, <http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/6b7aeaf8d7f9a18b80257fa300555939?OpenDocument>.

6 There is a similar ongoing dispute regarding whether this article may be used in situations where unlawfulness derives from contractual liability. Regarding this discussion, the following decision by the Tribunal da Relação de Lisboa (Lisbon Court of Appeal), Case no 8162/16.9T8ALM.L1-7, is very useful: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/5daedbccb6dc025f802585680031470c?OpenDocument>.

7 *Antunes Varela*, Das Obrigações em Geral (2005) 694. The author argues that, despite art 494 being included in the Civil Code section pertaining to liability derived from unlawful acts, art 499 states that rules

sibility, defending that generally, in strict liability, there is an insurance company[8] to pay the damages established by the court.

Article 496/4 alludes to art 494, therefore urging judges to consider following the principle of equity for *non-pecuniary* losses as well (with the same requirement that imposes the condition that the tortfeasor must not have acted with a serious degree of fault and that other circumstances of the case justify doing so). As damages awarded for non-pecuniary losses assume a compensatory nature, some authors[9] warn that using the principle of equity in these instances should only occur when the financial situation of the tortfeasor and the injured party is most disproportionate, safeguarding the general principle of equality, where equivalent losses mean awarding comparable damages. This is a point at dispute: although the principle of equity may be used for non-pecuniary losses, it is difficult to agree on whether taking into account the financial situation of the injured party would amount to a violation of said principle of equality (art 13 of the CRP). Some authors believe that observing art 494 is not compulsory for cases of non-pecuniary losses and that the court is exempt from taking into account the financial situation of the injured party, for fear of violating art 13. Following this line of thought is the decision of the STJ in Case no 3138/06.7TBMTS.P1.S1 (22 October 2009[10]) and more recently again in 2013 (Case no 198/06TBPMS.C1.S1 [24 April 2013[11]]). This means that the financial situation of a particularly wealthy injured party does not limit the liability of the tortfeasor. The opposite may happen, under stricter conditions in the case of damages for non-pecuniary losses, where art 494 (ex vi art 496/4) is applied much more frequently. 5

on liability for unlawful acts shall also apply to cases of liability for risk (strict liability), insofar as they are appropriate and in the absence of legal provisions stating the contrary.

8 Regarding maximum limits of damages to be awarded, art 508 states that in cases of road traffic accidents where 'liability is risk-based' (strict liability), the maximum limit corresponds to the minimum sum stipulated for compulsory third party motor liability insurance. Since 1 June 2022, the amount is established at € 6,450,000 per accident, for personal injuries and € 1,300,000 per accident, for damage to property. Although no caps are fixed regarding damages for loss of life, after the tragic events of the 2017 Pedrógão Grande fires, the minimum value was set at € 80,000 per victim.

9 *MM Veloso*, Danos não patrimoniais, in Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977, vol III, Direito das Obrigações (2007) 538 ff.

10 This decision clearly takes a position on this issue: <https://dre.pt/web/guest/pesquisa/-/search/89557475/details/maximized?perPage=100&sort=whenSearchable&sortOrder=ASC&q=Portaria+n.%C2%BA%208-B%2F2007%2C%20de+3+de+janeiro+>.

11 Supremo Tribunal de Justiça (Supreme Court of Justice) Case no 198/06TBPMS.C1.S1, 24 April 2013: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a4756777dc8ab78880257b6e00538443?OpenDocument>.

16. Norway

Høyesterett (Norwegian Supreme Court) 28 May 1997

Rt 1997, 883

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-1997-41-b?searchResultContext=3448&rowNumber=1&totalHits=1>

Facts

1 A 27-year-old man, A, headbutted another man in the streets of Bergen. The 31-year-old victim V was severely injured and suffered loss of income for the remaining years of his career. V had earlier that evening provoked A by calling his girlfriend, whom he lived together with, a whore. This insult had taken place an hour prior to the headbutting, in a pub, whereas the headbutting took place out in the street when the friends of the two parties, including A's girlfriend, were quarrelling about the insult. There was, however, no immediate further provocation against A before he attacked V. Both A and V had consumed considerable amounts of alcohol.

Decision

2 The Supreme Court found, and it was not disputed, that A was liable for deliberately violently headbutting V, causing him a severe personal injury. The question was whether there was cause for reducing the award. The Norwegian Act on Compensatory Damages has a special, general reduction clause § 5-2, enacted in 1985, which reads as follows: 'The award may be reduced whenever the court, when taking into consideration the tortfeasor's financial capability, the applicable insurance covering and insurance possibilities, the blame on each side and other occurring circumstances, finds that the responsibility is unreasonably burdening to the tortfeasor. The same applies whenever in special cases it is reasonable that the victim wholly or partly carries the loss.'

3 The Court found that the award should be reduced by half, from NOK 1,100,000 to NOK 550,000. The reasons for the reduction were that A had been provoked. The last sentence of the cited rule was not expressly referred to, but the reasoning seems to fit well with the content of the sentence. It was expressly also mentioned, with reference to the preparatory works, that the award could be reduced to a sum that made it possible for the tortfeasor to actually pay the damages. It was noted that a reduction to a payable sum was in the victim's own interest. An award for non-pecuniary loss of NOK 50,000 was included in the final award. Hence the reduction of the pecuniary loss and loss of amenities was set at 50 % of the claimed amount.

Comments

4 It is important to note that the Supreme Court chose to reduce the award even though the tortfeasor had acted with intent and in a manner that warranted penal reactions

which could have led to imprisonment. Hence, the case shows that the stance on reduction is rather liberal in Norway compared to most other European states.

The reasoning behind the reduction of the award to a realistic sum of payment for the tortfeasor has a strong foundation in the preparatory works. It is, however, a rather rare occurrence that the Supreme Court openly argues in this manner. 5

The fact that the provocation was a part of the Court's reason for a reduction is somewhat problematic. The system in the Compensatory Damages Act presupposes that contributory negligence on the part of the victim is taken into account in cases where the victim has contributed to the damage in a culpable manner, cf sec 5-1. The Court, however, did not apply this rule, but rather employed a similar reasoning anchored in the reduction clause. As long as the Court did not apply the specific rule designed for these situations, provocation as a kind of contributory neglect, one may assert that there was not sufficient ground for reduction. The rule on reduction of damages is supposed to be applied in exceptional cases. One scholar has therefore made critical remarks to the solution in the case.[1] Other scholars have, however, explicitly accepted the solution.[2] 6

Høyesterett (Norwegian Supreme Court) 30 January 2004

Rt 2004, 165

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2004-198-a?searchResultContext=3510&rowNumber=1&totalHits=1>

Facts

A 22-year-old man deliberately set a home for elderly people on fire. He acted in this manner due to a sudden impulse in a state of confusion caused by his continuous use of drugs. The residents were luckily saved, but the harm caused damage to the property amounting to NOK 1.5 million. An insurance company filed a recourse claim against the tortfeasor. 7

Decision

The Court decided that the award that correlated to the damage should be reduced by 50 % based on the general reduction clause that applies under Norwegian tort law – sec 5-2 of the Compensatory Damages Act. The Court compared the case at hand to previous cases and found some differences. In earlier cases, the lower courts had denied a reduction in compensation due to the gravity of the tortfeasor's act, namely that the acts were exercised with a determined criminal purpose. The Court referred particularly to a case 8

1 *B Askeland*, Den alminnelige lempningsregelen i kritisk belysning, TfE 2017, 291.

2 *N Nygaard*, Skade og ansvar [Damage and responsibility] (6th edn 2007) 406, 410, somewhat more nuanced *Hagstrøm*/*Stenvik*, Erstatningsrett [Tort Law] (2019) 589.

where a 20-year-old man had deliberately set fire to a church because of his satanic beliefs. In considering the case at hand, the Supreme Court emphasised that the gravity of the tortfeasor's fault was not as considerable as in the case mentioned. The Court put weight on the fact that the tortfeasor had been influenced by drugs and the fact that he had acted on a sudden impulse. After consideration of all the circumstances in the case, the Court concluded ('having serious doubts') that the economic responsibility would be an oppressive burden on the tortfeasor. Accordingly, the court reduced the sum of payment to NOK 700,000.

Comments

9 In sec 5-2 of the Compensatory Damages Act there is a legal basis for a reduction in damages after the use of ordinary stipulation rules. The reduction clause gives the judge a wide margin of discretion although some guidelines are given. The judge shall put weight 'on the extent of the damage, the financial abilities of the responsible party, the existence of insurance or insurance possibilities, gravity of fault and other relevant conditions'. This is an exception from the general principle that a tortfeasor should pay the compensation in full.

10 The preparatory works to the Act state that the reduction exception is narrow in scope and this is also emphasised by the Supreme Court. The clause has, however, been applied in quite a number of cases. This development has been criticised.[3]

11 An interesting point is also that the Norwegian Supreme Court in several cases, such as the one cited above, has allowed for reduction even in cases where the tortfeasor acted with intent. The practice directly contradicts the soft law principle in European principles of law, non-contractual liability arising out of damage to another, art 6: 202.[4]

Høyesterett (Norwegian Supreme Court) 8 December 2004

Rt 2004, 1887

<https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2004-2014-a?searchResultContext=7817&rowNumber=1&totalHits=1>

Facts

12 A municipality decided to build a breakwater in order to protect boats and infrastructure in a harbour from waves in bad weather. A firm of consultant engineers was engaged and planned the breakwater. Before a construction contract was concluded, there was a lot of uncertainty regarding the role of the advisors and the consequences of dif-

3 *B Askeland*, TfE 2017, 268 ff.

4 See *C von Bar et al*, Principles of European Law, Book 6 – Non-Contractual Liability Arising out of Damage Caused to Another (2009) art 6: 202.

ferent construction models. During the construction process, it was discovered that the engineers had overlooked an underwater shelf that, under certain recurring weather conditions, would cause the waves to find a way past the breakwater. Hence the construction was not effective, and the whole project had to be reorganised and repriced. As a result of the failure to register the effect of the underwater shelf, the municipality incurred NOK 33 million in extra expenses. Compensation in damages based on this amount was claimed from the consulting firm. The claim's basis was contractual.

Decision

The Supreme Court found that the consultant firm was liable in negligence. The fact that they failed to foresee the consequence of the underwater shelf amounted to negligence. However, the Court found that the award should be reduced by one-third based on the general reduction clause. The conclusion was that it was, under the circumstances, 'unreasonable' to claim damages in full, because of the uncertainty when the contract was concluded, and the fact that the effect of the shelf under the sea, which led to extraordinary high waves, was not known to experts at the time the breakwater was built. The Court therefore accepted that the consequences were very difficult to foresee. It was also considered relevant that a municipality employee had been involved in the project plans without any objections. **13**

Comments

The case is interesting since it shows that the general reduction clause sometimes transcends from delict to contract. The argument was raised in the case that the reduction clause would distort the balance of risks within the contract that the parties had agreed upon. The judges did not see this as a problem or obstacle to reduction. **14**

The case also shows that elements of inadequacy may play a role in the reasoning on reduction. This has been observed by scholars as a more general phenomenon.[5] **15**

Minor contributory negligence may also be taken into consideration as part of the reasoning for reducing an award. It is in this respect sufficient that the victim contributed to the events that led to the damage, even if they cannot be deemed to have acted in a culpable manner. **16**

5 *N Nygaard*, Skade og ansvar (6th edn 2007) 409ff.

17. Sweden

Högsta domstolen (Supreme Court) 25 November 1992

NJA 1992, 660

Facts

1 According to the Swedish Tort Law Act ch 6 para 2, the duty to pay compensation can be reduced if it is unreasonably burdensome in view of the tortfeasor's financial circumstances, whereby the needs of the victim also shall be taken into account.[1] In this case, two men were found guilty of more than one hundred serious thefts (31 victims sued for compensation). They argued that the sum of the compensation should be reduced according to the mentioned rule.

Decision

2 The Supreme Court did not find causes for reduction in this case, and the two thieves were held fully liable. In cases of intentional offences of a serious nature, the Court stated, a tortfeasor's personal circumstances can only be considered if full liability would decisively jeopardise their reintegration into society. However, since these two men had, over a period of many years, systematically and almost professionally, committed thefts fully aware of the injuries they had caused, there were no binding arguments for a reduction.

Comments

3 The case shows that the consideration of social and economic factors on the part of the tortfeasor has its limits. Even if full liability as a matter of fact can be seen as a burden, this consequence is not – especially not in criminal cases – evaluated as 'unreasonably burdensome'. Actually the application of the reduction clause is not particularly frequent, one reason being that the situation for the tortfeasor is not considered 'unreasonably burdensome' if he has third party liability insurance (but such insurance does not cover crimes as this case shows).

1 See *J Hellner*/*M Radetzki*, Skadeståndsrätt (10th edn 2018) 411ff.

18. Finland

Korkein oikeus (Supreme Court) 19 March 1984, KKO 1984 II 47

<https://finlex.fi/fi/oikeus/kko/kko/1984/19840047>

Facts

A limited company had neglected its regular tax deduction payments to the tax authority due to its financial difficulties. Managing director A and office manager B, who were responsible for the company's payment transactions, had negotiated with the tax authority and tried to find a way to restructure the business and maintain jobs. However, the attempts failed and the company went bankrupt, which had led the tax authority to suffer a loss of over FIM 2 million through the lost tax deductions. The prosecutor pressed charges against A and B as well as demanded they compensate to the tax authority the loss they had caused by their decisions. 1

Decision

The majority of the Supreme Court (3–1–1) held that A and B had deliberately caused a loss to the tax authority when they had decided not to pay the tax deduction payments. According to ch 2 sec 1(2) of *vahingonkorvauslaki* (31.5.1974/412), the general statute on extra-contractual liability, liability for damages 'may be adjusted if the liability is deemed unreasonably onerous in view of the financial status of the person causing the injury or damage and the person suffering the same, and the other circumstances. However, if the injury or damage has been caused deliberately, full damages shall be awarded unless it is deemed that there are special reasons for a reduction in the damages.' As A and B were found to have acted deliberately, only special reasons would lead to a reduction of their liability. 2

The majority of the Supreme Court noted that A and B had neglected to make the payments for reasons that were as such understandable. There was no indication at all that A and B acted as they did in order to unjustifiably benefit themselves or others. Furthermore, if they were held liable for the entire loss, A and B would clearly face financial difficulties due to their solvency, thus subjecting them for a long time, probably for the rest of their lives, to a debt recovery procedure. Because of these circumstances, the Supreme Court ordered A to pay compensation of FIM 500,000 and B FIM 300,000. 3

One of the dissenting Justices considered that A and B could not have reasonably acted otherwise without risking the company's solvency and preserving the employee's jobs. Because of this, the conduct of A and B could not be regarded as intentional. On these grounds, the Justice arrived at the same conclusion as the majority. 4

However, another dissenting Justice, as well as the referendary of the case, held the conduct of A and B to be intentional and found no grounds for adjusting their liability at all. 5

Comments

6 The case illustrates that ch 2 sec 1(2) of *vahingonkorvauslaki* may lead to an essential adjustment of liability even in the case of deliberate misconduct if the circumstances of the case sufficiently favour such outcome. The case also shows how diverse circumstances may be significant when assessing the possibility for adjustment – even though the damaging misconduct was deliberate as such, the motives thereof were held as justifiable. However, it is clear that the motives themselves could not have justified adjustment, unless also the amount of the entire loss would not have clearly exceeded the tortfeasors' financial means. On the other hand, it is worth noting that, even after the adjustment, the compensation amounts to be paid by A and B were determined as being hundreds of thousands of marks[1] and thus quite remarkable for a private person. In other words, even though the Supreme Court sympathised with A and B to some degree, they were far from being released from the consequences of their acts in economic terms.

7 In legal literature, case KKO 1984 II 47 has been regarded as relatively sympathetic to the damaging party, when compared to the quite similar case of KKO 1985 II 157, where the managing director of a company was obliged to compensate the tax authority for the entire loss of FIM 500,000. It has been suggested that, as the Supreme Court paid much attention to the altruistic motives of A and B, the Court regarded this as an extremely special feature of the case, justifying an adjustment of liability even in a case of intentional damaging acts.[2]

Korkein oikeus (Supreme Court) 7 December 1998, KKO 1998:149

<https://finlex.fi/fi/oikeus/kko/kko/1998/19980149>

Facts

8 A misled the Social Security Institution into paying A and their family over FIM 80,000 in unjustified travel aid. After A's fraud was revealed, the authority performed a thorough investigation of all A's applications in the previous six years, which caused the authority extra labour costs of FIM 20,000. A was punished for gross fraud. The authority claimed compensation of the loss caused by A's conduct. A demanded an adjustment of their liability stating the weak economic situation of their family, their unemployment, having four children of whom two are ill as well as the fact that all the wrongfully received money was spent to cover necessary living costs.

1 One FIM in 1984 corresponds to € 0.36 in 2020. See the value of money converter on the website of Statistics Finland, <https://www.stat.fi/tup/laskurit/rahanarvonmuunnin_en.html> (5 October 2021).

2 *M Hemmo*, Vahingonkorvauksen sovittelu ja moderni korvausoikeus (1996), 61, 82f.

Decision

The Supreme Court noted that A had committed their crime by means of methodical wrongdoing for a period of four years, thus receiving an economic benefit that cannot be held as minor. Against this background, an adjustment of liability could not be justified merely by the social circumstances. Thus, the majority (3–2) of the Supreme Court obliged A to compensate the authority the entire loss of over FIM 100,000.[3] The minority and the referendary accepted the majority's stand as regards the sum of the wrongfully received travel aid but suggested reducing the compensation to be paid by A for the extra labour costs incurred to the authority from FIM 20,000 to FIM 6,000, noting that it had not been A's intention to cause such costs, and A's social circumstances favoured such an adjustment. **9**

Comments

The case shows that any adjustment of liability is never an open-and-shut case but all the circumstances of the specific case have to be taken into account. Despite the facts that A's social situation as such would have strongly favoured an adjustment and that any possible compensation from A would have virtually no significance for V, an adjustment of A's liability was ultimately completely rejected, because the counter-arguments were also exceptionally strong in the present case. At the same time, the case illustrates that when a damaging act is an intentional crime yielding benefit to the damaging party, the liability of such party cannot virtually ever be adjusted to be less than the received benefit. **10**

As adjusting of liability has been regarded as an exception to the damaged party's right to receive full compensation, it has been considered that, in a case where the damaging party acted in a particularly blameworthy manner, their interest in limiting liability is not – as a main rule – weighty enough to justify restricting the damaged party's right.[4] In other words, particular blameworthiness of the damaging party's act is a factor that normally turns the weighing of interests into a position where adjusting liability is excluded. **11**

3 It is worth noting that in some jurisdictions the decision that A is liable to pay back the unjustified travel aid of FIM 80,000 could have been based also – or even primarily – on rules of unjustified enrichment or a corresponding doctrine. Also Finnish law recognises the doctrine of unjustified enrichment, mostly as a non-codified set of rules, but, as a ground for liability, it has been regarded as secondary to rules on liability for damage. See, for example, *E Aurejärvi*/*M Hemmo*, Velvoiteoikeuden oppikirja (3rd edn 2007) 210. As the grounds for A's liability for damages were obvious in case KKO 1998:149, the courts assessed A's liability simply on these grounds, without paying attention to the doctrine of unjustified enrichment.
4 *M Hemmo*, Vahingonkorvauksen sovittelu ja moderni korvausoikeus (1996) 325f.

Korkein oikeus (Supreme Court) 4 February 1999, KKO 1999:12
<https://finlex.fi/fi/oikeus/kko/kko/1999/19990012>

Facts

12 A group of persons acted as managing directors and board members of a local bank. As was the case with many other banks in those days of 'casino economy' in Finland, the defendants favoured granting loans ignoring statutory provisions and the bank's requirements for sufficient collateral, When the financial market collapsed and the national economy fell into depression, the negligent granting of credit led to excessive credit losses in numerous banks. The bank in the present case claimed from the defendants compensation for losses of over FIM 30 million. The defendants demanded an adjustment of their liability.

Decision

13 The liability of the directors was based on special provisions of acts on savings banks, which mostly correspond to the general rules on liability of directors of a limited company. As noted below in 3/18 no 11, the liability of directors of a company is, under Finnish law, normally understood as a special form of extra-contractual liability. As regards the grounds for adjusting the directors' liability, the Supreme Court found the general rule of ch 2 sec 1(2) of *vahingonkorvauslaki* to apply.

14 The Supreme Court held that, although the defendants had neglected to follow rules on granting credit, they could not be regarded as having acted grossly negligently, because a loose interpretation of such rules was, at that time, quite typical for Finnish banks. Furthermore, it was noted that the occurrence and amount of the loss had not resulted merely because of the acts and omissions of the defendants but also the exceptionally severe and long-lasting economic depression, which the defendants could not have foreseen.

15 The Supreme Court noted that even though any review of the economic circumstances of most of the defendants had not been presented, it was obvious that full liability of the loss they had caused would exceed their financial means. As regards the various defendants, the Supreme Court held that those who had acted as managing directors of the bank, A and B, bore more extensive responsibility than those who had acted merely as board members (C to L). On these grounds, the liability of each of the former managing directors was adjusted to 10 % of the loss they actually caused. As regards the rest of the defendants, the liability of the former chairman of the board was adjusted to 4 % and the liability of the former board members to 3 %.

Comments

16 Case KKO 1999:12 shows the full power of adjustment of liability as a legal tool for avoiding outcomes that would put the tortfeasor in an intolerable situation. Although the de-

fendants had obviously caused the bank to suffer a loss, and were even significantly negligent in their conduct, their full liability – or even liability for most of the loss – would have appeared unfair in light of the societal circumstances at the time of the damaging acts and thereafter. Because of this, the tortfeasors' liability was adjusted to no more than 3 % to 10 % of the actual loss.

17 From a more general viewpoint, one may note that the assessment of whether to adjust liability is highly dependent on case-specific circumstances. Such an assessment cannot be performed as a straightforward 'test', but rather involves a comprehensive weighing of different arguments. This may be seen as a natural consequence of the idea of adjustment to enable a court, according to its own discretion, to prevent normal rules of the law of damages from leading to an outcome that would appear, although accordant with the general rules, too harsh for the liable party.

18 The above analysed case KKO 1984 II 47 (see 10/18 no 1 above) on the liability of directors towards the tax authority is a good example of the case-specific nature of the adjustment of liability. The Supreme Court accepted a relatively significant adjustment of the directors' liability even though the directors had run their business deliberately in violation of tax legislation and caused the authorities a remarkable loss. However, as the directors' motives appeared as sufficiently understandable and legitimate, the Supreme Court allowed a reduction of the compensation to be paid.

19 Correspondingly, as regards case KKO 1999:12 on the liability of bank directors, one could ask whether it is convincing to excuse irresponsible actions of the directors partly by the fact that directors in many other banks had also acted negligently at this time. Perhaps the Supreme Court approached the question from a more societal and humane viewpoint and took into account that the entire economy of Finland was overheated then, for which the nation had to pay a very high price through the subsequent, historically severe depression in the first half of the 1990s. Although it may be difficult to allow this background any place in the traditional framework of the law of damages, it would be understandable to regard it as significant when assessing whether full liability for damage appears, in the light of common sense, as unjust, unfair or unreasonable.

20 Nevertheless, certain rules of thumb on the application of adjustment provisions may be outlined. As transpires from the wording of ch 2 sec 1(2) of *vahingonkorvauslaki,* deliberately causing the damaging act is a clear counter-argument against adjustment of liability. If the deliberate act has produced a benefit for the damaging party, adjustment of liability seems to be absolutely precluded up to the amount of the gained benefit, as transpires from the above (10/18 no 8) analysed case, KKO 1998:149 on unjustifiably received social aid.

21 Further, the comparison between the economic situation of the liable party and the damaged party lies at the core of the assessment of adjustment of liability. In a case where not receiving full compensation would result in financial ruin for the damaged party, the threshold for accepting an adjustment should be very high, even though full liability would be correspondingly burdensome for the liable party. In other words, the need to protect the financial situation of the damaged party is regarded as more impor-

tant than protecting the interests of the liable party.[5] On the contrary, if the financial position of the damaged party is not dependent on receiving the compensation, this opens a possibility even for a radical adjustment of liability, as is evident from the above (10/18 no 12) analysed case KKO 1999:12 on the liability of directors towards the bank.

22 Correspondingly, if full liability would not endanger the financial situation of the liable party, there should be no need to adjust liability. This becomes particularly clear in situations where the liability of the damaging party is covered by their liability insurance. As it transpires from cases KKO 1984 II 28, KKO 1991:176 and KKO 2001:70, adjustment of liability is in such situations practically excluded.

19. Estonia

Tallinn Ringkonnakohus (Tallinn Court of Appeal) 24 November 2017

Civil Case No 2-17-10608

Facts

1 Between 2012 and 2016, the defendant removed from the wild and kept in a flat in Tallinn two merlins that are a protected species (first category of protection). When the birds were found in the defendant's flat, one of them had a broken wing and the other suffered from balance disorders. Under subsec 4 of § 58 of the Nature Conservation Act, it is, as a rule, prohibited to remove merlins from the wild. By violating the ban, the defendant caused € 2,600 in environmental damage. According to a respective regulation of the Government of the Republic, the compensation rate for environmental damage is € 1,300 per bird in the present case. For the above reasons, the Republic of Estonia (the claimant) filed a claim for damages in the amount of € 2,600 against the defendant.

2 The defendant argued that they did not remove the birds from the wild but provided them with aid. The first bird was brought to the defendant in the summer of 2012 by a man the defendant did not know. The defendant found the second bird on the side of a road in 2013. Both birds were exhausted. The first bird had a wing trauma. The other bird suffered from balance disorders likely to have been caused by a concussion. Had the birds not been helped, they would have died.

3 The district court denied the claim, finding that the defendant's actions cannot be considered as the illegal removal of the birds from the wild. The district court noted that if the defendant were liable, LOA § 140(1) should be applied and the damages should be reduced to zero because the defendant assisted the injured birds, which would probably have died in the wild if they had not been helped.

5 *M Hemmo*, Vahingonkorvauksen sovittelu ja moderni korvausoikeus (1996) 68ff.

Decision

The court of appeal upheld the district court's judgment. However, unlike the district court, the court of appeal held that also in a situation where a protected bird has been unlawfully kept and raised in an artificial environment but has not been previously removed from the wild by the same person, damage has been caused to the natural entity. The defendant's conduct was unlawful and the defendant is liable for the damage based on tort law provisions. LOA § 140(1) allows for a reduction of damages if compensation to the full extent would be extremely unfair towards the obligated person or otherwise reasonably unacceptable. In the current situation, it would have been extremely unfair to order the defendant to pay € 1,300 per bird. The defendant removed the birds from the wild because they were injured. For the above reasons, it would be extremely unfair towards the defendant to order them to pay € 2,600 due to causing damage by removing the merlins from the wild, as a result of which the amount of the damages must be reduced to zero. 4

Comments

Estonian tort law contains a provision that allows for a reduction of the amount of damages solely because compensating the damage to the full extent would be unfair towards the tortfeasor. More specifically, LOA § 140(1) reads as follows: 'The court may reduce the damages if compensation for damage to the full extent would be extremely unfair towards the obligated person or otherwise reasonably unacceptable. Thereby all of the circumstances must be taken into account, above all, the nature of liability, relationships between people and their economic situation, including whether they are insured.' 5

This rule is rarely applied in Estonian case law. While tortfeasors very often ask the court to reduce the damages based on LOA § 140(1), the courts tend to hold that compensating the damage to the full extent is not extremely unfair and do not reduce the damages payable. Under the case law of the Supreme Court, the court must apply LOA § 140 (1) on its own initiative (*ex officio*) where the respective circumstances have been brought to the court's attention. 6

In the given case, the court of appeal found it unfair to have the defendant whose actions were aimed at improving the birds' condition (not at harming them) pay the government damages. 7

Tartu Maakohus (Tartu District Court) 3 June 2019

Case No 2-17-13788

Facts

There was a water leak in the defendant's flat as a result of which water penetrated into the flat below the defendant's flat and caused damage to the owner of the flat underneath. The damaged flat was insured by the claimant (the insurer). The claimant com- 8

pensated the victim for the damage and filed a recourse claim against the defendant, demanding compensation of € 2,633.

Decision

9 The district court took the view that the prerequisites for liability had been met in the case of the defendant and no circumstances which would preclude liability had been proven. Under LOA § 140(1), the court may reduce the damages if the compensation for damage to the full extent would be extremely unfair towards the obligated person or otherwise reasonably unacceptable.

10 The defendant is an old-age pensioner and it was confirmed at a hearing that the defendant was not employed. Upon application of LOA § 140(1), it is currently of relevance that the defendant did not cause the damage intentionally but due to negligence. In the present case, there is also a ground for reducing the damages owing to the fact that the victim paid insurance premiums to the claimant (insurer). Thus, the insurer (the claimant) has mitigated some of the risk of possible compensation for damage in the case of an insured event in the form of insurance premium payments and this fact must certainly be taken into account under LOA § 140(1) in the present case. Given the low income due to the defendant's age and other circumstances mentioned above, the district court considered it justified to reduce the damages by 30 % based on LOA § 140(1).

Comments

11 This case also falls under one of the exceptional cases where the court has found it justified to reduce the damages based on LOA § 140(1). In reducing the damages, the court referred to the defendant's economic situation and the fact that the damage was caused due to negligence. In addition, it appears from the judgment that one of the factors taken into consideration when deciding whether to reduce the damages was the fact that the claimant was an insurance undertaking.

12 It is highly likely that if the defendant had not insured the flat and been the claimant in these proceedings, the court would not have reduced the damages.

22. Poland

Sąd Najwyższy (Supreme Court) 26 January 2011, IV CSK 308/10

OSP 11/2011, item 112

Facts

1 V, a two-year-old patient, was hospitalised with pneumonia. She was not properly diagnosed and this subsequently led to cardiac arrest and circulatory insufficiency, after which she became paraplegic and suffered irreversible brain damage. The attending

doctor (A1) was found guilty and sentenced by a criminal court. As fault could not be questioned before a civil court, the defendant hospital (A2) objected to its joint and several liability. A1 and A2 had a contract to perform medical services (hence not a contract of employment), in which the parties agreed that the doctor, as an independent contractor, would be solely liable for damage caused to patients in connection with her services performed in the hospital. It was established that the doctor worked under double-supervision of the manager of the hospital as well as of the head of the paediatric ward. Hence, she was dependent organisationally on the hospital and was obliged to follow professional advice and instructions of the head physician. The lower courts found the hospital liable under art 430 KC (vicarious liability), and held both defendants liable jointly and severally.

The courts awarded an annuity and an exceptionally high award of € 119,000 for non-pecuniary loss, which exceeded the insurance guarantee sum. In cassation, A1 questioned, among others, the non-application of the ad hoc reduction clause. **2**

Decision

The Supreme Court held that a caveat in the contract between A1 and A2 is ineffective, and it may not influence the application of a legal basis to claims of third persons based on tort law. A2 is vicariously liable for a 'subordinate' in accordance with art 430 KC[1]. **3**

On the question of whether the damages should have been mitigated pursuant to art 440 KC, the trial court was correct in its evaluation of facts. Pursuant to art 440, which is a general reduction clause (see 1/22 no 8) in relations between natural persons, the scope of the duty to redress damage may be limited according to the circumstances of the case if, having regard to the financial circumstances of the injured person or those of the persons liable for the damage, the principles of community life (principles of fairness) require such limitation. This rule should be interpreted strictly. On the evidence, the defendant doctor did not meet the burden of proof. Moreover, principles of fairness do not support mitigation of damages in a case where the breach of duty was so grave as to constitute a criminal offence and the extent of personal injury as well as its irreversibility has precluded the child from living a normal, quality life. The cap on the doctor's civil liability insurance (€ 45,000) was not a reason to reduce compensation, as it was her own choice to procure such low insurance cover. **4**

1 A person who on his own account entrusts the performance of an act to a person who at the performance of the act is under his control and has a duty to abide by his instructions is liable for any damage caused by that person's fault in the course of performance.

Comments

5 The *ius moderandi* is rarely applied because of its limited personal scope of application. In addition to the statutory prerequisites, there are some further judge-made limitations to its use. Accordingly, it is not applied in cases of intentional fault or gross negligence of the tortfeasor, in personal injury cases (since this would be contrary to the principles of fairness). All these additional factors were present in the commented case. Moreover, the rationale behind art 440 KC does not allow a reduction of damages where the person liable has liability insurance cover.[2] Hence, *ius moderandi* concerns only natural persons who are not insured. The pre-condition for the reduction is the poor financial situation of the defendant, which is to be established on the basis of the actual income and of the earning capacity of the tortfeasor.

23. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 21 January 2020
No 25 Cdo 2216/2019

Facts

1 On 23 February 2014, there was a verbal altercation between the claimant and the respondent and another person at a restaurant, in which the claimant cursed the other person in a vulgar manner. The altercation culminated in the respondent physically assaulting the claimant and fighting with him. The claimant sued the respondent for damage resulting from the physical assault.

2 Both the courts of first and second instance upheld the claim for compensation for damage, however, whether the courts correctly rejected the application of the reduction clause under sec 2953 of the Civil Code[1] became subject to an extraordinary appeal. The courts did not find any circumstances which merited special consideration. The first reason for such a conclusion is that it was the respondent who joined the claimant despite being previously verbally challenged by him. Secondly, the respective financial situations of the parties are not fundamentally different. The imposition of the duty to provide compensation to the respondent will certainly not be extremely problematic in financial terms and moreover, the performance was allowed in instalments.

2 See *M Nesterowicz et al*, Kodeks cywilny z komentarzem [The Civil Code with a commentary] vol 1 (1989) 438.

1 For a translation, see 1/23 no 2 (fn 2).

Decision

The Supreme Court confirmed the decision of the courts and provided a general interpretation of the reduction clause. It ruled that, in general, it cannot be ruled out that, from the point of view of the legal regulation of the reduction right according to sec 2953 of the Civil Code, all aspects stated in it do not have to be considered if they are not significant for the assessment of the case and therefore do not become part of the specific application of the provision. If the law requires consideration of how the damage occurred, it gives the court discretion to assess all the possible circumstances which arose in connection with the damaging event and which must be taken into account according to the degree of relevance. 3

The purpose of the so-called reduction clause of the court is to mitigate the impact of the obligation to compensate damage where the imposition of the obligation in full would be too harsh, taking into account all the circumstances. The starting point for this provision is that, in some cases which merit special consideration for unintentional damage, the imposition of an obligation to pay full damages would be contrary to the preventive and reparative effects of liability for damage and the principles of justice (decision of the Supreme Court, No 25 Cdo 691/2006, which deals with the former Civil Code). 4

Comments

For comments see below. 5

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 31 August 2020

No 25 Cdo 4393/2018

Facts

The claimant, the State enterprise Lesy České republiky, has the right to manage land which is intended to fulfil the function of a forest and is part of a hunting ground used by the respondent. In the spring of 2016, the claimant planted pine seedlings on the plot in question, but roe deer caused their destruction and a partial reduction in their growth. The claimant sued the respondent for damages in the amount of CZK 125,000 as a result of the destruction by roe deer. However, as the damage occurred in spring when the risk of damage caused by animals is lower than in winter, both the court of first and second instance applied the reduction clause under sec 2953 of the Civil Code and limited the awarded damages. 6

However, whether the courts correctly applied the reduction clause under sec 2953 of the Civil Code when the respondent is a legal entity became subject to extraordinary appeal. 7

Decision

8 The Supreme Court concluded that there is no legitimate reason for the adjustment of damages to be limited to certain entities, as even the property relations of legal persons can be so problematic that the non-application of the court's moderation right could lead to their financial ruin. The conditions (not only property) of the injured party are the other side of the coin, because the very comparison of the situations of both parties can determine how a balance between a fair amount of compensation and the elimination of any hard or even liquidating impact of full compensation on a poor wrongdoer can be achieved.

Comments

9 The right to reduce damages is laid down in sec 2953 of the Civil Code[2] and presents a standard and frequently applied provision. A very similar provision was contained also in the former Civil Code valid until 2013. The moderation (mitigation) right allows the court to determine the amount of damages at a lower amount than their 'normal' extent, so that the awarded damages express what can be fairly demanded from the wrongdoer in a particular case. This is a reasonable reduction, expressing proportionality, which, taking into account the circumstances of the case and other legal grounds, is fair both in terms of the injured party's legitimate claim and in view of the wrongdoer's personal and financial circumstances. Moreover, there is no threshold to be observed by the courts.

10 It is therefore necessary to consider the wrongdoer's family, social and personal relations as well as property relations and their overall ability to pay the imposed compensation within their lifetime. At the same time, it is necessary to consider whether the injured party can be fairly asked to be satisfied with reduced compensation. Thus, the interest of the wrongdoer must substantially exceed the interests of the injured party. The decisive factor is the overall amount of damages and its consequences both for the wrongdoer and the injured party.[3]

11 However, in case 25 Cdo 2216/2019, the Supreme Court correctly pointed out that aspects stated in sec 2953 do not have to be considered if they are not significant for the assessment of the case and therefore do not become part of the legal norm.

12 The reduction is possible in cases where the wrongdoer is either a legal or natural person (25 Cdo 4393/2018). Nevertheless, when considering the possibility of the reduction, the following reasons which merit special consideration should be assessed: (i) the

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

3 *F Melzer* in: F Melzer/P Tégl et al, Občanský zákoník § 2894–3081, Velký komentář, Sv. IX [Civil Code secs 2894–3081, Large commentary] (2018) 963.

personal and property situations of both the wrongdoer and the injured party; (ii) the form of fault, since in the case of intent, any reduction is excluded; (iii) objective criteria of imputability, such as foreseeability; (iv) the importance of the damage and its compensation for the injured party; and (v) the preventive function of tort law.[4]

13 The court has the right to reduce (limit) the obligation to pay damages. However, this limitation cannot lead to a full release from the duty to pay compensation. For the reduction, it is not required that the wrongdoer requests a reduction awarded by the court, since, as soon as the court realises facts which justify such an approach, the court is obliged to consider them and consequently limit the compensation. However, the burden of proof is borne by the wrongdoer.[5]

14 As to the scope of application with respect to non-pecuniary damage, there are two opinions. Vojtek believes that sec 2953 will hardly apply to cases of satisfaction for non-material harm, as the provision speaks only about damage, which is a separate category of harm and must be distinguished from non-material damage. However, more important is that the court may consider all the relevant facts to determine reduction when already deciding on the scope of satisfaction.[6] This complicated situation is illustrated by a case of the Supreme Court file no 25 Cdo 894/2015, where the Court clearly requires the same criteria for assessment that apply under sec 2953. Melzer is of the opinion that there is no legal obstacle to limiting even the compensation of non-pecuniary damage.[7]

15 Meanwhile, in the above-mentioned case 25 Cdo 2216/2019, the Supreme Court came to the conclusion that although the application of sec 2953 of the Civil Code dealing with a reasonable reduction of damages by the court is probably not completely ruled out even in the case of compensation (reparation) for non-pecuniary damage, it can apply only to a limited extent. Non-pecuniary damage (as opposed to property damage) is difficult to quantify exactly, which complicates the possibility of determining the correct amount of compensation and then reducing it. In addition, aspects relevant for the reduction already apply when determining the total amount of compensation for non-pecuniary damage and the same circumstances cannot be taken into account twice when calculating compensation.[8] Finally, the right to personal protection (including the right to health protection) is functionally higher than the right to protection of a wrongdoer's

4 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 967.

5 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 961.

6 *P Vojtek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník, Komenntář, Svazek VI, Závazky z deliktů (§ 2894–§ 2971) [Civil Code, Commentary, vol VI, Obligations from delicts (§ 2894–§ 2971)] (2021) 1076 ff.

7 *F Melzer* in: Melzer/Tégl et al, Občanský zákoník § 2894–3081, Velký komentář IX (2018) 962.

8 In considering the adequacy of the proposed satisfaction for non-pecuniary damage to the personality of a natural person, the court must first consider both the general nature and the circumstances of the particular case; it must take into account, for example, the intensity, nature and mode of unauthorised interference, the character and extent of the injured personality, the duration and effect of the non-pecuniary damage incurred for the status of the injured person in society, etc (Supreme Court 25 Cdo 894/2015).

property and therefore, in principle, the consideration of the wrongdoer's property situation cannot lead to a reduction of compensation.

16 Another provision which enables the court to adjust damages is contained in sec 2920 (2)[9], pursuant to which, the liability of a minor can be established if it is fair with respect to the property circumstances of the wrongdoer and the injured party. However, there is a substantial difference as to the right of the court. Whilst sec 2953 enables the court only to limit the duty to compensate, sec 2920 enables the court to establish liability, which would otherwise not arise.

24. Slovakia

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) Resolution of 22 November 2012

Case No 3MCdo/7/2011

Facts

1 V (the insurance company) claimed against A for reimbursement of the sums which it had paid to the owner of a damaged motor vehicle under a statutory insurance policy. It was established that the accident occurred only because the driver of the vehicle, in an attempt to avoid A lying on the road, swerved and crashed.

2 The evidence showed that the accident was caused solely by A, as he was lying on the road at night, in a drunken state and without reflective elements on his clothes, when it was snowing. The court found no violation of legal obligations by the driver of the vehicle.

3 The court of appeal upheld the judgment. The decision was challenged by the Attorney General by way of an extraordinary appeal on the ground that the courts had failed to address the question as to whether there were special reasons for a reduction in compensation under sec 450 CC.[1] On the initiative of the Attorney General, the Supreme Court annulled the decisions of both courts and remitted the case for further proceedings. In the new proceedings, the parties concluded a settlement.[2]

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9 'If a minor who has not gained full legal capacity or anyone who suffers from a mental disorder was not able to influence his actions and consider their consequences, the injured party has the right to damages if it is fair with respect to the property circumstances of the wrongdoer and the injured party.'

1 § 450 CC: 'For reasons of special consideration, the court shall reduce the damages accordingly. In doing so, it shall take into account, in particular, the manner in which the damage was caused and the personal and financial circumstances of the natural person who caused it; it shall also take into account the circumstances of the natural person who was injured. No reduction may be made where the damage was caused intentionally.'

2 Resolution of the District Court of Námestovo of 25 March 2014, No 5C/134/2008.

Decision

The lower courts, even without A's suggestion, should have considered reasons that would have mitigated the impact of the consequences to A. Such a course of action is justified, even though it was not disputed in the proceedings that the damage was caused solely by A. **4**

Comments

The provisions of sec 450 CC also apply to cases of an insurer's right of recourse under sec 813(2) CC[3]. Here, too, the impact of liability for damage is to be mitigated, where the imposition of full liability would impose an unreasonable hardship on the tortfeasor (R 144/1951). The only limitation on the application of the law of moderation is that the damage was not caused intentionally. **5**

According to V, in the present case, there are no reasons of special consideration for a reduction of the compensation. V, in her statement of appeal, submitted that, although A was in a difficult financial situation, the fact that he had caused the damage himself in a state of extreme intoxication into which he had voluntarily placed himself was significant to his detriment. **6**

The possibility to moderate damages by the court is a long-established institute in the Slovak legal order. Moderation was already regulated by the previous Civil Code valid from 1951 (Act No 141/1950 Coll.) while the current Civil Code (Act No 40/1964), having undergone some changes, also regulates the courts' right of moderation. **7**

The aspects listed in art 450 of the Civil Code are given only as examples. It is not excluded that the court may take into account other individual circumstances, not explicitly mentioned by law, when exercising the right of moderation. These may be circumstances of a material nature (resulting, for example, from what damage has occurred, how it occurred, what caused it) or of a personal nature (who caused the damage, what are their personal, health, social circumstances, to whom the damage was caused, etc). However, the court is required in each case to know, assess, state and explain in its decision all the important circumstances relevant to the reduction of damages. **8**

For example, in a 2012 case,[4] the court dealt with a claim by an injured driver of a motor vehicle who, in an attempt to avoid hitting A's dog, swerved and crashed into rubbish bins and then into a tree. The court considered an allegation on A's part that A was being treated for drug addiction at an undisclosed location. Accordingly, the court reduced the damages claimed by one-half. The court of appeal did not accept the grounds for the reduction in compensation. According to the court, A's alleged dependence on narcotic drugs and psychotropic substances could not be subsumed under the legal **9**

3 § 813(2) CC: 'If the insurer succeeds to a right under subsection 1 against an individual, the provision of section 450 shall apply as appropriate to the exercise of this right.'

4 Judgment of the Regional Court of Žilina of 14 November 2012, case no 7Co/237/2012.

meaning of the grounds of special consideration and could in no way constitute a mitigating circumstance in relation to his liability for the unlawful conduct.

10 In another dispute (see the judgment of the Trenčín regional court of 18 April 2019, Case no 17Co/406/2017), the court reduced the compensation by 10 %. In doing so, it took into account the fact that the damage was caused by A's negligence, at a young age, and A regretted causing the damage. On the other hand, the court took into account the severity of the consequences suffered and the social circumstances of V, where V's income decreased as a result of receiving a disability pension and V will suffer this low standard of living for the rest of their life.

11 The court of appeal disagreed with the part of the decision that reduced the damages. The court also considered it necessary to take into account the fact that A had caused V serious personal injury. According to the court, in the case of such damage, the fact that the damage was caused by negligence cannot be taken into account as a reason for special consideration. Nor can A's young age and the fact that he regrets the consequences of his act be regarded as a circumstance for which a reduction in damages would be justified. In the court's view, it does not appear from the evidence that A is a person suffering from material hardship[5] or that his state of health prevents him from earning an income.

Krajský súd v Trenčíne (Regional Court of Trenčin) 17 May 2017

Case no 5Co/427/2016

Facts

12 In the proceedings before the court of first instance, V (the Social Insurance Institution) sought compensation from A for pension benefits paid. Pursuant to Act No 461/2003 Coll on social insurance, the Social Insurance Institution is entitled to compensation for damage in the amount of the benefits paid out from the person who caused the damage by culpable unlawful conduct.

13 It was established at trial that the damage to health occurred during a barbecue when both V and A decided to set the barbecue on fire using a diluent. The actual pouring of the diluent was done by A. The court also took into account the fact that both V and A were intoxicated at the time. The court held that A was 50 % contributory and therefore reduced the damages by half.

14 Consequently, the court found that even compensation of 50 % (ie € 241) per month was particularly harsh on A's financial and thus social circumstances and reduced the claim by a further 20 % pursuant to art 450 CC.

5 At the time of the court's decision, the defendant's income was € 2,300–2,400 per month net.

V appealed against the judgment, arguing that there was no basis for a 20 % reduction of the claim. The regional court upheld the judgment of the court of first instance on the ground that it agreed with the exhaustive reasoning of the court of first instance. 15

Decision

The amount of compensation, which would exceed the minimum subsistence level for a natural person of full age, should not lead the person liable for the damage to resigning to work for a living. The purpose of avoiding unreasonable harshness (art 450 CC) is to ensure that a person liable to pay damages for several decades does not decide that it is more appropriate for him or her to earn an income from the 'shadow' economy and thus avoid the enforcement of the amount owed. 16

Comments

According to art 450 CC, the court shall reduce the damages accordingly for reasons of special consideration. In doing so, it shall take into account the manner in which the damage was caused and the personal and financial circumstances of the natural person who caused it; it shall also take into account the circumstances of the natural person who was injured. No reduction may be made where the damage was caused intentionally. 17

Article 450 CC is an exception to the principle that the offender is to compensate for the damage to the extent to which it was caused by them. (The extent of compensation for damage is regulated in the provisions of arts 442 to 449 CC). 18

The court is to assess the social situation of both A and V, as well as in the context of what the social situation of A will be if the court orders them to compensate the full amount of the damage. The thought behind the consideration is that, in some cases, the imposition of an obligation to pay full compensation would be contrary to the principle of justice. On the other hand, the application of art 450 CC cannot lead so far that the court would not award the injured party any compensation at all. The court's decision to mitigate the extent of compensation is governed by the principle of proportionality. 19

In the present case, the court took into account the financial circumstances of A, who was unemployed, had lost both parents and had led an orderly life until then. 20

The court reduced the amount of damages in an effort to avoid unreasonable harshness on A. Moreover, the court needed to emphasise that a reduction in compensation should encourage A to take up proper employment in order to compensate for the damage caused. The court wanted to avoid a situation where it would be better for A not to have an official income that could be subject to foreclosure. 21

25. Croatia

Presuda Županijskog suda u Sisku (Judgment of the County Court in Sisak) 5 October 2017, No 13 Gž 1225/2014-4

<https://www.iusinfo.hr/sudska-praksa/ZSRH2014SkGzB1225A4>

Facts

1 A physically attacked V, thereby inflicting severe bodily injury on him.

2 The first instance court upheld V's claim and ordered A to compensate V for material and non-material damage caused by the physical attack.

3 The County Court in Sisak, acting as an appellate court, partly dismissed A's appeal and partly accepted it, but not for the reasons invoked by A, and only in the part relating to default interest.

Decision

4 The County Court in Sisak dismissed the invocation of art 1091 of the COA. According to the County Court in Sisak, art 1091, para 1 of the COA represents an exception to the full compensation principle, which can be applied only if two conditions provided for therein are met: that a tortfeasor did not act intentionally or with gross negligence and that a responsible person is indigent and paying compensation in full would impoverish him. The County Court in Sisak also quite rightly noted that these two conditions must be met *in cumulo*, and further observed that this requirement was not fulfilled in the case at hand. In this respect, the County Court in Sisak noted that, in criminal proceedings, A was found guilty of intentionally attacking V and therefore the conditions for the application of art 1091, para 1 of the COA are not met.

Comments

5 See below 10/25 nos 12–15.

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) 15 June 2005, No Rev 750/04-2

<https://www.iusinfo.hr/sudska-praksa/VSRH2004RevB750A2>

Facts

6 V was a chronic alcoholic who, one evening, heavily intoxicated, got into an argument with A1 and A2. A1 and A2 severely beat V and left him in a field, unattended, where he eventually died from his injuries. V1 and V2, V's spouse and child, sue A1 and A2 claiming compensation for material and non-material damage caused by the death of a close relative.

The first instance court accepts V1's and V2's claims entirely and orders A1 and A2 to compensate, jointly and severally, V1 and V2 for the damage they sustained. The appellate court dismissed A1's and A2's appeal and affirmed the first instance decision. 7

A1 and A2 filed an application for revision before the Supreme Court arguing, among others, that the lower courts failed to properly assess V's contribution to his own damage and failed to properly apply the statutory norm of art 1091 of the COA,[1] providing for a possibility that a court reduces compensation if a tortfeasor, being indigent, would be greatly impoverished if compensation were paid in full. 8

Decision

The Supreme Court dismissed A1's and A2's applications for revision and affirmed the lower courts' decision. In substantiating its position, the Supreme Court established that V, being heavily intoxicated, represented no real threat to A1 and A2 that would justify the use of force and therefore he did not contribute to his own damage. As for the lower courts' alleged failure to apply the statutory norm providing for a possibility to reduce the overall compensation, the Supreme Court noted that the statutory conditions for the application of this norm were not met in the case at hand. As explained by the Supreme Court, art 191 of the 'old' COA of 1978 (now art 1091 of the COA of 2005) can only be applied if a tortfeasor did not commit the tort with intention or with gross negligence, which was, according to the Supreme Court, not the case here. The Supreme Court explained that in criminal proceedings that preceded these civil proceedings, A1 and A2 were found guilty of causing a grievous bodily injury by beating V and leaving him without the necessary help, which implies that the conditions for the application of art 191 of the COA of 1978 were not met in this case. 9

Comments

See below 10/25 nos 12–15. 10

1 The full text of art 1091 of the COA reads as follows:
(1) The court may decide, taking into account the financial position of the victim, to require of a responsible person compensation lower than the amount of damage if the damage was not caused intentionally or by gross negligence, and if the responsible person is indigent and a full payment of the compensation would greatly impoverish him.
(2) If the tortfeasor caused damage whilst rendering a performance of interest to the victim, the court may reduce the compensation, taking into account due care demonstrated by the tortfeasor in his own dealings.

Presuda Županijskog suda u Varaždinu (Judgment of the County Court in Varaždin) 13 June 2016, No Gž R-10/16-2

<https://www.iusinfo.hr/sudska-praksa/ZSRH20161B0A2>

Facts and Decision

11 For Facts and Decision see under 3/25 nos 7–9.

Comments

12 Article 1091 of the COA provides for two exceptions from the full compensation principle, in which the courts are allowed to reduce the compensation. The first, provided for in para 1 of art 1091 of the COA, concerns a situation in which a tortfeasor did not act intentionally or with gross negligence and is indigent, which would lead to great financial difficulties if the compensation had to be paid in full. The second exception, provided for in para 2 of art 1091 of the COA, provides a court with a possibility to reduce compensation if the tortfeasor caused damage whilst rendering performance of a benefit to the victim, taking into account due care demonstrated by the tortfeasor in their own actions.[2, 3] Whereas, as is evident from the above-presented cases, the exception provided for in art 1091, para 1 of the COA is quite frequently invoked, the exception provided for in art 1091, para 2 of the COA is hardly ever invoked.

13 As rightly observed by the County Court in Sisak in judgment No 13 Gž 1225/2014-4, both conditions provided for in art 1091, para 1 of the COA must be met *in cumulo*. Hence, the court will only be allowed to reduce the compensation if it is established that the tortfeasor did not act intentionally or with gross negligence while committing a harmful act and that he is indigent, and paying the full compensation would greatly impoverish him. In other words, as rightly established by the County Court in Sisak in judgment No 13 Gž 1225/2014-4 and the Supreme Court of the Republic of Croatia in judgment No Rev 750/03-2, tortfeasors acting intentionally or with gross negligence will not be able to invoke art 1091, para 1 of the COA in an attempt to reduce the compensation awarded.

14 The wording of art 1091, para 1 of the COA clearly suggests that the possibility to reduce compensation provided for in this statutory provision is intended as a social measure, which should alleviate the hardship in which a tortfeasor who acted only with slight negligence could find themself after being ordered to pay compensation. Therefore, as appropriately observed by the County Court in Varaždin in judgment Gž R-10/16-2, the provision of art 1091, para 1 of the COA cannot be applied in cases in which the liable party is a legal person.

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2 Even though art 1091, para 2 of the COA does not mention this explicitly, it seems plausible to conclude that this provision applies only to cases in which the tortfeasor renders a performance to the benefit of the victim in their private, and not professional capacity.

3 For the full text of art 1091 of the COA, see fn 1 above.

Finally, as clearly provided for in art 1091, para 1 of the COA, in deciding whether to apply this provision, the court should also take into account the financial position of the victim. Hence, this provision clearly requires the court to carefully balance the financial interests of both parties involved and arguably, the court would not be entitled to apply this provision, notwithstanding the fact that conditions relating to the tortfeasor provided therein were met if this would adversely affect the victim's financial situation. **15**

26. Slovenia

Vrhovno sodišče (Supreme Court) 4 February 1998, II Ips 512/96

<https://www.sodnapraksa.si/> (1 December 2021)

Facts

The minor son of the defendants (A) injured V in a game by throwing a wooden peg that flew into V's eye. V suffered a blow to her left eye, a haemorrhage in the anterior chamber, a rise in intraocular pressure, and a displaced lens. Due to the injury, V was left with only 10 % vision in her left eye. The court of first instance ruled that the defendants were responsible for the damage, which was also confirmed by the court of second instance. **1**

Decision

The Supreme Court rejected revision and upheld the judgments of the courts of first and second instance. With regard to the amount of damages awarded, the Supreme Court emphasised that, subject to the fulfilment of other conditions of art 191 of the Code of Obligations[1], a poor financial situation may be a reason to determine lower compensation. This does not mean that the court must determine compensation at a level that the liable person can easily pay. The purpose of compensation must also be fulfilled, taking into account the social orientation of the provision of art 191 of the Code of Obligations. Despite the conditions set out in this provision, a court does not, therefore, reduce the compensation if V takes into account the financial situation of A when determining the amount of the compensation sought in the lawsuit and makes their claim accordingly. The Supreme Court ruled that, in the present case, the damages awarded were such as to constitute satisfaction for V but, at the same time, taking into account the poor financial situation of the defendants. This means that V may have been entitled to higher compensation if the defendants had been in a better financial situation. **2**

1 Uradni list SFRJ (Official Journal) No 29/1978.

Comments

3 The basic premise of the Code of Obligations as regards reparation is the rule of full compensation. Under this rule, the court awards the injured party damages in the amount necessary to make his or her financial situation what it would have been in the absence of the harmful act or omission (art 169 of the Code of Obligations). There are two exceptions to this rule of the Code of Obligations in paras 1 and 2 of art 170.[2]

4 Under para 1 of art 170 of the Code of Obligations, the court may, taking into account the injured party's financial situation, order the responsible person to pay less compensation than the damage if the damage was not caused intentionally or negligently and the liable person is in a precarious financial situation and the payment of full compensation would put him or her in need. Three conditions must therefore be met: (1) the injured party's financial situation must be such that full compensation would not greatly affect his or her financial situation; (2) the payment of full compensation would cause the person responsible financial hardship; and (3) the damage was not caused intentionally or through gross negligence.

5 Under para 2 of art 170 of the Code of Obligations, the court may award lower damages if the perpetrator caused the damage while acting for the benefit of the injured party, but court practice takes into account the diligence that the perpetrator shows when conducting his own affairs. The Code of Obligations in para 2 of art 170 does not require that the damage was not caused intentionally or through gross negligence, but court practice and the literature derive this condition from the general rule that liability for serious harm cannot be excluded (para 1 of art 242 of the Code of Obligations and *mutatis mutandis* para 1 of art 170 of the Code of Obligations).[3]

6 The Court may reduce damages under art 170 of the Code of Obligations only on application by the person who caused the damage and not *ex officio*.[4]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 *First scenario*. The 16-year-old A has no driving licence and no motor vehicle insurance. Nevertheless, he is driving with his 13-year-old girlfriend V as a passenger on his moped into a priority road where the moped is hit by a truck having priority. V is not wearing a

2 The presented decision of the Supreme Court was adopted on the basis of the previously valid art 191 of the Code of Obligations, whereby the provision of the valid art 170 of the Code of Obligations is the same in terms of content.

3 *N Plavšak* in: M Juhart/N Plavšak, (eds), Obligacijski zakonik s komentarjem, splošni del, 1. knjiga [Code of Obligations with commentary, General part I] (2003) 962.

4 Judgment of the Supreme Court II Ips 956/94, 24 October 1996, <odločitve – Vrhovno sodišče (sodisce.si)> (30 November 2021).

helmet and suffers a fracture of her skull and serious brain damage. Long and probably permanent rehabilitation measures are necessary. V's insurer pays compensation and requires A to reimburse these costs and all future costs that might become necessary as a consequence of the accident.[1]

Second scenario. A municipality decides to build a breakwater in order to protect **2** boats and infrastructure in a harbour from waves in bad weather. A firm of consultant engineers is engaged and plans the breakwater. A municipality employee is involved in the project plans, without raising any objections. During the construction process, it is discovered that the engineers have overlooked an underwater shelf that, under certain recurring weather conditions, would cause the waves to find a way past the breakwater. Hence the construction is not effective, and the whole project has to be reorganised and repriced. As a result, the municipality incurs almost € 3 million in extra expenses.

When the contract was awarded, these circumstances were not known and very dif- **3** ficult to detect. They should have, however, been discovered by the engineers so that the omission to detect the underwater shelf can still be regarded as negligent.[2]

Solutions

a) Solution According to PETL.[3] Article 10:401 PETL on the 'Reduction of damages' pro- **4** vides:

> In an exceptional case, if in light of the financial situation of the parties, full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Art. 1:101), the scope of protection of the interest (Art. 2:102) and the magnitude of the damage have to be taken into account in particular.

According to the Commentary to art 10:401 PETL, the 'article allows the court to mitigate **5** liability in exceptional situations where full compensation would be an oppressive burden to the defendant'.[4] The Commentary cites the example 'of a 14-year-old that burns down a house and may not have the resources to indemnify the owner thereof'.[5] In another example, a 14-year-old son of an unemployed couple injures 'a multibillionaire

1 Inspired by the German case: Bundesverfassungsgericht (Federal Constitutional Court) 13 August 1998, 1 BvL 25/96, NJW 1998, 3557, with comments by *U Magnus,* above 10/2 nos 2–6; see also the Slovenian case: Vrhovno sodišče (Supreme Court) 4 February 1998, II Ips 512/96, above 10/26 nos 1–6, with comments by *B Novak* and *G Dugar* (a minor injures another minor, liability of the parents, application of a reduction clause considered).

2 See the Norwegian case: Høyesterett (Norwegian Supreme Court) 8 December 2004, Rt 2004, 1887, above 10/16 nos 12–16, with comments by *AM Frøseth* and *B Askeland.*

3 For the liability of minors under the PETL, see *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) D.8.30 nos 8–15 (at 941 f) (*T Kadner Graziano*).

4 PETL – Text and Commentary (2005) art 10:401, no 1 (*O Moréteau*).

5 PETL – Text and Commentary (2005) art 10:401, no 1 (*O Moréteau*).

rock star' in a skiing accident. Due to the injuries suffered the rock star has to cancel 'a special gala concert [...] for which he would have earned € 2 million'.[6]

6 When considering a reduction under art 10:401 PETL, 'the fact that the victim benefits from insurance coverage is usually taken into account'.

7 The drafters of the PETL were aware that '[i]ntroducing a possibility of ad hoc mitigation may indeed generate complexity and uncertainty' and 'adds a further element of unpredictability to the resolution of disputes'.[7] The majority of the drafters assumed, however, that judges occasionally mitigate damages for the purpose of partly relieving debtors in exceptional cases, without necessarily stating this openly in their judgments. They therefore decided to add a mitigation clause in the PETL which may serve 'a double purpose: it aims to clarify an obscure and often unidentified judicial practice and this way it also meets the needs of harmonization'.[8]

8 In the first scenario of the 16-year-old A who caused severe damage to his 13-year-old girlfriend V, on the one hand, if he were obliged to pay full compensation, he may be burdened with debts for his lifetime. V benefits from insurance coverage, which is, according to the Commentary to the PETL, usually to be taken into account in favour of the tortfeasor when considering a 'reduction of damages' under art 10:401 PETL.

9 On the other hand, V suffers severe damage to her health, ie an interest that enjoys 'the most extensive protection' under art 2:102(2) PETL; A caused her damage with gross negligence. Both are aspects that may speak against him when considering a reduction of his liability under art 10:401 PETL.

10 In the second scenario, the municipality suffered damage in the amount of € 3 million. Once the conditions for liability are met, as 'a general rule, the magnitude of the harm as such is insufficient reason to refrain from attributing the loss to the liable person' under the PETL.[9] What is more, according to art 10:401 PETL, only 'if in light of the financial situation of the parties, full compensation would be an oppressive burden' to the defendant engineers, 'damages may be reduced'.

11 On the other hand, in the second case, the damage was pure economic loss, which enjoys a protection which 'may be more limited in scope' than, for example, damage to bodily integrity or property rights in tort law, according to art 2:102(4) PETL. Moreover, when the engineers were awarded the contract, the circumstances that later caused the damage were unknown and very difficult to detect. Much would thus depend on the financial situation of the parties when considering a reduction under art 10:401 PETL.

12 The second scenario was decided by the Norwegian Supreme Court. The Court held that the fact that the consultant firm had failed to foresee the consequence of the underwater shelf amounted to negligence. It reduced the award by one-third based on the general reduction clause in its national law. The Court ruled that, under the circumstances,

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6 PETL – Text and Commentary (2005) art 10:401, no 10 (*O Moréteau*).

7 PETL – Text and Commentary (2005) art 10:401, nos 5, 6 (*O Moréteau*).

8 PETL – Text and Commentary (2005) art 10:401, no 8 (*O Moréteau*).

9 PETL – Text and Commentary (2005) art 3:201, no 14 (*J Spier*).

it was 'unreasonable' to claim damages in full, because of the uncertainty when the contract was concluded, and the fact that the effect of the shelf under the sea, which led to extraordinary high waves, was not known to experts at the time the breakwater was built, and that the consequences of the mistake made by the firm of consultant engineers were very difficult to foresee. Under the PETL, a similar reasoning would be possible bearing always in mind, however, that the application of the reduction clause remains limited to 'exceptional cases.'[10]

b) Solution According to DCFR.[11] In the first scenario, A caused a road traffic accident resulting in serious injuries to V's health. Injury to the victim's health is legally relevant damage under the DCFR (art VI–2:201). A's conduct was the *conditio sine qua non* for V's damage and natural causation is established (art VI–4:101 DCFR). Article VI–3:205 DCFR holds the keeper of a motor vehicle strictly liable for personal injury and consequential loss suffered in a road traffic accident which results from the use of the vehicle. A is thus liable for damage sustained by V. **13**

It may, however, be possible to limit A's liability based on the DCFR's rule on reduction of liability, art VI–6:202 DCFR. **14**

The reduction clause in art VI–6:202 DCFR permits a reduction of the liability of the tortfeasor where it is 'fair and reasonable' to do so. It states: **15**

> Where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.

This provision shall 'allow a final check of the decision against general considerations of justice and fairness. This is mainly significant where a slight oversight or a technically negligent but morally unobjectionable act leads to damage, the reparation of which would disproportionally burden the injuring person, there being other possibilities for reparation open to the injured person'.[12] **16**

When considering the application of this provision, the age of the tortfeasor may be considered as a circumstance justifying a reduction, where it would impose on him an extraordinary financial burden for the rest of his life.[13] The reduction may depend on many factors, including the tortfeasor's financial situation, and the care required from his age group. **17**

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10 Høyesterett (Norwegian Supreme Court) 8 December 2004, Rt 2004, 1887, above 10/16 nos 12–16, with comments by *AM Frøseth* and *B Askeland.*

11 For the liability of minors under the DCFR, see *B Winiger*/*E Karner*/*K Oliphant* (eds), Digest of European Tort Law, vol 3: Essential Cases on Misconduct (2018) D.8.30 nos 16–19 (942 f) (*T Kadner Graziano*).

12 *C v Bar*/*E Clive*, DCFR, art VI–6:202, Comment (3785).

13 *C v Bar*/*E Clive*, DCFR, art VI–6:202, Illustration 1 (3785): the illustration deals with the liability of children aged eight and nine and concludes that a reduction would be possible in their case on the basis that: 'Their lives would be ruined before they have even begun'.

18 In the present case, 16-year-old A drove without a licence and took his 13-year-old girlfriend on his moped, even though she was not wearing a helmet. These are serious faults and severe offences, rather than a 'slight oversight or a technically negligent but morally unobjectionable act'. Even if considering his young age, it thus seems open whether a reduction of his liability under art VI–6:202 DCFR would be granted.[14]

19 In the *second scenario*, the negligence of the engineers caused the municipality a pure economic loss of almost € 3 million due to extra expenses.

20 Under the DCFR, the engineers' liability may be subject to a reduction pursuant to the same art VI–6:202. As mentioned above, one of the situations permitting reduction is 'where a slight oversight or a technically negligent but morally unobjectionable act leads to damage, the reparation of which would disproportionately burden the injuring person …'.[15]

21 The fact that, in the second scenario, the engineers overlooked an underwater shelf that was not known and very difficult to detect could indeed be characterised as 'technically negligent but morally unobjectionable', and the damage of almost € 3 million may be deemed disproportionate when compared to the degree of fault the engineers committed. Under these circumstances, a reduction of their liability in tort pursuant to art VI–6:202 DCFR indeed seems possible.

31. Comparative Report

1 There is no tradition for reduction clauses in Roman law. A number of European jurisdictions have nowadays a special statutory provision providing a clear legal basis for reduction, whereas other countries do not have such a clause at all.[1] Reduction clauses are found in Croatia, Finland, the Netherlands Norway, Sweden, Switzerland, Slovakia, Slovenia, Poland, and Portugal. In most of these countries, the reduction clauses are relatively new.[2] Also the soft law systems of the DCFR and the PETL allow for reduction and have integrated special reduction clauses.[3]

14 Although, but outside of the scope of the present chapter, another ground which might be considered for limiting the liability of A could be art VI–5:101(2) DCFR (Consent and acting at own risk). In this scenario, however, it would not be considered that the victim V voluntarily accepted the risk. See in particular *C v Bar/E Clive*, DCFR, art VI–5:101, Comment C, Illustration 9 (3614).

15 *C v Bar/E Clive*, DCFR, art VI–6:202, Comment (3785).

1 Cf Historical Report 1/10 no 18.

2 The Swiss reduction clause, however, dates back to 1881 (art 51 of the old Code of Obligations).

3 PETL/DCFR 10/30 no 4, citing PETL art 10:401 and no 18 citing DCFR art VI–6:202.

The mentioned reduction clauses in the various European jurisdictions are commonly narrow. These statutory provisions only apply in exceptional cases where the financial burden for the tortfeasor is especially heavy.[4] Additionally it is often a requisite for reduction that the tortfeasor has not acted with intent or with gross negligence.[5] 2

A jurisdiction with the said features is, for example, the Swiss, where reduction may be the outcome, provided that the tortfeasor did not act grossly negligently or with intent. It is, however, relevant whether or not the victim will suffer financial hardship without full payment. A case presented shows an example where the award was reduced to 15 % of full compensation.[6] In Sweden, the duty to pay compensation can be reduced if it is unreasonably burdensome in view of the tortfeasor's financial circumstances, whereby the needs of the victim are also to be taken into account.[7] In Poland, *ius moderandi* (ad hoc reduction) is stipulated in art 440 KC. It is a rule of an exceptional nature, as a civil court does not have the general power to reduce the amount of damages on account of a lower degree of fault of the tortfeasor, the standing of the defendant, or due to other circumstances of the case.[8] Such a rule has also been in force in Slovakia since 1950.[9] 3

In Estonia, the national statute LOA § 140 allows for reduction where payment in full would be extremely unfair.[10] In the neighbouring countries, Lithuania and Latvia, however, no such rule exists.[11] 4

Under Norwegian law, reduction is not precluded by the fact that the tortfeasor acted intentionally.[12] Hence a tortfeasor who intentionally headbutted the victim, leaving him severely injured, was granted a reduction of 50 % of the full award.[13] 5

Some jurisdictions have reduction clauses only for special kinds of tortfeasors. An example is the Belgian jurisdiction where insane tortfeasors as well as tortfeasors that are minors over the age of twelve years old will benefit from discretion rules now enacted in the new Civil Code.[14] 6

In Croatia, there is a legal basis for reduction in art 1091, para 1 of the COA. The court will, however, only be allowed to reduce the compensation if it is established that the tortfeasor did not act intentionally or with gross negligence while committing the harmful act and that he is indigent, and paying the full compensation would greatly impoverish him. In addition, there is an interesting possibility of reduction where the al- 7

4 See, eg, Netherlands 10/8 no 3.

5 This requisite is as mentioned above also found in the DCFR, however not in the PETL.

6 Switzerland 10/4 no 5.

7 Sweden 10/17 no 1. The Swedish Tort Law Act ch 6 para 2 applies.

8 Poland 1/22 no 9.

9 Slovakia 9/24 no 7.

10 Estonia 10/19 no 4.

11 Lithuania 1/21 no 10; Latvia 1/20 no 10.

12 Norway 9/16 no 4.

13 Norway 9/16 nos 1–3

14 See Belgium 10/7 no 6 (Art. 5.155) and 10/7 no 8 (Art. 5.154).

leged tortfeasor performed his activity for the benefit of the victim.[15] Very similar rules are found in Slovenia.[16]

8 Some countries do not, as mentioned, have any reduction clause at all. This is true for Austria, England and Wales, Germany, Greece, Hungary, Ireland, Lithuania, Malta and Scotland.[17] There may still be an element of reduction in very special cases. In German law, there is, for example, a special exception for minors, whereas Austrian scholars hold that reduction may be allowed in very special cases on constitutional grounds.[18] French law is also restrictive. In France, reduction clauses are exceptional and only enacted due to European legislation or instruments.[19] There are no reduction clauses reported in the report on European law.

9 The Historical Report shows that the European tradition is that the tortfeasor must pay in full. There are, however, examples where the responsible owner of a slave who caused damage may pay by transporting the very slave to the victim. The result of such a transaction equals a reduction in payment whenever the award exceeds the value of a slave.[20]

10 The main picture seems to be that the Scandinavian countries have the most positive attitude towards reduction clauses whereas common law countries have a negative attitude. Also, the jurisdictions within the Romanistic family are, in principle, reluctant to adopt such rules. In countries where there recently have been greater revisions of the civil codes, there is a clear tendency to adopt reduction clauses (see, for example, the situation in Portugal and the Netherlands). The solution in Portugal was interestingly inspired by Swiss law.[21]

11 PETL and DCFR: In both sets of principles there are reduction clauses.[22] Both systems allow for reduction only in exceptional cases where a heavy financial burden would be placed on the tortfeasor. Interestingly there is a significant difference between the two clauses. In the DCFR, intentional behaviour on the part of the tortfeasor excludes the possibility of reduction altogether, whereas the PETL theoretically allow for reduction also for tortfeasors acting with intent.[23]

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15 Croatia 10/25 no 12.

16 See Slovenia 10/26 no 9 cf no 4f.

17 Austria 1/3 no 8; England and Wales 1/12 no 6; Germany 10/2 no 1; Greece 1/5 no 6; Ireland 1/14 no 7; Latvia 1/20 no 10; Lithuania 1/21 no 10 and Scotland 1/13 no 6.

18 Germany 10/2 no 1; Austria 1/3 no 8.

19 France 10/6 no 3.

20 Historical Report 10/1 no 4.

21 Portugal 10/11 no 3.

22 PETL/DCFR 10/30 no 2 and no 15.

23 PETL/DCFR 10/30 no 4, citing PETL art 10: 401 and no 18 citing DCFR art VI–6:202.

F. Other Issues

11. Additional questions

10. Spain

Ordinary risks of life – Tribunal Supremo (Supreme Court) 22 December 2015

RJ 2015\5571

Facts

V and his wife X bought a car in A's store. The vehicle was parked on a plot of land located next to a river. When V approached the rear of the vehicle to store the warning triangles in the car boot, he suddenly fell into the river and died. Like other cars placed there, V's car was parked at a very short distance from the border of the parking area and the river flowed six metres below. A usually left vehicles for sale there and had asked permission from the local council to build a defensive wall. The local council authorised him to build a jetty only. The First Instance Court and the Court of Appeal dismissed the claim brought by V's family against A. The Supreme Court upheld their appeal and awarded damages. **1**

Decision

Since there were no protective fences in place, the defendant could have foreseen that he was generating a risk such as the one that materialsed (see STS 26 June 2008) given that there was a short distance between the vehicles and the slope. The defendant had attempted to build a wall and was not allowed, but he failed to prove that he had tried to put any kind of fencing system in place. The primary purpose of the wall and the jetty was to contain the river water, but what was necessary was to build a system to prevent people from falling insofar as the lot was used for the operation of the car business. Accordingly, we are not dealing here with what legal writing and case law describe as 'ordinary risks of life', since the victim could not foresee the event because the defendant had created a risk that exceeded average standards (see STS 20 December 2007). **2**

Comments

In all of life's activities, there are certain risks. The criterion of the 'ordinary risks of life' is used to rule out the objective imputation of damage that is a realisation of risks usually linked to human existence, and which are the expression of risks that could be considered usual or typical of the normal development of social life.[1] As the Supreme Court has stated, these are 'the small risks that life forces us to bear'.[2] **3**

1 *B Gregoraci Fernández,* Practicum Daños: 2019 (2019) 294; *LF Reglero*/*F Peña*, Lecciones de responsabilidad civil (4th edn 2014) 113.

2 STS 11.11.2005 (RJ 2005\9883) and 2.3.2006 (RJ 2006\5508).

https://doi.org/10.1515/9783111001272-012

4 The case law of the Supreme Court confirms that the ordinary risks of life 'must be excluded as an autonomous source of liability'. On the contrary, it is a heading of imputability of damage to the victim.[3] Legal writing has also linked the criterion to the 'protective purpose of the rule'[4], even if the Supreme Court has pointed out that it is connected with the foreseeability of damage since the criterion is based on the assessment of whether the risk was ordinary and usually assumed, or not.[5]

5 The Supreme Court decided that injuring one's hand in the revolving door of a hotel was an 'ordinary risk of life'[6], as well as stumbling over a small hose placed on a public road to water gardens,[7] or falling from one's bicycle because of gravel.[8] By contrast, it does not consider an 'ordinary risk of life' a fall on a recently scrubbed area that has not been correctly marked[9], or on vomit on the floor of a toilet[10] or due to the lack of a stair handrail.[11] Nor is the case of the fall of a 65-year-old woman, suffering from a bad bone and joint condition and who fell on entering a restaurant not noticing a step placed without signs in a semi-dark area.[12] Nor it is an ordinary risk of life when a customer steps on splinters of broken glass in the vicinity of a bathroom.[13]

6 To limit the liability of the agent whose conduct or activity contributed to the damage, the ordinary risks of life criterion requires that the agent has taken the ordinary precautionary measures for common risks, that is, the measures that reduce the risk of damage within what is reasonable.[14] On occasion, the Supreme Court examines the case without mixing the imputation criterion with the analysis of fault, as in the last judgment on broken glass. More often than not, the Court overlaps the imputation criterion with the absence of fault[15] – as in a fall on the non-slip flooring in a camping shower[16] – or with the victim's contributory negligence – as in the case of a 67-year-old man who broke his hip when stumbling over a perfectly visible step in a commercial centre.[17] Ac-

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3 STS 17.12.2007 (RJ 2007\8264). See *E Roca Trías,* El riesgo como criterio de imputación subjetiva del daño en la jurisprudencia del Tribunal Supremo Español, Indret 4/2009, 14.

4 *FA Melchiori*, Las teorías de la casualidad en el daño. Equivalencia de condiciones, causalidad adecuada e imputación objetiva en la doctrina del Tribunal Supremo (2020) 94.

5 STS 17.12.2007 (RJ 2007\8264) and 22.12.2015 (RJ 2015\5571).

6 STS 17.6.2003 (RJ 2003\5646).

7 STS 2.3.2006 (RJ 2006\5508).

8 STS 11.12.2009 (RJ 2010\1).

9 STS 20.6.2003 (RJ 2003\4250).

10 STS 26.5.2004 (RJ 2004\4262).

11 STS 21.11.1997 (RJ 1997\8093).

12 STS25.3.2010(RJ 2010\4347).

13 STS 18.3.2016 (RJ 2016\983).

14 STS 16.5.2018 (RJ 2018\5191). See also *FA Melchiori*, Las teorías de la casualidad en el daño. Equivalencia de condiciones, causalidad adecuada e imputación objetiva en la doctrina del Tribunal Supremo (2020) 94f and passim.

15 *LF Reglero*/*F Peña*, Lecciones de responsabilidad civil (4th edn 2014) 113.

16 STS 17.12.2007 (RJ 2007\8934).

17 STS 31.10.2006 (RJ 2006\8882). See also, STS 11.11.2005 (RJ 2005\9883) (fall in an elevator).

cordingly, some authors conclude that to determine if the damage is to be attributed to the ordinary risks of life, ultimately, this means no less than having to assess whether the agent omitted any duty of care and increased the risks to which any of us is exposed by the mere fact of existing, that is, whether or not the damage originated in a fortuitous event.[18]

20. Latvia

Rīgas apgabaltiesa (Riga Regional Court) 9 November 2020, No C32251417

<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/433758.pdf>

Facts

V brought a claim against A, the mother of their son, requesting compensation for non-pecuniary harm suffered as a result of the denial of access to his son. Within the same court case, he requested compensation from the current partner of A for damaging belongings of V and for non-pecuniary harm induced by personal injuries. Although the access rights of V were recognised by a court judgment in previous proceedings, A had not allowed V to see his son on several occasions. A fine of € 100 had been imposed in separate proceedings on A for non-compliance with the court judgment. 1

Decision

The first instance court rejected the claim completely. The second instance court satisfied the claim in part, awarding € 800 from the partner of A for the non-pecuniary harm suffered by V and rejected the claim in the remaining part. The Supreme Court revoked the judgment insofar as the claim against A was rejected by the second instance court for compensation of non-pecuniary harm. The second instance court satisfied the claim, partially awarding V € 200 for the non-pecuniary harm and denied the claim for the remaining amount of € 300, requested by V. 2

The court of appeals, reviewing the claim for the second time, argued that V was entitled to claim compensation for non-pecuniary harm by proving that the harm inflicted on him had reached the severity threshold. The court came to the conclusion that the period (more than one year) during which V could not see his son and the age of the child (born in 2015) could lead to alienation between V and his son and thus caused moral suffering to V. The court also concluded that access was denied without objective grounds and that such a lack of communication could even have an irreversible effect 3

18 *P Álvarez Olalla*, Imputación objetiva y causalidad jurídica versus criterios de imputación subjetiva. Comentario a la Sentencia del Tribunal Supremo de 31 de enero de 2012, Revista Doctrinal Aranzadi Civil-Mercantil 8 (2012).

on the father-son relationship, and therefore the infringement of V's rights was considered to be significant.

Comments

4 A court case dealing with a compensation claim for non-pecuniary harm induced by the denial of access to a child is rather unusual in the court practice of Latvia. The second instance court was forced to turn to cases on violation of the right to privacy in order to find at least an indirect reference for establishing the amount of compensation. Such approach seems entirely justified as the right to a private and family life, protected under art 8 of the European Convention on Human Rights (ECHR), and, according to the findings of the European Court of Human Rights, the mutual enjoyment by parent and child of each other's company, constitutes a fundamental element of 'family life' within the meaning of art 8 of the ECHR.[1]

5 The severity threshold first recognised by the Supreme Court in this particular case and then applied by the court of second instance is arguable. There is no such criterion expressly requested either by statutory provision or established in case law regarding the claims for compensation of non-pecuniary harm. Most likely, the courts sought to establish some kind of *de minimis* clause in order to exclude minor infringements of rights as the grounds for a victim to request compensation for non-pecuniary harm. However, there is a risk that such threshold could, in court practice, be applied inconsistently and excessively thereby preventing the rights to appropriate compensations for legitimate violations of their rights. Thus, it may limit the liability of the infringer more than envisaged by the legislator or justified in the legal system.

6 The court of second instance, following the interpretation given by the Supreme Court in the particular case, also stated that it was important to evaluate whether the infringement had objective grounds. Such a statement appears to be not entirely precise as the court actually assessed whether there had been objective grounds to deny V access to his son and not whether there was an exemption from liability. If the court had concluded that there were objective grounds to deny access, no infringement could be established.

Rīgas apgabaltiesa (Riga Regional Court) 21 September 2015, No C33341813

<https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/238215.pdf>

Facts

7 V (an employee) brought a claim against A (his employer) requesting compensation for non-pecuniary harm suffered as a result of an accident that took place at work in the

1 ECtHR *Kuppinger v Germany*, 15.1.2015, no 62198/11, para 99.

amount of € 113,830. The State Labour Inspectorate acknowledged that the causes of the accident are work organisation and related shortcomings, namely, the use of inappropriate equipment, lack of safety equipment, and insufficient instruction of employees. A statement from a hospital confirmed that the damage to the claimant's health is severe. The decision of the State Medical Commission confirmed that the claimant has a disability, the cause of which was an accident at work, and the loss of ability to work was assessed at 30 %. The claimant argued that he is still suffering from physical pain and repeated operations have adversely affected his blood pressure and caused heart problems. In addition, the claimant has been subjected to a weight-lifting restriction due to the injury he has suffered.

Decision

The first instance court awarded the claimant € 6,500 and compensation for legal fees. **8**
The court took into account the claimant's age, idleness in finding another job and the fact that he did not fully comply with the work safety regulations when the accident took place as well as the fact that the degree of misconduct of the defendant was neither systematic nor substantial.

The judgment of the first instance was appealed by the claimant and the second in- **9**
stance court (Riga Regional Court) rejected the claim (to the same extent rejected by the first instance court) by arguing that the court must take into account and assess the importance of the violated rights and interests protected by law, the gravity of the infringement, the degree of misconduct of the offender, the claimant's conduct and the irreversibility of the damage caused as criteria for determining compensation for non-pecuniary harm. The claimant had to evaluate the potential dangerousness of the activity he was about to begin, which he failed to do. The disability of the claimant is temporary, indicating the existing possibility of restoring his work capacity fully. Considering the claimant's age, there has been no infringement of the claimant's fundamental rights which would have irreversible consequences and negative effects on the claimant's quality of life. The judgment of the court of appeals has not been further appealed and has become final.

Comments

The case reflects a wide variety of aspects generally used to limit liability for non-pe- **10**
cuniary harm. The courts of both the first and second instance agreed that the defendant is liable for the harm caused to the claimant. At the same time, the amount of compensation was reduced since both courts found that there was certain negligence on the claimant's part, which could rather be considered an exclusion of liability and not only a criterion to determine the amount of compensation, which would come after that. Although compensation for loss of earning capacity was never claimed, loss of earning capacity was used to determine, and presumably decrease, the award. This type of damage is often considered when determining compensation for non-pecuniary harm by the

courts of Latvia, despite the fact that separate grounds for such claim exist (under secs 2347 and 2348 of the CLL, for instance). One could argue that it may not be a suitable criterion since being employed or seeking employment is not a precondition to receiving compensation for non-pecuniary harm under Latvian law. Similar compensation would have to be awarded to someone walking past a building site or a visitor injured in a similar manner. Further, the age of the victim may not necessarily indicate the gravity. The consequences of the injury and the health condition of the victim in question (which was the claimant) may have arguably been a more fitting criteria to assess the consequences of the injury for the aggrieved person and the expected convalescence.

11 The court of appeals did not expressly mention foreseeability of damage and other ways to limit causation on a legal level, which is quite common in non-contractual liability cases since sec 1779[1] of CLL has been limited to contractual liability by the legislator and the courts normally tend not to extend the principle reflected by that norm to non-contractual liability cases. Instead of limiting causation by the negligence of the claimant himself and only then determining the amount of compensation, which would also have been possible, leading to a respective reduction of liability, the court of appeals appears to have skipped the assessment of causation and used various different criteria to rather adjust the compensation to be awarded having assessed awards in a few similar cases. Such an approach may characterise the general approach of Latvian courts in the last decade and limitations of liability commonly referred to in the legal theory of Latvia and other EU Member States are quite rarely applied at the causation level before assessing and determining the amount of compensation.

29. European Union

European Court of Justice, 25 April 2002, case C-52/00, Commission v France[1]

ECLI:EU:C:2002:252

Facts

1 The Commission sued France for failing to properly transpose the Product Liability Directive (PLD) into French law. In particular, the deviations complained of were:

(1) The French statute failed to introduce a lower threshold of € 500 as required by art 9 lit b PLD.

(2) Art 1386-7 *Code civil* placed the supplier on an equal footing with the producer[2], whereas art 3 para 3 PLD holds the supplier liable only if the producer remains unidentified.

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1 Cf the presentation of this case in *BA Koch*, European Union, in: H Koziol/B Steininger (eds), European Tort Law 2002 (2003) 432 (no 62 ff). See also ECJ 25.4.2002, C-154/00, *Commission v Greece*, [2002] ECR I-3887.

2 Art 1386-7 (now art 1245-6) Code civil reads: 'Si le producteur ne peut être identifié, le vendeur, le loueur, à l'exception du crédit-bailleur ou du loueur assimilable au crédit-bailleur, ou tout autre fournis-

(3) Two exemptions from liability introduced by art 7 lit d and e of the Directive were limited by further requirements unforeseen by the Directive: art 1386-12 *Code civil* denied such exemptions to a producer who failed to take appropriate precautions if a defect had manifested itself within ten years after putting the product into circulation.

The French government did not deny these discrepancies, but argued that they were justified in light of its understanding of the PLD as providing for a minimum standard only, thereby leaving it open to the Member States to mould their national regimes more favourably to the victims. **2**

With regard to the first point in particular, France argued that such a lower threshold would deprive victims of such losses of their access to the courts as protected by art 6 of the ECHR. Also, introducing such a limit would create unfair inequalities between both producers and consumers. Furthermore, exempting certain losses from tortious liability would run afoul of French public policy. Finally, by the time of this action, the Commission had already indicated considerations to revisit the PLD in this regard. **3**

Decision

The Court repeated the reasoning of its *González Sánchez* ruling[3] issued on the same day word by word[4], and concluded that all three pleas put forward by the Commission were well founded. **4**

As to the lower threshold of € 500 in property damage cases, the Court claimed that a Member State cannot 'plead the unlawfulness of a directive which the Commission alleges it to have infringed' (para 28). Moreover, the Court contended that the scope of the PLD was 'the result of a complex balancing of different interests', *including* in particular 'guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice' (para 29).[5] The exclusion of minor material damage from the scope of the PLD was necessary in order to avoid 'an excessive number of disputes'. However, the Court conceded that victims of such minor property losses may still file actions on other grounds not covered by the PLD. **5**

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seur professionnel est responsable du défaut de sécurité du produit dans les mêmes conditions que le producteur. ...'

3 ECJ 25.4.2002, C-183/00, *González Sánchez v Medicina Asturiana SA*, [2002] ECR I-3901.

4 Cf paras 23–32 of the *González Sánchez* case with para 14–23 of the Court's opinion in this case.

5 This was already claimed by Advocate General *Geelhoed* in his opinion (no 68), though on the basis of rather vague and general propositions. His reference to the alleged 'evolution of law in Western Europe during the last fifty years' (no 66) is particularly puzzling in light of the fact that the lower threshold of art 9 lit b PLD was a complete novelty to any legal system addressed and remains to be a singular exception.

6 As to France's claim that a lower threshold was contrary to French public policy, the Court countered that the domestic laws of the Member States cannot restrict the scope of Community law since this would undermine 'the unity and efficacy of that law' (para 33).

Comments

7 The presentation of this case was purposefully limited to the question of the lower threshold of art 9 lit b PLD in light of the focus of this volume. The ruling evidences that the Court deems it justified to restrict liability to certain losses in light of (allegedly) superior interests which outweigh the victim's own interest in being indemnified for losses fully attributable to others.

8 What is unique about this limit is that it is not a cap on liability exceeding certain amounts, but that it instead excludes certain smaller losses from the scope of the liability regime, a *de minimis* rule which is otherwise alien to all tort laws of the Member States. This is particularly odd in light of the fact that Member States have implemented art 9 lit b PLD differently.[6]

9 As already highlighted by France in that case, the lower threshold of art 9 lit b PLD has long been criticised and challenged, inter alia in light of different price levels in the Member States, and the discussion whether it should be abolished altogether has never stopped.[7] It is therefore also currently reconsidered in the ongoing debate about a possible reform of the PLD.[8]

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6 Cf the Third report on the application of Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999), COM(2006) 496 final, 14.9.2006 (p 11): 'In most Member States, including Austria, Denmark, Finland, Germany, and Italy, the threshold is treated as a "deductible", in that the amount of damages awarded to a successful claimant (for property damage) is reduced by the specified amount. In some other Member States, such as the Netherlands and the United Kingdom, the threshold is treated as a minimum amount, such that, provided the claim exceeds that minimum, the full amount of damages is recoverable. In Spain, the amount is expressed in the implementing legislation to be a deductible but in practice the courts treat it as a threshold, such that the amount has never actually been deducted from any award.'

7 Cf, eg, the Fourth report on the application of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, COM(2011) 547 final, 8.9.2011 (p 9 f).

8 Cf, eg, the public consultation started in October 2021 at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Civil-liability-adapting-liability-rules-to-the-digital-age-and-artificial-intelligence_en>.

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